COMMITTEE ON RULES
OF
PRACTICE AND PROCEDURE

Tucson, Arizona

January 12-15, 1994

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
TUCSON, ARIZONA
JANUARY 12-15, 1994

1. Remarks of the Chair.

   A. Executive Session.

2. Approval of the Minutes.

3. Report on Recent Rules Amendments.

4. Proposed Amendments Published for Comment.

5. Report of the Subcommittee on Long Range Planning.

   A. Presentation by Chief of the Office on Long Range Planning.

6. Report on Local Rules Project.

7. Proposed Standards on Facsimile Filing.

8. Report of the Advisory Committee on Bankruptcy Rules.

9. Report of the Advisory Committee on the Rules of Evidence.

10. Report of the Advisory Committee on Appellate Rules.

11. Report of the Advisory Committee on Criminal Rules.

    A. Proposed amendment to Criminal Rule 16 for publication.

12. Report of the Advisory Committee on Civil Rules.

    A. Recommendation that the Judicial Conference decline to support S. 585 regarding provisions on offer of judgment and expert witnesses.

13. Report of the Subcommittee on Style.

14. Next Meeting.

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ORAL PRESENTATION

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

Minutes of the Meeting of June 17-19, 1993
Washington, D.C.

The mid-year meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in the Thurgood Marshall Federal Judicial Building in Washington, D.C. on Thursday, Friday, and Saturday, June 17-19, 1993. The following members were present:

Judge Robert E. Keeton (chair)
Professor Thomas E. Baker
Judge William O. Bertelsman
Judge Frank H. Easterbrook
Judge Thomas S. Ellis, III
Justice Edwin J. Peterson
Alan W. Perry, Esquire
Judge George C. Pratt
Judge Dolores K. Sloviter
Judge Alicemarie H. Stotler
Alan C. Sundberg, Esquire
William R. Wilson, Esquire
Professor Charles Alan Wright

The Department of Justice was represented by Deputy Attorney General Philip B. Heymann (on Friday), Roger Pauley (Thursday and Friday), and Dennis G. Linder (Friday and Saturday).

Supporting the committee were Dean Daniel R. Coquillette, reporter to the committee, Peter G. McCabe, secretary to the committee, and John K. Rabiej, chief of the Rules Committee Support Office of the Administrative Office of the United States Courts.

Representing the advisory committees at the meeting were:

Advisory Committee on Appellate Rules - Judge Kenneth F. Ripple, chair, and Professor Carol Ann Mooney, reporter;

Advisory Committee on Bankruptcy Rules - Judge Edward Leavy, chair, and Professor Alan N. Resnick, reporter;

Advisory Committee on Civil Rules - Judge Sam C. Pointer, Jr., chair, and Dean Edward H. Cooper, reporter;

Advisory Committee on Criminal Rules - Judge William Terrell Hodges, chair, and Professor David A. Schlueter, reporter; and

Advisory Committee on Evidence Rules - Judge Ralph K. Winter, Jr., chair, and Professor Margaret A. Berger, reporter.

Also participating in the meeting were: Joseph F. Spaniol, Jr. and Brian R. Garner, consultants to the committee; Mary P. Squiers, project director of the local rules project; William B. Eldridge, director of the Research Division of the Federal Judicial Center, and Judith A. McKenna of the division; and Paul A. Zingg, Jeffrey A. Hennemuth, and Patricia A. Channon from the Office of Judges Programs of the Administrative Office.

INTRODUCTION

Judge Keeton reported that he had testified on June 16, 1993, in support of the rulemaking process at oversight hearings conducted before the House Judiciary Subcommittee on Intellectual Property and Judicial Administration. He stated that all witnesses at the hearings, including those opposed to the Judiciary's civil rules package, had urged definitive Congressional action -- one way or the other -- to approve or reject, rather than delay or defer, the proposed amendments to the civil rules.

Judge Keeton also noted that Professor Wright had become president of the American Law Institute and had asked to be relieved of his duties as chair of the Style Subcommittee.

APPROVAL OF MINUTES OF LAST MEETING

The committee voted without objection to approve the minutes of the last meeting, held in Asheville, North Carolina in December 1992.

FAX FILING

Dean Coquillette reported that he had coordinated the responses of the advisory committees and their reporters to the fax filing guidelines proposed by the Court Administration and Case Management Committee. He stated that most of the committees objected to the guidelines because they would have the effect of modifying the federal rules without complying with the rules amendment process and soliciting appropriate input from bench and bar. He added that the Bankruptcy Advisory Committee, in particular, was flatly opposed to the guidelines on both substantive and procedural grounds.

Dean Coquillette further reported that Judge Parker, chairman of the Court Administration and Case Management Committee, had stated that he would be pleased to have the rules committees redraft the fax guidelines to make them consistent with the federal rules. Accordingly, Judge Keeton had prepared a quick redraft of the guidelines the night before the meeting with the expectation that: (1) the members could express their initial views on the guidelines and the redraft, and (2) the six reporters could consider these views and improve the document during a working lunch.

There followed a discussion on the merits of fax filing during which several members expressed the views that: (1) fax transmissions present a number of serious technological and administrative problems, and (2) the need for fax filing in general had not been demonstrated, since other means of prompt communication are available, such as express delivery services. It was pointed out, however, that the civil rules explicitly authorize fax filing in accordance with guidelines promulgated by the Judicial Conference. The Conference adopted limited, interim guidelines in 1991.

Mr. Wilson moved to have the committee reject the fax filing guidelines outright, rather than work to improve them. His motion died for lack of a second.

The reporters, consultants, and staff subsequently produced a redraft of the fax guidelines, pointing out, however, that they were merely accommodating the Court Administration and Case Management Committee and would not have drafted the guidelines the way that committee had. Dean Coquillette reported that some members of the ad hoc drafting group had doubted the wisdom of the whole enterprise because the proposed guidelines leave to local rule matters that should be decided on a national basis.

Judge Keeton recommended adoption of a resolution such as the following:

> The Standing Committee on Rules of Practice and Procedure recommends against adoption of the proposed Guidelines for Filing by Facsimile in their present form. The reporters for the rules committees attempted to draft an acceptable revision of the prepared draft. Having examined the report of the reporters, the standing committee is of the view that there are many issues that require careful consideration before approval of a revised draft could be recommended.
>
> We understand the existing guidelines adopted by the Judicial Conference to be as follows:
>
> [Here add a summary of the resolution]

Our consideration of this draft identified significant policy questions that need to be addressed, including the following:
[Here add a summary of the committee's concerns]

We recommend that the Judicial Conference not act before one or more of the committees have carefully considered these matters and presented recommendations to the Conference.

