ADVISORY COMMITTEE
ON
CIVIL RULES

Gleneden Beach, Oregon
April 19-20, 1999

AGENDA
Advisory Committee on Civil Rules
April 19-20, 1999

I. Opening Remarks of Chairman

A. Report of the January 1999 Standing Committee meeting
B. Legislative Report

II. Approval of Minutes of November 12-13, 1999 meeting

III. Consideration of Comments and Statements on Proposed Amendments Published for Comment

A. Discovery (Separate Book)
   1. Reporter's Discussion Paper
   2. Summary of Comments
B. Rules 4 and 12
C. Admiralty Rules

IV. Consideration of New Proposed Amendments

A. Electronic Service: Rules 5, 6, and 77
B. Rule 81(c)
C. Rule 51: Jury Instructions Requests Before Trial and More

V. Report of Agenda Subcommittee on Pending Matters

VI. Corporate Disclosure Statements

VII. Designation of Time and Place of Next Meeting

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I-A&B

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of January 7-8, 1999
Marco Island, Florida

Draft Minutes

The winter meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Marco Island, Florida on Thursday and Friday, January 7-8, 1999. The following members were present:

Judge Anthony J. Scirica, Chair
Judge Frank W. Bullock, Jr.
Charles J. Cooper, Esquire
Professor Geoffrey C. Hazard, Jr.
Gene W. Lafitte, Esquire
Patrick F. McCartan, Esquire
Judge James A. Parker
Sol Schreiber, Esquire
Judge Morey L. Sear
Judge A. Wallace Tashima
Chief Justice E. Norman Veasey
Judge William R. Wilson, Jr.

Judge Phyllis A. Kravitch and Deputy Attorney General Eric H. Holder were unable to be present. The Department of Justice was represented at the meeting by Neal K. Katyal, Advisor to the Deputy Attorney General. Roger A. Pauley also participated in the meeting on behalf of the Department.

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 United States Courts, Mark D. Shapiro, deputy chief of that office, and Nancy G. Miller, the Administrative Office's judicial fellow.

Representing the advisory committees were:

Advisory Committee on Appellate Rules —
Judge Will L. Garwood, Chair
Advisory Committee on Bankruptcy Rules —
Judge Adrian G. Duplantier, Chair
Professor Alan N. Resnick, Reporter
Advisory Committee on Civil Rules —
Judge Paul V. Niemeyer, Chair
Professor Edward H. Cooper, Reporter

Advisory Committee on Criminal Rules —
Judge W. Eugene Davis, Chair
Professor David A. Schlueter, Reporter
Advisory Committee on Evidence Rules —
Judge Fern M. Smith, Chair
Professor Daniel J. Capra, Reporter

Also participating in the meeting were: Joseph F. Spaniol, Jr., consultant to the committee; Professor Mary P. Squiers, project director of the local rules project; and Marie C. Leary of the Research Division of the Federal Judicial Center.

Alan C. Sundberg, former member of the committee attended the meeting and was presented with a certificate of appreciation, signed by the Chief Justice, for his distinguished service on the committee over the past six years.

INTRODUCTORY REMARKS

Judge Scirica reported that Judge Stotler was unable to attend the meeting because she had to participate in the dedication of the new federal courthouse in Santa Ana, California. He added that she would participate at the next committee meeting, to be held in Boston in June 1999.

Judge Scirica noted that he was participating in his first meeting as chair of the Standing Committee. He stated that it had been his great honor to have served for six years as a member of the Advisory Committee on Civil Rules under three extraordinary chairmen — Judges Pointer, Higginbotham, and Niemeyer.

Judge Scirica observed that it was very important for the rules committees to uphold the integrity of the Rules Enabling Act and be vigilant against potential violations of the Act. At the same time, he pointed out that the committees had to be careful in their work in distinguishing between matters of procedure and substance.

He emphasized the importance of establishing and maintaining good professional relations with members and staff of the Congress. He said that it would be ideal if these relationships were personal and long-lasting. But membership changes in the Congress and on the committees make it difficult as a practical matter to achieve that goal. Nevertheless, he said, it is possible to keep the Congress informed about the benefits of the Rules Enabling Act, the important institutional role of the rules committees, and ways in which the committees can be of service to the Congress.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee voted without objection to approve the minutes of the last meeting, held on June 18-19, 1998.

REPORT OF THE ADMINISTRATIVE OFFICE

Legislative Report

Mr. Rabiej presented a list of 41 bills introduced in the 105th Congress that would have had an impact on the federal rules or the rulemaking process. (Agenda Item 3A) He pointed out that the Administrative Office had monitored the bills on behalf of the rules committees and the Judicial Conference, and it had prepared several letters for the chair to send to members of Congress commenting on the language of specific bills and emphasizing the need to comply with the provisions of the Rules Enabling Act. He noted that only three of the 41 bills had actually been enacted into law, and their impact on the federal rules would be comparatively minor. They included provisions: (1) establishing a new evidentiary privilege governing communications between a taxpayers and an authorized tax practitioner, (2) requiring each court to establish voluntary alternative dispute resolution procedures through local rules, and (3) subjecting government attorneys to attorney conduct rules established under state laws or rules.

Mr. Rabiej stated that comprehensive bankruptcy legislation had come close to being enacted in the 105th Congress, and it likely would be reintroduced in the 106th Congress. He pointed out that the legislation, if enacted, would create an enormous amount of work for the Advisory Committee on Bankruptcy Rules. He also predicted that legislation would also be reintroduced in the new Congress to federalize virtually all class actions.

Administrative Actions

Mr. Rabiej reported that the Rules Committee Support Office was now sending comments from the public on proposed amendments to the rules to committee members by electronic mail. He noted that the Administrative Office had received about 160 comments from the bench and bar on the proposed amendments to the bankruptcy rules, about 110 comments on the amendments to the civil rules, and about 65 comments on the amendments to the evidence rules. He added that all the comments, together with committee minutes, would be placed on a CD-ROM and made available to all the members of the advisory and standing committees.

REPORT OF THE FEDERAL JUDICIAL CENTER

Ms. Leary reported that Judge Rya Zobel had announced that she would be leaving her position as director of the Federal Judicial Center to return to work as a United States district judge in Boston. She noted that a search committee had been appointed by the Chief Justice to find a successor, and it was expected that the Center's board would name a new director by April 1999.

Ms. Leary presented a brief update on the Center's recent publications, educational programs, and research projects. (Agenda Item 4) She noted that as a consequence of the comprehensive, ongoing studies of class actions and mass torts conducted by the Advisory Committee on Civil Rules and the Mass Torts Working Group, the Center had decided that revisions to the *Manual for Complex Litigation* were needed. To that end, the Chief Justice had appointed a board of editors to oversee the work, including Judges Stanley Marcus, John G. Koeltl, J. Frederick Motz, Lee H. Rosenthal, and Barefoot Sanders. The Chief Justice, she said, had also selected two attorneys to serve on the board of editors, and the Center was awaiting their response to his invitation. (Sheila Birnbaum and Frank A. Ray were later announced as the new members.) She added that staff of the Research Division would provide support for the work of the board of editors.

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 December 7, 1998. (Agenda Item 5)

Judge Garwood stated that the advisory committee had no action items to present to the standing committee. He noted, though, that the advisory committee had approved a number of additional amendments to the appellate rules, but had decided not to forward them to the standing committee for publication until the bar has had adequate time to become accustomed to the restyled body of appellate rules. He added that a package of amendments would probably be ready for publication by the year 2000.

Committee Notes

Judge Garwood pointed out that the Standing Committee had recommended previously that the notes accompanying proposed rules amendments be referred to as "Committee Notes," rather than "Advisory Committee Notes." He reported that the Advisory Committee on Appellate Rules, although accepting the recommendation, had discussed this matter at its last meeting and had concluded that the term "Advisory Committee Notes" was both more traditional and more accurate. Judge Garwood pointed out, for example, that "Advisory Committee Notes" had long been used by the Chief Justice

when transmitting rules amendments to Congress, by legal publications, and by the legal profession generally.

Professor Cooper and Mr. Rabiej responded that the use of the term "Committee Notes" had been selected over "Advisory Committee Notes" because the Standing Committee from time to time revises or supplements the notes of an advisory committee. As a result, the published notes will contain language representing the input of both the pertinent advisory committee and the standing committee, and it is often difficult to tell exactly what has been authored by each committee.

Judge Garwood pointed out that when the Standing Committee proposes that a change be made in a note *before publication,* the chair of the advisory committee will take the matter back to the advisory committee for consideration of the change. As a rule, the advisory committee will in fact agree with — and often improve upon — the proposed change and incorporate it into the publication distributed to bench and bar. Therefore, the note effectively remains that of the advisory committee. On the other hand, when changes in a note are made by the standing committee *after publication,* the chair of the advisory committee will normally accept the changes at the standing committee meeting on behalf of the advisory committee and thereby avoid the delay of returning them for further consideration by the advisory committee.

Professor Coquillette added that the standing committee has always been deferential to the advisory committees in the preparation of committee notes, and it normally will make only minor changes in the notes and obtain the agreement of the chair and reporter of the pertinent advisory committee in doing so. But, he said, when the standing committee proposes changes that are major in nature, or disputed, it will normally send the note back to the advisory committee for further consideration and redrafting. He concluded that the question of the appropriate terminology for the notes was an important matter that would be discussed further at the reporters' next luncheon.

Proposed Effective Date for Local Rules

Judge Garwood reported that the advisory committee at its April 1998 meeting had drafted a proposed amendment to FED. R. APP. P. 47(a)(1) that would mandate an effective date of December 1 for all local court rules, except in cases of "immediate need." After the meeting, however, the advisory committee was informed by the Advisory Committee on Civil Rules that the concept of having a uniform, national effective date for local rules may conflict with the Rules Enabling Act, which gives each court authority to prescribe the effective date of their local rules. 28 U.S.C. § 2071(b).

Judge Garwood said that the Advisory Committee on Appellate Rules had not considered this potential legal impediment at its April meeting. Rather, it had focused only on the merits of the proposal referred to all the advisory committees to fix a uniform national effective date for all local rules. Accordingly, he suggested that it would be appropriate for the standing committee to make a threshold decision on whether the Rules Enabling Act would permit amendments to the national rules to mandate effective dates for local rules. If the committee were to decide that there would be no conflict with the Rules Enabling Act, the Advisory Committee on Appellate Rules would recommend fixing a single annual date of December 1 for all local rules of court, except in the case of emergencies.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Duplantier and Professor Resnick presented the report of the advisory committee, as set forth in his memorandum and attachments of December 3, 1998. (Agenda Item 6)

Pending Amendments to the Bankruptcy Rules

Judge Duplantier reported that a heavy volume of comments had been received from bench and bar in response to the "litigation package" of proposed amendments to the Federal Rules of Bankruptcy Procedure. He said that the great majority of the comments had expressed opposition to the package generally. The most common argument made in the comments, he said, was that the proposed amendments were simply not needed and would impose elaborate and burdensome procedures for the handling of a heavy volume of relatively routine matters in the bankruptcy courts. Most of the bankruptcy judges who commented, he said, had argued that FED. R. BANKR. P. 9013 and 9014 currently work well because they give judges flexibility — through local rules on motion practice — to distinguish among various types of "contested matters" and to fashion efficient and summary procedures to decide routine matters.

He added that many judges also had commented negatively about the requirement in revised Rule 9014 that would make FED. R. CIV. P. 43(e) inapplicable at an evidentiary hearing on an administrative motion. The proposed amendment would thus require witnesses to appear in person and testify — rather than give testimony by affidavit — when there is a genuine issue of material fact.

Judge Duplantier pointed out that the advisory committee would hold a public hearing on the proposed amendments on January 28, 1999, and it would meet again in March to consider all the comments and make appropriate decisions on the amendments.

Omnibus Bankruptcy Legislation

Professor Resnick reported that comprehensive bankruptcy legislation was likely to be introduced early in the new Congress. Among other things, it would probably add new provisions to the Bankruptcy Code to govern small business cases and international or transnational bankruptcies. In addition, the Congress may alter the appellate structure for bankruptcy cases and authorize direct appeals from a bankruptcy judge to the court of appeals. He said that the sheer magnitude of the expected legislative changes would likely require the Advisory Committee on Bankruptcy Rules to review in essence the entire body of Federal Rules of Bankruptcy Procedure and Official Forms in order to implement all the new statutory provisions.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Niemeyer presented the report of the advisory committee, as set forth in his memorandum and attachments of December 10, 1998. (Agenda Item 7)

He pointed out that the committee was seeking authority to publish for comment proposed amendments that would abrogate the copyright rules and bring copyright impoundment procedures explicitly within the injunction procedures of FED. R. CIV. P. 65.

Copyright Rules

Professor Cooper noted that the proposed abrogation of the Copyright Rules of Practice had been proposed in 1964, but had been deferred for various reasons since that time. He explained that the advisory committee was now recommending:

1. abrogating the separate body of copyright rules;
2. adding a new subdivision (f) to FED. R. CIV. P. 65 to bring copyright impoundment procedures within that rule's injunction procedures; and
3. amending FED. R. CIV. P. 81 to reflect the abrogation of the copyright rules.

He noted that FED. R. CIV. P. 81 would also be amended both to restyle its reference to the Federal Rules of Bankruptcy Procedure and eliminate its anachronistic reference to mental health proceedings in the District of Columbia.

Professor Cooper explained that the language of the current Rule 81 was the starting point in considering the proposed amendments. RULE 81 states explicitly that the Federal Rules of Civil Procedure do not apply to copyright proceedings, except to the extent that a rule adopted by the Supreme Court makes them apply. Professor Cooper then pointed out that Rule 1 of the Copyright Rules of Procedure promulgated by the Supreme Court

specifies that copyright proceedings are to be governed by the Federal Rules of Civil Procedure. But that rule applies only to proceedings brought under the 1909 Copyright Act, which was repealed by the Congress in 1976. Thus, on the face of it, there appear to be no current rules governing copyright infringement proceedings.

Professor Cooper pointed out that the remainder of the copyright rules establish a pre-judgment procedure for seizing and holding infringing items and the means of making those items. But the procedure does not provide for notice to the defendant of the proposed impoundment, even when notice can reasonably be provided. Nor does it provide for a showing of irreparable injury as a condition of securing relief, nor for the exercise of discretion by the court. Rather, the Copyright Rules provide that an application to seize and hold items is directed to the clerk of court, who signs the writ and gives it to the marshal.

To that extent, he said, the rules are inconsistent with the 1976 copyright statute that vests a court with discretion both to order impoundment and to establish reasonable terms for the impoundment. Professor Cooper added that the pertinent case law leads to the conclusion that the procedures established by the copyright rules would likely not pass constitutional muster.

He stated that most of the courts have reacted to the lack of explicit legal authority for copyright impoundment procedures by applying the Federal Rules of Civil Procedure, especially FED. R. CIV. P. 65, which sets forth procedures for issuing restraining orders and authorizing no-notice seizures in appropriate circumstances. He added that the amendments proposed by the advisory committee would regularize the current practices of the courts and provide them with a firm legal foundation.

He also noted that another important advantage of the proposed amendments is that they would make it clear that the United States will meet its responsibilities under international conventions to provide effective remedies for preventing copyright infringements. To that end, the proposed changes would give fair and timely notice to defendants, vest adequate authority in the judiciary, and provide other elements of due process. He said that the proposed amendments would let the international community know that the United States has clear and effective procedures against copyright infringements. He added that the copyright community had expressed its acceptance of the advisory committee's proposal.

The committee approved abrogation of the copyright rules and adoption of the proposed amendments to the civil rules for publication without objection.

Discovery Rules

Judge Niemeyer reported that the standing committee had approved publication of a package of changes to the discovery rules at its last meeting. He noted that the volume of public comments received in response to the proposed amendments had been heavy. The majority of the comments, he said, were favorable to the package, but there had also been many negative comments. He added that the advisory committee had conducted one public hearing on the amendments in Baltimore, and it would conduct additional hearings in San Francisco and Chicago. Following the hearings and additional review of all the comments at its next business meeting, he said, the advisory committee could present a package of proposed amendments to the standing committee for final action in June 1999.

Mass Torts

Judge Niemeyer reported that the Chief Justice had authorized a Mass Torts Working Group, spearheaded by the Advisory Committee on Civil Rules, to conduct a comprehensive review of mass-tort litigation for the Judicial Conference. The group held four meetings in various parts of the country to which it invited prominent attorneys, litigants, judges, and law professors to discuss mass tort litigation. Judge Niemeyer stated that the legal and policy problems raised by mass torts were both numerous and complex. He added that the group had prepared a draft report identifying the principal problems arising in mass torts and suggesting a number of possible solutions that might be pursued by the Judicial Conference, in cooperation with the Congress and others. The final report, he said, would be presented to the Chief Justice in February 1999.

Special Masters

Judge Niemeyer noted that the Advisory Committee on Civil Rules had appointed a special subcommittee, chaired by Chief Judge Roger C. Vinson, to study the issues arising from the use of special masters in the courts.

Local Rules of Court

Judge Niemeyer reported that the advisory committee would address a number of concerns raised by the proliferation of local rules of court. He noted that the Civil Justice Reform Act had encouraged local variations in civil procedure, with a resulting erosion of national procedural uniformity among the district courts. He noted that the advisory committee was giving preliminary consideration to two alternative amendments to FED. R. CIV. P. 83.

The first suggested amendment would provide that a local rule of court could not be enforced until it is received in both the Administrative Office and the judicial council of the

circuit. The second alternative would go much further and provide that a court could not enforce a new local rule or amended rule — except in case of "immediate need" — until 60 days after the court has: (a) given notice of it to the judicial council of the circuit and the Administrative Office; and (b) made it available to the public and provided them with an opportunity to comment. Under this alternative, the Administrative Office would be required to review all new local rules or amendments and report to the district court and the circuit council if it finds that they do not conform to the requirements of Rule 83. If a new rule or amendment has been reported by the Administrative Office, enforcement of it would be prohibited until the judicial council has approved the provision.

Judge Niemeyer pointed out that the advisory committee would like to see greater national procedural uniformity and fewer local rules. He added that proposed changes in the provisions dealing with local rule authority would have to be coordinated among the other advisory committees under the supervision of the standing committee.

One of the members responded that there was a legitimate need for local rules of court, especially to govern matters that necessarily have to be treated individually in each district — such as issues flowing from geographic considerations. In addition, he said, local rules help to reduce variations in practice among the judges within a district. He pointed out that the Rules Enabling Act requires the circuit councils to review and, if necessary, modify or abrogate local rules. Accordingly, he said, the most appropriate way to deal with problems that may arise from local rules of court is not to limit the authority of the courts to issue local rules, but to persuade the respective circuit councils to review the rules adequately. He added that the council in his own circuit had been very conscientious in reviewing and commenting on the local rules of the courts within the circuit.

Judge Scirica said that the proposed amendments were very helpful, and he suggested that they be referred to the local rules project for consideration in connection with a new, national study of local rules.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Davis presented the report of the advisory committee, as set forth in his memorandum and attachments of December 3, 1998. (Agenda Item 8)

FED. R. CRIM. P. 32.2 - *Criminal Forfeiture*

Judge Davis reported that the proposed new FED. R. CRIM. P. 32.2 — together with proposed conforming amendments to FED. R. CRIM. P. 7, 31, 32, and 38 — would govern criminal forfeiture in a comprehensive manner. He noted that an earlier version of the new rule had been presented to the standing committee at its June 1998 meeting but rejected by a

vote of 7 to 4. He said that much of the discussion at the standing committee meeting had focused on whether a defendant would be entitled to a jury trial on the issue of the nexus between the offense committed by the defendant and the property to be forfeited. In addition, concerns had been raised at the meeting regarding the right of the defendant to present evidence at the post-verdict ancillary proceeding over ownership of the property.

Judge Davis explained that the advisory committee had considered the rule anew at its October 1998 meeting, taking into account the concerns expressed by the standing committee. As a result, the advisory committee had made changes in the rule to accommodate those concerns, and it had made a number of other improvements in the rule as well. The advisory committee, he said, recommended approval of the revised version of Rule 32.2, and he directed attention to a side-by-side comparison of the June 1998 version and the revised version of the rule. He then proceeded to summarize each of the principal changes made by the advisory committee since the last meeting.

First, he pointed out that the principal change made by the advisory committee had been to paragraph (b)(4) of the rule. The revised language would specify that either the defendant or the government may request that the jury determine the issue of the requisite nexus between the property to be forfeited and the offense committed by the defendant.

He said that the advisory committee had also added language to paragraph (b)(1) to provide explicitly that both the government and the defendant have the right to present evidence to the court on the issue of the nexus between the property and the offense. To that end, the revised rule provided specifically that the court's determination may be based on evidence already in the record, including any written plea agreement, or — if the forfeiture is contested — on evidence or information presented by the parties at a hearing after the verdict or finding of guilt.

Judge Davis stated that the advisory committee had amended paragraph (b)(1) to include a specific reference to money judgments. He noted that the courts of appeals of four circuits had held that the government may seek not only the forfeiture of specific property, but also a personal money judgment against the defendant. He said that there was no reason to treat a forfeiture of specific property in the same manner as a forfeiture of a sum of money. Thus, paragraph (c)(1) had also been amended to provide that an ancillary proceeding is not required to the extent that the forfeiture consists of a money judgment.

Judge Davis noted that the advisory committee had amended Rule 32.2(a) to make it clear that the government need only give the defendant notice in the indictment or information that it will seek forfeiture of property. The earlier version had required an allegation of the defendant's interest in property subject to forfeiture.

Paragraph (b)(2) had been revised to make it clear that resolution of a third party's interest in the property to be forfeited had to be deferred until the ancillary proceeding. Paragraph (b)(3) had been amended to allow the Attorney General to designate somebody outside the Department of Justice, such as the Department of the Treasury, to seize property.

Judge Davis noted that paragraph (c)(2) had been simplified to make it clear that if no third party is involved, the court's preliminary order of forfeiture becomes the final order if the court finds the defendant had an interest in the property that is forfeitable under the applicable statute. He said that under subdivision (e) there would be no right to a jury trial on the issue of subsequently located property or substitute property

Judge Davis said that the advisory committee had spent more than two and one-half years in considering the rule and had devoted two hearings and several meetings to it. He said that the committee was very comfortable with the revised rule and believed that it would bring order to a complicated area of the law.

Judge Wilson moved to approve the revised rule, subject to appropriate restyling, and send it to the Judicial Conference. He added that he had opposed the rule at the June 1998 meeting, but said that inclusion of a provision for the jury to determine the issue of the nexus between the property and the offense had led him to support the current proposal.

One of the members expressed continuing concern over the jury trial issue and suggested that the revised rule was internally inconsistent in that it provided for a jury's determination in certain situations, but not in others. He said that he was troubled over the issue of money judgments, in that the government would be given not only a right to forfeit specific property connected with an offense, but also a right to restitution for an amount of money equal to the amount of the property that would otherwise be seized. He suggested that the money judgment concept constituted a improper extension beyond what is authorized by the pertinent forfeiture statutes.

Judge Davis responded that at least four of the circuits had authorized the practice. He added that the advisory committee was only attempting to provide appropriate procedures to follow in those circuits where money judgments are authorized under the substantive law of the circuit. The underlying authority, he said, is provided by circuit law, not by the rule. At Judge Tashima's request, Judge Davis agreed to insert language in the committee note to the effect that the committee did not take a position on the correctness of those rulings, but was only providing appropriate procedures for those circuits that allowed money judgments in forfeiture cases.

One member expressed concern about the concept of seizure in connection with a money judgment. He noted that paragraph (b)(3) of the revised draft provided that the

government may "seize the property," and he suggested that the word "specific" be added before the word "property." Thus, the government could not "seize" money. It could only seize the "specific property" specified in paragraph (b)(2). Judge Davis agreed to accept the language change.

Another member questioned why a jury trial would be required to determine the nexus of the property to the offense, but not when substitute property is involved. Judge Davis responded that it would be very difficult to do so, since substitute property is usually not found until after the trial is over and the original property has been converted or removed. Mr. Pauley added that the pertinent case law had been uniform in holding that there is no jury-tial right as to substitute and later-found property.

Chief Justice Veasey expressed support for the substance of the revised amendments submitted by the advisory committee. But he pointed to a letter recently received from the National Association of Criminal Defense Lawyers, which had been distributed to the members before the meeting. The letter argued that the advisory committee had made major changes in the original proposal, had approved the rule by a vote of 4 to 3, and should be required to republish it for additional public comment. He said that he was concerned about forwarding the revised new rule to the Judicial Conference without further publication. **Accordingly, Chief Justice Veasey moved to republish proposed new Rule 32.2 for additional public comment.**

Professor Schlueter responded that the 4-3 vote in the advisory committee had been on the question of whether a right to a jury determination should be preserved in light of the Supreme Court's decision in *Libretti v. United States.* In that case, the Court held that criminal forfeiture is a part of the sentencing process. He added that considerable sentiment remained in the advisory committee that a jury determination is simply not required.

Judge Davis and three members of the committee added that it was unlikely that any additional, helpful information would be received if the proposed rule were to be published again. They recommended that the committee approve the revised rule and send it to the Conference.

The motion to republish the rule for further comment was defeated by a vote of 9 to 2.

Judge Tashima moved to adopt the proposed Rule 32.2 and the companion amendments to Rules 7, 31, 32, and 38 and send them to the Judicial Conference, subject to: (a) making appropriate style revisions, and (b) adding language to the committee note stating that the committee takes no position on the merits of using money judgments in forfeiture proceedings. The committee thereupon voted to approve the proposed new rule without objection.

Judge Davis and Professor Schlueter presented the committee with an additional sentence that would be inserted at line 277 of the committee note. After accepting suggestions from Mr. Sundberg and Judge Duplantier, they agreed to add the following language: "A number of courts have approved the use of money forfeiture judgments. The committee takes no position on the correctness of those rulings."

Professor Schlueter added that the advisory committee wished to delete the words "legal or possessory" from line 422 of the committee note. Thus, the pertinent sentence in the note would read: "Under this provision, if no one files a claim in the ancillary proceeding, the preliminary order would become the final order of forfeiture, but the court would first have to make an independent finding that at least one of the defendants had an interest in the property such that it was proper to order the forfeiture of the property in a criminal case."

Presence of Defense Attorneys in Grand Jury Proceedings

Judge Davis reported that the congressional conference report on the Judiciary's appropriations legislation required the Judicial Conference to report to Congress by April 15, 1999, on whether Rule 6(d) of the Federal Rules of Criminal Procedure should be amended to allow a witness appearing before a grand jury to have counsel present.

He noted that the time frame provided by the Congress was extremely short and simply did not permit a comprehensive study of the issues. The Advisory Committee on Criminal Rules, he said, had appointed a special subcommittee to consider the matter and make recommendations. The subcommittee reviewed earlier studies, including: (a) a comprehensive report by the Judicial Conference to the Congress in 1975 that declined to support a change to Rule 6(d); and (b) a 1980 report by the Department of Justice to the Congress opposing pending legislation that would have allowed attorney representation in the grand jury room. He noted that the subcommittee had decided that the reasons stated in the past for declining to amend Rule 6(d) remained valid today. In summary, he said, the three principal reasons for not allowing a witness to bring an attorney into the grand jury were that the practice would lead to:

1. loss of spontaneity in testimony;
2. transformation of the grand jury into an adversary proceeding; and
3. loss of secrecy, with a resultant chilling effect on witness cooperation, particularly in cases involving multiple representation.

Judge Davis said that the subcommittee had concluded by a vote of 3 to 1 not to recommend any changes Rule 6(d). The full advisory committee was then polled by a mail vote, and it concurred in the recommendation of the subcommittee by a vote of 9 to 3.

Judge Davis reported that members of the advisory committee had been concerned that allowing attorneys in the grand jury without a judge present would create problems and prolong the proceedings. He pointed out that about half the states that have retained a grand jury system do in fact permit lawyers in grand jury proceedings, but he noted that there were other ways to indict defendants in these states.

One member stated that he was in favor of amending Rule 6 to relax the restriction on the presence of attorneys. He suggested that it was not necessary to allow individual lawyers for every witness, but at least one attorney might be present to protect the basic rights of witnesses and prevent abuse and mistreatment by prosecutors. A second member expressed support for the suggestion and added that it would be fruitful to establish pilot districts to test out the concept and see whether a limited presence of attorneys for witnesses would lead to improvements in the grand jury system.

A third member concurred with the suggestion to establish pilot projects. He said that the advisory committee might wish to explore an amendment to Rule 6(d) to allow an attorney for a witness in the grand jury room upon the express approval of the court or the United States attorney. He added, however, that the time given by the Congress to respond was unreasonably short and did not allow for thoughtful consideration of alternatives. As a result, the committee would have to take a quick "up or down" vote at this time, but it could at a later date consider the advisability of further research and the establishment of pilot projects. Judge Scirica added that the judiciary had inquired informally as to whether the Congress would be amenable to giving additional time to respond, but had been informed that a request along those lines would not be well received.

Mr. Pauley expressed the strong support of the Department of Justice for the advisory committee's report and recommendation. He pointed out that the proposal to amend Rule 6(d) was not new and had been rejected in the past. He added that the Department was very much opposed to a change in the rule and feared that it would adversely impact its ability to investigate organized crime. He concluded a prerequisite for consideration of any change in the rule should be the demonstration of an "overwhelming" case of need for the change.

Mr. Pauley also emphasized that the Department of Justice had taken effective steps against potential prosecutorial abuses and had set forth effective safeguards in the United States attorneys' manual. Among other things, the manual requires prosecutors to give *Miranda* warnings to witnesses who may be the target of grand jury proceedings. He added that the Department enforced the manual strictly.

Chief Justice Veasey moved to approve the report of the advisory committee.

Judge Wilson moved, by way of amendment, to have the committee inform the Judicial Conference that it did not support changes in Rule 6(d) at this time, but that it would enthusiastically support the establishment of pilot studies to test the impact of the presence of lawyers for witnesses in the grand jury.

Another member said that empirical data would be needed to test the concerns expressed on both sides of the issue and how they would play out in practice. He suggested that, rather than establishing a pilot program, it would be advisable at the outset to research the practice and experience in the states that permit lawyers into the grand jury room.

Three other members said that the advisory committee might well study the issues further and make appropriate recommendations for change in the future, but they emphasized that the Judicial Conference had been required by legislation to provide a quick response to the Congress. Therefore, the committee had to take a "yes or no" vote on whether to amend Rule 6(d) at this time.

Judge Scirica proceeded to call the question, noting that the committee could discuss at a later point whether any pilot projects or additional research were needed. He noted that the Advisory Committee on Criminal Rules would be responsible for taking the lead on giving any additional consideration to the matter.

The committee voted to reject Judge Wilson's amendment by a voice vote.

It then approved Chief Justice Veasey's motion to approve the report of the advisory committee by a vote of 7 to 2. Judges Wilson and Tashima noted for trhe record their opposition to the motion.

One of the members said that there was no need to discuss the matter of pilot projects further since the chair and reporter of the Advisory Committee on Criminal Rules had just participated in the discussion and could take the issues and suggestions back to the advisory committee for any additional consideration. Judge Davis concurred and noted that the Rules Committee Support Office had already begun to gather information on state practices regarding attorneys for witnesses in grand jury proceedings.

Restyling of the Criminal Rules

Professor Schlueter reported that the advisory committee had been working with the style subcommittee to restyle the Federal Rules of Criminal Procedure. He said that the committee would spend a substantial amount of time on the restyling project at its next several meetings, and it would address other matters only if they were found to be essential. He added that Professor Stephen Saltzburg had been engaged by the Administrative Office to work with the advisory committee and the style subcommittee on the restyling project.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

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

Judge Smith reported that the advisory committee had no action items to present to the standing committee. She noted that a substantial number of public comments had been received in response to the package of rule amendments published in August 1998 and that:

1. eight commentators had appeared before the committee at its October 1998 hearing in Washington;
2. the December 1998 hearing in Dallas had been canceled; and
3. at least 15 people had filed requests to date to testify at the San Francisco hearing in January 1999.

Judge Smith said that most of the comments received had been directed to the proposed amendments to FED. R. EVID. 701-703, dealing with expert testimony.

FED. R. EVID. 701-703

Judge Smith noted that the proposed amendment to FED. R. EVID. 701 was designed to prohibit the use of expert testimony in the guise of lay testimony. The Department of Justice, she said, had submitted a negative comment on the proposal, but the other public comments in response to the rule had been positive. She added that the advisory committee was listening to the Department's concerns and was open to refining the language of the amendment further, particularly with regard to drawing a workable distinction between lay testimony and expert testimony.

Judge Smith explained that the proposed amendment to FED. R. EVID. 702 would provide specific requirements that must be met for the admission of all categories of expert testimony. She said that the public comments received in response to the proposed amendments to Rule 702 were about evenly divided, with defense lawyers strongly in favor of the amendments and plaintiffs' lawyers strongly opposed to them.

She noted that the Supreme Court had recently granted certiorari in *Kumho Tire v. Carmichael,* where the issue was whether the gatekeeping standards set down by the Supreme Court in the *Daubert* case apply to the testimony of a tire failure expert who had testified largely on the basis of his personal experience. She said that the Department of Justice had cautioned against making amendments in the rule before the Court renders its decision in the *Kumho* case. But, she said, the advisory committee wanted to continue receiving public comments on the merits of the proposed amendment to Rule 702. The

advisory committee, though, would await the outcome of the *Kumho* case before forwarding any amendment to the Standing Committee.

Judge Smith pointed out that the amendment to FED. R. EVID. 703 would limit the ability of an attorney to introduce hearsay evidence in the guise of information relied upon by an expert. She said that the advisory committee wanted to admit the opinion of the expert into evidence but have a presumption against admitting the underlying information relied upon by the expert unless it is independently admissible. She reported that the public comments on Rule 703 had been uniformly positive.

FED. R. EVID. 103

Judge Smith noted that the proposed amendment to FED. R. EVID. 103 would provide that there is no need for an attorney to renew an objection to an advance ruling of the court on an evidentiary matter as long as the court makes a "definitive ruling" on the matter. She said that some public comments had questioned whether the term "definitive ruling" was sufficiently explicit.

FED. R. EVID. 404

Judge Smith pointed out that the proposed amendment to FED. R. EVID. 404 would provide that if an accused attacked the character of a victim, evidence of a "pertinent" character trait of the accused may also be introduced. She explained, however, that use of the term "pertinent" in the proposed amendment might allow the introduction of more matters than the advisory committee believes advisable. Accordingly, she said, it was inclined to refine the language of the proposed amendment to allow the introduction only of evidence bearing on the "same" character trait of the witness. She added that the issue arises most frequently in matters of self-defense. Thus, for example, if the defendant were to attack the aggressiveness of a witness, the witness could in turn raise the question of the aggressiveness of the defendant.

FED. R. EVID. 803 AND 902

Judge Smith said that the proposed amendments to FED. R. EVID. 803(g) and 902 would allow certain business records to be admitted into evidence as a hearsay exception without calling the custodian for in-court testimony. She said that the proposed rule would provide consistency in the treatment of domestic business records and foreign business records. Currently, she noted, proof of foreign business records in criminal cases may be made by certification, but business records in civil cases and domestic business records in criminal cases must be proven by the testimony of a qualified witness.

DISCLOSURE OF FINANCIAL INTERESTS

Professor Coquillette stated that recent news accounts had focused attention on the need to provide federal judges with assistance in meeting their statutory responsibility of recusing themselves in cases of financial conflict. He said that the Judicial Conference's Committee on Codes of Conduct had suggested that it would be beneficial to "revis[e] the Federal Rules of Civil Procedure or local district court rules to require corporate parties to disclose their parents and subsidiaries (along the lines of FED. R. APP. P. 26.1) and possibly also to require periodic updating of such affiliations." The Codes of Conduct Committee had reported to the Conference in September 1998 that it would coordinate with the standing committee on the possible addition of corporate disclosure requirements in the federal rules.

Professor Coquillette reported that the reporters had discussed this matter collectively at their luncheon and had agreed to coordinate with each other in drafting common language for the advisory committees that might be used as the basis for proposed amendments to the various sets of federal rules on corporate disclosure. He pointed out, though, that bankruptcy cases presented special problems and that some adjustments in the common language might be needed in proposed amendments to the Federal Rules of Bankruptcy Procedure.

Mr. Rabiej pointed out that FED. R. APP. P. 26.1 was quite narrow in scope and did not apply to subsidiaries. He suggested that the advisory committees might seek some guidance from the Standing Committee as to whether a proposed common disclosure rule should include subsidiaries or in other respects be broader than the current FED. R. APP. 26.1.

Judge Garwood said that the Advisory Committee on Appellate Rules had considered Rule 26.1 recently and had concluded that it would simply not be possible to devise a workable disclosure statement rule that would cover all the various types of conflicting situations and financial interests that require recusal on the part of a judge. He said that the rule should focus on those categories of conflicts that require automatic recusal under the statute, rather than the conflicts that entail judicial discretion.

PROPOSED RULES GOVERNING ATTORNEY CONDUCT

Professor Coquillette referred to his memorandum of December 6, 1998, and reported that each of the five advisory committees had appointed two members to serve on the Special Committee on Rules Governing Attorney Conduct. He said that Judge Stotler had named Chief Justice Veasey and Professor Hazard to serve on the committee as representatives of the standing committee and that the Department of Justice would also be asked to name participants.

He said that the special committee would hold a meeting in Washington on May 4, 1999. At that time, the members would review the pertinent empirical studies and consider the major recommendations submitted to date by various organizations and individuals. All options would be discussed at the May meeting, but no decisions would be made at that time.

The special committee would then meet again in the fall of 1999. At that time, it would be expected to approve concrete proposals to bring before the respective advisory committees for a vote at their fall meetings. The standing committee at its January 2000 meeting could then consider the final attorney conduct recommendations of the special committee and the advisory committees.

Professor Coquillette said that the options at this point appeared to be either:

1. to adopt a single federal rule adopting the attorney conduct statutes and rules of the state in which a federal district court sits; or
2. to adopt a single federal rule adopting the attorney conduct statutes and rules of the state in which a federal district court sits; except for a small number of "core" issues to be governed by uniform, national federal rules. These would be limited to matters of particular concern to federal courts and federal agencies, such as the Department of Justice.

He pointed out that there was considerable disagreement over these options within the legal community.

SHORTENING THE RULEMAKING PROCESS

Judge Scirica reported that the Executive Committee of the Judicial Conference had asked the committee to consider ways in which the length of the rulemaking process might be shortened without adverse effect. He said that there were, essentially, two basic options that might accomplish that objective — either eliminating the participation in the rules process of one of the bodies presently required to approve rule amendments or shortening the time periods now prescribed by statute or Judicial Conference procedures. He said that neither alternative was attractive and added that most of the members of the standing committee had already expressed opposition to shortening the time allotted for public comment on proposed amendments.

Some members added that it was apparent that the Supreme Court wanted to continue playing a significant role in the rulemaking process. They said that it would be very difficult, in light of the Court's schedule, to reduce the amount of time that the justices currently are given to review proposed rules amendments. Nevertheless, they said, it might

be useful to take a fresh look at all the time limits currently imposed by statute or Judicial Conference procedures.

Judge Scirica reported that it had been suggested that the committee consider adopting an emergency procedure for adopting amendments on an expedited basis when there is a clear need to do so. Several members pointed out that the rules committees had, in fact, acted on an expedited basis on several occasions in response to pending action by the Congress. Most recently, they noted, the committees had acted outside the normal, deliberative Rules Enabling Act process in responding to the Congressional mandate for their views on the advisability of amending FED. R. CRIM. P. 6(d) to permit witnesses to bring their lawyers into the grand jury room.

But several members also cautioned against establishing a regularized procedure for handling potential amendments on an expedited basis. They said that the Rules Enabling Act process, as protracted as it may seem, ensures the integrity of the rulemaking process. It assures careful research and drafting, thorough committee deliberations, and meaningful input by the public. They added that only a few selective matters require expedited treatment, and these exceptions can be dealt with expeditiously on a case-by-case basis. They said that the very establishment of a regularized "fast track" procedure would only encourage its use and undermine the effectiveness of the rulemaking process.

Judge Scirica said that the committee might respond to the Executive Committee by stating that the present deliberative process serves the public very well, but that the rules committees are prepared to respond to individual situations on an expedited basis whenever necessary. The members agreed with his observation and suggested that he explore it with the chairman of the Executive Committee.

REPORT OF THE STYLE SUBCOMMITTEE

Judge Parker reported that the restyling of the body of the Federal Rules of Criminal Procedure was the major task pending before the style subcommittee. He noted that soon after the Supreme Court had promulgated the revised Federal Rules of Appellate Procedure, Bryan Garner, the Standing Committee's style consultant, prepared a first draft of a restyled set of criminal rules. That draft, he said, was then revised by each member of the style subcommittee and by Professor Stephen Saltzburg, who had been engaged specially by the Administrative Office to assist in the restyling task. Mr. Garner then prepared a second draft of the criminal rules, and the style subcommittee met in Dallas to begin work on reviewing the product.

Judge Parker reported that the style subcommittee had completed its review of FED. R. CRIM. P. 1-11, 54, and 60, and it planned to complete action on another dozen rules

by mid-February 1999. Judge Davis added that the Advisory Committee on Criminal Rules was working closely with the style subcommittee on the project. He stated that one of the great challenges was to avoid making inadvertent, substantive changes in the rules as they are restyled.

REPORT OF THE TECHNOLOGY SUBCOMMITTEE

Mr. Lafitte reported that the technology subcommittee was monitoring developments in technology with a view towards their potential impact on the federal rules. He noted that the subcommittee was concentrating its efforts on considering rules amendments that might be needed to accommodate the judiciary's Electronic Case Files (ECF) initiative. He said that, among other things, ECF will permit: (a) electronic filing and service of court papers, (b) maintenance of the court's case files in electronic format, (c) electronic linkage of docket entries to the underlying documents, and (d) widespread electronic access to the court's files and records. The project, he added, was being tested in 10 pilot courts and was expected to be made available by the Administrative Office to all federal courts within one to two years.

Mr. Lafitte reported that the subcommittee had met the afternoon before the standing committee meeting to review the status of ECF and identify any federal rules that might need to be changed to accommodate electronic processing of case papers. He said that the subcommittee had been aided substantially in that effort by a comprehensive policy paper prepared by Nancy Miller, the Administrative Office's judicial fellow.

Mr. Lafitte said that the 1996 amendments to the rules had authorized a court by local rule to "permit papers to be filed, signed, or verified by electronic means that are consistent with technical standards, if any, that the Judicial Conference . . . establishes." [FED. R. CIV. P. 5(e); FED. R. BANKR. P. 5005; FED. R. APP. P. 25(a)(2). *See also* FED. R. CRIM. P. 49(d).] The rules, however, do not authorize service by electronic means. Accordingly, he said, the ECF pilot courts have relied on the consent of the parties in experimenting with electronic service in the prototype systems.

Mr. Lafitte reported that the subcommittee had concluded that it was necessary to legitimize the experiments taking place in the pilot courts and amend the federal rules to provide an appropriate legal foundation for electronic service. To that end, he said, the subcommittee would like the advisory committees to consider a common amendment to the rules that would authorize courts by local rule to permit papers to be *served* by electronic means — just as they may currently authorize papers to be *filed, signed, or verified* by electronic means. He said that the subcommittee had asked Professor Cooper to prepare a draft rule, using as a model the proposed amendment to FED. R. BANKR. P. 9013(c) published in August 1998.

He added, however, that the proposed amendment to authorize electronic service through local rules should be identified as an interim solution, necessary because of rapid advances in technology and local experimentation. The ultimate objective, he said, should be to fashion a uniform set of national rules that will govern electronic files and filing in the federal courts.

Mr. Lafitte also reported that the subcommittee would meet again in February 1999 — together with judges, clerks, and lawyers from the ECF pilot districts and Administrative Office staff — to consider procedural issues raised by the change from manual to electronic processing of case papers and files.

Judge Scirica recommended that Nancy Miller's paper be sent to all members of the standing committee.

LOCAL RULES PROJECT

Professor Coquillette reported that the first local rules project had been mandated by the Congress in response to widespread concern over the proliferation of federal court local rules. He explained that Professor Mary Squiers, the director of the project, had reviewed the local rules of every district court and reported back to those courts on inconsistencies and other problems with their rules. The process, he said, had been voluntary, and it led a number of courts to improve and reduce their local rules.

Professor Squiers then described the original project in detail and pointed out that the review of all the local rules had also been beneficial in that it revealed many subjects covered by local rules that were later determined to be appropriate subjects to be included in the national rules. The project, she said, had also considered the possibility of drafting a set of model local rules, but it decided instead simply to compile several samples of effective local rules for the courts to consider. Professor Squiers added that the 1995 amendments to the federal rules required courts to renumber their local rules to conform with the numbering systems of the national rules.

Professor Coquillette said that a new study of local rules was needed. He pointed out that the Civil Justice Reform Act had greatly complicated the picture by encouraging local procedural experimentation and de facto "balkanization" of federal procedure. In addition, he said, several courts had not yet complied with the requirement to renumber their local rules.

One of the members added that recently-enacted legislation requires each district court to establish an alternative dispute resolution program under authority of local rules. He suggested that a new local rules project consider the advisability of having certain uniformity among the courts in this area.

Professor Coquillette said that it was important for the committee to decide in advance as a matter of policy what it would do with the results of a new national study of local rules. He said, for example, that the committee might consider the following options:

1. developing model local rules;
2. proposing new national rules to supersede certain categories of local rules; or
3. encouraging more vigorous enforcement of FED. R. CIV. P. 83.

One of the members suggested that the committee draft model local rules and use them as a vehicle for judging the local rules of the courts.

NEXT COMMITTEE MEETING

The committee will hold its next meeting in Boston on Monday and Tuesday, June 14-15, 1999. Judge Scirica pointed out that the agenda for the meeting would be very heavy and may require the scheduling of a working dinner for Sunday night, June 13.

Respectfully submitted,

Peter G. McCabe,
Secretary

LEGISLATION AFFECTING
THE FEDERAL RULES OF PRACTICE AND PROCEDURE
106th Congress

SENATE BILLS

S. 32 *No title*
- Introduced by: Thurmond
- Date Introduced: 1/19/99
- Status: Referred to the Committee on Judiciary
- Provisions affecting rules
  - Rule 31(a) of the Federal Rules of Criminal Procedure is amended by striking "unanimous" and inserting "by five-sixths of the jury."

S. 159 *No title*
- Introduced by: Moynihan
- Date Introduced: 1/19/99
- Status: Referred to the Committee on Judiciary; 3/24/99 Referred to Subcommittee on Oversight and Courts.
- Provisions affecting rules
  - Increases juror fees from $40 to $45.

S. 248 Judicial Improvement Act of 1999
- Introduced by: Hatch (5 co-sponsors)
- Date Introduced: 1/19/99
- Status: Referred to the Committee on Judiciary; 3/24/99 Referred to Subcommittee on Oversight and Courts
- Provisions affecting rules
  - Sec. 4. Would amend Section 1292(b) of title 28, and allow for interlocutory appeals of court orders relating to class actions;
  - Sec. 5. Creates original federal jurisdiction based upon minimal diversity in certain single accident cases; and
  - Sec. 10. Clarifies sunset of civil justice expense and delay reduction plans.

S. 250 Federal Prosecutor Ethics Act
- Introduced by: Hatch (2 co-sponsors)
- Date Introduced: 1/19/99
- Status: Referred to the Committee on Judiciary
- Provisions affecting rules
  - Sec. 2 authorizes Attorney General to establish special ethical standards governing federal prosecutors in certain situations. Those standards would override state standards.

S.353 Class Action Fairness Act of 1999

- Introduced by: Grassley (2 co-sponsors)
- Date Introduced: February 3, 1999
- Status: Referred to the Committee on Judiciary
- Provisions affecting rules:
  - Sec. 2. Provides for notification of the Attorney General & state attorney generals;
  - Sec. 2. Limits on attorney fees
  - Sec. 3. Minimal diversity requirements;
  - Sec. 4. Allows for removal of class actions to federal court; and
  - Sec. 5. Removes judicial discretion from Civil Rule 11(c).

S. 625 *Bankruptcy Reform Act of 1999*

- Introduced by: Grassley (5 co-sponsors)
- Date Introduced: March 16, 1999
- Status: Referred to the Committee on Judiciary; Letter sent by Director to Hatch 3/23/99
- Provisions affecting rules:
  - Section 702 requires clerks of court to maintain a register of all governmental units to ensure that the appropriate government office receives adequate notice of bankruptcy filings.
  - Sections 102, 319, and 425 would authorize or mandate the initiation of the rulemaking process with respect to separate proposals for rule changes.

S. 716 Juvenillee cime Bill

S. 721 No title (See *H.R. 1281*)

- Introduced by: Grassley (4 co-sponsors)
- Date Introduced: March 25, 1999
- Status:
- Provisions affecting rules:
  - Section 1 states the presiding judge of any appellate court or district court may, in his or her discretion, permit the photographing, electronic recording, broadcasting, or televising to the public of court proceedings over which that judge presides; safe guards are provided to obscure the identity of nonparty witnesses; the Judicial Conference is authorized to promulgate advisory guidelines
  - Section 3 provides a 3 year sunset of section 1.

S. 755 Ethical standards -

S. 758 Asbestos -

HOUSE BILLS

H.R . 461 Prisoners Frivolous Lawsuit Prevention Act of 1999

- Introduced by: Gallegly (14 co-sponsors)
- Date Introduced: February 2, 1999
- Status: Referred to the Committee on Judiciary; 2/25/ 99 Referred to the Subcommittee on Courts and Intellectual Property.
- Provisions affecting rules:
  - Sec. 2 would amend Civil Rule 11 creating special sanction rules for prisoner litigation.

H.R . 522 Parent-Child Privilege Act of 1999

- Introduced by: Andrews (co-sponsors)
- Date Introduced: February 3, 1999
- Status: Referred to the Committee on Judiciary; 2/25/99 Referred to the Subcommittee on Courts and Intellectual Property.
- Provisions affecting rules:
  - Sec. 2 would create new rule 502 of the Rules of evidence providing for a parent/child privilege.

H.R. 771 No title

- Introduced by: Coble (10 co-sponsors)
- Date Introduced: February 23, 1999
- Status: Referred to the Committee on Judiciary; 3/11/99 Forwarded by Subcommittee to Full Committee; Letter to Hyde 3/22/99
- Provisions affecting rules:
  - Amends rule 30 of the Federal Rules of Civil Procedure to require that depositions be recorded by stenographic or stenomask means unless the court upon motion orders, or the parties stipulate in writing, to the contrary.

H.R .775 Year 2000 Readiness and Responsibility Act; Small Business Year 2000 Readiness Act (See S. 96 and S. 461)

- Introduced by: Davis (62 co-sponsors)
- Date Introduced: February 23, 1999
- Status: Referred to the Committee on Judiciary; Letter to Hyde 3/24/99
- Provisions affecting rules:

H.R. 833 Bankruptcy Reform Act of 1999

- Introduced by: Gekas (92 co-sponsors)
- Date Introduced: February 24, 1999
- Status: Referred to the Committee on Judiciary; Forwarded by Subcommittee to Full Committee in the Nature of a Substitute by the Yeas and Nays: 5 - 3; letter sent by Director to Hyde on 3/23/99.

- Provisions affecting rules:
  - Section 802 require clerks of court to maintain a register of all governmental units to ensure that the appropriate government office receives adequate notice of bankruptcy filings.
  - Sections 102, 403, 607, and 816(e) would authorize or mandate the initiation of the rulemaking process with respect to separate proposals for rule changes.

HR 1281

H.R. 1281 No title (See S. 721)
- Introduced by: Grassley (36 co-sponsors)
- Date Introduced: March 25, 1999
- Status: 3/25/98 Referred to the House Committee on the Judiciary.
- Provisions affecting rules:
  - Section 1 states the presiding judge of any appellate court or district court may, in his or her discretion, permit the photographing, electronic recording, broadcasting, or televising to the public of court proceedings over which that judge presides; safe guards are provided to obscure the identity of nonparty witnesses; the Judicial Conference is authorized to promulgate advisory guidelines
  - Section 3 provides a 3 year sunset of section 1.

HR 1283 Asbestos

JOINT RESOLUTIONS

S. J. RES. 3; *A joint resolution proposing an amendment to the Constitution of the United States to protect the rights of crime victims.*
- Introduced by: Kyl (30 Co-sponsors)
- Date Introduced: 1/19/99
- Status: Referred to the Committee on Judiciary; 3/23/99 Referred to Subcommittee on Constitution, Federalism, Property; 3/24/99 Committee on Judiciary. Hearings held.
- Provisions affecting rules
  - Calls for a Constitutional Amendments enumerating victim's rights.

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

ANTHONY J. SCIRICA
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

WILL L. GARWOOD
APPELLATE RULES

ADRIAN G. DUPLANTIER
BANKRUPTCY RULES

PAUL V. NIEMEYER
CIVIL RULES

W. EUGENE DAVIS
CRIMINAL RULES

FERN M. SMITH
EVIDENCE RULES

March 22, 1999

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

Dear Mr. Chairman:

As chair of the Advisory Committee on Civil Rules and on behalf of the Judicial Conference of the United States, I am writing to express opposition to H.R. 771, which was introduced on February 23, 1999. The bill would undo amendments to Civil Rule 30(b), which took effect on December 1, 1993. It would require recording of all oral depositions taken as part of a federal lawsuit by stenographic or stenomask means unless otherwise ordered by the court or stipulated by the parties. The overriding purpose of the 1993 rule amendments was to provide parties in litigation with the discretion to select recording means best suited to their individual needs.

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

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

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

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

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

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

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

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

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

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

Sincerely,

Paul V. Niemeyer
United States Circuit Judge

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

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

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

LEONIDAS RALPH MECHAM
Secretary

March 24, 1999

Honorable Henry J. Hyde
Chairman, Committee on the Judiciary
United States House of Representatives
2138 Rayburn House Office Building
Washington, DC 20515-1306

Dear Mr. Chairman:

On behalf of the Judicial Conference of the United States, I write to transmit views with respect to pending year 2000 ("Y2K") legislation. H.R. 775, as well as S. 96 and S. 461, seeks to promote the resolution of potentially large numbers of Y2K disputes. The federal judiciary recognizes the commendable efforts of Congress to resolve Y2K disputes short of full-scale litigation so as to alleviate the burden of such litigation on private parties as well as on federal and state courts. These are clearly laudable public policy objectives.

Some of the provisions, however, will affect the administration of justice in the federal courts. The Judicial Conference, at its March 16th session, determined to oppose the provisions expanding federal court jurisdiction over Y2K class actions in bills (H.R. 775, S. 96, and S. 461) currently under consideration by the 106th Congress. In addition, because the Y2K pleading requirements included in these bills circumvent the Rules Enabling Act, the Conference also opposes these provisions.

Class Actions

These bills create no federal cause of action. Instead, they assume that plaintiffs will rely on typical state causes of action to provide relief in Y2K disputes. Under the bills, individual plaintiffs, as opposed to class action plaintiffs, can bring their tort, contract, and fraud suits in a state court where they will remain until resolved. While federal defenses and liability limitations established in the legislation may be raised in such litigation, the bills recognize that state courts are fully capable of applying these provisions and carrying out federal policy. This reliance on state courts, which today handle 95 percent of the nation's judicial business, follows the traditional allocation of work between the state and federal courts.

The provisions of these Y2K bills take a radically different approach to Y2K class actions—one that would effect a major reallocation of class action workloads. These bills create original federal court jurisdiction over any Y2K class action based on state law, regardless of the amount in controversy, where there is minimal diversity of citizenship—that is, where any single member of the proposed plaintiff class and any defendant are from different states. They also provide for the removal of any such Y2K class action to federal court by any single defendant or any single member of the plaintiff class who is not a representative party. While the bills do identify limited circumstances in which a federal district court may abstain from hearing a Y2K class action, it is unlikely that many actions will meet the specified criteria. The net result of these provisions will be that most Y2K class action cases will be litigated in the federal courts.

This assignment of the class action workload to the federal courts is particularly troubling because the Y2K problem may result in a very large number of class actions. While no one knows how many cases will be filed, Senator Robert Bennett, Chair of the Special Committee on the Year 2000 Technology Problem, has predicted that there could be a "tidal wave" of litigation resulting from Y2K problems. Given the nature of the Y2K problem, it is reasonable to expect that similar claims will often arise in favor of multiple plaintiffs against the same defendant or defendants. Thus, it can be expected that a substantial portion of these cases will be brought as class actions. Responding to class actions, regardless of where they are filed, will likely be a monumental task. If the current class action provisions remain in these bills, however, the important contribution the state courts would otherwise make to meeting this challenge will be lost, and the burden on the federal system will be correspondingly increased. The transfer of this burden to the federal courts holds the potential of overwhelming federal judicial resources and the capacity of the federal courts to resolve not only Y2K cases, but other causes of action as well.

Federal administration of these state-law class action claims will impose other substantial burdens. By shifting state-created claims into federal court, the bills confront the federal courts with the responsibility to engage in difficult and time-consuming choice-of-law decisions. The *Erie* doctrine requires that federal district courts, sitting in diversity, apply the law of the forum state to determine which body of state law controls the existence of a right of action. The wholesale shift of state-law class actions into federal court makes this choice-of-law obligation all the more daunting as the sheer number of possible subclasses and relevant bodies of state law multiplies. Some federal courts have taken the position that such multiplicity of law itself stands as a barrier to the certification of a nationwide class action. Even where a district court agreed to certify a class, it would have to make choice of law and substantive determinations that would have no binding force in subsequent Y2K litigation in the states in question.

In addition to the potential adverse docket impact on the federal courts, the proposed bills infringe upon the traditional authority of the states to manage their own judicial business. State legislatures and other rule-making bodies provide rules for the aggregation of state-law claims

into class-wide litigation in order to achieve certain litigation economies of scale. By providing for class treatment, state policymakers express the view that the state's own resources can be best deployed not through repetitive and potentially duplicative individual litigation, but through some form of class treatment. The proposed bills could deprive the state courts of the power to hear much of this class litigation and might well create incentives for plaintiffs who prefer a state forum to bring a series of individual claims. Such individual litigation might place a greater burden on the state courts and thwart the states' policies of more efficient disposition.

Federal jurisdiction over class action litigation is an area where change should be approached with caution and careful consideration of the underlying relationship between state and federal courts. The Judicial Conference Advisory Committee on Civil Rules has recently devoted several years of study to the rules in class action litigation. One outgrowth of that study was the appointment by the Chief Justice of a Mass Torts Working Group. The Working Group undertook a study which revealed the complexities of litigation that aggregates large numbers of claims and illustrates the need for a deliberative review of the issues that must be addressed in attempting to improve the process for resolution of such litigation. Such issues involve not only procedural rules, but also the jurisdiction of federal and state courts and the interaction between federal and state law. Y2K class action litigation implicates the same complex and fundamental issues that the Working Group identified. Even for familiar categories of litigation, these issues can be satisfactorily resolved only by further study. An attempt to address them in isolation, for an unfamiliar category of cases that remains to be developed only in the future, is unwise.

It may well be that extending minimal diversity to mass torts may be appropriate if accompanied by suitable restrictions. The Judicial Conference, for example, has endorsed in principle the use of minimal diversity jurisdiction in single-event, mass tort situations, like airplane crash litigation, and there may be other situations in which the efficiencies to be gained from consolidating mass tort litigation in federal courts are justified. Expansion of class action jurisdiction over Y2K class actions in the manner provided in the pending bills, however, would be inconsistent with the objective of preserving the federal courts as tribunals of limited jurisdiction and the reality that the federal courts are staffed and supported to function as tribunals of limited jurisdiction.

Judicial federalism relies on the principle that state and federal courts together comprise an integrated system for the delivery of justice in the United States. There appears to be no substantial justification for the potentially massive transfer of workload under these bills, and such a transfer would seem to be counterproductive. State courts provide most of the nation's judicial capacity, and a decision to limit access to this capacity in the face of the burden that Y2K litigation may impose could have significant consequences for the efficient resolution of Y2K disputes.

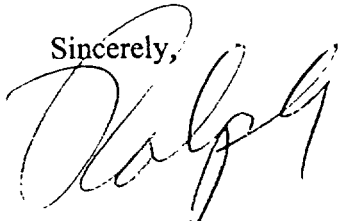
Pleading Requirements

H.R. 775, as well as S. 96 and S. 461, sets forth specific pleading provisions in Y2K litigation that would require a plaintiff to state with particularity certain matters in the complaint regarding the nature and amount of damages, material defects, and the defendant's state of mind. These requirements are inconsistent with the general notice pleading provisions found in the Federal Rules of Civil Procedure (*i.e.*, Rule 8), which apply to civil cases. The bills' provisions bypass the rulemaking provisions in the Rules Enabling Act (28 U.S.C. §§ 2071-77). They have not been subjected to bench, bar, and public scrutiny envisioned under the Rules Enabling Act and are inconsistent with the policies underlying the Act, which the Judicial Conference has long supported.

Not only do the statutory pleading requirements bypass the Rules Enabling Act, they do so in a particularly objectionable way because they are contained in stand-alone statutory provisions outside the federal rules. This will cause confusion and traps for unwary lawyers who are accustomed to relying on the Federal Rules of Civil Procedure for pleading requirements. It also would signal yet another departure from uniform, national procedural rules, following closely in the wake of similar pleading requirements contained in the Private Securities Reform Litigation Act.

On behalf of the federal judiciary, I appreciate your consideration of these views. If you or your staff have any questions, please contact Mike Blommer, Assistant Director, Office of Legislative Affairs (202-502-1700).

Sincerely,



Leonidas Ralph Mecham
Secretary

cc: Honorable John Conyers, Jr., Ranking Member
Members of the Committee on the Judiciary

DRAFT MINUTES

CIVIL RULES ADVISORY COMMITTEE

November 12 and 13, 1998

Note: This Draft Has Not Been Reviewed by the Committee

The Civil Rules Advisory Committee met on November 12 and 13, 1998, at the Lodge Alley Inn, Charleston, South Carolina. The meeting was attended by Judge Paul V. Niemeyer, Chair; Sheila Birnbaum, Esq.; Judge John L. Carroll; Justice Christine M. Durham; Assistant Attorney General Frank W. Hunger; Mark O. Kasanin, Esq.; Judge Richard H. Kyle; Judge David F. Levi; Myles V. Lynk, Esq.; Judge Lee H. Rosenthal; Professor Thomas D. Rowe, Jr.; Judge Shira Ann Scheindlin; Andrew M. Scherffius, Esq.; and Chief Judge C. Roger Vinson. Judge David S. Doty, Francis H. Fox, Esq., and Phillip A. Wittmann, Esq., attended as members who had completed their second three-year terms. Edward H. Cooper was present as Reporter, and Richard L. Marcus was present as Special Reporter for the Discovery Subcommittee. Judge Anthony J. Scirica attended as Chair of the Standing Committee on Rules of Practice and Procedure, and Sol Schreiber, Esq., attended as liaison member from the Standing Committee. Judge A.J. Cristol attended as liaison from the Bankruptcy Rules Advisory Committee. Peter G. McCabe and John K. Rabiej represented the Administrative Office of the United States Courts. Thomas E. Willging represented the Federal Judicial Center. Observers included Scott J. Atlas (American Bar Association Litigation Section); Alfred Cortese; John S. Nichols; Fred S. Souk; and Jackson Williams.

Chairman's Introduction

Judge Niemeyer introduced the new Committee members, Judges Kyle and Scheindlin, and lawyers Lynk and Scherffius. He noted that Judge Carroll had been reappointed to a second term, and that lawyer Kasanin had been appointed for an extension beyond the end of his second term. He read and presented Judicial Conference Resolutions honoring the service of Doty, Fox, and Wittmann. Judge Scirica also has concluded his time as an Advisory Committee member, having become Chair of the Standing Committee. Doty, Fox, and Wittmann each expressed appreciation of the opportunity to serve on the Committee, and expressed confidence that the Committee's work would be carried on to good effect.

Judge Niemeyer noted that Professor Daniel R. Coquillette, Reporter of the Standing Committee, had been prevented by circumstances from attending the meeting.

Judge Niemeyer then offered the new members some information about Advisory Committee practices. The Rules Committees are "sunshine" committees; meetings are open to the public, and on suitable occasions observers have been offered an opportunity to provide information for consideration in Committee discussions. The full extent of the open meetings commitment has never been fully determined — the tendency has been to resolve questions in favor of openness. If a quorum of Committee members wish to discuss committee business, the practice has been to treat the proposed discussion as an open Committee meeting. But subcommittees have met in nonpublic sessions; no subcommittee has had more than five members, and most have only three. And it seems proper for two Committee members to discuss committee work in private. It also is proper to hold Committee discussions in executive session, but the spirit of openness has been honored — there have been no executive session meetings in the experience of any present Committee member.

Observers at Committee meetings include those who represent clients or identifiable constituencies. It is important that they attend and know how open the Committee is. It is important to the Committee that they be free, to the extent the pace of deliberation allows, to make observations; their input can help improve Committee work, in much the same way as public comments and testimony. But it also is important to remember that however familiar and friendly the regular observers become, Committee members' relationships with them must "withstand front-page scrutiny."

To be complete, it also is necessary to make open recognition of the spirit that continually guides Committee deliberations. Each member aims for the best possible development of civil procedure. "Our own particular interests must be put aside." Each member comes to the meetings with unique knowledge and experience, and with unique perspectives that have been shaped by this knowledge and experience. The combination of these perspectives and values, drawn from a dozen and more lives in the law, is what makes the Committee process so valuable.

Finally, the new remembers were reminded that the work of the Committee is not self-organizing. The Administrative Office provides invaluable support, particularly through Peter McCabe as Secretary of the Standing Committee and John Rabiej as Chief of the Rules Committee Support Office.

Minutes Approved

The minutes for the March, 1998 meeting were approved.

Legislation Report

Judge Niemeyer prefaced the Legislation Report by noting that Congress takes an interest in the Civil Rules. Bills that would change the rules directly are introduced with increasing frequency. The Committee has been impelled to become more interested in these bills. The Administrative Office is the chief agency for keeping track of the developments that warrant Committee attention.

John Rabiej began the Legislation Report by noting that nearly forty bills were monitored during the recently concluded session of Congress. Several of them are likely to be introduced early in the first session of the new Congress.

A senate bill to undo the deposition recording amendments of 1993 got out of subcommittee this time, and is likely to be introduced again.

Several bills were proposed to provide for interlocutory appeals from orders granting or denying class-action certification. The sponsors were persuaded to amend the bills so that the effect would be only to accelerate the effective date of the new Civil Rule 23(f) that the Supreme Court sent to Congress last spring. Since Rule 23(f) is on track to become effective this December 1, it is not likely that these bills will reappear.

HR 1965, dealing with civil forfeitures, would amend Admiralty Rule C. Although proposed Rule C amendments would address the time provisions of the bill, the bill sweeps across many more forfeiture topics and is likely to be reintroduced.

A bill to subject government attorneys to state attorney-conduct rules passed, but is subject to a 180-day delay that will provide the Department of Justice an opportunity to decide whether it should seek repeal. This topic is closely related to topics that have been considered in the ongoing Standing Committee study of the need for federal rules to regulate the conduct of attorneys who appear in federal court.

An alternate dispute resolution bill was enacted, requiring that every court have some type of ADR system. The choice of ADR systems is left to local rule; the Administrative Office worked with Congress to improve the provisions invoking the local rulemaking power.

Class-action bills have been introduced. They bear directly on class-action practice, removal of class actions from state court, and other matters. Civil Rule 11 would be restructured for class actions by at least one bill. It is likely that many of these bills will reappear.

Offer-of-judgment proposals have been perennial topics of Congressional attention, and seem likely to return.

Report on Standing Committee

Judge Niemeyer reported on the consideration of Civil Rules proposals at the June meeting of the Standing Committee. Discussion of the proposals to publish discovery rules amendments for comment went rather well. There was less enthusiastic support for some of the proposals than for others. It is clear that the vote to approve publication does not represent a commitment by the Standing Committee to recommend adoption of any proposal that emerges unscathed from the public comment process. The Standing Committee did direct a change in proposed Rule 5(d). As proposed by the Advisory Committee, the rule would provide that discovery materials "need not be filed" until used in the action. The Standing Committee directed that the proposal be that the materials "must not be filed" until used in the action. Discussion of the change was rather cursory; it may be that after public comment and testimony, the Advisory Committee should consider whether a strong case can be made for returning to the "need not" formulation.

The proposed one-day, seven-hour limit for depositions was approved for publication by the narrowest margin, a vote of 6 for to 4 against. The reasons for concern are summarized in the draft Standing Committee minutes at pages 27 to 28. There is concern that the limit will not work well, particularly in multiparty cases. There has been favorable experience, however, with an Arizona rule that sets a presumptive 3-hour time limit for depositions. The proposal was made by the Advisory Committee in part because of the complaints of plaintiffs that deposition practice in some courts is being used to impose unwarranted, and at times unbearable, costs. Mr. Schreiber observed that he continues to believe that it would be desirable to supplement the one-day limit with a requirement that documents be exchanged before the deposition. This practice would facilitate the best use of the limited time. There also is concern about the provision that requires consent of the deponent for a stipulated extension of time; deponent consent may become a problem when the deponent is a party, or a person designated to testify for an organization party

under Civil Rule 30(b)(6).

The progress of the Mass Torts Working Group also was reported to the Standing Committee.

The Standing Committee also approved publication of proposed amendments to Civil Rules 4 and 12, dealing with actions brought against United States employees in their individual capacities, and to Admiralty Rules B, C, and E.

Discovery

A number of proposed discovery rule amendments were published for comment last August. Hearings will be held in Baltimore in December, and in San Francisco and Chicago in January. The development of these proposals was reviewed, in part for the benefit of new Committee members and in part to inform all Committee members of the steps that were taken by the Discovery Subcommittee to implement the decisions made at the March Committee meeting.

Judge Niemeyer began the discussion by noting that the discovery effort had been as streamlined as seems possible for a big project. From the beginning, the question has been whether we can get pretty much the same exchange of information at lower cost. After the undertaking was launched by appointing the Discovery Subcommittee, the first step was a January, 1997 meeting with experienced lawyers, judges, and academics. This meeting gave some sense of the areas in which it may be possible to improve on present discovery practice without forcing sacrifice of some recognizable sets of interests for the benefit of other recognizable sets of interests. This small conference was followed by a large-scale conference at Boston College in September, 1997. The conference was designed to provide expression of every point of view, and succeeded in this ambition. In addition to the information gathered at these conferences, empirical work was reviewed. The RAND data on experience under local Civil Justice Reform Act plans were studied, and the Federal Judicial Center undertook a new survey for Committee use. The FJC data proved very interesting. The data, in line with earlier studies, show that discovery is not used at all in a substantial fraction of federal civil actions, and that in more than 80% of federal civil actions discovery is not perceived to be a problem.

The Subcommittee compiled a list of nearly forty discovery proposals for consideration by the Committee. The Committee chose the most promising proposals and asked the Subcommittee to refine

these proposals for consideration at the March, 1998 meeting. The refined proposals were further modified at the March meeting, with directions to the Subcommittee to make further changes. The proposals presented to the Standing Committee in June conformed to the Committee's actions and directions. Approval for publication, it must remembered, does not represent unqualified Standing Committee endorsement of the proposals. Even apart from the lessons to be learned from public comments and testimony, the Standing Committee expressed reservations that must be addressed if this Committee recommends adoption of any of the proposals.

Professor Marcus then provided a detailed review of the published proposals and their origins. The Discovery Subcommittee met in San Francisco in April, in conjunction with a conference held by the Judicial Conference Mass Torts Working Group. The revised discovery proposals were then circulated to the full Committee, and the Committee reactions were incorporated in the set of proposals approved by the Standing Committee.

Some preliminary reactions were provided by an ABA Litigation Section Panel during the August annual meeting. The first small set of written comments are starting to come in, including an analysis by the New York State Bar Association that runs more than forty pages. The topics that most deserve summary reminders and updating at this meeting include uniformity; disclosure; the scope of discovery; cost-sharing; and the duration of depositions. These are the topics that are most likely to provoke extensive public comments.

Uniformity. The local rule opt-out provision built into Rule 26(a)(1) in 1993 was not intended to endure for many years. The published proposal deletes the opt-out provision, and indeed proposes to prohibit local rules variations on discovery topics other than the number of Rule 36 requests to admit and the Rule 26(f) "conference" requirement. The proposed Committee Notes contain strong language invalidating local rules that are inconsistent with present and proposed national rules.

There is likely to be much comment about the need for national uniformity as against the value of local rules. Many district judges are strongly attached to their local rules. Some local rules, indeed, may provide practices that are more effective than present or proposed national practices. The strength of the desire for local autonomy is reflected by local rules that purport to opt out of portions of Rule 26(a) that do not authorize local rule departures.

Local rules, however, undercut the national rules regime. They also complicate the handling of cases that are transferred between districts that adhere to different practices. And local rules even complicate life for judges who are assigned to cases in districts away from home.

Disclosure. The disclosure obligations set out in Rule 26(a)(1)(A) and (B) were discussed extensively during the Subcommittee and Committee deliberations. The eventual recommendation limits the disclosure requirement to "supporting" information, not because of any direct ground for dissatisfaction with the 1993 rule but because of the desire to achieve a uniform national practice. Uniform adherence in all districts to the 1993 rule does not seem achievable now. The question remains whether this retrenchment is appropriate. The proposal proved popular at the August ABA Litigation Section meeting. Disclosure is described as information that supports the disclosing party's claims or defenses, drawing from the phrase used to define the scope of discovery. Some uncertainty was expressed at the Standing Committee meeting as to the reach of this phrase — does it require disclosure of information that will support a party's efforts to controvert a defense? This issue may need to be addressed.

A minority drafting view won significant support in Committee deliberations, and has been pointed out in Judge Niemeyer's memorandum to Judge Stotler inviting public comment, on page 8 of the publication book. This drafting view would require disclosure of information that "may be used to support" the claims or defenses of the disclosing party. This issue should be kept in mind during the comment process and subsequent deliberations.