The committee adopted the resolution with one dissent,

The committee voted unanimously to send the redrafted fax guidelines to the Court Administration and Case Management Committee.

UNIFORM RULE PROVISIONS

Dean Coquillette presented three proposed common provisions for changes in each set of federal rules, dealing with: (1) authority of the Judicial Conference to promulgate technical and conforming amendments in the rules, (2) uniform local rule numbering, and (3) authority of a local court or judge to regulate local practice where there is no controlling law. (Agenda Item III)

Technical Changes

Dean Coquillette stated that the reporters had met at lunch and had removed virtually all remaining differences among the advisory committees on the proposed uniform rule.

Professor Resnick stated that the Advisory Committee on Bankruptcy Rules was unanimously opposed to the technical change rule because: (1) it is unnecessary, and (2) there is uncertainty as to exactly what constitutes a technical change.

The committee voted unanimously to approve in principle the reporters' draft.

Uniform Local Rule Numbering System

Dean Coquillette reported that there was no disagreement on the common rule that would require the courts to follow any uniform local rule numbering system promulgated by the Judicial Conference.

The committee voted unanimously to approve in principle the reporters' draft.

Regulation of Local Practice Where There is No Controlling Law

Mr. Perry moved to amend the February 1993 "Asheville Draft" by substituting the words "the alleged violator has been furnished actual notice of the requirement in a particular case" in the last line of the draft. The motion was approved by the committee on a vote of 7-3.

The committee voted unanimously to substitute the word "law" for the word "statutes."

The committee then approved in principle the proposed uniform rule by a vote of 8-4.

On Mr. Perry's motion, the committee voted 6-5 to add to the uniform rule the following additional sentence contained in the civil committee's draft: "A local rule imposing a requirement of form must not be enforced in a manner that causes a party to lose rights because of a negligent failure to comply with the request."

Publication of the Uniform Rules

The committee discussed whether the uniform rule amendments should be reviewed again by the respective advisory committees or should be sent out immediately for public comment as part of the next round of proposed amendments to the various sets of rules. Judge Keeton pointed out that there were no proposed amendments to the bankruptcy rules to which the uniform rules might be attached.

Judge Easterbrook moved to publish the uniform rule proposals in all five sets of rules and let the advisory committees review them later, after the public comments had been received. The motion was approved unanimously by the committee.

On Judge Easterbrook's motion, the committee voted unanimously to publish the uniform rules amendments immediately with a 6-month public comment period.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Ripple presented the report of the advisory committee, as set forth in his memorandum of May 28, 1993. (Agenda Item VIII) He stated that the advisory committee was presenting two sets of amendments. The first had been published for public comments and was now being presented by the committee for submission to the Judicial Conference. The second set of proposals was new, and the advisory committee was seeking the standing committee's approval to publish them for comments.

1. Amendments for adoption by the Judicial Conference

Number of copies

Judge Ripple stated that the first group of proposed changes in the appellate rules (Rules 3, 5, 5.1, 21, 25(e), 26.1, 27, 30, 31, and 35) governed the number of copies of various documents that counsel must file with the court of appeals. There was no objection from the members, and the committee agreed to change the word "shall" to "must" in these rules.

The committee further determined to make the change from "shall" to "must," wherever appropriate, throughout all the proposed amendments to the rules, in accordance with the convention established by the Style Subcommittee.

Reorganization of F.R.A.P. 48

Judge Ripple pointed out that the proposed change in Rule 48 was purely one of reorganization and had not been published for public comment. Rule 48, dealing with the scope and title of the rules, would be shifted to become a new Rule 1(c). It would also allow the committee to add future rules at the end of the F.R.A.P.

The committee voted unanimously to approve both the reorganization of the rules and the action of the advisory committee in not seeking public comment on the matter.

F.R.A.P. 9

The committee approved the proposed amendments to Rule 9, dealing with release in a criminal case, with a modification suggested by Judge Pointer that the word "Title" be eliminated on line 62.

Judge Pratt pointed out that the first sentence of Rule 9(a), which imposes requirements on district judges, belongs in the criminal rules, rather than the appellate rules. Judge Keeton stated that he was sympathetic to this view, but its implementation would require several other changes in the appellate rules. The committee thereupon voted to retain the language of Rule 9(a) in the appellate rules.

F.R.A.P. 25(a)

The proposed rule, which parallels similar revisions in the civil and bankruptcy rules, would prohibit a clerk from refusing to accept for filing any paper solely because it is not presented in proper form. Judge Pratt and Judge Sloviter expressed concern that the revised rule could increase paperwork burdens in clerks' offices. Mr. Perry and Mr. Sundberg, on the other hand, expressed strong support for the rule, stating that lawyers

should not have their papers rejected by clerks, especially where legal rights may be affected.

Judge Ripple stated that the key issue is whether a decision to reject a pleading may be made by a clerk or must be made by a judicial officer.

After changing the word "shall" to "must" on line 22, the committee approved the proposed amendments to Rule 25(a) by a vote of 9-2.

F.R.A.P. 25(d)

Justice Peterson moved to eliminate lines 33-36 of the proposed amendments to make them consistent with Rule 25(a). He stated that the language was surplus.

The committee voted unanimously to adopt the motion and approve the rule, as modified.

F.R.A.P. 28

Justice Peterson stated that the word "etc." should be deleted from line 35, for it has no place in the federal rules. Others agreed that it was very poor usage but had not caused any problems in practice. Moreover, problems might be created if it were changed at this point.

The amendments to Rule 28(a) and (g) were approved unanimously by the committee without change, other than to substitute "must" for "shall" on line 31.

F.R.A.P. 32

Judge Ripple reported that as a result of the public comments the advisory committee had made substantial changes in rule 32, dealing with the form of briefs, appendices, and other papers,

Judge Stotler and Keeton suggested an amendment to line 45, dealing with pro se parties. Judge Ripple accepted the amendment, which would insert the words "the filings of" before the words "pro se parties."

Judge Ripple stated that the advisory committee had struggled with the issue of typeface and was disappointed with the lack of comments from the bench and bar. He recommended that the rule be sent back for further public comment and that the Administrative Office take special steps to solicit the views of the publishing industry on the matter.

Judge Easterbrook gave an overview of the pertinent technical aspects of typeface as it related to length of briefs. He suggested that the committee might publish three options for consideration of the bench and bar -- the option recommended by a majority of the advisory committee (Draft No. 1), the option recommended by Judge Jolly and Mr. Munford of the advisory committee (Draft No. 2), and an option specifying a limit of 100,000 characters in a brief.

Mr. Perry suggested that the easiest and most reliable alternative would be for the rule to specify a limit of 65 characters per line. He added that the word "be" should be inserted on line 20 before the word "bound" in Draft No. 2.

Judge Easterbrook moved that the committee republish for comment the advisory committee's Draft No. 2, i.e., 300 words per page, but with deletion of the reference to the Administrative Office. He added that the committee note should state that the committee is contemplating a number of options and is seeking comments as to what is the best method for prescribing brief limits.

The committee approved the motion unanimously and authorized the advisory committee to rewrite the committee note and republish the entire Rule 32 for further public comment.

F.R.A.P. 33

The committee approved the rule, dealing with appeal conferences, after making the previously agreed upon change of "shall" to "must" on line 21.

F.R.A.P. 38

Judge Ripple stated that the revised rule requires the court to give notice before imposing sanctions for frivolous appeals. He noted that there are strong differences of opinion among circuit judges on sanctions, and the advisory committee was not attempting to address the case law on the subject.

Judge Sloviter recommended deletion of the requirement that the court itself notice the proposed imposition of sanctions. Judge Ripple accepted the recommendation and agreed to delete the words "from the court" on line 3 of the draft. Judge Sloviter also recommended inserting the words "a separately filed motion or" before the word "notice" on line 3. Accordingly, if sanctions are requested in a separately filed motion, the court need not give notice.

Judge Ripple accepted the recommendation and agreed to prepare appropriate amendments to the committee note.

F.R.A.P. 40 and 41(a)

Judge Pratt, seconded by Judge Ellis, moved to change the word "however" in line 5 to "but." There ensued a discussion regarding the acceptability of starting a sentence with the word "however" or the word "but." Following the discussion, the committee voted 6-5 to reject Judge Pratt's motion.

F.R.A.P. 41(b)

The committee approved without change, other than "shall" to "must" on line 32, the proposed amendments to Rule 41(b), dealing with stay of the mandate pending a petition for certiorari to the Supreme Court.

F.R.A.P. 48

The committee approved without change the proposed new Rule 48, dealing with masters in the courts of appeal.

2. Rules submitted for public comment

F.R.A.P. 4

Professor Mooney stated that the advisory committee wished to incorporate two changes in language to conform Rule 4 to the revised language of Bankruptcy Rule 8002. (See later discussion regarding the bankruptcy rules.) On line 17, the committee would change the word "within" to "no later than," and on line 22, it would delete the words "the date of."

Professor Resnick stated that the Advisory Committee on Bankruptcy Rules would like to add the words "a notice or" to line 28 of revised Bankruptcy Rule 8002 in order to conform the bankruptcy rule to line 28 of F.R.A.P. 4(a)(4).

As a result of the above actions, the bankruptcy rule and appellate rule would have the same language.

Judge Sloviter, seconded by Judge Easterbrook, moved to approve for publication these changes in the appellate and bankruptcy rules. The motion was approved unanimously by the committee.

F.R.A.P. 8

The committee approved for publication the proposed technical change in Rule 8(c) and noted that a period was missing from the end of the committee note.

F.R.A.P. 10

The committee approved for publication the proposed amendments to Rule 10(b)(1), which were motivated by the bankruptcy advisory committee and which conform to the changes being made in F.R.A.P. 4(a)(4).

F.R.A.P. 21

Judge Ripple noted that Rule 21, dealing with mandamus, was back before the standing committee for a second look following a lengthy discussion at the December 1992 meeting of the advisory committee which focused on the issue of how to treat the district judge whose actions are being questioned.

Justice Peterson suggested that on line 9 the words "an information copy to the trial judge" be substituted for "an information copy to the clerk of the trial court for the information of the trial judge." Judge Ripple accepted the suggestion. On line 44, the word "shall" was changed to "must."

F.R.A.P. 25

The committee approved for publication without change the proposed amendments to Rule 25, dealing with filing and service.

F.R.A.P. 32, 35, and 41

The proposed amendments in these three rules address the issue of whether a suggestion for rehearing in banc should be treated like a petition for a panel rehearing. They would suspend the final judgment and extend the period for filing a petition for certiorari. It was later determined not to publish the proposed amendments to Rules 35 and 41.

Judge Easterbrook recommended changing the word "should" to "may" on line 5 of Rule 35. Judge Ripple accepted the recommendation.

F.R.A.P. 47 and 49

These rules were considered by the committee during the discussion on uniform rule provisions.

The committee then approved for publication all the rules in Part D of the advisory committee's report, as amended.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Leavy and Professor Resnick presented the report of the advisory committee, as set forth in Judge Leavy's memoranda of May 7, 1993 and May 10, 1993. (Agenda Item V) They recommended that the standing committee approve the proposed amendments to Rule 8002(b), dealing with the time for filing a notice of appeal, and a related amendments to Rule 8006, dealing with the record and issues on appeal.

Justice Peterson recommended that the committee note to Rule 8002 be clarified on page 6, line 36, by adding after the word "party" the words "who has previously filed a notice of appeal." Judge Leavy accepted the recommendation.

Professor Resnick stated that Rule 8002(b) is designed to conform with Federal Rule of Appellate Procedure 4(a)(4) and mirrors its language exactly. He added, however, that a stylistic change had been suggested for Rule 8002(b) to insert the words "the date of" on line 3 before the words "entry of the order." If so amended, the rule would read, "the time for appeal . . . runs from the date of entry of the order."

The members and reporters discussed whether the words "the date of" should be used in Rule 8002 or anywhere else in the rules. They agreed that whatever usage is selected must result in a consistent convention throughout the rules. Professor Resnick pointed out that the Civil Rules do not use "date of." Accordingly, he agreed not to add these words on line 3 of the draft. At Judge Keeton's suggestion, Professor Resnick further agreed, for the sake of consistency, to eliminate the words "the date of" on line 23 of the draft.