Proposed Rule 26(a)(1)(E) seeks to address arguments that disclosure is appropriate only in a middle run of litigation. It is too much to ask in "small" cases, and superfluous in complex or hotly contested cases. The approach taken to the complex cases is to allow any party to postpone disclosure by objecting to the process, forcing determination by the court whether disclosure is appropriate for the case. The alternative of attempting to define complex or contentious cases by rule was thought unattractive. The approach for small cases became known as the "low-end" exclusion. It was readily agreed that disclosure often is unsuitable for cases that would not involve discovery in the ordinary course of litigation. The drafting approach has been to attempt to identify categories of cases in which discovery is unlikely and in which disclosure often would be unnecessary work. Inspiration was sought in local rules that identify categories of cases excluded from Rule

16(b) requirements, but the inspiration was mixed — there are only a few categories of cases that are excluded by many local rules, and there are many categories of cases that are excluded by one local rule or a small number of local rules. After the March meeting, a list of 10 categories was prepared. At the Standing Committee meeting, however, the Bankruptcy Rules Advisory Committee pointed out flaws in two categories aimed at bankruptcy proceedings even before the discussion began. These two categories were withdrawn; the published draft excludes eight categories of cases. These categories are avowedly tentative — advice is sought on whether all of these cases should be excluded, whether other categories of cases should be excluded, and whether the words used to describe the excluded cases are appropriate. A preliminary review by Federal Judicial Center staff suggests that the proposed list would exclude about 30% of federal civil actions. The exemptions carry over, excepting the same cases from the Rule 26(f) party conference requirement and the Rule 26(d) discovery moratorium.

It was pointed out that the published proposals do not revise Rule 16(b), leaving in place the provision that authorizes local rules that exempt categories of cases from Rule 16(b) requirements. It was recognized that Rule 16(b) could be tied in to the same approach, identifying categories of cases to be excluded. But it is too late to graft this approach onto the current proposals — separate publication of a Rule 16(b) proposal would be required. And it also is a question whether there is a need for national uniformity in this area that parallels the perceived need for uniformity in disclosure practice. The wide variation that exists among local exemption rules today also may suggest grounds for going slow. It also was observed that it would be risky to go the other way, adopting local Rule 16(b) exclusions into disclosure practice — districts opposed to disclosure might adopt Rule 16(b) exclusions for the purpose of defeating disclosure.

Returning to the exclusion of "high-end" cases, it was noted that any case can be excluded from disclosure on stipulation of all the parties. It cannot be predicted what fraction of all federal cases may be excluded either by party stipulation or by the process of objection and eventual court order.

Rule 26(a)(1)(E) also would address, for the first time, the problem of late-added parties. An attempt was made to draft detailed provisions for this problem, but the drafting exercise identified too many problems to permit sensible resolution by uniform rule. The published proposal is deliberately open-ended

and flexible.

Finally, some early reactions to the broad disclosure proposal were reported. The New York State Bar Association wants a uniform national rule, but a rule of no disclosure at all. A Magistrate Judges group, on the other hand, has urged continuation of the full present disclosure practice, including "heartburn" information that harms the position of the disclosing party.

Rule 26(b)(1) Scope of Discovery. A Committee Note has been written to explain the proposal. The goal is to win involvement of the court when discovery becomes a problem that the lawyers cannot manage on their own. The present full scope of discovery remains available, as all matters relevant to the subject matter of the litigation, either when the parties agree or when a recalcitrant party is overruled by the court. Absent court order, discovery is limited to matters relevant to the claims or defenses of the parties. No one is entirely clear on the breadth of the gap between information relevant to the claims and defenses of the parties and information relevant to the subject matter of the action, but the very juxtaposition makes it clear that there is a reduction in the scope of discovery available as a matter of right. There have been some preliminary responses to this proposal. One is that simply because it is a change, it will generate litigation over the meaning of the change. Another, from the New York State Bar Association, applauds the proposal, but urges that the Committee Note state that it is a clear change. And the concept of "good cause" for resorting to "subject-matter" discovery is thought too vague.

Committee discussion urged that the Note not belittle the nature of the change — this is a significant proposal. But it was urged that the draft Note in fact is strict. Another observation was that any defendant will move that discovery is too broad; the proposal, if adopted, will generate a "huge load of motion practice." Together with the cost-bearing proposal [more accurately called cost-shifting, on this view], thousands of motions will be generated.

Cost-bearing. The published Rule 34(b) language was drafted after the March meeting, in response to deserved dissatisfaction with the proposals offered there. At the Standing Committee meeting, it was asked whether the proposed language adequately describes the intent to apply cost-bearing only as an implementation of Rule 26(b)(2) principles — whether cost-bearing could be ordered as to discovery that would be permitted to proceed under present applications of

(b)(2) principles. The problem of drafting Rule 34 language, indeed the general problem of incorporating this provision specifically in Rule 34, joined with policy doubts to suggest reconsideration of the question whether cost-bearing would better be incorporated directly in Rule 26(b)(2). There was extensive debate of this question at the April Subcommittee meeting, leading to a close division of views. The Rule 26(b)(2) approach would have at least two advantages in addition to better drafting. The Reporters believe that Rule 26(b)(2) and Rule 26(c) now authorize cost-bearing orders; incorporation in Rule 26(b)(2) would quash the doubts that might arise by implication from location in Rule 34. In addition, it is important to emphasize that the cost-bearing principle can be applied in favor of plaintiffs as well as in favor of defendants; there is a risk that location in Rule 34 will stir questions whether the proposal is aimed to help defendants in light of the fact that defendants complain of document production, while plaintiffs tend to complain more of deposition practice. This question is raised in Judge Niemeyer's letter to Judge Stotler, at pages 14 to 15 of the publication book.

It was observed that the arguments for relocation of the cost-bearing provision in Rule 26(b)(2) are strong. The Committee should feel free to consider the matter further in light of the views that may emerge from the public comments and testimony.

An important question was raised at the Standing Committee meeting that may deserve a drafting response. After a court allows discovery on condition that the requesting party pay the costs of responding, the response may provide vitally important information that belies the court's initial prediction that the request was so tenuous that the requesting party should bear the response costs. Should the rule provide a clear answer whether the cost-bearing order can be overturned in light of the value of the information provided in response?

The New York State Bar Association opposes this proposal because it agrees that the intended authority already exists. Adoption of an explicit rule will lead some litigants to contend for — and perhaps win — a broader sweep of cost-sharing than is intended.

Some preference was expressed for leaving the proposed amendment in Rule 34. This view was that "there is too much in Rule 26" now; "no one reads all of Rule 26." The most important source of the most extravagantly expensive over-discovery is document production. The explicit cost-bearing protection should

be expressed in Rule 34.

It also was noted that at the Standing Committee meeting, it had been urged that if the target is the complex or "big documents" case, the rule should be drafted expressly in terms of complex cases. It also was feared that the proposal will create a "rich-poor" issue: there will be a marked effect on civil rights and employment cases, where poor plaintiffs will be denied necessary discovery because neither they nor their lawyers can afford to pay for response costs. There have been few cost-bearing orders in the past; no matter what the rule intends, it will be difficult to convince lawyers that they can continue to afford to bring these cases. They will fear that cost-bearing will be ordered in cases where discovery is now allowed.

These concerns were met by responses that Rule 26(b)(2) now says that the court shall deny disproportionate discovery; the cost-bearing provision simply confirms a less drastic alternative that allows access to otherwise prohibited discovery. No one is required to pay for anything; it is only that if you want to force responses to discovery requests that violate Rule 26(b)(2) limits, you can at times obtain discovery by agreeing to pay the costs of responding. All reasonable discovery will be permitted without interference, as it now is under Rule 26(b)(2). Rule 26(b)(2) principles expressly include consideration of the parties' resources; there is no reason to anticipate that poor litigants will be put at an unfair disadvantage. And it has proved not feasible, even after some effort, to define "big," "complex," or "contentious" cases in terms that would make for administrable rules.

Deposition Length. The proposal is to establish a presumptive limit of one business day of seven hours for a deposition. The most frequently expressed concern is that this proposal will prove too rigid, and by its rigidity will promote stalling tactics. The Standing Committee also expressed concern over allocation of the time in multiparty cases; perhaps the Committee Note should be revised to address this concern. The proposal also requires consent of the deponent as well as the parties for an extension by consent without court order. The Committee may well not have thought hard enough about the requirement of deponent consent for cases in which the deponent is a party; perhaps further thought should be given to requiring deponent consent only when the deponent is not a party. It also might be desirable to amend the Note to express general approval of the practice of submitting documents to the deponent before the deposition occurs, so as to

save time during the deposition. Among early comments, the New York State Bar Association opposes this proposal for fear that it will promote undesirable behavior at depositions.

Other Matters. Rule 26(f) would be amended to delete the requirement of a face-to-face meeting; recognizing the great values of a face-to-face meeting, however, provision has been made for local rules that require the meeting. The draft Committee Note emphasizes the success of present practice, but recognizes that some districts may be so geographically extended that face-to-face meetings cannot realistically be required in every case.

This Committee recommended publication of a draft Rule 5(d) that would have provided that discovery materials "need not" be filed until used in the action or ordered by the court. The Standing Committee changed the provision, so that the rule published for comment provides that discovery materials "must not" be filed until used in the action or ordered by the court. The discussion in the Standing Committee did not focus special attention on the public access debate that met a similar proposal in 1980. Depending on the force of public comments and testimony on the published proposal, the Advisory Committee may wish to urge reconsideration of this issue.

It was asked in the Standing Committee whether there had been a "judicial impact study" of the proposed amendments. The amendments are designed to encourage — and perhaps force — greater participation in discovery matters by the substantial minority of federal judges who may not provide as much supervision as required to police the lawyers who appear before them. But it is not clear whether these judges in fact have time to devote to discovery supervision. It also was asked why the rules should be changed for all cases, if fewer than 20% of the cases are causing the problems. In considering this question, it should be remembered that it is difficult to draft rules only for "problem" cases. And it also should be remembered that figures that refer only to percentages of all cases in federal courts are misleading. There is no discovery at all in a significant fraction of cases, and only modest discovery in another substantial number of cases. Rules changes that nominally apply to all cases are not likely to affect these cases in any event. Lawyers perceive significant problems in a large portion of the cases that have active discovery. It is worthwhile to attempt to reach these cases.

It was suggested that if possible, it would be useful to acquire information — including anecdotal information, if as seems

likely nothing rigorous is available — about the experiences in Arizona and Illinois with rules that limit the time for depositions. And it was predicted that one effect of deposition time limits will be that documents are exchanged before the litigation, even though there is no express requirement. And even without an express requirement that a deponent read the documents provided, failure to read them will provide a strong justification for an order directing extra time. The potential problems are likely to be sorted out in practice by most lawyers in most cases.

It was noted that discovery is likely to be the central focus of the agenda for the spring meeting.

Mass Tort Working Group

Judge Niemeyer noted that class actions have been on the Advisory Committee agenda since 1991. The Rule 23 proposals published in 1996 generated many enlightening comments that addressed mass torts among other topics. The problems identified by the comments were far-reaching, and often seemed to call for answers that are beyond the reach of the Enabling Act process. The Committee found so many puzzles that it recommended present adoption only for the interlocutory appeal provision that is about to take effect as new Rule 23(f).

The Judicial Conference independently began to consider appointment of a "blue ribbon" committee on mass torts. An entirely independent committee seemed likely to duplicate work already done by the Advisory Committee. It was suggested that the best approach would be to establish a cooperative process among the several Judicial Conference committees that might be interested in the mass torts phenomenon. An initial recommendation was made to establish a formal task force across committee lines. The Chief Justice reacted to this suggestion by authorizing an informal working group to be led by the Advisory Committee. Other Judicial Conference committees were invited to participate. Four committees, dealing with bankruptcy administration, court administration and case management, federal-state jurisdiction, and magistrate judges accepted the invitation and appointed liaison members. The chair of the Judicial Panel on Multidistrict Litigation also joined the working group. Judge Scirica accepted appointment as chair of the working group, and Advisory Committee members Birnbaum and Rosenthal also were appointed members. Professor Francis McGovern was appointed as special reporter.

With the indispensable help of Professor McGovern, the working

group held three impressive conferences to gain the advice of the most experienced and thoughtful participants in the continual evolution of mass torts practice. (A fourth conference is scheduled for December 8.) The process was stimulated by rough sketches of various possible approaches that were prepared for the specific purpose of providing a launching pad for discussion.

The problems presented by mass torts litigation often seem to invite solutions that cannot be provided by the rulesmaking process. Some of the solutions that have proved attractive even seem to test the constitutional limits of permissible legislation. To take a stylized example, how can our judicial system undertake to resolve the claims that arise when a course of action pursued by five defendants inflicts injury on a million people?

The Working Group has pushed its deliberations to the point of producing a draft report. The report is intended to summarize the information that has been gathered by the Working Group, and to make recommendations for the next steps that might be taken in addressing mass torts problems. No immediate action will be taken; instead, it will be recommended that a new Judicial Conference committee be created to formulate specific recommendations for consideration in the rulesmaking process and by Congress. The constitution of a new committee will be a delicate task, seeking to achieve representation and experience that are as broad as possible without producing a body too large to work effectively and expeditiously. The draft report is presented to the Advisory Committee for consideration and, if possible, for approval, but it remains short of final form. Further work will be required in response to reactions from Advisory Committee members and, to the extent that time allows, from the committees whose liaison members have helped constitute the working group. The hope is that in the end, ways will be found to streamline the mass torts process. But it is a complicated task. February 15, 1999 has been set as the date for transmitting the final and formal report.

Judge Scirica began presentation of the draft report by stating that the working group has been very successful. This pattern of cross-committee deliberation may become a model for future problems. The work of the group was greatly assisted by Professor McGovern's aid in organizing the conferences. Professor Geoffrey C. Hazard, Jr., a member of the Standing Committee, became an important adviser. And important help was provided by Thomas Willging and the Federal Judicial Center studies that are still under way.

The Working Group process of inquiry provided an education for all involved. The lawyers who do mass torts regularly, and a few judges, know far more about the problems than do most others. One problem is that the landscape keeps changing. Each successive mass tort is in some important ways different from the one that came before it. The most difficult problems are presented by dispersed personal injury cases.

Despite the differences, there also are common problems that seem to link most mass torts. One is the "elasticity" phenomenon, occurring as improved means of resolving large numbers of claims invite the filing of still larger numbers of claims. As the sheer number of related claims proliferate, there is a danger courts will come to reward "false positives" — claims that would be rejected if presented as individual actions, but that become indistinguishable in the press to resolve more claims than any single tribunal can handle effectively. Another problem is the bewildering array of problems that are described as the problems of "maturity." Each mass tort presents a different range of needs for development of individual cases as a foundation for moving toward aggregated disposition. Premature aggregation can generate pressures that are not easily contained, threatening dispositions that are not fair to anyone involved, not to plaintiffs and not to defendants. Delayed aggregation, on the other hand, can invite waste, unnecessary multiplication of inconsistent results, and races for available assets that may overcompensate early claimants while denying any compensation to later claimants. There is a continuing competition between the great traditional value of individual control and the equally important values of efficiency, fairness, and consistency. Reconciliation of the competition is possible only with proper recognition of the point of maturity.

In approaching these problems, it is necessary to understand the incentives to sue or not to sue. Some understanding may be emerging. The difficulty of achieving understanding is underscored, however, by the continuing difference of views among plaintiffs' lawyers. Some believe it best to represent only a small number of individual clients who have strong individual claims. Others believe it best to undertake individual representation of large numbers of individual clients, effectively achieving aggregation through common representation. Still others believe it best to aggregate many claims on other bases, whether by multidistrict proceedings, class actions, or still different devices.

It also is necessary to remember that there are substantive

problems that require us to think about the role of the judiciary.

Among the problems that might be addressed are these: (1) Aggregation — by what means? At what time, remembering the dangers of premature or tardy aggregation? How far can we distinguish between aggregation for pretrial purposes, for settlement, or for trial? (2) What, if anything, can be done about claims that depend on uncertain science? (3) Limited fund problems may be addressed by the Supreme Court in the Ahearn asbestos litigation — it seems prudent to defer any deep consideration while the decision remains pending, but it would not be prudent to expect that the decision in any single case will resolve all problems. (4) Can means be found to achieve closure for defendants, particularly by settlement — if you want to settle with all claimants, or nearly all, how can this result be accomplished?

The draft report defines the issues and describes the problems that have been perceived from different perspectives. There are so many perspectives that inevitable tensions emerge in the perceptions — phenomena that seem problems to some seem opportunities to others. Care must be taken to make it clear that the description of problems does not strike the casual reader as inconsistent. The draft report also notes possible approaches to addressing the problems, but does not make any choices among these approaches.

Throughout the process, there has been a substantial body of consistent advice about the important tools of judicial management. More can be done to avoid discovery conflicts. And many observers believe the time has come to expand the treatment of mass tort litigation in the Manual for Complex Litigation.

In considering possible rules changes, the topic of settlement class actions continually recurs. The *Amchem* decision seems to approve of settlement classes, but the terms of the approval remain uncertain.

In considering possible recommendations for legislation, any successor committee must think carefully about the extent to which a Judicial Conference committee can properly or prudently become involved with legislative processes. Close involvement with legislative committees may be important as a means of teaching important lessons about the problems, but it also threatens to belie judicial independence. In another direction, judicial proposals that bear on substantive choices may impugn judicial neutrality, no matter how far removed from direct involvement with

the legislative process. Still, the Judicial Conference has already approved legislative proposals to amend 28 U.S.C. § 1407, and has approved "single event" mass-tort proposals. The path to be followed is a difficult one.

Professor McGovern took up the discussion, observing that the strong feeling of most participants has been that the only way to understand mass tort litigation is to become involved. The Working Group conferences were organized to show what is different about this litigation, and to identify the problems that have emerged. The conferences worked very well. As work continues, McGovern will meet with three of the liaison committees to gather their reactions to the draft report. The Court Administration and Case Management, Bankruptcy Administration, and Federal-State Jurisdiction Committees all will be involved.

Later in the discussion, Professor McGovern noted that the intent behind the draft report is to be descriptive, not normative. The Working Group has reached a consensus as to "the nature of the beast," and a rough consensus as to the things that at least some people see as problems. The paradigm of litigation is one plaintiff, facing one, two, or three defendants. The procedure is taken straight from the Federal Rules of Civil Procedure. The Pinto cases were tried like this. "Then something happened." The desire arose to achieve efficiencies that are denied by individual case-by-case disposition of each claim that arises from a mass tort. Aggregation was sought for pretrial, and then for trial. Aggregation enables courts to move the cases, to reduce transaction costs, to get more money to the victims, and so on. So, for example, Maryland adopted transfer legislation for state-wide consolidation, and 8,555 asbestos cases were consolidated in one proceeding. As aggregation developed, people realized that aggregation was spurring the filing of still more cases — the phenomenon referred to as the "elasticity" or "superhighway" (build a superhighway and there will be a traffic jam) problem. And defendants came to hope for closure, to find a procedure that would enable them to resolve all mass tort claims at once and move on. Innovative procedures were adopted in Amchem and Ahearn. And as innovation proceeded, it came to be recognized that aggregation, class actions, and other devices "are not curing everything."

The Working Group inquiry began against this background. The Working Group asked "what are the problems"? If transaction costs are reduced early in the development of a mass tort, we get more cases; if too late, a high price of inefficiency is paid in processing more individual actions or small aggregations than need

be paid. And so the quest was for solutions to specific problems. The Working Group remains open to identification of problems not yet identified. It is interested in proposed solutions, recognizing that there will be disagreement even as to what events constitute problems. A catalogue of possible solutions has been considered. But no attempt will be made to recommend solutions, to suggest the relative importance of the problems, or even to determine which of the perceived problems are problems in fact.

Thomas Willging reported on the work being done by the Federal Judicial Center. A draft-in-progress was provided. The work is highly detailed, but can be summarized in three parts.

The first part of the FJC study looks at the individual characteristics of mass torts. In the end, fifty mass torts will be studied. One characteristic is the number of claims presented. In this regard, and others, asbestos litigation has been "decidedly unique." Dalkon Shield and silicone gel breast implant litigation also has yielded hundreds of thousands of claims, but the claims in these cases were generated mostly by judicial processes for giving notice of the litigation. The next group of numbers is far smaller, involving mass torts with 10,000 or 20,000 claims. The claims rate has been studied as the ratio of claims to persons exposed. Remembering that exposure does not equate to injury, the figures seem to suggest that aggregation goes in company with a claim-filing rate greater than ten percent. No causal inference can be drawn from this conjunction — it is possible that it is aggregation that causes the claim rate to rise, and also possible that it is an independently high claim rate that causes aggregation. Clear proof of causation between the claimed wrong and asserted injuries is another important characteristic that distinguishes mass torts. About two-thirds of the cases studied enjoyed "pretty clear" showings of general causation. The remaining third did not have clear showings, and tended to drop off (Bendectin, repetitive stress injury) or to settle (Agent Orange).

The second part of the study involves three cases with "limited fund" settlements. One of the major themes of this part is that there is great difficulty in determining the size of the "fund." The Civil Rule 23(b)(1) device as used in these cases provided information far inferior to the information that was presented to the bankruptcy court when one of the proposed settlements failed. The difficulty seems to be that information as to the value of the defendant is presented only by parties who have already agreed on a settlement. In each of the three cases, the information dramatically underestimated the value of the company.

Discussion of the size of the fund pointed out that it is not possible to make meaningful comparisons between the value of a company faced with unresolved mass tort liability and the same company that has achieved resolution of the liability. Acromed, involved in one of the case studies, did not have the money to pay off the tort claims and could not borrow the money. Once a settlement was reached, it was possible to borrow the money; without a means of settlement, Acromed was worthless and the claimants would get little or nothing. With the settlement, the claimants won substantial payments and Acromed was once again a viable company. The problem arises from the difficulty of predicting the value of a company once liability is removed, even if the prediction is made on the basis of the terms offered by a specific settlement. One way of viewing the problem is that a "surplus" is created by the very process of settlement — allocation of the surplus between the claimants and the defendant not only presents a difficult policy problem, but also turns in on itself as adjustment of the settlement terms affects the post-settlement value of the company.

An illustration of the problem is presented by the Eagle-Picher litigation. Eagle-Picher proposed settlement on the basis of a $200 million fund. The settlement was not approved, and bankruptcy ensued. After six years and $47 million of professional fees, a Chapter 11 plan was approved. The company was sold for $700 million, for the benefit of the claimants. Reduced to present value at the time the $200 million settlement was rejected, the reorganization yielded more than $500 million, or more than twice the original proposed settlement. The court in the bankruptcy case took evidence from several experts on the value of the claims and the value of the company. The process cost a lot in professional fees, but the determination, when made, set the stage for disposition.

The third part of the FJC study is a literature review. Of necessity, the review is selective — a vast literature is developing on mass torts topics. The review will focus on the recommendations for rules or legislation, rather than on the descriptions of the problems.

The ensuing discussion of the draft report wove around two sets of issues. One set involved changes that might be made to improve the report. The other involved the proper role of the Advisory Committee with respect to the Working Group and its report.

One of the first questions addressed to the draft report was whether it is clear that the focus is on a limited set of the cases that might be characterized as "mass torts." The Working Group has not been concerned with the "small-claims consumer" class actions that aggregate large numbers of claims that reflect individually minor injuries. Neither has the Working Group been concerned with regulatory and business wrongs, such as antitrust and securities law violations, that may inflict substantial economic injuries. It was agreed that the report must clearly exclude these class actions from its reach, and suggested that the scope discussion at pages 12 to 13 might emphasize these limits more clearly. The Advisory Committee has explored these topics in depth, and the Working Group has deliberately put them aside.

A related set of questions asked whether the draft report may be too optimistic about present procedures for handling "single event" mass torts. The draft, on page 25, seems to suggest both that the universe of claimants is clear in single-event torts, and that there is nothing left to the 1966 Advisory Committee Note suggestion that Rule 23 cannot be adapted to mass torts. There may be single-event torts in which the universe of possible claimants is not known. An example was provided by the explosion of a tank car releasing fumes that went for uncertain distances in indeterminate directions. 8,000 claimants have been identified, but it remains unclear how many actually have been affected by the release, and so on.

It was suggested that the discussion at draft pages 15 to 22 could be taken out of context, and misused. It should be made even more clear that this portion — and indeed all of the report — is a reflection of concerns, not findings of fact.

The reference to the Ahearn litigation on page 19 might seem to imply some view on the merits of questions now pending before the Supreme Court. The reference should be reworded to make it clear that no view of the merits is implied.

Another concern was that there is not enough clarity in the Part V division between issues that might profitably be addressed by a successor committee and more long-range issues. The discussion of attorney fee issues, for example, is separated from the discussion of professional responsibility issues. Science issues may deserve a different presentation.

It was agreed that the Part V discussion of solutions that might be explored should be reorganized, deleting any ordering by

suggested sequences of consideration. At the same time, it is proper to recognize that some proposed solutions require much more further study than others — the "bill of peace" proposal for resolving science issues is an example of a matter that is so innovative that it requires more careful review than more familiar extensions of current practices. So attorney issues may be brought together, as could science issues, aggregation issues, and so on.

One of the many proposals in the appendix materials is expansion of federal-court power to enjoin state-court proceedings by amending 28 U.S.C. § 2283. This suggestion might deserve explicit mention in the report.

Another set of issues identified by the draft report involves professional responsibility problems. When a single lawyer represents many claimants, the settlement process often generates pressure to participate in the allocation of settlement amounts among different clients. The difficulty of responding to these pressures is mentioned in the draft report, and perhaps can be emphasized by presenting in one place the various issues with respect to appointment, compensation, and conduct of attorneys.

It was asked why there should be any recommendation for consideration of "science" issues, now that the Evidence Rules Advisory Committee has published proposals to amend the rules dealing with expert testimony. The response was that there remain real problems in dealing with scientific issues in some mass torts, and that the Evidence Rules proposals do not deal with these distinctive problems. One illustration is the difficulties that may arise when two or more courts each appoint panels of experts to consider the same issues. The "general causation" issue is of critical importance in some mass torts, and it is very difficult to define the proper time to move toward a single determination that will bind all future cases. The Court Administration and Case Management Committee is working on some of these issues, with support from the Federal Judicial Center. The draft report should make it clear that it is addressing only the need for further study of expert evidence in mass-tort cases, not a broader range of topics.

Another illustration of a specific mass-tort evidence problem arises from the question whether there should be one Daubert - Rule 104(a) hearing when there are multiple cases. Some judges are doing this. One issue is what advice the Manual for Complex Litigation should provide. In the breast implant litigation, Judge Jones in Oregon and Judge Weinstein in New York had very different

Rule 104(a) approaches, and Judge Pointer in the MDL cases had still a different approach. It may be that competition of this sort is a good thing, at least up to a point. But the question seems to deserve further study.

Pursuing the "science" issues, it was noted that there is a "tension" between different parts of the draft report. Page 36 refers to the risk of conflicting scientific determinations, but other parts refer to the risk of premature aggregation. Without aggregation, there will be conflicting determinations in the cases that in fact present difficult science issues. Delay is a problem, and moving too fast is a problem. The tension should be recognized more explicitly. And it should be emphasized that there is no ready formula — that each mass tort will present a different sort of uncertainty, and will be best handled by means different from those best adapted to the mass torts that have gone before. It also was urged that page 54 seems to involve issues that are beyond the reach of the Advisory Committee, involving issues better addressed by the Evidence Rules Committee. And the idea of an "issues class" to resolve science issues only, leaving all other issues for disposition in some other form of proceedings, is novel. It was recognized that there is no intent to carry the Civil Rules Committee into the realms of evidence. The recommendation for creation of an ad hoc committee contemplates that the ad hoc committee will identify topics for further consideration by appropriate bodies. Congress will be the appropriate body to study many of the likely solutions to mass-tort problems, while different rules advisory committees are likely to be appropriate for other possible solutions. The multi-committee approach is reflected at pages 56 and 58 of the draft report. It is important to emphasize that the recommendation is for a committee that will commend proposals for further consideration in the channels customarily followed for each type of proposal. "We cannot be too specific" in making this clear.

Pages 44 to 45 of the draft report focus on Rule 23 and settlement classes. It might help to supplement this discussion by referring to the "maturity" factor in the draft Rule 23(b)(3) that remains pending in the Advisory Committee.

Another pending Advisory Committee proposal is to amend Rule 23(c)(1) to provide for class certification "when practicable," not "as soon as practicable." This proposal could have a direct link to the maturity issues, including a direct link to settlement-class issues.

Discussion turned to the portions of the draft report that deal with the relationship between the rate of filing claims and the actual rate of injury. One view is that use of aggregation devices such as class actions leads to a significant increase in the rate of filing claims. In discussing this view, it should be made clear that an increase in rates of filing is not necessarily a bad thing — when the result is to provide compensation to those who have legitimate claims, it seems like a good thing. The problem is a problem only when the confusion and difficulty of resolving individual issues in a large aggregated proceeding facilitates awards to those who do not have legitimate claims. This problem is often referred to as the "false positives." And it is very difficult to know what the real claiming rate is — many settlements reward people who are not at all injured, and many claimants are "signed up" merely to hold their place in case injury does eventually develop. As difficult as it is to measure or compare filing rates, however, it may be important to make the point that we do not generally litigate all of society's wrongs. The possibility that aggregation devices can reduce the transaction costs of resolving individual claims in mass torts, increasing the rate of filing, deserves mention.

It was further observed that the difficulty of measuring claims rates depends in part on the setting. There are studies that have generated reasonably solid figures, particularly in the medical malpractice field. The Federal Judicial Center study now being completed looks to claims rates in relation to the number of people exposed to an injury-causing condition or event; this information does not of itself describe the claims rate in relation to the number of people actually injured.

Another suggestion was that the Working Group continually heard the advice that it is common to focus on the last mass tort that was litigated, obscuring the need to approach each new mass tort with a close look for the differences that require different procedures. This advice may deserve greater prominence in the report.

After noting that the Working Group "did a great job of getting its arms around the problem," it was asked what might be the "end game"? If further study does not yield a final solution, where will an ad hoc committee go? How can those involved in further study "let go"? It was responded that the purpose is to address the things that can be seen to be problems and that at least seem susceptible of useful recommendations. One example would be the desire to find a means of facilitating final closure

of all — or nearly all — claims in a mass tort. It will not be possible to control all changes in the dispute-resolution process. But, to take another example, Rule 23 is a remarkably powerful tool; it may be that it can be adapted to the needs of mass torts, perhaps in conjunction with reforms of other procedures, jurisdictions, or powers that must be addressed outside the Civil Rules Committee and outside the Enabling Act process. Other rules changes may appear to be profitable subjects for study by the Advisory Committees. A growing body of information can be gathered to support an expanded treatment of mass torts in the Manual for Complex Litigation. "We can do little things. It is worth while to attempt more." There is no hope that every problem will be solved, only a judgment that the risk and cost of further work are warranted by the prospect that some useful recommendations will emerge. Some solutions, even if desirable, may not be realistic — a specialized "mass torts" court, for example. "There is no silver bullet." As to grand solutions, "we must be prepared to fail." But even if specific solutions do not emerge, the process itself will yield valuable educational benefits that, indirectly, will contribute to the gradual evolutionary process that will continue to advance our approaches to mass-torts litigation.

The second focus of discussion was identifying the proper role of the Advisory Committee in relation to the Working Group report. The Working Group is a novel entity, created under the leadership of the Advisory Committee. The Advisory Committee meeting was scheduled for mid-November for the special purpose of providing the opportunity to review an advanced draft of the Working Group report. The novelty of the situation, however, leaves room to debate whether the Advisory Committee should decide whether in some way to adopt the report.

One approach is that leadership entails the responsibility to review the report to determine whether it can be endorsed by the Advisory Committee. Another approach would be to approve the recommendation that an ad hoc Judicial Conference committee be appointed to carry on the work begun by the Working Group, and to transmit the report without specifically endorsing the report.

A possible reason for limiting the role of the Advisory Committee is that the Committee has not had much time to review the draft report. The draft report summarizes a great deal of information that was gathered by the Working Group, and it is difficult for Advisory Committee members who were not part of the Working Group to assimilate all of this information.

A more expansive role for the Advisory Committee was supported on the ground that the report makes only one recommendation — that the problems arising from mass-tort litigation deserve further study by a new committee specifically appointed for this purpose. There is reason to hope that progress can be made toward finding solutions, and there is an even better foundation than before for concluding that the work can be done only by a body that draws from the support of many traditionally separate bodies.

The length and detail of the draft report should not mislead discussion of these issues. The report is drafted to distill the fruits of the working group's efforts into a form that will prove most helpful to a successor committee. This form also will help to educate the important and relevant constituencies about the problems and the need to pursue the problems. The report does not consist of "findings" or "recommendations" for action. The Advisory Committee can do no more than approve the report as a clear description of the mass-torts phenomenon as it has been experienced, along with the problems that have been identified from all perspectives of the phenomenon and the solutions that have been proposed.

It was urged that when he authorized appointment of the Working Group, the Chief Justice asked that it report. The draft report is precisely the kind of report that is most useful to show the need for further work, and to suggest the means of undertaking the task. The need for further work seems clear. The Advisory Committee can ensure that nothing is overstated, and — as demonstrated by the many specific suggestions for revision — improve the product.

Further comments from Advisory Committee members can be worked into the draft report up to November 18, or possibly a few days later. After that, the draft will be circulated in its then-current form to the liaison committees. Further comments on that draft can be received up through the end of December.

After this discussion, a motion was made and seconded to approve the Working Group recommendation that a successor ad hoc committee be appointed, and to transmit the Working Group report. It was observed that this approach seemed timid in light of the nature of the report — that the Advisory Committee had enjoyed sufficient opportunity to review and discuss, and would have sufficient opportunity to suggest further revisions, to warrant more positive action now. It will be clear that the report is not making any proposals or recommendations beyond creation of a new

committee. Deferring action for vote by mail ballot seems unnecessary.

Following this discussion, the motion to transmit the report was withdrawn with the consent of the seconder. A motion was then made that the Advisory Committee approve the report, subject to continuing editorial revisions and with changes made to reflect the Advisory Committee discussion at this meeting. There is to be no further vote by the Advisory Committee, although "wordsmithing" contributions from all members will be welcomed. A new draft will be circulated to the Advisory Committee for this purpose. The motion was adopted by 14 votes for and 2 votes against. (The vote total reflected participation by the members whose committee terms have concluded, since the report will reflect their participation in the process throughout the year.)

The vote to approve includes approval of the suggestion that the Chief Justice will be given an opportunity to indicate whether the approach being followed in the draft report reflects the nature of the report that he has expected to receive. Committee members were reminded that suggestions for change in the next draft will be due by the end of December.

Agenda Subcommittee Report

Justice Durham presented the report of the Agenda Subcommittee. The report is the beginning of an undertaking to reinvigorate the program for review and disposition of docket matters. The Committee has pursued several large projects in recent years, and has found it difficult to keep abreast of the more focused matters that regularly come to it. More regular review is planned for the future.

The memorandum presented for this meeting reviews docket items that have no further action listed and that appear to be matters that can either be scheduled for consideration at a 1999 meeting or be removed from the docket. It is not a complete review of all matters still pending.

Some items on the docket are listed as "deferred indefinitely." These items involve matters that the Committee does not want to reject, but that seem better accumulated for consideration as parts of larger packages. Rule 4, for example, regularly draws suggestions for improvements. It would be easy to act on service-of-process issues every year. A comprehensively revised rule took effect in 1993, however, and it has seemed wise to gather suggestions for reform over a period of several years.

When it seems possible to undertake a broad review of experience under the new rule, these items can be considered as a package. Rule 81 is another illustration. A number of issues have accumulated around Rule 81, and with the proposal on Copyright Rules on the agenda for this meeting, the time may have come to clean up several Rule 81 matters in one package. Even then, Rule 81 presents questions that involve the relationship of the Civil Rules to the Habeas Corpus - § 2255 Rules that are being considered by the Criminal Rules Committee. Action on Rule 81 now will result in a significant prospect that a later Rule 81 proposal also will be needed. But perhaps the later proposal can catch up with the present proposals for publication in August, 1999.

Focusing on specific proposals to amend Rule 4, it was suggested that the Subcommittee could combine two approaches. Some of the proposals might be put into a "cumulative minor changes" category, to be held for action when the rule seems ripe for a general review. Other proposals may deserve to be rejected without further study. The Subcommittee will take a closer look at all of the pending Rule 4 proposals to determine which proposals may fit into which category.

Proposals to amend Rule 5 are accumulating. The proposals generally center on electronic filing, notice-giving, and service. The Standing Committee has a technology subcommittee that is coordinating these issues across all of the advisory committees. The Civil Rules technology subcommittee is working with the Standing Committee subcommittee. Other Judicial Conference committees also are working on these topics. There are ten pilot courts doing electronic filing, and another court doing it on its own. The pilot districts are finding "rules problems" as they implement their programs. Rule 5 and consent of the bar have made the programs possible. But there are problems. The chief problem is service; pending Bankruptcy Rules amendments would allow electronic service. These topics will be reviewed with the advisory committee reporters during the January Standing Committee meeting. These issues are difficult, and the process of dealing with them will draw out for a long time. The Committee voted to refer these docket items to the Technology Subcommittee.

A proposal has been made to amend Rule 12 to provide that an official immunity defense must be raised by dispositive pretrial motion, and cannot be raised for the first time at trial. This proposal would be inconsistent with the rules that allow amendment of the pleadings, and would defeat the power to grant judgment as a matter of law on an official immunity defense. A motion to

reject this proposal was adopted by unanimous vote.

The committee also voted unanimously to reject proposed amendments to Rule 30. One would require that persons be allowed to make audio tapes of courtroom proceedings. The other sought to allow orders that would protect a deponent against harassment, orders that already are authorized by Rule 30(d)(3).

Another proposal suggested amendment of Rule 36 to forbid false denials. The Committee rejected this proposal, noting the adequacy of the present sanctions for false denials.

Rule 47 would be amended by another proposal to eliminate all peremptory challenges in civil actions. Peremptory challenges in civil cases are authorized by 28 U.S.C. § 1870; see also § 1866(b)(3). There may be good reasons to reconsider peremptory challenge practice in light of the difficulties that surround efforts to prevent discriminatory uses. But the questions do not seem so urgent as to undertake a project that would require deliberate use of the power to supersede a statute. The Committee voted to delete this topic from the docket, recognizing that Congress may wish to take it up and that future circumstances might justify further consideration by the Committee.

A question about the role of the district clerks as agents for service of process under Civil Rule 65.1 was removed from the docket in light of the action taken by the Committee at the March meeting.

The Committee agreed that other agenda items should be reviewed by the Subcommittee. It further suggested that the subcommittee should review future items that arise and determine the proper place on the agenda for these items by recommending rejection, scheduling for prompt consideration, deferment, or such other disposition as might seem desirable.

Automation

Automation topics returned for further discussion. The Committee hopes to benefit from monitoring the activities of the Bankruptcy Rules Advisory Committee in this field.

It was suggested that the short-term solution may be to continue to rely on local rules. In the long run, it will be necessary to go through all the rules to make sure that they are compatible with emerging electronic practices. Courts have been

successful in reaching sensible adaptations of the rules to meet current needs. But service remains a big current problem. People are continuing to effect service by paper because there is no authority for electronic service.

One of the incidents of electronic storage is that there are complete records. Nothing can ever be erased — if changes are made in an electronic docket, the systems retain both the original version and the revised version. There are many ways to ensure that paper records are the same as electronic records. "The talk is machine-to-machine. It is a different way to do things." The accommodations required to meet these differences will be worked out over a period of several years.

Reliance on experimentation in pilot districts is likely to provide much valuable information. There also is a risk, however, that the advanced districts will become entrenched in different ways of doing things, creating difficulties for future attempts to adopt uniform protocols. The Judicial Conference is working on Guidelines for electronic filing, and has interim standards that all districts seem to follow.

Electronic filing is creating genuine concerns about privacy. Although the records made available electronically are the same as the records that could be examined by visiting the clerk's office, the greatly enhanced ease of access may lead to far greater use. Bankruptcy practice, for example, makes all the records available through the Internet, including tax returns, banking records, and the like. There may be a point at which it is better to limit access to people whose interests are so significant as to prompt a visit to the courthouse.

It seems likely that the Committee will have to focus on these issues in the relatively near-term future.

Rule 83

The topic of Rule 83 amendments was introduced by noting that local rules can undermine national uniformity and national policy. The Judicial Conference has pursued a policy to unify and to monitor local rules developments. But there is still great deference to the circuit judicial councils. 28 U.S.C. § 332(d)(4) requires that each judicial council "periodically review the rules which are prescribed under section 2071 of this title by district courts within its circuit for consistency with rules prescribed under section 2072 of this title." "Each council may modify or abrogate any such rule found inconsistent in the course of such a

review." Some judicial councils actively pursue this mandate. Others honor it sporadically if at all. The local rules committees in the 94 different districts generally are active. Each seeks to adopt rules that work in the local district. These 94 local rules sovereignties can, however, adopt rules that impinge on important policies. The 6-person civil jury emerged from local rules, and has taken root with such tenacity that the recent effort to restore the 12-person jury foundered in the Judicial Conference. The practice of limiting the number of Rule 33 interrogatories began in local rules long before it was adopted in the national rule.

The Standing Committee and the Civil Rules Advisory Committee have had ongoing projects to study local rules. The Standing Committee is attempting to encourage hold-out districts to conform to the uniform numbering system, as required by Rule 83. There also is an attempt to clarify the distinction between local rules and "standing orders" that may take on all the characteristics of local rules but that do not emerge from the local rulemaking process.

It was observed that many local rules problems took root in the Civil Justice Reform Act, which encouraged development of local rules. The local CJRA committees took their responsibilities seriously, and sought to develop better procedure rules that might become patterns for national reform. Now the national rulesmaking bodies are encouraging retrenchment.

It is evident that the questions presented by local rules cannot all be addressed quickly. The topic will remain a long-range agenda item even while individual issues are addressed and resolved. The best approach to many problems is likely to be education aimed at the district courts.

It was noted that the American Bar Association Litigation Section is launching a local-rules project. The scope of the project remains to be finally determined — it is recognized that the whole topic is too big for a single project.

The Standing Committee has asked the several advisory committees to consider adoption of a uniform effective date requirement for local rules, subject to an exception allowing immediate effect to meet special needs. The Appellate Rules Committee has recommended a proposal that sets December 1 as the effective date and allows a different effective date if there is "an immediate need for the amendment." Going beyond the effective date question, the Appellate Rules proposal also would prohibit

enforcement of a local rule "before it is received by the Administrative Office of the United States Courts."

In preparing a Rule 83 draft analogous to the Appellate Rules proposal, it seemed wise to expand the range of inquiry. A local circuit rule need be reported only to the Administrative Office; a local district rule must be reported as well to the circuit judicial council. At a minimum, adherence to the Appellate Rules model would prohibit enforcement before a local rule is received by both the Administrative Office and the judicial council. It also may be desirable to consider other constraints, if only as a means of stimulating more consistent patterns of review among the judicial councils. At the same time, it must be recognized that there is a political difficulty in cutting back on established local enterprises and structures. The discussion draft reaches far, and perhaps too far. The expanded draft would require the Administrative Office both to publish local rules by means that provide convenient public electronic access and also to review local rules for conformity to acts of Congress and the national rules of procedure. If the Administrative Office concludes that a local rule does not conform, it is to report its finding to the district court and to the judicial council. A district court could not enforce a rule reported by the Administrative Office until the judicial council had acted to approve the rule.

A question of Enabling Act authority is raised by the proposals to establish a uniform effective date and to suspend enforcement for specified events. 28 U.S.C. § 2071 establishes the power to establish local district-court rules. Section 2071(b) provides that a local rule "shall take effect upon the date specified by the prescribing court." Section 2071(c)(1) provides that the local rule "shall remain in effect unless modified or abrogated by the judicial council of the circuit." A national rule that specifies a uniform effective date would be inconsistent with subsection (b), and a national rule prohibiting enforcement until stated conditions are satisfied apparently would be inconsistent with subsections (b) and (c)(1). The obvious argument to circumvent this problem draws from the supersession clause in § 2072 — after a Federal Rule of Procedure takes effect, "[a]ll laws in conflict with such rule[] shall be of no further force or effect." But there is a cogent argument that §§ 2071 and 2072 should be read in pari materia, as part of an integrated set of rulemaking provisions. The statutes accord to district courts a power to adopt rules consistent with the national rules that is outside the power to supersede except by a national rule that

addresses the same topic as the local rule. Of course the statutes also could be read to require that a local rule be consistent with a national rule that prescribes a uniform effective date or otherwise directly regulates local rulemaking. The answer does not seem entirely clear. But without a clear answer, real care must be taken in approaching these issues.

One response to the question of relative authority might be to amend Rule 83 simply to recognize the power of the district court to set the date, but to suggest a uniform date. This device would set a target, perhaps with the effect of a presumption, and avoid the need to decide whether a mandate could be established by national rule.

Another response was that a rule adopted by the Supreme Court and accepted by Congress must trump any local rule.

The immediate rejoinder was that to the contrary, a national rule cannot control the local rulemaking process in defiance of § 2071. More important, the proposal is a bad idea. Local rulemaking takes a long time. It is difficult even to get the judges of a district together, particularly if they sit in different places. The judges must consider, then await reactions from the local advisory committee, and eventually conclude the process. Two or three years may be used up. If the process reaches a conclusion in mid-December, or January, or February, it is too long to have to wait for the following December 1. There is no reason for uniform deadlines.

This view as echoed by the simple question: why do we need a uniform date?

The need for a uniform date was expressed as part of the questions of access. It would be helpful to have a means of ensuring that copies are provided to the Administrative Office and judicial council, and of encouraging judicial-council review. A single uniform date can be helpful as part of that package of reforms.

A variation on this view was expressed with the observation that local rules are most important when they are used in a dispositive way. The most important single thing to ensure is that all litigants can have assured access to all local rules for their district in a single, central place.

A related observation was that many of the bodies of local rules run to great length, and that it can be difficult to find the

relevant rules. Not all districts have yet conformed with the uniform numbering requirement.

Similar comments suggested that a single annual effective date is not particularly important, but that it is important that there be clear and ready access to local rules. Some districts do not themselves know what their local rules are, even while other courts reprint their rules on a regular basis.

It was asked whether it would be better to allow a local rule to take effect 60 days after the rule is filed with the Administrative Office. Administrative Office representatives responded that the result would be a lot of calls asking about local rules. As a practical matter, it would be better to require that a rule be posted in a way that makes it "available to the world" — electronic means would be best.

Discussion turned to the "strong form" draft Rule 83(a)(1). This was the draft that prohibits enforcement until 60 days after the district court gave notice of a local rule to the judicial council and the Administrative Office, and until the rule has been made available to the public by convenient means that include electronic means. The draft also requires the Administrative Office to publish all local rules by means that provide convenient public access, and also to review all local rules. The Administrative Office would be required to report to the district court and the judicial council a rule that does not conform to Rule 83 requirements; the report would suspend enforcement of the rule until the judicial council gave approval. The question of power to adopt these requirements in face of § 2071 was renewed. It also was pointed out that there may be an implicit conflict with § 332(d)(4): judicial councils are required to review local rules, but there is no provision for suspending a local rule until the judicial council actually acts.

It was pointed out that several judicial councils have asked for resources and other assistance to help in reviewing local rules.

A suggestion was made that the distinction between an effective date and enforcement may help in addressing the § 2071 question. Rule 83 could be drafted solely in terms of enforcement, recognizing that a local rule is in effect but prohibiting enforcement by penalizing a party for failure to comply. A uniform starting point would be convenient, and might be achieved by barring enforcement until December 1 following the effective date.

Further support for a uniform effective date was expressed by noting that there is a "comfort factor" in knowing when to look for new rules. On the other hand, the need for still more regulation of the local-rule process may not be so great as to justify the intrusion.

A similar opinion was offered that a uniform effective date would be a convenience, but that the genuinely important questions are uniformity, conflict with the Federal Rules, and sound content.

The experience of the discovery proposals was urged as important grounds for caution. Even in the early part of the comment period, complaints are being heard that the local rule option should be preserved. Adoption of something like the Administrative Office report-and-moratorium proposal will be very difficult to sell. The apparent conflict with § 2071 is more important than anything that could be achieved by adopting a uniform December 1 effective date. If the discovery proposals should be adopted, moreover, many districts will be obliged to review their local rules to come into compliance with the new discovery rules — the occasion can be seized to support more thorough review of local rules.

Discussion continued with the observation that this is a delicate subject, best debated in the Standing Committee with all the advisory committees around the table. Or perhaps the course of wisdom would be to ask Congress to look at the problems: Congress has shown strong interest in local rules in the past, and might well be willing to take on these issues.

Support then was voiced for the draft postponing enforcement until a local rule has been sent to the Administrative Office and judicial council, and has been made fully available to the public. But the suggestion that the Administrative Office could force judicial council review by a notice that suspends a local rule was resisted.

One possible method to encourage review both by district courts and by judicial councils would be to require a "sunset" provision for all local rules. It was pointed out, however, that this provision would almost certainly conflict with § 2071(c). Congress would have to be asked to modify the statute.

The uniform effective date question was reopened by a suggestion that it might be more palatable to provide two or more effective dates in each year — as June 1 and December 1, or perhaps at the beginning of each calendar quarter.

Other local rules topics then were raised. It was asked whether it would be useful to create model local rules. It was pointed out that past efforts in this direction have not met great success. But model rules might provide continuity of format, high intrinsic quality, and still other advantages. The Maritime Law Association has drafted model local admiralty rules, and is optimistic that the rules will win widespread adoption.

Another observation was that good judges view their local rules as aids for attorneys, not as obstacles to be overcome. Often they are treated as "suggestions," clues on good procedure that will not turn into traps to be sprung on the unwary.

It was asked why all of these problems might not better be addressed by the Local Rules Project of the Standing Committee. Concern was expressed that the project needs additional financial support before it can do much more.

Brief comments were made on the report that the Standing Committee had rejected a proposal to establish a limit on the number of local rules, but by a very narrow margin. There are several points in the Civil Rules that seem to invite adoption of local rules — indeed, even the discovery proposals create a new local-rule option in Rule 26(f). A number limit could quickly run into real difficulties in complying with the Civil Rules and any similar requirements in the other rules. The limit proposal, however, does suggest a mood of impatience with continuing local rules problems.

Following this discussion, the Committee voted unanimously to present a report to the Standing Committee in these terms: the two drafts of Rule 83 considered at this meeting would be presented for discussion, with stylistic improvements that had been suggested by the Reporter. The question of statutory authority and the possibility of seeking legislation should be presented without any recommendation by this Committee. As to the uniform effective date, June 1 should be added as a second appropriate date.

Copyright Rules: Related Rules 65, 81

Action with respect to the Copyright Rules of Practice has been deferred because of concern that revision or repeal might be misunderstood in other countries. Appropriate congressional staff members have been informed of the continuing need to address the Copyright Rules, and understand that the Advisory Committee, having deferred, will move ahead. This fall, Congress has acted on pending treaties and implementing legislation. The International

Intellectual Property Alliance, which had urged delay while these matters were pending in Congress, has now concluded that this recent action makes it appropriate to go ahead with the Copyright Rules Proposal. The Committee concluded that the time has come to recommend publication of appropriate amendments.

As discussed at earlier meetings, the interplay between the Civil Rules and the Copyright Rules is itself a problem. Civil Rule 81(a)(1) provides that the Civil Rules do not apply to copyright proceedings "except in so far as they may be made applicable thereto by rules promulgated by the Supreme Court * * *." The Copyright Rules of Practice were adopted under now-repealed provisions of the 1909 Copyright Act. Rule 1 of the Copyright Rules adopts the Rules of Civil Procedure to "[p]roceedings under section 25 of the Act of March 4, 1909, entitled 'An Act to amend and consolidate the acts respecting copyright' * * *." On the face of things, there are no procedural rules to apply in proceedings under the 1976 Copyright Act. This problem could be corrected readily by amending Copyright Rule 1 to refer to proceedings under the 1976 Act. The special Copyright Rules enabling statute was repealed as redundant following enactment of the general Enabling Act, 28 U.S.C. § 2072; § 2072 provides ample authority to continue the Copyright Rules if that seems desirable.

The Copyright Rules themselves present problems far deeper than the technical failure to revise Rule 1 following enactment of the current copyright law. Copyright Rule 2, adopting special standards of pleading for copyright cases, was abrogated in 1966. The Civil Rules Advisory Committee also recommended abrogation of the remaining Copyright Rules, which deal with summary seizure of infringing items and the means of producing infringing items. In 1964, the Advisory Committee concluded that the summary seizure provisions were inconsistent with emerging due-process concepts of no-notice seizure. The Advisory Committee also noted, however, that the Standing Committee might wish to postpone action on the remaining Copyright Rules in light of the prospect that Congress might soon revise the 1909 Copyright Act. The Standing Committee voted to defer action. The topic has not been addressed between 1964 and the recent decision to revisit the issue.

The 1964 prediction has been proved out by later Supreme Court decisions. As described in the agenda memorandum, the Copyright Rules provisions for no-notice prejudgment seizure almost certainly violate current due-process standards. The Copyright Rules also seem inconsistent with the statutory impoundment provision enacted

in 1976, 17 U.S.C. § 503(a). Section 503(a) gives the court discretion whether to order impoundment, and discretion to establish reasonable terms. The Copyright Rules provisions do not reflect this discretion. At least as measured by published opinions, lower federal courts have recognized the invalidity of the Copyright Rules and have resorted instead to the temporary restraining order provisions of Civil Rule 65. No-notice seizure remains available, but a judge must make a pre-seizure determination that there is good reason for acting without notice to the alleged infringer.

The best means of ensuring strong copyright protection is to repeal the obsolete Copyright Rules and to make explicit in Rule 65 the availability of Rule 65 procedures in copyright impoundment. This action should reassure foreign countries that the United States indeed is honoring its treaty commitments to provide effective protection for the intellectual property rights embraced by copyright.

The American Intellectual Property Law Association has urged that repeal of the Copyright Rules and amendment of Rule 65 might well be accompanied by adoption of seizure provisions that parallel the Trademark Counterfeiting Act of 1984, 15 U.S.C. § 1116(d). The Association recognizes, however, that adoption of such measures as seizure of evidence may be a matter better left to Congress. The Committee concluded that no attempt should be made to include such provisions in the Civil Rules.

The Rule 65 proposal in the agenda materials would add a new subdivision (f): "**(f) Copyright impoundment.** This rule applies to copyright impoundment proceedings under Title 17, U.S.C. § 503(a)." The Reporter suggested that the draft might be amended to delete the explicit reference to the present statute. Two reasons were advanced for this proposal. The first was the ever-present concern that adoption of a specific statutory reference may require amendment of the rule if the statutory scheme is changed. The reference to copyright impoundment proceedings seems clear without adding the statutory provision. The second was a matter of speculation. It is conceivable that a circumstance might arise in which a copyright impoundment is available outside § 503(a). Materials might be prepared in the United States, for example, that do not infringe any United States copyright, but that are intended for infringing use in another country in violation of a copyright in that country. If seizure were attempted in this country, a court should be free to determine whether seizure is appropriate without any concern for negative implications from Rule 65(f). A

motion to delete the reference to § 503(a) was adopted by unanimous vote.

A motion to recommend publication of proposed Rule 65(f) as amended passed by unanimous vote.

A motion to recommend repeal of the Copyright Rules was passed by unanimous vote. A draft Supreme Court order will be presented to the Standing Committee for the Standing Committee's determination whether there is any need to recommend a particular form if the Copyright Rules are, in the end, to be abrogated.

Two forms of an amended Rule 81(a)(1) were presented. Both forms delete the provision restricting application of the Civil Rules to copyright proceedings, and also deleted as superfluous the present reference to mental health proceedings in the United States District Court for the District of Columbia. The District of Columbia Court Reform and Criminal Procedure Act of 1970 transferred mental health proceedings formerly held in the United States District Court to local District of Columbia courts. The broader form also modified the reference to proceedings in bankruptcy, making it clear that the Civil Rules apply in bankruptcy proceedings when the Federal Rules of Bankruptcy Procedure make them applicable.

The bankruptcy rules incorporation issue was discussed briefly. It was agreed that when a district judge manages a bankruptcy proceeding outside the bankruptcy court, the bankruptcy rules and civil rules apply as appropriate.

A motion to recommend publication of the broader form of Rule 81(a)(1) passed unanimously. The proposed rule would read:

(a) ~~To What p~~Proceedings to which the Rules Apply~~icable~~.

(1) These rules do not apply to prize proceedings in admiralty governed by Title 10, U.S.C., §§ 7651-7681~~.~~ or ~~They do not apply~~ to proceedings in bankruptcy, except as the Federal Rules of Bankruptcy Procedure make them applicable ~~or to proceedings in copyright under Title 17, U.S.C., except in so far as they may be made applicable thereto by rules promulgated by the Supreme Court of the United States. They do not apply to mental health proceedings in the United States District Court for the District of Columbia~~. * * *

[It should be remembered that in May 1997 the Committee determined that the next "technical amendments package" should

include a revision of Rule 81(c) that would conform to changes in statutory language. All present references to the "petition for removal" should be changed to the "notice of removal." See 28 U.S.C. § 1446. The Standing Committee will be advised of this action, for its determination whether to include Rule 81(c) in the publication of Rule 81(a) for comment, or instead to hold this change for action by other means.]

Rule 53

Civil Rule 53 has kept a holding place on the Committee docket since 1994, when a full-scale revision of the rule was briefly considered. The Committee concluded in 1994 that although there may be many ways in which present Rule 53 fails to reflect or regulate the contemporary uses of special masters, there were no indications that pressing problems were caused by the lack of a guiding rule. The court of appeals decision in the recent Microsoft litigation suggests that there may be good reason to undertake further review.

The more general reasons for studying Rule 53 continue unchanged. Special masters are being used for extensive pretrial and post-judgment purposes that simply are not reflected in Rule 53. Court-appointed experts seem at least occasionally to be set to chores outside the apparent scope of Evidence Rule 706, serving as judicial advisers as well as courtroom witnesses. More exotic appointments of advisers also appear from time to time. "Examiners" may be appointed. All of these functions relate closely to duties undertaken by magistrate judges, and there is a need to clarify the relationships between the occasions for relying on magistrate judges and the occasions for appointing private citizens to assist with judicial functions.

These problems are difficult. An initial difficulty will lie in attempting to form a clear picture of the seeming wide variety of present practices. Professor Farrell has explored some of these issues, but much work remains to be done if it is possible to do more.

It was suggested that the general feeling in 1994 seemed to be that lower courts seem to be muddling along pretty well even without any guidance in Rule 53. Unless there is a real problem, there may be no need to undertake a major task that might produce a rule that still fails to capture and regulate all actual and desirable practices.

The need for study was justified on the ground that the use of

special masters has changed dramatically since the Supreme Court's LaBuy decision greatly discouraged the use of masters for trial purposes. Masters are discharging many important duties without any real guidance in the rules.

Judge Niemeyer proposed appointment of a Rule 53 Subcommittee. The Subcommittee would be asked to report in the fall of 1999, in sufficient detail to provide a foundation for extensive discussion. Many people are interested in this topic, and the Subcommittee would be free to draw on advice from them. It also will be appropriate to ask the Federal Judicial Center to undertake any study that can be designed in consultation with the Subcommittee. The Subcommittee's task will be to make a recommendation whether Rule 53 reform should be pursued; there is no expectation that it must propose reform. It remains appropriate to conclude that the burdens and risks of amending Rule 53 are greater than the probable benefit of the best amendments that might now be devised. "We cannot attempt to make all rules perfect." The Committee approved this proposal.

Rule 51

Civil Rule 51 came to the docket as a result of the Ninth Circuit's review of local rules for conformity with the national rules. Many districts in the Ninth Circuit have local rules that require submission of requests for jury instructions before trial begins. These rules seem inconsistent with Rule 51, which provides for requests "[a]t the close of the evidence or at such earlier time during trial as the court reasonably directs." The Ninth Circuit recommended consideration of a Rule 51 amendment that would legitimate such local rules. The Committee concluded at the March, 1998 meeting that there is no apparent reason to subject this issue to the vagaries of local rules. If there are good reasons to enable a judge to demand requests before trial, the authority should be added to Rule 51.

This conclusion did not complete consideration of Rule 51. It also was suggested that Rule 51 is not easily read by those who are not fully familiar with the ways in which courts have interpreted its language. The Criminal Rules Committee, moreover, had already published a proposal to amend Criminal Rule 30 to authorize the court to direct that requests be made at the close of the evidence "or at any earlier time that the court reasonably directs." Recognizing that the Civil Rule could not catch up with the Criminal Rule, the Committees exchanged views and the Criminal Rules Committee came to consider the draft Rule 51 that was before

the March Civil Rules Committee meeting. The Criminal Rules Committee has expressed interest in considering broader review of the jury-instructions rules.

The draft Rule 51 in the agenda materials was discussed briefly. In addition to authorizing a requirement that requests be filed before trial, the draft recognizes the need to allow later requests in two ways. It provides discretion to permit an untimely request at any time before the jury retires to consider its verdict. And it requires that supplemental requests be permitted "at the close of the evidence on issues raised by evidence that could not reasonably be anticipated at the time initial requests were due." It was urged that this language was too narrow. "Anything is reasonably anticipated," and too few issues would qualify as not reasonably to be anticipated. On this view, the court should be required to treat any supplemental request as timely.

It was asked whether it would be wise to follow the lead of some local rules that limit the number of requests that can be submitted. This suggestion found little approval.

Many judges hold instruction conferences during trial: should the rule formalize this? Or is it better to have the conferences after completion of the evidence? Even in a complex case that presents many issues, or in a case that may present one or more very difficult issues of law? It was responded that it seems better to preserve flexibility; a judge should be left free to proceed without any instructions conference when that seems appropriate.

It was observed that judges often start working on instructions before trial.

The question of written instructions was raised. Some judges regularly use written instructions. Others do not, for fear that jurors may start to parse the instructions and end up ignoring the evidence.

Pattern instructions also were noted. Many circuits have pattern instructions that are used routinely on common issues. Trial courts rely on them. But they are not "official" in the way that many state pattern instructions are official. And they are not used for the tricky cases. There was no interest in attempting to amend Rule 51 to require use of pattern instructions.

The Committee noted its understanding that the Criminal Rules

Committee does not feel an urgent need to act on the jury instructions rules. Rule 51 will be carried forward on the docket, with the request that Committee members communicate their views on reform to the Reporter to support submission of an improved draft for the next meeting.

Corporate Disclosure Statement

The Judicial Conference Committee on Codes of Conduct has asked the Standing Committee to consider whether other sets of procedural rules should adopt provisions similar to Appellate Rule 26.1, which requires corporate disclosure statements. The underlying concern is that a district judge may lack information necessary to determine that the judge is disqualified from a particular case.

This topic came late to the agenda and was presented only in preliminary form. Discussion began by focusing on the deliberate decision to amend Appellate Rule 26.1 to delete the requirement that a corporate party identify "subsidiaries (except wholly-owned subsidiaries), and affiliates that have issued shares to the public." The Committee Note to the amended rule states that "Disclosure of a party's subsidiaries or affiliated corporations is ordinarily unnecessary. For example, if a party is part owner of a corporation in which a judge owns stock, the possibility is quite remote that the judge might be biased by the fact that the judge and the litigant are co-owners of a corporation." It was suggested that information about subsidiaries may be important. The theory that a subsidiary is not injured when a parent corporation is injured does not seem always realistic.

Reliance on filing forms was suggested as an alternative — rather than create a new Civil Rule requiring disclosure statements, a model filing form could be created for use by district courts. The form could be the same for civil, criminal, and bankruptcy cases if that should prove appropriate, or different forms could be adopted to meet such different needs as might emerge. One judge observed that her court requires corporate disclosure information by a form filed with the Rule 26(f) report.

The usefulness of forms was challenged by reflecting on the way in which the Appellate Rules reportedly came to include a disclosure requirement. Counsel for institutional litigants found it inconvenient to have to meet different disclosure practices in different circuits. It is much easier to adopt a single disclosure statement that can be duplicated and used in every court. A form

would meet this need only if a uniform form were adopted by all courts.

In favor of adopting a uniform national rule, it was observed that there is a uniform national disqualification standard. This would make it easier for corporations that are repeatedly caught up in litigation to comply. But there may be more reluctance to disclose in district court filings than in appellate court filings. And there is some cost and aggravation even in complying with a routine requirement, a burden that will be heavier for the first-time or sporadic litigant.

Turning to the substance of a possible disclosure rule, it was asked whether disclosure requirements should extend to partnerships — limited or general, limited liability companies, business trusts, or other organizations not in corporate form.

Two delegates must be appointed to the Standing Committee's ad hoc committee on federal rules of attorney conduct. The Committee concluded that the best way to take up disclosure statements is to ask these delegates to study the topic, perhaps in conjunction with the ad hoc committee's work.

This Committee will report to the Standing Committee that the corporate disclosure requirement deserves further study. It is useful to get the information, but it is not clear what disclosure means should be required. These questions deserve attention. Given the need to coordinate at least the Bankruptcy, Criminal, and Civil Rules Committees — and perhaps to involve the Appellate Rules Committee as well — it may be that initial consideration could be assigned to the attorney conduct committee as a separate issue.

Other Matters

Two agenda items were deferred to the spring meeting. Item VIII opens the question whether the Civil Rules should be amended to reflect the procedure established by 42 U.S.C. § 1997e(g) that allows a defendant to "waive the right to reply" in an action brought by a prisoner under federal law. This item will be considered by the Agenda Subcommittee. Item X invited further discussion of the time required to act in ordinary course under the Rules Enabling Act. The Standing Committee has urged consideration of these timing issues, and they will continue to be part of the agenda.

Next Meeting

The spring meeting was tentatively set for Monday and Tuesday, April 19 and 20, 1999.

Respectfully submitted,

Edward H. Cooper
Reporter

III-B

The rules proposals published for comment in August, 1998 included revisions of Rules 4 and 12 aimed at actions brought against federal officers or employees in an individual capacity. Rule 4 is set out at pages 21-24 of the publication booklet, and Rule 12 at pages 28-29. Summaries of the comments are set out below.

The Comments raise two issues that should be addressed in Rule 4(i). The first is the most troubling. As published, Rule 4(i)(2) could be read to say that when a federal officer or employee is sued in both official and individual capacities, service must be made twice on both the United States and the officer or employee. Of course this foolish result was not intended, and it might be reasonable to rely on courts to understand that Rule 4(i)(2)(B) applies — the United States is served once, but only once, under Rule 4(i)(1), and the officer or employee is served under the more protective provisions of Rule 4(i)(2)(B). But reassurance can be provided by a very small addition to Rule 4(i)(2)(A), limiting its application to cases in which the officer is sued only in an individual capacity. A parallel addition could be made to Rule 4(i)(2)(B), as shown in brackets below, but that course seems doubly unnecessary. The catch-line for Rule 4(i) also should be amended to add the word "employee." These changes are shown in the full text of Rule 4(i)(2) as follows, using underscoring to show only changes from the published text:

(i) Serving the United States, Its Agencies, Corporations, ~~or~~ Officers, or Employees.

* * *

(2) **(A)** Service on an agency or corporation of the United States, or an officer of the United States sued only in an official capacity, is effected by serving the United States in the manner prescribed by paragraph 1 of this subdivision and by also sending a copy of the summons and complaint by registered or certified mail to the officer, agency, or corporation.

(B) Service on 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 [— whether or not

the officer or employee is sued also in an official capacity —] is effected by serving the United States in the manner prescribed by paragraph (1) of this subdivision and by serving the officer or employee in the manner prescribed by subdivisions (e), (f), or (g).

Another suggestion is that similar provisions should be made for state employees. This question was considered at the March 1998 meeting and it was decided to address only the questions raised by the Department of Justice for federal employees. No new arguments have been advanced by the comments.

An unintentional inconsistency has been pointed out in the drafting of proposed Rule 12(a)(3)(A). Rule 4(i)(2)(A), addressing actions against a federal officer in an official capacity, refers only to an "officer," not to an "employee." Rule 12(a)(3)(A) as published, however, refers to an action against "an officer or employee of the United States sued in an official capacity." It seems better to express the two parallel rules in parallel terms. It seems awkward to conceive of an action against an "employee" in an official capacity, a consideration that might suggest deleting "employee" from Rule 12(a)(3)(A). That remedy also seems consistent with the thought that prompted the distinction between officers and employees implicit in the Rule 4(i)(2) draft: many of the lower-level federal employees who may become embroiled in litigation in their individual capacities do not discharge functions that would support suit in an official capacity. If this path is chosen, Rule 12(a)(3)(A) would be revised:

> **(3)** **(A)** The United States, an agency of the United States, or an officer ~~or employee~~ of the United States sued in an official capacity, shall serve an answer to the complaint or cross-claim — or a reply to a counterclaim — within 60 days after the United States attorney is served with the pleading asserting the claim.

One final question arises from reexamining the published draft. It refers to entities "sued" in an official capacity. This word may not fit well with crossclaims and counterclaims. But it is difficult to find a good alternative: "claimed against" is the best that comes to mind. If "sued" seems misleading, "claimed

against" — or some better phrase — can be substituted.

Comments on Rule 4, 12 Proposals

98-CV-007, James E. Garvey: Favors Rules 4 and 12.

98-CV-070, Chicago Bar Assn.: "has no objections."

98-CV-124, Hon. David L. Piester (D.Neb. Magistrate Judge): The proposal may imply that an officer must be served with two summons when sued in both official and individual capacities. This reading draws from the literal wording of Rule 4(i)(2)(A) and (B) as published. (A) requires that when an officer is sued in an official capacity, service be made on the United States and by mailing a copy of the summons and complaint to the officer. (B) requires that when an officer is sued in an individual capacity, service be made on the United States and service also must be made on the officer in the manner prescribed by Rule 4(e), (f), or (g).

Certainly there is no purpose to require that the same officer be served twice. The proposed cure is a rewording of (B) that does not change this problem and destroys the parallel with the wording of (A), and addition of a new subparagraph (C):

> **(C)** Service on an officer or employee of the United States sued in both an individual capacity and an official capacity is effected by serving the officer or employee as prescribed in subparagraph (B), above, noting on the summons that the officer is sued in both capacities.

98CV147: Department of Justice — Drug Enforcement Administration: The proposals to amend Rules 4 and 12 are good for the reasons given.

98CV159: Pennsylvania Trial Lawyers Assn.: Supports the Rules 4 and 12 proposals "as written for the salutary reason of ensuring that federal officials where the subject of litigation receive legal representation."

98CV167: Florida Attorney General Robert A. Butterworth: Both Rule 4 and Rule 12 should be amended to include state officials. A state too must decide whether to provide legal representation. Twenty days is not time enough to frame an answer — the realities of bureaucratic processing mean that even after it is decided to provide an attorney for the state-official defendant, very little

time is left. There is a corresponding temptation to file a motion to dismiss based on such legal challenges as can be found, providing shelter for a fact investigation that will support proper pleading.

98CV193: Philadelphia Bar Assn.: pp. 23-24: Picks up on a drafting oversight. Rule 4(i)(2) now refers to service on "an officer, agency, or corporation of the United States"; "employee" is not used. Rule 12(a)(3) likewise refers to "The United States or an officer or agency thereof," without referring to an "employee." In redrafting Rule 4(i), paragraph (2)(A) continues to refer only to "an officer of the United States sued in an official capacity." Proposed Rule 12(a)(3)(A), however, refers to "an officer or employee of the United States sued in an official capacity." The two rules should be made parallel. The Philadelphia Bar recommends that "employee[s]" be added to the caption of Rule 4(i), a desirable addition because paragraph (2)(B) will include employees. It also recommends that "employee" be added to (2)(A) at lines 7 and 13 of the published version. It seems odd, however, to think of an "employee" sued "in an official capacity." Perhaps it is better to take "employee" out of Rule 12(a)(3)(A).

98CV214: Civil Litigation Unit, FBI General Counsel: Favors the Rules 4 and 12 proposals for the reasons advanced by the Department of Justice.

98CV258: Mr. Paige: Favors the Rule 4 and 12 proposals.

98CV267: D.C. Bar, Courts Lawyers & Admn. of Justice Section: Expresses support for the Rule 4 and 12 proposals, but without elaborating the reasons.

98CV268: Federal Magistrate Judges Assn.: Supports the Rule 4 and 12 proposals, characterizing them as non-controversial. "The amendment will assist the practitioner (as well as the courts) in clarifying and making explicit a party's service obligations. * * * [S]ervice on the United States will help to protect the interests of the individual defendant * * * and will expedite the process of determining whether the United States will provide representation." The new Rule 4(i)(3) requirement of notice and opportunity to cure a failure to make all required service provides "clear direction" and a "spirit" that should be endorsed. The Rule 12 time for service complements the Rule 4 provisions — time is needed for the United States to decide whether to provide representation, and to

prepare an answer if representation is provided.

III-C

Admiralty Rules

The amendments published for comment in August, 1998 included Admiralty Rules B, C, and E, as set out from pages 71 through 104 of the publication booklet. Changes in the wording of Civil Rule 14(a) and 14(c) to conform to the new language of Rule C also were published, see pages 30-33. Summaries of the public comments and testimony are set out at the end of this section.

A few modest revisions suggested by the public comments deserve discussion. Several have won the concurrence of the Maritime Law Association, one of the original proponents of the amendments.

Rule B(1): Several proposals are made for the text of the rule, and one for the Note. The text proposals are shown below; the Note addition is discussed separately. Brackets enclose proposals that are not recommended for adoption.

(1) When Available; Complaint, Affidavit, Judicial Authorization, and Process. In an in personam action:

(a) If a defendant ~~in an in personam action~~ is not found within the district, a verified complaint [that asserts an admiralty or maritime claim] may contain a prayer for process to attach the defendant's tangible or intangible personal property * * *;

* * *

(d) **(i)** If the property is a vessel or tangible property on board a vessel, ~~the clerk must deliver~~ the summons, process, and any supplemental process must be delivered to the marshal for service.

(ii) If the property is other tangible or intangible property, ~~the clerk must deliver~~ the summons, process, and any supplemental process must be delivered to a person or organization authorized to serve it, who may be * * *;

* * *

(e) The plaintiff may invoke state-law remedies under Rule 64 for [~~seizures~~ the restraint] of person or [seizure of] property or for the purpose of securing satisfaction of the judgment.

B(1) "In an in personam action": Rule B(1) applies only to in personam claims. This restriction was drafted into paragraph (a), but belongs in the preface to all paragraphs. This is merely a drafting change that became apparent on considering the proposal to revise the paragraph (e) proposal. The change should be adopted.