Judge Pointer suggested that on lines 13-14 the rule should substitute the words "no later than 10 days" for the words "within 10 days." Professor Resnick pointed out that the language of the bankruptcy rule was taken directly from F.R.A.P. 4(a)(4)(f). Judge Keeton suggested that the bankruptcy rule should be changed to "no later than," since it is preferable usage, even though it would not be consistent with the language of the appellate rule. (See earlier discussion regarding the appellate rules.)

Professor Resnick noted that there was an important difference between Bankruptcy Rule 8002 and F.R.A.P. Rule 4. The bankruptcy rule specifies that the time for filing a notice of appeal is extended when certain motions are timely filed, while the appellate rule extends the time if these motions are timely served. He emphasized that there is a special need for certainty and speed in bankruptcy. The Advisory Committee on Bankruptcy Rules therefore recommended that filing, rather than service, be used as the trigger date for extending the time for a notice to appeal. Filing is preferable because it is dispositive and easy for parties to determine from the court's docket.

Professor Resnick stated that the advisory committee believes that the most appropriate way to achieve consistency in this matter would be to amend Fed.R.Civ.P. 50, 52, and 59 to prescribe filing, rather than service, as the jurisdictional trigger. Since the bankruptcy rules incorporate Rules 52 and 59 by reference, there would be no need to change the bankruptcy rules.

During the discussion that followed, the members agreed that there should be consistency throughout the rules and that "filed" was preferable both to "served" and to "served and filed." Professor Resnick agreed to add a sentence to the committee note to Rule 8002 regarding the requirement of filing. He later presented the following additional sentence which was approved by the committee:

> The reason for providing that the motion extends the time to appeal only if it is filed within the 10-day period is to enable the court and the parties in interest to determine solely from the court records whether the time to appeal has been extended by a motion for relieve under Rule 9024.

The committee voted unanimously to approve and send to the Judicial Conference the proposed amendments to Bankruptcy Rules 8002(b) and 8006, and the accompanying committee notes, as modified above.

Professor Resnick also pointed out that the advisory committee had voted unanimously against the proposed uniform rule that would allow the Judicial Conference to make technical amendments to the Federal Rules of Bankruptcy Procedure without sending them to the Supreme Court and the Congress. (New Rule 9037)

The proposed amendments to Rules 8010, 9029 and 9037 were considered by the committee during the discussion on uniform rule provisions.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Pointer presented the report of the advisory committee, as set forth in his memorandum of May 17, 1993. (Agenda Item XI) He recommended that the standing committee approve for public comment amendments to Rules 26(c), 43(a), 50(c)(2), 52(b), 59(b)-(e), 83, and 84.

Judge Pointer reported that the advisory committee was not seeking approval of the proposed amendments to Rule 23 at this time.

Fed.R.Civ.P. 26(c)

Judge Pointer corrected a typo on line 31 and deleted the words "by the court."

The committee voted 8-2 to approve for publication amendments to Rule 26(c), dealing with protective orders. It also agreed to defer to its advisory committee the date of publication.

Fed.R.Civ.P. 43

The amendments to the rule, authorizing testimony in open court by contemporaneous transmission from a different location, were approved unanimously for publication without change.

Fed.R.Civ.P. 50, 51, and 59

The amendments to the three rules would make uniform the time for making a post-trial motion. Judge Pointer pointed out that the advisory committee draft specified that a timely motion must be both "served and filed. " But in light of the committee's discussion earlier in the meeting regarding the appellate and bankruptcy rules, the advisory committee would substitute "filed" for "served and filed." He added that the committee notes would be modified and would highlight the fact that the rules elsewhere require that papers that are filed must also be served.

Judge Pointer stated that it would also be necessary to make a change in Rule 50(b) from "service and filing" to "filing." Moreover, the advisory committee would proceed to examine the body of civil rules generally to see whether further conforming amendments would be necessary. Any further changes could be included in the same package for publication.

Judge Pointer agreed to delete the dash on line 14 and the word "even" on line 15, regarding Rule 59(d).

The committee voted unanimously to approve publication of the amendments to Rules 50(b), 50(c), 52, and 59.

Fed.R.Civ.P. 83 and 84

The rules were considered by the committee during the discussions of uniform rule provisions.

Judge Pointer pointed out some differences in language between the provisions of Rule 83 and 84 and provisions of the other uniform rules discussed above.

The committee voted unanimously to authorize publication of the proposed amendments to Rules 83 and 84.

Timing of Publication

Judge Pointer expressed concern over the timing of publishing the proposed amendments to the civil rules. He stated that the advisory committee preferred not to publish any additional amendments as long as extensive and controversial amendments were still pending before the Congress. In addition, the amendments before the Congress include changes to Rule 50 and 52, which are now the subject of further amendments.

Judge Keeton moved to authorize all the advisory committees to publish their respective proposed amendments as they see fit. They might determine to publish them early, or include them in a package with other rules for publication after January 1, 1994. His motion was approved without objection.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Hodges presented the report of the advisory committee, as set forth in his memorandum of May 14, 1993. (Agenda Item VI) He stated that the advisory committee was presenting two sets of amendments. The first had been published for public comments and was now being presented by the committee for submission to the Judicial Conference. The second set of proposals was new, and the advisory committee was seeking the standing committee's approval to publish them for comments.

1. Amendments for adoption by the Judicial Conference

Fed.R.Crim.P. 16

Judge Hodges stated that the comments received from the public had been favorable to the proposed amendments to Rule 16(a)(1)(A), but some commentators had complained that the revisions to Rule 16 simply did not go far enough in permitting discovery in criminal cases.

The committee approved the amendments to Rule 16 without change.

Fed.R.Crim.P. 29

The committee approved the amendments to the rule, which would allow a district judge to reserve judgment on a motion for judgment of acquittal.

Fed.R.Crim.P. 32

Judge Hodges reported that the advisory committee had received a substantial number of comments on the proposed amendments to Rule 32 and had given careful consideration to a letter submitted by the chairman of the Criminal Law Committee opposing a number of provisions in the proposed amendments. He stated that the advisory committee had made several changes in the rules as a result of the letter, but had rejected some of its suggestions.

Judge Hodges summarized each of the advisory committee's changes made as a result of the public comments, as set forth at pages 2-4 of his memorandum of May 14, 1993. Most significantly, the advisory committee had agreed to eliminate the 70-day time limit between a finding of guilt and the imposition of sentence. This action was taken largely to accommodate the concerns of probation officers, who had complained that the proposed period is too restrictive for their offices. Accordingly, the advisory committee revised the rule after the public comment period to specify simply that sentence should be imposed "without unnecessary delay."