B(1)(a) "That asserts an admiralty or maritime claim": This addition was suggested by the comments of Committee on Civil Litigation, Eastern District of New York, summarized below. The concern is that without these limiting words, an over-eager lawyer in Iowa may seek to use Admiralty Rule B to attach a tractor, reopening the due process questions that plagued Rule B until it came to be accepted that maritime litigation presents special needs that justify notice practices that would not be acceptable in landlocked litigation. The words seem pure surplusage. Admiralty Rule A defines the scope of the Supplemental Rules: "These Supplemental Rules apply to the procedure in admiralty and maritime claims within the meaning of Rule 9(h) with respect to the following Remedies: (1) Maritime attachment and garnishment * * *. These rules also apply to the procedure in statutory condemnation proceedings analogous to maritime actions in rem, whether within the admiralty and maritime jurisdiction or not." There is no excuse for attempting to invoke Rule B(1) outside of maritime attachment and garnishment. Although no apparent harm would be done by adding the suggested language, it is recommended that the language not be added.

B(1)(d) "must be delivered" This suggestion also comes from the Committee on Civil Litigation, Eastern District of New York. The practice in the Eastern District is that the clerk delivers the process to the attorney for the plaintiff, who arranges delivery to the person who will make service. The Maritime Law Association recommends that the suggestion be adopted because the clerk may prefer that the party be responsible for delivering the process to the marshal or other person who will make service, and because this procedure may expedite service. The same question arises under Rule C(3)(b)(i) and (ii) as published for comment.

The source of the published draft is present Rule C(3). When Rule C(3) was amended to provide for service of the warrant in an in rem proceeding by a person other than a marshal, it provided that "the warrant shall be delivered by the clerk to a person or organization authorized to enforce it." The purpose of amending Rule B(1)(d)(ii) was to adopt a parallel procedure for maritime attachment. No independent thought was given to the distinction

between delivery by the clerk to the marshal and delivery by the clerk to someone who would become responsible for delivery to the marshal or other person authorized to effect service.

Some guidance may be found in the history of Civil Rule 4. As adopted in 1938, Rule 4(a) directed that the clerk deliver the summons for service "to the marshal or to a person specifically appointed to serve it." This provision was amended in 1982 to direct the clerk to deliver the summons to "the marshal or to any other person authorized by Rule 4(c) to serve it." In 1982, the Supreme Court submitted to Congress a revision of Rule 4(a) that directed the clerk to deliver the summons "to the plaintiff or his attorney." This proposal was part of a package designed to reduce the role of the Marshals Service in making service. Congress did not approve the proposal, substituting its own form in 1983 that directed the clerk to "deliver the summons to the plaintiff or the plaintiff's attorney, who shall be responsible for prompt service." Present Rule 4(b), adopted in 1993, simply provides that the plaintiff presents a summons to the clerk, who is to "sign, seal, and issue it to the plaintiff for service on the defendant." The onus has been shifted entirely to the plaintiff.

With this background in the evolution of Rule 4, there seems little reason to attempt to dictate the means by which even a Rule C(3) warrant is moved from the clerk to the marshal. It is recommended that the suggested change be adopted. The parallel change in Rule C(3)(b) is noted separately below.

B(1)(e) "The restraint of person or seizure of property": This change was raised during Maritime Law Association discussions. The concern is that "seizure of person" seems outmoded. The language in Rule B(1)(e) as published draws directly from Civil Rule 64. Until Rule 64 is changed, it seems better to identify Rule 64 in its own terms. It is recommended that this change not be adopted.

B(1)(e) Note: Restricted Appearance: Rule B(1)(e) was proposed to replace a provision that had incorporated the Civil Rule 4 incorporation of state quasi-in-rem jurisdiction provisions. The 1993 revisions of Rule 4(n)(2) left any reliance on state law redundant in an in personam admiralty proceeding. Civil Rule 64 was incorporated in place of state quasi-in-rem jurisdiction to erase any possible doubt whether Rule 64 could be applied in admiralty proceedings. At the same time, reference to the restricted appearance provision of Rule E(8) was deleted from Rule B(1), and Rule E(8) is amended to delete any reference to Civil

Rule 4. These changes have raised concern at the Maritime Law Association that the amendments may seem to oust any special or limited appearance procedure provided by state law as part of a state-law security procedure incorporated through Rule 64. Rule 64 makes state-law remedies available "in the manner provided by the law of the state." This restriction seems to incorporate all of the protective practices that accompany the state remedy, including a special appearance to challenge the propriety of the remedy or a limited appearance to contest the merits without submitting to personal jurisdiction. There is no obvious or pressing need to add new language to the Rule B(1) Note. Nonetheless, it is appropriate to consider adding this much after the final sentence in this paragraph of the Note: "Because Rule 64 looks only to security, not jurisdiction, the former reference to Rule E(8) is deleted as no longer relevant. But if state law allows a special, limited, or restricted appearance as an incident of the remedy adopted from state law, the state practice applies through Rule 64 "in the manner provided by" state law." The Reporter stands indifferent as to the merits of this addition.

Rule C(3)(b): The only suggestion as to Rule C is that the provision directing the clerk to deliver the warrant to the marshal or other person authorized to enforce the warrant be amended to provide simply that the warrant must be delivered. The reasons for this suggestion are discussed with Rule B(1)(d) above. The only reason for caution is that there has been no specific invitation for public comment, and that in the context of Rule C(3) this change departs from the clear present language of the rule. If this difference seems to require republication of Rule C(3) for comment, it seems better not to delay adoption of the Admiralty Rules proposals, nor to sever Rule C(3) from the package. In that case, Rule C(3) should be submitted for approval as published. But if the change seems sufficiently minor to justify adoption without further publication, the change can be adopted for the same reasons as the change in Rule B(1)(d). As amended, Rule C(3)(b) would look like this:

(b) Service.

(i) If the property that is the subject of the action is a vessel or tangible property on board a vessel, ~~the clerk must deliver~~ the warrant and any supplemental process must be delivered to the marshal for service.

(ii) If the property that is the subject of the action is other property, tangible or intangible, ~~the clerk must deliver~~ the warrant and any supplemental process must be delivered to a person or organization authorized to enforce it, who may be * * * .

Admiralty Rules Comments: 1998

98CV011: Jack E. Horsley: Speaking apparently to Rule C(6)(b)(i), suggests that it may invite a statement of right or interest that is conclusionary. Recommends adding these words at the end: " * * * must file a verified statement of right or interest based upon facts which support such a statement and not upon the conclusions of the person who asserts a right of possession and must file such a statement: * * * "

98CV077: Comm.on Civil Litigation, EDNY: This is the only extensive comment on the admiralty rules proposals. There are two suggestions for change. (1) Rule B now begins "With respect to any admiralty or maritime claim in personam * * *." The proposed rule begins merely "if a defendant in an in personam action * * *." The suggestion is that an explicit reference to admiralty or maritime proceedings be restored: "if a defendant in an in personam action is not found within the district, a verified complaint that asserts an admiralty or maritime claim may * * *." This suggestion stems from a fear that plaintiffs may attempt to invoke Admiralty Rule B in non-admiralty proceedings. Use of Rule B in non-admiralty proceedings might, in turn, reopen the question whether Rule B is constitutional — it has been accepted only by distinguishing the special needs of admiralty from the needs of land-based litigation. The fact that Admiralty Rule A limits Rule B to admiralty and maritime claims, as well as "statutory condemnation proceedings analogous to maritime actions in rem," is not protection enough. (2) Rule B(1) does not now direct what happens to process of attachment and garnishment after the clerk issues it. Proposed rule B(1)(d) directs the clerk to deliver the process to the marshal or another person eligible to make service. The present practice in E.D.N.Y. is that the clerk delivers the process to the attorney for the plaintiff, who in turn arranges delivery to the person who will make service. Requiring that process be delivered by the clerk to the server "very likely will occasion delay in cases where time is usually of the essence." The rule should

provide that process "must be delivered" to the person making service, without designating who is to effect the delivery.

98CV214: Civil Litigation Unit, FBI General Counsel: Recommends adoption of the Rule 14 conforming amendment, but does not address the Admiralty Rules proposals otherwise.

98CV258, Mr. Paige: Is in favor of the proposed changes to Rule 14 and Admiralty Rules B, C, and E.

98CV267: D.C. Bar, Courts, Lawyers & Admn. of Justice Section: Supports the Rule 14 change without elaboration.

98CV268: Federal Magistrate Judges Assn.: Supports all of the Admiralty Rules proposals. There are repeated statements endorsing the style changes: The style changes in Rule B "are a significant improvement and provide clarity"; in Rule C, "[t]he result is much greater clarity" in a rule that "is written in rather archaic language, probably because it has been an outgrowth of admiralty law," and the effect is to "bring the verbiage of the rule into the 20th Century (just in time for the 21st)."

The changes in Rule B are supported because they reduce the need for service by the United States Marshal, reflect the 1993 changes in Civil Rule 4, and expressly confirm the availability of state security remedies through Civil Rule 64.

The changes in Rule C recognize the broadened statutory bases for forfeiture, and clearly identify differences in procedure between admiralty in rem proceedings and civil forfeiture proceedings. The continued practice that permits interrogatories with the complaint "recognizes the often exigent nature of admiralty actions." Other "small changes" "appear calculated merely to establish more clearly the actions expected of parties rather than place new duties or restrictions upon them."

The Rule E changes "are not considered controversial or significant in nature or scope."

IV-A

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JOHN K. RABIEJ
Chief
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April 5, 1999

MEMORANDUM TO ADVISORY COMMITTEE ON CIVIL RULES

SUBJECT: *Electronic Filing Materials*

Professor Cooper prepared the following agenda item. I have attached a letter from Professor Alan Resnick commenting on an earlier draft of amendments to Rules 5, 6, and 77, the agenda material prepared by Professor Patrick Schiltz for the upcoming meeting of the Appellate Rules Advisory Committee, a memorandum prepared by Nancy Miller, the Judicial Fellow, discussing the rules implications of the electronic filing pilot programs, and an article from *US Law Week* discussing electronic filing in federal court.

John K. Rabiej

Electronic Service: Civil Rules 5(b), 77(d)

The Standing Committee Subcommittee on Technology has explored electronic service. This proposal to amend Civil Rule 5(b) grows out of Technology Subcommittee discussions. The proposal is to be informally reviewed by the Appellate, Bankruptcy, and Criminal Rules Advisory Committees, with the thought that sufficient consensus might emerge to support a recommendation for publication in August. It would be possible to recommend this proposal for publication in August if the other advisory committees find no significant need for further work. These notes provide a brief summary of the background experience with electronic filing under Civil Rule 5(d) and a proposal that restyles present Rule 5(b) and adds a provision for electronic service. Several attachments are set out at the end, including such reports from the other advisory committees as are available, and an Administrative Office report on the Electronic Case Filing program.

Experience with Electronic Case Filing is gradually accumulating in the wake of the 1996 Rule 5(e) amendment authorizing local rules that permit papers to be filed, signed, or verified by electronic means. The basis of experience is in some ways narrow. Only a few courts are currently involved, including four district courts participating in a prototype program for filing documents over the internet. The complaint is initially filed by traditional means; only when the case is later selected for electronic filing does the clerk "back-file" the complaint in the electronic record. Cases are individually selected for electronic filing, and consent of the parties is generally required. These limits suggest caution in seeking to extrapolate lessons for more general application. Nonetheless, the experience of those who engage in electronic filing is just what might be hoped: it is faster, more reliable, and less expensive. Still greater benefits can flow from authorizing parties to serve documents electronically. The benefits are likely to be greatest for small offices and for districts that are geographically broad. There is growing pressure to authorize development of electronic service. The lead has been taken by the Bankruptcy Rules Committee. Proposed amendments to Bankruptcy Rule 9013(c), published for comment in August, 1998, deal with "Application for an order." It provides that: "Service shall be made in the manner provided in Rule 7004 for service of a summons, but the court by local rule may permit the notice to be served by electronic means that are consistent with technical standards, if any, that the Judicial Conference of the United States establishes." A similar provision is included in the proposed amendments to Bankruptcy Rule 9014.

A first choice is whether act now to authorize electronic service for the summons and complaint under Rule 4 and "other process" under Rule 4.1. Experience with electronic filing provides very little guidance for these situations. The Technology Subcommittee has agreed that the first step should be limited to service of papers that do not qualify as "process." Rule 5 is to be the sole focus in the Civil Rules, with comparable provisions in the Appellate and Criminal Rules. Bankruptcy Rules may be developed in more adventurous ways. Bankruptcy practice is not easily divided between "process" and other papers, and it has traditionally moved ahead of the other rules in developing the benefits of advancing technology.

The second choice to be made, once the concept of electronic service for documents is embraced, is how far to push it. For the moment, it seems safest to allow electronic service only with the consent of the person to be served. This limitation need not be a severe restraint. If the advantages of electronic service are as substantial as the enthusiasts believe, consent is apt to be given by an increasing number of parties and attorneys. The time to abandon the consent requirement will come as modern technology is developed still further and adopted more universally. Detailed provisions for implementing the consent requirement could be incorporated in the national rule. Among the questions that have been suggested are whether advance consent is required, whether consent can be sought in the process of making electronic service, whether failure to object to electronic service implies consent, and so on. The attached draft, however, does not include provisions for these questions. It has seemed better to avoid the risk of fossilizing specific details that would be difficult to adjust through the Enabling Act process. The draft Note suggests that local rules might address these questions.

The task of excluding service under Rules 4 and 4.1 from Rule 5(b) is not quite as easy as it may seem. Exposition of the drafting issues is best supported by setting out the full text of present subdivisions 5(a) and 5(b).

Rule 5(a) provides:

> **(a) Service: When Required.** Except as otherwise provided in these rules, every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every paper relating to discovery required to be served upon a party unless the

> court otherwise orders, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer of judgment, designation of record on appeal, and similar paper shall be served upon each of the parties. No service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons in Rule 4.
>
> In an action begun by seizure of property, in which no person need be or is named as defendant, any service required to be made prior to the filing of an answer, claim, or appearance shall be made upon the person having custody or possession of the property at the time of its seizure.

Rule 5(b) is set out with superscripts designating the parts of the new draft that incorporate the present provisions:

> **(b) Same: How Made.** [5(b)(1)] Whenever under these rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party is ordered by the court. [5(b)(2)] Service upon the attorney or upon a party shall be made by [5(b)(2)(A)] delivering a copy to the attorney or party [5(b)(2)(B)] or by mailing it to the attorney or party at the attorney's or party's last known address or, [5(b)(2)(C)] if no address is known, by leaving it with the clerk of the court. Delivery of a copy within this rule means: [5(b)(2)(A)(i)] handing it to the attorney or to the party; or[5(b)(2)(A)(ii)] leaving it at the attorney's or party's office with a clerk or other in person in charge thereof; or, if there is no one in charge, leaving it at a conspicuous place therein; or, [5(b)(2)(A)(iii)] if the office is closed or the person to be served has no office, leaving it at the person's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. [5(b)(2)(B)] Service by mail is complete upon mailing.

Rule 5(a) begins by excepting service "as otherwise provided by these rules." Separate service provisions appear in at least Rule 45(b) (subpoenas); 71A(d)(3) (notice in condemnation proceeding); and 77(d) (notice by the clerk of the entry of an order or judgment). There may be other exceptions as well.

Despite the formidable catch-all "every written notice * * * and similar paper" category at the end, at least one court has held that a trial brief is not included in the Rule 5(a) categories, see 4A C. Wright & A. Miller, Federal Practice & Procedure: Civil 2d, § 1143 p. 415. The puzzle of Rule 5(a) is important not in its own terms, however, but only as a challenge for drafting Rule 5(b).

Rule 5(b) does not now indicate whether it covers all service, only service of items covered by Rule 5(a), or some intermediate category. If it is limited to Rule 5(a), it is only by the catch-line ("Same: How Made") that we know it. The puzzle is aggravated by the first sentence, which refers only to service on an attorney, but is sweeping: "Whenever under these rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney * * * ." That language should cover, at the least, the clerk's service of notice of an order or judgment under Rule 77(d). It has been held, however, that Rule 45(b) requires service of a subpoena on the party, not the party's lawyer, see 9A Wright & Miller, § 2454, p. 24. This minor inconsistency should be addressed. More important, it is difficult to believe that Rule 5(b) supersedes the service provisions of Rules 4 and 4.1 whenever a party is represented by an attorney before the action is commenced, when an order of civil commitment is served, or the like. Rule 71A(d)(3), further, requires service in accord with Rule 4, and if — as seems probable — Rules 4 and 4.1 are impliedly excluded from the Rule 5(b) provision for serving an attorney, Rule 71A(d)(3) also should be excluded. These problems should be addressed in revising Rule 5(b), if only to define clearly the new provision for electronic service.

These problems with the first sentence of Rule 5(b) flow into the next sentence, which tells how service is made upon the attorney or a party. This sentence does not expressly invoke the first sentence reference to any service required by these rules. This is the point where it is necessary to draft in terms that clearly exclude service under Rules 4, 4.1, 45(b), and 71A(d)(3). (It is proposed below that Rule 77(d) be amended to incorporate revised Rule 5(b), so that the clerk can make service of orders and judgments by electronic means.)

The draft that follows addresses these questions by limiting the "service on the attorney" provision to service under Rules 5(a) and 77(d). This drafting deserves further study. The general service provisions are limited to Rule 5(a) service; the Rule 77(d) proposal simply incorporates Rule 5(b).

Although the immediate impetus arises from the desire to extend electronic filing to electronic service, it has seemed best to allow other means of service as well. Proposed Rule 5(b)(2)(D) includes any means consented to by the person served.

Electronic service raises questions that parallel the present Rule 5(b) provision that "[s]ervice by mail is complete upon mailing." The Technology Subcommittee concluded that it is better to follow this analogy for electronic service. Administrative Office staff active with electronic case filing believe that the best word to use is "transmit" or "transmission." Difficulties arise because the lack of a universal electronic mail system leaves it impossible, at times, to provide an electronic confirmation that the message has been delivered. There also was concern that a person anxious to avoid service might close down its machinery, so as to obtain a de facto extension of time if service were made effective on receipt. A different drafting difficulty arises from the choice to include nonelectronic means of service. It is somewhat awkward to think of transmitting an envelope to an express service. The draft resolves this problem by making service complete on delivering the paper to the agency designated to make delivery. This language may be clear, but it is not aesthetically pleasing. The draft also includes an illustration of the alternative choice to make email service effective only on receipt.

The choice to make service effective on transmission or delivering the paper to the agency designated to make delivery raises the Rule 6(e) question of additional time. Even electronic means of communication may fail to achieve instantaneous communication. And even an instantly delivered facsimile or email message may arrive on a Saturday, Sunday, or other time when the recipient is not keeping watch. The Technology Subcommittee concluded that it is better to expand Rule 6(e) to allow an additional three days whenever service is made by means other than physical delivery. The draft incorporates this decision; alternatives are sketched with the draft.

A final question is whether responsibility for serving papers filed with the court should continue to fall on the parties. The next generation of filing software may enable courts to effect automatic service on all parties of any paper filed with the court. At least for cases in which all parties have consented to electronic service, it seems desirable to authorize experiments with service by the court. The final sentence of proposed Rule 5(d) would do this; authorization by local rule is required as a means of protecting unwilling courts against litigant requests.

Draft Rule 5(b)

(b) Making Service.

(1) Service under Rules 5(a) and 77(d) on a party represented by an attorney is made on the attorney unless the court orders service on the party.

(2) Rule 5(a) service is made by: [Service under Rule 5(a) is made by:]

(A) Delivering a copy to the person served by:

(i) handing it to the person;

(ii) leaving it at the person's office with a clerk or other person in charge, or if no one is in charge leaving it in a conspicuous place in the office; or

(iii) if the person has no office or the office is closed, leaving it at the person's dwelling house or usual place of abode with someone of suitable age and discretion [then] residing there.

(B) Mailing a copy to the last known address of the person served. Service by mail is complete on mailing.

(C) If the person served has no known address, leaving a copy with the clerk of the court.

(D) Delivering a copy by [electronic or any other means]{any other means, including electronic

means,}[1] consented to by the person served. Service by electronic means is complete on [transmission]{receipt by the person served}[2]; service by other consented means is complete when the person making service delivers the copy to the agency designated to make delivery. If authorized by local rule, the court may make service [on behalf of a party][3] under this subparagraph (D).

Committee Note

Rule 5(b) is restyled.

Rule 5(b)(1) makes it clear that the former provision for service on a party's attorney applies only to service made under Rules 5(a) and 77(d). Service under Rules 4, 4.1, 45(b), and 71A(d)(3) — as well as rules that invoke those rules — must be made

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[1] Two votes have been expressed on the alternative choices. Professor Capra prefers "other means, including electronic means, consented to" because it defeats any argument that consent is not required for electronic means. Gene Lafitte, Chair of the Technology Subcommittee, prefers "electronic or any other means consented to."

[2] The first draft made service complete on receipt. This approach eliminates any need to provide extra time to act in response, see Rule 6(e). It also puts the risk of transmission on the party who wishes to rely on electronic service. It leaves the party effecting service in some uncertainty, since present technical advice is that it is not always possible to ensure delivery of an electronic "receipt" across different electronic mail delivery services. The consensus at the technology subcommittee meeting favored completion on dispatch by the party making electronic service. Technical advisers in the Administrative Office suggested "transmission" as the best single word to convey this idea.

[3] This phrase, or some equivalent phrase, might be inserted to indicate that the court is acting in place of the party that is required to make service. It does not seem to interfere with the incorporation of Rule 5(b) as proposed for Rule 77(d).

as provided in those rules.

Paragraphs (A), (B), and (C) of Rule 5(b)(2) carry forward the method-of-service provisions of former Rule 5(b).

Paragraph (D) of Rule 5(b)(2) is new. It authorizes service by electronic means or any other means, but only if consent is obtained from the person served. Early experience with electronic filing as authorized by Rule 5(d) is positive, supporting service by electronic means as well. Consent is required, however, because it is not yet possible to assume universal entry into the world of electronic communication. It is anticipated that the benefits of electronic service will become so apparent that in time consent will readily be given by parties and attorneys. Local rules may be adopted to describe the means of consent, including provisions that enable lawyers and parties who regularly engage in litigation to file general consents for all actions. Paragraph (D) also authorizes service by nonelectronic means such as commercial carriers. The Rule 5(b)(2)(B) provision making mail service complete on mailing is extended in Paragraph (D) to make service by electronic means complete on transmission; transmission is effected when the sender does the last act that must be performed by the sender. Service by other agencies is complete on delivery to the designated agency.

Finally, Paragraph (D) authorizes adoption of local rules providing for service by the court. Electronic case filing systems will come to include the capacity to make service by the court's transmission of all documents filed in the case. It may prove most efficient to establish an environment in which a party can file with the court, knowing that the court will automatically serve the filed paper on all other parties. Because service is under Paragraph (D), consent must be obtained from the persons served.

The expansion of authorized means of service is supported by the amendment of Rule 6(e). The additional three days for acting after service by mail are allowed for service by mail, by leaving a copy with the clerk of the court, or by electronic or other means.

Rule 6(e)

(e) Additional Time After Service ~~by~~ ~~Mail~~ under Rule 5(b)(2)(B), (C), or (D). Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon the party and the notice or paper is served upon the party ~~by mail~~ under Rule 5(b)(2)(B), (C), or (D), 3 days shall be added to the prescribed period.

Committee Note

The additional three days provided by Rule 6(e) is extended to the means of service authorized by the new paragraph (D) added to Rule 5(b), including — with the consent of the person served — service by electronic or other means. The three-day addition is provided as well for service on a person with no known address by leaving a copy with the clerk of the court.

Alternative 1

Do not change Rule 6(e). Electronic service is the speediest means available. Federal Express and other means also are likely to be speedier than the mails. Service by any of these means requires consent of the party to be served; consent should be given only if the party is prepared to monitor the addresses permitted for service.

Alternative 2

If additional time is provided for everything but "personal service" under Rule 5(b)(2)(A), there is an unreasoned distinction. Eliminate Rule 6(e), rather than add 3 days to every response-time period in the rules.

Alternative 3

(e) Additional Time After Service by Mail. Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon the party and the notice or paper is served upon the party by mail or by a means permitted only with the consent of the party served, 3 days shall be added to the prescribed period.

This alternative was suggested by Alan N. Resnick as language that could be adopted by Bankruptcy Rule 9006(f). The Bankruptcy Rules do not adopt Civil Rule 6(e), and cannot effectively incorporate Civil Rule 5(b) by cross-reference. The proposed language could be adopted verbatim in Bankruptcy Rule 9006(f), effecting a clear parallel between the two sets of rules.

Rule 77(d)

(d) Notice of Orders or Judgments. Immediately upon the entry of an order or judgment the clerk shall serve a notice of the entry ~~by mail~~ in the manner provided for in Rule 5(b) upon each party * * * . Any party may in addition serve a notice of such entry in the manner provided in Rule 5(b) for the service of papers.

Committee Note

Rule 77(d) is amended to reflect changes in Rule 5(b). A few courts have experimented with serving Rule 77(d) notices by electronic means on parties who consent to this procedure. The success of these experiments warrants express authorization. Because service is made in the manner provided in Rule 5(b), party consent is required for service by electronic or other means described in Rule 5(b)(2)(D). The same provision is made for a party who wishes to ensure actual communication of the Rule 77(d) notice by also serving notice. As with Rule 5(b), local rules may establish detailed procedures for giving consent.

Add-on: Electronic Request to Waive Rule 4 Service

Rule 4(d) requires that a request to waive service of process be made in writing. We may want to think about allowing the request to be made by electronic means. This change would be a first and very limited stop on the road to service of summons and complaint by electronic means. The Technology Subcommittee did not think it necessary to address this question in conjunction with electronic service. Two difficulties are apparent: providing assurance of actual receipt, and providing a clear means of response. A simple but probably inadequate approach would revise Rule 4(d)(2) by making a few additions:

* * * The notice and request

(A) shall be in writing or electronic form and shall be addressed directly to the defendant, if an individual, or else to an officer or managing or general agent (or other agent authorized by appointment of law to receive service of process) of a defendant subject to service under subdivision (h);

(B) shall be dispatched through first-class mail, electronic means, or other reliable means;

(C) shall be accompanied by a copy of the complaint and shall identify the court in which it has been filed;

(D, E, F): Unchanged; and

(G) shall, if made in writing, provide the defendant with an extra copy of the notice and request, as well as a prepaid means of compliance in writing. * * *

myself in understanding when the message is transmitted for service purposes. I also want to add that these amendments to Rule 5(b) should not require any corresponding amendments to the Bankruptcy Rules because Bankruptcy Rule 7005 merely incorporates by reference Civil Rule 5 for adversary proceedings. Thus, there is no need to agree on uniform language for Rule 5 and a Bankruptcy Rule.

(3) I have several comments regarding the draft of the proposed amendment to Rule 6(e):

(a) We discussed the wisdom of applying the 3-day mail rule to electronic service (and other agreed-upon means) in Washington, but only briefly. After further thought, I am not sure that I agree with the conclusion that it should apply. I question whether it makes sense to extend the response time by 3 days when the parties agree to use the fastest service method known to mankind. Service by E-mail is virtually instant. If anything, it should speed up cases. I understand and appreciate the position that parties should be encouraged to consent to electronic service because it is such an efficient way to operate. But if it is so beneficial to the parties, I doubt that attorneys would be reluctant to agree to accept electronic service only because they want the additional 3 days if served by mail. First, mail service takes 2 or 3 days so that the benefit of the enlarged time is really lost for those who insist on mail service rather than by electronic means. Second, if electronic service is made on a weekend or holiday, the response time begins to run on the next business day. Third, although one can imagine E-mail service on Friday evening, if the time period is less than 11 days, the intervening weekends do not count anyway. In any event, I think that the advisory committees should address the initial question of whether the 3-day mail rule should apply only to mail. I have the same concerns for applying the 3-day mail rule to service by Federal Express or other overnight delivery service.

(b) Assuming that the 3-day mail rule is made applicable to service by electronic or other means, I question whether the draft is too narrow in that it is limited to service under Rule 5(b) and would not include service (in any form) under Rule 4. It is my understanding that Civil Rule 4, in certain circumstances, would permit service of process by mail or electronic or other means if, for example, the laws of the applicable state would permit it (I would not be surprised if some states already have provisions for electronic or mail service). See Civil Rule 4(e)(1) and (h) (incorporating service methods under state law); Rule 4(i)(1) (permitting service on the U.S. or a federal agency by certified or registered mail to the U.S. attorney and the Attorney General). I suggest that the proposed new language for Rule 6(e) be deleted and that, rather than referring to Rule 5(b), the following phrase (or something like it) be used: "... and the notice or paper is served upon the party by mail or by any other means permitted by these rules only upon the consent of the party served, 3 days shall be added to the ..." I realize that this would not include leaving a copy with the clerk when the party served has no known address, but in that situation the 3-day extension probably would be meaningless and would serve only to delay the inevitable entry of a default judgement or the like. The committee note could cross-reference to the new language in Rule 5(b) and also explain that the 3-day rule

would apply when mail is authorized under Rule 4.

(c) If we want to strive for uniform language in all bodies of rules, Rule 6 should not cross-reference to Rule 5. Rule 6 is not applicable in any bankruptcy proceeding (adversary proceedings, contested matters, or otherwise); Bankruptcy Rule 9006(f) contains the same 3-day mail rule. Therefore, it would be ideal to amend Rule 9006(f) to conform to the same language that will be used in Rule 6. But Civil Rule 5 is not applicable in contested matters (when perhaps most mail service is made in bankruptcy cases). Rule 5 is applicable only in adversary proceedings (through Rule 7005, which does not apply in contested matters). Thus, a cross-reference to Bankruptcy Rule 7005 or to Civil Rule 5 in Bankruptcy Rule 9006(f) would not be an effective way of making the 3-day mail rule applicable in contested matters. It would be better to spell out the kind of service to which the 3-day rule applies (as I tried to do in (b) above) in Civil Rule 6(e) and Bankruptcy Rule 9006(f), and attempt to be uniform in our language.

(d) I am not sure about the intended timing of these proposals. Since it is unclear whether, or when, the Advisory Committee will be ready to present to the Standing Committee proposed amendments to Rules 9013 and 9014 regarding electronic service, the Advisory Committee might want to wait to see what happens with those proposals before going ahead with proposed changes to Rule 9006(f) designed to extend the 3-day rule to electronic service.

(4) The proposed amendments to Rule 77(d) appear to be fine. Bankruptcy Rule 9022(a) (which governs notice of entry of a judgment or order entered in the bankruptcy court) provides that the clerk "shall serve a notice of the entry by mail in the manner provided by Rule 7005 [i.e., Civil Rule 5]..." Rule 9022(b) provides that notice of a judgment or order entered by a district judge is governed by Civil Rule 77(d). If Ed's draft amendment to Rule 77(d) is adopted, it should not be necessary to change any Bankruptcy Rule.

(5) I suggest that the draft amendments to Civil Rule 4(d)(2) be dropped because of the difficulties Ed points out. This would be better left to a later study of electronic service of process under Rule 4.

John, as you know, the Advisory Committee on Bankruptcy Rules is meeting in less than two weeks. Is it anticipated that Ed will produce another draft after receiving the comments of the other reporters, and that the Advisory Committees will address that draft at their March/April meetings? Will this be on the agenda for each Advisory Committee meeting? Are we expected to have a draft ready for publication for the Standing Committee in June? Or is it expected that we will address this at the Fall meetings? Our agenda for our March 18-19 meeting has been set and the materials distributed. We have a heavy agenda because of the controversial comments received on the Litigation Package. If Ed does prepare another draft, and if time permits, perhaps I can bring it to the meeting and have at least a preliminary discussion on this topic. I do not

know whether the Advisory Committee will be in a position to approve for publication any proposed amendments to the Bankruptcy Rules on this topic at its March meeting (again, it appears that the only Bankruptcy Rule that may have to be changed to conform to a uniform approach is Rule 9006(f) on the 3-day extension of time). If possible, can you give me some idea as to what the other reporters are anticipating regarding the timing of this.

Sincerely,

Alan N. Resnick

MEMORANDUM

DATE: March 10, 1999

TO: Advisory Committee on Appellate Rules

FROM: Patrick J. Schiltz, Reporter

RE: Item No. 99-03

All of the rules of practice and procedure — appellate, bankruptcy, civil, and criminal — include almost identically worded provisions authorizing the promulgation of local rules that permit electronic *filing*. *See* Fed. R. App. P. 25(a)(2)(D); Fed. R. Bankr. P. 5005(a)(2), 7005(e), 8008(a); Fed. R. Civ. P. 5(e); Fed. R. Crim. P. 49(d). In FRAP, the electronic filing provision is found in FRAP 25(a)(2)(D):

> (D) **Electronic Filing.** A court of appeals may by local rule permit papers to be filed, signed, or verified by electronic means that are consistent with technical standards, if any, that the Judicial Conference of the United States establishes. A paper filed by electronic means in compliance with a local rule constitutes a written paper for the purpose of applying these rules.

Even before these rules took effect, a few district courts and bankruptcy courts had begun experimenting with electronic case filing ("ECF"). Following enactment of the ECF rules in 1996, the Judicial Conference Committee on Automation and Technology developed the "ECF Initiative," under which those district and bankruptcy courts that had been experimenting with electronic filing agreed to serve as ECF "prototypes." The Committee on Automation and Technology hoped that the experiences of the prototype courts would help the Judicial

Conference to identify the legal, policy, and technical issues that would need to be addressed before ECF could be implemented on a nationwide basis.[1]

The prototype courts have, for the most part, had positive experiences with electronic *filing*, and they are anxious to move to the next step: electronic *service*. At present, such service is not authorized by any of the rules of practice and procedure (although a proposed amendment to the bankruptcy rules would permit bankruptcy judges to authorize certain notices to be served by electronic means). Rather than ask each of the advisory committees to work independently on electronic service rules, the Standing Committee directed Prof. Edward Cooper, the Reporter to the Advisory Committee on Civil Rules, to draft electronic service provisions for the civil rules. The Standing Committee's intent is that, after satisfactory language regarding electronic filing is found for the civil rules, that language can be incorporated into the appellate, bankruptcy, and criminal rules.

Prof. Cooper presented alternative proposals for amending the civil rules at a February 1999 meeting of the Subcommittee on Technology. (The reporters to the advisory committees also attended the meeting.) After considerable discussion, the Subcommittee made a few tentative decisions, and Prof. Cooper agreed to draft amendments implementing those decisions. Prof. Cooper's draft amendments are attached. All of the advisory committees are being asked to review the draft amendments during their spring 1999 meetings and to share their views on the draft amendments at the June 1999 meeting of the Standing Committee. The Subcommittee on

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[1]Unfortunately, no *appellate* court has yet agreed to serve as a prototype, and thus this advisory committee is not benefitting from the ECF Initiative as much as the advisory committees on the bankruptcy, civil, and criminal rules. Judge Garwood has asked the Administrative Office to advise us regarding what might be done to encourage the creation of at least a couple prototype appellate courts.

Technology hopes that the Standing Committee will be able to publish proposed amendments to the civil rules in August and that, after reviewing the comments, the Standing Committee will be able to approve amendments next year. Once language satisfactory to the Standing Committee emerges, the other advisory committees will be asked to use that language in drafting electronic service amendments to their own rules.

As you will see, Prof. Cooper's draft amendments are accompanied by considerable explanation. It may nevertheless be helpful if I highlight some of the tentative decisions that were made by the Subcommittee on Technology at the February 1999 meeting:

1. The Subcommittee decided that parties should have the option to use or not to use electronic service. Thus, under the draft amendments, electronic service cannot be imposed upon an unwilling party. However, if the parties agree to electronic service, a district court may not, by local rule, forbid electronic service to be used.

2. Although the Subcommittee did not want to permit district courts to *block* the use of electronic service by consenting parties, the Subcommittee recognized that the district courts must be free to use local rules to *regulate* such service. A number of difficult questions are likely to arise after parties begin serving each other electronically, and it is important that district courts have the flexibility to address those problems. For example, questions may arise concerning the scope of consent to electronic service. In theory, a party could agree to electronic service of a particular paper, or all papers in a particular case, or all papers in all cases — pending and future — filed by or against that party in that district. A local rule might provide that a party (or attorney) may file a general consent with the court, authorizing electronic service upon her in all

matters filed in that court. Local rules might also address whether and how consent to electronic service might be withdrawn.

I should note that the authority of courts to use local rules to regulate electronic service is not as clear in Prof. Cooper's draft amendments as it might be. The amendments themselves say nothing about local rules (with the exception of local rules permitting service by the clerk instead of by the parties, discussed below). Similarly, the Committee Note mentions local rulemaking only in connection with regulating the "means of *consent*" to electronic service; it says nothing about using local rules to regulate other aspects of electronic service.

3. Under the draft amendments, only "Rule 5" service may be made electronically; "Rule 4" service must continue to be made manually. Roughly speaking, Rule 4 (and Rule 4.1) service is the service that commences a lawsuit — that is, the service of "process" (the summons and complaint) — while Rule 5 service is essentially all of the service that occurs thereafter (e.g., service of answers, discovery requests, and motions). The Subcommittee was nervous about permitting electronic service of the summons and complaint.[2]

4. Under draft FRCP 5(b)(2)(D), service is authorized by "electronic or any other means" consented to by the parties. The phrase "any other means" appears to refer primarily to Federal Express and other third-party commercial carriers. Although inclusion of the words "electronic or" is, strictly speaking, unnecessary (as electronic service would presumably fall within "any

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[2]FRCP 4(d) permits a plaintiff to request certain defendants to waive formal service of the summons and complaint. The rules specifically state that such a request "shall be in writing," FRCP 4(d)(2)(A), and "shall be dispatched through first-class mail," FRCP 4(d)(2)(B). The Subcommittee decided that FRCP 4(d) requests should continue to be in writing, but I see that Prof. Cooper, on his own initiative, has provided a draft amendment to FRCP 4(d) that would permit such requests to be made electronically.

other means"), the Subcommittee wanted the rule specifically to mention electronic service in the hope of encouraging parties to use it. I should note that FRAP 25(c) already provides that "[s]ervice may be personal, by mail, or by third-party commercial carrier for delivery within 3 calendar days." In other words, FRAP already seems to authorize all likely modes of service other than electronic.

5. The Subcommittee struggled with the question of when electronic service will be deemed complete. The Subcommittee rejected a proposal that electronic service be deemed complete upon "receipt" because it is too vague (Is an electronic message "received" when it has reached the server of the recipient but not yet been downloaded to the recipient's personal computer? Is the message "received" when it has been downloaded to the recipient's personal computer but not yet opened by the recipient?) and manipulable (Can a party avoid service by keeping his computer turned off?). The Subcommittee also rejected a proposal that electronic service be deemed complete when the sender receives "confirmation" that his message has been received. Some e-mail programs do not confirm the receipt of messages, while others do. Also, any confirmation rule would be subject to manipulation.

The Subcommittee eventually decided that electronic service should be deemed complete upon "transmission" — roughly speaking, when the sender hits the "send" button on his computer and launches the message on its way through cyberspace. The transmission rule closely parallels the "mailbox" rule of FRCP 5(b), under which service by mail is deemed complete "upon mailing." (A similar rule appears in FRAP 25(c), which states that "[s]ervice by mail or by commercial carrier is complete on mailing or delivery to the carrier.")

6. The Subcommittee considered the question of whether the "three day" rule of FRCP 6(e) should apply to electronic service. FRCP 6(e) currently provides:

> **(e) Additional Time After Service by Mail.** Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon the party and the notice or paper is served upon the party by mail, 3 days shall be added to the prescribed period.

After much discussion, the Subcommittee decided that FRCP 6(e) should be redrafted so that three days are added to the prescribed period whenever service is made by *any* means — including electronic — other than personal service.[3] At first glance, it may seem strange to apply the three day rule to electronic service, which is instantaneous. But electronic service is not instantaneous as a practical matter if it is made at 8:00 p.m. on a Friday night and the recipient does not turn on her computer until 9:00 a.m. Monday morning.

7. Finally, the Subcommittee discussed the fact that, before long, it may make sense to require the clerk, rather than the parties, to serve all papers filed with the court. Software is apparently being developed that would permit the clerk, with a touch of a button, to serve an electronically filed paper on all parties. Under the draft amendment, a district court could, by local rule, authorize service by the clerk instead of by the parties. (For a circuit court to have the same authority, we would need to propose an amendment to FRAP 25(b), which presently requires party service of all papers unless FRAP expressly assigns the responsibility to the clerk.)

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[3]If this amendment is adopted, FRCP 6(e) will closely parallel FRAP 26(c), which adds "3 calendar days" to deadlines that begin to run upon service of a paper "unless the paper is delivered on the date of service stated in the proof of service."

IMPLICATIONS OF ELECTRONIC CASE FILING FOR THE FEDERAL RULES

INTRODUCTION

This memorandum describes some of the implications that filing court cases and documents electronically may have for the federal rules of procedure. It briefly discusses the context in which the courts are moving toward use of electronic case files and their reasons for doing so. Using examples drawn from the courts currently experimenting with electronic filing, this memo will describe, mainly from the litigator's perspective, how electronic filing can operate and how it relates to the federal rules of procedure. It will also highlight some related issues that may be of interest to the Rules Committees.

BACKGROUND

There is little question that the world in general, and American society in particular, is moving toward increasing use of electronic communications. Not only are growing numbers of Americans using e-mail and the Internet, but most attorneys are also at a minimum using computerized word processing to prepare legal documents. Courts, both federal and state, increasingly rely on computer technology to speed and improve their operations. Although court need for storage space and ready access to records may be among the driving forces for these efforts,[1] automated systems have many other advantages for court administrators and judges. For example, the amount of time spent moving and duplicating documents within the court, as well as providing copies to the public, could be reduced if documents were readily available in electronic form. Judges and their staff, who already have access to electronic research materials, docket sheets, and some case management information, could also access the case files themselves, with the text searching and copying opportunities such electronic access can bring.

As part of the judiciary's transition toward increased automation of court operations, the Judicial Conference Committee on Automation and Technology developed the Electronic Case Files (ECF) initiative.[2] The ECF initiative is a part of a broader Automation Committee effort to

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[1]For example, Ohio Northern, one of courts testing a prototype electronic case filing system, was motivated at least in part by the need to handle huge numbers of documents in asbestos litigation pending there.

[2]The ECF initiative includes (1) a project to replace the courts' present automated case management systems (ICMS, etc.) over the next few years with automated systems that perform the necessary case management functions and include electronic filing and case file capability that courts can implement at their discretion; and (2) ongoing efforts to study and resolve various legal, policy, and technical issues that arise in conjunction with electronic filing, e.g., privacy concerns, possible rules changes, questions involving the use of court personnel and other resources, and associated "cultural" issues. As part of the ECF initiative, the Administrative Office has produced a number of documents detailing a variety of aspects of the transition to electronic case file systems. See, e.g., *Electronic Case Files in the Federal Courts: A Preliminary Examination of Goals, Issues, and the Road Ahead, Discussion Draft* (March 1997); Staff paper for the Technology Subcommittee entitled Status of Electronic Filing in the Federal Courts -- Potential Issues and Topics (June 1998).

reduce the federal courts' primary reliance on paper as the medium for creating, storing and retrieving information. Alongside this initiative, nine courts (four district and five bankruptcy courts) are testing prototype ECF systems developed in conjunction with the Administrative Office, and other courts are either testing or at least considering similar prototype systems of their own design.[3]

The ECF prototypes (and other court-based experiments) are testing and refining various ways that electronic filing might operate in the federal courts and how it might mesh with electronic docketing and case management systems.[4] These experiments are not necessarily precise models for future expansion. Rather, the hope is that the judiciary will be able to draw from this early experience, taking advantage of successes and learning from both things that work and those that do not work as planned.

As presently set up, the ECF prototypes generally allow attorneys to file documents in certain cases by sending them over the Internet from their offices to the relevant courts, where the documents are filed, acknowledged, and automatically docketed.[5] These experimental programs currently permit pleadings (except civil complaints), motions, and some (but not all) accompanying documents to be filed in electronic form. The prototypes, which are evolving as they go, vary among themselves in a number of ways. Although this memo is not a detailed description of how the ECF prototypes operate, some specifics will be used as examples and described more fully as part of the discussion below. It is important to keep in mind that future electronic filing systems may or may not follow these models.

ECF systems clearly have implications for the federal rules of procedure. Those rules, developed beginning in the 1930s, and still largely hewing to their original structure, were naturally designed with paper in mind. Although some issues raised by electronic filing may have parallels in the paper world, others do not. This memo will discuss the extent to which the continued and expanding use of electronic filing in the federal courts may require adjustments to the existing rules.

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[3]The prototype courts are: New York Eastern; Ohio Northern; Missouri Western; Oregon; New York Southern (bankr.); Virginia Eastern (bankr.); Georgia Northern (bankr.); Arizona (bankr.); and California Southern (bankr.). The District of New Mexico has developed an Advanced Court Engineering (ACE) system that has been in use in civil cases in the district court for over a year, and is now being extended to cases in the bankruptcy court. The Court of Appeals for the Second Circuit is currently exploring possible use of electronic filing in its appellate proceedings.

The experience so far is that use of electronic filing in the prototype bankruptcy courts has generally been heavier than in the district courts.

[4]The ECF programs also provide capability to provide electronic notice, as well as expanded case file access.

[5]In at least some courts, documents can be filed on diskette and/or court personnel convert paper filings into electronically imaged form.

RULES ACTIVITY SO FAR

Electronic filing of documents in federal court may take place only to the extent that it is permitted under the applicable rules of procedure. In 1996, as a first step in the transition from all-paper systems, and in recognition of the need for local experimentation during that time, the federal rules were amended to provide that:

> A court may by local rule permit papers to be filed, signed, or verified by electronic means that are consistent with technical standards, if any, that the Judicial Conference of the United States establishes. A paper filed by electronic means in compliance with a local rule constitutes a written paper for the purpose of applying these rules.[6]

Thus, the federal rules of procedure currently offer considerable flexibility to individual courts that want to implement electronic case filing systems, by allowing them to use local rules to address relevant procedural issues. It should be noted that the amendment quoted above addresses filing documents with the court, but it does not provide authority to alter the manner of service, either of the original process or of subsequently-filed documents. Although the Judicial Conference has not issued any technical standards, the Committee on Automation and Technology has approved non-binding technical standards and guidelines.

In addition, amendments to the Federal Rules of Bankruptcy Procedure that would permit electronic service of certain types of documents are currently under consideration.[7]

The courts now testing prototype ECF systems have in some instances issued local rules specifically authorizing electronic filing, although many are instead using general orders to establish (and in some cases modify) the actual procedures.[8] In many cases, these have been supplemented with detailed "user guides" or "user manuals" that focus on the technical aspects of electronic filing.

Although this structure appears to be working for the prototype courts, the Rules Committees will need to consider whether this "localized" model is the most appropriate as increasing numbers of federal courts make the transition to electronic systems. The appropriate

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[6]FED. R. CIV. P. 5(e); see also FED. R. CRIM. P. 49(d); FED. R. APP. P.25(a)(2)(D); cf. FED.R. BANKR. P. 5005(a)(2), 7005(e), 8008(a).

[7]Proposed FED. R. BANKR. P 9013(c), currently out for public comment, provides that "the court by local rule may permit the notice to be served by electronic means that are consistent with technical standards, if any, that the Judicial Conference of the United States establishes." See also FED. R. BANKR. P 9014(c)(2)(identical language).

[8]See attached charts that summarize the local rules and procedures for the courts testing the AO-developed prototype and the District of New Mexico.

scope and timing of action on issues discussed below should be the subject of further consideration. In the short term, the Rules Committees should consider amending the relevant rules to allow electronic service. These questions will be discussed in more detail below.

LITIGATION IN THE ELECTRONIC WORLD

The next sections of this memo follow a hypothetical piece of litigation through an electronic filing process, noting some of the rules issues as it goes along. The discussion will be largely from an attorney's point of view, since attorneys are the primary users of the federal rules of procedure. As appropriate, however, issues relevant to judges and court staff will also be noted. This is intended not to be an exhaustive discussion of every possible issue, but rather to highlight the fact that the federal rules of procedure do come into play in some different ways in electronic and paper systems. It is useful to keep in mind that issues arising from electronic filing of documents often have parallels in the paper system, some of which issues are and some of which are not addressed in the rules.

I. Do all courts have electronic filing systems?

No. Although the 1996 amendments to the federal rules authorize courts to issue rules permitting electronic filing, at present, only a limited number of courts have done so and are set up to receive electronically filed documents.[9] Five bankruptcy courts and five district courts presently offer some sort of electronic filing.

A. Which cases are potentially eligible for electronic filing?

For courts with the technical capability to accept electronic filings, any or all types of cases could be deemed eligible to use the system. As courts first begin using ECF systems, however, electronic filing might well be limited by rule or practice to certain categories or types of cases. Judges might encourage certain cases or types of cases to use electronic filing. Or, courts could rely on parties to make the decisions among themselves.

All the courts testing prototype systems have initially limited the types of cases eligible to participate in the experiment, although actual practice is evolving beyond those limitations. Although a prototype is now being developed for use in criminal cases, none of the district courts currently permits electronic filing in criminal cases. Some bankruptcy prototype courts limit electronic filing to certain types of cases (e.g., Chapter 11 proceedings); in others, it is left to the judge's discretion on a case-by-case basis. Some prototype courts are urging particular types of cases into their ECF system, either by general order or on a case-specific basis. For example, Ohio Northern's general order mentions civil rights and intellectual property cases as an initial

[9]The 1996 amendments also authorize courts to permit filing by facsimile. This memo, however, focuses on systems that provide documents in electronic form.

focus, although the practice has not followed this suggestion. Judges in New York Eastern have urged a large number of student loan collection cases into the ECF system. In Missouri Western, the court retains discretion. In New Mexico, all court orders are now included in the ECF system, but any party may choose whether to file a given document in a case electronically.

Rules issues: *Should case eligibility for electronic filing be addressed by rule?*
If so, should categories of cases be limited?
Should selection criteria be set out?
Should parties' consent be a criterion?
How much discretion should there be, and who (court or parties) should exercise it?

B. Are there other limitations on ECF participation?

Most prototype courts limit electronic filing to members of the court bar. Few allow electronic filing in pro se cases. In the future, arrangements might be devised to allow pro se litigants to file electronically, using computer terminals in the courthouse or at other remote locations. Issues relating to prisoner cases will need to be considered, and some standards or limits on filing and docketing might need to be developed.

Rules issues: *Are there issues that should be addressed by rules?*

C. At what stage of the case may documents be filed electronically?

The federal rules in their present form authorize electronic filing of documents (but not electronic service). The rule language quoted above (at note 6) would appear to authorize electronic filing of a complaint or other initiating document, as well as subsequent papers. It does, however, leave some unanswered questions relating to filing complaints electronically; for example, questions relating to effecting personal service, payment of filing fees, and who is authorized to file electronically. (See further discussion in section IV below.)

Since none of the district courts testing prototype systems currently permits electronic filing of a complaint or electronic service of process, complaints are still filed "conventionally." Most of the local rules and orders do not address the issue of when a case can or should enter the electronic filing system. Several prototype courts currently use the initial case management or "Rule 16" scheduling conference to discuss whether ECF is appropriate for a particular case. In other courts, parties may use electronic filing whenever they are all willing to participate and the court approves.

Many of the bankruptcy prototype courts do provide for electronic filing of bankruptcy petitions. Since petitions need not be "served" for the purpose of obtaining jurisdiction on anyone, issues of personal service do not arise.

Because the initial pleading generally may not be filed electronically, courts are providing that the complaint, and any other documents previously filed in paper form, are to be "back-filed" electronically in cases put into the ECF process.

Rules issues: *Should courts be encouraged to permit electronic filing of complaints or other initiating documents?*
How would courts handle situations where one or more parties is not equipped (or willing) to file electronically?
How could and should personal service be accomplished electronically (see discussion below, section IV)?
At what stage in the litigation should decisions on ECF participation be made?
Should use of electronic filing be included in the issues set out in Fed. R. Civ. P. 16 and corresponding sections in other rules?

D. Is participation in ECF programs mandatory?

Courts have historically relied on paper-based records. They are, however, beginning to enter into a transition period. The key is how to manage that transition. Electronic case filing could be made universally mandatory, courts or the rules could require it in certain types of cases, it could be subject to agreement among the parties, or individual parties could make the decision for themselves without regard to whether other parties are filing electronically. If electronic filing were to be made mandatory, the issue of how to provide for those without their own access to the means to file electronically would have to be addressed.

Participation is voluntary in all the district court prototype programs. In many courts, all parties have to consent to participation. In the District of New Mexico, the court accepts electronic filing from single parties. In the bankruptcy courts, participation is voluntary, although the Southern District of New York has persuaded the bar to file electronically in all Chapter 11 cases.

Although paper-based and electronic filing systems will likely co-exist for a considerable time, courts will most likely at some time in the future choose to move to an electronic system for most if not all types of cases. Requiring litigants to participate in electronic filing would probably speed the transition. On the other hand, mandatory participation would impose a burden on those not prepared to use it.

Rule issues: *To what extent should the scope of participation in electronic filing be addressed in rules?*
Should courts be authorized to require parties to participate in electronic filing?
Should it be dependent on a finding that parties are capable of doing so?

II. What is needed to participate in electronic case filing programs?

As a practical matter, participating in an electronic case filing system requires certain hardware and software. The 1996 federal rules amendments authorize electronic filing subject to "technical standards, if any, that the Judicial Conference of the United States establishes." Although the Automation Committee has approved technical guidelines that recommend compliance with certain standards, they are not mandatory, and the Judicial Conference has not been asked to endorse them.

Obviously, technology is not static. It is not possible to predict exactly what hardware and software will be used over time.

The ECF prototypes are designed to let attorneys use "off-the-shelf" and readily available hardware and software to the extent possible. The prototypes all are based on using the Internet to transmit documents electronically from law offices to the court (and vice-versa in some situations). The technological options over the long term are hard to predict.

A. What kind of hardware is needed?

Participation in the prototype ECF programs generally requires a sufficiently powerful computer and a modem (for Internet access). Depending on what kinds of documents a user may want to file, and whether they are available in electronic form, a scanner may be necessary.

B. What kind of software is needed?

Documents are prepared on a basic word-processing program. Because the prototypes all are requiring filed documents to be converted into a particular format (called PDF (portable document format)) before they can be transmitted to the court, the software necessary to do that conversion must be purchased -- Adobe Acrobat PDF Writer is the currently-used software. The software for reading documents in PDF format, Adobe Acrobat Reader, can be downloaded free from the Internet. Because the Internet is used to transmit documents to the court, a connection through an Internet Service Provider (ISP) is needed. An Internet browser is usually available at no charge from the ISP, but users need to check to make sure it is one that is compatible with the court's program. Because certain notices are being transmitted over e-mail, an e-mail address (usually available through the ISP) is needed.

C. How can users learn how the system works?

All the ECF prototype courts provide training and education. They all have user guides or other instructional materials to help users understand how the process works. In addition, most have a "training" site as part of their court websites that offers potential users a fairly quick and straightforward opportunity to practice before they actually try to file a document. Some courts also have help lines, and all are currently providing some type of hands-on training.

D. Does it cost anything to participate?

None of the prototype courts is currently imposing any user or other ECF-specific fees, although this may change in light of the Judicial Conference's recently adopted policy on fees for Internet access.[10]

Normal document filing fees remain applicable. Because ECF programs involve filing documents without appearing at the courthouse, courts have to develop ways to get fees paid. Some prototypes, mostly in bankruptcy courts, have arranged for prior authorization of credit card charges, but others do not presently permit electronic filing of documents where fees are concurrently required (see discussion above). None currently provides for electronic payment by credit card.

Rules issues: Are there any issues that need to be addressed by rule?

E. What about document security issues?

At least two separate issues are involved here: (a) making sure that only people with the proper authorization are filing electronically; and (b) being able to detect any alteration to filed documents.

The prototype courts are providing approved users unique passwords and identifications, which must be used to enter documents into the system. (See discussion below (section V(D)) about signatures and verifications.) Users are warned not to share those numbers, since documents filed with those passwords and IDs are assumed to be authorized.

Courts also have to be concerned about post-filing alterations (by "hackers" or others). Document security is a widely applicable concern for users of Internet technology, and is being considered in a broad range of contexts.

All prototypes are attaching a unique electronic document identification to each filed document. Any change to that document will automatically change that ID, so that tampering can be detected.

III. What rules and other procedures apply in ECF cases?

As noted above, national rules (e.g., Fed. R. Civ. P. 5(e)) authorize local rules to deal with local electronic filing programs. Individual prototype courts have issued local rules, often in conjunction with general orders, to address the specifics of their programs. In addition, many

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[10]In September, 1998, the Judicial Conference approved an "Internet PACER fee" of $.07 per page for PACER information obtained through a federal judiciary website.

have issued user guides to help explain the program. For the most part, these rules and procedures are available on the individual court's web site, and can be downloaded.

However, as more courts offer or use electronic filing systems, and as more experience develops, a more uniform set of procedures may be preferable. Some combination of national and local rules is one alternative, particularly if individual courts or circuits retain discretion to decide when, and in what manner, electronic filing is permitted.[11] (See discussion below in section XI.)

Rules issues: *Should rules relating to electronic filing be part of a national rule, be dealt with in local rules, or be a combination?*
If national rules are developed, should provisions applying to electronic filing be incorporated into the appropriate existing rules, or should they be put together into one rule?
Should any rule continue to contain express authorization for the Judicial Conference to issue technical standards?

IV. How is a complaint or other initiating document filed and served electronically?

As noted above (section I(C)), the rules authorize electronic filing of any document (including a complaint), but do not currently authorize electronic service of process or of other documents. Courts could thus permit parties to file initiating documents with the court electronically. This raises issues of whether the plaintiff should be the one to decide whether a case will be part of the ECF system, fee issues, as well as issues relating to court control over the bar, e.g., who is authorized to file a case at all. Electronic service of process raises additional technical and due process issues, including whether the defendant or other parties can or ought to be required to accept electronic service of process, how electronic service of process would actually occur, how receipt could be verified, and separately, whether proof of service could be filed electronically.

As also noted above, none of the prototype district courts currently permits filing or serving the complaint in a civil case electronically. For cases that are ultimately put into the ECF system, the prototype courts require previously filed documents (including the complaint) to be "back-filed" electronically, so that the electronic case file is complete.

In the bankruptcy court prototypes, petitions may be filed electronically in some courts. These do not raise "service of process" issues.

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[11]Another relevant factor is the extent to which electronic filing is expected ultimately to completely replace paper files, as opposed to having parallel systems.

Rules issues (filing of complaint) (Fed.R. Civ. P. 5, Fed. R. Crim. P. 49, Fed. R. App. P. 25):
Should the rules treat the electronic filing of the complaint or other initiating documents differently from filing any other paper?
What if the other party consents?
How do fee payment issues get resolved?

Rules issues (service of process) (Civil Rule 4):
Should electronic service of process be authorized in Civil Rule 4?
How could receipt be ensured and verified?
Could companies be required to designate "electronic agents"?
Even if actual electronic service of process were not authorized, could proof of service be filed electronically?
Should there be a difference in the way service is handled under Civil Rules 4 and 5? See also Fed. R. Crim. P. 5, 9. See also section V(F), below.

V. How are documents actually filed in an ECF case?

The procedure for filing depends on how a particular court has set up its ECF program. It is likely that electronic filing systems will evolve over time, as technology changes and improves.

For the courts currently testing prototype systems, a document has to be in a specific format the court can accept. Prototype courts are currently requiring electronically filed documents to be in a specific electronic format, called "portable document format" or PDF. Thus, the document would first be created in the usual way on a word processor. Commercially available special software (such as Adobe Acrobat PDF Writer) is needed to convert the document to PDF. Once the document is in this format, a filer goes to the court's web site and follows the instructions. (As noted above, most of the courts have training sites that let users try out the system in advance.) Part of the instructions involve creating the docket entry. The last step involves attaching the document to be filed (in PDF form) and sending it off to the court.[12]

Most of the prototype courts' rules or orders specifically provide that electronically-filed documents are considered "filed" or "docketed."

Rules issues: *The rules authorizes electronic filing if permitted by local rule. Is this sufficient?*
Should a national rule address specific issues?
Does the rule need to be explicit about when a document is deemed filed?

[12]As noted above, some courts permit documents to be filed on disk.

A. How does the filing get docketed?

An advantage of electronic filing systems is that the docket entry can be prepared by the filer as part of the document transmission process, thus reducing the burden on the clerk of court. However, the clerk's role in monitoring the quality of docket entries needs to be considered.

The prototype court systems are designed so that the docket entry is prepared by the attorney as part of the filing process, using an approved list. The electronically filed document gets docketed automatically at the time it is filed.

The clerk of court in a prototype court therefore does not have to prepare a docket entry for documents filed electronically. Although the prototypes provide that the documents are considered docketed at the time they are electronically filed, some of the prototypes specifically provide that the clerk retains the ability to review and modify the docket entry as appropriate.[13]

Rules issues: *Are any rule changes needed to address docketing issues?*
Should attorneys expressly be given the authority to prepare docket entries?
When should an electronically filed document be deemed docketed?
Should documents intended for filing be "lodged" subject to clerks' determination that an entry is appropriate for docketing?
Should certain categories of cases (e.g., pro se cases) be treated differently?

B. Can electronic filing be acknowledged by the court?

Prototype courts provide an automatic computerized acknowledgment, which is the functional equivalent to a date-stamped paper copy of the filing obtained from the clerk.

C. How are technological glitches and format problems handled?

As with paper systems, technological or other glitches do occasionally occur. This may prevent documents from being filed in a timely way. Provision may need to be made for problems (e.g., failures with the court's computer system, Internet problems, ISP problems) that prevent documents from being filed (or perhaps retrieved). Other types of technical problems also need to be addressed; for example, documents that are "filed" but cannot be read, because they are in the wrong format or for other reasons.

Many of the prototype courts provide that documents that cannot be timely filed because of technical failures may be filed the next day. Some sort of affidavit, other evidence of attempts to file, and/or notice to the clerk of the problem is required. Documents are then filed and backdated.

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[13]Initial experience suggests that the error rate in lawyer-prepared docket entries has been quite low.

Only one of the prototypes' rules addresses the question of a document timely filed but in an unreadable format. In that court, the document may be re-transmitted within 24 hours of discovery of the problem.

Rules issues: *How, if at all, should the rules address failure to file timely because of technological glitches?*
Should it matter what type of problem it is (Internet congestion or other problems, court system problem, attorney office problem)?
What remedy, if any, would be appropriate?
Current rules (e.g., Fed. R. Civ. P. 5(e) and Fed. R. Crim. P. 49(a)(4)), preclude the clerk from refusing the filing of a document just because it is not in "proper form." Should there be a different rule if the electronically "filed" document is unreadable?

D. How does the court (or clerk) know who actually filed the document?

Because electronic documents cannot be "signed" in the traditional way, various technologies exist or are being developed that are capable of injecting a unique "signature" into a document. This raises a variety of complex issues, which are being considered in a wide range of other contexts.

The rules currently require signatures for several different purposes, including as an indication that a document was filed by someone entitled to file it, as verification of the truth of the contents (e.g., for affidavits), and for Civil Rule 11 certifications.

Prototype courts are issuing unique passwords and IDs for ECF system users. They treat use of those as equivalent to a signature. Thus, users are warned not to share the passwords with others.

Rules issues: *What kinds of signature requirements should exist?*
Do they need to be the same for Fed. R. Civ. P. 11(a), 11(b), Fed. R. Bankr. P. 9011, and affidavits and other documents signed under oath?
What kind of authentication should be considered adequate?

E. How are signatures of third parties handled?

Documents sometimes must be signed by someone other that the person filing the document (e.g., affidavits) or by multiple parties (e.g., stipulations). Since current digital signature technology does not provide for transmitting "signatures" of third parties, some sort of alternative process is necessary. For example, each signing party could file the document separately, or the non-filing parties could file separate endorsements. Where a signer, e.g., a client or other third party, does not have a password into the electronic filing system, signed paper versions could be required to be maintained.

Many of the prototype courts require non-filing party-signatories to a document to file an electronic endorsement. However, most of the prototypes also ask that the filing party keep a paper original with all signatures on file. A similar process is used for documents requiring client or other third-party signatures.

In a few bankruptcy courts, a signed original of a bankruptcy petition must be filed with the clerk. In others, the original need only be retained by the party.

Rules issues: *What kind of authentication should be required for documents with multiple signatures or signatures of others than the filing attorney?*
What kinds of other record copies should be required and/or retained?

F. How are electronically filed documents served on other parties?

The federal rules require mail or personal service of filed documents. There is currently no authorization for electronic service. Most of the prototype courts operate on the parties' consent to accept electronic service.[14]

Were electronic service to be authorized, a variety of implementation mechanisms are available. These might include requiring the filing party to electronically transmit a copy of the document to each party, permitting electronic notice of filing to constitute service if it includes a "hyperlink" providing direct electronic access to the document being filed, or permitting electronic notice of filing to constitute service with the recipient then expected to go to the court's website to access the document. Another alternative is for the court itself to transmit notice of the filing automatically to all parties (with or without a hyperlink or the document itself attached). Provision must also be made for certificates of service.

The prototype courts vary on what kind of electronic notice and transmission of documents parties consenting to "electronic service" must receive. In some, sending another party notice by e-mail that a document has been filed is adequate service; the receiving party then must retrieve the document from the court's website. In some prototypes, a hyperlink (and thus direct access) to the document will soon be provided along with the notice of filing. For some, the whole package must be sent electronically. Several prototypes specifically provide for electronic filing of certificates of service; otherwise the assumption is that certificates of service are filed like other papers (either as part of the filing in question or separately).

Some of the prototype courts provide automatic e-mail notice that a document has been filed to all parties (and in some cases, to any member of the public interested in receiving such notice). This raises the question whether the court could or should ultimately take responsibility for service of documents.

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[14]In bankruptcy and in most district court prototypes, participation in electronic filing programs requires agreeing to accept electronic service and notice.

In some of the prototypes, parties are also required to provide paper copies of filings to the presiding judge.

Rules issues: *The rules currently contain no authorization for electronic service of documents. The only basis on which it is being done is by consent of parties. Does it need to be authorized by national or local rule?*
Should there be different procedures for service of the complaint (e.g., Civil Rule 4) or other initiating document and for service of subsequently filed documents (e.g., Civil Rule 5)? (See discussion above, section IV.)
Who should have responsibility for service?
What needs to be sent (only a notice of filing, or the underlying document itself)?
What kind of proof or certification of service would be required?
What kind of verification of actual receipt, if any, might be required?

G. Are there any changes needed to the applicable filing deadlines or time computation rules when documents are electronically filed?

Electronic filing (and service) have the potential to be virtually instantaneous. Occasionally, however, problems with Internet access, court or private computer systems being out of service, or other technical problems can affect how quickly documents are transmitted. This raises questions about how to treat electronically filed documents for the purposes of deadlines and time computations. Electronic filing could be treated as service by mail (i.e., allowing three extra days), as needing no extra time, or as something else. In addition, because documents can be electronically filed from a remote location, time zone issues might even come into play.

A few of the prototype courts have made adjustments to the rules governing computations of time; in one court, one additional day is added for the purposes of Fed. R. Civ. P. 6(e); in another, electronic service is treated as service by mail, and the three-day addition remains in effect. Prototype systems use the time at the court where the document is being filed as controlling.

Rules issues: *Should the fact that electronic transmission of documents can be virtually instantaneous have an impact on the amount of time allowed in the rules for various actions?*
If yes, what provision might be necessary in Fed. R. Civ. P. 6, Fed. R. Crim. P. 45, Fed. R. App. P. 26 and/or Fed. R. Bankr. P. 9006(f) to address technological glitches?

H. How are exhibits or other attachments filed?

Exhibits and attachments may or may not be available in electronic form. If they are in (or can be converted through imaging or scanning into) electronic form, they generally can be filed along with the underlying document. If not, some sort of separate filing would have to be

permitted. On the other hand, technology permits a broad range of information to be presented electronically, including video and audio information.

In a few prototype courts, there are some limits on the size of documents that can be filed over the Internet. Larger documents in electronic form may be filed on disk in some prototypes. Documents that are not in electronic form, and cannot be converted, are filed conventionally in most prototypes. In at least one prototype court, an electronic "notice of manual filing" is required if the document is filed conventionally.

From the perspective of the clerk of court, non-electronic filings in cases where much of the case is in electronic form will require additional handling.

Rules issues: *Are rules needed to address this? Would this always remain a local rule question?*

I. How are documents handled that are (or may be) subject to a sealing or other protective order?

Because electronically filed documents are potentially readily and very publicly accessible, provision needs to be made for filing of documents that the court has put under seal, as well as for documents that a party seeks to, but has not yet been authorized to, put under seal. For the former, non-electronic filing might be permitted, and/or the document could be filed on disk for use in a non-public database. For the latter (e.g., motions to seal), the motion itself might be filed electronically, with provision made to keep the potentially sealed document out of the electronic database until the court has ruled.

The prototype courts prohibit electronic filing of documents that are to be filed under seal. Several courts provide that a motion to seal and any court order authorizing filing under seal are to be filed electronically. (See further discussion below, section X(C).)

Rules issues: *No rule currently governs documents under seal. Should special provision be made for electronic filing of documents filed under seal?*
Should such documents be filed electronically but with a mechanism to block public access?
How should documents not yet subject to a sealing order be handled?

J. How are discovery documents handled?

Most discovery documents are not currently filed with the court, unless a judge orders it; a proposed rule amendment would formalize this practice.[15] None of the prototype courts is

[15]Proposed FED. R. CIV. P. 5(d), currently out for public comment, would provide that discovery requests and material are not to be filed with the court except as used in the proceeding itself or by court order.

accepting electronic filing of discovery documents, except as ordered by a judge or to the extent that particular documents are filed as attachments or exhibits.

The prototypes also do not address parties' ability to exchange discovery material among themselves electronically.

Rules issues: *Should the courts accept electronic filing or lodging of discovery?*
Is there any reason why the courts should serve as conduits for electronic exchange of discovery?
Should the rules address electronic exchange of discovery material among parties?

VI. What are the ECF implications for the trial?

Trial exhibits, trial transcripts and other documents become part of the record during a trial. Should they become part of the electronic case file? [16]

A. Can trial exhibits be filed electronically?

Trial exhibits entered into evidence during the proceedings could be "filed" into the record either during the trial itself or subsequently, depending on the types of facilities available in the courtroom. Even prior to trial, proposed exhibits could be "lodged" with the court electronically. Exhibits could be available on CD-ROM. To the extent that exhibits involve items that are not available in electronic form, and cannot be scanned (or otherwise imaged into electronic form), more traditional forms of filing would be necessary. These issues could be addressed at the final pre-trial conference.

One of the prototype courts provides that trial exhibits admitted into the record can be placed into the electronic filing system. Some of the prototypes allow electronic filing of some trial-related documents (e.g., witness and exhibit lists), but do not address the electronic filing of trial exhibits. One requires conventional filing. Others do not address trial issues at all.

Rules issues: *Should the rules address whether trial exhibits can be filed electronically?*
Should they address issues of whether trial exhibits should be part of the case file or docket?

B. Does the trial transcript become part of the electronic file?

Court reporters are increasingly making transcripts available in electronic form after the hearing. In some cases, the transcripts are even being electronically displayed during the hearing.

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[16]Some similar issues will arise with respect to other documents relating to proceedings but not part of the record, such as arrest warrants.

Should transcripts be included in the electronic case file? Should they be publicly available? Should they automatically be available for the record on appeal? What is the impact on court reporters?

28 U.S.C. § 753(b) provides that the transcript of a court proceeding (in at least note form) is to be filed with the clerk and made part of the public record. This suggests that an electronic version could be put into the electronic docket.

One prototype court provides that transcripts are to be filed conventionally. None of the other prototypes addresses this issue.

Rules issue: *Does the fact that this is a statutory rather than a rules provision affect whether a rule should address issues relating to transcripts?*
Should this be addressed, if at all, by national rule?

VII. Are court orders and decisions part of the electronic record?

Court orders, judgments and other decisions can readily be made a part of an electronic case file system, since the documents are generally prepared in chambers on computer. Notice of such documents could be provided to parties electronically, as could copies of the documents themselves. Current rules require service of orders and judgments by mail.

Court orders and judgments for ECF cases in prototype courts are generally available as part of the electronic file. In most prototype courts, the rules provide that the court can give electronic notice of court orders and decisions, although the rules do not specifically state how the documents are accessed (e.g., by hyperlink, by accessing the court electronic file). It appears that prototypes are relying on the consent of the parties to overcome the continuing requirement of service by mail.

Courts may want to think about the implications for the distinctions between published and unpublished opinions.

Rules issues: *Do the service rules (Fed. R. Civ. P. 77(d); Fed. R. Crim. P. 49(c); Fed. R. App. P. 45(c); Fed. R. Bankr. P. 9022) for court orders and judgments need to be altered?*

VIII. How does electronic filing in the lower court affect an appeal?

Having the trial court record in electronic form has implications for the courts of appeals. To the extent that appellate courts accept the record in electronic form, transfer could be easy and quick. The record could be forwarded electronically from the lower court, or the appellate court could access or extract the information it needs directly from the trial court site. In situations

where the appellate court does not accept electronic files, the lower court or the parties would have to arrange for creating paper copies of the files for appeal purposes.[17]

Clerks of the courts of appeals and bankruptcy courts are currently required to serve notices of appeals by mail. See Fed. R. App. P. 3(d); Fed. R. Bankr. P. 8004.

There are currently no electronic filing experiments at the appellate court level, although the Administrative Office and at least one court are in the process of developing prototype systems. A few courts of appeals are accepting briefs in electronic form on disk. One of the prototype courts states in its order that it will provide either a paper or an electronic copy of the record, as requested by the appellate court.

Rules issues: *Should there be any change in where and how an appeal is initiated? (Appeals are currently initiated in district court so that the court can certify the record.)*
Should provisions for service of notices of appeals be amended?
How should record certification and labeling be handled?
How should record transmission be handled (if at all)?

IX. Is the official record in electronic or paper form?

The official record of a proceeding currently is derived from records in paper form. Should this be different for cases where the documents have been maintained in electronic form? Is a dual system feasible, and if so, for how long? How should issues relating to those without access to electronic technology be handled?