Judge Hodges pointed out that the Criminal Law Committee and other commentators had objected to the new presumption that a probation office's recommendations on sentencing must be disclosed, unless the court orders otherwise. They urged reversal of the presumption, so that sentencing recommendations must be withheld, unless the court orders otherwise. The advisory committee rejected the recommendation.

Mr. Pauley reported that the Government had no objection to the committee's proposed presumption in favor of disclosure since the recommendations of the probation office are limited by the reality of the sentencing guidelines.

Judge Pointer pointed out that the word "withhold" on line 99 was unclear. Judge Sloviter and Judge Keeton recommended that the sentence beginning on line 95 be amended to read: "The court may, by local rule or in individual cases, direct the probation officer not to disclose the probation officer's recommendation, if any, on the sentence." Judge Pratt moved the change, and it was approved by the committee without objection.

Judge Bertelsman stated that the meeting of the probation officer with counsel is essential, since it can avert sentencing problems and lengthy sentencing hearings. He suggested that the rule have more teeth and moved that it should specify on line 110 that "the court may order" the defendant and counsel to meet with the probation officer. The motion died for lack of a second.

Judge Hodges accepted Judge Keeton's suggested improvements for pages 35-36 of the committee note. As modified during committee discussion, the revised language reads as follows:

> Under that new provision (changing former subdivision (c)(3)(A), the court has the discretion (in an individual case or in accordance with a local rule) to direct the probation officer to withhold any final recommendation concerning the sentence. Otherwise, the recommendation, if any, is subject to disclosure.

Mr. Garner and Professor Cooper recommended that the words "advanced or continued" on line 7 be changed to "shortened or lengthened," since technically one does not "continue" a time limit. Judge Hodges accepted the change.

Victim Allocution

Mr. Pauley reported that the Department of Justice supported the careful efforts of the advisory committee in redrafting Rule 32. He pointed out, however, that approval of the rule might be jeopardized because the Congress was likely to enact a limited right of victim allocution in the pending Violence Against Women Act. The legislation would give victims of violent crimes and sex offenses the right to address the court. It had been drafted by the Department of Justice and approved unanimously by the Senate Judiciary Committee.

Mr. Pauley asserted that the committee's rewrite of Rule 32 could, in effect, repeal a future act of the Congress that would be enacted before the effective date for the final rules amendments. This might not be an appropriate action for the rules committee to take. Therefore, the Judicial Conference and the Supreme Court should be alerted to this serious political problem.

Mr. Pauley also enunciated the merits of victim allocution and stated that victims feel slighted in the criminal justice system. Moreover, the personal appearance of a victim may influence the judge in sentencing. Accordingly, he proposed that the committee add a right of victim allocution to Rule 32. He suggested that the best fit would be between lines 194 and 195.

Judge Hodges reported that the advisory committee had considered the matter fully at its last meeting and had decided to adhere to its consistent position against mandating any victim allocution in the rule. The committee's views were articulated in the last paragraph of the committee note to Rule 32.

Several of the members stated that it would be a mistake to anticipate what the Congress would do with the pending legislation and recommended that committee action await final action by the Congress. The committee also discussed: (1) whether a victim allocution provision would necessarily invoke matters of substance, rather than procedure, and (2) whether it should be enacted by statute, rather than by rule. Mr. Wilson and Mr. Perry added that they believed in the right of victim allocution, but agreed that the committee should not mandate it in the rule at this time.

Judge Keeton and Judge Hodges stated that victim allocution was an important and sensitive issue and the committee's position should be communicated explicitly to both the Judicial Conference and the Supreme Court.

Mr. Pauley moved to include a right of victim allocution in Rule 32, based on the merits of the issue, with politics as a lesser consideration. The motion failed by a vote of 2-9.

Judge Sloviter, seconded by Professor Baker, moved to delete all but the first sentence of the last paragraph of the committee note. The motion carried by a vote of 7-4. Mr. Wilson moved to delete the entire paragraph, but the motion failed for lack of a second.

Fed.R.Crim.P. 40

The committee approved without change the proposed amendment to Rule 40, clarifying the authority of a magistrate judge to set conditions of release in cases where a probationer or supervised releasee is arrested in a district other than the one having jurisdiction.

Judge Keeton called for the vote on approving the entire package of criminal rules amendments and sending them to the Judicial Conference. The vote was unanimous to approve the package.

2. Rules submitted for public comment

Fed.R.Crim.P. 5

The committee approved for publication the advisory committee's proposed amendments that would carve out an exception to Rule 5's procedural requirements for Unlawful Flight to Avoid Prosecution cases. Judge Hodges accepted Mr. Garner's suggestion that on lines 5-6 the words "in the event that" be changed to the word "if."

Fed.R.Crim.P. 10

The committee approved for publication the proposed amendments to Rule 10. They would authorize video teleconferencing if the defendant waives the right to be arraigned in open court.

Mr. Wilson moved to eliminate the word "technology" from line 11 of the rule. The motion was approved with one dissent.

Fed.R.Crim.P. 43

Judge Pointer suggested that there was no parallelism in the structure of the five subdivisions of Rule 43(c) and that there were several inconsistencies in the rule. In light of Judge Pointer's suggestion, Judge Hodges subsequently prepared and circulated a revised draft of Rule 43(c).

The committee thereupon approved the following language proposed by Judge Hodges:

(c) PRESENCE NOT REQUIRED. A defendant need not be present:

(1) when represented by counsel and the defendant is an organization, as defined in 18 U.S.C. § 18;
(2) when the offense is punishable by fine or by imprisonment for not more than one year or both, the court, with the written consent of the defendant, may permit arraignment, plea, trial, and imposition of sentence in the defendant's absence;
(3) when the proceeding involves only a conference or hearing upon a question of law;
(4) when the proceeding is a pretrial session in which the defendant can participate through video teleconferencing and waives the right to be present in court; or
(5) when the proceeding involves a correction of sentence under Rule 35.

Fed.R.Crim.P. 53

The amended rule, which would allow photographs and broadcasting in the courtroom under guidelines of the Judicial Conference, was approved unanimously by the committee without change.

The committee voted unanimously to approve for publication the proposed amendments to Rules 5, 10, 43, and 53, as modified.