The District of New Mexico provides that for electronically filed documents, "the official document of record is the electronic document stored in the Court's data base." Other prototypes do not address the issue directly, indicating only that an electronically filed document is considered "filed" or "docketed."

Rules issues: *Is this a rules issue at all? See Fed. R. App. P. 10; Fed. R. Bankr. P. 8006.*

X. What other implications does electronic document filing have?

The existence of court case records in electronic form will have impacts on and implications for a variety of other rules-related matters. A few of those will be discussed below.

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[17]Similar issues would arise with respect to appeals to the Supreme Court.

A. How will record retention be handled?

Until such time (if ever) that the courts have a totally electronic system, there will be questions about retaining paper copies of documents. During a transition period (and perhaps more long-term than that), what paper records should be retained, by whom, and for how long? The questions about length and form of retention will also arise for records in electronic form.[18] Unless and until there is a widely accepted method of transmitting signatures electronically, paper copies of documents with original signatures will probably need to be kept. They could be retained by the parties or by the courts.

As noted above (section IX), long-term answers to these questions will depend on the form in which the official record is determined to be kept.

Most of the prototypes require that paper copies of all electronically transmitted documents be retained by attorneys. Others require retention of paper versions of some documents (e.g., documents that were converted to electronic form via scanning, documents containing multiple signatures or signatures other than that of the filer).

Rules issues: *Who (clerks, parties) should be required to retain records, in what form and for how long?*
To what extent should this be addressed in rules?

B. How might electronic filing affect retention of other documents that might be used as evidence?

A wide variety of documents, prepared by government entities, businesses and others, are routinely entered into court records as exhibits and trial evidence. To the extent that the original documents are kept in electronic form, submitted versions (in electronic or written form) need to be authenticated. Authentication is also an issue where documents are converted from paper into electronic form. Decisions about the admissibility of official and other documents in court proceedings may well affect the routine document preparation and archiving practices of government entities and others.

None of the prototypes address these issues.

Rules issues: This is both an evidence issue (e.g., Fed. R. Evid. 902,1002-1005) and a question of procedure (see, e.g., Fed. R. Civ. P. 44).
How will documents (not pleadings) be authenticated when they are maintained in electronic form (i.e., when the creator of the document creates and stores it electronically), or when they are converted from paper to electronic form for submission?

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[18]Archiving requirements also come into play.

C. How might the existence of electronic case files affect access to those files?

Electronic documents have the potential to be easily accessible. In fact, this is generally considered to be one of their great advantages. They can be accessed from remote locations, and by more than one person at a time. Thus, a document in an electronic court file could be available at any time to anyone. This raises issues of what ought to be available, and to whom.

A court could make the entire electronic file available over the Internet, including all docket entries, party filings, and court actions. It could make subsets of the file available to different groups (e.g., court employees, parties, the public). For example, the docket sheets could be available to the public, with the party filings available only to parties. The court could permit public access to the entire electronic case file, or it could limit public electronic access to certain types of documents (e.g., ones that implicate privacy issues, such as medical records, tax returns, other very personal information), even though they are not subject to seal.

Most of the prototype courts are permitting public access to the entire electronic case file (party filings and court decisions). Some are permitting public access to the docket sheet, but limiting access to the underlying documents to registered ECF system users (and court employees).

Rules issues: *Is the scope of electronic access an issue that should be addressed in rules at all, given that rules do not govern the paper analog?*
Should access be broad, or more limited?
Should electronic access be co-extensive with what would be available at the courthouse, or do the privacy or other implications of potential unlimited access suggest that some additional limitations should be put on electronic access?
Should the rules address changes in what is actually filed by parties?

XI. What are the next steps?

This paper has sought to raise at least some of the rules issues that derive from use of electronic case filing. In addition to the substance of how those issues should be handled in specific rules, there are the threshold questions that need to be addressed:

(1) Should the national rules be amended to address the range of specific issues, should they be handled through local rules, or should there be some sort of combination?
(2) If the issues are handled at the national level, when should that happen? Is the time ripe to consider amendments to the national rules? Should all issues relating to electronic filing be addressed at one time?
(3) Should amendments addressing electronic filing be included as part of the various rules addressing the issue in the non-electronic context, or should they be put together in one rule addressing electronic filing?
(4) Should a model local rule be developed?

There are pros and cons to various approaches. A national rule promotes uniform practice across the country, and it is the direction that the Judicial Conference (and many others) believe is the best way to approach rules generally.[19] Particularly since technology eliminates some kinds of geographical barriers, a national rule may be appropriate. On the other hand, electronic filing is still in its relative infancy, and practice has certainly not gelled around a particular approach. It may not yet be appropriate to discourage local experimentation. Even if the ultimate goal is a national rule, the current approach of Rule 5 -- authorizing local rules -- may be the best approach for the present.

In the short term, the Civil Rule 5 authorization of local rules for electronic filing seems to be adequate to support current use. But, electronic service (Civil Rule 5 and perhaps Rule 4 service) should be addressed. Service issues are generally being handled in the prototype courts by consent. A provision in the federal rules allowing local rules to authorize electronic service (of pleadings and perhaps of process), would probably be sufficient as an interim measure to allow electronic filing programs to go forward. On the other hand, a national rule similar to the proposed amendments to Bankruptcy Rules 9013(c) and 901(c), specifically authorizing electronic service, might be appropriate.

A model local rule, perhaps containing various options, might also be helpful to courts that want to experiment with electronic filing. Such a model might help promote some consistency, or might be a way to test various approaches.

The Committee ought also to begin considering how and when to address the range of other rules discussed above. A preliminary list of rules potentially affected by electronic filing is attached.

CONCLUSION

The development of electronic case filing systems for federal court litigation has implications for the federal rules of procedure. The rules currently authorize local rules to permit electronic filing, and courts experimenting with prototype systems have developed local rules and orders to address a wide range of issues that arise when litigation documents are in electronic form. The Rules Committees should develop a strategy to address such issues as electronic filing becomes more widespread. In the short term, the committees should consider authorizing electronic service as a next step.

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[19]See, e.g., Judicial Conference of the United States, *Long Range Plan for the Federal Courts* 58 (Dec. 1995)(Implementation Strategy 28b).

ATTACHMENT

Local Rules and Procedures Governing Prototype Electronic Case File (ECF) Systems in the Federal District and Bankruptcy Courts

(As of December 7, 1998)

NOTE: To date, one court testing an ECF prototype system—the U.S. District Court for the District of Oregon—has not adopted a local rule or order generally prescribing special procedures for electronically filed cases. The electronic filing procedures in that court are presently established on a case-by-case basis.

Prepared by the Office of Judges Programs, AOUSC

December 7, 1998

Local Rules and Procedures Governing Prototype Electronic Case File (ECF) Systems in the District Courts

Topics/Issues	District Courts			
	Missouri-Western (ecf.mowd.uscourts.gov)	**New York-Eastern** (ecf.nyed.uscourts.gov)	**New Mexico** (www.nmcourt.fed.us) [both district & bankruptcy]	**Ohio-Northern** (ecf.ohnd.uscourts.gov)
Source of ECF Procedures	• En Banc Order (Electronic Filing), dated Nov. 6, 1997 • ECF Procedures Manual, dated Nov. 18, 1997 • Electronic Case Files (ECF) User Manual, dated Oct. 20, 1998	• Administrative Order 97-12, dated Oct. 23, 1997 • User's Manual for ECF [Electronic Case Filing], dated Dec. 5, 1997	• Local Civil Rules 5.5, 5.6 & 83.6 • Local Bankr. Rules 5005-4b & 7005-1 • Administrative Orders 97-26 (dated Feb. 11, 1997) & 97-83 (dated June 9, 1997) • ACE User Documentation, dated Apr. 15, 1998 • Standing orders entered in individual cases when a party advises, at the first conference with a judge, that the party wishes to participate in the case electronically	• Local Rules 5.1, 16.3(b)(2)(B) • General Order 97-38, dated Oct. 6, 1997 • Electronic Filing Policies and Procedures Manual, dated Feb. 2, 1998 (adopted pursuant to Gen. Order 97-38)
Cases Accepted for Electronic Filing	Court selects cases for ECF and notifies the parties (En Banc Order ¶ 1)	• Electronic filing potentially authorized in any civil case assigned to a judge who agrees to participate in testing the prototype system (Admin. Order 97-12, ¶ 2(a)) • Cases become subject to electronic filing procedures if the judge approves and all parties consent at initial scheduling conference or any later time (*id.* ¶ 2(a)-(b))	• Any party in civil proceedings can file and serve any paper by electronic means in accordance with guidelines established by the court (Local Civil Rules 5.5 and 5.6) • Any party in bankruptcy proceedings can file any paper using electronic transmission in accordance with guidelines established by the court (Local Bankr. Rule 5005-4b)	• Electronic filing authorized if ordered by the court (Local Rule 5.1(b)) • Cases selected at initial case management conferences or other times if parties stipulate and presiding judge approves (Local Rule 16.3(b)(2)(B); Gen. Order 97-38, ¶ 5) • Potentially all civil cases included, but the initial focus on civil rights and intellectual

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		• Either upon application of a party or *sua sponte*, judge can modify or terminate application of electronic filing procedures at any time (*id.* ¶ 2(d))		property cases (Gen. Order 97-38, ¶ 1) • Cases best suited for electronic filing may include those in which: (a) the parties filing or requiring service are reasonably identifiable; (b) the parties filing or requiring service have or can acquire access to a computer, the World Wide Web and, where necessary, a scanner; and (3) the number and/or size of the documents likely to be scanned before electronic filing is not unreasonable (Pol. & Proc. Manual, ¶ 5).
Voluntary or Mandatory Participation	Not specifically addressed in the court's procedures	• Judge and parties must consent • Addressed at initial scheduling conference • In giving consent, parties also provide e-mail address of record; parties must exchange test e-mail messages (Admin. Order 97-12, ¶¶ 2, 3)	Participation in electronic filing is voluntary for any attorney/user/ participant in a case	In "early stages" of project, court will seek voluntary cooperation by parties and attorneys (Gen. Order 97-38, ¶ 1)
Outside Users (Eligibility and Registration)	Each member in good standing of the court bar is entitled to one ECF system login (account) and password, obtained by applying to	• Members of court's bar and pro se litigants with pending civil actions (for only as long as unrepresented by attorney) may	• Any attorney seeking access to the electronic filing system must meet the court's minimum requirements for participants/	• To utilize the electronic filing system, an attorney must be admitted to practice in the district, and must complete an

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	the clerk's office. The login and password cannot be used by anyone other than the attorney or any authorized employee of his/her law firm or organization (En Banc Order ¶ 2)	register as Filing Users (Admin. Order 97-12, ¶ 12) • Registration constitutes consent to service by electronic means as substitute for Fed. R. Civ. P. service (*id.* ¶ 6(c))	users and submit a "WWW Account Request Form" to clerk's office (Admin. Order 97-26, ¶ 3) • To obtain the necessary user identification number and password, an attorney must be admitted to practice in Federal Court and be in good standing (*id.* ¶ 2) • Registration constitutes consent to service by electronic means as substitute for Fed. R. Civ. P. service	"Electronic Filing System Attorney Registration Form" and file it with the clerk of court (Gen. Order 97-38, ¶ 8; Pol. & Proc. Manual, ¶ 12 & App. B) • Registered parties are assigned user identification names and passwords by the court, and are required to protect the security of their passwords, and to notify the clerk of court immediately if the password is compromised (Pol. & Proc. Manual, ¶ 12)
Filing/Service of Initial Case Papers	Complaints to be filed "conventionally and not electronically" unless the court specifically authorizes electronic filing (En Banc Order ¶ 6.a.1)	Initial complaint must be filed in paper form. It must be refiled electronically within 10 days after an action becomes subject to electronic filing (Admin. Order 97-12, ¶ 1, 2 (c))	Not specifically addressed in the court's procedures	Initial papers must be filed and served in the "traditional manner," not electronically (Gen. Order 97-38, ¶ 4). If a case is subsequently accepted for electronic filing previous paper filings must be provided to clerk of court in electronic form (*Id.* ¶ 6.b)
Fees	Credit card payment of fees may be authorized through the clerk's office financial officer (En Banc Order ¶ 3.e)	Not specifically addressed in the court's procedures	Not specifically addressed in the court's procedures	Initial filing fees must be paid in "traditional manner" (Gen. Order 97-38, ¶ 4)

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Filing of Other Papers/Receipt from Court	• In cases designated for electronic filing, all motions, pleadings, legal memoranda, or other documents required to be filed with the court shall be filed electronically with the exceptions noted above and below (En Banc Order ¶ 3.a) • Electronically filed pleadings or other documents must be titled using one of the categories specified in the ECF Procedures Manual available from the clerk's office (*id.* ¶ 3.d)	Electronic transmission to web site plus receipt of "Notice of Electronic Filing" from court (Admin. Order 97-12, ¶ 4(c))	• Papers filed electronically via the Internet to court's web site. • Electronic document considered filed on the date received on the court's server (Local Civil Rule 5.6) • Printed copy of court's electronic file stamp serves as equivalent of court's mechanical file stamp (Admin. Order 97-26, ¶ 5) • Filers immediately receive an electronic acknowledgment that filing has occurred	• Unless the presiding judge orders otherwise, papers in cases selected for electronic filing must be filed with the court via the Internet with only the exceptions noted below (Gen. Order 97-38, ¶¶ 1, 6.a.) • Filing of discovery materials to be governed by the Case Management Plan adopted under Local Rule 16.1(b)(4); the judge determines whether or not such materials are filed electronically after consulting with the parties (Pol. & Proc. Manual, ¶ 20) • Filers immediately receive an electronic acknowledgment that filing has occurred (*id.* ¶ 9)
Filing of Court Orders and Judgments	All orders, decrees, judgments, and proceedings of the court in cases designated for electronic filing must be entered in accordance with the electronic filing procedures (En Banc Order ¶ 3.c)	Filed electronically by clerk (Admin. Order 97-12, ¶ 9)	Court-generated documents filed electronically in chambers and by the clerk in both civil and criminal cases	Filings by judges and court officers not specifically mentioned in the court's procedures, but might be subsumed under the general references to filing of "papers" in cases selected for electronic filing

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Attachments, Exhibits, Other Difficult-to-Handle Items	• Attachments (to motions and pleadings) not available in electronic form, transcripts, state court records, and proposed orders are not to be filed electronically (En Banc Order ¶ 6.a.(2), (4)-(6)). • However, exhibits to filed documents can be electronically imaged and filed in PDF format; attorneys are encouraged to extract and file electronically relevant portions of conventionally produced documents (ECF Proc. Manual, ¶ III.A.3.)	Filing user brings electronic media to court and files using highband equipment in clerk's office (Admin. Order 97-12, ¶ 4(g))	May be filed electronically if available in electronic form (either originally or as a scanned image); otherwise these items are to be filed conventionally	• Trial exhibits lodged with the court under Local Rule 39.1 (but not yet admitted into the official record) not filed electronically (Gen. Order 97-38, ¶ 6.a.), but the party "lodging" the exhibits may be required to submit them in electronic form once they are admitted into the record (Pol. & Proc. Manual, ¶ 19) • Other papers excludable from electronic filing by court order (Gen. Order 97-38, ¶ 6.a.), including protective orders under Fed. R. Civ. P. 26(c) (Pol. & Proc. Manual, ¶ 15) • Electronic filing may be excused under "limited circumstances," such as when the item cannot be reduced to an electronic format or it exceeds the file size limit (see below) (*id.*). A party who seeks to make a non-electronic filing must file electronically a "Notice of Manual Filing" setting forth the reasons (*id.*).

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Sealed Documents	Sealed documents are not to be filed electronically. Motions to file documents under seal and court orders authorizing filing of documents under seal must be filed electronically unless prohibited by law. Paper copy of court order must be attached to the sealed document (which is filed and retained in paper format) (En Banc Order ¶ 6.a.(3))	Material prohibited by order from filing except under seal to be filed under physical seal (Admin. Order 97-12, ¶ 4(i))	Sealed documents are not to be filed electronically	Papers under seal are not to be filed electronically (Gen. Order 97-38, ¶ 6.a.)
Status of Papers Filed Electronically	Pleadings or other documents filed electronically in accordance with the court's procedures are considered filed for all purposes under the Fed. R. Civ. P. and local rules (En Banc Order ¶ 3.b)	Papers filed electronically under the court's procedures considered filed for all purposes under Fed. R. Civ. P. and local rules (Admin. Order 97-12, ¶ 4(c))	Any case document that is filed electronically by the court or an authorized attorney/user/participant is the official document of record (Admin. Order 97-26, ¶ 97-26)	Papers filed electronically under the court's procedures are deemed "written papers" that are filed for purposes of Fed. R. Civ. P. and local rules (Local Rule 5.1(b); Pol. & Proc. Manual, ¶ 9)
Retention of Documents in Paper Form	See below under "Signature"	Filing user must retain documents in paper form until 1 year after final resolution of action, and in electronic form for 10 years after final resolution (Admin. Order 97-12, ¶ 4(f))	• When attorney/other user files electronically an affidavit or other document requiring a verified signature other than his or her own, he or she must retain original paper document so that it can be retrieved if the court so orders (Admin. Order 97-26, ¶ 6) • Attorneys/users/participants must maintain back-up copies of any transmissions to the court (*id.* ¶ 9)	Originals of documents requiring scanning to be filed electronically must be retained by the filer and made available, upon request, to the court or other parties until one year after expiration of all time periods for appeals (Pol. & Proc. Manual, ¶ 16)

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Signature	• Use of authorized login and password constitutes attorney's "signature" for all purposes (En Banc Order ¶ 4.a)
	• Any pleading, affidavit or other document in which the original paper contains handwritten signatures must indicate those signatures as "s/Jane Doe" in the electronic version; the original paper must be retained by the filer for five years after final resolution of the action, including any appeals (*id.* ¶ 4.b)
	• In case of a stipulation or other document to be signed by two or more persons:
	  • Filer confirms that document is acceptable to all signatories and obtains their physical signatures on a hard copy of the document (which must be retained as specified above)
	  • Document is then filed electronically, indicating the signatures as "s/Jane Doe, etc."
	  • No later than first business day after filing, each signatory files "Notice of Endorsement"
		• Every paper filed electronically must be signed for purposes of Fed. R. Civ. P. 11 and local rules (Admin. Order 97-12, ¶¶ 4(b), 5)
		(1) **"Filing User"** - use of user ID and password constitutes signature (*id.* ¶ 5(a))
		(2) **Others** - optically scanned page with physical signature; filing user retains executed original paper (*id.* ¶ 5(b))
		• **Where paper already filed electronically** - use "Notice of Endorsement" (*id.* ¶ 5(c))
		• **Multiple signatories** - can combine (1) and (2) in single transmission, or can provide signatures through two or more electronic filings via "Notice of Endorsements" (*id.* ¶ 5(d)-(e))
			• Attorney's identification number and password, when used to file documents in court's electronic system, constitutes his or her signature on such documents for purposes of Fed. R. Civ. P. 11 (Admin. Order 97-26, ¶ 1)
			• See above concerning retention of the original paper if a document filed electronically requires a verified signature other than that of the attorney/ other user of the ECF system
			• On orders initiated within chambers or in clerk's office, use of authorized login and password and attachment of graphical signature block is equivalent of written signature (Admin. Order 97-83, ¶ 3)
				• User identification name and password provided by the court to a registered user (see above) serves as the user's signature (if an attorney) under Fed. R. Civ. P. 11 and serves as the signature for all other purposes under local rules and Federal Rules of Civil Procedure (Gen. Order 97-38, ¶ 7)
				• Documents filed electronically must include a signature block with the typewritten name (preceded by "s/"), address, telephone number, and (where applicable) Ohio Bar registration number (Pol. & Proc. Manual, ¶ 17)
				• Documents requiring more than one party's signature are filed by submitting a scanned document containing all necessary signatures, by representing the consent of the other parties on the document, or by identifying in the document the parties whose signatures are required and submitting a notice of endorsement by the other

Topics/Issues	District Courts			
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	• Document considered fully executed when all Notices of Endorsement are filed (ECF Proc. Manual, ¶ II.C.2)			parties within three business days after filing the document (*id.*)
Service of Papers Filed Electronically	• Participants in the ECF prototype agree to notice and service as prescribed in the court's electronic filing procedures (En Banc Order ¶ 5.b) • "Notice of Electronic Filing" generated by the court's ECF system must be served by hand, facsimile, e-mail, or first-class mail on all parties entitled to service under Fed. R. Civ. P. and local rules. (En Banc Order, ¶ 5.a). Except for documents filed in paper form or on 3.5 inch disk, filers not required to serve any pleading or other document on parties entitled to electronic notice (ECF Proc. Manual, ¶ II.B.2) • Paper copy of any electronically filed document, together with the "Notice of Electronic Filing," must be delivered to the chambers of the judge assigned to the case (unless and until the judge orders	• **Parties consenting to electronic filing** - transmission of e-mail notice to e-mail address of record (Admin. Order 97-12, ¶ 6) • **Third-party defendants** - paper; answer must include consent to or motion for exemption from electronic filing (*id.* ¶ 7(a)) • **Others** - paper (*id.* ¶ 7(b)) • **Judge** - document requiring judge's signature must also be delivered to judge on paper (*id.* ¶ 4(h)); judges may also require paper courtesy copies of any paper required (*id.* ¶ 4 (j))	• Clerk of court or any other person may serve and give notice by electronic transmission, in lieu of service and notice by mail, to any person who has on file with clerk of court a written request (which can be withdrawn) to receive service and notice by electronic transmission on the court's system (Local Civil Rule 5.6; Admin. Order 97-26, ¶ 7; Local Bankr. Rule 7005-1) • Electronic service/notice is complete when the sender of document receives confirmation of receipt of transmission; service after 5:00 p.m. is effective the next business day (*id.*) • Electronic service equivalent to service by mail under Fed. R. Civ. P. 5(b) and 77(d) and Fed. R. Bankr. P. 7005 and 9022 (*id.*) • Attorneys/users/other participants in electronic filing project required to check their	• Parties to cases selected for electronic filing are deemed to consent to all service and other notices (including court notices) by electronic means, are required to make available electronic mail addresses for service, and are strongly encouraged to check the dockets of their cases in the electronic filing system at regular intervals (Gen. Order 97-38, ¶ 6.c.; Pol. & Proc. Manual, ¶ 13) • A certificate indicating that service was accomplished under the court's electronic filing procedures must be included with all electronically filed documents (Pol. & Proc. Manual, ¶ 13). • Service by electronic mail does not constitute service by mail under Fed. R. Civ. P. 6(e) (*id.*)

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	otherwise), and must be served, in accordance with Fed. R. Civ. P. and local rules, on parties not designated (or able) to receive electronic notice (En Banc Order, ¶ 5.a; ECF Proc. Manual, ¶ II.B.1) • Except as otherwise ordered by the court, pleadings and other documents that are not filed electronically (including those filed on 3.5 inch floppy disks) must be served in accordance with Fed. R. Civ. P. and local rules (En Banc Order, ¶ 5.a; ECF Proc. Manual, ¶ III.B.)		"electronic mailboxes" as they would regular mailboxes (Admin. Order 97-26, ¶ 8) • Attorneys and *pro se* parties with a written request on file to receive service and notice by electronic transmission have a continuing duty to notify the clerk of court in writing of any change in their electronic address (Local Civil Rule 83.6)	
Notice of Court Orders and Judgments	Clerk's office to follow above-described procedures for service of court orders and other documents that are electronically filed (En Banc Order ¶ 5.a)	• **Parties consenting to electronic filing** - transmission of notice of entry to e-mail addresses of record, with note of transmission in docket • **Others** - notice in paper form (Admin. Order 97-12, ¶ 9)	• See above under "Service of Papers Filed Electronically" • Court can also provide notice by fax, but only with consent of the party/attorney	See above under "Service of Papers Filed Electronically"
Docket Entries	• All electronically filed documents (including pleadings, other party-filed documents, and court orders, decrees and other proceedings) are considered entered on the docket kept by the	• Papers filed electronically considered entered on the docket kept by the clerk under Fed. R. Civ. P. 58 and 79 (Admin. Order 97-12, ¶ 4(c)) • Electronic docket to denote	Filer's description of electronically filed document is provisionally accepted as docket entry, subject to modification by the clerk	• Upon complete receipt by the clerk of court, the electronic transmission of a document under the court's procedures constitutes entry of that document onto the docket by the

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	clerk under Fed. R. Civ. P. 79(a) (En Banc Order ¶ 3.b-c) • Electronic filer responsible for designating a title for the filed document from a court-approved "Listing of Events" (ECF Proc. Manual, ¶ II.F.) • Documents forming part of the same pleading (e.g., a motion and supporting affidavit), if filed at the same time by the same party, may be electronically filed together as one docket entry; a suggestion in support of a motion should be filed separately and shown as a related document to the motion (ECF Proc. Manual, ¶ II.A.2.)	filings of paper in electronic filing case, regardless of whether filed electronically (*id.* ¶ 8) • The clerk of court is to make technical accommodations to permit access to electronic dockets through the existing PACER system (*id.*)		clerk under Fed. R. Civ. P. 58 and 79 (Pol. & Proc. Manual, ¶ 9) • Docket entry created using information provided by the filer, subject to modification by the clerk of court where necessary and appropriate to comply with quality control standards (*id.* ¶ 10)
Technical Failures	• Filings due on a given day that are not filed solely as a result of a technical failure are due the next business day (ECF Proc. Manual, ¶ V) • Delayed filing will be rejected unless accompanied by the filer's declaration/affidavit attesting to at least two failed attempts to file electronically (not less than one hour apart) occurring after 12	• Filings due next business day if web site unable to accept filings continuously or intermittently for more than one hour after 12:00 noon (Admin. Order 97-12, ¶ 10(a)) • May retransmit a copy if it is discovered within 24 hours after filing that the electronic version available for viewing through the ECF system does	Filer must inform clerk's office of problem by telephone and fax copy of document to be filed; and on the next day, filer must file document electronically, at which time it will be backdated by the clerk	If a party is unable to file electronically and, as a result, may miss a filing deadline, the party must contact the court's Help Desk to inform the clerk of court of the difficulty. If the deadline is missed due to an inability to file electronically, the party may file the document no later than noon of the court's first business day after the deadline

Topics/Issues	District Courts			
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	noon on each day the filing was delayed (*id.*) • Court's public web site subject to a "technical failure" on a given day if unable to accept filings continuously or intermittently for longer than one hour after 12 noon on that day (*id.*)	not conform to the document transmitted (*id.* ¶ 10(c))		passes, accompanied by a declaration stating the reason(s) for missing the deadline (Pol. & Proc. Manual, ¶ 11)
Public Access	• Docket and electronically filed documents accessible without a system password through the court's Internet site (ECF Proc. Manual, ¶ IV.A.) • Electronic access to docket and electronically filed documents at the clerk's office during regular business hours (*id.* ¶ IV.B.)	• Clerk to provide equipment and facilities to allow public electronic filing and public access to all court records (Admin. Order 97-12, ¶ 16(a)) • Internet site includes list of E-Mail Addresses of Record for cases subject to electronic filing (*id.* ¶ 3(c))	• Clerk to provide equipment and facilities to allow public electronic filing and public access to all court records	Not specifically addressed in the court's procedures
Other Special Provisions for Electronic Filing		• One day added to prescribed period re Fed. R. Civ. P. 6(e) for papers filed and served electronically • Parties must have stipulated and court authorized filing of discovery requests, responses, and materials; otherwise, can only be excerpted, quoted or used as selected exhibits with other filings (Admin. Order 97-12, ¶ 6(b))	In motion practice: • Standing order entered in any case with electronic participant waives "packet" submission rule • Notice is immediately generated (and placed in electronic "mailboxes" of all attorneys/ users/other participants in particular case who agreed to electronic filing) whenever document is filed in court's system; this constitutes service on	• Documents filed electronically must be broken into their component parts--a foundation document (e.g., a motion) and other supporting items (e.g., memorandum and exhibits)--each of which must be uploaded separately in the filing process (Pol. & Proc. Manual, ¶ 14) • No component exceeding 1.5 megabytes in size shall be filed electronically (*id.*)

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		• Internet site contains prominent notice of copyright and other proprietary rights (*id.* ¶ 13) • Provides for motion for protective order respecting proprietary rights or privacy interests (i.e., order prohibiting electronic filing of specific materials) (*id.* ¶¶ 14-15)	those parties, and is equivalent to mail service for purposes of "three-day mailing" rule under Fed. R. Civ. P. 6(e) • Attorney/user/other participant required to notify court of conventional service on non-electronic case participants • Timing of responses and replies must conform to local rule otherwise applicable to motion practice unless parties otherwise agree • Movant required to give court electronic notice that matter is either ready for a ruling or no longer requires a ruling. (Admin. Order 97-26, ¶ 7, as amended by Admin. Order 97-83, ¶ 2(b); Standing Order)	• Filing documents electronically does not alter any filing deadlines, and all electronic transmissions must be received completely by the clerk's office before midnight to be considered filed on a given day. Although filing can occur 24 hours a day, parties are strongly encouraged to file during normal clerk's office working hours when assistance is available (*id.* ¶ 9) • Electronically filed documents must meet the requirements of Fed. R. Civ. P. 10 (form of pleadings), the local rules governing general format of filed papers and designation of district judge and/or magistrate judge, and the local rule and any court order establishing page limitations (Pol. & Proc. Manual, ¶ 8)
Record on Appeal	Not specifically addressed in the court's procedures	Clerk to deliver complete paper copy of record on appeal or electronic reproduction until court advised otherwise (Admin. Order 97-12, ¶ 16(b))	Not specifically addressed in the court's procedures	Not specifically addressed in the court's procedures

Local Rules and Procedures Governing Prototype Electronic Case File (ECF) Systems in the Bankruptcy Courts

Topics/Issues	Bankruptcy Courts				
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Source of ECF Procedures	• General Order No. 69, dated Oct. 2, 1997, as amended by General Order No. 74, dated Aug. 11, 1998 (authorizes "[t]he filing of petitions and papers . . . by electronic means as established by an Interim Operating Order") • Interim Operating Order No. 2 (In re Electronic Case Filing Procedures), dated Aug. 11, 1998 (superseded Interim Operating Order No. 1, dated Oct. 2, 1997) • "Administrative Procedures for Electronically Filed Cases" (Exhibit 2 to Interim Operating Order No. 2), dated Aug. 3, 1998 • Electronic Filing System User's Manual, revised Aug. 11, 1998	• Local Bankr. Rule 9004-1 (provides that Fed. R. Bankr. P. 9004, read in conjunction with the applicable local rules, governs preparation and filing of papers "except as otherwise required by the court") • Bankruptcy General Order No. 162 (In re Provisions for Electronic Case Filing), dated June 17, 1998 (with effect from Mar. 25, 1998) • "Administrative Procedures for Filing, Signing and Verifying Pleadings and Papers by Electronic Means," dated June 17, 1998 • Online Electronic Case Filing Manual, updated through Aug. 13, 1998	• Local Bankr. Rule 5005-5 (authorizes clerk of court to receive for filing "documents submitted, signed, verified or served by electronic means that are consistent with technical standards, if any, that the Judicial Conference established and that comply with administrative procedures established by the Bankruptcy Court"), adopted Aug. 31, 1998 • [The bankruptcy court's administrative procedures are still in preparation]	• Local Bankr. Rules 1002-1, 5005-1, 5005-2, 5075-1, 9001-1(c), 9011-1, 9021-1, and 9070-1 • General Order No. M-182 (Electronic Case Filing Procedures), dated June 26, 1997 (entered *nunc pro tunc* to Nov. 25, 1996), as amended on May 1, 1998 • "Administrative Procedures for Electronically Filed Cases" (Exhibit to Gen. Order M-182), revised May 1, 1998 • Electronic Filing System Attorney User's Manual, revised July 21, 1998 • Order published in N.Y.L.J., Dec. 8, 1997, p. 42 • Order published in N.Y.L.J., Jan. 21, 1998, p. 35, col. 9	• General Order No. 97-1 (Order Adopting Electronic Case Filing Procedures), dated October 30, 1997 • "Administrative Procedures for Electronically Filed Cases" (Exhibit to Gen. Order 97-1), revised July 17, 1998 • In anticipation of expanding the ECF system beyond the Alexandria division (see below), the court, in February 1998, disseminated for public comment a series of amendments to the local bankruptcy rules relating to electronic filing

Topics/Issues	Bankruptcy Courts				
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Cases Accepted for Electronic Filing	Cases designated by court (Admin. Proc. ¶ I.A); cases filed under any chapter of the Bankruptcy Code in the Phoenix Division may be included in the electronic filing pilot program (Gen. Order 69, ¶ 2, as amended by Gen. Order 74))	• Cases designated by court (Admin. Proc. ¶ I.A) • Electronic filing procedures applicable only to Chapter 7 cases (including adversary proceedings and contested matters) until further order of the court (Gen. Order 162, ¶ 10)		• Cases designated by court (Admin. Proc. ¶ I.A) • As of Dec. 31, 1997, filings in all new Chapter 11 cases will be made electronically	Cases designated by court (Admin. Proc. ¶ I.A); limited until further order to Chapter 11 cases (including adversary proceedings and contested matters) filed in Alexandria Division (Gen. Order 97-1, ¶ 10)
Voluntary or Mandatory Participation	Not specifically addressed in the court's procedures	Parties and attorneys who are not participants in the court system (see below) not required to make electronic filings in cases assigned to the system (Admin. Proc. ¶ II.A.1)		Not specifically addressed in the court's procedures	Parties and attorneys who are not participants in the ECF system (see below) are not required to file papers electronically in cases assigned to the system (Admin. Proc. ¶ II.A.1)
Outside Users (Eligibility and Registration)	• Attorneys admitted to practice in the court (Admin. Proc. ¶ I.B)	• Attorneys admitted to practice in the court are entitled to one system password each upon registration using the prescribed form; except for out-of-state attorneys (who can make special arrangements), the system password must be picked up at the clerk's office by the registered attorney or		• Attorneys admitted to practice in court (Admin. Proc. ¶ I.B) • Password required for electronic filing to be used only by the attorney to whom it is assigned, or by authorized members and employee's of the attorney's law firm (Local Rule 9011-1(c)) • Participation constitutes	• Attorneys admitted to practice in court (Admin. Proc. ¶ I.B) • Participation constitutes request for service and notice electronically under Fed. R. Bankr. P. 9036, and agreement to accept such notice and service (Gen. Order 97-1, ¶ 8) • A registered attorney/

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		authorized representative (Admin. Proc. ¶¶ I.B & I.C.1-3) • A registered attorney participant in the court's system may withdraw from that participation upon written notice (*id.* ¶ I.C.4) • Participation (signified by receipt of password) constitutes request for electronic service and notice under Fed. R. Bankr. P. 9036, and agreement to accept notice and service by that means (Gen. Order 162, ¶ 8) • No attorney to knowingly permit or cause to permit anyone other than an authorized employee of his/her law firm to utilize his/her password; no person other than an authorized employee of the law firm to knowingly utilize or cause anyone to utilize a registered		waiver of conventional service, including notice under Fed. R. Bankr. P. 2002 and service under Fed. R. Bankr. P. 7004, and agreement to accept by electronic means (Gen. Order M-182 ¶ 10)	other participant may withdraw from participation upon written notice (Admin. Proc. ¶ I.C.5)

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		attorney's password (*id.* ¶¶ 3, 4)			
Filing/Service of Initial Case Papers	Petitions to commence cases under the Bankruptcy Code and complaints initiating adversary proceedings must be filed conventionally unless the court specifically authorizes electronic filing (Admin. Proc. ¶ III.A.1 & A.2)	Petitions in cases assigned to the court's electronic filing system must be filed electronically; but non-participants in the system are not required to file electronically even in assigned cases (Admin. Proc. ¶ II.A.1)		• No electronic filing unless specifically authorized; petitions to commence case under Bankruptcy Code and complaints initiating adversary proceedings are to be filed conventionally (Admin. Proc. ¶ III.A.1 & A.2) • If an exception is made to allow electronic filing of a petition, filer must provide the court with a diskette of creditor information for noticing purposes and immediately send paper copies of the petition to the U.S. trustee, SEC (2 copies), IRS, and the assigned judge (User's Manual pt. II.D.1)	Not specifically addressed in the court's procedures
Fees	• May apply to clerk's office for authorization of credit card payment (Admin. Proc. ¶ II.D)	For filings requiring a fee, application must be made to the financial administrator in the clerk's office for		May to clerk's office apply for authorization of credit card payment (Admin. Proc. ¶ II.D); payment by	May apply to clerk's office for authorization of credit card payment (Admin. Proc. ¶ II.D)

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	• When a document requiring a filing fee is filed, the clerk's office charges the fee to the lawyer/law firm's account by the next business day (User's Manual pt. I.G.) • If a document requiring a filing fee is filed before a credit card account is established with the court, the filing fee must be delivered to the clerk's office no later than the close of the next business day (i.e., 4:00 p.m.). Copy of the "Notice of Electronic Filing" for the filed document must be submitted with the fee (*id.*)	authorization to make payment by credit card (Admin. Proc. ¶ II.D)		credit card available as of January 1998	
Filing of Other Papers/Receipt from Court	• Papers in cases designated for electronic filing generally must be filed electronically (Admin. Proc. ¶ II.A.1) • An original declaration containing a verification of the schedules and	• All documents required to be filed with the court in cases assigned to the court's electronic filing system generally must be filed electronically; but non-participants in the system are not required to		• Papers in cases designated for electronic filing generally must be filed electronically (Admin. Proc. ¶ II.A) • Hard copies of all papers electronically filed with the court, other than	Papers in cases designated for electronic filing generally must be filed electronically; but non-participants in electronic filing not required to file papers electronically even in designated cases

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	statement of affairs must be filed conventionally with the clerk as separate document (Interim Order 2, ¶ 2; Admin. Proc. ¶ II.C.) • Delivery of paper copies of pleadings and documents for chambers required unless court orders otherwise (Interim Order 2, ¶ 7) • Whenever a pleading or other paper is filed electronically, the system generates a "Notice of Electronic Filing" (User's Manual pt. II.C., Exh. 5)	file electronically even in assigned cases (Admin. Proc. ¶ II.A.1) • When otherwise required, electronic filing is not required in exceptional circumstances that prevent an attorney/other participant from filing electronically (*id.*) • Whenever a pleading or other paper is filed electronically, clerk's office serves filer with "Notice of Electronic Filing" by electronic means at time of docketing (Gen. Order 162, ¶ 7.a; Admin. Proc. ¶ II.B.1)		proofs of claim, must be provided to the clerk of court for transmittal to the U.S. trustee (Local Rule 9070-1) • Hard copies of all papers electronically filed with the court must also be provided to chambers unless and until the judge deems it unnecessary (Local Rule 9070-1; Gen. Order M-182 ¶ 5)	(Admin. Proc. ¶ II.A.1)
Filing of Court Orders and Judgments	• Clerk enters all orders, decrees, and judgments in the electronic filing system; notation in the docket constitutes entry and docketing for all purposes (Interim Order 2, ¶ 9). • To facilitate electronic	For the time being, all orders will be submitted conventionally to the court; when orders are submitted through the court's system, procedures will be amended to reflect the change (Admin. Proc. ¶ II.E)		• Clerk of court enters all orders, decrees, and judgments of the court in the court's electronic filing system, which constitutes docketing for all purposes; clerk's notation of an order, judgment, or decree on	Filed electronically by judge; to facilitate, parties provide judge with proposed order (and related documents electronically filed) on disk with paper copy (Admin. Proc. ¶ II.E)

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	filing of orders, a party seeking an order must provide the judge with a proposed order on 3.5 inch diskette and a paper copy of any related, electronically filed document. A party may alternatively submit a proposed order and a copy of the Notice of Electronic Filing of the related document by e-mail (Admin. Proc. ¶ II.E; User's Manual pt. II.C.5)			the appropriate docket constitutes entry (Local Rule 9021-1) • Filed electronically by judge; to facilitate, parties provide judge with proposed order (and related documents electronically filed) on disk with paper copy (Admin. Proc. ¶ II.E)	
Attachments, Exhibits, Other Difficult-to-handle Items	• All documents forming part of a pleading may be filed together under one docket number (Admin. Proc. ¶ II.A.2) • Unless otherwise authorized, trial or hearing exhibits to be filed conventionally (*id.* ¶ III.A.4) • Court's copy of court hearing transcripts to be filed conventionally if not	• With the exception of a memorandum of law, all documents forming part of a pleading may be filed together under one docket number; memorandum of law must be separately filed and shown as related to the particular motion (Admin. Proc. ¶ II.A.2) • Exhibits not available in electronic form can be filed conventionally; but		• With the exception of a memorandum of law, all documents forming part of a pleading may be filed together under one docket number (Admin. Proc. ¶ II.A.2) • When an exhibit is not available in an electronically produced text form, only excerpts directly germane to the matter under the court's	• With exception of a memorandum of law, all documents forming part of a pleading may be filed together under one docket number (Admin. Proc. ¶ II.A.2) • Exhibits not available in electronic form can be conventionally filed and must be served per Fed. R. Bankr. P. and local rules (*id.* ¶ III.A.2 & B)

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	filed in acceptable electronic format (*id.* ¶ III.A.5)	such documents, or the relevant portions thereof, should be imaged and filed electronically wherever possible (*id.* ¶ III.A.2) • Proofs of claim must be filed conventionally unless specifically authorized by the court (*id.* ¶ III.A.3) • Emergency motions, supporting pleadings, and objections to be filed electronically, but the filer must advise the judge's law clerk of the filing by phone (*id.* ¶ II.A.3)		consideration should be filed conventionally (with complete exhibit made available in the courtroom and to the court and other counsel upon request) (Gen. Order M-182 ¶ 14; Admin. Proc. ¶ II.F.); if an exhibit not available in an electronically produced text format cannot be excerpted, it should be submitted as an electronically produced image (Admin. Proc. ¶ III.A.4.) • Conventionally filed documents must be served per Fed. R. Bankr. P. and local rules (*id.* ¶ III.B.)	
Sealed Documents	• Filed conventionally unless court authorizes electronic filing (Admin. Proc. ¶ III.A.3) • Motions to file documents under seal and court orders authorizing filing under seal are filed	• Filed conventionally unless electronic filing is specifically authorized by the court; paper copy of order authorizing filing under seal must be attached to the sealed document and delivered		• Filed conventionally unless court authorizes electronic filing, but also submitted on diskette so that it can be filed electronically if later unsealed (Admin. Proc. ¶ III.A.3)	• Filed conventionally unless court authorizes electronic filing (Admin. Proc. ¶ III.A.1) • Motion to file documents under seal and court orders authorizing filing under seal are filed

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	electronically, with paper copies of those orders attached to the sealed documents and delivered to the clerk or chief deputy clerk (*id.*)	to the clerk's office (Admin. Proc. ¶ III.A.1) • Motions to file documents under seal to be filed electronically (*id.*)		• Motion to file documents under seal and court orders authorizing filing under seal are filed electronically (*id.*)	electronically (*id.*)
Status of Papers Filed Electronically	Electronic filing constitutes entry on the docket (Interim Order 2, ¶ 8)	Electronic filing constitutes entry on the docket for purposes of Fed. R. Bankr. P. 5003 (pleadings and other papers) and 9021 (orders, decrees, judgments, and court proceedings) (Gen. Order 162, ¶¶ 5, 6)		Electronic filing constitutes entry on docket under Fed. R. Bankr. P. 5003 (Gen. Order M-182, ¶ 6); see also above under "filing of court orders and judgments"	Electronic filing constitutes entry on docket under Fed. R. Bankr. P. 5003 (Gen. Order 97-1, ¶ 5)
Retention of Documents in Paper Form	Attorney generally must maintain original signed copy of each filing (Interim Order 2, ¶ 1; Admin. Proc. ¶ II.C.1); see also below under "signatures"	See below under "signatures"		See below under "signatures"	Not specifically addressed in the court's procedures
Signature	• Use of initials and either state bar identification number or last four digits of social security number (Interim Order 2, ¶ 1) • Documents requiring original signatures, verifications under Fed.	• Electronic filing by a registered attorney/ participant in the court's system constitutes the attorney's signature for purposes of Fed. R. Bankr. P. 9011 and Local Rule 9004-3(b) (Gen.		• Initials of attorney's first and last names followed by the last four digits of attorney's social security number constitutes the attorney's signature for purposes of Fed. R. Bankr. P. 9011; attorney	• Electronic filing by registered attorney constitutes signature (Gen. Order 97-1, ¶ 2) • Documents requiring original signatures, verifications under Fed. R. Bankr. P 1008 and

Topics/Issues	Bankruptcy Courts				
	Arizona (ecf.azb.uscourts.gov)	**California-Southern** (ecf.casb.uscourts.gov)	**Georgia-Northern** (ecf.ganb.uscourts.gov)	**New York-Southern** (ecf.nysb.uscourts.gov)	**Virginia-Eastern** (ecf.vaeb.uscourts.gov)
	R. Bankr. P 1008, and unsworn declarations under 28 U.S.C. § 1746 are filed electronically with signature indicated as "s/name"; filer maintains originally executed documents, except that originally executed verifications of schedules and statements of affairs are filed with the clerk (Admin. Proc. ¶ II.C.1)	Order 162, ¶ 2) • Petitions, lists, schedules and statements requiring the debtor's signature are filed electronically, with a paper "Declaration re: Electronic Filing" to be signed by the debtor and filed with the court within 15 days after the petition is electronically filed (*id.*; Admin. Proc. ¶ II.C.1) • Documents containing original signatures or requiring verification under Fed. R. Bankr. P. 1008, and unsworn declarations as provided in 28 U.S.C. § 1746, are filed electronically with the signature indicated as "/s/ Jane Doe"; original signed paper documents must be maintained by attorney of record or originating party for the maximum allowable time to complete the appellate process, and the original paper document must be		required to maintain an original signed copy of each filing (Local Rule 9011-1(b); Gen. Order M-182, ¶ 2) • Documents requiring original signatures, verifications under Fed. R. Bankr. P 1008 and unsworn declarations under 28 U.S.C. § 1746 are filed electronically with signature indicated as "s/name"; filer maintains originally executed documents (Admin. Proc. ¶ II.C.1)	unsworn declarations under 28 U.S.C. § 1746 are filed electronically with signature indicated as "s/name"; filer maintains originally executed documents until 3 years after case closing (Admin. Proc. ¶ II.C.1)

Topics/Issues	Bankruptcy Courts				
	Arizona (ecf.azb.uscourts.gov)	**California-Southern** (ecf.casb.uscourts.gov)	**Georgia-Northern** (ecf.ganb.uscourts.gov)	**New York-Southern** (ecf.nysb.uscourts.gov)	**Virginia-Eastern** (ecf.vaeb.uscourts.gov)
		provided to other parties or the court upon request (*id.* ¶ II.C.2)			
Service of Papers Filed Electronically	• Electronic filer may serve the filed pleading or other document on an attorney or other registered participant in the court's electronic filing system by serving by e-mail, hand delivery, fax or, if e-mail, hand delivery and fax are impracticable, by overnight mail a "Notice of Electronic Filing" generated by the system; service by e-mail deemed made on the next business day (Interim Order 2, ¶ 10; Admin. Proc. ¶ II.B.1) • Paper copies must be served according to Fed. R. Bankr. P. and local bankr. rules when a pleading or other document is filed conventionally or on diskette, and when	• Filing party serves the document in accordance with applicable rules; but if service by first-class mail is permitted and the recipient is a registered participant in the court's system, service can be effected by serving the Notice of Electronic Filing (see above) by electronic means (Gen. Order 162, ¶ 7.b-c; Admin. Proc. ¶ II.B.2-3) • Except as otherwise ordered, documents filed conventionally or on 3.5 inch floppy disk must be served in the manner provided in, and to the parties entitled to notice under, Fed. R. Bankr. P. and local bankr. rules (Admin. Proc. ¶ III.B)		**Parties designated to receive electronic notice** - service of "Notice of Electronic Filing" generated by electronic filing system by hand, fax, or authorized e-mail, or by overnight mail if hand, fax, or e-mail service impracticable (Gen. Order M-182, ¶ 8; Admin. Proc. ¶ II.B.1) **Judge** - deliver by hand or overnight mail "Notice of Electronic Filing" with paper copy of document (Admin. Proc. ¶ II.B.1) **Others** - in accordance with Fed. R. Bankr. P and local rules (*id.*)	• Filing party serves "Notice of Electronic Filing" received electronically from Clerk on all persons in accordance with applicable rules (Gen. Order 97-1, ¶ 7; Admin. Proc. ¶ II.B.1-3) • If service by first class mail is permitted by applicable rules and party entitled to service is an electronic filing participant, service may be by electronic means (Gen. Order 97-1, ¶ 7; Admin. Proc. ¶ II.B.1-3)

Topics/Issues	Bankruptcy Courts				
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	service is required on the debtor as well as the debtor's attorney, on a Chapter 13 trustee (for schedules, statements, plans, or any amendments thereto), on a Chapter 7 trustee who is not a registered participant in the court's electronic filing system, on the United States Trustee (unless the U.S. Trustee otherwise directs), on a creditor (for notices required to be served on all creditors), and on all parties who are not registered participants in the court's electronic filing system (Interim Order 2, ¶ 11; Admin. Proc. ¶ II.B.1). • Unless the judge directs otherwise, paper copies of the Notice of Electronic Filing and electronically filed document must be delivered to the judge by means of hand delivery or				

Topics/Issues	Bankruptcy Courts				
	Arizona (ecf.azb.uscourts.gov)	**California-Southern** (ecf.casb.uscourts.gov)	**Georgia-Northern** (ecf.ganb.uscourts.gov)	**New York-Southern** (ecf.nysb.uscourts.gov)	**Virginia-Eastern** (ecf.vaeb.uscourts.gov)
	mail to the clerk's office (Admin. Proc. ¶ II.B.1) • Attorney filing a pleading or other document electronically must include in the filing any fax number or Internet e-mail address at which the attorney can be reached (Interim Order 2, ¶ 12)				
Notice of Court Orders and Judgments	Upon docketing of an order, decree, judgment, or other court document, the clerk serves the proponent of the order or other document by e-mail, facsimile, or first class mail; the proponent, in turn, serves the parties as described above under "Service of Papers Filed Electronically" (Interim Order 2, ¶ 10)	Not specifically addressed in the court's procedures		Clerk serves proponent with "Notice of Electronic Filing" by e-mail; proponent serves on all parties entitled to electronic filing by fax or e-mail, and to other parties/attorneys by overnight or first class mail (Gen. Order M-182, ¶ 8)	Clerk electronically serves "Notice of Electronic Filing" on all persons in accordance with applicable rules. If service by first class mail is permitted by such rules and party is an electronic filing participant, service may be by electronic means (Gen. Order 97-1, ¶ 7; Admin. Proc. ¶ II.B.1-3)
Other Notices	See above	Not specifically addressed in the court's procedures		• Paper copies of Fed. R. Bankr. P. 2002(a) (1) (4) (5) (7) and (8) and (b) (1) and (2) notices required until recipient requests electronic notice under Fed. R. Bankr. P. 9036	Same as notice for court orders and judgments

Topics/Issues	Bankruptcy Courts				
	Arizona (ecf.azb.uscourts.gov)	**California-Southern** (ecf.casb.uscourts.gov)	**Georgia-Northern** (ecf.ganb.uscourts.gov)	**New York-Southern** (ecf.nysb.uscourts.gov)	**Virginia-Eastern** (ecf.vaeb.uscourts.gov)
				(Gen. Order M-182, ¶ 9; Admin. Proc. ¶ I.A) • Fed. R. Bankr. P 2002 (a) (2) (3) and (6) notice may be served in manner outlined above under "service" (Gen. Order M-182, ¶ 9)	
Docket Entries	Electronic filer designates title of docket entry from a list of prescribed categories in the "Glossary of Events" (Admin. Proc. ¶ II.G)	Electronic filer designates title of docket entry from a list of prescribed categories (Admin. Proc. ¶ II.F)		Electronic filer designates title of docket entry from a list of prescribed categories (Admin. Proc. ¶ II.F)	Electronic filer designates title of docket entry from a list of prescribed categories (Admin. Proc. ¶ II.F)
Technical Failures	Not specifically addressed in the court's procedures	Not specifically addressed in the court's procedures		Not specifically addressed in the court's procedures	Not specifically addressed in the court's procedures
Public Access	• Public access to documents and docket at clerk's office (Admin. Proc. ¶ IV.B) • "Read only" access to docket sheet and documents generally available via Internet only for those persons with a current PACER account in good standing who obtain a password (*id.*	• Public access to documents and docket at clerk's office (Admin. Proc. ¶ IV.B) • Public Internet "read only" access to docket sheet and documents via Internet (*id.* ¶ IV.A) • Conventional copies and certified copies of electronically filed documents may be		• Public access to documents and docket at clerk's office (Admin. Proc. ¶ IV.B) • Public Internet "read only" access to docket sheet and documents via Internet (*id.* ¶ IV.A) • May purchase conventional and certified copies of electronically filed documents (*id.*	• Public access to documents and docket at clerk's office (Admin. Proc. ¶ IV.B) • Public Internet "read only" access to docket sheet and documents via Internet (*id.* ¶ IV.A.1) • May purchase conventional and certified copies of electronically filed documents (*id.*

Topics/Issues	Bankruptcy Courts				
	Arizona (ecf.azb.uscourts.gov)	**California-Southern** (ecf.casb.uscourts.gov)	**Georgia-Northern** (ecf.ganb.uscourts.gov)	**New York-Southern** (ecf.nysb.uscourts.gov)	**Virginia-Eastern** (ecf.vaeb.uscourts.gov)
	¶ IV.A.; password application form posted on "www.azb.uscourts.gov") • Conventional copies and certified copies of electronically filed documents may be purchased at the clerk's office (*id.* ¶ IV.C)	purchased at the clerk's office (*id.* ¶ IV.C)		¶ IV.C)	¶ IV.C)
Other Special Provisions for Electronic Filing	If an electronically filed motion or other document is to be set for hearing, the date and time for the hearing can be obtained by sending the courtroom deputy an e-mail request for hearing that includes a copy of the Notice of Electronic Filing of the underlying document (Admin. Proc. ¶ II.F.; User's Manual pt. II.C.4)				
Record on Appeal	Not specifically addressed in the court's procedures	Not specifically addressed in the court's procedures		Not specifically addressed in the court's procedures	Not specifically addressed in the court's procedures

ATTACHMENT

Federal Rules Potentially Affected by Implementation of Electronic Filing

"Filing"—Method and Format

Fed. R. Bankr. P.:
5005 (filing and transmittal of papers)
7005 (applying Fed. R. Civ. P. 5 to adversary proceedings)
8008(a) (filing of papers related to appeals)
9004 (general requirements of form)

Fed. R. Civ. P.:
5 (filing of pleadings and other papers)
6 (time)
7(b) (form of motions and other papers)
10 (form of pleadings)
58 (entry of judgment)
79 (books and records kept by clerk and entries therein)

Fed. R. Crim. P.:
45 (time)
49(d) (filing of papers same as in civil cases)

§ 2254 R.:
2(c) (form of petition)
3(a) (place of filing petition; number of copies)

§ 2255 R.:
2(b) (form of motion)
3(a) (place of filing motion; number of copies)

Fed. R. App. P.:
12(a) (docketing the appeal)
21(d) (form of petitions for extraordinary writs; number of copies)
25(a), (e) (filing; number of copies)
26 (computation and extension of time)
27(d) (motions: form of papers; number of copies)
28-30 (briefs and appendices to briefs)
31(b) (number of copies of brief)
32 (form of briefs, appendices and other papers)
35(b), (d) (form and number of copies of petition for en banc determination)
40(b) (form of petition for panel rehearing)
45(b) (duties of clerks: docket; calendar; other records required).

"Signatures" and Document Authentication

Fed. R. Bankr. P.
1008 (verification of petitions and accompanying papers)
9011 (signing of papers by attorney or unrepresented party)

Fed. R. Civ. P.:
11(a) (signing of pleadings, motions and other papers by attorney or unrepresented party)
44 (proof of official record)
58 (entry of judgment signed by clerk)

Fed. R. Crim. P.:
4(c) (arrest warrant or summons upon complaint signed by magistrate judge)
7 (indictment or information signed by government attorney)
9(b)(1) (warrant or summons upon indictment or information signed by clerk)
32(d)(1) (judgment signed by judge)

§ 2254 R. 2(c) (petition signed by petitioner under penalty of perjury)

§ 2255 R. 2(b) (motion signed by movant under penalty of perjury)

Fed. R. App. P.:
36 (entry of judgment signed by clerk)
42 (dismissal of appeals upon stipulation of parties)

Fed. R. Evid.:
902 (self-authenticating documents)
1001-1004, 1006 (contents of writings, requirement of original, and admissibility of duplicates and other evidence of contents)
1005 (certification of public records)

Service/Notice of Process, Papers, and Court Orders

Fed. R. Bankr. P.:
7005 (applying Fed. R. Civ. P. 5 to adversary proceedings)
8004 (service of notice of appeal)

Fed. R. Civ. P.:
4 (service of summons)
4.1 (service of other process)
5 (service of pleadings and other papers)
77(d) (notice of orders and judgments)

Fed. R. Crim. P.:
4(d) (service of summons upon complaint)
9(c) (service of summons upon indictment or information)
49(a)-(c) (service of papers and orders)

§ 2254 R. 3(b) (service of petition)

§ 2255 R. 3(b) (service of motion)

Fed. R. App. P.:
3(d) (serving notice of appeal as of right—from district courts)
5(a) (service of petitions for discretionary appeals)
13(c) (serving notice of appeal—from tax court)
15(c) (serving petition for review or application for enforcement of agency orders.)
19 (serving proposed judgment when agency order is partially enforced)
21(a)(1) (petitions for extraordinary writs: proof of service on parties; copy for trial judge)
25(b)-(d) (service; manner and proof of service—generally)
27(a) (proof of service of motions)
31 (service of briefs)
36 (copies of opinion or judgment mailed to parties)
41 (proof of service of motion for stay of mandate pending petition for certiorari)
45(c) (notice of orders or judgments).

Types of Papers Filed Electronically

Fed. R. Bankr. P.:
1002-1004 (commencement of case by filing petition; involuntary petitions; partnership petitions)
1007 (lists, schedules, and statements)

Fed. R. Civ. P. 3 (commencement of action by filing complaint)
7 (pleadings, motions)

Fed. R. Crim. P.:
3 (complaint)
4 (arrest warrant or summons upon complaint)
7 (prosecution by indictment or information)
9 (warrant or summons upon indictment or information)
32(b) (pre-sentence investigation report)
41 (search warrant)

§ 2254 R. 3 (petition)

§ 2255 R. 3 (motion)

Fed. R. App. P.:
3, 4 (notice of appeal as of right—district courts)
5 (petitions for discretionary appeals)
6 (appeal in bankruptcy cases)
13 (notice of appeal—Tax Court)
15 (petition for review of agency order)
21 (petition for extraordinary writ)
22 (application for habeas corpus or § 2255 relief; certificate of appealability)
24 (proceedings *in forma pauperis*)
26.1 (corporate disclosure statement0
27 (motions)

Time

Fed. R. Bankr. P.:
8002 (time for filing notice of appeal)
9006 (time generally)

Fed. R. Civ. P. 6 (time generally)

Fed. R. Crim. P. 45(d)-(e) (timing of motions; additional time after mail service)

Fed. R. App. P.:
26 (computation and extension of time)

Fees

Fed. R. App. P. 3(e), 5(d) (filing fee for appeal paid to clerk of court from which appeal is taken)

Fed. R. Bankr. P.:
1006(a) (petition accompanied by filing fee)
8001(a) (filing fee for appeal paid to clerk of the bankruptcy court)

Clerks' Offices

Fed. R. Civ. P. 77(a) (courts are "always open" for the purpose of filing)

Fed. R. App. P. 45(a) (courts are "always open" for the purpose of filing)

Appeals

Fed. R. Bankr. P.:

8001 (manner of taking appeal; voluntary dismissal)
8003 (motion for leave to appeal under 28 U.S.C. § 158(a))
8006 (record and issues on appeal)
8007 (completion and transmission of the record; docketing of the appeal)

Fed. R. App. P.:

3, 4 (notice of appeal as of right)
5 (petitions for discretionary appeal)
6 (appeals for final judgments in bankruptcy cases)
10 (record on appeal)
11(transmission of the record)
12 (docketing the appeal; filing the record)
13 (review of Tax Court decisions)
16 (record on review or enforcement of agency order)
17 (filing of the record on petitions for review/applications for enforcement of agency orders)

Special Report

Electronic Filing

This article is the first of two on electronic filing in the courts. It focuses on activity in the federal courts. Next week's article will survey e-filing projects in the state courts.

Federal Electronic Case File Project Changing Way Lawyers Do Business

Federal courts are taking the lead in implementing electronic filing and case management practices. That, at least, is the view of Michael Greenwood of the Administrative Office of the United States Courts, who reports that nine federal courts are using the government's prototype Electronic Case File project.

So far, several thousand federal cases have been processed electronically and tens of thousands of documents have been filed without passing paper.

Greenwood heads the AO's research and development group working on the ECF project. A separate group is developing a schedule for offering an "official national product" to give to the federal courts—bankruptcy courts, district courts, and appellate courts. That offer may come as early as the first half of 2000, Greenwood says.

Goal: Integrated Case Management System. The ultimate objective of the federal initiative, Greenwood told BNA, is an integrated case management system. Electronic filing and docketing is a component of that package. Coupled with document and case management systems, the filing becomes the first step in creating an integrated case file that is available, in most instances, to the public as well as the parties and their counsel.

ECF, a prototype service initiated in January 1996, offers Internet access to official case records in nine federal courts: the U.S. District Courts for the Districts of Western Missouri, Eastern New York, Northern Ohio, and Oregon, and federal bankruptcy courts for Arizona, Southern California, Northern Georgia, Southern New York, and Eastern Virginia.

"Necessity is the mother of invention" would aptly describe the development of a single software system for case management, says AO's Diane DiMarco. The need first became clear when the Northern District of Ohio was deluged with multidistrict maritime asbestos litigation, DiMarco said, and the AO developed a system to consolidate and manage the onslaught.

From volunteers, the AO selected nine prototype jurisdictions. The relevant criteria guaranteed geographic diversity, different circuit representation, and size distinctions, DiMarco said.

Any pitfalls? Yes, said DiMarco, but not the ones that were expected. Cultural, policy, and legal issues, rather than technical problems, presented the biggest stumbling blocks. "Giving up paper isn't easy for everyone," she said.

Guided Motion Filing. The ECF prototype involves filing motions electronically, without a paper docket sheet. DiMarco described the process as "guided motion" filing, in which the attorney can select from lists of motions or even create new ones. This represents a paradigm shift in which the court, no longer the author of the docket sheet, becomes the quality assurance guarantor, DiMarco said.

Northern Ohio has been the most stringent about requiring electronic filing, DiMarco said. In that jurisdiction, a filer must show "just cause" for not filing electronically. The other prototype courts have been "not so extreme," she said.

Payment takes a variety of forms. The bankruptcy courts generally use credit cards. The courts hearing civil matters are not yet set up for that and usually follow the practice of accepting a complaint on disk from the filer, accompanied by a check.

Northern Ohio's original system for maritime asbestos filings accommodated data particular to that specific litigation. That court now has a separate database for a broader range of civil cases, DiMarco said.

At the outset, the prototype jurisdictions planned to restrict their experiments to specific types of cases: civil rights cases for Missouri, Social Security cases for Northern Ohio, and corporate counsel cases for Eastern New York. But this rigidity soon broke down. One federal judge in Missouri, DiMarco said, prefers all case filings via ECF; other jurisdictions are asking attorneys if they are interested and proceeding with whatever comes along.

Using ECF doesn't require a lot of fancy or expensive equipment, DiMarco said. On a word processor, a filer can log in to the court to create and attach software, such as Adobe Acrobat Exchange, that permits documents to be saved in portable document format (PDF).

The Administrative Office initially took responsibility for ECF training needs, but the participating courts themselves are now in the act, DiMarco said. Although AO goes to the courts to "train the trainers," the courts are coming up with ways to take the next step. One of the courts runs a training session when it gives attorneys a log-in and password; the clerk's office for another court holds a weekly question and answer ses-

sion. Training sessions and seminars that meet continuing legal education requirements are also a possibility, DiMarco said.

Greenwood cited two factors that make ECF "somewhat distinct" from various commercially developed packages used in a number of state courts. First, case management is the primary interest, and success in that effort carries with it the qualities most desirable for e-filing. Second, the entire system is Internet-based.

Cultural Change. ECF represents a cultural change for the judiciary and for attorneys, Greenwood acknowledged. It changes filing practices as well as ways of keeping up to date with a case. However, inducements accompany the change. A filer will know the moment of filing and will receive e-mail notification within minutes, he said.

The federal initiative addresses three concerns: how documents get to the court, how they get stored, and how people retrieve them. Greenwood emphasized that e-filing is just part of the AO's interest. The "real meat and potatoes is integration and case management."

Characterizing a paperless court as "one of the myths," Greenwood said filers can still use paper if they want or present a diskette to the court for loading into a file. The entire case is stored. Thousands of entire case files can already be searched, regardless of how they were originally filed, he said.

Various means of access are available. Some judges prefer to read a paper file; those who are more computer literate are content to read from a computer screen.

ECF meets its objectives, Greenwood said. It facilitates storage and access to official files, making them readily available 24 hours a day. It also allows fast and easy exchange of information among the court, parties, and attorneys.

Attorney Enthusiasm. Attorney Michael B. Sachs, who practices in San Diego, Calif., opted to file bankruptcy petitions exclusively via computer when the federal bankruptcy court in his jurisdiction opened its electronic doors. "Anyone halfway into the 20th century in a law firm with computers and the right type of bankruptcy software can do this," he said.

Sachs, who files between 30 and 50 petitions per month, says e-filing allows him to file "when and where I want." He also finds advantages in collectively filing cases, so that he can get a trustee for perhaps 10 cases and go to a hearing where all the cases will be handled, rather than having to schedule 10 independent trips to the courthouse.

Sometimes the flexibility and ease of filing translate into additional assistance for clients, Sachs said, because being able to file on the spot when a client comes to the office might make it possible to stop a wage garnishment or sale of property.

Resource savings can be considerable, too, Sachs observed. "No more original and three copies for the court. Now, it's a single copy over the Internet."

Adam C. Rogoff, of New York's Weil, Gotshal & Manges, also enjoys the benefits of e-filing: "It eliminates the mad rush to the courthouse." Filing electronically yields "tremendous time-saving benefits" by facilitating the tracking of a case and retrieving files, he said.

Through this system a law firm can develop an "electronic library" of its own that includes search capability of vast document resources, Rogoff said. One benefit of such an undertaking is the ability to "check out what an adversary has said," he added.

Nothing But Praise From Clerks. Clerks of courts working with ECF are hard pressed to find anything negative to say. Cecelia G. Morris, bankruptcy clerk for the U.S. Bankruptcy Court for the Southern District of New York, told BNA that if anyone tried to take ECF away from the New York lawyers who have been working with the system, she "might have to find another job" to escape their wrath. "It's *that good* a system," she said. It improves lawyers' ability to do their jobs because it is "so correct, so efficient."

ECF no longer is a prototype in this jurisdiction, Morris said. "It's not the wave of the future; it's here and moving."

The quick success of the federal initiative "debunked a popular myth about government," Morris added. The AO took something from a concept to the market in a really short period of time and at a reasonable cost, she said.

The only "negative" has been the natural frustration in growing a system, Morris said. Getting there is "not as perfect as you'd like." The first group of bankruptcy lawyers to use ECF were like "Army volunteers," Morris said. The second group—the "self-selects"—is completely different. "We couldn't keep them out of the front door." Word of mouth and training, both in court and in lawyers' offices, have created enthusiasm, she said.

Still, lawyering is a conservative profession, and some apprehension naturally accompanies changes of this kind, Morris said.

Fraud Always a Problem. One challenge to those using ECF is the need for internal controls. ECF can't solve the problem of fraud, although it can facilitate tracking, Morris said. Lawyers will have to make sure they have safeguards in place to ensure that their passwords aren't compromised and that their personnel understand how the system works and the implications for abuse, she added.

Robert F. Connor, clerk for the U.S. District Court for the Western District of Missouri, shared Morris's praise for ECF. He boasted that his staff has introduced more than 2,000 lawyers to the system and shown them how to use it. Connor said his staff works closely with the state bar in training programs, informing Missouri attorneys about ECF and carrying on training sessions.

Bankruptcy is the perfect fit for ECF because it is "form-driven," Connor said, but electronic case management is "going to revolutionize the administration of justice" across the board. Since the beginning of this year, all civil cases in two of his offices, Jefferson City and Springfield, are treated as ECF cases, he said.

The original assumption was that the big law firms would be the most eager to shift to e-filing, Connor told BNA. But the "little guy" has turned out to be the most receptive. Small firms and solo practitioners see ECF as a way of leveling the playing field, he said, citing as an example a lawyer who practices in rural Missouri and can file the many civil rights and employment discrimination cases he handles "without having to drive into Springfield."

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IV-B

Rule 81(c)

It seems that Rule 81 will be always with us. In January the Standing Committee approved publication of amendments to Rule 81(a)(1) in connection with the proposal to abrogate the Copyright Rules of Practice and amend Rule 65. The January meeting might have seemed the obvious time to implement the May, 1997 determination by this Committee that Rule 81(c) should be revised to reflect the change of the statutory removal procedure from a petition for removal to a "notice of removal." At the last moment before suggesting this revision to the Standing Committee, it was recognized that the drafting changes are not entirely automatic. Rule 81(c) refers to the "petitioner" as well as the petition to remove. Various phrases come to mind, with "removing party" perhaps the least awkward. Rule 81(c) was put over for further consideration, with the thought that it might be better to restyle it.

The following restyled version of Rule 81(c) makes modest changes in the version prepared by Judge Pointer on the basis of Bryan Garner's wholesale restyling of the Civil Rules. A few styling alternatives are presented by square and pointed brackets, and a few questions are identified by footnotes. The text of present Rule 81(c) is set out separately, with indications of the places where corresponding provisions are found in the styled version.

Restyling attempts invariably uncover previously unseen ambiguities and suggest doubts about the content of the present rule. A couple of these doubts are noted in the footnotes. They do not seem ripe for resolution at the April meeting. If the Committee wishes to undertake revision beyond restyling, further study is appropriate.

If this version seems acceptable, it could be recommended to the Standing Committee for publication in August with the Rule 81(a) proposal already slated for publication. If there are problems that seem to deserve further study, Rule 81(c) need not stand alone for future publication. Rule 81(a)(2) must be revised soon to effect better integration with the habeas corpus rules, and Rule 81(c) could be coupled to that publication.

(c) Removed Actions.

(1) Applicability. These rules apply to a civil action after it is removed to a United States District Court from a state court.[1]

(2) Further pleading.

(A) Pleadings filed[2] before removal need not be repleaded unless the court so orders.

(B) A defendant who has not answered before removal must answer or present other defenses or objections [available] under these rules within the longest of [the following]{these} periods:

(i) 20 days after receiving — through service or otherwise — a copy of the initial pleading stating the claim for relief;

(ii) 20 days after being served with the summons for that initial pleading[, then filed][3]; or

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[1] Judge Pointer's draft refers to a "federal district court," and makes the rules apply "once it is removed." Both the "once it is removed" and "after removal" formulations skirt the persisting ambiguity about the time when removal is accomplished. Because the problem arises from the removal statutes, it probably is better not to attempt a partial cure in the Civil Rules.

[2] Is "filed" the proper term? Should something more open-ended such as "accomplished" be used to cover the possible state variations of service, filing, or perhaps something else? "Filed" may be the best word, because it will integrate with the statutory provisions for transmitting the record from the state court.

[3] "then filed" appears at this point in the present rule. Judge Pointer omitted it. It seems better to continue to say "then

(iii) 5 days after the notice of removal is filed.[4]

(3) Demand for Jury Trial.

(A) A party who expressly demanded jury trial according to state law before removal need not renew the demand after removal.

(B) If the [state] law of the court from which the action is removed does not require an express demand for jury trial, a party need not make a demand after removal unless the [federal] court directs that a demand be made

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filed." This phrase probably corresponds to the final part of the first paragraph of 28 U.S.C. § 1446(b). The first paragraph of § 1446(b) establishes the time for removal in an action that is removable as originally filed in the state court. The time is 30 days from the defendant's receipt "through service or otherwise, of a copy of the initial pleading * * * or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter."

[4] This tracks the present rule, which for this alternative is "5 days after the filing of the petition for removal." The evident sense of it is that ordinarily a notice of removal must be presented by all defendants served at the time of removal. Five days is enough for them. Defendants served after removal are protected by the alternative 20-day provisions. But there may be an inconsistency between these 20-day periods and the provisions of Rule 12(a)(3), now or as we propose to amend it, allowing 60 days for an answer by the United States or an agency or officer of the United States. And if removal is accomplished by a foreign state under § 1441(d), by a federal officer or the like under § 1442, by a member of the armed forces under § 1442a, by the United States under § 1444, and so on, there may be a problem with respect to other defendants. Similar confusions may arise in those courts that interpret § 1441(c) to permit removal on the basis of counterclaims, crossclaims, or third-party claims; see 14C Federal Practice & Procedure: Jurisdiction 3d, § 3724.

within a specified time. The court must [so] direct [that a demand be made] at a party's request, and may do so on its own. A party who fails to make a demand when so directed [waives]{forfeits} trial by jury.

(C) If all necessary pleadings have [already] been served at the time of removal, a party entitled to jury trial under Rule 38 must be accorded one if it serves a demand within 10 days after:

(i) it files the notice of removal; or

(ii) it is served with a notice of removal filed by another party.[5]

Committee Note

Rule 81(c) has been revised to reflect the amendment of 28 U.S.C. § 1446(a) that changed the procedure for removal from a petition for removal to a notice of removal. Style changes also have been made.

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[5] The present rule reads: "or if not the petitioner within 10 days after service on the party of the notice of filing the petition." Both this language and the style language are ambiguous with respect the possibility of multiple notices. Perhaps the answer is that there should not be multiple notices, since all defendants are required to join in removal. But the possibility remains — a § 1441(c) removal may be followed by remand of "all matters in which State law predominates," and still later by a change in the posture of the state litigation that supports a second removal notice. Perhaps there are other possibilities. It may be better to leave the ambiguity in the text: if indeed there is a second removal, it may present a good reason for demanding a jury trial even though no party wanted jury trial earlier.