REPORT OF THE ADVISORY COMMITTEE ON THE RULES OF EVIDENCE

Judge Winter reported that the new advisory committee had recast the proposed Rule 412 that it had inherited as its first order of business. The committee's redraft was set forth in a draft dated May 24, 1993. (Agenda Item VII) He summarized the provisions of the draft and offered some stylistic improvements as oral amendments to the advisory committee's report.

Judge Leavy pointed out that the amended Rule 412, as drafted, would cause problems for a prosecutor who tries to introduce evidence of prior sexual acts by the defendant with the victim, such as in a case of multiple child molestation. The evidence of prior acts would be offered to prove that the defendant had engaged in prior sexual misconduct with the victim.

The committee discussed this problem, and the members suggested a number of refinements in the rule. It was agreed that Judge Winter and Dean Berger would take these suggestions into account and prepare a revised draft of the rule for consideration by the committee later in the meeting.

Judge Winter subsequently circulated a new draft of Rule 412, which formed the basis of the committee's further deliberations.

Judge Pratt moved to eliminate from (b)(2) of the redraft the words "evidence" through "victim," but the motion died for lack of a second.

Judge Pratt suggested that the words "an alleged victim's" be inserted before the word "reputation" on line 37. Judge Winter accepted the change.

Professor Schlueter recommended that in line 1 the rule should be revised to begin with the following words: "The following evidence is not admissible." He suggested that the same formulation should also appear on lines 14-15, i.e., "the following evidence is admissible." Judge Winter accepted the changes.

Judge Winter also agreed: (1) to take out the reference to Rule 404(b) on line 27, (2) to relocate the word "alleged" in the heading of the rule from before the word "Sexual" to before the word "Victim's," (3) to change the word "authorize" to "require" on line 49, and (4) to change punctuation on lines 26 and 52.

Judge Stotler moved approval of the rule, as revised. The committee thereupon voted unanimously to approve Judge Winter's revised draft and submit it to the Judicial Conference.

REPORT OF THE SUBCOMMITTEE ON LONG RANGE PLANNING

Professor Baker presented the report of the subcommittee. (Agenda Item IX)

The committee approved the recommendations in the subcommittee's report:

1. That the new Advisory Committee on the Rules of Evidence review the Report of the Carnegie Commission on Science, Technology, and Government, Science and Technology in Judicial Decision Making -- Creating Opportunities and Meeting Challenges (March 1993) and report back with recommendations for rules or procedures, if appropriate. Additionally, that the Advisory Committee suggest how the Standing Committee, in turn, might respond to the Carnegie Commission Report more generally within the context of the committee structure of the Judicial Conference.

2. That the Advisory Committee on the rules of Evidence coordinate a joint effort among the various Advisory Committees to study Judge Keeton's concept of "Rules of Trial Management."

3. That the subcommittee be authorized to undertake a thorough evaluation of the federal court rulemaking procedures that will include: (1) a descriptive narrative of existing procedures; (2) a summary of the extant criticisms of the existing procedures; and (3) an assessment of the existing procedures and the criticisms, with recommendations how federal court rulemaking might be improved.

Judge Keeton mentioned that some criticism had been voiced during the June 16, 1993 oversight hearings regarding the role of the Supreme Court and the degree of judge control of the rulemaking process.

Judge Keeton pointed out that the committee needed to respond to the Judicial Conference's Long Range Planning Committee on the issues of: (1) capping the size of the article III bench, and (2) the appropriate mission of the federal courts. There was a consensus among the members that the institutional expertise of the rules committees was generally limited to rulemaking. Accordingly, while the members as individuals could surely voice their own views on these two important issues, the rules committees were simply not in a position to take an institutional position on the issues submitted by the Long Range Planning Committee.

Judge Sloviter moved that the committee take no position as a committee on the issue of capping the size of the article III judiciary. The committee approved the motion with one dissent.

Judge Keeton stated that he had prepared the following draft response, which he proposed to send to the Long Range Planning Committee:

> The Standing Committee on Rules of Practice and Procedure has considered whether a cap or limitation on the number of Article III judges would have substantial effects on the rules enabling Act process or the content of the federal rules that ought to be taken into account in formulating a Judicial Conference position regarding the size of the judiciary. It is the sense of this Committee that the answer is no.
>
> Many of the specific proposals for amendment of federal rules recommended in recent years and now under consideration respond to the growing numbers and complexity of cases and the growing burden on individual judges at both the trial and appellate levels. Thus, the scope of the jurisdiction and the extent of the workload of courts do bear upon the work of this Committee. It is the view of the Committee, however, that rules of procedure can be adapted to needs and that decisions on more fundamental questions about the future of the federal judiciary should not be driven by concerns about procedural rules and rulemaking.
>
> With respect to the more fundamental question, the views of individual members of this Committee vary widely and, we believe, are not in any way materially different from the differences among federal judges generally. Many of us have expressed our views to your Committee individually. In these circumstances, we conclude that we should not take a position on this matter as a committee.

MISSION AND PROCEDURES OF THE RULES COMMITTEES

The standing committee members and the chairs of the advisory committees engaged in an extended discussion of the role and procedures of the rules committees.

Judge Ripple expressed concern that: (1) the Department of Justice representatives had injected partisanship into the rules deliberations and tended to represent their client, rather than the rulemaking process, (2) the terms of rules committee members was too short, resulting in a loss of institutional memory to the committees, and (3) the membership of the committees may not be sufficiently representative of the legal community.

Judge Sloviter suggested reconsideration of the role of the liaison members of the standing committee to the advisory committees.

Several members voiced the view that the standing committee generally spent too much time at its meetings on redrafting the language of proposed rules amendments submitted by the advisory committees. One member asserted that the committee should spend less time on "minutiae" and more on policy issues.

Some members suggested that the standing committee should become more involved in improving the substance and language of proposed amendments before the committee meeting. They could communicate their concerns to the reporter and chair of the appropriate advisory committee. In this way they could mutually resolve any problems by letter or telephone and avoid taking time on these matters at the standing committee meeting.

Judge Keeton made four general observations:

1. The standing committee, which now operates largely in a reactive mode, should be more pro-active.
2. The committees should engage in more short-term and long-range planning.
3. It is difficult to separate substance from style. Thus, drafting in a large group can be beneficial, since it provides a wider range of viewpoints and ultimately produces a better product.
4. The committees need to establish new time schedules for considering proposed amendments to the rules.

Several members suggested rethinking the length of time required for public comment on proposed amendments in an effort to expedite the rules process.