Distribution of Present Rule

(c) Removed Actions. (1) These rules apply to civil actions removed to the United States district courts from the state courts and govern procedure after removal. **(2)(A)** Repleading is not necessary unless the court so orders. **(2)(B)** In a removed action in which the defendant has not answered, the defendant shall answer or present the other defenses or objections available under these rules **(i)** within 20 days after the receipt through service or otherwise of a copy of the initial pleading setting forth the claim for relief upon which the action or proceeding is based, **(ii)** or within 20 days after the service of summons upon such initial pleading, then filed, **(iii)** or within 5 days after the filing of the petition for removal, whichever period is longest. **(3)(C)** 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 **(i)** is served within 10 days after the petition for removal is filed if the party is the petitioner, **(ii)** or if not the petitioner within 10 days after service on the party of the notice of filing the petition. **(3)(A)** A party who, prior to removal, has made an express demand for trial by jury in accordance with state law, need not make a demand after removal. **(3)(B)** If state law applicable in the court from which the case is removed does not require the parties to make express demands in order to claim trial by jury, they 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. The failure of a party to make demand as directed constitutes a waiver by that party of trial by jury.

IV-C

Rule 51: Requests Before Trial and More

Rule 51 was considered briefly at the March, 1998 meeting, in response to a memorandum that was substantially the same as the version set out below. The immediate impetus was provided by the Ninth Circuit proposal to legitimate local rules that require that proposed instructions be filed before trial. The Committee agreed with the suggestion that the question should not be left to disposition by local rules — there should be a uniform national practice, whatever may prove to be the best practice. The Committee also concluded that if the rule is changed to allow a pretrial deadline for requests, there must be provision for supplemental requests to reflect new issues that first appear at trial. Finally, the Committee concluded that further thought should be given to other possible changes in Rule 51. There was no commitment to any change, but the topic was held for further study.

The Criminal Rules Advisory Committee earlier took up the same issue and published for comment a revised Criminal Rule 30 that would provide for instruction requests "at the close of the evidence, or at any earlier time that the court reasonably directs." The Committee Note said: "While the amendment falls short of requiring all requests to be made before trial in all cases, the amendment now permits a court to do so in a particular case or as a matter of local practice under local rules promulgated under Rule 57." In an attempt at coordination, a copy of the Civil Rules memorandum was provided to the Criminal Rules Committee. At their October, 1998 meeting, they expressed an interest in the broader questions addressed to Civil Rule 51 and suggested that the Civil Rules Committee take the lead in considering these questions. It also was earnestly suggested by several members of the Criminal Rules Committee that it would be desirable to require that instructions always be given before final arguments.

There is no indication that the Criminal Rules Committee feels an urgent need for prompt revision of the rules on jury instructions. There is a real question whether it is wise for this Committee to take up consideration of Civil Rule 51 now, in face of the prospect that consideration of comments and testimony on the proposed discovery amendments may monopolize the time available at this April meeting. It may be helpful, however, to begin the discussion of Rule 51. The most important question is whether the time has come to rewrite the rule so that it more nearly reflects current practices. The draft rule illustrates the kinds of issues that would be considered if the task is attempted. Other issues almost certainly will arise, and of course the best resolutions of

the issues remain to be identified.

The Ninth Circuit Beginning

In the wake of its review of local rules, the Ninth Circuit Judicial Council has recommended that Civil Rule 51 be amended "to authorize local rules requiring the filing of civil jury instructions before trial." This recommendation raises at least three distinct questions. The most obvious is whether it is good policy to require that requests for instructions be filed before trial in some cases or in all cases. If pretrial request deadlines are desirable, it must be decided whether this matter should be confided to local rules or instead should be approached in a national rule. On the face of it, there is no apparent reason to relegate this matter to local option. It is difficult to imagine variations in local circumstances that make this policy more desirable in some parts of the country but less desirable in other parts. No more will be said about this second question. The third and least obvious question is whether a general change in the Rule 51 request deadline should be the only change proposed for Rule 51. Rule 51 notoriously "does not say what it means, and does not mean what it says." If some part of the request-objection-review question is to be addressed, perhaps the rule should be approached as an integrated whole.

Pretrial Instruction Requests

The first sentence of Rule 51 now reads:

> At the close of the evidence or at such earlier time during trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests.

This sentence seems to limit the court's authority to directing that requests filed before the close of the evidence be filed "during trial," not before trial. It is difficult to find anything in the generalities of Rule 16 that can be read as an implicit license to direct earlier requests. Local rules that require pretrial requests are at great risk of being held invalid as inconsistent with Rule 51.

Three principal advantages seem to underlie the interest in pretrial jury requests. Pretrial requests will help the court if it wishes to provide preliminary instructions at the beginning of the trial. All parties will have a better idea of the instructions likely to be given, and can shape trial presentations accordingly;

this advantage would be enhanced if the court were required to make at least preliminary rulings on the requests before trial. The court will have more time to consider the requests, particularly if it is not required to make final rulings before trial. There may be incidental advantages as well. The competing requests may focus the dispute in ways that support renewed consideration of motions to dismiss or for summary judgment. The better focus may instead suggest that potentially dispositive issues be tried first, cf. Rules 16(c)(14) and 50(a), or be designated for separate trial. Advantages of this sort are most likely to be realized if the instruction requests are made part of the pretrial conference procedure.

The potential disadvantages of pretrial instruction requests arise from inability to predict just what the evidence will reveal. In smaller part, the problem is that wishful parties may request instructions on issues that will not be supported by trial evidence. In larger part, the problem is that even wishful parties may not anticipate all of the issues that will be supported by trial evidence. It will not do to prohibit requests as untimely when there was good reason to fail to anticipate the evidence that supports the request.

The simplest way to accommodate these conflicting concerns would be to strike the limiting language from Rule 51:

> At the close of the evidence or at such earlier time ~~during the trial~~ as the court reasonably directs, any party may file written requests * * * .

The Committee Note could point to the reasons that may justify a direction that requests be filed before trial, particularly in complex cases. The reasons for caution also should be pointed out. One of the cautions might be a reflection on the meaning of Rule 51's fourth sentence: "No party may assign as error the giving or the failure to give an instruction unless the party objects thereto before the jury retires to consider its verdict * * *." This sentence does not mean that it is enough to make a request for the first time, couched as an "objection," before the jury retires. The objection works only if there was a duty to instruct, and there is a duty to instruct only if a timely request is made.

The reason for considering Rule 51 in more general terms is suggested by the cautionary observation that might be written to explain the difference between a request and an objection. It is easy for the uninitiated to misread Rule 51. It can be revised to

convey its messages more clearly.

General Rule 51 Revision

Rule 51 can be read easily only by those who already know what it means. A party who wants an issue covered by instructions must do both of two things: make a timely request, and then separately object to failure to give the request as made. The cases that explain the need to renew the request by way of objection suggest that repetition is needed in part to ensure that the court has not simply forgotten the request or its intention to give the instruction, and in part to show the court that it has failed in its attempt to give the substance of a requested instruction in better form. An attempt to address an omitted issue by submissions to the court after the request deadline fails because it is not an "objection" but an untimely request. Many circuits, moreover, recognize a "plain," "clear," or "fundamental" error doctrine that allows reversal despite failure to comply with Rule 51. This doctrine is explicit in the general "plain errors" provision of Criminal Rule 52; the contrast between this general provision and Rule 51 has led some circuits to reject the plain error doctrine for civil jury instructions.

Although unlikely, it also is possible that the formal requirements of Rule 51 may discourage the timid from making untimely requests that would be granted if made. Requests framed as objections may well be given, despite the risk that tardy requests will seduce the court into error, confuse the jury, or at least unduly emphasize one issue.

Present Rule 51 is set out as a prelude to a revised draft, adding only numbers to indicate the points at which distinct thoughts emerge in the text:

> [*1: Requests*] At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury. [*2: Instructions*] The court, at its election, may instruct the jury before or after argument, or both. [*3: Objections*] No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and

the grounds of the objection. Opportunity shall be given to make the objection out of the hearing of the jury.

The following draft Rule 51 is only an approximation that suggests many of the issues that might be addressed by a comprehensive attempt to adopt a rule that better guides parties and courts:

Rule 51. Instructions to Jury: Objection

(a) Requests. A party may file written requests that the court instruct the jury on the law as set forth in the requests at the close of the evidence or at an earlier reasonable time directed by the court. [Permission must be granted to file supplemental requests at the close of the evidence on issues raised by evidence that could not reasonably be anticipated at the time initial requests were due.] The court must inform the parties of its proposed action on the requests before jury arguments. {The court may, in its discretion, permit an untimely request [to be] made at any time before the jury retires to consider its verdict.}

(b) Objections. A party may object to an instruction or the failure to give an instruction before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection. Opportunity must be given to make the objection out of the jury's hearing.

(c) Instructions. The court may instruct the jury at any time after trial begins. Final instructions must be given to the jury immediately before or after argument, or both.

(d) Forfeiture; plain error

(1) A party may not assign as error a mistake in an instruction actually given unless the party made a proper objection under subdivision (b).

(2) A party may not assign as error a failure to give an instruction unless the party made a proper request under subdivision (a), and — unless the court made it clear

that the request had been considered and rejected — also made a proper objection under subdivision (b).

(3) A [trial or appellate] court may set aside a jury verdict for error in the instructions that has not been preserved as required by paragraphs (1) or (2), taking account of the obviousness of the error, the importance of the error, the costs of correcting the error, and the importance of the action to nonparties.

Committee Note

Rule 51 is revised to capture many of the interpretations that have emerged in practice. The revisions in text will make uniform the conclusions reached by a majority of decisions on each point.

Requests. Subdivision (a) governs requests. Apart from the plain error doctrine recognized in subdivision (d)(3), a court is not obliged to instruct the jury on issues raised by the evidence unless a party requests an instruction. The revised rule recognizes the court's authority to direct that requests be submitted before trial. Particularly in complex cases, pretrial requests can help the parties prepare for trial. In addition, pretrial requests may focus the case in ways that invite reconsideration of motions to dismiss or for summary judgment. Trial also may be shaped by severing some matters for separate trial, or by directing that trial begin with issues that may warrant disposition by judgment as a matter of law; see Rules 16(c)(14) and 50(a). The rule permits the court to further support these purposes by informing the parties of its action on their requests before trial. It seems likely that the deadline for pretrial requests will often be connected to a final pretrial conference.

The risk in directing a pretrial request deadline is that unanticipated trial evidence may raise new issues or reshape issues the parties thought they had understood. The need for a pretrial request deadline may not be great in an action that involves well-settled law that is familiar to the court. Courts should avoid a routine practice of directing pretrial requests.

Untimely requests are often accepted, at times by acting on an

objection to the failure to give an instruction on an issue that was not framed by a timely request. The revised rule expressly recognizes the court's discretion to act on an untimely request. The most important consideration in exercising discretion is the importance of the issue to the case — the closer the issue lies to the "plain error" that would be recognized under subdivision (d)(3), the better the reason to give an instruction. The cogency of the reason for failing to make a timely request also should be considered — the earlier the request deadline, the more likely it is that good reason will appear for failing to recognize an important issue. Courts also must remain wary, however, of the risks posed by tardy requests. Hurried action in the closing minutes of trial may invite error. A jury may be confused by a tardy instruction made after the main body of instructions, and in any event may be misled to focus undue attention on the issues isolated and emphasized by a tardy instruction.

Objections. No change is intended in the requirements for making objections.

Instructions. Subdivision (c) expressly authorizes preliminary instructions at the beginning of the trial, a device that may be a helpful aid to the jury. In cases of unusual length or complexity, interim instructions also may be made during the course of trial.

Forfeiture and plain error. Many cases hold that a proper request for a jury instruction is not alone enough to preserve the right to appeal failure to give the instruction. The request must be renewed by objection. An objection, on the other hand, is sufficient only as to matters actually stated in the instructions. Even if framed as an objection, a request to include matter omitted from the instructions is just that, a request, and is untimely after the close of the evidence. This doctrine is appropriate when the court may not have sufficiently focused on the request, or may believe that the request has been granted in substance although in different words. Yet this doctrine may also prove a trap for the unwary who fail to add an objection after the court has made it clear that the request has been considered and rejected on the merits. The authority to act on an untimely request despite a failure to object is established in subdivision (a). Subdivision (d)(2) establishes authority to review the failure to grant a timely request, despite a failure to add an objection, when the court has made clear its consideration and rejection of the request.

Many circuits have recognized the power to review errors not

preserved under Rule 51 in exceptional cases. The foundation of these decisions is that a district court owes a duty to the parties, to the law, and to the jury to give correct instructions on the fundamental elements of an action. This duty is shaped by at least the four factors enumerated in subdivision (d)(3).

The obviousness of the error reduces the need to rely on the parties to help the court with the law, and also bears on society's obligation to provide a reasonably learned judge. Obviousness turns not only on how well the law is settled, but also on how familiar the particular area of law should be to most judges. Clearly settled but exotic law often does not generate obvious error.

The importance of the error must be measured by the role the issue plays in the specific case; what is fundamental to one case may be peripheral in another. Importance is independent of obviousness. The most obvious example involves law that was clearly settled at the time of the instructions, only to be overruled by the time of appeal.

The costs of correcting an error are affected by a variety of factors. If a complete new trial must be had for other reasons, ordinarily an instruction error at the first trial can be corrected for the second trial without significant cost. A Rule 49 verdict at the first trial may enable correction without further proceedings.

In a case that seems close to the fundamental error line, account also may be taken of the impact a verdict may have on nonparties. Common examples are provided by actions that attack government actions or private discrimination.

Other Possible Revisions

The revisions set out above reflect issues frequently encountered in present practice. At least in large part, they reflect what most courts do. Other possible changes can also be noted:

Serve Requests: Rule 51 does not require that instruction requests be served on all parties. It seems likely that exchange is routine, and that courts will require exchange if the parties fail to do it. It might be helpful to adopt an express requirement that all requests be served on all parties, particularly if the requests are filed before trial.

Make Objections on the Record: It has been held that specific

objections made during "extensive discussions off the record in chambers concerning the jury instructions" are not sufficient — that "to preserve an argument concerning a jury instruction for appellate review, a party must state distinctly the matter objected to and the grounds for the objection on the record." Dupre v. Fru-Con Engineering Inc., 8th Cir.1997, 112 F.3d 329, 333-334. Is this a trap for the unwary that should be set out on the face of Rule 51?

Who Must Object: Rule 51 says that a party may not assign as error the giving or the refusing to give an instruction "unless *that* party objects thereto * * *." This requirement is preserved in the draft revision. But why should it not be enough that any party has complied with Rule 51? Particularly when there are coparties, should it not be enough that the matter urged on appeal was properly raised by any party?

Direction to Request: Illinois Supreme Court Rule 239(b) provides: "At any time before or during the trial, the court may direct counsel to prepare designated instructions. * * * Counsel may object at the conference on instructions to any instruction prepared at the court's direction, regardless of who prepared it * * *." Is there any reason to adopt a similar provision for Rule 51?

Anything Else: ?

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April 5, 1999

MEMORANDUM TO ADVISORY COMMITTEE ON CIVIL RULES

SUBJECT: *Report of the Agenda Subcommittee*

I have attached a brief report of the Agenda Subcommittee submitted by Justice Christine Durham. A revised docket sheet indicating the subcommittee's evaluation of the work to be done on particular suggested rule amendments is also attached.

Professor Cooper has summarized the Agenda Subcommittee's recommendations regarding the proposed rule amendments. With the exception of two suggestions, copies of the original proposals studied by the subcommittee are attached for your information.

John K. Rabiej

3/9/99

Federal Rules of Civil Procedure
Advisory Committee

March 2, 1999

Agenda Subcommittee Report

The Agenda Subcommittee met by conference call on February 22 and 26, 1999, with Ed Cooper and John Rabiej on the calls. The subcommittee discussed a revised method of categorizing and tracking proposals on the Civil Rules Agenda. We identified the following classification categories:

1. Items relating to routine revision and periodic updates of the Rules. These should be accumulated and reviewed by the Reporter, the Chair and staff on a regular basis to determine when they need to be scheduled for Committee action.

2. Items that are not ripe for immediate attention but need to be monitored. This is a "wait and see" category.

3. Items that need study and/or discussion either by the Civil Rules Committee or another group. These need to be scheduled and/or referred for study.

4. Items that are ready for action by the Committee at a meeting. These need to be scheduled.

5. Items that are not relevant to the Committee's work or are entirely without merit (the "bad idea" category). These need to be reviewed by the Rules Committee for removal from our docket (with communication of that action to the proposers where appropriate).

6. Items awaiting review and assessment by the Agenda subcommittee.

The subcommittee has undertaken a review of the current docket using this system, and a copy of the results is attached. Also, the April meeting agenda contains recommendations for removing some items from the docket.

Ed Cooper suggested that on occasion the Chair and/or the Committee might wish to use the Agenda subcommittee itself to undertake substantive review of some proposals and make recommendations for further action, and the subcommittee members agreed that such a function would be possible if desired.

Federal Rules of Civil Procedure
Advisory Committee
March 2, 1999

The institutional memories of Ed Cooper and John Rabiej were invaluable in our discussion, and it is anticipated that they should continue to be part of all work on the agenda. It appears that it may be very beneficial to have an active Agenda Subcommittee to help us stay current and informed about the docket, as it will require several Rules Committee members, as well as the Chair and the Reporter, to monitor its progress regularly.

Respectfully submitted:

Christine Durham, Chair
David Levi
Thomas Rowe

AGENDA DOCKETING
(PENDING MATTERS ONLY)

ADVISORY COMMITTEE ON CIVIL RULES

Proposal	Source, Date, and Doc #	Status
[Financial disclosure statement]	Comte on Codes of Conduct 9/23/98	11/98 — Comte considered **Defer Discussion (Continue to Monitor)**
[Admiralty Rule-New]— Authorize immediate posting of preemptive bond to prevent vessel seizure	Mag. Judge Roberts 9/30/96 (96-CV-D) #1450	12/24/96— Referred to Admiralty and Agenda Subc **Defer Discussion (Continue to Monitor)**
[Non-applicable Statute]— 46 U.S.C. § 767 Death on the High Seas Act not applicable to any navigable waters in the Panama Canal Zone	Michael Marks Cohen 9/17/97 (97-CV-O)	10/97 — Referred to reporter, chair, and Agenda Subc **Recommend Committee Remove from Agenda**
[Admiralty Rule C(4)] — Amend to satisfy constitutional concerns regarding default in actions *in rem*	Gregory Walters, Cir. Exec., 9th Cir. 12/4/97 (97-CV-V)	1/98 — Referred to reporter, chair, and Agenda Subc **Defer Discussion (Continue to Monitor)**
[CV4(d)] — To clarify the rule	John J. McCarthy 11/21/97 (97-CV-R)	12/97 — Referred to reporter, chair, and Agenda Subc **Accumulate for Routine Revision and Periodic Update**
[CV4] — To provide sanction against the willful evasion of service	Judge Joan Lefkow 8/12/97 (97-CV-K)	10/97 — Referred to Reporter, Chair, and Agenda Subc **Accumulate for Routine Revision and Periodic Update**
[CV5] — Service by electronic means or by commercial carrier; fax noticing produces substantial cost savings while increasing efficiency and productivity	Michael Kunz, clerk E.D. Pa. and John Frank 7/29/96; 9/10/97 (97-CV-N)	4/95 — Declined to act 10/96 — Reconsidered, submitted to Technology Subcommittee 5/97 — Discussed in reporter's memo. 9/97 — Information sent to reporter, chair, and Agenda Subc 11/98 — Referred to Tech. Subcommittee **Referred to Other Committee (Technology Subcomte)**

Proposal	Source, Date, and Doc #	Status
[CV5(b)] — Facsimile service of notice to counsel	William S. Brownell, District Clerks Advisory Group 10/20/97 (97-CV-Q)	11/97 — Referred to reporter, chair, and Agenda Subc 11/98 — Referred to Technology subcommittee **Referred to Other Committee (Technology Subcomte)**
[CV11] — Mandatory sanction for frivolous filing by a prisoner	H.R. 1492 introduced by Cong Gallegly 4/97	5/97 — Considered by committee **Recommend Committee Remove from Agenda**
[CV11] — Sanction for improper advertising	Carl Shipley 4/97 (97-CV-G) #2830	5/97 — Referred to reporter, chair, and Agenda Subc **Recommend Committee Remove from Agenda**
[CV11] — Should not be used as a discovery device or to test the legal sufficiency or efficiency of allegations in pleadings	Nicholas Kadar, M.D. 3/98 (98-CV-B)	4/98 — Referred to reporter, chair, and Agenda Subc **Subject to Preliminary Evaluation by Cooper**
[CV12] — To conform to *Prison Litigation Act of 1996*	John J. McCarthy 11/21/97 (97-CV-R)	12./97 — Referred to reporter, chair, and Agenda Subc **Ripe and Ready for Scheduling Committee Action**
[CV12(b)] — Expansion of conversion of motion to dismiss to summary judgment	Daniel Joseph 5/97 (97-CV-H) #2941	5/97 — Referred to reporter, chair, and Agenda Subc **Recommend Committee Remove from Agenda**
[CV 15(c)(3)(B)] —Clarifying extent of knowledge required in identifying a party	Charles E. Frayer, Law student 9/27/98 (98-CV-E)	9/98 — Referred to chair, reporter, and Agenda Subc **Accumulate for Routine Revision and Periodic Update**

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 committee 5/97 — Approved and forwarded changes to (c)(1), and (f); rejected (b)(3)(A) and (B); and deferred other proposals until next meeting 4/97 — Stotler letter to Congressman Canady 6/97 — Changes to 23(f) were approved by ST Cmte; changes to 23(c)(1) were recommitted to advisory cmte 10/97 — Considered by cmte 3/98 — Considered by comte deferred pending mass torts working group deliberations **Defer Discussion (Continue to Monitor) — Subject to Chief Justice's Action on Mass Torts Ad Hoc Comte**
[CV23] — Standards and guidelines for litigating and settling consumer class actions	National Assoc. for Consumer Adv. 12/10/97 (97-CV-T)	12/97 — Referred to reporter, chair, and Agenda Subc **Defer Discussion (Continue to Monitor) — Subject to Chief Justice's Action on Mass Torts Ad Hoc Comte**
[CV23(e)] — Amend to include specific factors court should consider when approving settlement for monetary damages under 23(b)(3)	Beverly C. Moore for Class Action Reports 11/25/97 (97-CV-S)	12/ 97 — Referred to reporter, chair, and Agenda Subc **Defer Discussion (Continue to Monitor) — Subject Chief Justice's Action on Mass Torts Ad Hoc Comte**
[CV26] — Depositions to be held in county where witness resides; better distinction between retained and "treating" experts	Don Boswell 12/6/96 (96-CV-G)	12/96 — Referred to reporter, chair, and Agenda Subc. 5/97 — Reporter recommends that it be considered part of discovery project **Referred to Other Committee (Discovery Subcomte)**

Proposal	Source, Date, and Doc #	Status
[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 **Referred to Other Committee (Mass Torts Com)**
[CV45] — Discovering party must specify a date for production far enough in advance to allow the opposing party to file objections to production	Prof. Charles Adams 10/1/98 (98-CV-G)	10/98 — Referred to chair, reporter, Agenda Subc, and Discovery Subc **Referred to Other Committee (Discovery Subcomte)**
[CV45(d)] — Re-service of subpoena not necessary if continuance is granted and witness is provided adequate notice	William T. Terrell, Esq. 10/9/98 (98-CV-H)	12/98 — Referred to chair, reporter, and Agenda Subc **Referred to Other Committee (Discovery Subcomte)**
[CV50(b)] — When a motion is timely after a mistrial has been declared	Judge Alicemarie Stotler 8/26/97 (97-CV-M)	8 /97 — Sent to reporter and chair 10/97 — Referred to Agenda Subc **Accumulate for Routine Revision and Periodic Update**
[CV51] — Jury instructions filed before trial	Judge Stotler (96-CV-E) Gregory B. Walters, Cir. Exec., for the Jud. Council of the Ninth Cir. 12/4/97 (97-CV-V)	11/8/96 — Referred to chair 5/97 — Reporter recommends consideration of comprehensive revision 1/98 — Referred to reporter, chair, and Agenda Subc 3/98 — Comte considered 11/98 — Comte considered **Schedule for Study and Discussion**
[CV53] — Provisions regarding pretrial and post-trial masters	Judge Wayne Brazil	5/93 — Considered by cmte 10/93 — Considered by cmte 4/94 — Draft amendments to CV16.1 regarding "pretrial masters" 10/94 — Draft amendments considered 11/98 — Subcom appointed to study issue **Referred to Other Committee (Special Master Subcomte)**

Proposal	Source, Date, and Doc #	Status
[CV56(a)] — Clarification of timing	Scott Cagan 2/97 (97-CV-B) #2475	3/97 — Referred to reporter, chair, and Agenda Subc 5/97 — Reporter recommends rejection **Accumulate for Routine Revision and Periodic Update**
[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 **Accumulate for Routine Revision and Periodic Update**
[CV68] — Party may make a settlement offer that raises the stakes of the offeree who would continue the litigation	Agenda book for 11/92 meeting; Judge Swearingen 10/30/96 (96-CV-C); S. 79 Civil Justice Fairness Act of 1997 and § 3 of H.R. 903	1/21/93 — Unofficial solicitation of public comment 5/93, 10/93, 4/94 — Considered by cmte 4/94 — Federal Judicial Center agrees to study rule 10/94 — Delayed for further consideration 1995 — Federal Judicial Center completes its study **DEFERRED INDEFINITELY** 10/96 — Referred to reporter, chair, and Agenda Subc. (Advised of past comprehensive study of proposal) 1/97 — S. 79 introduced § 303 would amend the rule 4/97 — Stotler letter to Hatch 5/97 — Reporter recommends continued monitoring **Recommend Committee Remove from Agenda**
[CV73(b)] — Consent of additional parties to magistrate judge jurisdiction	Judge Easterbrook 1/95	4/95 — Initially brought to committee's attention 11/95 — Delayed for review, no pressing need 10/96 — Considered along with repeal of CV74, 75, and 76 5/97 — Reporter recommends continued monitoring **Recommend Committee Remove from Agenda**

Proposal	Source, Date, and Doc #	Status
[CV 77(b)] — Permit use of audiotapes in courtroom	Glendora 9/3/96 (96-CV-H) #1975	12/96 — Referred to reporter and chair 5/97 — Reporter recommends that other Conf. Committee should handle the issue **Recommend Committee Remove from Agenda**
[CV77(d)] — Fax noticing to produce substantial cost savings while increasing efficiency and productivity	Michael E. Kunz, Clerk of Court 9/10/97 (97-CV-N)	9/97 — Mailed to reporter, chair, and Agenda Subc **Ripe and Ready for Scheduling Committee Action**
[CV77(d)] — Facsimile service of notice to counsel	William S. Brownell, District Clerks Advisory Group 10/20/97 (CV-Q)	11/97 — Referred to reporter, chair, and Agenda Subc **Ripe and Ready for Scheduling Committee Action**
[CV 81(a)(2)] — Inconsistent time period vs. Habeas Corpus rule 1(b)	Judge Mary Feinberg 1/28/97 (97-CV-E) #2164	2/97 — Referred to reporter, chair, and Agenda Subc. 5/97 — Considered and referred to Criminal Rules Cmte for coordinated response **Defer Discussion (Continue to Monitor)**
[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 **Accumulate for Routine Revision and Periodic Update**
[CV83(a)(1)] — Uniform effective date for local rules and transmission to AO		3/98 — Comte considered 11/98 — Draft language considered **Referred to Other Committee (Stg. Comte)**
[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, Fed. Mag. Judge Assn. 7/17/97 (97-CV-I)	7/97 — Mailed to reporter and chair 10/97 — Referred to Agenda Subc **Schedule for Study and Discussion**

Proposal	Source, Date, and Doc #	Status
[CV Form 1] — Standard form AO 440 should be consistent with with summons Form 1	Joseph. Skupniewitz, Clerk 10/2/98 (98-CV-F)	10/98 — Referred to chair, reporter, and Agenda Subc **Ripe and Ready for Scheduling Committee Action**
[CV Form 17] Complaint form for copyright infringement	Professor Edward Cooper 10/27/97	10/97 — Referred to cmte **Ripe and Ready for Scheduling Committee Action**
[Interrogatories on Disk]	Michelle Ritz 5/13/98 (98-CV-C)	5/98 — Referred to reporter, chair, and Agenda Subc **Refer to Other Committee (Technology Subcomte)**
[To change standard AO forms 241 and 242 to reflect amendments in the law under the Antiterrorism and Effective Death Penalty Act of 1997]	Judge Harvey E. Schlesinger 8/10/98 (98-CV-D)	8/98 — Referred to reporter, chair, and Agenda Subc **Refer to Other Committee (Criminal Rules Comte)**

Agenda Docketing Memorandum

April, 1999

Introduction

The Agenda Subcommittee has considered the matters pending on the agenda and has made the recommendations described in the "Status" column of the Agenda Docketing list. This memorandum provides brief explanations of the recommendations.

Financial Disclosure Statement. Following consideration by the Subcommittee, a conference call among Judge Scirica and several of the advisory committee reporters discussed disposition of the questions raised by the Committee on Codes of Conduct. A brief note reflecting the fruits of that conversation is included in the April agenda.

Admiralty Rule-New: 96CVD. This proposal would create a new procedure that would allow a party to avoid arrest or attachment of a vessel by posting a preemptive bond before seizure. The advice of the Maritime Law Association has been sought. The Subcommittee recommends that further action be deferred pending advice from the MLA.

Admiralty: Death on the High Seas Act: 97CVO. The proposal is that the language in 46 U.S.C. § 767 making the Death on the High Seas Act applicable to "any navigable waters in the Panama Canal Zone" be removed as moot. The Subcommittee recommends that the proposal be removed from the agenda because it addresses a statutory question outside Advisory Committee authority. The Administrative Office staff can communicate the suggestion to Congress.

Admiralty Rule C(4): Constitutional concerns over defaults in proceedings in rem: 97CVV. This proposal has been referred to the Maritime Law Association for advice. The Subcommittee recommends that further action be deferred pending advice from the MLA.

Rule 4(d): Mandatory use by pro se plaintiff: 97CVR. The plaintiff, an indigent prisoner, complains that a magistrate judge ordered him to seek waiver of service under Rule 4(d), and suggests that Rule 4(d) should be amended to make it clear that resort to Rule 4(d) is optional. The Subcommittee recommends that this question be added to the accumulation of proposals to amend Rule 4. Rule 4 was amended extensively in 1993, a series of proposals for small changes keep coming in, and it seems better to avoid annual minor revisions.

Rule 4: Duty to cooperate in service: 97CVK. Magistrate Judge Lefkow submits for consideration Indiana Rules of Trial Procedure

4.16, which declares the duty of every person being served to accept service, comply with the rules, and acknowledge receipt of service in writing. A person who refuses to accept service may not challenge service. Offering or tendering the papers and advising the person that service is being made constitutes service. The Subcommittee recommends that this proposal be accumulated with other Rule 4 proposals for later consideration.

Rule 5: Electronic service: 97CVN. Materials on electronic service are included in this agenda book under a separate tab.

Rule 5: Mailbox Filing: 99CVA. (This proposal has not yet been reviewed by the Agenda Subcommittee. It suggests adoption of Texas RCP 5, which allows timely first-class mail to count as filing if the document is actually received by the clerk "not more than ten days tardily"; a legible postmark affixed by the Postal Service is prima facie evidence of the date of mailing.)

Rule 5(b): Facsimile service of notice to counsel: 97CVQ. The Rule 5 materials include a Rule 77(d) that embraces this proposal.

Rule 11: H.R. 1492. This bill would make Rule 11 sanctions mandatory in a case involving a party who is a prisoner; the sanctions would reach the attorney, law firm, or party responsible for the Rule 11 violation. The Subcommittee recommends that this item be removed from the agenda. Legislative proposals to amend Rule 11 are common; there is little point in holding each of them indefinitely on the agenda.

Rule 11(?): Lawsuit abuse: 97CVG. This proposal recommends adoption of a rule stating that unreasonable lawyer advertising to solicit litigation is conduct unbecoming an officer of the court and bar of a court of appeals in the United States. The Subcommittee recommends that the proposal be removed from the agenda.

Rule 11: Misuse for discovery: 98CVB. This proposal comes from a doctor who describes at great length his involvement as an unwilling expert witness in malpractice litigation. There is much that indicates that discovery may have been mismanaged in that particular litigation. There is little to indicate the reason for his belief that Rule 11 was misused to support discovery and as a means to test the sufficiency of the pleadings. There are good reasons to believe that discovery may at times be appropriate in disposing of a Rule 11 motion — the most likely occasion would be a claim that a pleading, motion, or other paper was presented for an improper purpose in violation of Rule 11(b)(1). The Subcommittee has recommended preliminary evaluation by the Reporter. The Reporter recommends that this proposal does not deserve a separate place on the Committee agenda; Rule 11 remains so prominent that any general problems will surely come to the Committee's attention.

Rule 12: Conform to Prison Litigation Act of 1996: 97CVR. This proposal has been in the agenda books for the two most recent Advisory Committee meetings. The problem is that the Prison Litigation Reform Act allows a defendant sued by a prisoner on a federal claim to waive the right to reply. The waiver prevents the court from granting any relief unless the court directs the defendant to reply. This procedure is arguably inconsistent with at least Rules 7, 8, and 12. But the issue has not seemed to call for urgent action. It presents a serious question whether the Civil Rules must be amended to reflect each statute that establishes a peculiar procedure. The Subcommittee believes the issue ripe for consideration if the Committee concludes it should be addressed, but also believes that it would be better to defer action until it becomes clear whether the statute has created any real problems of confusion.

Rule 12: Invoke Rule 56 procedures on Rule 12(b)(1) motions: 97CVH. This proposal is that summary judgment procedures should be invoked when materials beyond the pleadings are considered on a Rule 12(b)(1) motion to dismiss for lack of subject-matter jurisdiction. The proposal is based on the proponent's dissatisfaction with a particular litigating experience. The Subcommittee recommends that the proposal be removed from the agenda. There is a long tradition of special procedures on motions challenging subject-matter jurisdiction, including factfinding by procedures that go far beyond Rule 56. Determinations as to diversity jurisdiction, for example, may call for difficult inquiries into such facts as domicile, principal place of business, or the like.

Rule 15(c)(3)(B): 98CVE. This proposal from a law student is attractive. An amendment changing the party against whom a claim is asserted relates back to the date of the original pleading if, among other conditions, the new party "knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party." Some courts, at least, have interpreted this language to defeat relation back when the plaintiff had not made a mistake but knew that the identity of the proper party was not known. A common illustration involves a plaintiff who claims mistreatment by a police officer, but who cannot identify the police officer. Suit often is brought against an "unknown named officer" of the local police department. Even if the proper police officer learns of the lawsuit within the proper Rule 15(c) time and knows that the action would have been brought against her if she could be identified, relation back is denied. There are powerful arguments that this interpretation is

wrong, and that the rule should be fixed. The Subcommittee recommends that this proposal be held on the agenda for consideration when time permits.

Rule 23: Several proposals, including 97CVT and 97CVS. A variety of class-action proposals remain on the agenda, including those directed to mass torts, consumer class actions, and criteria for approving settlements. Rule 23 was on the active agenda for several years, and has been moved one step back while consideration is given to the best means of addressing mass torts. Settlement class issues have been held in abeyance not only because of the mass torts questions, but also because of the desire to monitor experience under the *Amchem* decision and the anticipation of another Supreme Court decision this Term. The Subcommittee recommends that all Rule 23 proposals be carried forward while the Advisory Committee continues to monitor class-action developments.

Rule 26(45): Place of nonparty deposition; expert witnesses: 98CVG. This proposal addresses two separate subjects. The first, directed to Rule 45 more than Rule 26, suggests that a witness must be deposed in the county where the witness resides or works. The second suggests that Rules 26(a)(2) and 26(b)(4) be amended to clarify the role of professionals — such as treating physicians — who are called upon to render expert opinions without having been retained or specially employed. The Subcommittee recommends that these proposals be referred to the Discovery Subcommittee, noting that Rule 45 was extensively amended in 1991 to increase protections for deponents, and that the expert witness question seems to be addressed expressly in the present rules and committee notes.

Rule 32: Use of expert witness depositions in multiple trials: Judge Weinstein. This proposal grows out of several recent attempts to develop procedures that would allow panels of court-appointed experts to study mass-tort problems and offer opinions that could be admitted in evidence in multiple trials. The best-known efforts have been made in the breast-implant litigation. The procedure would include two depositions of the experts: first a discovery deposition, and then a videotaped trial deposition that could be admitted as evidence in trials throughout the country. The Subcommittee recommends that this proposal be considered first by any mass torts committee that may be formed. Failing formation of a mass-torts committee, the Discovery Subcommittee is the appropriate body to provide initial study.

Rule 45: Advance notice of deposition: 98CVG. This proposal was

forwarded by Professor Marcus acting on a suggestion by Professor Charles Adams. The concern is that subpoenas to produce documents may be served on nonparties on terms that do not allow adequate time for a party to assert privilege claims. The Subcommittee recommends that this proposal be referred to the Discovery Subcommittee.

Rule 45: Subpoena continues during continuance: 98CVH; 99CVB. The first proposal is based on Arkansas Rule 45(d): "If a continuance is granted and if the witness is provided adequate notice thereof re-service of the subpoena shall not be necessary." A similar question is raised by 99CVB: when a deposition, hearing, or trial is rescheduled, a continuing duty to respond should be recognized. The Subcommittee recommends that this proposal be referred to the Discovery Subcommittee.

Rule 45: Dispense with Subpoena for Party, 99CVA. (This proposal has not yet been reviewed by the Agenda Subcommittee. It urges emulation of California CCP 1987(b), which provides that a subpoena is not needed to secure attendance of a party at a trial.)

Rule 50(b): Time for renewed motion after mistrial: 97CVM. This proposal from Judge Stotler suggests that Rule 50(b) should be amended to specify the time for renewing a motion for judgment as a matter of law after a mistrial. The Reporter has prepared a draft, but the question may tie to other minutiae of Rule 50(b) practice. The Subcommittee recommends that consideration be deferred as a routine revision that can be addressed when time permits.

Rule 51: Submit requested instructions before trial: 96CVE, 97CV-V. A revision of Rule 51 has been prepared to reflect this proposal and to suggest several other revisions of Rule 51. The draft has been twice before the Advisory Committee and twice deferred for further consideration. The Subcommittee recommends that the proposal be advanced for Committee study. Materials are included in the April agenda book.

Rule 53: Pretrial and post-trial masters: Judge Wayne Brazil. A draft Rule 53 has been prepared and referred to the Rule 53 subcommittee, which expects to report to the Advisory Committee at the 1999 fall meeting.

Rule 56(a): Time for plaintiff's motion: 97CVB. Rule 56(a) permits a party seeking to recover on a claim to move for summary judgment "at any time after the expiration of 20 days from the commencement of the action." Under Rule 3, an action is commenced by filing a

complaint. Rule 4(m) sets the presumptive limit for serving the complaint at 120 days after filing. Literally, Rule 56(a) permits a summary-judgment motion to be made before a defendant is served. The proposal is that Rule 56(a) allow a motion following expiration of 20 days from serving the defending party. Proposed Rule 56 amendments were rejected by the Judicial Conference several years ago. Variations of some of those proposals have remained under consideration, awaiting a proper time to seek reconsideration. The Subcommittee recommends that this proposal be accumulated with other Rule 56 proposals for eventual revision.

Rule 56(c): Time for serving reply materials: 94CVD. This proposal was stirred by a Ninth Circuit opinion that invalidated a local rule that established time limits that seem at odds with the Rule 56(c) provision that allows an opposing party to "serve" opposing affidavits "prior to the day of the hearing." Service the day before the hearing seems questionable if it means actual delivery; it seems ludicrous if it means mailing, to arrive after the hearing. The immediate occasion for the proposal was removed when the Ninth Circuit — informed that virtually every district in the Circuit had a similar local rule — granted rehearing and sustained the local rule. The only way to find that such local rules are consistent with Rule 56 is by brute force, justified by the need to establish a sensible practice. The issue remains worthy of consideration with other Rule 56 proposals, as the Subcommittee recommends.

Rule 68: More effective "sanctions"; 96CVC. The Committee considered Rule 68 over a period of more than four years without reaching consensus. A relatively recent proposal was made by the Federal Magistrate Judges Association in 1996. Prolonged study showed that offer-of-judgment problems are enormously complex, and are tied to deep-seated traditions about financing litigation. In 1997, the Committee determined that the case had not been made for revision. Although bills are regularly introduced in Congress to amend Rule 68 directly, or to provide independent offer-of-judgment rules, the Subcommittee recommends that the topic be removed from the agenda. Should developments in Congress warrant further attention, a new agenda line can be opened.

Rule 73(b): All-party consent to magistrate-judge trial. This item came to the agenda in reaction to a Seventh Circuit rule that a completed trial before a magistrate judge is void if, although all original parties consented to the trial, a later-added party participated without explicitly consenting. There has not been any indication that substantial problems have yet resulted from this

ruling. The Subcommittee recommends that the issue be removed from the agenda.

Rule 77(b): Private audiotaping of judicial proceedings, 96CVH. The proposal is made by a pro se litigant who believes a party should be allowed to avoid the cost of official court transcripts by making a private audiotape of the proceedings. The Subcommittee believes that the issues are better considered by Congress than in the Enabling Act process. It recommends that the proposal be removed from the agenda.

Rule 77(d): Facsimile service: 97CVN, 97CVQ. Rule 77(d) is addressed with the Rule 5(b) proposals for electronic service described above and included in the April agenda.

Rule 81(a)(2): Habeas corpus time periods: 97CVE. This proposal has been before the Committee, and was referred to the Criminal Rules Committee. The Criminal Rules Committee plans to recommend deletion of the time provisions in Rule 81. The question will be placed on the agenda for action when the Criminal Rules recommendation is received.

Rule 81(c): Conforming to change from "petition" to "notice" of removal. Some years back, 28 U.S.C. § 1446 was amended to describe the paper that initiates removal as a "notice" rather than a "petition." Rule 81(c) never has been changed to reflect the new nomenclature. Revision is a bit more complicated than substitution of "notice of" for "petition for." The rule refers to the petitioner; the awkwardness of substitute phrasing suggests that it might be better to restyle the entire subdivision. The Subcommittee recommends that this project be retained for disposition in connection with other Rule 81 changes. Because an amendment of Rule 81(a)(1) will be published for comment in August, 1999, a memorandum revising Rule 81(c) is included in the April agenda materials.

Rule 83(a)(1): Uniform effective date for local rules. This topic was considered at the November, 1998 Advisory Committee meeting in light of a proposal by the Appellate Rules Committee that uniform provisions be adopted to govern the effective date of local rules. Various drafts were considered, and the topic was recommended to the Standing Committee for further consideration by a process that could coordinate the several advisory committees and integrate their deliberations with the Local Rules Project.

Pro se Litigants: 97CVI. The Federal Magistrate Judges Association has proposed a project to develop separate rules for pro se

litigation, offering several illustrations of specific problems but also raising the much more general issue "whether the underlying presumption in the rules that all cases proceed with skilled, professional advocates on all sides is in fact true in pro se cases." It is recognized that such a task may be "greater than the Civil Rules Committee typically undertakes." The Subcommittee, recognizing the magnitude of the task, recommends that the proposal be scheduled for study and discussion.

Form 1: 98CVF. Rule 4(a) states that the summons must "state the time within which the defendant must appear and defend." Form 1 illustrates a summons that instructs the defendant to serve an answer on the plaintiff's attorney within the required time, but that does not also direct the defendant to file the answer with the court. AO Form 440 explicitly requires the defendant "to file with the Clerk of this Court and serve upon plaintiff's attorney" an answer. The recommendation is that Form 1 be amended to include a similar requirement. One amendment would add a final sentence to the body of the form: "You also must file a copy of the complaint with the Clerk of this Court." [This alternative seems better than simply adopting Form 440, which if read literally threatens the defendant with a default judgment if the answer is served on the plaintiff but no copy is filed with the court.] The Subcommittee recommends that this question is ready to be scheduled for Committee consideration.

Form 17: Copyright Complaint. Form 17 was last amended in 1948, when the 1909 Copyright Act remained in effect. The Copyright Act was completely revised in 1976. At best, expert copyright eyes are required to determine how far Form 17 should be revised to conform with current law. The obvious problem leads to a second problem: is it desirable to include form complaints for the Federal Employers' Liability Act (Form 14), the Merchant Marine Act (Form 15), patent infringement (Form 16), and copyright infringement? On the one hand, it may be desirable to show that the "short and plain statement" requirement of Rule 8(a)(2) applies in potentially complex statutory actions. On the other hand, there may be a significant risk of misleading anyone who seriously relies on the forms, even assuming that each form is precisely right for one situation under the respective laws. The Subcommittee recommends that these issues are ripe and ready to be scheduled for Committee consideration.

Interrogatories on Disk: 98CVC. The proposal is that interrogatories be served in electronic form that permits answers to be written onto the same disc, eliminating any need to copy the

question that is addressed by the answer. The Subcommittee recommends that this proposal be referred to the technology subcommittee, with an eye to consideration by the Standing Committee Technology Subcommittee in coordination with the other advisory committees.

AO Forms 241, 242: 98CVD. This proposal suggests changes in Administrative Office forms for habeas corpus proceedings. The Subcommittee recommends that the proposal be referred to the Criminal Rules Advisory Committee.

#1450

John D. Roberts
United States Magistrate Judge
Federal Building and Courthouse
222 West Seventh Avenue, Box 46
Anchorage, Alaska 99513-7563

[redacted]
Sessions
96-CV- D

COPY

September 30, 1996

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

Dear Judge Stotler:

Please find enclosed a proposed rule and comment for consideration by the Standing Committee On Rules Of Practice And Procedure. I have also mailed a copy of this proposed rule and comment to the Chairman of the Advisory Committee On Civil Rules.

The local admiralty rules committee which I chair has considered this proposed rule. However, it was unable to reach a consensus on the advisability of it. Perhaps some of that resistance was based on the inevitable bias that comes from the particular practice of the lawyers involved. Regardless, it is clear to me that consideration of this rule taxes our local committee's resources beyond its means. I am convinced that once a complaint in admiralty has been filed there is nothing to prevent a court from considering a motion for the kind of preemptive bond contemplated by this proposed rule. See generally Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction 2d § 3522; Alyeska Pipeline Service Co. v. Vessel Bay Ridge, 703 F.2d 381 (9th Cir. 1983); U.S. v. Little, 26 Fed. Cas. 979, 982 (1818). The anticipated utility of the rule is explained in the attached proposed comment.

Thank you for your time and consideration.

Sincerely,

The Honorable John D. Roberts
United States Magistrate Judge

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

Attachments

RULE_____
SUBMISSION TO JURISDICTION BY DEFENDANT VESSEL:
PREEMPTIVE BOND HEARING

(A) **Submission To Jurisdiction.** At any time after the filing of an action in rem or quasi in rem as provided for in Supplemental Rule E against a vessel and prior to any arrest of such vessel, a defendant may file a notice of appearance submitting to the jurisdiction of the court. Such appearance may be expressly restricted to the defense of an admiralty or maritime claim, and in that event shall not constitute an appearance for the purposes of any other claim with respect to which process is not available or has not been served.

(B) **Preemptive Bond.** Upon submitting to the jurisdiction of the court pursuant to subdivision (A) of this rule and prior to its arrest, a defendant may move the court for a hearing to have the court fix a bond in accordance with Supplemental Rule E(5)(a) or a general bond in accordance with Supplemental Rule E(5)(b). Such bond will serve to establish the security necessary to protect the plaintiff's interests, and to prevent the arrest or attachment of the vessel. If a general bond is filed judgment and remedies may be had on such bond as if it were a bond filed under Supplemental Rule E(5)(b).

(C) **Hearing.** The requested hearing shall occur as soon as practicable but no more than 5 days after the request is filed

with the court unless the movant requests the hearing be held at a later date.

(D) **Notice.** Any notice of a hearing under this rule shall be made on all parties by personal service or by certified mail with return receipt requested. Whenever possible, notice of hearing shall also be given by telephone.

(E) **Process of arrest unaffected.** Nothing in this rule, including the filing of a motion to fix a bond under section (B), shall impair the process of any otherwise lawful arrest of the vessel.

PROPOSED COMMENTARY

This rule is intended to prevent the kind of eleventh hour jockeying for tactical advantage achieved by arresting or attaching vessels, which too often intrudes upon the fair and efficient flow of litigation. Under section (E) of this rule a vessel may still be arrested even after the filing of a motion for special bond as provided by section (B). Only the actual setting and posting of such bond would stop an arrest from going forward. This rule is not in conflict with Supplemental Rule E which involves vessels which have already been attached or arrested.

#5008

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9/29/97

97-CV-0

September 17, 1997

Our File: 91091

Mark O. Kasanin, Esq.
McCutchen, Doyle, Brown & Enersen, LLP
Three Embarcadero Center, 25th Floor
San Francisco, California 94111

Dear Mark:

Here's another statute which the Rules Committee might consider recommending for amendment.

The Death on the High Seas Act is by its terms not applicable to "any navigable waters in the Panama Canal Zone." 46 U.S.C. §767. With the disestablishment of the District Court for the Canal Zone, those waters may now be the only ones in the world, outside the Great Lakes and State territorial waters, where DOHSA has no force even if it would otherwise apply under relevant choice-of-law rules.

I think the quoted provisions should be deleted from the statute.

Regards.

Sincerely,

Michael Marks Cohen

MMC:epa

91C91EMJ.WP5

SEP 2 3 1997

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UNITED STATES COURTS FOR THE NINTH CIRCUIT

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December 4, 1997

97-CV-V

97-CR-015

The Honorable Alicemarie H. Stotler
Chair, Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
751 West Santa Ana Boulevard, Room 403
Santa Ana, California 92701-4599

Dear Judge Stotler:

As you know, the Judicial Council of the Ninth Circuit, with funding assistance from the Administrative Office, recently completed an exhaustive survey of circuit local rules. As a result, there has been a great effort on the part of the districts to bring their local rules into conformity with the federal rules. Many districts have completed the process and most others are well on their way to bringing their rules into harmony with the federal rules. The Council also found during the course of the study that it would suggest revising four federal rules.

1. Fed. R. Civ. P. 5(d)

The District Local Rules Review Committee of the Judicial Council of the Ninth Circuit found that most districts are violating the requirements of Rule 5(d) which makes filing of discovery documents the general rule and non-filing the exception. The question becomes whether the local rules against filing of discovery documents should be abrogated or whether 5(d) should be amended to conform to actual practice. While public access is certainly a significant concern, it must be balanced against the time, expense, and space problems which would result from the routine filing of all discovery documents. Moreover, the public access theoretically protected by Rule 5(d) is in fact illusory given the numerous local rules against filing discovery documents.

Rule 5(d) could be amended to accommodate more realistically the competing interests. Specifically, Rule 5(d) could allow district courts to adopt local rules providing that discovery documents would generally not be filed, but permitting the courts to order that discovery documents be filed when required in a proceeding or to permit public access. Such a change in Rule 5(d) could actually expand public access since the majority of districts currently prohibit the filing of discovery documents.

2. Fed. R. Civ. P. 51

Fed. R. Civ. P. 51 gives each party the option of filing proposed jury instructions by use of the word "may." It also directs that any proposed instructions be filed "[a]t the close of the evidence or at such earlier time during the trial as the court reasonably directs," clearly contemplating filing during trial.

The Judicial Council of the Ninth Circuit recommends amending Fed. R. Civ. P. 51 to authorize local rule requiring that civil jury instructions be filed before trial. Both the court and the parties benefit if the court has before it specific proposed language embodying each party's theory. The court must have the proposed instructions before the trial to be able to consider them properly and to be prepared to instruct the jury without an interruption in the trial.

3. Fed. R. Crim. P. 30

Fed. R. Crim. P. 30 language mirrors Fed. R. Civ. P. 51.

The Judicial Council of the Ninth Circuit recommends Fed. R. Civ. P. 30 be amended to authorize local rules requiring that criminal jury instructions be filed before trial. Both the court and the parties benefit if the court has before it specific proposed language embodying each party's theory. The court must have the proposed instructions before the trial to be able to consider them properly and to be prepared to instruct the jury without an interruption in the trial.

4. Fed. R. Civ. P., Supp. R. C(4)

The Judicial Council of the Ninth Circuit recommends amending this rule to assure constitutional soundness. Under the current rule, the only notice required following the seizure of property is by publication. That notice requirement has been challenged on constitutional grounds and may not provide enough protection to pass constitutional muster. *See MacDougalls' Cape Cod Marine Service, Inc. v. One Christina 40' Vessel*, 900 F. 2d 408 (1st Cir. 1990) (notice by publication inadequate to satisfy requirements of due process under the Fifth Amendment) and *United States v. Approximately 2,538.85 Shares of Stock*, 988 F. 2d 1281 (1st Cir. 1993) (in a civil forfeiture action service of the warrant for arrest on the res itself was of doubtful constitutional sufficiency). Accordingly, we recommend that Fed. R. Civ. P., Supp. R. C(4) be amended to satisfy constitutional concerns regarding default in actions *in rem*.

Thank you for your consideration of these recommendations.

Sincerely,

Gregory B. Walters
Circuit Executive

OFFICE OF THE CIRCUIT EXECUTIVE

UNITED STATES COURTS FOR THE NINTH CIRCUIT

121 SPEAR STREET, SUITE 204
POST OFFICE BOX 193846
SAN FRANCISCO, CA 94119-3846

GREGORY B. WALTERS, CIRCUIT EXECUTIVE
PHONE: (415) 744-6150
FAX: (415) 744-6179

TO: The Judicial Council

FROM: Roxane Eppes, *Assistant Circuit Executive for Legal Affairs* Roxane

DATE: November 7, 1997

RE: Local Rules Review Committee

Follow-up letters have been sent to each district thanking them for the revisions that have already been made to the local rules and listing any additional rules that should be amended or abrogated; a sample letter is attached. Five districts have completely finished the amendment process.

We are conveying to the National Rules Committee the Ninth Circuit's support for amendments to four federal rules:

1. Fed. R. Civ. P. 5(d) to authorize local rules for the non-filing of discovery;
2. Fed. R. Civ. P. 51 to authorize local rules requiring the filing of civil jury instructions before trial;
3. Fed. R. Crim. P. 30 to authorize local rules requiring the filing of criminal jury instructions before trial; and
4. Fed. R. Civ. P., Supp. R. C(4) to satisfy constitutional concerns regarding default in actions *in rem*.

A recommendation for a statutory amendment to 28 U.S.C. § 636(c) to permit shifting the burden of notification from the court to the parties will also be sent to the appropriate committee.

The council also agreed to establish a consistent Ninth Circuit policy in two areas, discussed below. Both matters will be placed on the agenda for the Conference of Chief District Judges for further discussion and feedback.

The first policy regards collecting and retaining money in a non-appropriated fund, possibly including payment of sanctions. While there is no federal authority for a non-appropriated fund, the committee and the council recognized that such funds are extremely useful for district court needs such as advancing costs in cases where pro bono counsel has been

appointed. However, this presents certain administrative difficulties. We will therefore also refer this proposal to the clerks of court for their assessment on how such a policy might be implemented.

The second policy regards court participation in the settlement of complex criminal cases. Recent Ninth Circuit decisions have cast doubt on whether judges can become involved in settling criminal cases and, if so, at what point. I will research this question and prepare a memoranndum on the status of the law in this area for the Conference of Chief District Judges. Their comments will be reported back to the council.

Finally the council agreed to urge the district courts to adopt three model rules: (1) supplemental formatting rules; (2) requiring the complete reproduction of amended pleadings; (3) default in actions *in rem* to supplement the federal rule to satisfy constitutional concerns. These model rules were addressed in the individual letters to the districts. This may also be placed on the agenda for the Conference of Chief District Judges.

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

MEMORANDUM

January 5, 1997

To: John K. Rabiej
Chief, Rules Committee Support Office

From: Judge Alicemarie H. Stotler ahs (by jkr)

Re: Transmittal of Suggestion for Rules Amendments

The enclosed letter and attachments from the Ninth Circuit suggest amendments to four of the federal rules. Please refer this information to the appropriate advisory committees for review. (Note that two of the suggestions are already pending before the rules committees — an amendment to Fed. R. Crim. P. 30, authorizing the filing of jury instructions before trial, was published for public comment in August, and a similar amendment to the Civil Rules is pending before the Advisory Committee on Civil Rules.)

attachments

cc (w/o attach.):
Gregory B. Walters, Circuit Executive,
United States Courts for the Ninth Circuit

G:\docs\ahscommo\rules\9cir-sug.jkr

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

January 26, 1998

Gregory B. Walters, Circuit Executive
United States Courts for the Ninth Circuit
95 Seventh Street
Post Office Box 193939
San Francisco, California 94119-3939

Dear Mr. Walters:

Your letter of December 4, 1997 was forwarded to me by Judge Stotler. Thank you for your comments on the proposed amendments to Criminal Rule 30 and Civil Rule 51, and your suggestions to amend Civil Rule 5(d), and Rule C(4) of the Supplemental Rules for Certain Admiralty and Maritime Claims. A copy of your letter will be sent to the members of the Advisory Committee on Criminal Rules and the chair and reporter of the Advisory Committee on Civil Rules for their consideration. I am also sending to you a copy of the preliminary draft of proposed amendments to Criminal Rule 30, which addresses the concerns raised in your letter. It was published for public comment in August 1997. The Civil Rules Committee is also considering proposing considering a similar amendment to Civil Rule 51.

We welcome your comments and suggestions and appreciate your interest in the rulemaking process.

Sincerely,

Peter G. McCabe
Secretary

Enclosure:

cc: Honorable Alicemarie H. Stotler
Honorable W. Eugene Davis
Advisory Committee on Criminal Rules
Honorable Paul V. Niemeyer
Civil Rules Agenda and Policy Committee
Professor David A. Schlueter
Professor Edward H. Cooper
Professor Daniel R. Coquillette

alternates from the deliberating jurors and instructing the alternate jurors not to discuss the case with any other person until they replace a regular juror. *See,* e.g., *United States v. Olano*, 507 U.S. 725 (1993) (not plain error to permit alternate jurors to sit in during deliberations); *United States v. Houlihan*, 92 F.3d at 1286-88 (harmless error to retain alternate jurors in violation of Rule 24(c); in finding harmless error the court cited the steps taken by the trial judge to insulate the alternates). If alternates are used, the jurors must be instructed that they must begin their deliberations anew.

Finally, the rule has been reorganized and restyled.

Rule 30. Instructions

Any party may request in writing that the court instruct the jury on the law as specified in the request. The request may be made ~~At~~ at the close of the evidence, or at ~~such~~ any earlier time that ~~as~~ the court reasonably directs. ~~, any party may file written requests that the court instruct the jury on the law as set forth in the requests.~~ At the same time, a copy of the request shall be furnished to all other parties. ~~copies of such requests shall be furnished to all parties.~~ Before closing arguments, the ~~The~~ court shall inform counsel

of its proposed action on the requests ~~upon the requests prior to their arguments to the jury~~. The court may instruct the jury before or after the arguments are completed, or at both times. No party may appeal from ~~assign as error~~ any portion of the charge or from anything omitted, ~~omission therefrom~~ unless that party objects ~~thereto~~ before the jury retires to consider its verdict and states, ~~stating~~ distinctly the matter to which objection is made ~~that party objects~~ and the grounds for ~~of~~ the objection. An opportunity must ~~Opportunity shall~~ be given to object ~~make the objection~~ out of the jury's hearing ~~of the jury~~ and, on request ~~of any party~~, out of the jury's presence ~~of the jury~~.

COMMITTEE NOTE

The amendment addresses the timing of requests for instructions. As currently written, the trial court may not direct the parties to file such requests before trial without violating Rules 30 and 57. While the amendment falls short of requiring all requests to be made before trial in all cases, the amendment now permits a court

to do so in a particular case or as a matter of local practice under local rules promulgated under Rule 57.

Rule 31. Verdict

* * * * *

~~(c) CRIMINAL FORFEITURE. If the indictment or the information alleges that an interest or property is subject to criminal forfeiture, a special verdict shall be returned as to the extent of the interest or property subject to forfeiture, if any.~~

COMMITTEE NOTE

The rule is amended to reflect the creation of new Rule 32.2, which now governs criminal forfeiture procedures.

Rule 32. Sentence and Judgment

* * * * *

(d) JUDGMENT.

* * * * *

(2) *Criminal Forfeiture.* Forfeiture procedures are governed by Rule 32.2. ~~If a verdict contains a finding that~~

November 21 1997

97-AP-L

To: Peter G. McCabe, Secretary
Committee On Rules of Practice and Procedure
of the Judicial Conference of the United States
Washington, D. C., 20544

97-CV-R

From: John J. McCarthy 14163
Northern Prison
Box 665
Somers, Ct 06071

Re: Copy of New Rules For December 1, 1997
and suggestion for changes and amendments
to the Rules of Civil and Appellate Procedure;

Sir;

I am a indigent prisoner, disabled held in Solitary for over three years now. The Prison has no Legal Law Library or provides access to Law Books or Rules.

Please, if you can, send to me a copy of the new Federal Rules. I do have many Civil and Criminal cases and Appeals pending.

I have some interesting suggestions for

Rule 4 (d) F. R. Civ. P.

This rule does not indicate that there is a duty to save costs of service on the plaintiff. to follow this procedure.

Recently I had a problem in a Civil case because I was proceeding in forma pauperis. The Court Ordered that if I did not comply with Rule 4 (d) supra encompassing service of an Amended Complaint, the Court would dismiss my case

I pointed out to the Court that compliance with Rule 4 (d) is optional on part of plaintiff furthermore impinges on my discretionary response which is much sooner if I don't comply.

Rule 12 F. R. Civ. P.

The Prison Litigation Reform Act of 1996 provides a provision which allows the defendants' to "waive their Response to the Complaint.

Rule 12 has not adopted this, furthermore it would appear that the Acts provision is no longer in force or effect after December 1 1996 because it is in conflict

with Rule 12 requirements. see; 28 U.S.C. 2072 (b) and 2074 (a). Congress never authorized otherwise for this Rule by Law.

Rule 56 F.R. Civ. P.

There is no provision that addresses "cross-motions" for Summary Judgment. Findings of Facts transpose as the Legal Standard shifts when the party's positions are transitioned from moving to non-moving. Obviously there is incongruity in reviewing standards and confusion creating a double standard.

On a cross-motion for summary judgment a party should be viewed as a "moving" party at all times. see; 56 (e) supra cf. Anderson v. Liberty Lobby, Inc, 477 U.S. 242, 255 (1986) (Providing doubts and inferences to be drawn in favor of the nonmoving party)

Additionally the rule does not explicate who's motion gets reviewed first on cross-motions.

Depriving the moving party of doubts and inferences and then providing them when transitioning the partys positin as non moving affects the propriety of material facts or genuine issues.

Rule 81 F.R.Civ.P.

This rule does not explicitely include, injunctions Appellate Courts do sanction parties with injunctions. see; e.g. Rule 38, and 47(b) F.R.A.P.

Rule 22 F.R.A.P.

There is not a time period perscribed for filing a "certificate of appealability" in this rule. see; 28 U.S.C 2253(c).

22(b) is vague and ambiguous. The second sentence does not indicate whether the district judge makes a ruling on the citificate, sua sponte, if an appeal is taken or must wait for the petitioner to seek a "formal request". 2253(c) supra provides no forum how a certificate must be sought.

The sentence states "[I]f an appeal is taken..." An appeal is taken as soon as Rule 3 or 4 are complied with. Therefore when must the certificate request be filed, before or after Notice of Appeal.

Furthermore because 2253(c) supra, and Rule

22, et seq fail to require a certificate to be sought within any specific time frame technically Rule 3 and 4 supra are inapplicable because it is not necessarily the judgment that is being appealed but rather the granting or denial of the certificate.

Yours Truly

John J. McCarthy

#5009

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
CHICAGO, ILLINOIS 60604-1706

RECEIVED 8/25/97

CHAMBERS OF
JOAN HUMPHREY LEFKOW
UNITED STATES MAGISTRATE JUDGE

(312) 435-5832

97-CV-K

August 12, 1997

Mr. Peter McCabe
Secretary, Advisory Committee on
Civil Rules
Administrative Office of the U.S. Courts
Washington, DC 20544

Dear Mr. McCabe:

As a magistrate judge for more than a decade I have dealt with evasion of service, even by members of the bar, on numerous occasions. Recently I came across the enclosed provision of Indiana law which imposes a duty to cooperate with service of summons. Undoubtedly there is a down-side to such a provision, but I haven't thought of it. I pass it along as a suggested improvement to Rule 4 which for all its elaborate provisions to induce waiver of service provides no sanction against the willful evasion of service.

Very truly yours,

Joan H Lefkow

JHL/mg
Enclosure

cc: Mr. John Rabiej, Staff Counsel
Advisory Committee on Civil Rules

WEST'S ANNOTATED INDIANA CODE
TITLE 34, APPENDIX COURT RULES (CIVIL)
INDIANA RULES OF TRIAL PROCEDURE
II. COMMENCEMENT OF ACTION; SERVICE OF PROCESS, PLEADINGS, MOTIONS AND ORDERS

Rule 4.16. Summons: Duties of persons to aid in service

(A) It shall be the duty of every person being served under these rules to cooperate, accept service, comply with the provisions of these rules, and, when service is made upon him personally, acknowledge receipt of the papers in writing over his signature.

(1) Offering or tendering the papers to the person being served and advising the person that he or she is being served is adequate service.

(2) A person who has refused to accept the offer or tender of the papers being served thereafter may not challenge the service of those papers.

(B) Anyone accepting service for another person is under a duty to:

(1) promptly deliver the papers to that person;

(2) promptly notify that person that he holds the papers for him; or

(3) within a reasonable time, in writing, notify the clerk or person making the service that he has been unable to make such delivery of notice when such is the case.

(C) No person through whom service is made under these rules may impose any sanction, penalty, punishment, or discrimination whatsoever against the person being served because of such service. Any person willfully violating any provision of this rule may be subjected to contempt proceedings.

CREDIT(S)

1996 Main Volume

Amended Oct. 30, 1992, effective Jan. 1, 1993.

< General Materials (GM) - References, Annotations, or Tables >

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

November 21, 1997

Honorable Joan Humphrey Lefkow
United States District Court
Everett McKinley Dirksen Building
219 South Dearborn Street
Chicago, Illinois 60604-1706

Dear Judge Lefkow:

Thank you for your suggestion to amend Civil Rule 4. A copy of your letter will be sent to the committee's reporter and its subcommittee on agenda and policy for consideration to be placed on the committee's future agenda. The committee meets next on March 16-17, 1997.

We welcome your suggestion and appreciate your interest in the rulemaking process.

Sincerely,

Peter G. McCabe
Secretary

cc: Honorable Alicemarie H. Stotler
Honorable Paul V. Niemeyer
Agenda and Policy Subcommittee
Professor Edward H. Cooper
Professor Daniel R. Coquillette

J. MICHAEL SCHAEFER*
JOSEPH E. PAGE**

99-CV-A

SCHAEFER & ASSOCIATES
Law Offices

Dec. 28, 1998

Leonidas Ralph Meacham, Director
Adm. Office of the U.S. Courts
One Columbus Circle, NE
Washington, DC 20544

Re: Proposed Amendment to F.R.C.P.

Dear Mr. Meacham:

It is my reasonable expectation that your office would be alert to the best procedures arising in the various jurisdictions of our land and bring these into the federal court system so that all of America might benefit from good experiences in part of our land. But this is the unfulfilled dream.

1.Texas has a rule that constitutes any U.S. Mailbox as the Clerk's Office, so that it is deemed timely filed if postmarked timely, and actually delivered in a specific time, not more than 10 days.

I had an amended pleading due on a Monday in an important federal case in San Diego, Schaefer v. Caspary, the pleading was put into Expressmail on Sunday with clerk indicating next-day-delivery, giving me option of noon or 3pm; it was delivered the 2nd day, Tuesday, and that morning the Judge dismisse my case with prejudice, triggering an appeal. A statute such as TRCP 5 would save a lot of the problems that our national postal system, whims of weather, unavoidable delays, causes. Please see that the Chief Justice is aware.

1184

ADMITTED NV & CA
*ADMITTED AS PATENT AGENT ONLY. ALL JURISDICTIONS

4440 S. MARYLAND PKWY
STE. 208-222
LAS VEGAS, NV. 89119

TEL. (702) 792-6710
FAX (702) 792-6721
PAGER (702) 678-9538

2. California has a statute, CCP 1987, that avoids use of subpoenas to assure attendance at trial by a party, or of a person for whose immediate benefit an action is prosecuted or defended, or any officer, directory of managing agent of such part---if WRITTEN NOTICE is simply served by mail at last 10 days ahead of time. What a grand idea, so simple, no prejudice to anybody.

If your office and the Chief Justice don't consider that the FRCP can be improved, then those of us who practice in federal courts should just ignore the problems we perceive and consider our federal procedures to be set in stone and not a living thing. And the appeals that arise from delays in the mail will continue to impose on our appellate machinery.

Sincerely,

J.MICHAEL SCHAEFER
Public Interest Attorney

P.S. Eliminate "not-a-party" subpena-service requirement too.

cc: Honorable William H. Rehnquist, Chief Justice
U.S. Supreme Court

Enclosures:

Texas Rules of Civil Procedure 5
California Code of Civil Procedure 1987

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See also Gov't Code §311.014, "Computation of Time" *Commentaries* Computing Deadlines to File p 98 Computing Deadlines to Respond," p 109

History of TRCP 4 Amended eff Sept 1, 1990 by order of Apr 24, 1990 (785 S W 2d xxxiv) Changed title added last sentence, and omits the counting of Saturdays Sundays, and legal holidays in all periods of less than five days with certain exceptions Amended eff Jan 1, 1961 by order of July 26, 1960 (23 Tex B J 619 [Oct 1960]) Added the word "Saturday" in second sentence Adopted eff Sept 1, 1941 by order of Oct 29, 1940 (3 Tex B J 525 [1940]) Source FRCP 6(a), with changes Omitted the Federal provision excluding intermediate Sundays or holidays when the period of time is less than seven days and the Federal reference to half-holidays

TRCP 5. ENLARGEMENT OF TIME

When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may, at any time in its discretion (a) with or without motion or notice, order the period enlarged if application therefor is made before the expiration of the period originally prescribed or as extended by a previous order; or (b) upon motion permit the act to be done after the expiration of the specified period where good cause is shown for the failure to act. The court may not enlarge the period for taking any action under the rules relating to new trials except as stated in these rules

If any document is sent to the proper clerk by first-class United States mail in an envelope or wrapper properly addressed and stamped and is deposited in the mail on or before the last day for filing same, the same, if received by the clerk not more than ten days tardily, shall be filed by the clerk and be deemed filed in time. A legible postmark affixed by the United States Postal Service shall be prima facie evidence of the date of mailing.

Miller Brewing Co. v. Villarreal, 829 S.W.2d 770, 771-72 (Tex.1992). "Under our current rules, a party who finds the courthouse closed on the last day that a document must be filed ... may mail the document that day, and if it is received by the clerk not more than ten days later it is timely filed. [TRCP] 5; [TRAP] 4(b). He may also locate the clerk or judge of the court and file the document with them. [TRCP] 74; [TRAP] 4(b). In some circumstances a party may also move for an enlargement of time."

Milam v. Miller, 891 S.W.2d 1, 2 (Tex.App.—Amarillo 1994, writ ref'd). "Rule 5 applies to 'any document.' This includes original pleadings.... Rule 5 does not enlarge the time in which to file a pleading

(i.e., an answer). Rather, it defines what constitutes a proper and timely filed pleading. Thus, once the provision of Rule 5 are met, the post office becomes a branch of the district clerk's office for purposes of filing pleadings."

See *Commentaries*, Rules for Filing Documents," ch 1-D Motion for Continuance," ch 7-D Requests for Admissions," ch 6-E, Motion for New Trial," ch 10-B

History of TRCP 5 Amended eff Sept 1, 1990 by order of Apr 24 1990 (785 S W 2d xxxiv) Amended to make the last date for mailing under TRCP 5 coincide with the last date for filing Amended eff Sept 1, 1986 by order of Apr 10, 1986 (705 S W 2d xxxiii) Deleted reference to appellate procedure and deleted the phrases "or motions for rehearing or the period for taking an appeal or the period for application for writ of error in the Supreme Court" and "motion for rehearing, any matter relating to taking an appeal or application for writ of error " Amended eff Jan 1, 1976 by order of July 22 1975 (525 S W 2d xliv) A legible postmark shall be prima facie, not conclusive evidence of date of mailing Amended eff Feb 1, 1973 by order of Oct 3, 1972 (483 S W 2d xxi) Inserted the words 'affixed by the United States Postal Service 'in the final proviso Amended eff Jan 1, 1971 by order of July 21 1970 (455 S W 2d xxiv) Changed to eliminate the requirement that the date of mailing be shown by a postmark on the envelope and added an additional proviso to make a legible postmark conclusive as to the date of mailing Amended eff Mar 1 1950 by order of Oct 12, 1949 (12 Tex B J 529 [1949]) Added the first proviso at the end of the rule Adopted eff Sept 1 1941 by order of Oct 29 1940 (3 Tex B J 525 [1940]) Source FRCP 6(b), with changes The second clause in the Federal rule requires a showing that the failure to act "was the result of excusable neglect " Also, specific reference is made in this rule to the time limitations relating to motions for new trial and for rehearings and to appeals and writs of error, while in the Federal rule the cross reference to such subjects is by rule number

TRCP 6. SUITS COMMENCED ON SUNDAY

No civil suit shall be commenced nor process issued or served on Sunday, except in cases of injunction attachment, garnishment, sequestration, or distress proceedings; provided that citation by publication published on Sunday shall be valid.

Nichols v. Nichols, 857 S.W.2d 657, 659 (Tex App.—Houston [1st Dist.] 1993, orig. proceeding "The plain language of rule 6 prohibits service process on Sunday. Ms. Nichols [who was served on Sunday] was not served in strict compliance with the law. Service was invalid and the trial court's order was improper." Court reversed default judgment

See *Commentaries*, "Serving the Defendant," ch 2-H, "Default Judgment ch 5-A.