Judge Winter asserted that the rapid rotation of members of Judicial Conference committees was a serious problem. Several other members agreed with him.

Several members stated that there are simply too many changes and too frequent changes in the rules.

REPORT OF THE STYLE SUBCOMMITTEE

Judge Pratt reported that the Advisory Committee on Civil Rules had completed its review of the work of the Style Subcommittee. The civil rules amendments, thus, are back before the Style Subcommittee for further action. He further reported that Mr. Garner might soon have ready the redraft of the appellate rules. After completion of

the appellate rules, the subcommittee will turn its attention to the criminal rules, then the bankruptcy rules, and maybe the evidence rules.

Professor Wright stated that intense efforts have been devoted to style revision and that many thanks are due to Judge Pratt and to everyone else who had worked so hard on the project.

Judge Pointer suggested that the public comment period for the style revisions to the civil rules should be nine months or a year.

Judge Keeton asked the Administrative Office to send copies of the style revisions to all members of the civil advisory committee in time for consideration at their next meeting in October.

THANKS TO RETIRING COMMITTEE CHAIRS

The committee extended its profound gratitude to Judges Keeton, Ripple, Hodges, Pointer, and Leavy for their enormous contributions to the rules process as committee chairmen during the last three years, as committee members for additional years, and in other capacities in support of the rules program.

THANKS TO THE STAFF

Judge Keeton thanked the staff for their "hard work and exceptional competence."

NEXT MEETING

The committee voted to hold its next meeting in Arizona on June 13-15, 1994. The staff was asked to make appropriate arrangements.

Respectfully submitted,

Peter G. McCabe
Secretary

AGENDA ITEM - 3
Tucson, Arizona
January 12-15, 1994

L. RALPH MECHAM
DIRECTOR

CLARENCE A. LEE, JR.
ASSOCIATE DIRECTOR

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS
WASHINGTON, D.C. 20544

JOHN K. RABIEJ
CHIEF, RULES COMMITTEE
SUPPORT OFFICE

December 14, 1993

MEMORANDUM TO MEMBERS OF THE STANDING COMMITTEE

SUBJECT: Agenda Item Regarding Recent Amendments

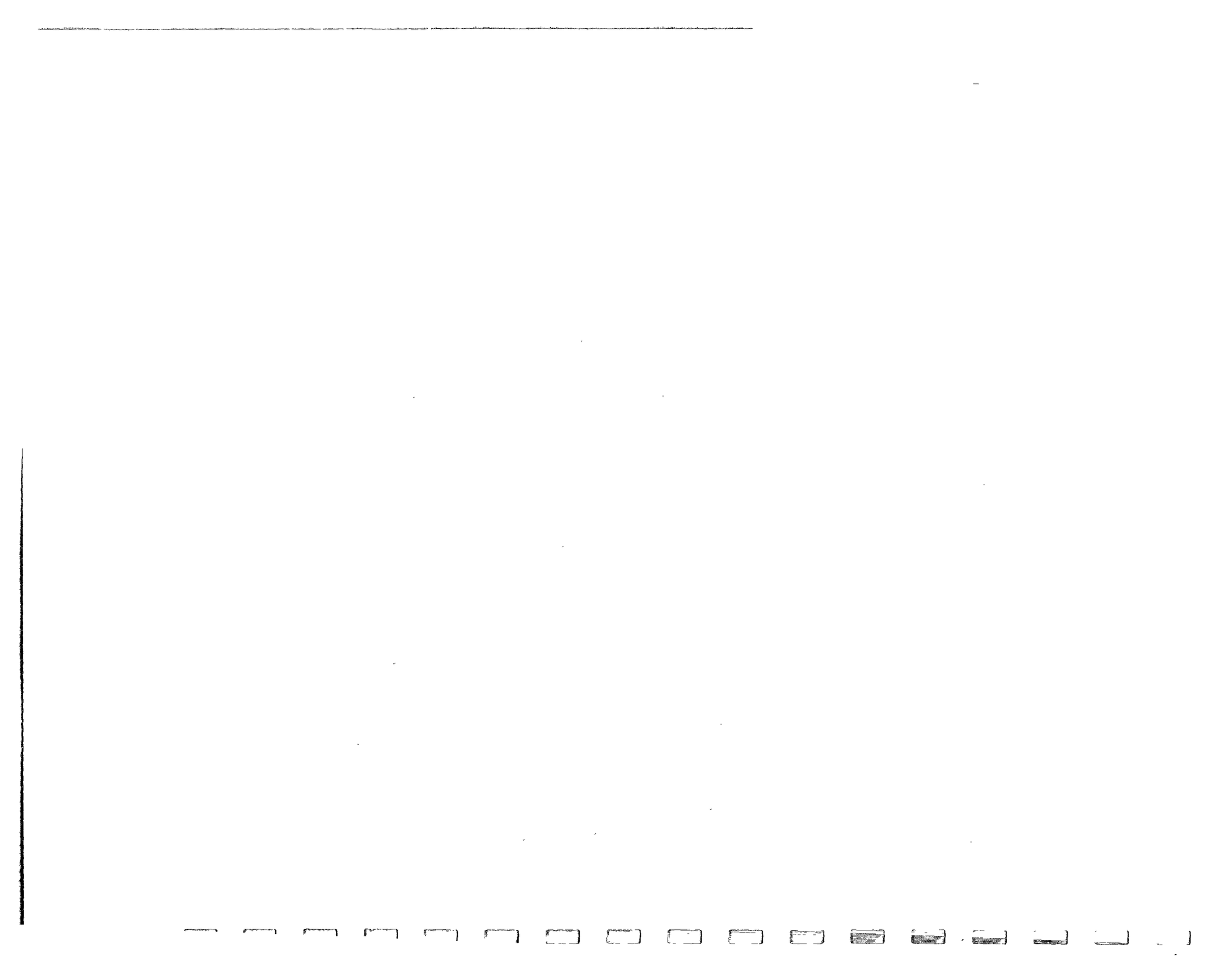
Congress failed to take action before adjournment to reject or modify any rule amendment that was approved by the Supreme Court on April 22, 1993. All the amendments became effective on December 1, 1993. The courts received timely notification of the amendments and received an analysis of the amendments to the civil rules prepared by Judge Patrick E. Higginbotham and Dean Edward H. Cooper. The analysis has been well received and verbatim copies have appeared in various local and national legal periodicals.