History of TRCP 6 Amended eff. Feb 1, 1973 by order of Oct 3, 1972 (483 S W 2d xxii) Added provision about publication of citation on Sunday Adopted eff Sept 1, 1941 by order of Oct 29, 1940 (3 Tex B J 525 [1940]) Source Tex Rev Civ Stat art 1974 (repealed)

TRCP 7. MAY APPEAR BY ATTORNEY

Any party to a suit may appear and prosecute or defend his rights therein, either in person or by attorney of the court.

---

superior court of the county in which the witness is to be examined.

(c) To require attendance out of court, in cases not provided for in subdivision (a), before a judge, justice, or other officer authorized to administer oaths or take testimony in any matter under the laws of this state, it is obtainable from the judge, justice, or other officer before whom the attendance is required.

If the subpoena is to require attendance before a court, or at the trial of an issue therein, it is obtainable from the clerk, as of course, upon the application of the party desiring it. If it is obtained to require attendance before a commissioner or other officer upon the taking of a deposition, it must be obtained, as of course, from the clerk of the superior court of the county wherein the attendance is required upon the application of the party requiring it. *(Enacted 1872. Amended by Stats.1907, c 391, p 730, § 1. Stats 1929, c 110, p 197, § 1. Stats 1957, c 1904, p 3321, § 2, operative Jan 1, 1958. Stats 1970, c 458, p 1607, § 2.)*

Cross References

Administrative adjudication, see Government Code § 11510
Blank issuance in criminal cases, see Penal Code § 1326
Criminal proceedings, see Const Art 1, § 15, Penal Code § 1326
Deposition for use in foreign jurisdiction, to witness subject to, see Code of Civil Procedure § 2029
Disobedience to subpoena, report of judge or officer authorized to take testimony, see Code of Civil Procedure § 1991 et seq
Election contest, subpoenas for witnesses, see Elections Code § 16502
Form and purpose in criminal proceeding, see Penal Code § 1327
Grand jury may request judge to issue, see Penal Code § 1326
Habeas corpus hearing, see Penal Code §§ 1484, 1489, 1503
Issuance of subpoena by
- Agricultural prorate advisory commission, see Food and Agricultural Code § 59612
- Assessors, see Revenue and Taxation Code § 454
- Attorney general, see Government Code §§ 12550, 12560
- Board of pilot commissions, see Harbors and Navigation Code § 1155
- Control, board of, see Government Code §§ 13910, 13911
- County board of equalization, see Revenue and Taxation Code § 16094
- District attorney, see Penal Code § 1326
- Education, board of, see Education Code § 33034
- Heads of state departments, see Government Code § 11181
- Industrial welfare commission, see Labor Code § 1176
- Insurance commissioner, see Insurance Code §§ 1042, 12924
- Labor standards enforcement division, see Labor Code § 92
- Legislature, see Government Code § 9401 et seq
- Military courts, see Military and Veterans Code § 460 et seq
- Officer taking proof of instrument, see Civil Code § 1201
- State athletic commission, see Business and Professions Code §§ 18826, 18845
- State bar of California, see Business and Professions Code §§ 6049, 6050

Legislator's privilege, see Const. Art. 4, § 14
Oaths, persons who may administer,
- Generally, see Code of Civil Procedure § 2093, Government Code § 1225, Military and Veterans Code § 16
- Administrative adjudication, see Government Code § 11528
- Controller may designate, see Government Code § 12403
- Court commissioners, see Code of Civil Procedure § 259
- Courts, see Code of Civil Procedure § 128
- Industrial welfare commission, see Labor Code § 74
- Judicial officers, see Code of Civil Procedure § 177
- School officers, see Education Code §§ 45311, 88130.
- State department heads, see Government Code § 11181

Oil and gas conservation proceedings, see Public Resources Code § 3357
Personnel board hearing, see Government Code §§ 18671, 18672, 18678
Present in court, must testify without, see Code of Civil Procedure § 1990
Proof of an instrument, issuance of subpoena, see Civil Code § 1201
Searches and seizures, see Const. Art. 1, § 13

§ 1986.5. Witness fees and mileage for persons required to give depositions; fees for production of business records

Any person who is subpoenaed and required to give a deposition shall be entitled to receive the same witness fees and mileage as if the subpoena required him or her to attend and testify before a court in which the action or proceeding is pending. Notwithstanding this requirement, the only fees owed to a witness who is required to produce business records under Section 1560 of the Evidence Code pursuant to a subpoena duces tecum, but who is not required to personally attend a deposition away from his or her place of business, shall be those prescribed in Section 1563 of the Evidence Code. *(Added by Stats.1961, c 1386, p 3159, § 1. Amended by Stats 1986, c 603, § 4.)*

§ 1987. Subpoena; notice to produce party or agent; method of service; production of books and documents

(a) Except as provided in Sections 68097.1 to 68097.8, inclusive, of the Government Code, the service of a subpoena is made by delivering a copy, or a ticket containing its substance, to the witness personally, giving or offering to the witness at the same time, if demanded by him or her, the fees to which he or she is entitled for travel to and from the place designated, and one day's attendance there. The service shall be made so as to allow the witness a reasonable time for preparation and travel to the place of attendance. The service may be made by any person. When service is to be made on a minor, service shall be made on the minor's parent, guardian, conservator, or similar fiduciary, or if one of them cannot be located with reasonable diligence, then service shall be made on any person having the care or control of the minor or with whom the minor resides or by whom the minor is employed, and on the minor if the minor is 12 years of age or older.

(b) In the case of the production of a party to the record of any civil action or proceeding or of a person for whose immediate benefit an action or proceeding is prosecuted or defended or of anyone who is an officer, director, or managing agent of any such party or person, the service of a subpoena upon any such witness is not required if written notice requesting the witness to attend before a court, or at a trial of an issue therein with the time and place thereof, is served upon the attorney of that party or person. The notice shall be served at least 10 days before the time required for attendance unless the court prescribes a shorter time. If entitled thereto, the witness, upon demand, shall be paid witness fees and mileage before being required to

3rd SUGGESTION: Why not permit a Subpena to be served by ~~a~~ party?
Who knows the subpena target better than a party? Jurisdiction already exists.
This is quite different than service of a SUMMONS to create the case.

SHORT TITLE:	CASE NUMBER.

PROOF OF SERVICE OF SUBPENA

1. I served this ☐ Subpena ☐ Subpena Duces Tecum and supporting affidavit by personally delivering a copy to the person served as follows:

   a. Person served *(name)*:

   b. Address where served:

   c. Date of delivery:
   d. Time of delivery:

2. I received this subpena for service on *(date)*:

3. ☐ **NON-SERVICE RETURN OF SUBPENA**
   a. ☐ After due search, careful inquiry, and diligent attempts at the dwelling house or usual place of abode or usual place of business, I have been unable to make personal delivery of this ☐ Subpena ☐ Subpena Duces Tecum in this county on the following persons *(specify)*:

   b. Reason:
   (1) ☐ Unknown at address.
   (2) ☐ Moved, forwarding address unknown.
   (3) ☐ No such address.
   (4) ☐ Out-of-county address.
   (5) ☐ Unable to serve by hearing date.
   (6) ☐ Other reasons *(explanation required)*:

4. Person serving:
   a. ☐ Not a registered California process server.
   b. ☐ California sheriff, marshal, or constable.
   c. ☐ Registered California process server.
   d. ☐ Employee or independent contractor of a registered California process server.
   e. ☐ Exempt from registration under Bus. & Prof. Code section 22350(b).
   f. Name, address, and telephone number and, if applicable, county of registration and number:

can be served by any one - even a party!

the "not a party" requirement is artificial and a hinderance to efficient administration

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

▶ _____
(SIGNATURE)

(For California sheriff, marshal, or constable use only)
I certify that the foregoing is true and correct.

Date:

▶ _____
(SIGNATURE)

Chairman
William S. Brownell, Clerk
156 Federal Street
Portland, ME 04101
207-780-3356
Fax 207-780-3772

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Buffalo, NY 14202-3498
716-551-4211
Fax 716-551-4850

Orion Arnold, Clerk
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Charlotte Amalie
St. Thomas, VI 00802-6424
809-774-0640
Fax 809 774-1067

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Fax 415-522-2176

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Fax 405-231-5207

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1729 5th Avenue North
Birmingham, AL 35203
205-731-2000
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FCCA President
Lance S. Wilson, Clerk
U.S. Courthouse
300 Las Vegas Blvd. South
Las Vegas, NV 89101
702-388-6071
Fax 702-388-6046

DISTRICT CLERKS ADVISORY GROUP

97-AP-K

97-CV-Q

97-CR-J

October 20, 1997

Michael E. Kunz, Clerk
United States District Court
Independence Mall West
601 Market Street
Philadelphia, PA 19106-1797

Dear Mike:

I write to advise you that the District Clerks Advisory Group met on October 15, 1997 by conference call and that we support the proposed amendments to F.R.Civ.P. 5(b) and 77(d), F.R.Crim.P. 49(c), and F.R.A.P. 3(d) regarding the facsimile service of notice to counsel. We understand that fax noticing is a process being used successfully in several districts, that it has proven to be an effective and economical procedure in court operations, and that it has been enthusiastically supported by the bar.

We appreciate the valuable work undertaken by the Eastern District of Pennsylvania during the pilot portion of this project.

Sincerely,

William S. Brownell

WSB/er

cc: George Ray, DCAD

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA
US COURTHOUSE
601 MARKET STREET
PHILADELPHIA PA 19106-1797

MICHAEL E. KUNZ
CLERK OF COURT

CLERK'S OFFICE
ROOM 2609
TELEPHONE
(215) 597-7704

October 20, 1997

Peter F. McCabe, Secretary
Committee on Rules of Practice and Procedures
of the Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
Washington DC 20544

Dear Mr. McCabe:

Enclosed please find a letter from the District Clerks Advisory Group supporting the proposed amendments to F.R.Civ.P 5(b) and 77(d), F.R.Crim.P. 49(c), and F.R.A.P. 3(d) regarding the facsimile/electronic service of notice.

I respectfully request that this be furnished to the committee members who will be evaluating the proposed amendments.

Should you require any additional information concerning the recommendation for amendment, please do not hesitate to contact me.

Very truly yours,

MICHAEL E. KUNZ
Clerk of Court

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

November 24, 1997

William S. Brownell
Clerk
District Clerks Advisory Group
156 Federal Street
Portland, Maine 04101

Dear Mr. Brownell:

Thank you for your suggestions on behalf of the District Clerks Advisory Group to Appellate Rule 3(d), Civil Rule 5(b) and 77(d), and Criminal Rule 49(c).

The proposed suggestions on fax noticing were received and will be reviewed by the chairs and reporters of the Appellate, Civil, and Criminal Rules Committees; the Civil Rules Agenda and Policy Subcommittee; and Gene W. Lafitte, Chair of the Technology Subcommittee of the Committee on Rules of Practice and Procedure.

We welcome your suggestions and appreciate your interest in the rulemaking process.

Sincerely,

Peter G. McCabe
Secretary

cc: Honorable Alicemarie H. Stotler
Chairs and Reporters of the Appellate,
Civil, and Criminal Rules Committees
Civil Rules Subcommittee on Agenda
and Policy
Gene W. Lafitte, Esq.
Professor Daniel R. Coquillette

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Prev Hit	Back	HomePage
Hit List	Best Sections	Help
	Doc Contents	

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Prisoners Frivolous Lawsuit Prevention Act of 1997 (Introduced in the House)

HR 1492 IH

105th CONGRESS

1st Session

H. R. 1492

To amend rule 11 of the Federal Rules of Civil Procedure regarding representations made to courts by or on behalf of, and court sanctions applicable with respect to, prisoners.

IN THE HOUSE OF REPRESENTATIVES

April 30, 1997

Mr. GALLEGLY (for himself, Mr. BEREUTER, Mr. BUNNING, Mr. CONDIT, Mr. DAVIS of Virginia, Mr. EHRLICH, Mr. FOLEY, Mr. GIBBONS, Mr. HAYWORTH, Mr. HORN, Ms. MOLINARI, Mr. PACKARD, Mr. ROYCE, Mr. SCARBOROUGH, Mr. SOLOMON, Mr. STEARNS, and Mr. TRAFICANT) introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To amend rule 11 of the Federal Rules of Civil Procedure regarding representations made to courts by or on behalf of, and court sanctions applicable with respect to, prisoners.

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 `Prisoners Frivolous Lawsuit Prevention Act of 1997'.

SEC. 2. AMENDMENTS.

Rule 11 of the Federal Rules of Civil Procedure (28 U.S.C. App.) is amended--

(1) in subdivision (b)(3) by inserting `are made in a case involving a party other than a prisoner and' after `or,', and

(2) in subdivision (c)--

(A) by striking `If' and inserting `Except as otherwise provided in this subdivision, if',

(B) by inserting after the 1st sentence the following:

`If after notice and a reasonable opportunity to respond, the court determines in a case involving a party who is a prisoner that subdivision (b) has been violated, the court shall, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.', and

(C) in the first sentence of paragraph (2) by inserting before the period the following: `, but the limitation specified in this sentence shall not apply in a case involving a party who is a prisoner'.

SEC. 3. EFFECTIVE DATE; APPLICATION OF AMENDMENTS.

(a) EFFECTIVE DATE- Except as provided in subsection (b), this Act and the amendments made by this Act shall take effect 30 days after the date of the enactment of this Act.

(b) APPLICATION OF AMENDMENTS- The amendments made by this Act shall not apply with respect to conduct occurring before the effective date of such amendments.

THIS SEARCH	*THIS DOCUMENT*	*GO TO*
Next Hit	Forward	New Bills Search
Prev Hit	Back	HomePage
Hit List	Best Sections	Help
	Doc Contents	

#2830

Carl Shipley

RECEIVED 4/28/97

April 24, 1997

RECEIVED 5/5/97

97-CV-G

Secretary
Committee on Rules and Practice and Procedure, Administrative Office of the United States Courts
Washington, D.C. 20544

Sir:

The attached article on "lawsuit abuse", an unforseen consequence of the U.S. Supreme Court ruling that lawyers may constitutionally advertise the prices at which certain routine services will be performed. (Bates v. Arizona) 433 US 350 (1977), emphasizes a problem.

TV ad "ambulance chasing" is giving our profession a bad name and eroding public confidence in Art. III procedures.

It appears that the common law restraints of champerty, maintenance, barratry and abuse of judicial process have gone the way of the dodo bird.

Maybe its time to amend the Federal Rules of Civil Procedure to provide: "Lawsuit abuse, defined as unreasonable lawyer advertising to solicit litigation, shall be conduct unbecoming an officer of the court and bar of a court of appeals in the U.S. and/or its territories."

Respectfully,

Carl Shipley

Harvard Law School '48

Federalizing Tort Reform

by David J. Owsiany

On May 20, 1996, the United States Supreme Court engaged in its own version of tort reform by striking down the punitive damages award of two million dollars in the *BMW of North America* v. *Gore* case. Unfortunately, this case represents an example of two of the worst trends in public policy: expansion of the federal government's intrusion on the states and judicial usurpation of legislative authority. While the *BMW* case was proceeding to the Supreme Court, the Ohio legislature was considering a broad tort reform proposal that would dramatically alter the state's personal injury lawsuit system. On October 28, after more than 20 months of legislative tinkering, Governor George Voinovich signed the tort reform bill into law.

There is plenty of evidence that our society has become too litigious and that lawsuit abuse is extremely costly to consumers, businesses, and professionals. According to a recent study, the estimated direct cost to Americans of our civil litigation system is $132 billion per year. Over the past two decades, the average jury award has more than tripled. American companies pay liability insurance premiums that are 20 percent to 50 percent higher than those paid by foreign companies. And, of course, incidents like the one concerning the spilled McDonald's coffee are reported regularly in the press.

Personal injury lawsuits have historically been regulated at the state level. The result of the *BMW* case, however, was that punitive damages in personal injury lawsuits became an issue to be dealt with at the *federal* level. To make matters worse, it was not the elected representatives who addressed the issue but *unelected federal judges*.

The plaintiff in the *BMW* case purchased what he believed to be a new BMW automobile. Apparently, the car was repainted when the original paint job was damaged during transportation or manufacture. BMW had a policy of selling a car as new if the cost of any such

manned by males, but somehow terrific if populated by sweating, shorn, and swearing females. Men's-club or locker-room camaraderie is reprehensible, but the same behavior transposed to a female key is right on. Boys and men are ridiculed (and medicated) for having "testosterone poisoning," while women bulk up on steroids to win Olympic medals.

Now there are those who suspect that this massive female invasion of male turf is only a scheme hatched by levelers and pacifists to neuter men's warlike nature and thereby destroy "militarism" from within. And such may well be the case; certainly this is the aim of Patsy Schroeder and the next Chief Justice of the Supreme Court, Ruth Bader Ginsburg. Any wicked fairy tale can come true in the Age of Clinton.

Nevertheless, the female masses are not wise to the plot. They have bought and swallowed the regendering program whole. In high schools and colleges throughout the country, it is *verboten* for girls to admit they would like to be wives and mothers when they grow up. The only way to escape the program—and a way increasing numbers of desperate girls are taking—is to get pregnant and opt out of "higher education" altogether. For the rest, their lives as women will be, and in many cases already have been, sacrificed to the dizzyingly swift ongoing inversion of all values. Thus we get the grisly spectacle of women lobbying passionately for partial-birth abortions while understandably crazed men shoot up abortuaries. The former protected status of women as the more vulnerable sex will probably never recover. Women face the worst of both worlds: vulnerability and "equality."

Daughters brought up motherless do not learn to be mothers. Motherless sons do not learn to respect or love women. Such denatured generations are swiftly arising to overtake us. The underclass, from which "welfare" has banished fathering, experiences little but mortally wounded mothering, while the former middle class, now thoroughly proletarianized, manages its own demoralization along convergent lines, slavishly conforming to the state's desire to turn all human activity into taxable wage labor. Particularly hard hit are young men, al-

cally. By taking issues away from the state legislatures—be it abortion, gay rights, or, now, tort reform—the Court endangers our liberties, and calls into question the fundamental concept of federalism and the very foundation of our government structure, representative democracy.

David J. Owsiany is an attorney in Columbus, Ohio, and a member of the board of trustees of the Ohio Alliance for Civil Justice. The views expressed are his own.

Solomons and Caesars

by Gregory J. Sullivan

Karen Finley is a "performance artist." Her performances are succinctly described by Judge Robert Bork in his new book *Slouching Towards Gomorrah*: "Before an audience, [Finley] would strip to the waist, smear her body with chocolate (to represent excrement) and sprouts (sperm), and wail about what men have done to women." According to a recent decision by the California-based Ninth Circuit Court of Appeals—the former court of the apostate Justice Kennedy—Finley's First Amendment right to free speech was violated when the National Endowment for the Arts (NEA) turned her down for a grant. Clearly, First Amendment jurisprudence has departed from the realm of reason.

In response to the NEA's support of Robert Mapplethorpe's pornographic photographs and Andres Serrano's blasphemous "Piss Christ," Congress amended a statute to require that the NEA "take into consideration general standards of decency and respect for the diverse beliefs and values of the American public" when making grants. The Ninth Circuit's opinion, which along with the district court's opinion decorously eschewed a description of Finley's performance (would such a description have been indecent?), said that this standard was, under the First Amendment, an impermissible content-based restriction. The fact that Finley's right to free speech was not in the least abridged—the NEA simply refused to force the taxpayers to subsidize it—failed to make any difference to this majority of what Judge Bork has called "First Amendment voluptuaries."

In his dissent, Judge Andrew Kleinfeld has no difficulty demolishing the majority's embarrassing incoherence. "We now live in a legal context prohibiting display of a cross or menorah on government property," he noted. "But if a cross is immersed in urine, a government grant cannot be withheld on the ground that the art would offend general standards of decency and respect for the religious beliefs of most Americans." He wryly added: "This self-contradictory silliness is not built into the Bill of Rights. The First Amendment does not prohibit the free exercise of common sense." Judge Kleinfeld explained to the majority a proposition with which any first-year law student is familiar: "First Amendment law protects individual liberty from government, not the government from the people."

Of course, *Finley* is not a constitutional aberration, especially by Ninth Circuit standards. In *Compassion in Dying* v. *Washington*, for example, the Ninth Circuit, with a brazen lawlessness and abuse of the historical evidence that might surprise even Justice Brennan, invented a hitherto unknown right to physician-assisted suicide. This right was promulgated over another fine dissent by Judge Kleinfeld in which he pointed out a fundamental error in the approach in both *Compassion in Dying* and *Finley*. Judge Kleinfeld, who was appointed to the Ninth Circuit in 1991 by President Bush (Bush's other appointment: Clarence Thomas), observed that the "Founding Fathers did not establish the United States as a democratic republic so that elected officials would decide trivia, while all great questions would be decided by the judiciary. . . . That an issue is important does not mean that the people, through their democratically elected representatives, do not have the power to decide it. One might suppose that the general rule in a democratic republic would be the opposite, with a few exceptions." This is a sound understanding of our constitutional system, and in its witting renunciation of this understanding the Ninth Circuit subverts the document that it purports to construe. This point is particularly true with respect to the author of the lunatic majority opinion in *Compassion in Dying*, Judge Stephen Reinhardt, who specializes in results-driven, make-it-up-as-you-go-along jurisprudence.

What can be done about such abuses? The appointment of more jurists like Judge Kleinfeld is critical, but that is impossible with President Clinton in the White House. The main thing at this point is to make sure that these decisions are recognized for the arrogation of power by the judiciary that they plainly are. In the short term, the most obvious way to eliminate the problem presented by the *Finley* case is to enact what many conservatives have advocated: the abolition of the NEA and the removal of the government from the art-subsidy business altogether. And in order to salvage what little is left of intelligible constitutional law, perhaps we should also abolish the Ninth Circuit Court of Appeals.

Gregory J. Sullivan is an attorney in private practice in New Jersey.

GOVERNMENT

Secession and the New American Constitution

by Joseph Stumph

The nine states that ratified the Constitution on June 21, 1788, created an entirely new government. This government was not patterned after the one established under the Articles of Confederation, which was created by the 13 states just seven years before. The Articles actually transferred very little power to the agent they called the "central," or "general," government and readily recognized that the attempt by 13 sovereign nations to act in unison was an untried experiment. For example, it was well understood that if these states were to defeat Great Britain in the Revolutionary War, it would take a unified effort of all 13 acting as one, as well as "a firm Reliance on the Protection of divine Providence."

The Revolutionary War officially ended with the signing of the Treaty of Paris on September 3, 1783. The states' newly won independence was acknowledged when Great Britain, in the first

repair did not exceed three percent of the car's suggested retail price. When the plaintiff discovered his car had been repainted, he sued BMW. The jury returned a verdict finding BMW liable for economic (out of pocket) damages of $4,000. Additionally, the jury held BMW liable for *four million dollars* in punitive damages because it found BMW's policy of selling a repainted car as new to be "gross, oppressive or malicious" fraud. The Alabama Supreme Court reduced the punitive damage award, holding that "a constitutionally reasonable punitive damages award" in the case was two million dollars.

The majority opinion for the U.S. Supreme Court, written by Justice John Paul Stevens, conceded that "punitive damages may properly be imposed to further a state's legitimate interests in punishing unlawful conduct and deterring its repetition." According to Stevens, "States necessarily have considerable flexibility in determining the level of punitive damages that they will allow" in any particular case. However, Stevens noted that when an award is "grossly excessive" in relation to the state's interests it enters the "zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment." Stevens concluded that while the court is "not prepared to draw a bright line marking the limits of a constitutionally acceptable punitive damages award," it was fully convinced that the "grossly excessive award" in the *BMW* case "transcends the constitutional limit."

Justice Antonin Scalia, in a dissent joined by Justice Clarence Thomas, pointed out that at the "time of adoption of the Fourteenth Amendment," it was well understood that punitive damages represented "the assessment by the jury, as the voice of the community, of the measure of punishment the defendant deserved." Scalia said that the majority's decision is "really no more than a disagreement with the community's sense of indignation or outrage expressed in the punitive damage award" of the jury as reduced by the Alabama Supreme Court. He also noted that nothing in the due process clause gives the U.S. Supreme Court "priority over the judgment of state courts and juries" with regard to punitive damages, and concluded that the "Constitution provides no warrant for federalizing yet another aspect of our Nation's legal culture (no matter how much in need of correction it may be), and the application of the Court's new rule of constitutional law is constrained by no principle other than the Justices' subjective assessment of the 'reasonableness' of the award in relation to the conduct for which it was assessed."

Justice Ruth Bader Ginsburg, in a separate dissenting opinion joined in by Chief Justice William Rehnquist, wrote that the majority "unnecessarily and unwisely ventures into territory traditionally within the States' domain, and does so in the face of reform measures recently adopted or currently under consideration in legislative arenas." Ginsburg included an appendix to her opinion listing 14 states that have capped punitive damage awards. Additionally, at least three other state legislatures were considering caps on punitive damages at the time of the *BMW* decision. Ohio's was one of those reform proposals then under consideration.

The Ohio legislature's broad tort reform proposal includes a wide array of changes in the personal injury lawsuit system, including provisions aimed at limiting the number of frivolous lawsuits and placing caps on noneconomic (commonly known as "pain and suffering") as well as punitive damages. Since its introduction in early 1995 by Ohio Representative Pat Tiberi, a Republican from Columbus, the bill has been widely debated in the legislature and the media.

While the legislative process is never pretty, it does permit various interested parties to present their viewpoints. The Ohio legislature heard from trial attorneys and former personal injury suit plaintiffs advocating status quo in the tort system. They claimed there was no lawsuit crisis and that juries should determine the amount of compensation that injured plaintiffs receive. On the other side, the legislature heard from small business owners, farmers, professionals, like accountants, physicians, and dentists, and many others who testified how the threat of lawsuit abuse and huge jury awards affect their businesses. The legislature also heard from representatives of the Ohio Bar Association and state judges giving their input on how the proposed changes would affect the courts and the parties to personal injury lawsuits. Some polls showed that as many as 80 percent of Ohioans thought that the personal injury lawsuit system needed reform.

The bill as introduced capped punitive damages to an amount not to exceed the amount to economic damages. Economic damages, commonly known as "out of pocket" damages, like lost wages and medical bills, were not in any way limited in the proposed legislation. Punitive damages are meant to punish the defendant and, generally, are awarded only when the defendant's conduct is found to be willful or wanton. By capping punitive damages to the amount of economic damages, the Ohio legislature was attempting to tie the extent of the punishment to the actual harm done.

When the bill emerged from the conference committee (which had the task of ironing out the differences between the House and Senate versions), it limited punitive damages to the lesser of three times the amount of compensatory damages, or $100,000, when the defendant is an individual or employer with 25 or fewer employees. For larger employers the cap is three times compensatory damages, or $250,000, whichever is greater. When Voinovich signed the bill into law, the elected officials of Ohio, who are accountable to the citizenry, had finally passed significant tort reform.

The importance of maintaining state sovereignty over such matters was recognized by our Founders. As James Madison wrote in *Federalist 51*, "In the compound republic of America, the power surrendered by the people, is first divided between two distinct governments, and then the portion allotted to each, subdivided among distinct and separate departments. Hence a double security arises to the rights of the people." Both of those features—respect for the division of power between state and federal governments and the separation of powers—were disregarded in the *BMW* case. The intended function of federal courts is to apply the law as it comes to them from the legislature. The U.S. Supreme Court disagreed with the state of punitive damage law in Alabama, so it followed its own agenda for punitive damages. In doing so, the Supreme Court disregarded the separation of powers by taking the issue from the legislative branch and establishing itself, an elite group of unelected judges, as king in the realm of punitive damages. Furthermore, the Court disregarded the notion of limited federal government by deciding the issue at the federal level despite the fact that state legislatures, like Ohio's, were establishing their own rules with regard to personal injury lawsuits, generally, and punitive damages, specifi-

cally. By taking issues away from the state legislatures—be it abortion, gay rights, or, now, tort reform—the Court endangers our liberties, and calls into question the fundamental concept of federalism and the very foundation of our government structure, representative democracy.

David J. Owsiany is an attorney in Columbus, Ohio, and a member of the board of trustees of the Ohio Alliance for Civil Justice. The views expressed are his own.

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

May 7, 1997

Carl Shipley, Esquire
475 Galleon Drive
Naples, Florida 33940

Dear Mr. Shipley:

Thank you for your suggestion to amend the Federal Rules of Civil Procedure to provide that unusual lawyer advertising should be sanctioned as conduct unbecoming an officer of the court. A copy of your letter will be sent to the chair and reporter of the Advisory Committee on Civil Rules for their consideration.

We welcome your suggestion and appreciate your interest in the rulemaking process.

Sincerely,

Peter G. McCabe
Secretary

cc: Honorable Paul V. Niemeyer
Agenda and Policy Subcommittee
Professor Edward H. Cooper

#4724

RECEIVED 3/30/98

98-CV-B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

101 West Lombard Street
Baltimore, Maryland 21201

Chambers of
PAUL V. NIEMEYER
United States Circuit Judge

(410) 962-4210
Fax (410) 962-2277

March 26, 1998

Dr. Nicholas Kadar
11 Jackson Court
Cranbury, New Jersey 08512

Dear Dr. Kadar:

Thank you for your complete memorandum relating to Federal Rule of Civil Procedure 11. I am taking the liberty of forwarding this to our staff to have it placed on our docket for consideration.

Sincerely,

Paul V. Niemeyer

cc: ✓ Mr. John K. Rabiej (w/enc.)

To members of the Advisory Committee on the Federal Rules of Civil Procedure:

Honorable Paul V. Niemeyer, Chairman
Honorable Anthony J. Scirica
Honorable David S. Doty
Honorable C. Roger Vinson
Honorable David F. Levi
Honorable Lee H. Rosenthal
Honorable John L. Carroll
Honorable Christine M. Durham
Professor Thomas D. Rowe, Jr.
Carol J. Hansen Posegate, Esq.
Mark O. Kasanin, Esq.
Francis H. Fox, Esq.
Phillip A. Wittann, Esq.
Honorable Frank W. Hunger
Edward H. Cooper, Reporter.

Distinguished Jurists, Learned Professors, Ladies and Gentleman:

I am a physician who was recently embroiled in a web of lawlessness that I had thought impossible in America at the close of the twentieth century. I am, therefore, writing to the members of the Advisory Committee on Civil Rules to urge the following amendment to Rule 11, whose provisions were used to perpetrate shocking injustice (and quite possibly something worse):

Rule 11(e): Rule 11 should not be used as a discovery device or to test the legal sufficiency or efficiency of the allegations in the pleadings.

It is my understanding, confirmed by Professor Marcus of Hastings Law School, that by revising Rule 11 in 1993, the Advisory Committee had intended to foreclose the use of Rule 11 for discovery purposes so as to prevent precisely the kind of injustice that has been wrought in the federal district court for the Northern District of Georgia through Rule 11 discovery. I write with that understanding in mind.

The genesis of my recommendation is rooted in a subpoena that "commanded" my deposition, ostensibly as a medical expert, in a medical malpractice-RICO action brought in federal court in Atlanta, (Manov v. Nezhat), in which I was not a retained medical expert (nor a treating physician), had not reviewed the medical records, and had rendered no opinion, written or oral. The subpoena was issued pursuant to a court order of the federal district court for the Northern District of Georgia granting defendants' request for unilateral Rule 11 discovery. This Rule 11 discovery has finally terminated after 26 months during which the judge froze all discovery by plaintiff.

The background to and genesis of the Georgia court order are bizarre and need briefly to be told.

The Manov complaint was filed on January 12, 1996. Two years prior to that another, unrelated malpractice-RICO action was filed against the same defendants in state court, (Mullen v. Nezhat (Mullen)), and against the Board of Trustees of the hospital where the Nezhat defendants perform surgery, (Mullen v. Spanier (Spanier)), in federal court. I was one of the medical expert retained in Mullen and provided a written opinion in Mullen three months **after** the complaint in Manov was filed. But I was not a retained expert in Manov, and have never provided an affidavit in any law suit involving the Nezhat defendants.

These two law suits have been embroiled in one irregularity after another, and the irregularities have continued in the Manov case. Two retained experts withdrew following threats or intimidatory conduct against them by the attorneys, defendants and/or persons unknown, another expert, who is Jewish, had commands issued to him in German at his deposition and he received middle of the night telephone calls at his residence (sic; see attached affidavit), one lay witness had red paint smeared on her front door after her identity was revealed, and a marble was fired through the office window of plaintiff's counsel with a high velocity propellant, narrowly missing his secretary, as he was about to leave to interview a witness. (See attached letter by Mr. Byrne to the presiding judge).

The Medical Director of the Georgia Medical Board, Dr. David Morgan, has since been indicted on charges of fabricating a medical review of a patient death and forgery involving a prominent Atlanta physician. Dr. Morgan was purportedly involved in a three year Nezhat "investigation" which included no interviews with any of nine patients, six former employees, and seven surgeons whose names were provided to the Medical Board. The Executive Director of the Georgia Medical Board, Mr. Andrew Watry, has also since been asked to resign and has tendered his resignation. During Mr. Watry's "investigation" of the Nezhats, he forwarded pro-Nezhat material to the press which he obtained from the from Nezhat lawyers, and "suspended" the Nezhat investigation. Eventually a journalist reported Mr. Watry's pro-Nezhat activities to the Georgia Secretary of State.

Spanier was presided over by a Judge Hall for about eighteen months before the judge suddenly recused himself sua sponte stating no reasons. Before he recused himself, Judge Hall denied defendants' motion to disqualify Mr. James Neal, the architect of the law suits against the Nezhats. The case was then assigned to Judge Cooper who granted a discovery request involving sixteen medical records which allegedly would have revealed a pattern of unnecessary operations on the healthy rectums of young women performed to promote a new surgical device, manufactured by the Ethicon Corporation (heavy sponsors of the Nezhats - three Iranian gynecologists, all brothers), and was potentially devastating to the defendants' case. Whereupon a law firm (Walbert & Mathis), one of the named partners of which was a personal friend of Judge Cooper, was immediately hired even though seven lawyers had been working on the case for eighteen months and their law firm had a long standing relationship with the Nezhat

brothers. Within two weeks of the appearance of his friend's law firm the judge reversed his prior order, froze all discovery, communicated ex parte with the Nezhat lawyers, signed a secretly presented order ordering nineteen witnesses not to appear, ordered eight more witnesses not to answer questions, then dismissed the case on summary judgement even though issues central to the case were hotly contested by experts in affidavits. That was Spanier. As a state judge, this same judge signed dispositive orders presented ex parte by another personal friend and the decision was set aside by a unanimous Georgia Supreme Court. (The order, though signed by Judge Cooper, was attributed to the Chief Judge who had died by the time the Georgia Supreme Court rendered its ruling - see McCauley v. McCauley, 377 S.E.2d 676 (1989)).

Mullen was presided over by a magistrate who signed an order disqualifying Mr. Neal on the basis of the same allegations on which Judge Hall had denied his disqualification. Based on typographical errors in the order and the type face (inspected by a former CIA writing expert) it is alleged that the order was drafted by and submitted ex parte by defendants' attorneys. The Magistrate then promptly disqualified himself (after presiding over the case for 600 days) sua sponte three days after learning of an FBI investigation into witness tampering. The Magistrate refused to answer questions about who had drafted the order disqualifying Mr. Neal, and sought legal representation. The attorney of record in Mullen, who signed the motion to disqualify Mr. Neal, was none other than the law clerk of the presiding juidge in Manov, and Mr. Neal's disqualification in Mullen had been a central issue in the Rule 11 discovery request in Manov.

The request for unilateral Rule 11 discovey in Manov was made, not by a motion (as the rule required), but by a hand delivered personal letter to the presiding judge, a copy of which was delivered to opposing counsel, Mr. Michael Byrne, on Friday afternoon, May 3, 1996. A hearing had already been set for the following Monday, May 6, 1996 in the judge's chambers to review scheduling matters. At that meeting defense counsel raised the Rule 11 discovery issue he had written to the judge about the preceeding Friday, and produced an order for the judge to sign. The judge was about to sign this order even though there was no court reporter present, and no motion was pending before the court. After plaintiff's counsel objected, he was given ten days to reply but was told by the judge, "I am ninety-nine percent sure I am going to sign that order". An order granting Rule 11 discovery was signed on June 5, 1996 which contained the following provision:

> "It is further ORDERED that such discovery may include, but is not limited to, the depositions of: (1) Michael Byrne and James Neal; (2) plaintiff's previous counsel in her prior Superior Court action against the Nezhats; (3) plaintiff; and (4) **those physicians whose affidavits have been relied upon by plaintiff and her counsel**". (emphasis added).

The presiding judge in Manov had accepted the case on transfer even though he employed as his law clerk the former attorney for the Nezhats in Mullen, and failed to inform plaintiff's counsel of this fact. After the indentity of his law clerk was discovered, the judge refused to allow his law clerk to answer questions about what he knew of who drafted the disqualifying order in Mullen, denied a motion to recuse himself, and refused to certify the matter. A mandamus was filed with the Eleventh Circuit requesting the judge's recusal which was denied without any opinion.

As part of this Rule 11 discovery, the judge in Manov ordered the discovery of all plaintiff's counsel's work product, including interviews with four witnesses who feared reprisals from the Nezhat defendants, in disregard of his sua sponte duty to protect privileged material. The subpoena requesting the privileged material was irregular on its face (as even defense counsel admitted in a motion) and Mr. Byrne was given 46 hours in which to raise objections to thounsands of pages of documents. In ordering this discovery, the judge stated on the record, "Well, we're going to deviate in some respects from Rule 45. We're going to deviate to Tidwell's way of doing things. And that is the way we're going to do it". As if this were not bad enough, I append a copy of a most moving entreaty by Mr. Byrne on behalf of his clients and the judge's sickening reply, which must surely shock everyone who has even only a modicum of decency.

I filed a motion to quash the subpoena that was served on me in the federal district court for the district of New Jersey pro se. A federal district court in Philadelphia had denied a motion to quash a subpoena served on one of the retained experts (Dr. Goldstein) in Manov without a written opinion, and so plaintiff's attorney saw no point in resisting my subpoena in New Jersey, even though, unlike Dr. Goldstein, I was not a retained expert and had not provided any affidavits. The main thrust of my argument was that Rule 11 discovery was prohibited by the 1993 amendments to Rule 11, the Advisory Committee Notes to which provided that "Rule 11... should not be used as a discovery device or to test the legal sufficiency or efficiency of the allegations in the pleadings".

In rejecting my arguments, the presiding Magistrate confused the Advisory Committee Notes to the 1983 amendments with those pertaining to the 1993 amendments. The Magistrate said to me:

> "I beg to differ with you, Doctor.....The 1990.. The advisory notes to the 1993 amendments to Rule 11 state among other things, quote, "...Thus, discovery should be conducted only by leave of the court and only in extraordinary circumstances"".

The Magistrate recognized that he had misspoken, however, for he later said in his summation:

> "For the purpose of the record, I will again refer to the Advisory

Committee Notes of the 1983 amendments to the Federal Rules, Federal Rule 11. And to the extent I previously said the 1993 amendments of Rule 11, I misspoke, it's the 1983 amendments. The advisory committee notes again states, quote, "discovery should be conducted only by leave of the court and then only in extraordinary circumstances."

Nonetheless, the Magistrate went on to cite Indianapolis Colts v. Mayor and City Council of Baltimore, 775 F.2d 177 (7th Cir. 1985) as the leading authority for the proposition that discovery could be granted by leave of court in extraordinary circumstances, a case clearly decided on the basis of the 1983 amendments to Rule 11, and ordered my deposition within four days of the hearing on a day for which a hearing had already been set in Atlanta involving the Manov case.

It is perhaps noteworthy, given how the federal judges operated in Georgia, and the unseemly haste with which my deposition was ordered in New Jersey, a previously scheduled hearing on the same day notwithstanding, that my deposition coincided with a judicial conference, which meant that all Article III judges were out of town and it was extremely difficult for me to appeal under the Magistrates Act. The Magistrate refused to grant a stay to allow me to appeal. Only after I wrote to the Chief Judge did I get a fax from the presiding judge at 6PM the night before my deposition stating that the Magistrate's ruling was not "clearly erroneous".

Without complicating the story further with my reasons, I felt able to comply in a limited way with the original Georgia court order by construing it as having authorized what amounts to "pre-Rule 11 discovery", which would not violate the face of the law. But, that was insufficient and the matter did not go away because defendants sought to depose me further even though they had deposed me for almost seven hours the first time around, and by the time they deposed me they had already deposed plaintiff's counsel for two days and discovered his entire work product, they had also deposed the plaintiff, and the two retained experts who had provided affidavits in Manov for a total of about sixteen hours

The Magistrate ordered my further deposition at a telephone conference. Prior to the telephone conference I filed a motion for declaratory judgement to determine whether discovery was authorized by the provisions of Rule 11 as amended in 1993. I argued that the intent of the Supreme Court and Congress in amending Rule 11 in 1993 was to foreclose the use of its provisions for discovery purposes and the creation of a law suit within a law suit. This intent was evident, I suggested, from the deletion from the Advisoty Committee Notes to the 1993 amendments of the provision for discovery by leave of court under extraordinary circumstances contained in the Advisory Committee Notes to the 1983 amendments, and by the addition of language stating that "Rule 11 ... should not be used as a discovery device or to test the legal sufficiency or efficiency of the allegations in the pleadings". The motion was simply ignored by the court. After the Magistrate ordered me to be deposed further, I wrote a letter informing him

with deep regeret that I could not obey a court order that was unlawful on its face. The relevant sections of my letter reads:

> "The record will show that my efforts to comply with the lawful orders of this Court have been tireless and painstaking. My search of the law has been diligent and I have been prepared to accept any colorable argument that Rule 11 discovery does not violate the law. However, my search for such an argument has been utterly fruitless and in vain. Unfortunately, our system of adjudicating civil disputes provides a party no means to appeal an unlawful court order related to discovery other than to resist the order and appeal if the court chooses to hold the party in contempt. Indeed, the Courts have actually described such a course to parties seeking review. See e.g. United States v. Ryan, 91 S.Ct. 1580 (1971).
>
> Let there be no doubt, however, in this Court's or anyone else's mind that I have a most profound respect for the rule of law the depth of which only those who have suffered the yoke of totalitarianism can fully understand. Let there also be no doubt that I recognize that if any citizen could defy the lawful orders of a court because he or she simply disagreed with the court, however sincerely and profoundly and with however good reason, our society would rapidly descend into total anarchy. Every citizen has an obligation to obey the lawful orders of our courts, however erroneous the rulings on which they are based may be, and however much a person may disagree with those rulings. If a person cannot in good conscience obey a lawful order, then, on the theory underpinning all legitimate acts of civil disobedience, he must pay the penalty as an expression of the sincerity of belief in the principle on which he has chosen to stand.
>
> But the doctrine of Rule 11 discovery under which my deposition is being compelled does not involve such issues. I could care less about being deposed, and I had not even thought about, much less held strong views as to what Rule 11 should in principle be. Therefore, my opposition to this Court's order stems not from a disagreement with the Court's ruling, not from anything whatsoever related to the merits of the underlying law suit or its advocacy, but from the inherent unlawfulness of the Court's order.
>
> The Supreme Court and Congress have determined what Rule 11 should be when they amended Rule 11 in 1993, and what it determined Rule 11 to be is the law by which this Court must be bound, and which this Court has no authority to change. If this Court is allowed to disregard the law to-day because it pertains to a rather uninteresting procedural rule, and substitute what it wants the law to be for what the sovereign's duly elected representatives have

ordained it to be, who is to say what law it will allow itself to disregard or change tomorrow? And if, as a matter of principle, this Court is allowed to disregard or change any law and brook no gainsay, we have a tyranny not of the legislature but of judges, and then God help us all".

I was certified, but in violation of my right to proper notice, I was not notified of this fact until the afternoon before a hearing was set before the presiding judge. The judge refused to reschedule the meeting.

I appeared before the presiding judge and requested that the matter be certified to the Third Circuit but he refused to certify what was purely a question of law, and one that to my knowledge has not been considered to this day by any circuit. Instead, in a departure from all precedents, he threatened me with incarceration. I have been able to find no case in which a civil litigant who was prepared to assume the risk that he was wrong on the law was threatened with incarceration or incarcerated. See United States v. Ryan, 91 S.Ct. 1580 (1971)(denial of motion to quash a subpoena cannot be appealed and party must either obey court order or "refuse to do so and contest the validity of the subpoena if he is subsequently cited for contempt on account of his failure to obey"); Shelton v. American Motors Corp., 805 F.2d 1323, 1330n7 ("We cannot agree with the dissent that AMC should be punished merely because it took a position opposite to the district court and adamantly stood by that position. AMC risked the possibility of sanctions and took a chance that its position was correct.....when that party is wrong sanctions should be imposed. But AMC is right in this case").

I was eventually able to comply with the order without sacrificing the priciple on which I had stood on the following reasoning.

In his magisterial essay "A Matter of Interpretation", Justice Scalia said that it was not the intent of the law giver that governs but the laws that they enact. I had assumed that Rule 11(d) incorporated, so to speak, the provision in the Advisory Committee Notes prohibiting discovery into the body of the rule, but I learned that I had been mistaken. This meant that the prohibition on discovery in the Advisory Notes had no connection with the face of the law and were simply statements of what the Committee had "intended". That being the case, the face of the law did not in fact prohibit discovery under Rule 11 unless the Advisory Committee Notes had a different legal status from, say, the legislative history of a statute as reflected in Congessional Commiittee reports. Therefore, Professor Marcus was also asked whether the Advisory Committee Notes had the full force and effect of law. He said he knew of no case that stood for the proposition that the Advisory Committee Notes had the full force and effect of law, but that they were always deferred to by courts. That was enough for me to comply with the court order.

The subsequent history of the Manov case underscores the wisdom of the original policy of prohibiting the use of Rule 11 for discovery purposes. The best

justification may not, however be that it wards off unscrupulous lawyers but that the prohibition safeguards citizens against a judge hell bent on bending the law to his will or worse. The presiding judge who deviated from Rule 45 somewhat to "Tidwell's way of doing things" and authorized the discovery of an attorney's entire work product, who employed defendants' lawyer as his law clerk, and who authorized Rule 11 discovery, eventually imposed Rule 11 sanctions on plaintiff and her attorney for bringing a RICO action. He limited the deposition of the principal defendants in the medical maplpractice action to six hours, sua sponte sealed the deposition, barred Mr. Byrne from discussing the deposition with Mr. Neal, and prohibited background questions of the defendants. It is noteworthy that I, an unretained expert in Manov, was deposed for ten and a half hours, and Dr. Goldstein, the principal medical expert, was deposed for thirteen hours. The judge gave defense lawyers his home phone number, his car phone number and his cellular phone number before the pricipal defendant was deposed.

With respect to the Rule 11 sanctions, I will only say that there are thousands of pages of documents cataloging a vast array of billing fraud and other abuses by the defendants (all amassed without even the benefit of discovery), the most significant of which is conclusive proof that one of the brothers obtained medical licensure in this country through unauthorized means and very compelling evidence that he did not complete medical school training in Iran. All this evidence has been simply disregarded by the presiding judge even though the wider implications of the breathtaking scope of Mr. Neal's inquiries is that there may be many more physicians who may have obtained licensure in this country by the same unauthorized means and be practicing in the United States without having completed basic medical school training. That a federal judge should disregard the societal implications of such a threat is absolutely shocking.

It is, I think, very easy to miss the message of these bizarre proceedings; indeed, it is easy to shrug them off simply as an aberration. Whenever an airliner crashes and many lives are lost, it is a tragedy. If such a crash reveals that the operating procedures of an entire airline are defective and all potential passengers are exposed to the possibility of such a tragedy, the tragedy is compounded by wider concerns and alarm. But if the entire system regulating flights in and out of our airspace is found to be defective, then we have the makings of a national disaster of monumental proportions and far reaching implications even if what warns us of that potential disaster is the crash of a small, private aircraft with six people on board.

The Nezhat have used professional publicists to promote themselves as surgical pioneers on the basis of bogus scientific publications with potentially devastating consequences to mostly young women in the prime of reproductive life. They have permanently crippled one woman by performing an experimental operation on her normal rectum, and they permanently impaired the hearing of another by mistreating the complications that followed the unnecessary operation they performed to remove her healthy appendix. The Nezhats have engaged in numerous billing fraud schemes and regularly bill patients at higher rates on the

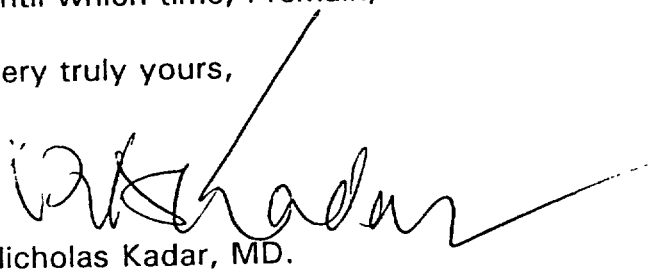
pretext that surgeries on healthy and normal organs were rendered unusually difficult by complex pathology. There is proof that one of the brothers obtained medical licensure in the United States by unauthorized means and very strong evidence that he never finished medical school in Iran.

Shocking as these facts are, the truth is that in the wider scheme of things, far worse things are done by human beings to one another on a regular basis. What is significant is that of the many patients that have filed law suits against the Nezhats, only Stacey Mullen and Debbie Manov have been denied justice in Georgia, and it seems because they did not simply seek compensation for their injuries as the others had but wanted to expose the abuses to which women had been subjected at the hands of these physicians. It is this denial of justice by judges operating ouside the perimeters of the law that has made the Nezhat affair the small plane crash alerting us to inherent and fundamental problems in our airflight control system, a metaphor for the judiciary, which may have, paradoxically, become the most dangerous branch of government in America. One need only ask could any Senator or Congressman, President or whitehouse official have flaunted the rules in the way these federal judges have or have gotten away with doing so for so long (with little prospect that anyone will ever investigate the matter much less sanction them for their wrongdoing)?

The message, I suggest, is that we need clear rules of procedure, and we need mechanisms to insure that judges abide by those rules if we are to live in a free society, especially if we are to invest so much power in individual judges (and no other democracy does). If this Committee intended that Rule 11 should not be used as a discovery device, I respectfully submit that it should say so in the body of the rule clearly and unambiguously.

Until which time, I remain,

Very truly yours,



Nicholas Kadar, MD.
11 Jackson Ct.,
Cranbury, NJ 08512.

AFFIDAVIT OF RICHARD S. GOLDSTEIN, M.D.

Richard S. Goldstein, M.D. personally appeared before undersigned officer and, after being duly sworn, deposes and states as follows:

1.

I am Richard S. Goldstein, M.D., a physician licensed to practice medicine in the State of Pennsylvania with a specialty in Colon and Rectal Surgery. I am over the age of 18 years, of sound mind, and competent to give this affidavit.

2.

I have appeared as an expert witness in Manov v. Nezhat, et al, as well as in another suit involving Nezhat. Prior to being deposed by Mr. Henry Green in the Manov case, I had expressed concern about participating due to a series of other potential witnesses who indicated that they had been threatened. Late night "hang up" phone calls to my residence only further heightened my apprehension.

3.

At my deposition Mr. Henry Green, counsel for the Nezhats, forced me to read my home address into the record. This has never been requested at any expert deposition that I have been party to before.

4.

Throughout my deposition, Mr. Green repeatedly used very theatrical German in the form of commands and imperative phrases. The entire two day deposition was conducted in an aggressive, hostile fashion. Mr. Green and his co-counsel, Mr. Walbert, would converse between themselves while I was trying to answer Mr. Green's many highly convoluted, multipart questions. When I objected to this behavior, Mr. Walbert informed me that, in effect, my answers were worthless.

5.

In light of the history of alleged intimidation of other witnesses, I left this deposition feeling very uncomfortable and that Mr. Green was trying to intimidate me into withdrawal as a witness.

6.

I promptly reported my suspicions to Mr. Matthew Mullan, Special Agent at the FBI regional office in Lansdale, PA. Having been made aware that the Atlanta office was already knowledgeable of the earlier alleged intimidations, I asked that a file be opened and flagged to their attention. He was agreeable to this.

FURTHER AFFIANT SAYETH NAUGHT this 30th day of September, 1997.

RICHARD S. GOLDSTEIN, M.D.

Sworn to and subscribed before me this 30Th day of SEPTEMBER 1997.

Notary Public

NOTARIAL SEAL
ELIZABETH J MULLANE Notary Public
Bensalem Bucks County

MICHAEL T. BYRNE
ATTORNEY AT LAW

2138 E Main St. (US Hwy. 78)
Snellville, Georgia 30278

Telephone: (770) 979-4300
Facsimile: (770) 979-3559

November 11, 1996

Honorable G. Ernest Tidwell
District Court Judge
19th Floor U.S. Courthouse
75 Spring Street
Atlanta, Georgia 30303

RE: Manov v. Nezhat, et al
Civil Action File No. 1:96-CV-0096-GET

Dear Judge Tidwell:

It is with a great deal of anxiety that I even write this letter to you; however, given the circumstances of these past few days, I feel that it is my moral and ethical duty first and foremost as a human being, and secondly, as a lawyer to do so. Rest assured all of my opposing counsel will be copied with this letter.

As a bit of background, I feel it is important to tell you who I am, in order that you may understand why I am writing this to you. I mean no disrespect to you or this Court.

I have been a practicing attorney here in Atlanta for a little over nine years. While I have had some experience before this Court, I have not had the pleasure of practicing before your Honor until this case. Prior to starting my own practice, I had the pleasure of working with the law firm of Branch, Pike & Ganz (now merged into Holland & Knight) while I was in law school, and with the firm of Carter & Ansley, a long standing insurance defense firm. From my very early career, I have always been taught that the practice of law is a noble profession, and that we should always strive to do our best within the confines of law to do what was fair, just, equitable and moral in representing our clients. That has always been my practice and will always be my practice so long as clients continue to entrust me with their legal problems.

The dilemma that I am faced with is how best to comply with this Court's Order wherein I have been ordered to turn over the extent of all my work product to my opposing counsel, or risk having this case dismissed with prejudice. The dilemma is intensified when some of the witnesses who have spoken with us have shared information which they believe would subject themselves to great danger if this information were exposed to the other side, even to the point where some witnesses stated they feared that the Defendants would have them killed. Since witness threats are a

serious part of this case, I cannot dismiss the fears of these individuals.

Therefore, I have produced to opposing counsel all documents as requested by this Court, with the exception of the documents I am submitting herewith to you. These documents which I am submitting to you (and not to opposing counsel) I do so out of a greater moral duty which I owe to these individuals, even though to do so technically violates your Order. I ask the Court to not grant my opposing counsel permission to view these documents.

As I was writing this letter to you, we experienced an incidant where someone driving by my office shot (with either an air powered rifle or some other instrument)a marble breaking through a window and denting the wall on the other side of the room, narrowly missing one secretary's head. The police have stated that if it hit her head, it may have killed her. Whether this incident is related to this case, I have no way of knowing. I hope and pray it is not.

Kindest regards.

Sincerely yours,

Michael T. Byrne

MTB/lsa
1642

cc: Ms. Debra Manov
James J. Neal, Esquire
Edward T. M. Garland, Esquire
David F. Walbert, Esquire
Susan V. Sommers, Esquire
Henry D. Green, Jr., Esquire
Clerk of United States District Court

NITED STATES DISTRICT COUR.
NORTHERN DISTRICT OF GEORGIA
1967 UNITED STATES COURTHOUSE
75 SPRING STREET, S.W.
ATLANTA, GEORGIA 30303-2361

CHAMBERS OF
G. ERNEST TIDWELL
CHIEF JUDGE

(404:331-6535

November 13, 1996

Mr. Michael T. Byrne
Attorney at Law
2138 E. Main Street
U.S. Highway 78
Snellville, Georgia 30278

Re: Manov v. Nezhat, et al.
Case No. 1:96-cv-96-GET

Dear Mr. Byrne:

This will acknowledge receipt of your letter of November 11, 1996.

Please be advised that furnishing documents to the court instead of opposing counsel as required by the orders of this court do not in any way constitute compliance with the order requiring production to opposing counsel.

Yours very truly,

G. Ernest Tidwell

GET:sw

cc: Mr. David F. Walbert
Suite 1400, The Equitable Building
100 Peachtree Street
Atlanta, Georgia 30303

Mr. Henry D. Green, Jr.
Sullivan, Hall, Booth & Smith
1360 Peachtree Street, N. E.
800 One Midtown Plaza
Atlanta, Georgia 30309-3214

#2941

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WRITER'S DIRECT DIAL NUMBER (202) 887-4052

97-CV-H

May 6, 1997

Hon. Paul V. Niemeyer
United States Circuit Judge
United States Court of Appeals
for the Fourth Circuit
100 West Lombard Street
Baltimore, MD 21201

Dear Judge Niemeyer:

I received, filled out, and returned the survey form sent to me by the subcommittee of the Civil Rules Advisory Committee, which you chair. I hope that the survey achieves its goals.

Question 13 of the survey asked if there were additional observations or suggestions we had about possible changes to the Rules, and I attached a suggestion that the scope of the final sentence of Rule 12(b) be expanded. Because that suggestion is not related to the subject of the survey, I am taking the liberty of attaching a copy of the text of the suggestion to you in your capacity of Chair of the Advisory Committee. I believe that the change I suggest deserves the Committee's consideration.

Thank you for your attention.

Respectfully,

Daniel Joseph, P.C.

Note in Further Answer to Question 13

Daniel Joseph
Akin, Gump, Strauss, Hauer & Feld, L.L.P.
May 2, 1997

This case disclosed a weakness in Rule 12 (b), Fed. R. Civ. P., that I believe should be rectified. The final sentence of that Rule provides that if, on a Rule 12 (b)(6) motion, matters outside the pleadings are submitted to and not excluded by the district court, then the matter is converted to a motion summary judgment under Rule 56, "and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." This provision is one of the fairest and most perceptive in the Rules, and it tends to defeat a lot of gamesmanship. I submit, however, that the scope of this provision should be broadened so that it also applies at least in a motion for dismissal under Rule 12 (b)(1). The simple reason is that a factual issue may be asserted to govern jurisdiction, and the procedure in that event should be no different from the summary judgment procedure. I also believe that this change should be made with respect to any Rule 12 (b) motion, although my experience is limited in this case to Rule 12 (b)(1). The issue arose as follows.

1. We filed suit under the Federal Tort Claims Act, asserting that the plaintiffs' daughter, an officer in the United States Navy, had been murdered by another naval officer as the result of negligence on the part of the Navy. The federal government moved to dismiss, asserting that the decedent's death had arisen incident to her service in the Navy and that recovery was accordingly blocked by *Feres v. United States*, 340 U.S. 135 (1950). We responded that the suit fell within the Federal Tort Claims Act because the decedent's death did not arise incident to her military service, citing *Brooks v. United States*, 337 U.S. 49 (1949).

2. The government characteristically asserted in its motion that the court lacked subject matter jurisdiction under Rule 12 (b)(1), not that we had failed to state a cause of action under Rule12 (b)(6). In its view, the sovereign immunity of the United States bars suit because the Federal Tort Claims Act, a partial waiver of sovereign immunity, does not extend to the injury complained of. Nonetheless, as the previous paragraph shows, even in the government's view the question of whether the court had jurisdiction depended on resolution of a mixed question of fact and law: whether the injury in question had arisen incident to the decedent's military service. Note also that, as is typically the case, the government, as defendant, had virtually exclusive control of the information that would throw light on the answer to this question.

3. The government attached certain documents along with its motion and reply briefs asserting that the court lacked jurisdiction. The documents (particularly the orders assigning the decedent to her current post) bore on the question of the incidence of the injury to the decedent's military service. Citing the final sentence of Rule 12 (b), we filed a motion to exclude those documents or, alternatively, to convert the motion to dismiss

into a motion for summary judgment. We asserted that pursuant to *Bell v. Hood*, 327 U.S. 678 (1946), we had stated a cause of action in the Complaint and that whether we could make the case or not, the cause was clearly within the court's jurisdiction. Thus, we asserted, the government's motion should be read to amount to one under Rule 12 (b)(6). We also pointed out that even if the case were one under Rule 12 (b)(1), the Second Circuit had held, in *Kamen v. American Tel. & Tel. Co.*, 791 F. 2d 1006, 1011 (2d Cir. 1986) that on a Rule 12 (b)(1) motion, where there is a question of fact upon which jurisdiction may depend, that discovery may be appropriate, "at least where the facts are peculiarly within the knowledge of the opposing party." The government asserted that there was no basis for discovery.

4. The district court cut the knot by holding that it was not necessary to decide whether discovery was necessary in our case, because even on facts admitted by the plaintiffs the government was correct, and it dismissed. The court said that discovery would have been warranted if there had been a material factual dispute, but it held that there was none. (A copy of the court's ruling is attached.) We appealed, and the case is now pending in the Third Circuit. (No. 97-7030) (because of the district court's holding, the procedural issue discussed herein is only tangentially involved in the appeal).

5. While I believe that we were correct and that *Bell v. Hood* is controlling, it has been my experience that that case is not well understood (indeed, I may be the one who does not understand it), and (certainly meaning no disrespect to the district court in our case), I thought the court was reluctant to base a holding on that issue. Therefore, I believe, a defect in the Rules contributed to a cutoff of our ability to develop an important fact issue that was at the root of the government's motion.

6. This is a problem that probably recurs with some frequency. Taking a somewhat narrow view, it would arise whenever the federal government asserts, as it typically does, that cases against it seeking money damages are unconsented suits outside of the court's jurisdiction because some part of a factual predicate is not met. But the issue can arise much more often than that. One sees motions to dismiss federal cases asserting lack of subject matter jurisdiction when what is really meant is that the case lacks merit and, because the federal courts are courts of limited jurisdiction, the court accordingly lacks jurisdiction as well. Certainly there ought not to be any procedural benefit to labelling a factual issue jurisdictional that tends to cut off an opponent's right to develop the issue under the summary judgment procedure. Yet that is how Rule 12 (b) now appears to be drafted.

7. Moreover, a question of fact can govern even a valid question of whether a court has jurisdiction; this typically occurs when it is asserted that a party does not have sufficient contacts with a district to warrant that district's exercising jurisdiction over the person. There can also be factual questions governing the applicability of other Rule 12 (b) grounds, such as whether a controversy is really worth the amount that is the lower limit for federal jurisdiction, what the true domicile of one of the parties is in a diversity case, whether service was actually effected, or whether another party in fact has the kind

of interest that requires joinder. It would seem a beneficial change for Rule 12 (b) to state that whenever any motion to dismiss is supported by material outside the pleadings, the procedures of Rule 56 should be used, with their well-understood goal of determining whether a material question of fact exists and their guarantee of an opportunity for all parties to develop and submit relevant material. This change is particularly warranted if the Second Circuit's *Kamen* case is correctly decided, as it seems to be. If discovery may properly be taken on a Rule 12 (b)(1) issue that turns on a factual question, there is no reason why that result should not be regularized in the Rules and brought into harmony with similar proceedings now provided for with respect to Rule 12 (b)(6) motions by the last sentence of Rule 12(b).

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

BONNIE A. O'NEILL, on behalf of herself and the estate of Kerryn L. O'Neill, and EDMUND J. O'NEILL

Plaintiffs

vs.

UNITED STATES OF AMERICA

Defendant

CIVIL NO. 96-800
(Judge Kosik)

MEMORANDUM AND ORDER

Plaintiffs instituted this action in tort pursuant to the Federal Tort Claims Act [FTCA] for injury to and the wrongful death of their daughter, Kerryn L. O'Neill, an Ensign in the United States Navy who was shot to death by a fellow officer, with whom she shared a fractured romantic relationship, after he gained entry to her living quarters on a naval base in Coronado, California. At the time, Ensign O'Neill was off-duty and not in leave status.

The complaint alleges that the death of Ensign O'Neill resulted from the negligence of the United States Navy in not fully evaluating the mental illness of the named officer who killed their daughter. Had appropriate evaluations occurred, the killer's personality disorder could have been treated, and the risk to their daughter could have been prevented.

Defendant has filed a motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(1) for lack of subject matter jurisdiction. The motion is supported by a declaration of the Commanding Officer of Ensign O'Neill stating that she was not in leave status at the time

of her death. The defense relies on Feres v. United States, 340 U.S. 135 (1950) and United States v. Shearer, 473 U.S. 52 (1985) and their progeny, holding that an exception exists as to the government's general liability under the FTCA where the injury arose out of or was "in the course of activity incident to service" of the injured plaintiff in military service.

Plaintiffs oppose the motion for various reasons, including the assertion that the murder was not in the course of Ensign O'Neill's service activity because she was off-duty at the time and engaged in a personal activity. We find none of the reasons persuasive.

After the plaintiffs' response, the government filed a reply memorandum with exhibits to contradict a claim of plaintiffs that dismissal of the action would leave no remedy for the injury or death of Ensign O'Neill. These exhibits attest to death benefit payments to the parents of Ensign O'Neill, and are not relevant to the issue of jurisdiction.

Plaintiffs filed a motion to strike the reply brief and evidence and, in the alternative, seek a stay of the proceedings to allow for discovery. The discovery they seek is outlined in a declaration of counsel, Document 18. The stated goal of the discovery would be to demonstrate that Ensign O'Neill, at the time of her death, was not under specific orders, that she was engaged in unrestricted leisure activities, that the quarters she occupied were accessible to visitors with permits, and that the reason resulting in her murder was unrelated to her military duties.

Contrary to the opposition of the government, we believe that plaintiffs would be entitled to discovery in opposing a motion filed pursuant to Fed.R.Civ.P. 12(b)(1) attacking jurisdiction. However, the discovery plaintiffs seek is not relevant to any determination as to whether the doctrine of Feres bars recovery here. Plaintiffs do not seek to contradict that Ensign O'Neill was not on leave status, and that she was off-duty in her private quarters at the military base. Defendant does not dispute that at the time of her death she was off-duty and engaged in purely personal pursuits. In these circumstances, we believe Feres precludes recovery.

Accordingly, we will deny the plaintiff's motion to strike the defendant's reply memorandum and evidence, and in the alternative to stay proceedings to allow for discovery outlined in Document 18. We will grant the motion to dismiss this action for the reasons stated above.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

BONNIE A. O'NEILL, on behalf of herself and the estate of Kerryn L. O'Neill, and EDMUND J. O'NEILL	:	
Plaintiffs	:	CIVIL NO. 96-800 (Judge Kosik)
vs.	:	
UNITED STATES OF AMERICA	:	
Defendant	:	

ORDER

NOW, this 7th day of November, 1996, IT IS HEREBY ORDERED THAT:

[1] the plaintiffs' motion to strike the reply brief and evidence and, in the alternative, seek a stay of the proceedings to allow for discovery, is denied;

[2] the defense motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(1) is granted; and

[3] the Clerk of Court is directed to close this case.

Edwin M. Kosik
United States District Judge

Daniel Joseph, Esq.
Akin, Gump, Strauss, Hauer & Feld
1333 New Hampshire Ave, N.W.
Washington, DC 20036

Re: 3:96-cv-00800

Please file all pleadings directly with the Clerk's Office in which the assigned Judge is located. Do not file any courtesy copies with the Judge's Chambers.

JUDICIAL OFFICERS:	CLERK'S OFFICE ADDRESS:
Chief Judge Sylvia H. Rambo Judge William W. Caldwell Magistrate Judge J. Andrew Smyser	U.S. District Court 228 Walnut Street P.O. Box 983 Harrisburg, PA 17108
Judge Edwin M. Kosik Judge Thomas I. Vanaskie Judge William J. Nealon Judge Richard P. Conaboy Magistrate Judge Raymond J. Durkin Magistrate Judge Thomas M. Blewitt	U.S. District Court 235 N. Washington Ave. P.O. Box 1148 Scranton, PA 18501
Judge James F. McClure Judge Malcolm Muir	U.S. District Court 240 W. Third Street P.O. Box 608 Williamsport, PA 17701

September 27, 1998

Charles E. Frayer
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Bloomington, IN 47404
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98-CV-E

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
Administrative Office of the U.S. Court
Washington, D.C. 20544

Re: Suggestion for change to Rule 15(c)(3)(B) of the Federal Rules of Civil Procedure.

Dear Secretary McCabe:

I respectfully submit for consideration the following proposed change to Rule 15(c)(3)(B) of the Federal Rules of Civil Procedure concerning Relation Back of Amendments.

Rule 15(c)(3)(B):

Current Language
"(B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party."

[New Language Proposed]
"(B) knew or should have known that, but for a mistake [or lack of knowledge] concerning the identity of the proper party, the action would have been brought against the party."

The suggestion for this change occurred to me while studying the case of Worthington v. Wilson, 790 F.Supp. 829 (C.D.Ill. 1992), which states in relevant part;

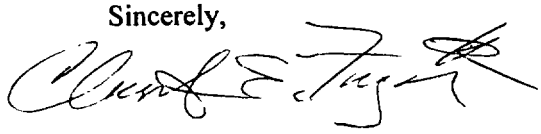
> "The Defendants argue that the failure of the original complaint to name Wilson and Wall was not due to a 'mistake' but rather was due to a lack of knowledge over the proper defendant. The Defendants argue that while Rule 15(c) permits amendments which change a mistaken name in the original complaint, it does not permit a plaintiff to replace 'unknown' parties with actual parties." Id. at 834. (photocopy enclosed)

Adoption of this change should serve to eliminate such future claims based on the ambiguous form of the current language. In addition, it should resolve any divisions on this issue among the United States District Courts, thus eliminating the need for future review by the United States Supreme Court. Furthermore, justice surely dictates that where a claimant lacks knowledge concerning the identity of the proper party against whom a claim is asserted, that claimant, upon

receipt and verification of identity of the property party, should be permitted to relate back an amendment on that basis within a reasonable period of time.

Allow me thank you in advance for your time and consideration of this issue. Please contact me if I may be of assistance. I look forward to hearing from you.

Sincerely,



Charles E. Frayer, Student
Indiana University
School of Law—Bloomington

Enclosure

USPS Cert. Mail Article Number Z 528 280 524

Injunctive Relief

i. Private Plaintiffs

[13] We turn then to the question of whether the thirteen private Plaintiffs have standing to pursue injunctive relief. The Supreme Court has determined that "in order to seek injunctive relief ... a private plaintiff must allege threatened loss or damage 'of the type the antitrust laws were designed to prevent and that flows from that which makes defendants' acts unlawful.'" *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 113, 107 S.Ct. 484, 491, 93 L.Ed.2d 427 (1986). Injunctive relief is available for private parties "against threatened loss or damage by violation of the antitrust laws ... when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity...." 15 U.S.C. § 26, Clayton Act § 16. Before looking at the elements Plaintiffs must satisfy in order to obtain injunctive relief, the Court observes that the private Plaintiffs request for injunctive relief in this case does not appear serious. Plaintiffs' Final Statement fails to even address the requirements that must be satisfied before injunctive relief can be granted.

The record reveals also that several Plaintiffs are no longer in the ethanol production or gasohol blending business. As already stated, in order to obtain injunctive relief, "a private plaintiff must allege threatened loss or damage 'of the type the antitrust laws were designed to prevent and that flows from that which makes the defendants' acts unlawful.'" *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 113, 107 S.Ct. 484, 491, 93 L.Ed.2d 427 (1986). Obviously a plaintiff who has already gone out of business no longer faces a threat of loss or damage. Nonetheless, Plaintiffs make no mention of the fact that not all Plaintiffs can possibly be entitled to injunctive relief. The request by the private Plaintiffs for injunctive reliefs was casually thrown into the Plaintiffs' complaints and prayer for relief and, accordingly, it is now a throw away.

ii. State of Illinois

Defendants have not challenged the standing of the State of Illinois to pursue the alleged antitrust violation and the State clearly stands on a different footing, when it comes to antitrust standing, than do the private Plaintiffs. The Court is aware that the dismissal of the original Plaintiffs to this suit does not require the dismissal of a party that has intervened. *See United States Steel Corporation v. Environmental Protection Agency*, 614 F.2d 843 (3rd Cir.1979); *Magdoff v. Saphin Television & Appliance, Inc.*, 228 F.2d 214 (5th Cir. 1955). Nonetheless, several factors lead the Court to conclude that the State's case should be dismissed without prejudice.

[14] The State of Illinois intervened in this action almost two years after it was filed seeking injunctive relief and state statutory penalties. Most of the injuries claimed by the state of Illinois, including their claims that Defendants' actions adversely affected the public health, increased the cost of meeting Clean Air Standards, and deprived Illinois of the economic development that a larger ethanol industry would have brought, are not of the type that the antitrust laws were intended to redress.

The State's prayers for statutory penalties were dismissed in July of 1990, leaving the State in this case only for injunctive relief.

The State of Illinois has been a follower in this case and has candidly stated that it "does not have the allocable resources to vigorously pursue the prosecution of this lawsuit on its own, absent the resources of private counsel...."

In addition, the State of Illinois' complaint is clearly rendered from the complaint of the private Plaintiffs. Likewise, the contentions and proof of State of Illinois are not discussed separately in its Final Statement of Contentions and Proof. Yet, it is clear from the record that the State of Illinois case is not the same as the private Plaintiffs. For example, Plaintiffs allege that the Defendants violated the Sherman Act and the Gasohol Competition Act of 1980 with their "no alcohol" advertising, yet in the Final Statement of Contentions and Proof only three Defendants are identified as having conducted such advertising campaigns within Illinois. In addition, a 1986 map included in the last appendix to Plaintiffs' Final Statement shows the percentage of ethanol blends (presumably as compared to all motor fuel sales) at more than 24 percent. By contrast, in some states ethanol blend sales are less than 1 percent of total motor fuel sales. Obviously, this raises significant questions about whether the Illinois motor fuels market was affected by any of Defendants' alleged antitrust violations. Plaintiffs' Final Statement, however, simply fails to focus in on this or many other points that bear on the State of Illinois' claim.

Should the State of Illinois wish to pursue its claims, it would be in the best interest of both the parties and the Court if it did so in a new suit tailored to its individual situation.

III. CONCLUSION

Ergo, Count III of the Plaintiffs' and Intervenors' complaints alleging monopolization activities in violation of § 2 of the Sherman Act and that part of Count IV that alleges monopolization activities in violation of the Illinois antitrust laws are DISMISSED WITH PREJUDICE.

Defendants' Motion for Summary Judgment based on Plaintiffs' Lack of Antitrust Injury and Standing is ALLOWED IN PART as it pertains to Counts I and II alleging, respectively, "a contract, combination or conspiracy" in violation of section 1 of the Sherman Act and violations of the Gasohol Competition Act of 1980, section 25a of the Clayton Act.

The State of Illinois claims under Counts I and II are DISMISSED WITHOUT PREJUDICE.

The Illinois Fraud and Deceptive Practices Act claim under Count IV and the commercial disparagement claim in Count V are DISMISSED WITHOUT PREJUDICE for lack of jurisdiction.

Richard WORTHINGTON, Plaintiff,

v.

Dave WILSON and Jeff Wall, Defendants.

No. 91-1047.

United States District Court, C.D. Illinois, Peoria Division.

April 27, 1992.

Arrestee brought civil rights action against village and "unknown named police officers" in state court. Village removed action to federal court and moved to dismiss claims. Arrestee filed amended complaint naming two officers who arrested him, and the defendants moved to dismiss the amended complaint and sought sanctions. The District Court, Mihm, Chief Judge, held that: (1) arrestee's complaint naming officers did not relate back, for limitations purposes, to original complaint in which arrestee sued unknown police officers; (2) federal law, rather than state law, applied upon the relation-back issue, and (3) court could not apply sanctions under Rule 11.

Dismissed.

1. Limitation of Actions ⇐125

Amended complaint which changes names of defendant will relate back to filing of original complaint, for limitations purposes, if it arises out of same conduct contained in original complaint and new party was aware of action within 120 days of filing of original complaint. Fed.Rules Civ.Proc.Rule 15(c), 28 U.S.C.A.; Fed.Rules Civ.Proc.Rule 15(c), 28 U.S.C.(1988 Ed.)

2. Limitation of Actions ⇐121(2)

Court would retroactively apply amended version of rule governing relation-back of amendment of a pleading to

action pending on effective date of amended version; it was "just" to apply the new version which saved the plaintiff's claim and it was "practicable" to apply the new version, in that there was nothing about new version which made it impossible to apply. Fed.Rules Civ.Proc.Rule 15(c), 28 U.S.C.A.

3. Limitation of Actions ⇐121(2)

Arrestee's civil rights complaint in which he named arresting officers did not relate back, for limitations purposes, to original complaint in which arrestee sued unknown police officers; arrestee's original pleading was not a "mistake," in that the amendment corrected a lack of knowledge at time of original complaint. Fed.Rules Civ.Proc.Rule 15(c), (c)(3), 28 U.S.C.A.

4. Federal Courts ⇐427

Federal law, rather than state law, governed in determining whether arrestee's civil rights complaint in which he named arresting officers related back, for limitations purposes, to original complaint in which arrestee sued unknown officers; federal rule addressed issue of relation-back of unknown named defendants, provided that parties brought in by amendment whose identities were not known at time of original complaint were not added due to "mistake," the state law would dictate a contrary result, and, thus, the federal law governed. Fed.Rules Civ.Proc.Rule 15(c), 28 U.S.C.A.; Ill.S.H.A. ch 110, ¶ 2-413.

5. Federal Civil Procedure ⇐2771(5)

A civil rights plaintiff's attorney violated rule 11 when he signed complaint alleging respondeat superior as basis for municipal liability, despite attorney's contention that he intended to sue village under "custom or policy" and inclusion of "respondeat superior" language was simple clerical error by assistant, Supreme Court had held 14 years ago that respondeat superior was not valid basis for municipal liability under § 1983 and fact that "respondeat superior" language appeared in complaint led to conclusion that the attorney did not read, or at least carefully read, complaint he signed. 42 U.S.C.A. § 1983; Fed.Rules Civ.Proc. Rule 11, 28 U.S.C.A.

6. Federal Civil Procedure ⇐2778

Federal district court would not sanction civil rights plaintiff under Rule 11 for complaint initially filed in state court and then removed to federal court; initial complaint filed in state court contained claim that was against clear legal authority, and amended complaint filed in district court following removal contained no reference to the claim which was contrary to clear legal authority. Fed.Rules Civ.Proc.Rule 11, 28 U.S.C.A.

Gary Morris, Peoria, Ill., for plaintiff.

Jeanne L. Wysocki, Peoria, Ill., for defendants.

MEMORANDUM OPINION AND ORDER

MIHM, Chief Judge.

Before the court are the Defendants' motion to dismiss or for more definite statement, the Defendants' motion to strike, and the Defendants' motion for sanctions. For the reasons set forth below, the motion to dismiss (# 16–1) is granted, the motion for more definite statement (# 16–2) is moot, the motion to strike (# 28) is moot, and the motion for sanctions (# 9) is denied.

BACKGROUND

According to the amended complaint, the Plaintiff Richard Worthington ("Worthington") was arrested on February 25, 1989 by two police officers in the Peoria Heights Police Department. At the time of the arrest, Worthington was nursing an injured left hand and so advised the arresting officer. The officer responded by grabbing and twisting Worthington's injured hand and wrist, which prompted Worthington to shove the officer away and tell him to "take it easy." A second officer arrived at the scene and the two officers wrestled Worthington to the ground and handcuffed him. The officers then hoisted Worthington from the ground by the handcuffs which caused him to suffer broken bones in his left hand. These allegations are taken as true by this court for purposes of the pending motions

Exactly two years later, on February 25, 1991, Worthington, by his attorney Gary Morris, filed a complaint in the Circuit Court of Peoria County against the Village of Peoria Heights and "three unknown named police officers." This complaint recited the facts above and claimed that the officers' actions deprived Worthington of his constitutional rights in violation of the Civil Rights Act of 1964, 42 U.S.C. § 1983. This complaint was divided into five counts. The first three name the officers jointly and severally, and claim a variety of damages. The fourth and fifth counts name the Village, and claim that it was also responsible for the officers' conduct under the doctrine of respondeat superior. The Village removed the action to this court and moved to dismiss the claims against it on the grounds that respondeat superior is not a valid basis for municipal liability under § 1983.

The motion was set for hearing before Magistrate Judge Robert J. Kauffman on May 2, 1991. Worthington did not respond to the motion to dismiss before that date, but on the date of the hearing he voluntarily dismissed the counts against the Village. Oddly enough, three weeks later, on May 23, 1991, Mr. Morris filed a response to the Village's motion to dismiss, which had already been disposed of when Worthington voluntarily dismissed the claims against the Village. In this response, Mr. Morris confessed that the reliance upon the theory of respondeat superior in the complaint was an oversight, but stressed that there was a valid basis for the § 1983 claims against the officers. On June 4, 1991, the Village of Peoria Heights filed a motion to strike this response as improper since the motion to dismiss was no longer pending. This motion to strike was later granted by the Magistrate. The Village also moved for sanctions against Worthington and Mr. Morris for having filed a baseless action against it. This motion remains pending.

On June 17, 1991, Worthington filed an amended complaint which named as Defendants Dave Wilson and Jeff Wall ("the Defendants"), the two officers who arrested Worthington on February 25, 1989. This amended complaint contains no claim against the Village of Peoria Heights These Defendants, represented by Jeanne Wysocki (the same attorney who represented the Village), moved to dismiss the amended complaint on the grounds that the statute of limitations had run and that the complaint failed to state a proper claim under § 1983. Worthington responded to this motion and a hearing was held before the Magistrate on October 31, 1991. On December 19, 1991, the Magistrate issued a recommendation that both the motion to dismiss and the motion for sanctions be allowed. Worthington filed an objection to this recommendation, to which the Defendants in turn responded The Defendants also filed a motion to strike an affidavit included in Worthington's response to the motion to dismiss. This motion also remains pending. On March 17, 1992, this court held an additional hearing on the pending motions.

DISCUSSION

I. *Statute of Limitations/Relation Back*

In their motion to dismiss, the Defendants first argue that the amended complaint against them must be dismissed because the statute of limitations has run. The Defendants note that the statute of limitations for § 1983 cases in Illinois is two years, and that the amended complaint was not filed until about four months after this period had expired. Moreover, the Defendants argue that the amended complaint cannot be deemed to relate back to the filing date of the original complaint because the prerequisites of relation back under Federal Rule of Civil Procedure 15(c) have not all been met. Specifically, the Defendants argue that they did not have notice of the action before the statute of limitations period had run as required by *Schiavone v. Fortune*, 477 U.S. 21, 106 S.Ct. 2379, 91 L.Ed.2d 18 (1986), and that

the renaming of fictitious parties does not constitute a "mistake" under Rule 15(c).

Worthington's primary argument in response is that relation back of his amended complaint is not governed by Rule 15(c), but rather by certain provisions in the Illinois Code of Civil Procedure, namely Ill. Rev.Stat. ch. 110, ¶¶ 2–407 and 2–413. Worthington argues that, under these provisions, his amended complaint is properly deemed to relate back to the February 25, 1991 filing of the original complaint. In the alternative, Worthington suggests that the requirements of Rule 15(c) have been met. Finally, Worthington argues that, whatever rules govern the situation, he should not be punished for omitting the arresting officers' names from the original complaint because the Peoria Heights Police Department had withheld that information from him.

In his recommendation, the Magistrate agreed with the Defendants that, under Rule 15(c) and *Schiavone*, the amended complaint naming the officers could only relate back if the officers were actually aware of the action before the limitations period expired on February 25, 1991. Since the record demonstrated that the Village was not even served until February 28, 1991, the Magistrate concluded that the Defendants did not have actual knowledge of the action on February 25, 1991 and that the amended complaint should therefore be dismissed as untimely filed. This court now addresses the parties' arguments in turn.

A. *Schiavone Notice Requirements*

As an initial matter, there is no doubt that the statute of limitations for a § 1983 action in Illinois is two years. *See Wilson v. Garcia*, 471 U.S. 261, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985); *Kalimara v. Department of Corrections*, 879 F.2d 276 (7th Cir.1989). Therefore, as noted by the Magistrate, Worthington's action against the Defendants must have been filed by February 25, 1991. Since the amended complaint was not filed until June 17, 1991, the only way the amended complaint can be found to be timely filed is if it relates back to the filing of the original complaint. Relation back of amendments under federal rules is covered by Rule 15(c).

The Defendants' first argument is that Rule 15(c), as interpreted by *Schiavone*, requires that the party to be brought in by amendment receives notice of the action before the expiration of the statute of limitations period. The Defendants argue that because they did not receive notice of this action within this time, the amended complaint does not relate back and is therefore untimely. Because this court finds that *Schiavone* no longer controls, it rejects the Defendants' first argument.

Until December 1, 1991, Rule 15(c) provided, in relevant part:

> Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against the party to be brought in by amendment that party (1) has received such notice of the institution of the action that the party will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

In *Schiavone*, the Supreme Court interpreted this provision to require that, in addition to the amended complaint arising out of the same conduct set forth in the original complaint, the new party must have received actual notice of the action (and that it was the proper party) before the statute of limitations period expired. 477 U.S. at 30–31, 106 S.Ct. at 2385. As noted by the Magistrate and counsel for the Defendants, it appears that the Defendants did not receive notice of this action against them by February 25, 1991. Thus, under the old version of Rule 15(c) and *Schiavone*, the amended complaint against the officers would not relate back and would thus be untimely filed.

However, as of December 1, 1991, Rule 15(c) reads differently. As will be seen momentarily, the amendment was designed to change the requirement of *Schiavone* that the new party receives notice of the action before the expiration of the limitations period. As amended on December 1, 1991, Rule 15(c) reads, in relevant part:

> An amendment of a pleading relates back to the date of the original pleading when:
>
> . . . . . .
>
> (2) The claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, or
>
> (3) the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (2) is satisfied and, within the period provided by Rule 4(j) for service of the summons and complaint, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

[1] As noted by the Advisory Committee on the Federal Rules, this amendment was designed to change the result dictated by *Schiavone*.

> Paragraph (c)(3). This paragraph has been revised to change the result in *Schiavone v. Fortune, supra*, with respect to the problem of a misnamed defendant. An intended defendant who is notified of an action within the period allowed by Rule 4(m) [apparently intending to mean Rule 4(j)] for service of a summons and complaint may not under the revised rule defeat the action on account of a defect in the pleading with respect to the defendants named, provided that the requirements of clauses (A) and (B) have been met. If the notice requirement is met within the Rule 4(m) period, a complaint may be amended at any time to correct a formal defect such as misnomer or misidentification. On the basis of the text of the former rule, the Court reached a result in *Schiavone v. Fortune* that was inconsistent with the liberal pleading practices secured by Rule 8.
>
> In allowing a name-correcting amendment within the time allowed by Rule 4(m), this rule allows not only the 120 days specified in that rule, but also any additional time resulting from any extension ordered by the court pursuant to that rule, as may be granted, or example, if the defendant is a fugitive from service of the summons.

(Citations omitted). Thus, relation-back is now governed by a modified standard. An amended complaint which changes the name of the defendant will relate back to the filing of the original complaint if it arises out of the same conduct contained in the original complaint and the new party was aware of the action within 120 days of the filing of the original complaint.

[2] Thus, under the amended version of Rule 15(c), Worthington's amended complaint, which arises out of the very same conduct in its original complaint, would relate back to February 25, 1991 if the Defendants were aware, before June 25, 1991, that they were the officers referred to as "unknown named police officers" in the original complaint. At oral argument on March 12, 1992, counsel for the Defendants conceded that they were aware of the pendency of the action within this period; thus, under the new version of Rule 15(c), the amended complaint would be timely because the Defendants received notice of the action within 120 days of the original filing. Given that the two versions of Rule 15(c) dictate opposite results on this issue in this case, the question becomes which version governs here. The answer is that the new version applies.

In its order of April 30, 1991, which adopts all of the 1991 amendments to the

Federal Rules of Civil Procedure, the Supreme Court states:

> [T]he foregoing additions to and changes in the Federal Rules of Civil Procedure ... shall take effect on December 1, 1991, and shall govern all proceedings in civil actions thereafter commenced *and, insofar as just and practicable, all proceedings in civil actions then pending.*

(Emphasis added). Thus, the new version of Rule 15(c) applies to this action if such application is "just and practicable." This court is of the opinion that it is just to apply the new version of Rule 15(c) which saves Worthington's claim. As noted in the Committee notes to Rule 15(c) reprinted above, Rule 8 secures liberal pleading practices in federal court. The revision of Rule 15(c) makes clear that the Supreme Court had created too restrictive a requirement in *Schiavone* and that the true intent of Rule 15(c) was to allow the amended pleading in cases such as this. Thus, justice dictates that the amended complaint be governed by the new, more relaxed version of Rule 15(c). Moreover, it is "practicable" to apply the amended version of Rule 15(c). Black's Law Dictionary defines "practicable" as "that which may be done, practiced, or accomplished; that which is performable, feasible, or possible." Certainly it is feasible or possible to apply the newer version of Rule 15(c) to this case—there is nothing about the amended version of Rule 15(c) which makes it impossible to apply it to this case.

Accordingly, this court rejects the Defendants' argument and the Magistrate's recommendation that *Schiavone* prohibits relation back of this amended complaint. Rule 15(c) no longer requires that the party to be brought in by amendment receives notice of the action prior to the expiration of the statute of limitations period.

B *"Mistake"*

[3] The Defendants also argue that relation back is not permitted here under Rule 15(c) because there was no "mistake" concerning the identity of the proper party. In this regard, Rule 15(c) states that an amendment changing the naming of a party will relate back if, among other things, the party brought in by the amendment "knew or should have known that, but for a *mistake* concerning the identity of the proper party, the action would have been brought against the party." (Emphasis added) Both the old version and the new version of Rule 15(c) contain this identical language.

The Defendants argue that the failure of the original complaint to name Wilson and Wall was not due to a "mistake" but rather was due to a lack of knowledge over the proper defendant. The Defendants argue that while Rule 15(c) permits amendments which change a mistaken name in the original complaint, it does not permit a plaintiff to replace "unknown" parties with actual parties. In support of this argument, the Defendants cite *Wood v. Worachek*, 618 F.2d 1225, 1230 (7th Cir.1980) and *Rylewicz v. Beaton Services, Ltd.*, 888 F.2d 1175, 1181 (7th Cir.1989). These cases reflect the Seventh Circuit's view that an amended complaint which replaces fictitious names with actual names due to an initial lack of knowledge concerning the proper defendant does not involve a "mistake" and is therefore not entitled to relation back under Rule 15(c) *See also Norton v. International Harvester Co.*, 627 F.2d 18, 22 (7th Cir.1980). *But see Sassi v. Breier*, 584 F.2d 234, 235 (7th Cir.1978). These holdings would seem to control in this case, since Worthington concedes that he designated the Defendants as "unknown named police officers" in the original complaint because he was unaware of their identities at that time. Moreover, the recent amendment of Rule 15(c) would not seem to undercut the applicability of these holdings, since the language concerning mistake is identical in both versions. Accordingly, the court finds that, pursuant to the Seventh Circuit authority noted above, Worthington's amended complaint is not entitled to relation back.

However, this court will take this opportunity to respectfully express its disagreement with the above-noted Seventh Circuit decisions. First of all, this court is of the opinion that the "mistake" language in Rule 15(c) does not create a new, separate prerequisite for relation back, but rather merely refers back to the first portion of Rule 15(c)(3). The word "mistake" appears to this court to be a way of referencing, in one word, the phrase "change the party or the naming of the party" at the beginning of the subsection.

> (3) the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (2) is satisfied and, within the period provided by Rule 4(j) for service of the summons and complaint, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake [meaning the changing of the party or the naming of the party] concerning the identity of the proper party, the action would have been brought against the party.

Read this way, the word mistake would not create an additional prerequisite for relation-back. The requirements for relation-back would only be three:

> (1) the amendment changes the party or the naming of the party;
>
> (2) the defendant received notice of the action within the service of process period, and
>
> (3) the defendant knew that it was the party being sued.

The above is an explanation of *how* Rule 15(c)(3) can be rationally interpreted, under its existing language, as not having a separate "mistake" requirement. The more interesting question to be addressed now is *why* such a "mistake" requirement should not be included. It must be questioned whether a fourth requirement of "mistake" logically fits in with the other three requirements listed above. Those first three requirements in essence demand that the party being brought in had *notice*—that he knew about the action and knew that he was the one intended to be sued. The focus is on the awareness of the party to be brought in, out of concern for due process. A separate "mistake" requirement improperly shifts the focus to the state of mind of the plaintiff bringing the action—whether the plaintiff named the wrong defendant out of a mistake or because he did not have enough information to identify the proper defendant at all. Such an analysis is irrelevant in this court's view. The heart of Rule 15(c) is notice to the defendant. *See generally* 6A Wright & Miller, *Federal Practice and Procedure*, § 1498. The mistake requirement does nothing to further this controlling interest.

Indeed, it can plausibly be argued that a mistake requirement would actually hinder the important interest of notice to the Defendant. As is true in this case, a complaint which does not attempt to specifically identify the proper defendants leaves open the possibility that the eventual defendants are the ones being sued. If the original complaint comes to the attention of those defendants (as it did here) and the complaint uses "John Doe" or "unknown," the defendants will be on notice that they are being sued if the content of that complaint implicates them. Contrast that with the situation where the complaint actually names defendants, but names the wrong ones. Had Worthington simply randomly chosen the names of two officers in the department, the Defendants Wilson and Wall might have been lulled into the belief that they were not being sued As a result, a separate "mistake" requirement could be detrimental to the true purpose of Rule 15(c) and should not be included in the analysis. Having said all of this, this court recognizes that it is duty bound to follow Seventh Circuit precedent on point, and accordingly reaches the result dictated by *Wood*.

Accordingly, this court finds that Worthington's amended complaint does not relate back under Rule 15(c) because the amendment did not correct a "mistake," but rather corrected a lack of knowledge at the time of the original complaint.

C. *State Law*

[4] This brings us to Worthington's only real argument in support of relation-back. Worthington asserts that the issue of relation-back in this case is not governed

by Rule 15(c), but rather is governed by § 2–413 of the Illinois Code of Civil Procedure. That section provides, in relevant part:

> Unknown Parties. If in any action there are persons interested therein whose names are unknown, it shall be lawful to make them parties to the action by the name and description of unknown owners, or unknown heirs or legatees of any deceased person, who may have been interested in the subject matter of the action previous to his or her death; but an affidavit shall be filed by the party desiring to make those persons parties stating that their names are unknown. Process may then issue and publication may be had against those persons by the name and description so given, and judgments entered in respect to them shall be of the same effect as though they had been designed by their proper names.

Worthington suggests that this provision would allow the amended complaint to relate back because his inability to discover the names of the arresting officers was not for want of due diligence. This court need not address the question of whether Worthington's efforts would satisfy § 2–413, because it now finds this provision to be inapplicable in this action.[1]

In support of the notion that an Illinois procedural rule would govern the issue of relation back in this action, Worthington cites *Cabrales v. County of Los Angeles*, 644 F.Supp. 1352 (C.D.Cal.1986), which held that relation-back of an amendment which added a new party was an issue governed by state law. 644 F.Supp. at 1360. Perhaps even more important is the Ninth Circuit's decision on the appeal of this case. *Cabrales v. County of Los Angeles*, 864 F.2d 1454 (9th Cir.1988). In affirming the trial court's decision, the Ninth Circuit stated:

> As the *Wilson* Court stated, "the length of the limitations period, and closely related questions of *tolling and application*, are to be governed by state law." The California relation back doctrine is such a tolling issue that, under *Wilson*, must be decided under state law. Also, as the district court noted, statutes of limitation define the substantive rights of parties. The California pleading practice allows new defendants to be named after the original complaint is filed without violating the statute of limitations is such a substantive state policy that it is applicable in the federal courts.

864 F.2d at 1463–64. The decision rests on the principle that, because federal courts borrow state statutes of limitation for § 1983 claims, they must also borrow state rules of procedure which increase or decrease those statutes of limitations, such as tolling or relation-back.

This decision seems to be at odds with Seventh Circuit authority.[2] In *Lewellen v. Morley*, 875 F.2d 118 (7th Cir.1989), Judge Easterbrook agreed with the Ninth Circuit's general proposition that "[w]hen state law supplies the period of limitations, it also supplies associated tolling and extension rules." 875 F.2d at 120. However, after noting that state law rules which affect the period of limitations are often part of the state law which a federal court borrows for § 1983 cases, Judge Easterbrook noted a bright-line limitation on this principle: "[f]ederal courts absorb state law only when federal law neglects the topic." 875 F.2d at 121. In other words, even though a state rule may affect the state statute of limitations, a federal court in a civil rights case does not borrow that rule unless there is no similar federal provision In this case, there is a federal rule (Rule 15(c)) which addresses the issue of relation-back of unknown named defendants addressed in § 2–413. That federal rule, as interpreted by the Seventh Circuit in *Wood*, provides that parties brought in by amendment whose identities were not known at the time of the original complaint were not added due to a "mistake" and therefore, the amended filing does not relate back. To the extent that § 2–413 would dictate a contrary result, it is at odds with federal law. As noted in *Lewellen*, when there is such a clash between state and federal rules, "[f]ederal law wins these contests every time." 875 F.2d at 121.

1. As an aside, it appears that Worthington has not satisfied the requirements of § 2–413, which allows for service by publication of certain unknown defendants. That section requires the party to file an affidavit, prior to service of process, which states that the names of the potential parties are unknown. Those parties are then served by publication. Worthington did not follow such a procedure in this case

2. Moreover, the decision seems to represent an extension of law on this topic. Courts have struggled with the issue of the applicability of state relation back doctrines in the context of diversity cases, presumably because of the elusive substance/procedure distinction. *See generally* Wright & Miller, *Federal Practice and Procedure*, Vol. 6A, § 1503. But in federal question cases, the issue is much simpler—federal law controls. The only exception to this is that state law at times provides the statute of limitations, as is true in § 1983 cases. Thus, while this court borrows § 13–202 (and presumably state rules which are inextricably entwined with the statute of limitations) from Illinois for § 1983 cases, it does not borrow any and all state procedural rules which may have some impact on the limitations period, particularly where there is a federal rule of procedure directly on point *See Lewellen v. Morley*, 875 F.2d 118, 121 (7th Cir.1989).

II. *Failure to State Proper § 1983 Claim*

The Defendants also move for dismissal of the amended complaint on the grounds that it fails to state a proper § 1983 claim. The Defendants argue that the amended complaint, which states that the officers' excessive force violated Worthington's Eighth and Fourteenth Amendment rights, does not designate the appropriate constitutional provision for a case of excessive force used during arrest. The Defendants suggest that the appropriate constitutional provision to claim under the facts alleged in the complaint is the Fourth Amendment. In light of this court's ruling on the statute of limitations issue, it need not address this question.

III. *More Definite Statement*

Because this court has granted the Defendants' motion to dismiss the amended complaint, their alternative motion for a more definite statement in the amended complaint is moot.

IV. *Motion to Strike*

Similarly, the Defendants' motion to strike the affidavits filed on March 26, 1992 in support of Worthington's opposition to the motion to dismiss, is moot. This court has granted the Defendants' motion to dismiss and rejected Worthington's argument that Illinois procedure should be consulted on the issue of relation back Since the affidavits submitted are designed to support his argument for relation-back under § 2–413, they were not considered by the court and need not be stricken.

V. *Sanctions*

Shortly after Worthington voluntarily dismissed the claims against the Village of Peoria Heights found in the original complaint, the Village filed a motion for sanctions against Worthington or his attorney. In that motion, the Village argues that Worthington's attempt to state a § 1983 claim against it on the basis of respondeat superior was contrary to clear legal authority and therefore in violation of Rule 11. The Village notes that the Supreme Court held 14 years ago, in *Monell v. Department of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed 2d 611 (1978), that respondeat superior is not a valid basis for municipal liability under § 1983, and that cases since then have uniformly applied this principle. The Village also argues that the fact that Worthington voluntarily dismissed his claim against the Village in response to the motion to dismiss is a clear indication that this claim had no basis in law.

In his response to this motion, Worthington concedes that respondeat superior is an invalid basis for municipal liability under § 1983. However, Worthington argues that Rule 11 sanctions are inappropriate because the inclusion of the respondeat superior theory in his first complaint was not due to an inadequate pre-filing inquiry, but rather due to a clerical oversight. Worthington's attorney argues in the response that his handwritten drafts of the complaint included the necessary "custom or policy" language for municipal liability, and that he had fully intended to include

this language in the complaint submitted to the court. However, according to Mr. Morris, such language was ultimately omitted from the complaint because an assistant in his office used a form complaint on his word processor without substituting the "custom or policy" language for the "respondeat superior" language. Mr. Morris suggests that this is an innocent mistake and that Rule 11 sanctions would be inappropriate. Worthington also argues that the fact that he voluntarily dismissed the claim against the Village should not be construed as a concession that he had no viable case against the Village. Worthington explains that he contemplated suing the Village for custom or policy, but later dropped the notion because he decided it would be too difficult to prove.

[5] Rule 11 states, in relevant part, that "[t]he signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading...." Thus, if, as he claims, Mr. Morris had intended all along to sue the Village under "custom or policy" and the inclusion of the "respondeat superior" language was simply a clerical error by an assistant, he would have detected as much when he read the hard copy of the complaint. The fact that the "respondeat superior" language still appeared in the complaint submitted leads to but one conclusion: that Mr. Morris did not read, or at least carefully read, the complaint he signed. This would constitute a violation of Rule 11, even if the mistake was an "innocent" one.

[6] However, this court is without power to sanction Mr. Morris's conduct in this instance. While Rule 11 would authorize sanctions for such a filing in this court, it does not authorize sanctions for a pleading initially filed in state court which is later removed to federal court. *See Schoenberger v. Oselka*, 909 F.2d 1086, 1087 (7th Cir.1990); *Dahnke v. Teamsters Local 695*, 906 F.2d 1192, 1200–01 (7th Cir.1990). The first complaint, which contained the reference to respondeat superior, was filed in Peoria County Circuit Court and is therefore outside the reach of this court's sanction power under Rule 11. The amended complaint, which was filed in this court, contained no reference to respondeat superior. The Defendants' motion for sanctions is accordingly denied.

CONCLUSION

For the reasons set forth above, the Defendants' motion to dismiss (# 16–1) is GRANTED, the Defendants' motion for a more definite statement (# 16–2) is MOOT, the Defendants' motion to strike (# 28) is MOOT, and the Defendants' motion for sanctions (# 9) is DENIED. The Clerk is instructed to enter final judgment in favor of the Defendants and against the Plaintiff.

Jay ZAMBRANA, Petitioner,

v.

UNITED STATES of America, Respondent.

No. HCR 91-243.

United States District Court, N.D. Indiana, Hammond Division.

April 28, 1992.

Following affirmance, 841 F.2d 1320, of various drug convictions, defendant filed motion to vacate, set aside or correct sentence. The District Court, Moody, J., held that: (1) defendant was not denied effective assistance of counsel, and (2) sentence did not violate double jeopardy.

Motion denied.

1. Criminal Law ⇐997.2

Government counsel's failure to raise and brief defendant's procedural default waived issue

2. Criminal Law ⇐641.13(1)

To prevail on ineffective assistance of counsel claim, defendant must show both deficient representation and prejudice arising from the deficiency. U.S.C.A. Const Amend. 6.

3. Criminal Law ⇐997.5, 997.8

Defendant's claim that trial counsel was ineffective in not introducing character evidence was essentially an effort to present and argue new evidence, and not reviewable by district court on motion to vacate can set aside or correct sentence. 28 U.S.C.A. § 2255.

4. Criminal Law ⇐641.13(6)

Defense counsel's failure to introduce character evidence was not prejudicial, in view of overwhelming evidence of defendant's guilt. U.S.C.A. Const.Amend. 6.

5. Criminal Law ⇐1130(6)

Reply briefs are an improper vehicle for presenting new arguments, and should be confined to issues raised in opening motion or brief.

6. Criminal Law ⇐997.4

Issue of admissibility of wiretap evidence was not cognizable on motion to vacate, set aside or correct sentence. 28 U.S.C.A. § 2255.

7. Criminal Law ⇐700(3, 6)

There was no *Brady* violation, where government neither had the information nor refused to disclose it as exculpatory material.

8. Double Jeopardy ⇐29

Double jeopardy clause does not prohibit consecutive sentences for substantive offenses and conspiracy to commit those substantive offenses. U.S.C.A. Const. Amend. 5.

9. Double Jeopardy ⇐29

Double jeopardy clause is not offended by consecutive sentences for conspiracy and for aiding and abetting pursuant to that conspiracy. U.S.C.A. Const.Amend. 5.

10. Conspiracy ⇐37

Wharton's Rule did not apply to merge defendant's conviction for conspiracy to distribute cocaine with aiding and abetting violations of Travel Act or aiding and abetting possession with intent to distribute cocaine, and therefore crimes could be punished by separate sentences; Congress did not intend that such crimes would merge, conspiracy involved more members than necessary for substantive offense at issue and offenses at issue implicated grave harms to society. 18 U.S.C.A. § 2; Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(a)(1), 406, 21 U.S.C.A. §§ 841(a)(1), 846; U.S.C.A. Const. Amend. 5.

11. Conspiracy ⇐37

Wharton's Rule precluding merger of conspiracy with substantive offenses for certain crimes is inapplicable where harm from conspiracy at issue ranges far beyond immediate event or substantially affects persons who do not participate as necessary actors; Rule should not apply unless immediate consequences of crime rest on parties themselves rather than on society at large, nor should Rule apply if conspiracy at issue will likely produce agreements to engage in more general pattern of criminal conduct, such that it is actually more dangerous than the agreement inherent in the substantive offense. U.S.C.A. Const. Amend. 5.

12. Criminal Law ⇐1210(4)

Government's decision to transfer drug run into two Travel Act components did not result in multiplicious consecutive sentences. 18 U.S.C.A §§ 2, 1952, U.S.C.A. Const Amend. 5.

Jay Zambrana, pro se.

Andrew B. Baker, Jr., Asst U.S Atty., Dyer, Ind., for respondent.

ORDER

MOODY, District Judge

This matter is before the court for resolution of the *pro se*, incarcerated defendant's "Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody." The government responded pursuant to the court's

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98-CV- G

RICHARD L. MARCUS
Distinguished Professor of Law

Oct. 1, 1998

John Rabiej
Chief
Rules Committee Support Office
Federal Judiciary Building
One Columbus Circle, N.E.
Washington, D.C. 20002

Dear John:

Some time ago I mentioned that I received a suggestion for an amendment to Rule 45, and you suggested that I send it to you so that it could be officially logged. I am now doing so; I attach copies of two June 22 e-mail messages to me from Prof. Charles Adams of the University of Tulsa College of Law, and of my responding message.

I hope that this is sufficient to get the proposal officially logged in. I've talked to Ed Cooper a bit about this, and suspect that it should be added to the agenda of the Discovery Subcommittee once that subcommittee undertakes new work in addition to dealing with the pending proposed amendments.

If I should do something more to make this official, please let me know.

Sincerely,

Rick Marcus

Richard L. Marcus
Distinguished Professor
of Law

cc: Prof. Charles Adams

Date sent: Mon, 22 Jun 1998 13:01:28 -0500
To: marcusr@uchastings.edu
From: Chuck Adams <chuck-adams@utulsa.edu>
Subject: Suggestion for Amendment to Fed. Disc. Rules

Dear Rick:

□I saw in an e-mail that Roger Park sent to an Evidence List that you are the Reporter for the civil discovery rules. Congratulations.
□I have a suggestion for a rule change that I've been meaning to send in to the Committee that handles civil rule amendments. Several years ago, Oklahoma adopted the 1991 amendment to FRCP 45 that provides a procedure for document production from nonparty witnesses without the need for attendance of a custodian of records or other witness at a deposition. Since then, there's been a problem here with hospitals producing medical records of plaintiffs without the plaintiffs' attorneys being given an opportunity to claim a physician-patient privilege. I am attaching a copy of an amendment that I drafted to Okla. Stat. tit. 12, Sec. 2004.1 (which corresponds to FRCP 45) to take care of this problem by requiring the discovering party to specify a date for production far enough in advance to allow the opposing party to file objections to production. This amendment has been enacted in Oklahoma and will be going into effect on November 1.
□Another alternative that was considered was a variation on the Rule 11 procedure, which would call for serving the subpoena on the opposing parties before serving it on the witness. This would have the advantage of eliminating the possibility that the witness would produce privileged documents before the opposing party had a chance to object, but it would be less efficient, because it would allow for 2 rounds of objections -- once by the opposing party and then by the witness.
□There's also another problem that I found out about after the prior amendment had already been introduced into the Oklahoma Legislature. This had to do with parties serving subpoenas on nonparty witnesses simultaneously with the filing of the lawsuit. I have another amendment to deal with this by requiring leave of court for filing subpoenas on witnesses during the first 30 days after service of the summons (similar to the former limitation in FRCP 30(a)) that will be introduced in the next Legislative Session, and I am attaching a copy of this proposed amendment as well.
□I would think that similar types of problems have arisen in federal courts in other states besides Oklahoma, and I would like to suggest consideration of these amendments for the Federal Rules. If you would like me to send you hard copies of these proposals or have any questions, please let me know. Also, let me know if there is somebody else I ought to send these

proposals to.

□□□□Chuck Adams
□□□□University of Tulsa College of Law

OKLAHOMA STATUTES ANNOTATED
TITLE 12. CIVIL PROCEDURE
CHAPTER 39. OKLAHOMA PLEADING CODE

§ 2004.1. Subpoena
SUBPOENA

A. SUBPOENA; FORM; ISSUANCE.

1. Every subpoena shall:

a. state the name of the court from which it is issued and the title of the action; and

b. command each person to whom it is directed to attend and give testimony or to produce and permit inspection and copying of designated books, documents or tangible things in the possession, custody or control of that person, or to permit inspection of premises, at a time and place therein specified. A subpoena shall issue from the court where the action is pending, and it may be served at any place within the state. If the action is pending outside of Oklahoma, the district court for the county in which the deposition is to be taken shall issue the subpoena. Proof of service of a notice to take deposition constitutes a sufficient authorization for the issuance by the clerk of subpoenas for the persons named or described therein.

2. A witness shall be obligated upon service of a subpoena to attend a trial or hearing at any place within the state and to attend a deposition or produce or allow inspection of documents at a location that is authorized by subsection B of Section 3230 of this title.

3. The clerk shall issue a subpoena, or a subpoena for the production of documentary evidence, signed and sealed but otherwise in blank, to a party requesting it, who shall fill it in before service. As an officer of the court, an attorney authorized to practice law in Oklahoma may also issue and sign a subpoena on behalf of an Oklahoma state court.

4. Leave of court for issuance of a subpoena for the production of documentary evidence shall be required if the plaintiff seeks to serve a subpoena for the production of documentary evidence prior to the expiration of thirty (30) days after service of the summons and petition upon any defendant.

* * * * *

Laws 1985, c. 277, § 4, eff. Nov. 1, 1985. Amended by Laws 1993, c. 351, § 1, eff. Sept. 1, 1993; Laws 1994, c. 343, § 10, eff. Sept. 1, 1994; Laws 1996, c. 61, § 2, eff. Nov. 1, 1996.

OKLAHOMA STATUTES
TITLE 12. CIVIL PROCEDURE
CHAPTER 41.--OKLAHOMA PLEADING CODE

2004.1. Subpoena.

SUBPOENA

* * * *

B. 1. SERVICE. Service of a subpoena upon a person named therein shall be made by delivering or mailing a copy thereof to such person and, if the person's attendance is demanded, by tendering to him the fees for one (1) day's attendance and the mileage allowed by law. Service of a subpoena may be accomplished by any person who is eighteen (18) years of age or older. ~~Prior notice of any commanded~~ A copy of any subpoena that commands production of documents and things or inspection of premises before trial shall be served on each party in the manner prescribed by subsection B of Section 2005 of this title. If the subpoena commands production of documents and things or inspection of premises from a nonparty before trial but does not require attendance of a witness, the subpoena shall specify a date for the production or inspection that is at least 7 days after the date that the subpoena and copies of the subpoena are served on the witness and all parties, and the subpoena shall include the following language: "In order to allow objections to the production of documents and things to be filed, you should not

produce them until the date specified in this subpoena, and if an objection is filed, until the court rules on the objection."

* * * *

C. PROTECTION OF PERSONS SUBJECT TO SUBPOENAS.

* * * *

2.a. A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

b. Subject to paragraph 2 of subsection D of this section, a person commanded to produce and permit inspection and copying or any party may, within fourteen (14) days after service of the subpoena or before the time specified for compliance if such time is less than fourteen (14) days after service, serve ~~upon the party or attorney designated in the subpoena~~ written objection to inspection or copying of any or all of the designated materials or of the premises. If the objection is made by the witness, the witness shall serve the objection on all parties; if objection is made by a party, the party shall serve the objection on the witness and all other parties. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to

an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

* * * *

Laws 1985, c. 277, § 4, eff. Nov. 1, 1985. Amended by Laws 1993, c. 351, § 1, eff. Sep. 1, 1993; Laws 1994, c. 343, § 10, eff. Sep. 1, 1994.

Committee Comments

In 1993, the Civil Procedure Committee proposed a procedure for a party to obtain production of documents from a nonparty without taking the nonparty's deposition. This proposal was based on a provision of the Federal Rules of Civil Procedure, and it was adopted by the Oklahoma Legislature in 1994. Since then there have been some instances when a nonparty (such as a hospital or doctor) has produced confidential documents (such as a plaintiff's medical records) in response to a subpoena without the opposing parties having an opportunity to interpose objections to the production. The proposed amendments would require notice and an opportunity for opposing parties to object to production of subpoenaed documents. The subpoena would include instructions to the third party witness to not produce the documents until a specified date, and during this period an opposing party could object to production. If an objection is filed, production would be suspended until the court ruled on the objection.

From:	**Self <Single-user mode>**
To:	**Chuck Adams <chuck-adams@utulsa.edu>**
Subject:	**Re: Suggestion for Amendment to Fed. Disc. Rules**
Send reply to:	**marcusr@uchastings.edu**
Date sent:	**Mon, 22 Jun 1998 10:53:00 -0800**

Dear Chuck;

Many thanks for the message. I'm wrapping things up and trying to get off to vacation, so I don't have much time to think about your suggestions right now. I suspect that Rule 26(d) should largely solve the problem of serving the subpoena with the complaint. Regarding the privilege, I'm rather amazed that doctors don't take more care to adhere to their obligations not to reveal privileged materials.

In any event, I'm trying to print off what you sent for future reference.

Date sent: **Mon, 22 Jun 1998 15:28:38 -0500**
To: **marcusr@uchastings.edu**
From: **Chuck Adams <chuck-adams@utulsa.edu>**
Subject: **Re: Suggestion for Amendment to Fed. Disc. Rules**

Dear Rick:
□Thanks for your prompt response.
□I agree with you about Rule 26(d); Oklahoma has the old version of the Rule.
□A number of attorneys and trial judges tell me that the waiver of privilege problem by hospitals is a real one in Oklahoma. I don't know about other states, but you might ask around. For a good case law example, see Mann v. Univ. of Cincinnati, 152 FRD 119 (SD Ohio 1993).
□I'd appreciate it if you would let me know where, if anywhere, my suggestion goes in the Advisory Committee.
□Have a nice vacation.

□□□Chuck Adams
□
At 10:52 AM 6/22/1998 -0800, you wrote:
>Dear Chuck;
>
>Many thanks for the message. I'm wrapping things up and trying to
>get off to vacation, so I don't have much time to think about your
>suggestions right now. I suspect that Rule 26(d) should largely
>solve the problem of serving the subpoena with the complaint.
>Regarding the privilege, I'm rather amazed that doctors don't take
>more care to adhere to their obligations not to reveal privileged
>materials.
>
>In any event, I'm trying to print off what you sent for future
>reference.
>
>_____
>Richard Marcus
>Hastings College of the Law
>200 McAllister St.
>San Francisco, Calif. 94102
>marcusr@uchastings.edu
>[415] 565-4829
>

G. ROBERT HARDIN
DAVID A. GRACE
GEOFFREY B. TREECE
WILLIAM T. TERRELL
ANDREW V. FRANCIS

HARDIN & GRACE
A PROFESSIONAL ASSOCIATION
ATTORNEYS AT LAW
410 WEST THIRD, SUITE 200
LITTLE ROCK, ARKANSAS 72201
TELEPHONE (501) 378-7900
FACSIMILE (501) 376-6137

98-CV-H

October 9, 1998

The Honorable William Wilson
United States District Courthouse
600 West Capitol Avenue, Suite 153
Little Rock, AR 72201

RE: Suggested Change to Federal Rules of Procedure

Dear Judge Wilson:

In a recent proceeding in your Court, I requested that you sign an Order which continued the validity of any subpoena previously served on witnesses. You graciously agreed to sign that Order, but you did so with the caveat that you did not know if you had the authority to do so under the federal rules of civil procedure. In other words, if I chose to rely on that Order, I would be taking my chances.

It is my recollection that the Arkansas rule of civil procedure dealing with subpoenas includes a provision regarding the validity of subpoenas in the event of a continuance. I have enclosed a copy of ARCP 45. Specifically, I have underlined the relevant part of ARCP 45 (d).

It is my understanding that you serve on a committee which oversees the Federal Rules of Civil Procedure. Please accept this letter as a request that your committee consider the possibility of adding a provision to FRCP 45 which would be similar to the one I have highlighted on the attached ARCP 45.

Thank you for your consideration of the above.

Sincerely,

HARDIN & GRACE, P.A.

William T. Terrell

WTT/jle

Enclosure

Rule 45.

SUBPOENA

(a) **Form and Issuance.** Every subpoena shall be issued by the clerk under seal of court, shall state the name of the court and the title of the action, and shall command each person to whom it is directed to appear and give testimony at the time and place therein specified.

(b) **For Production of Documentary Evidence.** A subpoena may also command the person to whom it is directed to produce the books, papers, documents, or tangible things designated therein; but the court, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may (1) quash or modify the subpoena if it is unreasonable or oppressive or (2) condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents or tangible things.

(c) **Service.** A subpoena for a trial or hearing or for a deposition may be served at any place within this State in the manner prescribed in this subdivision. A subpoena for a trial or hearing or for a deposition may be served by the sheriff of the county in which it is to served, by his deputy, or by any other person who is not a party and is not less than eighteen (18) years of age. Service shall be made by delivering a copy of the subpoena to the person named therein; provided, however, that a subpoena for a trial or hearing may be served by telephone by a sheriff or his deputy when the trial or hearing is to be held in the county of the witness' residence. A subpoena for a trial or hearing or for a deposition may also be served by an attorney of record for a party by any form of mail addressed to the person to be served with a return receipt requested and delivery restricted to the addressee or agent of the addressee.

(d) **Subpoena for Trial or Hearing.** At the request of any party the clerk of the court before which the action is pending shall issue a subpoena for a trial or hearing, or a subpoena for the production at a trial or hearing of documentary evidence, signed and sealed, but otherwise in blank, to the party requesting it, who shall fill it in before service. A witness, regardless of his county of residence, shall be obligated to attend for examination on trial or hearing in a civil action anywhere in this State when properly served with a subpoena at least two (2) days prior to the trial or hearing. The court may grant leave for a subpoena to be issued within two (2) days of the trial or hearing. The subpoena must be accompanied by a tender of a witness fee calculated at the rate of $30.00 per day for attendance and $0.25 per mile for travel from the witness' residence to the place of the trial or hearing. In the event of telephone service of a subpoena by a sheriff or his deputy, the party who caused the witness to be subpoenaed shall tender the fee prior to or at the time of the witness' appearance at the trial or hearing. If a continuance is granted and if the witness

is provided adequate notice thereof, re-service of the subpoena shall not be necessary. Any person subpoenaed for examination at the trial or hearing shall remain in attendance until excused by the party causing him to be subpoenaed or, after giving testimony, by the court.

(e) **Subpoena for Taking Depositions: Place of Examination.** Upon the filing of a notice of deposition upon oral examination pursuant to Rule 30(b), the clerk of the court in which the action is pending shall, upon the request of the party giving notice, issue a subpoena in accordance with the notice. The subpoena may command the person to whom it is directed to produce and permit inspection and copying of designated books, papers, documents, or tangible things which constitute or contain matters within the scope of the examination permitted by Rule 26(b), but in that event the subpoena will be subject to the provisions of Rule 26(c) and subdivision (b) of the rule. The witness must be properly served at least five (5) business days prior to the date of the deposition, unless the court grants leave for subpoena to be issued within that period. The subpoena must be accompanied by a tender of a witness fee calculated at the rate of $30.00 per day for attendance and $0.25 per mile for travel from the witness' residence to the place of the deposition.

The person to whom the subpoena is directed may, within ten (10) days after the service thereof or on or before the time specified in the subpoena for compliance if such time is less than ten (10) days after service, serve upon the attorney causing the subpoena to be issued written objection to inspection or copying of any or all of the designated materials. If objection is made, the party causing the subpoena to be issued shall not be entitled to inspect and copy the materials except pursuant to an order of the court before which the deposition may be used. The party causing the subpoena to be issued may, if objection has been made, move, upon notice to the deponent, for an order at any time before or during the taking of the deposition.

A witness subpoenaed under this subdivision may be required to attend a deposition at any place within 100 miles of where he resides, or is employed, or transacts his business in person, or at such other convenient place as is fixed by an order of court.

(f) **Depositions for Use in Out-of-State Proceedings.** Any party to a proceeding pending in a court of record outside this State may take the deposition of any person who may be found within this State. A party who has filed a notice of deposition upon oral examination in an out-of-state proceeding, which complies with Rule 30(b), may file a certified copy thereof with the circuit clerk of the county in which the deposition is to be taken; whereupon, the clerk shall issue a subpoena in accordance with the notice. All provisions of this rule shall apply to such subpoenas. Any objection shall be heard by a circuit or chancery judge of the county in which the deposition is to be taken.

(g) **Contempt.** When a witness fails to attend in obedience to a subpoena or intentionally evades the service of a subpoena by

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
600 W. CAPITOL, ROOM 149
LITTLE ROCK, ARKANSAS 72201
(501) 324-6863
FAX (501) 324-6869

BILL WILSON
JUDGE

October 22, 1998

The Honorable Paul Niemeyer
U. S. Court of Appeals, Fourth Circuit
101 West Lombard Street
Baltimore, Maryland 21201

Dear Paul:

Enclosed is a copy of my letter of October 9, 1998, with its enclosure, from William T. Terrell of the Little Rock bar.

I have never looked into the law on this subject, but I have always questioned whether an order requiring a subpoenaed witness to show up for a different trial date is effective. You may know, off the top of you head, that it

If you think this is worth considering, with a view to an amendment something along the line of the Arkansas provision on this point, I will be happy to do some initial research, and make a stab at drafting a proposal.

If you think it isn't worthy of fooling with, I won't do anything else. It does seem to me that this should be the law, assuming no good reasons to the contrary – it should save the parties considerable expense and time.

Thank you for your consideration.

Cordially,

Wm. R. Wilson, Jr.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

101 West Lombard Street
Baltimore, Maryland 21201

Chambers of
PAUL V. NIEMEYER
United States Circuit Judge

(410) 962-4210
Fax (410) 962-2277

November 3, 1998

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

Dear Bill:

I am taking the liberty of forwarding your October 22 letter, which included a suggested change to the federal rules, to John Rabiej to place it on our docket. Under our procedure, it will then be reviewed for priority status in light of our other projects.

To assure you that the comment will not be lost, I might point out that at our next meeting in November, we are having a docket review to determine the matters that should occupy the Committee's attention in the immediate future.

With kindest regards.

Sincerely,

Paul V. Niemeyer

cc: Mr. John K. Rabiej (w/enc.)

99-CV-B

Morgan & Associates
Professional Corporation

165 North Old Woodward Avenue
Birmingham, Michigan 48009-3372

Telephone (248) 594-6340
Facsimile (248) 433-1989

January 27, 1999

VIA FIRST CLASS MAIL

Peter G. McCabe
Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the Unites States Courts
Washington, D.C. 20544

Re: *Rule 45 Federal Rules of Civil Procedure*

Dear Mr. McCabe:

My name is K. Dino Kostopoulos and I practice commercial litigation within the various Federal Courts within the Sixth Circuit. I would like to bring to your attention an issue regarding an ambiguity relating to Rule 45 of the Federal Rules of Civil Procedure. Specifically, the issue relates to the efficacy or continuing nature of a subpoena under Rule 45.

On two occasions within the last year, I have dealt with opposing counsel who have disputed the continuing nature or effectiveness of a validly issued subpoena. One occasion dealt with a deposition subpoena and the other with a trial subpoena.

As you very well know, it is very common in litigation that deposition dates and/or trial dates are frequently adjourned or re-scheduled for a number of reasons (especially when it relates to out-of-state depositions when the issuance of a subpoena is mandatory in order to ensure attendance). When this occurs, the following question arises: Is the originally issued subpoena valid or does a new subpoena need to be issued? Or stated another way: Is the duty to respond to the subpoena a "continuing duty" despite the omission of such language in the statute or court rule authorizing the subpoena?

Although FRCP 45 is silent on this issue, case law, although mostly directed at subpoenas issued in criminal cases, supports the interpretation of the continuing nature of a subpoena. See *United States v. Snyder*, 413 F.2d 288 (9th Cir. 1969) *cert. denied* 396 U.S. 907, 90 S. Ct. 223, 24 L. Ed. 2d 183 (1969) (Trial subpoena in criminal case); *Shulton, Inc. v. Optel*, 126 F.R.D. 80 (S.D. Fla. 1989) (Deposition subpoena in civil case); *In re Germann*, 262 F. Supp. 707 (S.D.N.Y. 1966) (Grand jury subpoena); See *also Blackmer v. United States*, 284 U.S. 421, 443, 52 S. Ct. 252, 257, 76 L. Ed.

375 (1932) (Interpreting former 28 U.S.C. §655, "It was the duty of the petitioner to respond to the subpoena and to remain in attendance until excused by the court or by the government's representatives.")

While case law is clear that a validly issued imposes a continuing duty to appear and does not expire on its stated date, FRCP 45 is silent. Unfortunately, this issue has been litigated in front of Judges (probably unhappy ones). I feel that the ambiguity in FRCP 45 can be cured by inserting language similar to that in the former 28 U.S.C §655; i.e. that a subpoena imposes a continuing duty to appear and does not expire on its stated date.

I hope that the Committee on Rules of Practice and Procedure will consider this issue in the next amendment of the Federal Rules of Civil Procedure. Thank you for letting me bring this issue to your attention.

Very truly yours,

MORGAN & ASSOCIATES, P.C.

K. Dino Kostopoulos

KDK/amm

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

97-CV-M

MEMORANDUM

August 26, 1997

To: Judge Paul V. Niemeyer
Professor Edward H. Cooper

From: Judge Alicemarie H. Stotler

Re: Civil Rule 50(b)

Enclosed please find a memo that sums up the issue of when a Rule 50(b) motion is timely *after a mistrial* has been declared. Since no "judgment" has been entered, the 10-day limit on filing a motion for judgment as a matter of law does not literally apply. As the research shows, courts are still treating the rule as though the 10-day limit is applicable. Thought you might want to stick this in your memory bag for someday reference.

enclosure

cc: Professor Charles Alan Wright
(w/enclosure)

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AUG 29 1997

MEMORANDUM

August 25, 1997

To: Judge Stotler

From: Jean Ann Quinn

Re: Time for Filing Renewed Motion for Judgment as a Matter of Law under Rule 50(b) Following a Mistrial

After a recent trial and mistrial, you and the assigned law clerk apparently discovered a glitch in the current version of Rule 50(b).

As we discussed earlier, prior to December 1, 1991, the relevant sentence read:

> Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move . . . or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move . . .

As you know, in 1991 the rule was amended (most notably to change the terminology from directed verdict/judgment notwithstanding the verdict to judgment as a matter of law) and, as a result, the language requiring filing "within 10 days after the jury has been discharged" was deleted. Instead the time limitation read simply "[s]uch a motion may be renewed by service and filing not later than 10 days after entry of judgment," though, in a separate sentence, the rule continued to provide for the contingency of a mistrial. The Advisory Committee Note to the 1991 amendments says only that subdivision (b) "also retains the former requirement that a post-trial motion under the rule must be made within 10 days after entry of a contrary judgment."

The rule was amended again in 1993 and 1995. The 1993 version retained the 1991 sentence structure which separated the "if no verdict was returned" language from the 10-day time limit for filing a renewed motion. The 1995 amendments, which were primarily stylistic[1], perpetuated this sentence structure. Although the mistrial contingency is still provided

---

[1]Even so, according to the Advisory Committee Note, the one substantive change made then was "to prescribe a uniform explicit time for filing of post-judgment motions under this rule -- no later than 10 days after entry of the judgment." It appears that it did not occur to the Committee that no judgment is entered when a mistrial is declared.

Judge Stotler
August 25, 1997

for in Rule 50(b)(2), the relevant language, now in two subdivisions, reads:

> The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment -- and may alternatively request a new trial or join a motion for a new trial under Rule 59. In ruling on a renewed motion, the court may:
>
> (1) if a verdict was returned:
> (A) allow the judgment to stand,
> (B) order a new trial, or
> (C) direct entry of judgment as a matter of law; or
>
> (2) if no verdict was returned;
> (A) order a new trial, or
> (B) direct entry of judgment as a matter of law.

The only post-1991 case I have located that directly discusses the timing for filing a renewed motion after a mistrial is Wiehoff v. GTE Directories Corp. 851 F. Supp. 1322 (D.Minn. 1993), *affirmed in part, reversed in part*, 61 F. 3d 588 (8th Cir. 1995). The court there found that counsel had timely filed its motion and stated, without further analysis, the following:

> A motion for judgment as a matter of law may be renewed after a jury has failed to return a verdict, by service and filing not later than 10 days after the jury has been discharged. F.R.Civ.P. 50(b); see O'Brien v. Thall, 283 F. 2d 741, 741 (2d Cir. 1960)(per curiam); see also 9 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 2537 (1971).

Id. at 1324. However, you'll notice that the citing references are pre-1991 when the language of Rule 50(b) actually said this. (The change in language and the potential problem it poses has not been noted in the Wright and Miller updates.)

In another case, Steward v. Walbridge, Aldinger Co., 882 F. Supp. 1441, 1443 (D.Del. 1995), the court simply stated that counsel, following a mistrial, had filed his renewed motion "in a timely manner pursuant to Rule 50 of the Federal Rules of Civil Procedure" without specifying what "timely" was. I assume it was filed within 10 days.

Judge Stotler
August 25, 1997

The only thing I can guess -- and this is really stretching -- is that since the courts, in interpreting the 1991 amendments, have held that the amendments "merely changed the name of these motions, but the standard for application of this rule remains the same," Jackson v. Swift-Eckrich, Inc., 836 F. Supp. 1447, 1449 (W.D. Ark. 1993), the 10-day rule remains the same as well. The more likely explanation, in my view, is that it just hasn't yet become an issue because no one has tried to file after the 10-day period. In other words, no one has yet noticed.

g:\docs\nhscommo\rules\Civ\R50B-tim.rev

97-CV-M

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

101 West Lombard Street
Baltimore, Maryland 21201

Chambers of
PAUL V. NIEMEYER
United States Circuit Judge

(410) 962-4210
Fax (410) 962-2277

September 2, 1997

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

Dear Alicemarie:

Thank you for your interesting memorandum of August 26. I am going to refer this to John Rabiej for inclusion on our docket to address when we do some clean up work. I think that you have identified a glitch.

I hope to see you soon.

Sincerely,

Paul V. Niemeyer

cc: Professor Edward H. Cooper
Mr. John K. Rabiej

.#7766

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

RECEIVED 11/13/96
96-CV-E

MEMORANDUM

November 8, 1996

To: Judge Paul V. Niemeyer

From: Judge Alicemarie H. Stotler

Re: Suggested Change to Civil Rule 51

While working with the Local Rules Committee here on the problem of "inconsistent" local rules, it came to my attention that Civil Rule 51 may be in need of change. Rule 51 requires that jury instructions be submitted "at the close of evidence or at such earlier time *during the trial* as the court reasonably directs" (*emphasis mine*). However, it seems to be a well-accepted notion that early settlement of the "jury charge" is necessary to efficient case/trial management. Thus, many districts require jury instructions to be submitted before trial, although this is plainly inconsistent with the language of Rule 51. A quick spot-check of district local rules revealed nearly 25 districts that require instructions sometime before the scheduled trial date (see attached). No doubt there are others. Perhaps, then, the Committee may want to consider amending Rule 51 so as to allow courts to require the submission of jury instructions prior to trial.

Attachment

cc: (all w/attach.)
Professor Daniel R. Coquillette
Professor Mary P. Squiers
John K. Rabiej, Esquire

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LOCAL RULES: JURY INSTRUCTIONS

District	Local Rule No.	Requirement
Alaska	15	5 days before trial
C.D. California	13.2.1	7 days before trial
N.D. California	235-8(b)	7 days before trial
Delaware	51.1	3 days before pretrial conference
Idaho	51.1	10 days before trial
N.D. Indiana	51.1	3 days before trial
W.D. Louisiana	13.10W	7 days before trial
Maryland	106-8	At such time as ordered by the court
N.D. Mississippi	14	10 days before trial
S.D. Mississippi	14	10 days before trial
N.D. New York	51.1	15 days before trial (App. A - Attach. 4)
E.D. No. Carolina	25.02(b)	5 days before trial
North Dakota	47.1(F)	5 days before trial (though additional requests may be received anytime prior to argument)
N. Mariana Islands	240-7(a)(2)	15 days before trial
E.D. Oklahoma	22(b)	10 days before trial
W.D. Oklahoma	22(B)	15 days before trial
Oregon	245-3	As court orders; if no order, 3 days before trial
Puerto Rico	324.1	7 days before trial
N.D. Texas	8.2(c)	3 days before trial
Utah	114(a)	2 days before trial

District	Local Rule No.	Requirement
Vermont	7	7 days before trial
E.D. Virginia	10	5 days before trial
E.D. Washington	51(c)	5 days before trial
W.D. Washington	51	2 days before trial

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#2475

United States Court of Appeals
for the Fifth Circuit

RECEIVED 3/3/97

~~96-CV-J~~
97-CV-B

February 27, 1997

PATRICK E. HIGGINBOTHAM
CIRCUIT JUDGE

UNITED STATES COURTHOUSE
1100 COMMERCE STREET
DALLAS, TEXAS 75242

Scott L. Cagan, Esq.
Bailey & Jones
Courvoisier Centre
Suite 300
501 Brickell Key Dr.
Miami, FL 33131-2623

Dear Mr. Cagan:

Thank you for your suggestions regarding Rule 56(a). My tenure as Chair of the Advisory Committee has ended so I am passing your letter along to John Rabiej, the Committee's Washington lawyer. He will put your letter in the proper hands.

Thank you again for taking the time to write. The suggestions from the bar are important – very important.

Sincerely yours,

Patrick E. Higginbotham
United States Circuit Judge

cc: John Rabiej (w/enclosure) ✓

Bailey & Jones
A PROFESSIONAL ASSOCIATION
ATTORNEYS AT LAW

COURVOISIER CENTRE
501 BRICKELL KEY DRIVE
SUITE 300
MIAMI, FLORIDA 33131-2623
TEL. (305) 374-5505
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JEANNETTE E. ALBO
RAUL A. ARENCIBIA
GUY B. BAILEY, JR.
ELIZABETH S. BAKER
PATRICIA M. BALOYRA
SCOTT L. CAGAN
TIMOTHY CONE
STEVEN CARLYLE CRONIG
JAMES C. CUNNINGHAM, JR.
JESSE C. JONES
KARIN B. MORRELL

OF COUNSEL
LAWRENCE S. EVANS
J. BRUCE IRVING
ROBERT E. SCHUR

SENIOR COUNSEL
WM. R. DAWES

February 21, 1997

Federal Rules Advisory Committee
Honorable Patrick E. Higgenbotham
United States Circuit Judge
13E1 United States Courthouse
1100 Commerce Street
Dallas, Texas 75242

Dear Judge Higgenbotham:

I write to propose a revision to Rule 56(a) of the Federal Rules of Civil Procedure.

Read literally, Rule 56(a) allows a plaintiff to file a motion for summary judgment against a defendant not yet served with a summons and complaint. Rule 56(c) states:

> A party seeking to recover upon a claim ... may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move ... for summary judgment .... (Emphasis added).

Rule 3, however, states that "[a] civil action is commenced by filing a complaint with the court." Moreover, under Rule 4(m), a plaintiff has 120 days after filing the complaint to serve the defendant. Thus, on its face, Rule 56(a) allows a plaintiff to move for summary judgment before serving the defendant.

This literal interpretation is, of course, unlikely to persuade any United States District Judge that summary judgment can be entered against a defendant before it has been served, but I believe the language of the rule should be technically correct. Therefore, I propose that Rule 56(a) be amended to read:

> A party seeking to recover upon a claim ... may, at any time after the expiration of 20 days from the ~~commencement of the action~~ date of service on the adverse party or after service of a motion for summary judgment by the adverse party, move . . . for a summary judgment .... [Proposed deletions struck out; proposed additions double-underlined.]

Thank you for considering this proposed change.

Sincerely,

BAILEY & JONES,
a professional association

By: Scott L. Cagan
Scott L. Cagan

SLC:z/eo-c
\ltrs\fedrcp.lt
2/21/97

Filed

United States District Court
Southern District Of California
940 Front Street
San Diego, California 92101-8906

Chambers of
Judith N. Keep
Chief Judge

94-CV-

November 21, 1994

Hon. Ann C. Williams
219 South Dearborn Street
Chicago, IL 60604

Dear Judge Williams:

Attached is a recent Ninth Circuit case for your review, Marshall v. ER Daryl F. Gates, 94 Daily Journal D.A.R. 15764 (November 9, 1994). I refer this case to you, because it urges that the Judicial Conference U.S. would have to propose amendments to Fed.R.Civ.P., Rule 56(c) to allow courts to provide greater time limits than one day before a hearing for submitting affidavits on a Motion for Summary Judgment. The grim effect of Marshall is already being felt as litigants are acting in conformity with its holding. Late affidavits promote the need for even later responses, and motion dates are being continued. Moreover, in this district, we try to urge parties to avoid costs of a hearing. If we review a summary judgment motion and determine no hearing is necessary, the parties are called in advance of the hearing t cancel their appearance and a written order is issued. This decision moots that procedure.

I hope that the Judicial Conference U.S. can help. Please contact me if you need any further information.

Sincerely yours,

JUDITH N. KEEP, Chief Judge
United States District Court

Enclosure

cc: Hon. Alicemarie H. Stotler
Hon. J. Clifford Wallace

CIVIL PROCEDURE

District Court's Application of Federal Rule Is Error When It Is Inconsistent With Federal Rule

Cite as 94 Daily Journal D.A.R. 15764

BOBBY RYDELL MARSHALL,
Plaintiff-Appellant,
v.
ER DARYL F. GATES, etc., et al.,
Defendants-Appellees.

No. 93-55022
D.C. No. CV-91-4860
United States Court of Appeals
Ninth Circuit
Filed November 8, 1994

Appeal from the United States District Court for the Central District of California Edward Rafeedie, District Judge, Presiding
Argued and Submitted
August 4, 1994--Pasadena, California

Before: Dorothy W. Nelson and John T. Noonan, Jr., Circuit Judges, and Samuel P. King*, District Judge. Opinion by Judge Noonan

NOONAN, Circuit Judge:

Bobby Rydell Marshall (Marshall) brought this civil rights action under 42 U.S.C. § 1983, et seq., against Daryl Gates and other police officers of the City of Los Angeles (Gates). The district court, applying a local rule of the court, granted summary judgment for the defendants. Because the local rule is inconsistent with Federal Rules of Civil Procedure 56(c), we hold that the district court erred in applying it and consequently reverse.

PROCEEDINGS

Marshall is an African-American Los Angeles Police Officer, who alleges he was subjected to two negative work actions as a result of his allegations of racism in the Los Angeles Police Department (LAPD). According to his two affidavits (a sworn declaration and a sworn answer to interrogatories), on May 19, 1991 he provided information to Barbara Kelly and Brian Sunn, two lawyers working for the Christopher Commission, about racism within the LAPD. He told the lawyers that he had personally experienced racism within this organization and that he had previously been urged not to report misconduct by LAPD officers, not to testify to misconduct by LAPD officers, and to participate in a code of silence. Also in May 1991 he appeared on a [illegible] television program, "Beyond 2000," on which Daryl Gates also appeared; on this program Marshall "strongly criticized racism" in the LAPD. Further, according to Marshall's affidavits, in June 1991 he was approached at roll call by Lieutenant Joseph Germain, the police officer to whom he reported. Germain admitted that racism existed within the LAPD but told Marshall that it should be handled within the department and should not be aired publicly. Germain then ordered Marshall to go with him to the office of Robert Kimball, the captain in command. Kimball expressed to Marshall his anger about what Marshall had said on the television show and his anger that Marshall had spoken to representatives of the Christopher Commission. Kimball told Marshall that he had been called by Chief Gates and another police officer and asked why one of his officers was embarrassing the chief and the department by his talk of racism to the Christopher Commission. Marshall replied that he had read the Constitution of the United States and that it referred to freedom of speech. At that Kimball became angry and told Marshall, "We will deal with you later, get out of my office."

Following this incident Marshall was transferred from the morning shift, working from 7:00 a.m. to 3:45 p.m., to "the graveyard shift, working from 10:00 p.m. to 6:30 a.m. Still according to his affidavits, the change of shift was contrary to the LAPD's watch rotation and seniority policy. The second work action involved a promotion which Marshall did not receive according to him, an improper transfer from a different division was used to fill the vacancy in retaliation for Marshall's complaints about racism.

According to the affidavit of Robert Kimball Marshall was transferred from the morning shift to the graveyard shift "based solely on the deployment needs of the Southwest Division" and the transfer which filled the vacancy prevented a promotion from within the division. According to the affidavit of Joseph Germain, Marshall once mentioned to him that he had testified before the Christopher Commission, but Germain did not question him concerning his testimony and never took him before the captain for that reason. According to Germain, he was not involved in the supervision of Marshall in June 1991. According to the affidavit of Daryl Gates, he never spoke to either Kimball or Germain about the event referred to by Marshall and had no knowledge of Marshall's change of watch. According to the declaration of Patricia Ibarra, a police officer in the Southwest Division, she reassigned Marshall in accordance with existing policy and with no knowledge of his testimony before the Christopher Commission.

The defendants moved for summary judgment. The court noted that under Local Rule 7.6 a party opposing summary judgment must "serve upon all other parties and file with the Clerk . . . the evidence upon which the opposing

party will rely in opposition to the motion . . ." fourteen days before the hearing on the motion. The hearing date set by the court was September 21, 1992. Under Local Rule 7.6 Marshall was required to file his opposition papers by September 8, 1992. But these papers, although mailed on September 16, 1992, were not filed until September 17 and 18, 1992, and had not been received by opposing counsel by the hearing date.

Under Local Rule 7.9 papers not timely filed by a party "will not be considered and may be deemed by the court consent to the granting or denial of the motion as the case may be." Applying this rule, the court declared that it would disregard Marshall's opposition papers. Based only upon the affidavits submitted by the defendants, the court ruled that there were no material facts in dispute and granted summary judgment for the defendants.

Marshall appeals.

ANALYSIS

Local rules are the "laws of the United States. " United States v. Hvass, 355 U.S. 570, 575 (1958). Local Rule 7.6 is a rule made by the Central District of California and so is valid if it is "not inconsistent" with the Federal Rules of Civil Procedure. F.R.C.P. 83.

The difficulty, however, is that the local rule is inconsistent with the federal rule governing summary judgment. F.R.C.P. 56(c). The federal rule explicitly provides: "The adverse party prior to the day of hearing may serve opposing affidavits." Service by mail is completed upon mailing. F.R.C.P. 5(b). It is inconsistent with Rule 56(c) to require a much earlier filing and service of opposing affidavits. The district court therefore erred in applying its local rule to a motion governed by F.R.C.P. 56(c). There was no need for Marshall to comply with Local Rule 7.6.

Indeed, by its own terms Local Rule 7.6 does not apply to motions governed by F.R.C.P. 56. The district court misin terpreted the local rule. Local Rule 7.1 governs the applicability of Rule 7, including sub-part 7.6. It provides that "the provisions of [Rule 7] shall apply to [all] motions . . . unless otherwise . . . provided by . . . the F.R.Civ.P. " Because F.R.C.P 56(c) provides the time for filing opposing affidavits, Local Rule 7 did not apply.

In reaching this result we are not unmindful of the problem that the conjuncture of Rule 5(b) and Rule 56(c) creates: an attorney may mail his affidavits the day before the hearing and be reasonably sure, given today's post office, that opposing counsel will not see them in advance of the hearing. No doubt this problem was what the drafters of the local rule addressed. But if there is to be a solution it can only be provided by the appropriate amendment of either Rule 5(b) or Rule 56(c).

Once Marshall's affidavits are considered it is apparent that there are several material facts at issue. His affidavits, in conflict with those of the police officers, state that he was disciplined for engaging in activities protected by the federal constitution. There was no way the district court could decide these disputed facts by summary judgment.

REVERSED.

*Honorable Samuel P. King, Senior United States District Judge for the District of Hawaii, sitting by designation.

COUNSEL

Stephen Yagman, Yagman & Yagman, Venice, California, for the plaintiff-appellant.

Leslie E. Brown, Deputy City Attorney, Los Angeles, California, for the defendants-appellees.

#2297

FEDERAL MAGISTRATE JUDGES ASSOCIATION

35th Annual Convention – Denver, Colorado
July 8-11, 1997

October 28, 1996

96-CV-C

96-CR-F

Peter McCabe, Secretary
Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
Washington, DC 20544

RE: **Proposed Amendment to Rule 68 of the Federal Rules of Civil Procedure and Rule 5(c) of the Federal Rules of Criminal Procedure.**

Dear Pete:

The Federal Magistrate Judges Association (FMJA) submits two proposed rules changes to the Rules Advisory Committee. These matters were first considered by the Rules Committee of the FMJA chaired by Hon. Carol E. Heckman. The committee members are: Hon. Nancy Stein Nowak, Hon. Anthony Battaglia, Hon. Paul Komives, Hon. Andrew Wistrich, Hon. Thomas Phillips, Hon. Patricia Hemann, Hon. John L. Carroll, and Hon. B. Waugh Crigler. The committee members come from several kinds of districts and have varying types of duties. Many of them consulted with their colleagues in the course of preparing these proposals. The proposals were then reviewed and approved by the Officers and Directors of the FMJA. They reflect the considered position of the magistrate judges as a whole.

The first proposal is an amendment to Rule 68 of the Federal Rules of Civil Procedure, which relates to offers of judgment. The proposal allows the rule to be equally available to plaintiffs and claimants, adds expert witness fees and expenses to costs recoverable under the rule, and advances the timing from more than 10 days before the trial to more than 30 days before trial to reduce last minute settlements.

The second proposal is to amend Rule 5(c) of the Federal Rules of Criminal Procedure as well as 18 U.S.C. § 3060(c). These amendments relate to the ability of a magistrate judge to continue a preliminary examination absent the consent of the defendant. Currently, both of these provisions require a district court, and not a magistrate judge, to make such determinations.

Comments are included with both proposals. We are pleased to have this opportunity to present our proposals for your committee's consideration.

Sincerely,

Ervin S. Swearingen
United States Magistrate Judge
President, FMJA

ESS/gmc
enclosures

RULE 68. OFFER TO ALLOW ENTRY OF JUDGMENT

(a) At any time more than thirty (30) days before the trial of a claim or issue begins, any party may serve on any other party an offer to allow judgment to be entered on the terms specified in the offer. If the offer is not accepted prior to trial or within thirty (30) days after it is made, whichever occurs first, it shall be deemed withdrawn. If a notice of acceptance contains any term which differs from the terms contained in the offer, then it shall constitute a rejection of the offer.

(b) Unless otherwise ordered by the Court, the Clerk shall enter judgment consistent with an offer upon the filing of the offer, a notice of acceptance of the offer, and proof of timely service of the notice of acceptance.

(c) If an offer is rejected, the rejecting party shall be liable for costs incurred by the offering party after expiration of the period allowed for acceptance if the judgment entered in the case on the claims or issues covered by the offer is not more favorable to the rejecting party than the terms of the offer. In addition to costs allowable under 28 U.S.C. § 1920, or as otherwise provided by law, the costs allowable pursuant to this rule shall include reasonable fees and expenses actually incurred and reasonably necessary of expert witnesses who are retained solely for the purpose of litigation.

(d) An offer that is rejected shall not be used for any purpose in any proceeding except to determine the allocation of costs pursuant to this rule after judgment on at least one claim or issue covered by the offer has been entered.

COMMITTEE NOTE

The proposed amendment changes Rule 68 from use solely by a defending party to a more generalized application, making it equally available to plaintiffs and claimants. The proposed amendment also adds expert witness fees and expenses to the "costs" recoverable under operation of the rule. The proposed amendment also advances the timing from more than ten (10) days before trial to more than thirty (30) days before trial to reduce last minute settlements prejudicing judicial resources and to hopefully achieve greater savings for the parties. These changes would be consistent with the law in many state jurisdictions (i.e. California Code of Civil Procedure §998) and it is submitted that the cost shifting effect will have a positive impact on case resolution. It is also submitted that the amendment will certainly encourage plaintiffs and claimants to present reasonable settlement options early in litigation and enhance the prospects of earlier and more frequent pre-trial settlements. Finally, the proposed amendments are consistent with recommendation 34 of the Long Range Plan for Federal Courts.[1]

Currently, Rule 68 provides:

> At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against the defending party for the money or property or to the effect specified in the offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability.

Costs are allowed as a matter of course to the prevailing party unless the court otherwise directs, except when an express provision is made in a United States Statute or in the Federal Rules. Fed. R. Civ. P. 54(d). A decision to deny costs to the prevailing party is largely a matter of discretion. Gardner v. Southern Railway Systems, 675 F.2d 949 (7th Cir. 1982). Under Rule 68, a defending party may make an offer of judgment utilizing procedures set forth in the rule, triggering a shift of subsequent court costs to the adversary if the opponent fails to secure a final judgment more favorable than the offer. The statute does not, however, shift costs to a plaintiff against whom a judgment has been entered. Lewis v. Safeway Stores, Inc., 671 F. Supp. 361 (D. Md. 1987).

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[1]Recommendation 34 of the Long Range Plan for the Federal Courts provides "the federal court system should continue to study possible shifting of attorneys fees and other litigation costs in particular categories of cases."

Rule 68 was added to the Federal Rules in 1937. The rule was based in significant part upon statutes from Minnesota, Montana and New York. The rule was intended to encourage settlement of litigation and to provide additional inducement to settlement in those cases in which there was a strong probability that the plaintiff would obtain a judgment but where the amount of the recovery was uncertain. Delta Air Lines, Inc. v. August, Ill., 450 U.S. 346 (1981). The rule was also intended to protect the defending party who was willing to settle from the burden of costs which subsequently accrue. Staffend v. Lake Central Air Lines, Inc., 47 F.R.D. 218 (N.D. Ohio 1969). There is no similar privilege extended to a plaintiff (or claimant) in a federal action. Armistead M. Dobie, The Federal Rules of Civil Procedure, 25 Va. L. Rev. 261, 303 n.102 (1939).

Under the effect of the current rule, costs are limited to those provided for by a federal statute listing allowable costs (i.e. 28 U.S.C. §1920). Parkes v. Hall, 906 F.2d 658 (11th Cir. 1990). Where, however, the underlying statutes supporting the cause of action defines "cost" to include attorney's fees, such fees are to be included as costs for purposes of this rule. Marek v. Chesney, 473 U.S. 1 (1985). For example, under 42 U.S.C. § 1988(b), the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fees as part of the costs. Under 42 U.S.C. § 1988(c), in awarding attorney's fees under (b), the court, in its discretion, may include expert fees as part of the attorney's fees.

Expert witness fees are not ordinarily awarded to a prevailing party above the per diem and mileage authorized under 28 U.S.C. § 1821 absent a contractual or specific statutory basis as noted above. Crawford Fitting Co. v. J.T. Gibbins, Inc., 482 U.S. 437 (1987). These cost items are a substantial expense in many of the cases presented in federal courts. This proposed amendment provides for inclusion of expert witness fees consistent with many state jurisdictions (i.e., California Code of Civil Procedure, Section 998), to enhance Rule 68's impact as a settlement-producing vehicle.

Under most circumstances, Rule 68, if amended as proposed, can provide a powerful incentive to settlement and facilitate the settlement process by adding additional burdens upon the party declining to settle. In effect, the discretion of the Court to deny costs is removed. Factors or considerations in light of Farrar v. Hobby, 506 U.S. 103 (1992) might also be effected. It is clear, however, from practical experience and by reference to state law, that plaintiffs can utilize this type of a procedure equally as well and with equal results.

From practical experience, and by reference to state law, the committee feels that the simple amendment to allow use of Rule 68 by plaintiffs as well as the provision for including expert witness fees as costs will be useful and beneficial, resulting in early case resolution and savings to litigants and the public.

There are currently several proposals pending in Congress for amendment to Rule 68. These other proposals are primarily addressed to the shifting of attorney's fees as part of the national debate concerning the "Contract with America", and the potential adoption of the "English Rule" requiring the losing party to pay the winner's attorneys fees. These proposals include H.R.988, which passed the House of Representatives 232-193, and S.672 which is pending in the U.S. Senate.

In response to H.R.988, a task force appointed by the American Bar Association's Tort and Insurance Practice Section formulated a model offer of settlement act with its own fee shift proposal.

The proposed amendment to Rule 68 submitted here is limited to the prospects of a use of that rule by all parties in a case, and to the addition of expert witness fees and expenses as items of cost. These concepts are consistent with contemporary American jurisprudence, and avoid much of the debate and concern with regard to the adoption of the "English Rule" with regard to the shifting of attorney's fees.

It is submitted, that whether or not Congress moves to an "English Rule" standard regarding attorneys fees, amendment of Rule 68 as proposed is timely and a positive step toward early case resolution.

Committee Note Re: Proposed Amendments to Rule 5(c), Fed. R. Crim. P. and 18 U.S.C. § 3060 (c)

The proposed amendments to Criminal Rule 5(c) and 18 U.S.C. § 3060 (c) relate to the ability of a magistrate judge to continue the preliminary examination absent the consent of the defendant.

Rule 5 of the Federal Rules of Criminal Procedure entitles a defendant in a felony case to a preliminary examination before a magistrate judge, within a specified period of time. The time for the examination can be continued by a magistrate judge on the consent of the defendant, or in the alternative, upon the order of a district judge showing that extraordinary circumstances exist and that the delay is indispensable to the interests of justice.

Magistrate judges in most districts are frequently called upon to extend the time for the preliminary hearing to allow the parties to discuss pre-indictment disposition. In fact, in many districts, very few preliminary examinations are actually conducted. Under the current statutory provisions, in the circumstances where a defendant is unwilling to consent to a continuance of the hearing date, and the prosecution moves to continue the hearing, the magistrate judge is required to transfer the matter to a district judge for purposes of the contested motion. The motion to continue typically arises on the date set for the preliminary hearing. As a result, a district judge must address the matter that same day. This procedure results in a great consumption of time for the judges, the judicial staff, the marshals, the attorneys, the court interpreters, and the pre-trial service officers. Realistically, providing magistrate judges jurisdiction to hear and determine the contested motion to continue will facilitate the handling of Rule 5 proceedings and conserve the resources of the judiciary and the associated individuals and agencies.

While the committee found no case law specifically limiting magistrate judges from exercising jurisdiction to grant the contested motion to continue, contemporary federal jurisprudence seems to indicate that the decision is outside the jurisdiction of the magistrate judge. This premise is supported by the notes of the Advisory Committee on Rules regarding the 1972 amendments to Fed. R. Crim. P. 54(c)[1] stating that the phrase "judge of the United States" does not include an United States magistrate. This premise is also reflected in The Legal Manual for United States Magistrate Judges, Vol. 1, § 7.02.b, published by the Administrative Office of the Courts, Magistrate Judges Division. Citing 18 U.S.C. § 3060(c) and Fed. R. Crim. P. 5(c), the Legal Manual states, "absent the defendant's consent, the preliminary examination may be continued only upon the order of a United States district judge. The district judge must find that extraordinary circumstances exist and that the delay of the preliminary examination is indispensable to the interests of justice."

The Legal Manual does point out that by local rules a district court could empower a magistrate judge to conduct the hearing on a request for a continuance of the preliminary examination and submit a report and recommendation to a district judge. This, of course, does nothing to save the resources of the involved entities and agencies, or expedite the process, and is not a practical solution to the problem.

In terms of other published works, Kent Sinclair, Jr., Practice Before Federal Magistrates (1995) confirms the contemporary position that "in the absence of defendants consent, a district judge may no less extend these dates" (for preliminary examination). Id. at §409. The cited authority in this instance is again, Fed. R. Crim. P. 5(c). The current statutory framework for this issue has been in effect since 1968. In 1968, 18 U.S.C. § 3060 (c) was amended[2] to clarify procedures with regard to the preliminary examination. Prior to that time, the only statutory

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[1] Fed. R. Crim. P. 54 deals with the application of these rules. Paragraph (c) defines many of the terms used throughout the rules including "federal magistrate judge," "magistrate judge," and "judge of the United States."

[2] The amendment was part of a bill to amend the Federal Magistrates Act, 28 U.S.C. § 631 et seq., with a stated purpose to "abolish the office of U.S. Commissioner and reform the first echelon of the Federal Judiciary into an effective component of a modern scheme of justice by establishing a system of U.S. Magistrates. H.R. 90-1629, 1968 U.S.C.C.A.N. 4252,

guidance regarding the time for preliminary examination was the reference in Fed. R. Crim. P. 5 which provided that the preliminary examination must be held "within a reasonable time following the initial appearance of an accused". HR 90-1629, 1968 U.S.C.C.A.N. 4252, 1968 WL 5307 [Leg. Hist., at *13 ("House Report")]. The 1968 amendment to 3060(c) introduced the specific outside time limits of 10 (for defendants in custody) and 20 (for defendants on bond or otherwise released) days from the initial appearance for holding the preliminary examination. At that time the amendment also added the provisions with regard to continuances.

The 1968 amendment to 18 U.S.C. § 3060(c) was the subject of discussion in the case of United States v. Green, 305 F. Supp. 125 (S.D.N.Y. 1969).[3] In Green, the Court highlighted that the amendment was precipitated by the routine continuances of the preliminary examination by commissioners (the predecessor of the magistrate judge), under the "reasonable time" standard. Congress moved to insure that a determination on probable cause is made soon after a person is taken into custody.

Review of 18 U.S.C. § 3060 (c) shows a distinction in contrasting the circumstances concerning a continuance by the magistrate judge with the defendant's consent and a continuance absent consent only on an order of a "judge of the appropriate United States district court". This distinction in the statutory language may well be the genesis of the current interpretation. Viewed in light of the 1972 amendments to Fed. R. Crim. P. 54(c) and its definitions, this premise is provided support.

In 1972, in concert with amendments to the Federal Magistrates Act (28 U.S.C. § 631 et seq.), Rule 54(c), Rule 5 was amended to be consistent with 18 U.S.C. §3060(c) concerning the timing of the preliminary examination. As amended in 1972, Rule 5(c) also, specifically discusses the role of the magistrate judge regarding a continuance of the preliminary examination with defendant's consent versus disposition absent consent by "a judge of the United States," supporting the distinction and the limitation in the power of the magistrate judge to grant the opposed continuance.

Interestingly, however, the published Advisory Committee Notes regarding the 1972 amendment to Rule 5 state that the time limits of Rule 5(c) were taken directly from Section 3060 with two exceptions:

> The new language allows delay to be consented to by the defendant only if there is 'a showing of good cause, taking into account the public interest and the prompt disposition of criminal cases'...*The second difference between the new rule and 18 U.S.C.A. §3060 is that the rule allows the decision to grant a continuance to be made by United States magistrate as well as by a judge of the United States.* This reflects the view of the advisory committee that the United States magistrate should have sufficient judicial competence to make decisions such as that contemplated by subdivision (c).

While an argument can be made that the 1972 amendments to Rule 5, and as explained by the Advisory Committee Notes, did confer full jurisdiction to the magistrate judge to continue the preliminary examination, with or without the defendant's consent, this statement is in conflict with the 1972 Advisory Committee notes to Rule 54(c) and the legal culture has maintained the distinction in the authority between magistrate judges and district judges regarding Rule 5(c).

This is an anomaly since the magistrate judge sets the preliminary examination on his or her calendar at the initial appearance in each case,[4] and is the judicial officer rendering the determination of probable cause resulting in the defendant's release or requirement that the defendant proceed

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[3] This case involved an appeal of the district courts dismissal of a criminal complaint for failure of the government to afford the defendant an opportunity for preliminary examination under the former "reasonable time" standard for the hearing of a preliminary examination.

toward trial in the case.[5] While the magistrate judge is empowered to hear and determine probable cause[6] as well as other liberty interest issues[7], this same judicial officer cannot make the decision with regard to the extraordinary circumstances or the interests of justice in an issue where the need for the continuance of a proceeding on this judicial officer's calendar is disputed. Like the Preliminary Examination itself, the magistrate judges order would be reviewable by a district judge.[8]

For all of the foregoing reasons, the proposed amendments would be consistent with the utilization of magistrate judges envisioned by the Congress, would serve in the best interests of judicial economy, and would be consistent with the pre-indictment management of criminal proceedings envisioned in developing the role of United States Magistrate Judge.

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[5] Fed. R. Crim. P. 5.1.

[6] "This procedure is designed to insure that a determination of probable cause is made-- by either the magistrate, some other judicial officer, or the grand jury-- soon after a person is taken into custody. No citizen should have his liberty restrained, even to the limited extent of being required to post bail or meet other conditions of release, unless some independent judicial determination has been made that the restraint is justified." U.S. v. Green, 305 F. Supp. 125, 132, fn.5 (S.D.N.Y. 1969).

[7] This would include bail determinations and pre-trial detention, 18 U.S.C. § 3142 et. seq.

[8] See United States v. Florida, 165 F. Supp. 318, 331 (E.D.Ark. 1958) and United States v.Vassallo, 282 F. Supp. 928, 929(E.D. Pa. 1968).

§ 3060. Preliminary examination.

(c) With the consent of the arrested person, the date fixed by the judge or magistrate **judge**[9] for the preliminary examination may be a date later than that prescribed by subsection (b), or may be continued one or more times to a date subsequent to the date initially fixed therefor. In the absence of such consent of the accused, the date fixed for the preliminary hearing may be a date later than that prescribed by subsection (b), or may be continued to a date subsequent to the date initially fixed therefor, only upon the order of a **United States magistrate judge or other** judge of the appropriate United States district court after a finding that extraordinary circumstances exist, and that the delay of the preliminary hearing is indispensable to the interests of justice. . . .

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[9] This statute was last amended in 1968, prior to the change of name of United States Magistrate to United States Magistrate Judge, effective December 1, 1990. The proposed amendment to section (c) should also include correction so that the term United States magistrate judge is replaced whereever the former term magistrate is used in section (c) and throughout Rule 5.

RULE 5. Initial Appearance Before the Magistrate Judge

(c) Offenses Not Triable by the United States Magistrate Judge. . . . With the consent of the defendant and upon a showing of good cause, taking into account the public interest in the prompt disposition of criminal cases, time limits specified in this subdivision may be extended one or more times by a federal magistrate judge. In the absence of such consent by the defendant, time limits may be extended by a **United States magistrate judge or other** judge of the United States only upon a showing that extraordinary circumstances exist and that delay is indispensable to the interests of justice.

after expiration of the Civil Justice Reform Act, only because Rule 26(a) authorizes them. The Standing Committee self-study has commended the importance of national uniformity, and indeed the desire to reduce local variations is one of the driving forces behind the Local Rules Project. At the same time, there are strong pressures from the district courts for local autonomy, for "district rights," that will be hard to resist.

The desire to establish a nationally uniform disclosure practice does not immediately dictate what the uniform practice shall be. It is important to know whether the system adopted by Rule 26(a) is the right one. Initial reactions were hostile. Growing experience seems to be softening attitudes. The survey by the Eastern District of Pennsylvania of local disclosure experience revealed a high level of satisfaction among lawyers, and an even higher level of satisfaction among judges. Other CJRA reports may tell us more.

Representatives of the Federal Judicial Center, Joe S. Cecil and Thomas E. Willging, discussed the types of empirical research the Center might be able to do in support of the discovery project. It has been twenty years since the Center last did a broad discovery project, see Connolly, Holleman & Kuhlman, *Judicial Controls and the Civil Litigative Process: Discovery* (FJC 1978). Disclosure and discovery will play central roles in the evaluation of experience under the Civil Justice Reform Act, and a study of protective orders was done for the Committee's work on Rule 26(c). The methods used for the 1978 study cannot be replicated today, since they relied on court filings under a system that required that discovery materials be filed with the court. They expected to be able to do a review of all other empirical work on discovery, and to undertake at least a survey to gather additional information. Within the constant constraints of time and competing projects, they may be able to undertake additional studies. The data gathered by RAND for the CJRA report may provide useful information. It may be possible to gather some additional data. They plan to work with this Committee and the Discovery Committee to design the most useful project that can be managed.

A motion to approve the discovery project outlined above was passed unanimously.

Magistrate Judge Appeals

Section 207 of S. 1887, the Federal Courts Improvement Act of 1996, to be signed into law this month,[1] reshapes the provisions in 28 U.S.C. § 636 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. Absent agreement by the parties at the time of consenting to trial before the magistrate judge, the judgment of the magistrate judge

[1] The legislation was in fact signed on October 19, 1996.

could be forwarded to the Supreme Court promptly. Given advance warning that the rules changes may be coming, the Court would have more than a month to review the changes before the deadline for submission to Congress. If submitted to Congress, the earliest the changes could take effect would be December 1, 1997, more than a full year after enactment of the new statute. The alternative path of publication and public comment would mean that the earliest effective date for the changes would be December 1, 1998.

It was pointed out that under 28 U.S.C. § 2074(a), when the Supreme Court adopts rules of procedure, the Court fixes the extent to which a new rule applies to pending proceedings, "except that the Supreme Court shall not require the application of such rule to further proceedings then pending 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." This provision confirms the conclusion that the present rules will continue to apply to any case in which the courts conclude that the opportunity to appeal to the district court remains available. It is the application of the statutory changes to pending cases that will control, not the effective date of the Civil Rules changes.

The Committee concluded unanimously that there is no need for public comment on the proposed conforming changes, and that it is better to seek to delete the misleading provisions of these rules as soon as possible. It is the Committee's recommendation that the Standing Committee recommend the conforming changes to the Judicial Conference for adoption without any period for public comment, and for timely action by the Supreme Court.

The Committee also discussed the question raised by several Seventh Circuit cases in which new parties are added to an action after the original parties have all consented to trial before a magistrate judge. Even when the new parties proceed without objection through trial, the Seventh Circuit has ruled that the right to a district-court trial has not been waived and that an appeal from the final judgment of the magistrate judge must be dismissed. This problem could be corrected by amending Civil Rule 73(b). One approach would be to require that the reference to the magistrate judge be withdrawn unless the new parties are given the opportunity to consent and expressly consent. Another approach would be to provide that failure to object to trial before the magistrate judge waives the right to district-court trial. This approach could be triggered in many ways: failure to object within a stated period; failure to object within a stated period after actual notice that the original parties have consented to trial before a magistrate judge; failure to object before beginning trial before the magistrate judge; or yet some other event. Judge Restani reported that the Bankruptcy Rules Committee has twice considered this issue and concluded not to act. There is some sense that this problem may be unique to the Seventh Circuit — that other courts have found effective ways to deal with the problem that do not require wasting a trial completed before the magistrate

judge.

The issue of consent by parties added after all original parties have agreed to trial before the magistrate judge will be kept on the Committee agenda.

Admiralty Rules B, C, E

The Maritime Law Association and the Department of Justice have proposed several changes in Admiralty Rules B, C, and E. Among the many changes, four should be regarded as the most important.

Rule B(1) would be amended to adopt the alternatives to service by a marshal that were earlier adopted for Rule C(3); there is no clear reason to explain the failure to adopt these provisions in Rule B(1) at the time they were adopted for Rule C(3).

Rule B(2) would be amended to reflect the ways in which Civil Rule 4 was restructured in 1993. Rule B(2)(b) has incorporated the service of process provisions of former Rule 4(d). Those provisions have been redeployed throughout Rule 4, and conforming changes must be made.

Rule C(2) would be amended to reflect the many recent statutes that provide for forfeiture proceedings in one district involving property situated outside the district.

Rule C(6) would be amended by adopting a new subdivision (a) governing forfeitures. The Department of Justice has long been anxious to adapt the in rem procedures of Rule C to the needs of forfeiture proceedings. The most significant difference is that Rule C(6)(a) would provide for direct participation by all persons who have claims against the property to be forfeited. Rule C(6)(b), on the other hand, would provide for direct initial participation only by those claiming possessory or ownership interests in the property attached in an in rem proceeding. Those having other claims against the property would continue to be subject to an intervention requirement, although this requirement has not been spelled out on the face of the rule.

Discussion of these proposals followed several paths.

The proposals were drafted in the style of the current Supplemental Rules, in an effort to hold changes to a bare minimum. The present style, however, is often confusing. In reviewing the proposals, the Admiralty Rules Committee was asked to review and incorporate the suggestions of the Standing Committee's Style Committee.

A question was raised as to the continuing need for any admiralty rules. It was suggested that the rules have continued to play a vital role since the basic integration of admiralty procedure with the general Civil Rules.

The reference in the draft of Rule C(6) to "equity ownership interest" also was questioned. This term appears both in

#1975 dupe 8/31/96 8481

Glendora
Box 416
White Plains, NY
10602
(914) 949-9495

T Advisory Committee on Civil Rules
Judicial Conference of the United States
Committee on Rules of Practice and Procedure
V Peter G. McCabe
Thurgood Marshall Bldg
1 Columbus Circle NE
Room 4-170
Washington, DC 20544 202 273 1800

96-CV-H

RECEIVED 9/3/96

A
D There's a bad rule you people
have to change and change fast: no
audiotape recorders in a U.S. Courthouse.
S A citizen has a right to walk into a US
Courthouse with her audiotape recorder and
record her courtroom procedings. There's
every good reason she should and you
don't have a good reason she should not.

A pro se litigant has a right
to make her own record of what
happened in her case in the courtroom.
It is a record she does not get ripped-off
for at $3.35 a page (and if you don't
watch these crook court stenographers IN

ABC CBS NBC

Manhatten even at 6.00 page) and for a page with wide margins and wide borders and long indentations. Plainly the page is half empty, so there will be more pages and more money to pay those greedy court stenographers. Further it is an instant record the litigant can hear as soon as the conference is over. With a court stenographer, one has to wait 30 days. Even then one may not get it. Further it is a record of voice reflection, of tone, of emotion of intent and more. There is nothing like hearing a person's voice saying his own words rather than reading them second-hand written by a court steno.

Court stenographers, along with gunboy lawyers and judges have turn courts into an industry; it's a money-maker for them. Somebody violates a person's federal rights. Said person goes to court for protection of his rights and for redress of a wrong, and the three groups above prey on the victim as ants do on a disabled insect. "Oh, goody, some big corporation violated Glendora's rights and we're going to make lots of money off that."

is entered as the judgment of the district court and appeal lies to the court of appeals in the ordinary course. The parties, however, could agree at the time of reference to the 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. The power to choose initial review in the district court has been rescinded.

Removal of the opportunity to consent to appeal to the district court requires conforming amendments to the Civil Rules. Civil Rules 74, 75, and 76 govern appeals from the magistrate judge to the court of appeals; they are now redundant and should be abrogated. Portions of Civil Rule 73 also must be made to conform, with appropriate changes in the title and catchlines. The reference to § 636(c)(7) in Rule 73(a) now should be made to § 636(c)(5). Rule 73(d), which describes the optional appeal route to the district court, must be abrogated. In Rule 73(c), the clause "unless the parties otherwise agree to the optional appeal route provided for in subdivision (d) of this rule" likewise must be deleted. Portions of Forms 33 and 34, as well as their captions, must be changed to reflect these changes.

The Committee agreed by consensus that these changes must be made. Discussion centered on the timing of the changes.

The first timing question goes to the effect of the changes on cases pending at the time of the statute's enactment. There will be many cases — for the most part concentrated in a few districts — in which the parties have consented both to trial before the magistrate judge and to appeal to the district court. The opportunity for appellate review quickly and inexpensively close to home may have been, in some of these cases, a significant reason for agreeing to trial before a magistrate judge. It seems likely that the courts will conclude that although the statute effects a procedural change that should apply to all pending cases in which the parties have not yet consented to a district-court appeal, they also may be persuaded that established consents should be honored. Many of these cases will have concluded before final action can be taken to remove the now redundant portions of the Civil Rules. Some, however, may be expected to linger on for many months. Not only may some cases prove complex, but in some the initial judgment may be reversed by the district court with a remand for further proceedings before the magistrate judge.

This timing question sets the framework for the second question. The ordinary requirements that rules changes be published for public comment can be suspended for changes that merely conform the rules to statutory changes. The proposed amendments do no more than recognize the elimination of the district-court appeal alternative. If publication is not ordered, it would be possible for the Standing Committee to recommend the changes for adoption by the Judicial Conference at its March, 1997 meeting. If the Judicial Conference approves the changes, they

minutes. The Fed Judicial Center published this report long ago, yet you go on making an industry of the courts and covering up for bad judges.

POINT 7

"Just how is a court, a judge, or this committee or the Judicial Conference of the U.S. prejudiced by having any litigant audiotape his proceedings? What harm does it do you? Why did you make the rule in the first place? What was your motive?

POINT 8

Aren't courts a public process? By the 6th amendment to the Constitution of the United States, isn't everybody by right entitled to a public trial? It isn't public if the public can't know about it on tape, audio or video?

POINT 9

Glendora's audiotape recorder fits in her blouse pocket and there it stays; nothing could be more unobtrusive.

The courtroom deputy makes the audiotape of the proceeding. But this costs $15 and you have to wait until the next day or the day after, and this throws off one's timing.

WHEREFORE you people have no real and honest reason to deprive us of our audio recorders and our right to record our proceedings, and we have every right to do so. This bad rule, cter-protective of bad judges and greedy court-stenographers, must be dropped and immediately

Dated: White Plains, New York
September 3, 2016

Yours in truth,
Glendora

4 hrs $10

Glendora
A Chat with Glendora

#2164

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
ELIZABETH KEE FEDERAL BUILDING
601 FEDERAL STREET, ROOM 1013
BLUEFIELD, WEST VIRGINIA 24701

97-CV-F

MARY S. FEINBERG
UNITED STATES MAGISTRATE JUDGE

304/327-0376
FAX 304/325-7662

January 28, 1997

John K. Rabiej, Chief
Rules Committee Support Office
Administrative Office of the
U.S. Courts
Federal Judiciary Building
One Columbus Circle, N.E.
Washington, D.C. 20544

Re: Rule 1(b), Habeas Corpus Rules

Dear Mr. Rabiej:

Thank you for your assistance in providing materials concerning the adoption of Rule 1(b) of the Habeas Corpus Rules. I have enclosed a copy of the Memorandum Order which I entered on the issue. Perhaps I used a sledge hammer to swat a fly, but the time limits in § 2243 and Rule 81(a)(2) have been troublesome. I am submitting the Memorandum Order to West for publication.

Very truly yours,

Mary S. Feinberg

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA

BLUEFIELD

THELMA WYANT,

Petitioner,

v. CIVIL ACTION NO. 1:97-0023

DAN EDWARDS, Acting Warden,
Federal Prison Camp
Alderson, West Virginia, and
BUREAU OF PRISONS, an agency of
the United States,

Respondents.

MEMORANDUM ORDER

This is a habeas corpus case filed by a federal prisoner pursuant to the provisions of 28 U.S.C. § 2241, challenging the decision by the Bureau of Prisons to deny Petitioner eligibility for early release pursuant to 18 U.S.C. § 3621(e)(2)(B).

Pending before the Court is Respondents' Motion to Reconsider Time Frame Order, which seeks additional time in which to file a Response to the Order to Show Cause entered January 13, 1997. Respondents previously filed a Motion to Extend Time, which was granted in part and denied in part, and a Response was ordered to be filed by February 5, 1997.

In the Order disposing of the Motion to Extend Time, the Court applied the provisions of 28 U.S.C. § 2243, and of Rule 81(a)(2), Fed. R. Civ. Pro., which Rule provides that a writ of habeas corpus "shall be returned within 3 days unless for good cause shown additional time is allowed which in cases brought under 28 U.S.C. § 2254 shall not exceed 40 days, and in all other cases shall not

exceed 20 days." [Emphasis added.]

Respondents' pending Motion to Reconsider points out that Kramer v. Jenkins, 108 F.R.D. 429, 432 (N.D. Ill. 1985), addresses Rule 81(a)(2), and holds that "the Supreme Court intended to allow district courts to bypass the time limits of Rule 81(a)(2) when it promulgated Rule 4 of the 2254 Rules." (Motion, at 2.) According to Shepard's, Kramer has not been cited by any other published case. Petitioner did not object to the previous Motion to Extend Time.

The Kramer case reasons that Rule 1(b) of the § 2254 Rules states as follows: "In applications for habeas corpus in cases not covered by subdivision (a), habeas rules may be applied at the discretion of the United States district court." Therefore, the case asserts, a § 2241 habeas corpus case is one not covered by Rule 1(a) of the § 2254 Rules, and is one covered by Rule 1(b). In particular, the Kramer case holds that the district court may apply, in its discretion, Rule 4 of the § 2254 Rules, which states, in pertinent part, that "the judge shall order the respondent to file an answer or other pleading within the period of time fixed by the court or to take such other action as the judge deems appropriate." 108 F.R.D. at 431. Kramer then asserts that the enabling statute for promulgation of rules, 28 U.S.C. § 2072, provides that "all laws in conflict with such rules shall be of no further force or effect after such rules have taken effect." Therefore, Rule 4 of the § 2254 Rules prevails over 28 U.S.C. § 2243. Id. Kramer holds that Rule 4 of the § 2254 Rules also

prevails over Rule 81(a)(2), Fed. R. Civ. Pro. because Rule 81 was promulgated in 1971, and Rule 4 in 1976. Id. at 432.

The Court recognizes that 28 U.S.C. § 2243 and Rule 81(a)(2) set time limits that may be unrealistic, given the volume of prisoner habeas corpus litigation (and the inexpensive filing fee of $5.00). However, habeas corpus is intended to provide "a swift and imperative remedy in all cases of illegal restraint or confinement." Fay v. Noia, 372 U.S. 391, 400 (1963). Habeas corpus claims should receive "a swift, flexible, and summary determination." Preiser v. Rodriguez, 411 U.S. 475, 495 (1973).

Given this background and policy, the Court has engaged in considerable research, with the invaluable assistance of the Librarian of the U.S. Court of Appeals for the Fourth Circuit and the Rules Committee Support Office of the Administrative Office of the U.S. Courts, attempting to learn the origin and meaning of Rule 1(b) of the 2254 Rules. That research has yielded some information, but not a definitive answer.

The Supreme Court suggested that procedural rules for habeas corpus be promulgated in Harris v. Nelson, 394 U.S. 286, 300 n.7 (1969) ("the rule-making machinery should be invoked to formulate rules of practice with respect to federal habeas corpus and § 2255 proceedings, on a comprehensive basis and not merely one confined to discovery"). It appears that the original version of Rule 1, proposed September 23, 1971, addressed only "persons in custody pursuant to the judgment of a state court, or subject to such custody in the future." On September 6, 1973, Professor Paul M.

Bator of the Law School of Harvard University wrote to Professor Frank J. Remington of the University of Wisconsin Law School and other members of the committee which proposed the 2254 Rules, and pointed out that the Rules did not address Section 2241 petitions. Professor Bator wrote, "the Rules should at least explicitly tell us why they do not cover these cases, and what procedure is contemplated for them."

When a Preliminary Draft of the proposed 2254 Rules was published, Rule 1 continued to address "persons in custody pursuant to the judgment of a state court" and "persons in custody pursuant to the judgment of a state or federal court for a determination that custody to which they may be subject in the future under another judgment of a state court," but did not address § 2241 petitions. The Advisory Committee Note stated that "[b]asic scope of habeas is prescribed by 28 U.S.C. § 2241(c) and 28 U.S.C. § 2254." The rest of the Note on proposed Rule 1 concerned the issue of "custody."

When Proposed Habeas Corpus Rules were again published, this time on June 3, 1974, Rule 1 retained the language of the Preliminary Draft. On August 14, 1974, two alternative provisions for Rule 1 were proposed. Alternative No. 1 defined "custody pursuant to a judgment of a state court" in subsection (b), and then added subsection (c), as follows:

> (b) "Custody Pursuant to a Judgment of a State Court" Defined. For purposes of these rules, a person is in custody pursuant to a judgment of a state court if he is in custody pursuant to a judgment of either a state or a federal court and makes application for a determination that custody to which he may be subject in the future

> under a judgment of a state court will be in violation of the Constitution.
>
> (c) Other Situations. In applications for habeas corpus in other cases not covered by subdivision (a) or (b), these rules may be applied at the discretion of the United States District Court.

Alternative No. 2 omitted the definition of "custody pursuant to a judgment of a state court," and retained the "Other Situations" language.

In the Minutes of the Meeting of the Advisory Committee on the Federal Criminal Rules of August 28, 1975, at page 25, Professor Remington (the recipient of Professor Bator's 1973 letter) remarked, "As now cast, Rule 1 would permit use of the rules under a habeas corpus action brought pursuant to § 2241, when § 2255 was otherwise inappropriate."

In the Advisory Committee Notes (1976 Adoption) to Rule 1, no specific reference is made that the 2254 Rules may apply to § 2241 petitions for writs of habeas corpus. The Notes simply state, "[w]hether the rules ought to apply to other situations is left to the discretion of the court." Examples of "other situations" include a person in active military service, or a reservist called to active duty, but who has not reported. The Notes then address the "unclear" boundaries of the custody requirement of the habeas statutes.

When the 2254 Rules were sent to Congress pursuant to 28 U.S.C. § 2072, Congress undertook to amend some of the Rules, but not Rule 1. The Court has reviewed the legislative history concerning adoption of the 2254 Rules (Pub. L. No. 94-426, House

Report No. 94-1471, Senate Report No. 1797, and the Congressional Record for September 14, 1976 (House), and September 16, 1976 (Senate)). There was no discussion concerning the scope of the 2254 Rules and their applicability to § 2241 petitions.

The Court has carefully considered Rules 1, 4 and 11 of the 2254 Rules, Rule 81 of the Federal Rules of Civil Procedure, the Advisory Committee Notes for all those Rules, and 28 U.S.C. §§ 2241 et seq. The 1971 Amendment to Rule 81(a)(2) increased to forty days the additional time that the district court may allow in habeas corpus proceedings involving persons in custody pursuant to a judgment of a state court. The amendment explicitly excluded habeas corpus cases like that of Petitioner, and left the additional time period at 20 days. The 1976 Adoption of the 2254 Rules, which became effective February 1, 1977, permits the district court, in Rule 4, to fix the time within which the respondent shall file an answer or other pleading. In the Fifth and Eleventh Circuits, the practice, even in § 2254 cases, is to order the respondent to file an answer "within the period of time fixed by the court," which is "3 days unless for good cause shown additional time is allowed which . . . shall not exceed 40 days . . .." Bagwell, David A., "Procedural Aspects of Prisoner § 1983 and § 2254 Cases in the Fifth and Eleventh Circuits," 95 F.R.D. 435, 461 (1982).

The Court has also reviewed the following cases: Kramer v. Jenkins, 108 F.R.D. 429 (N.D. Ill. 1985); Bennett v. Collins, 835 F. Supp. 930 (E.D. Tex. 1993); Clutchette v. Rushen, 770 F.2d 1469

(9th Cir. 1985); Bermudez v. Reid, 570 F. Supp. 290 (S.D.N.Y. 1983), stay granted, 720 F.2d 748 (2d Cir. 1983), rev'd, 733 F.2d 18 (2d Cir. 1984); Mattox v. Scott, 507 F.2d 919 (7th Cir. 1974); Troglin v. Clanon, 378 F. Supp. 273 (N.D. Cal. 1974). Bennett applies Rule 81(a)(2) to §§ 2241 and 2254 cases, and notes that "[t]he emphasis on a timely response makes sense in so far as the purpose of the writ is to allow a person in custody to challenge a wrongful, perhaps unconstitutional, imprisonment." 835 F. Supp. at 934-35. When confronted with repeated and extraordinary delay by respondent in answering, the Bennett court held that respondent had waived the procedural default defense to the petition.

In Clutchette v. Rushen, 770 F.2d 1469, 1475 (9th Cir. 1985), the Ninth Circuit held that in a § 2254 case, the district court had discretion to grant respondent an extension of time which exceeded the 40-day limit of Rule 81(a)(2).

The Second Circuit held, in Bermudez v. Reid, 733 F.2d 18 (2d Cir. 1984), that even in the face of inexcusable disregard by respondent of a district court order to respond to a petition, default judgment should not be granted, and the district court should reach the merits of the petitioner's claim.

Mattox v. Scott, 507 F.2d 919 (7th Cir. 1975), and Troglin v. Clanon, 378 F. Supp. 273 (N.D. Cal. 1974), were both decided before the § 2254 Rules were promulgated. Nonetheless, both cases are of interest because they recognize Congress' strong interest in prompt responses being filed to habeas corpus petitions, the problem of a respondent who is slow to answer, and the necessity for flexibility

by the district court in considering late returns.

The Court recognizes that it is not unusual for the Fourth Circuit to look favorably upon precedents and practices from the Fifth (and Eleventh) Circuits. However, given the historical information concerning the promulgation of Rule 1(b) of the § 2254 Rules, the nature of habeas corpus, and the difficulties of imposing strict sanctions on a respondent custodian who is slow to answer, the Court has concluded that the § 2254 Rules were intended to apply to § 2241 cases, and that Rule 4's allowance for discretion prevails over Rule 81(a)(2)'s strict time limits.

Accordingly, it is hereby **ORDERED** that the Motion to Reconsider Time Frame Order is granted, and Respondents shall file their answer to the Order to Show Cause on or before **February 17, 1997.**

The Clerk is directed to mail copies of this Order to counsel of record, including the Alderson Legal Assistance Program at Washington & Lee University School of Law.

ENTER: January 28, 1997

Mary Stanley Feinberg
United States Magistrate Judge

UNITED STATES DISTRICT COURT
DISTRICT OF NEBRASKA

DAVID L. PIESTER
UNITED STATES MAGISTRATE JUDGE
SUITE 566
FEDERAL BUILDING & V. DENNEY COURTHOUSE
100 CENTENNIAL MALL NORTH
LINCOLN, NEBRASKA 68508-3803

402/437-5235
FAX/402/437-5651

December 3, 1996

Honorable Paul V. Niemeyer
Chair, Civil Rules Advisory Committee
Committee on Rules of Practice
and Procedure
U.S. Courthouse
101 West Lombard Street
Baltimore, MD 21201

RE: Proposal for Committee Study
Pro Se Litigants

Dear Judge Niemeyer:

I write to suggest action by your committee concerning the Federal Rules of Civil Procedure and their failure to address the situation of the pro se litigant. A year ago I wrote a similar letter to the secretary of your committee, Peter G. McCabe. As I did not receive a response, I do not know whether the suggestion has been considered. On the assumption that these thoughts have not been reviewed by the committee, I submit them to you now. With the recent passage of the Prison Litigation Reform Act, I believe action is even more important now. I apologize for the length of this letter; this is an important area that I believe should be addressed.

As you may know, in 1995 and 1996 the Federal Judicial Center sponsored two national Workshops on Pro Se Litigation, concentrating on prisoner litigation. In the course of working on the planning committee for these workshops, as well as from the experience of handling literally thousands of such cases, it became clear to a number of us that the civil rules could well be amended to conform to not only the recently enacted PLRA, but also to local practices which may or may not comply with the present rules.

As our resource materials for the Pro Se Workshops disclosed, pro se (mostly prisoner) cases comprise up to thirty or forty percent of some districts' caseloads, yet none of the Federal Rules of Civil Procedure specifically addresses them. Unlike the situation where all parties are represented, pro se cases can

require an inordinate amount of judge time and even then can become chaotic. Problems abound in these cases.

For example, one of the findings of the FJC Pro Se Workshops was that many, if not most, courts engage in some form of "initial review" of pro se complaints before allowing the issuance of summons. Now such a review is required by the PLRA in prisoner cases. However, F.R.Civ.P. 4(b) seemingly does not permit such a review if the plaintiff presents a summons "in proper form." Thus, if a pro se plaintiff pays the filing fee (thus avoiding the "frivolous or malicious" hurdles of 28 U.S.C. §1915(d)), he/she can request and obtain issuance of summons for service (albeit at plaintiff's own expense) on a multitude of defendants in what may be a frivolous case. Such is obviously an abuse of process and of the court, but it frequently happens (especially in "tax protester" situations, as well as others, such as the recent, similar "flag" cases).

Although one could say that if a plaintiff is paying the filing fee and service costs, the court must indulge him or her, this practice expends the courts' valuable time, resources, and prestige--certainly precious commodities not fully reimbursed by such fees. When the clerks issue summons and file attendant documents, and when service of process is permitted, an appearance of legitimacy is given to the claims contained in a complaint. If such claims are frivolous, not only have the resources of the courts been squandered, but the courts have allowed themselves to be misused by some persons, to the expense of all.

The circuits are split on which of these early review methods are permissible. For example, early conferences with parties have been used extensively in some circuits, but are specifically prohibited in others; some circuits have held that payment of even a partial filing fee insulates a pro se litigant from any sua sponte review of his or her pleadings. Such disparities should be acknowledged, addressed, and either sanctioned or eliminated, to the end that the courts' prestige and resources are preserved and the rights of pro se litigants protected.

Another instance involves Rule 45(a)(3). It requires subpoenas to be issued in blank, signed by the clerk and provided to the parties. It is frequently NOT followed by magistrate judges in pro se cases; rather, a review of the need for the requested witnesses is regularly done in some districts before allowing the issuance of subpoenas, even if plaintiff is not proceeding in forma pauperis.

Yet another example is the last sentence of Rule 5(e). The clerks are required to accept for filing almost anything that comes

to them. If applied literally to pro se submissions, we would need to greatly expand the clerks offices' storage capacities! As you might imagine, some of this material could fill boxes and boxes, and may simply be sent to the clerk (supposedly as "exhibits" or "attachments" to a pro se complaint, but in fact) for safekeeping out of the control of prison officials, or worse, to give the plaintiff a public "forum." Additionally, some clerks have apparently taken the position that the signature of each pro se party is not required in order for a pleading to be considered "in proper form," thus raising a whole host of problems relative to Rule 11.

Further, the rules do not address the distinctions and interplay between proceeding in forma pauperis under 28 U.S.C. §1915 and proceeding pro se. While Congress has acted with respect to prisoners proceeding pro se and in forma pauperis, it has not acted with respect to other pro se litigants. It well could be that all pro se litigants should be treated in the same fashion regardless of whether they are also proceeding in forma pauperis. Such a classification would, in the eyes of many, be justified by the fact that the pro se litigant is not limited as effectively from asserting spurious claims as are attorneys, who are constrained by the bounds of professionalism, their status as "officers of the court," and the strictures of Rule 11. Yet that is not now the case. Whether the rules of civil procedure should be amended to address such disparities is a question that ought, in my view, to be studied and answered.

The PLRA has highlighted the issue of whether the underlying presumption in the rules that all cases proceed with skilled, professional advocates on all sides is in fact true in pro se cases. The PLRA also raises the issue of whether all pro se litigants should be treated the same, whether they are proceeding in forma pauperis or not, and whether they are imprisoned or institutionalized or not. Finally, the PLRA now requires actions by the courts that seemingly do not conform to the present rules. Determining what, if any, modifications are necessary to protect the rights of pro se litigants and prevent abuse of the courts is a task that is, in my view, both necessary and timely.

It may be that such a task is greater than the Civil Rules Committee typically undertakes. If so, I would suggest that some "special subcommittee" of it be drafted to get a start on this kind of a comprehensive review. Such action can do much to curtail abuses and accompanying costs, assure some consistency in procedure in all districts, and protect the rights of pro se litigants.

I hope you find these suggestions worthy of consideration. If I can provide any assistance, please feel free to contact me.

Yours truly,

David L. Piester
United States Magistrate Judge

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

101 West Lombard Street
Baltimore, Maryland 21201

Chambers of
PAUL V. NIEMEYER
United States Circuit Judge

(410) 962-4210
Fax (410) 962-2277

December 10, 1996

Honorable David L. Piester
United States Magistrate Judge
Suite 566
100 Centennial Mall North
Lincoln, Nebraska 68508

Dear Judge Piester:

Thank you for your December 3 letter. I am taking the liberty of referring this to our staff for inclusion on our docket.

Sincerely,

Paul V. Niemeyer

cc: Mr. John K. Rabiej

LEONIDAS RALPH MECHAM
Director

CLARENCE A. LEE, JR.
Associate Director

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
Chief
Rules Committee Support Office

August 5, 1997
Via Facsimile

MEMORANDUM TO PROFESSOR EDWARD H. COOPER

SUBJECT: *Rule 30(d) Question and Suggested Rules Amendments to Facilitate Disposition of Prisoner Filings*

RULE 30 QUESTION

We received a question from a magistrate judge regarding Rule 30(d)(1) & (2). The second sentence of (d)(1) refers only to a "party" who may instruct a deponent not to answer based on certain exceptions. The magistrate judge raises the situation in which the deponent is advised by his own (non-party) counsel not to answer a question. He asks whether the apparent distinction in the rule was intentional and whether it means anything.

Under (d)(2), the court can sanction "the persons responsible (for impeding, delaying, or other conduct frustrating the fair examination of the deponent)...." The Note is also clear that the sanction has general application and would cover "non-party" counsel advising a deponent not to answer a particular question. As a practical matter, I do not see a problem, because even if (d)(1) doesn't apply to "non-party" counsel, prohibited actions could be sanctioned under (d)(2). Presumably advising a deponent not to answer a legitimate question impedes, delays, or frustrates a fair examination. Nor can I envision an interpretation of the rule preventing non-party counsel from advising his deponent not to answer a particular question based on privilege grounds.

Why (d)(1) refers only to "party" is unclear. As published in 1991, the substance of present (d)(1) was contained in the Committee Note. But the Note referred to counsel in the generic sense. In light of comment recommending incorporating the Note into the Rule, Judge Pointer drafted the language and inserted it after the public comment period; seemingly

applicable only to a party. Are you aware of any reason for a distinction? Is this a real-life problem?

RULES AMENDMENTS FACILITATING PRISONER FILINGS

We also received a letter from Magistrate Battaglia endorsing a suggestion made by Magistrate Judge David Piester to amend the rules to facilitate the disposition of prisoner filings. The judges note several circuit conflicts regarding the degree of scrutiny that a court may exercise on a pro se prisoner complaint. Some circuits provide more discretion than others to courts in disposing quickly of pro se prisoner complaints.

The judges' recommendation for a comprehensive review of the rules would involve a great deal of study. On the other hand, prisoner filings are a big part of the judges' caseload and if rules improvements can be made, the judiciary would be grateful. As noted in the attached letter, the Prisoner Reform Act may provide some new ways to facilitate disposition of these cases.

Have you spoken with Judge Niemeyer or the Agenda and Policy Subcommittee on this issue? It is not referenced in my Civil Rules docket sheet. Do you have any thoughts on whether the committee should launch yet another major project on this issue?

John K. Rabiej

Attachment

THE UNIVERSITY OF MICHIGAN
LAW SCHOOL
ANN ARBOR, MICHIGAN 48109-1215

EDWARD H. COOPER
Thomas M. Cooley Professor of Law

HUTCHINS HALL
(313) 764-4347
FAX: (313) 763-9375

August 7, 1997

Hon. Paul V. Niemeyer
United States Circuit Judge
by FAX: 410.962.2277

John K. Rabiej, Esq.
Chief, Rules Committee Support Office
Administrative Office of the United States Courts
by FAX: 202.273.1826

Two-page message

Re: August 5 Agenda Questions

Dear Paul and John:

This note responds to John's August 5 Memorandum about two quite different agenda proposals for the Civil Rules Committee. (I spent yesterday with a truck and an apartment full of my younger daughter's furniture — the rascal is still in Florida with her summer job, but for complicated reasons the stuff had to be moved to Okemos now.) {What? You do not recognize Okemos as a suburb of East Lansing?}

The Rule 30(d) questions can safely be referred to the technical rules questions part of the Discovery Subcommittee agenda. I am not at all sure anything should be done. As to 30(d)(1), nothing is said about a deponent refusing to answer a question; it is not clear that the rule should extend to advice by a nonparty deponent's own attorney (or other adviser). The sanctions available under Rule 30(d)(2) may be sufficient for the needs of this setting. As to (d)(2), I fully agree that "another" party should be "a party." Correction can be included in any discovery amendments that may be proposed, or made a note for the style project.

If the Rule 30(d) questions are small, the "pro se" proposal is very big indeed. The pro se tradition is now enshrined in 28 U.S.C. § 1654: "In all courts of the United States the parties may plead and conduct their own cases personally or by counsel * * *." Not surprisingly, this statute traces back to the First Judiciary Act, § 35: "That in all courts of the United States, the parties may plead and manage their own causes personally or by assistance of such counsel or attorneys at law * * *." In addition to this tradition, we have the more recent tradition of uniform, non-tracked procedure. These two traditions converge in the very strong feeling of many courts, even today, that in a system of procedure that is beyond the will or capacity of many professional lawyers, it is the special responsibility of the court to help the pro se litigant avoid procedural disaster. A reasonably recent illustration is provided by Judge Cudahy's opinion in Donald v. Cook Cty. Sheriff's Dept., 7th Cir. 1996, 95 F.3d 548, 555. The plaintiff suffered a "massive heart attack" two days after jail officials took away his heart medication. He brought suit against the Department because he was unable to name any individual responsible. The court says: "To the extent the plaintiff faces barriers to determining the identities of the unnamed defendants, the court must assist the plaintiff in conducting the necessary investigation."

Followed by suggestions at 556.

The pro se tradition is deeply rooted in notions of democracy and access to the courts. It draws additional strength from persisting suspicions of lawyers. Many legitimate claims, moreover, simply cannot bear the cost of enforcement with a lawyer. Vindication of principle or a grudge must bear the freight when realistic economic calculation cannot. The "American Rule" against fee shifting plays a significant role in the calculation.

The other side, of course, is that litigating against a pro se party can be more expensive, and far more frustrating, than litigating against a represented party. The burdens fall on courts as well as parties. I suspect the courts' share of the burdens falls disproportionately on the clerks offices, staff attorneys, and magistrate judges, but there is still plenty of grief for Article III judges. I also suspect that pro se litigants not only fail more often than represented litigants, but that most of the time there is good reason. Lawyers — encouraged by economics and Rule 11 — do help weed out the claims that cannot be supported by fact or law.

Attempting to reconcile these competing concerns through rules separately designed for pro se litigants will be an arduous task. We (meaning now Congress, not the Rules Committee) are not likely to respond by creating "small claims" courts and procedures for federal questions. A de facto analogue in a small claims procedure for all parties, represented or not, or in a small claims procedure that forbids representation, will present great problems — beginning with the question whether to make it mandatory, a matter of one party's election, or a matter of all parties' consent. Special rules for pro se litigants alone might well wind up imposing greater burdens on courts and represented parties than present rules, encouraging greater resort to pro se proceedings. And so it goes.

These are not careful reflections on pro se litigants. But they are, I think, an indication of the first reactions that will be stirred in many hearts and minds. If the Committee is to approach these problems at all, the project must be a major undertaking that will dwarf either class action reform or discovery revisions. If we become interested, however, the time to start may be now. There should be a long period in which the idea alone is bruited about, stirring alarm and reactions that may help give direction to any project that may be formally launched.

Best,

EHC/lm

Edward H. Cooper

File

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

August 13, 1997

Honorable Anthony Battaglia
United States Magistrate Judge
U.S. Courts Building
940 Front Street
San Diego, California 92101-8927

Dear Judge Battaglia:

I am responding to your July 17 letter inquiring about the status of Judge Piester's December 3, 1996, suggestion to consider the promulgation of a set of rules governing cases filed by pro se litigants. The agenda of the Advisory Committee on Civil Rules for the past three committee meetings has been entirely full, and the committee has not yet had an opportunity to consider Judge Piester's suggestion.

The advisory committee has held one meeting since December 1996. At its May 1997 meeting, the committee devoted virtually all of its time to discussions of proposed amendments to Rule 23 [Class Actions]. The agenda of the committee's upcoming September and October meetings was planned more than a year ago and will involve a major comprehensive review of discovery practice and necessary changes to the admiralty and copyright rules as well as continuing work on class action practice. The pro se proposal is now before the chair and the committee's Subcommittee on Agenda and Policy Development for their consideration. I will keep you apprised of any committee action.

We welcome your comments and appreciate your interest in the rulemaking process.

Sincerely,

John K. Rabiej

for Peter G. McCabe
Secretary

cc: Honorable Alicemarie H. Stotler
Honorable Paul V. Niemeyer
Honorable Anthony J. Scirica
Professor Edward H. Cooper

OFFICE OF THE CLERK
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN
120 North Henry Street, Room 320 • P.O. Box 432 • Madison, WI 53701-0432 • 608-264-5156

October 2, 1998

98-CV-F

John K. Rabiej
Chief, Rules Committee Support Staff
Administrative Office of the
United States Courts
Washington, DC 20544

Dear Mr. Rabiej:

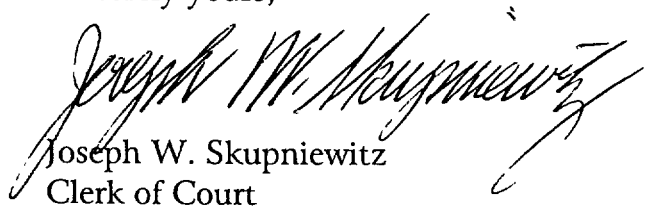
This letter suggests that a correction is appropriate to Form 1 in the Appendix of Forms to the Federal Rules of Civil Procedure. Rule 4(a) states that the summons must state the time within which the defendant "must appear" and appearance is normally accomplished by filing something in writing with the district court. AO Form 440, the national summons in a civil action form, embodies this requirement of Rule 4(a) by the language, "You are hereby summoned and required to file with the Clerk of this Court and serve upon plaintiff's attorney . . . ." Attached is a copy of this standard summons form. Form 1 in the Appendix of Forms deletes the requirement that the person summoned file with the Clerk of Court. I think is an inappropriate omission, either because Rule 4(a) requires a filing with the court or because as a practical matter we want to tell defendants that they must respond both to the court and opposing counsel in response to a summons. Thus my suggestion is that the form summons in the Appendix of Forms to the Federal Rules be changed to read the same way as the standard summons form.

This is not just an academic matter. The matter came up in my court where attorneys (and non-attorneys) not infrequently present me with a summons form for signature which they have devised rather than the standard AO Form 440. When they do this I check to see if they have used substantially the same language as the standard form. If not, I return the summons to them with copies of the standard form, indicating that they should use the language of the standard form. Imagine my surprise when an attorney pointed out to me that he had been following Form 1 from the Appendix of Forms and for that reason had omitted the language requiring a filing with the Clerk

of Court. Of course, he was entitled to rely on Rule 84 of the Federal Rules of Civil Procedure, even though the form in the Appendix might not be fully complying with the requirements of Rule 4(a). In any case the standard form distributed by the Administrative Office, AO 440, should be consistent with the summons Form 1 in the Appendix of Forms to the Federal Rules.

Thank you for taking this matter up with the Rules Committee which you support.

Sincerely yours,



Joseph W. Skupniewitz
Clerk of Court

United States District Court

DISTRICT OF

SUMMONS IN A CIVIL ACTION

V.

CASE NUMBER:

TO: (Name and Address of Defendant)

YOU ARE HEREBY SUMMONED and required to file with the Clerk of this Court and serve upon

PLAINTIFF'S ATTORNEY (name and address)

an answer to the complaint which is herewith served upon you, within _____ days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

CLERK

DATE

BY DEPUTY CLERK

United States District Court
Middle District of Florida
United States Courthouse
311 West Monroe Street
Post Office Box 1740
Jacksonville, Florida 32201-1740

98-CV-D

Chambers of
Harvey E. Schlesinger
United States District Judge

August 10, 1998

(904) 232-2931

Mr. Peter G. McCabe
Secretary to the Rules of Practice
and Procedure Committee,
Thurgood Marshall Office Bldg.
One Columbus Circle, N.E.
Washington, D.C. 2002-8003

Dear Peter:

At the last meeting of the U.S. District Court Forms Task Force, we considered a recommendation made by Judge William C. Sherrill, Jr. from the Northern District of Florida indicating that the standard forms used for proceedings under 28 U.S.C. §§ 2254 & 2255 should be revised to indicate the dates on which denial of post conviction motions was affirmed. The Task Force believes that these changes are needed to reflect amendments in the law under the Antiterrorism and Effective Death Penalty Act of 1997.

Since these forms (AO 241 and AO 242) are published in the appendices of forms following the "Rules Governing Section 2254 Cases in the United States District Courts" and the "Rules Governing Section 2255 Proceedings For the United States District Courts," the task force believes that this matter must be coordinated with the Rules Committees prior to any final modifications being made in these forms.

With warm personal regards,

Copies to:
Hon. Wm. C. Sherrill, Jr.
Hon. Tommy E. Miller

AO 241 (Rev. 5/85)

PETITION UNDER 28 USC § 2254 FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

If petitioner is attacking a judgment which imposed a sentence to be served in the future, petitioner must fill in the name of the state where judgment was entered. If petitioner has a sentence to be served in the future under a federal judgment which he wishes to attack, he should file a motion under 28 U.S.C. § 2255, in the federal court which entered the judgment.)

PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

Instructions – Read Carefully

(1) This petition must be legibly handwritten or typewritten, and signed by the petitioner under the penalty of perjury. Any false statement of a material fact may serve as the basis for prosecution and conviction for perjury. All questions must be answered concisely in the proper space on the form.

(2) Additional pages are not permitted except with respect to the facts which you rely upon to support your grounds for relief. No citation of authorities need be furnished. If briefs or arguments are submitted, they should be submitted in the form of a separate memorandum.

(3) Upon receipt of a fee of $5 your petition will be filed if it is in proper order.

(4) If you do not have the necessary funds for transcripts, counsel, appeal, and other costs connected with a motion of this type, you may request permission to proceed *in forma pauperis*, in which event you must execute form AO 240 or any other form required by the court, setting forth information establishing your inability to pay the costs. If you wish to proceed *in forma pauperis*, you must have an authorized officer at the penal institution complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution. If your personal account exceeds $_____ , you must pay the filing fee as required by the rules of the district court.

(5) Only judgments entered by one court may be challenged in a single motion. If you seek to challenge judgments entered by different courts either in the same state or in different states, you must file separate petitions to each court.

(6) Your attention is directed to the fact that you must include all grounds for relief and all facts supporting such grounds for relief in the petition you file seeking relief from any judgment of conviction.

(7) When the petition is fully completed, the original and at least two copies must be mailed to the Clerk of the United States District Court whose address is

(8) Petitions which do not conform to these instructions will be returned with a notation as to the deficiency.

AO 241 (Rev. 5/85)

PETITION UNDER 28 USC § 2254 FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

United States District Court	District	
Name	Prisoner No.	Case No.
Place of Confinement		
Name of Petitioner (include name under which convicted)	Name of Respondent (authorized person having custody of petitioner) V.	
The Attorney General of the State of:		

PETITION

1. Name and location of court which entered the judgment of conviction under attack _____

_____

2. Date of judgment of conviction _____

3. Length of sentence _____

4. Nature of offense involved (all counts) _____

_____

_____

_____

5. What was your plea? (Check one)
   (a) Not guilty ☐
   (b) Guilty ☐
   (c) Nolo contendere ☐

   If you entered a guilty plea to one count or indictment, and not a guilty plea to another count or indictment, give details:

_____

_____

6. If you pleaded not guilty, what kind of trial did you have? (Check one)
   (a) Jury ☐
   (b) Judge only ☐

7. Did you testify at the trial?
   Yes ☐ No ☐

8. Did you appeal from the judgment of conviction?
   Yes ☐ No ☐

9. If you did appeal, answer the following:

(a) Name of court _____

(b) Result _____

(c) Date of result and citation, if known _____

(d) Grounds raised _____

_____

(e) If you sought further review of the decision on appeal by a higher state court, please answer the following:

(1) Name of court _____

(2) Result _____

_____

(3) Date of result and citation, if known _____

(4) Grounds raised _____

_____

(f) If you filed a petition for certiorari in the United States Supreme Court, please answer the following with respect to each direct appeal:

(1) Name of court _____

(2) Result _____

_____

(3) Date of result and citation, if known _____

(4) Grounds raised _____

_____

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal?

Yes ☐ No ☐

11. If your answer to 10 was "yes," give the following information:

(a) (1) Name of court _____

(2) Nature of proceeding _____

_____

(3) Grounds raised _____

_____

(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes ☐ No ☐

(5) Result _____

(6) Date of result _____

(b) As to any second petition, application or motion give the same information:

(1) Name of court _____

(2) Nature of proceeding _____

(3) Grounds raised _____

(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes ☐ No ☐

(5) Result _____

(6) Date of result _____

(c) Did you appeal to the highest state court having jurisdiction the result of action taken on any petition, application or motion?
(1) First petition, etc. Yes ☐ No ☐
(2) Second petition, etc. Yes ☐ No ☐

(d) If you did *not* appeal from the adverse action on any petition, application or motion, explain briefly why you did not:

12. State *concisely* every ground on which you claim that you are being held unlawfully. Summarize *briefly* the *facts* supporting each ground. If necessary, you may attach pages stating additional grounds and *facts* supporting the same.

Caution: In order to proceed in the federal court, you must ordinarily first exhaust your available state court remedies as to each ground on which you request action by the federal court. If you fail to set forth all grounds in this petition, you may be barred from presenting additional grounds at a later date.

For your information, the following is a list of the most frequently raised grounds for relief in habeas corpus proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you may have other than those listed if you have exhausted you state court remedies with respect to them. However, *you should raise in this petition all available grounds* (relating to this conviction) on which you base your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The petition will be returned to you if you merely check (a) through (j) or any one of these grounds.

(a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea.

(b) Conviction obtained by use of coerced confession.

(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.

(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.

(e) Conviction obtained by a violation of the privilege against self-incrimination.

(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.

(g) Conviction obtained by a violation of the protection against double jeopardy.

(h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled.

(i) Denial of effective assistance of counsel.

(h) Denial of right of appeal.

A. Ground one: _____

_____

Supporting FACTS (state *briefly* without citing cases or law) _____

_____

_____

_____

_____

_____

_____

B. Ground two: _____

_____

Supporting FACTS (state *briefly* without citing cases or law) _____

_____

_____

_____

_____

_____

_____

C. Ground three: _____

_____

Supporting FACTS (state *briefly* without citing cases or law) _____

_____

_____

_____

_____

_____

_____

D. Ground four: _____

_____

Supporting FACTS (state *briefly* without citing cases or law) _____

_____

_____

_____

_____

_____

_____

13. If any of the grounds listed in 12A, B, C, and D were not previously presented in any other court, state or federal, state *briefly* what grounds were not so presented, and give your reasons for not presenting them: _____

_____

_____

_____

14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack?

Yes ☐ No ☐

15. Give the name and address, if known, of each attorney who represented you in the following stages of judgment attacked herein:

(a) At preliminary hearing _____

_____

(b) At arraignment and plea _____

_____

(c) At trial _____

_____

(d) At sentencing _____

_____

(e) On appeal _____

_____

(f) In any post-conviction proceeding _____

_____

(g) On appeal from any adverse ruling in a post-conviction proceeding _____

_____

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and the same time?

Yes ☐ No ☐

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?

Yes ☐ No ☐

(a) If so, give name and location of court which imposed sentence to be served in the future: _____

_____

(b) Give date and length of the above sentence: _____

_____

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?

Yes ☐ No ☐

Wherefore, petitioner prays that the Court grant petitioner relief to which he may be entitled in this proceeding.

_____

Signature of Attorney (if any)

I declare under penalty of perjury that the foregoing is true and correct. Executed on

_____

(date)

_____

Signature of Petitioner

AO 242 (Rev. 2/95) PETITIONER'S RESPONSE AS TO WHY HIS OR HER PETITION UNDER 28 USC § 2254 SHOULD NOT BE BARRED UNDER RULE 9

UNITED STATES DISTRICT COURT	District
Petitioner (name under which convicted)	Respondent (authorized person having custody of petitioner)
V.	
The Attorney General of the State of:	Case No.

Petitioner's Response as to Why His or Her Petition Should Not be Barred Under Rule 9

Explanation and Instructions–Read Carefully

(I) Rule 9. Delayed or Successive Petitions.

(a) Delayed Petitions. A petition may be dismissed if it appears that the state of which the respondent is an officer has been prejudiced in its ability to respond to the petition by delay in its filing unless the petitioner shows that it is based on grounds of which he or she could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the state occurred.

(b) Successive Petitions. A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

(II) Your petition for habeas corpus has been found to be subject to dismissal under rule 9 ( ) for the following reason(s):

_____

_____

_____

_____

(III) This form has been sent so that you may explain why your petition contains the defect(s) noted in (II) above. It is required that you fill out this form and send it back to the court within ____ days. Failure to do so will result in the automatic dismissal of your petition.

(IV) When you have fully completed this form, the original and two copies must be mailed to the Clerk of the United States District Court whose address is

(V) This response must be legibly handwritten or typewritten, and signed by the petitioner under penalty of perjury. Any false statement of a material fact may serve as the basis for prosecution and conviction for perjury. All questions must be answered concisely in the proper space on the form.

(VI) Additional pages are not permitted except with respect to the facts which you rely upon in Item 4 or 5 in the response. Any citation of authorities should be kept to an absolute minimum and is only appropriate if there has been a change in the law since the judgment you are attacking was rendered.

(VII) Respond to 4 or 5 below, not to both, unless (II) above indicates that you must answer both sections.

RESPONSE

1. Have you had the assistance of an attorney, other law-trained personnel, or writ writers since the conviction your petition is attacking was entered?

   Yes ☐ No ☐

2. If you checked "yes" above, specify as precisely as you can the period(s) of time during which you received such assistance, up to and including the present. _____

   _____

3. Describe the nature of the assistance, including the names of those who rendered it to you. _____

   _____

   _____

   _____

   _____

4. If your petition is in jeopardy because of delay prejudicial to the state under rule 9(a), explain why you feel the delay has not been prejudicial and/or why the delay is excusable under the terms of 9(a). This should be done by relying upon FACTS, not your opinions or conclusions. _____

   _____

   _____

   _____

   _____

5. If your petition is in jeopardy under rule 9(b) because it asserts the same grounds as a previous petition, explain why you feel it deserves a reconsideration. If its fault under rule 9(b) is that it asserts new grounds which should have been included in a prior petition, explain why you are raising these grounds now rather than previously. Your explanation should rely on FACTS, not your opinion or conclusions. _____

   _____

   _____

   _____

   _____

   _____

I declare under penalty of perjury that the foregoing is true and correct. Executed on

_____.
(Date)

_____
Signature of Petitioner

VI-VII

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

ANTHONY J. SCIRICA
CHAIR

PETER G. McCABE
SECRETARY

March 18, 1999

Honorable Rya W. Zobel
Director
Federal Judicial Center
Thurgood Marshall Federal Judiciary Bldg
One Columbus Circle, N.E
Washington, D C. 20002-8003

Dear Judge Zobel

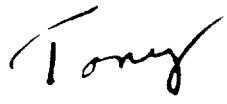
The Committee on Codes of Conduct has asked the rules committees to consider adopting rules similar in nature to Appellate Rule 26 1, which requires parties to disclose certain financial interests to help a judge make a recusal decision.

The rules committees have learned that practices vary widely among the courts on the amount of "financial" information required from parties and on the mechanisms used to obtain this information. Some courts and judges require detailed financial information from the parties, while others require much less information or nothing at all The courts also use different means to obtain this information Many judges require parties to complete a financial disclosure form early in the litigation. Other judges have standing orders and a few courts have promulgated local rules of court requiring parties to submit financial disclosure statements

The Advisory Committees on Appellate, Bankruptcy, Civil, and Criminal Rules are evaluating whether national rules requiring parties to disclose financial interests are necessary, and if so, how detailed the information should be. Accordingly, the rules committees are particularly interested in obtaining data on: (1) the scope of financial information required by courts—including courts of appeals and bankruptcy courts—and judges; and (2) the means used by courts—including courts of appeals and bankruptcy courts—and judges to require parties to submit such information, e.g., local forms, standing orders, local rules, etc. Any other information that the Federal Judicial Center believes would be helpful to the advisory committees on this issue would be welcome. The committees look forward to working with Center staff in developing the survey questionnaires

We plan to act on this issue at the spring 2000 advisory committee meetings. Under this tentative timetable, the advisory committees would need to review the results of a survey about the first of the year. A status report on the survey's progress would also be helpful at the committees' October-November meetings At your convenience, please advise me whether the Federal Judicial Center would be interested in undertaking this project. I very much appreciate your consideration of this request

Sincerely yours,



Anthony J Scirica

cc. Honorable Carol Bagley Amon
Reporters, Advisory Rules Committees
Professor Daniel R. Coquillette
Peter G. McCabe, Secretary
Marilyn J. Holmes

THE FEDERAL JUDICIAL CENTER
THURGOOD MARSHALL FEDERAL JUDICIARY BUILDING
ONE COLUMBUS CIRCLE, N.E.
WASHINGTON, DC 20002-8003

RYAN W. ZOBEL
DIRECTOR

TEL 202-273-4160
FAX 202-273-4019

March 25, 1999

Honorable Anthony J. Scirica
Chair
Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
United States Court of Appeals for the Third Circuit
22614 U.S. Courthouse
601 Market Street
Philadelphia, Pennsylvania 19106

Dear Judge Scirica:

In response to yours of March 18th we will be pleased to work with you and the members of the Standing Committee on the study you request. The proposed study of the need for national rules requiring parties to disclose financial interests pertinent to a recusal decision by the judge is consistent with work we have already undertaken for your committee and the Advisory Bankruptcy Rules Committee to determine whether national rules are required to govern attorney conduct in civil and bankruptcy matters.

Your suggested timeframe is also entirely appropriate for the kind of effort we will need to undertake. As you know, it is useful for us to be able to work with a committee liaison and I hope that you will consider so designating a member of your committee. If you will let Jim Eaglin, Director of the Research Division, know who that will be, he will follow-up with your liaison as we design and implement the study. Jim can be reached at (202) 502-4071.

On a more personal note, it was nice to see you again at last week's meeting of the Judicial Conference.

Sincerely,

cc: Honorable Carol Bagley Amon
Reporters, Advisory Rules Committees
Professor Daniel R. Coquillette
Mr. Peter G. McCabe
Mr. John Rabiej
Ms. Marilyn J. Holmes
Mr. James B. Eaglin

Corporate Disclosure Statements

"The Committee on Codes of Conduct has asked the rules committees to consider adopting rules similar in nature to Appellate Rule 26.1, which requires parties to disclose certain financial interests to help a judge make a recusal decision." So Judge Scirica opened a March 18 letter to Judge Zobel, requesting Federal Judicial Center assistance in studying the questions raised by consideration of these matters. Judge Scirica went on to ask whether the work could be done in time to provide a progress report for consideration at the fall, 1999 meetings of the advisory committees, and to enable action by the advisory committees at the spring, 2000 meetings. Judge Zobel has replied that the Judicial Center will undertake the project within the suggested timeframe. There is little reason for this Committee to act now.

Although there is nothing to be done now, a brief reminder may help to keep the questions in mind. This Committee considered these issues briefly in November, 1998. Even brief consideration raised a number of questions. Appellate Rule 26.1 does not begin to require disclosure of all information that bears on recusal for a conflict of interests, actual or seeming. Rule 26.1, indeed, was deliberately cut back by deleting the former requirement that a parent corporation disclose the identity of subsidiaries that have issued shares to the public. It is apparent that any rule attempting to list all of the information that might be relevant would impose extremely cumbersome requirements. As an illustration, the Appellate Rules Committee once considered a draft that required, among others, these disclosures:

> Whenever, by reason of franchise, lease, other profit sharing agreement, insurance or indemnity agreement, a publicly owned corporation, not a party to the appeal, has a financial interest in the outcome of the litigation in which another person is a party to an appeal, or to a motion or other proceedings relating to an appeal, counsel for the person who is a party shall advise the Clerk in writing of the identity of the publicly owned corporation and the nature of its financial interest in the outcome of the litigation.
>
> Whenever a trade association is a party to an appeal, or an intervenor, it shall be the responsibility of counsel for the trade association to advise the Clerk in writing of the identity of each publicly owned member of the association.

Apart from corporations, parties not in corporate form may present similar problems: should disclosure be required as to limited or general partnerships, limited liability companies, business trusts, entities created under foreign law, and the like?

It also was asked whether it is wise to add such detailed requirements as disclosure statements to the civil rules, however well they may fit with the appellate rules, and whether alternative means of securing the relief may prove better. The discussion is summarized toward the end of the November minutes.

The force behind Appellate Rule 26.1 as a model may be augmented by the Supreme Court's recent revision of its own Rule 29.6 to delete the requirement that a corporation disclose subsidiaries that have issued shares to the public:

Supreme Court Rule 29.6

Adopted January 11, 1999, effective May 3, 1999

Every document, except a joint appendix or *amicus curiae* brief, filed by or on behalf of **a nongovernmental corporation** shall **contain a corporate disclosure statement identifying the** parent **corporations and listing any publicly held company that owns 10% or more of the corporation's stock.** If there is no parent **or publicly held company owning 10% or more of the corporation's stock,** a notation to this effect shall be included in the document. If a **statement** has been included in a document filed earlier in the case, reference may be made to the earlier document (except when the earlier **statement** appeared in **a document prepared under Rule 33.2**), and only amendments to the **statement** to make it current need be included in the document being filed.

[Clerk's Comment: The Title of Rule 29 was changed to delete "corporate listing" and substitute therefor "corporate disclosure statement." Rule 29.6 has been revised to identify interests sufficient enough to cause a Justice's recusal. It deletes the requirement that a corporate party identify subsidiaries that have issued shares to the public. It is patterned on the recently adopted Rule 26.1 of the Federal Rules of Appellate Procedure.]