The attached memorandum of November 29, 1993, briefly recounts Congressional action affecting the rules, including the rules of evidence. Two articles are also included that describe the last minute Congressional activity and forecast the possibility of future legislation affecting the recently effective civil rule amendments.

Copies of H.R. 2814, the "Civil Rules Amendments Act of 1993," and amendments to the Federal Rules of Evidence contained in the Senate passed Crime Bill are attached. Neither bill was passed by both Houses of Congress before adjournment. Correspondence from Judge Stotler advising key members of Congress of the status and views of the Rules Committees regarding legislation affecting the rules is also included for your information.

John K. Rabiej

Attachments



L. RALPH MECHAM
DIRECTOR

JAMES E. MACKLIN, JR.
DEPUTY DIRECTOR

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

November 29, 1993

MEMORANDUM TO JUDGE ALICEMARIE H. STOTLER

SUBJECT: Report on the 103d Congress

I am writing to report on the legislative actions regarding the Civil, Criminal, and Evidence Rules completed in the first session of the 103d Congress.

The Senate did not pass H.R. 2814, the "Civil Rules Amendments Act of 1993." The courts have been advised that all the rules amendments approved by the Supreme Court on April 22, 1993, will be effective on December 1, 1993.

The Senate passed S. 1607, the "Violent Crime Control and Law Enforcement Act of 1993." A major part of the omnibus bill consisted of the Violence Against Women Act. The House did not pass the omnibus crime bill before adjourning. But it did pass H.R. 1133, its version of the Violence Against Women Act.

The Senate-passed Violence Against Women Act, which was in the omnibus crime bill, contained many provisions affecting the federal rules. As you know, we have been in close contact with the staff of the Senate and House and have advised them of the Rules Committees' positions on many occasions in writing and by telephone. We are pleased to report to you that no provision pertaining to the rules was included in the House-passed Violence Against Women Act. House-Senate conferences are likely to be held on the two bills next year.

During the House consideration of the proposed amendment to Criminal Rule 32 on victim allocution, Congressman Schumer agreed to delete the provision from the Violence Against Women Act, but stated that his Subcommittee on Crime would hold a hearing on it next year. Congressman Hughes also stated that he expects to hold a hearing on the provision. We have communicated the position of the Standing Rules Committee on this issue, i.e. oppose a general amendment of Rule 32, but would defer to Congress if it wishes to provide for allocution for certain types of offenses by enacting title 18 provisions.

The following rules amendments were proposed in the Senate-passed Violence Against Women Act, but rejected by the House. They may be considered in the next session of Congress. Each of these proposals has been addressed in letters submitted by us on

behalf of the Rules Committees to members of Congress. The Senate-passed crime bill:

(1) Amends Criminal Rule 24(b) to equalize the number of peremptory challenges to juror selections in felonies;

(2) Amends Criminal Rule 32 to require allocution at sentencing proceedings of victims of sexual offenses;

(3) Amends Evidence Rule 412 and adds new Evidence Rules 412A and 412B;

(4) Prescribes three new Evidence Rules (Evidence Rules 413-415) that would permit the introduction of evidence of past actions of a defendant charged with child molestation or a sexual abuse offense to prove that the defendant acted in conformity with them;

(5) Adds another new Evidence Rule 413 prohibiting introduction of a victim's clothing to show that the victim provoked the offense;

(6) Adds another new Evidence Rule 414 prohibiting introduction of evidence to show victim's provocation in a sexual abuse case;

(7) Requires the Judicial Conference to recommend amendments to Evidence Rule 404 after six-months; and

(8) Requires the Judicial Conference to study and make recommendations in six months on the advisability of prescribing federal rules governing the code of conduct of attorneys practicing in the federal courts.

The action of the House in passing its version of the Violence Against Women Act is a hopeful sign that its position will be maintained in conference. We will continue to monitor developments closely and advise you immediately of any action.

A future attempt, if any, to modify the amendments to Civil Rule 26 would require that new legislation be introduced in the next session of Congress. If a bill is introduced, subcommittee and committee hearings would be scheduled and held in both the House and Senate. Hopefully by that time, the courts and the bar would have acquired sufficient experience with the amended rule to dispel any concerns with it.

John K. Rabiej

cc: Advisory Committee Chairs and Reporters

Daily Report For Executives

November 26, 1993, Friday

1993 DER 226 d21

HEADLINE: Federal Courts, EFFORTS TO AMEND DISCOVERY BILL BREAK DOWN AS DEADLINE APPROACHES

BODY:

Any hope that controversial amendments to the federal civil discovery rules will not take effect as scheduled Dec. 1, died when the Senate recessed Nov. 24 without approving legislation which would have rescinded some of the new provisions.

As the dust settles on this legislative session, the reasons for Congress' inability to take action to stop the rules' implementation are becoming clearer.

Although the House of Representatives passed HR 2814, the Civil Rules Amendment Act of 1993, which would have rescinded the voluntary disclosure provisions of proposed Fed.R.Civ.P. 26(a)(1), the bill never reached the Senate floor. If both houses fail to pass the bill before Dec. 1, the amendments to Rule 26 and to other civil procedure rules will go into effect automatically.

According to a spokesperson for Sen. Charles Grassley (R-Iowa), the bill failed to be introduced for a Senate vote because no agreement could be reached on two issues, both raised in the final days before recess: whether a cap placed on the number of depositions and interrogatories by proposed amendments to Rules 30, 31, and 33 should be retained, and whether to extend for another six months the time Congress has to act on the proposed rule amendments.

Grassley agreed to increasing the number of depositions and interrogatories permitted, but unexpected, last-minute opposition was voiced by Sen. Howard Metzenbaum (D-Ohio), who was moved by concerns expressed by civil rights litigants and public interest groups that opposed any limitations on the discovery. Metzenbaum proposed legislation which would have extended for six months the deadline for Congressional action. Grassley did not support a proposed six-month extension for congressional action.

Voluntary Disclosure

The proposed amendment to Fed.R. Civ.P. 26(a)(1) would require parties to disclose, without waiting for a discovery request, the names and addresses of all persons with discoverable information "relevant to disputed facts alleged with particularity in the pleadings." Proposed amendments to other discovery rules would limit depositions to 10 per side and interrogatories to 25 questions.

Rule 26(a)(1), as proposed, engendered widespread criticism. In response to concerns raised by a spectrum of interests, the House of Representatives passed HR 2814, which would have scrapped the voluntary disclosure provision.

The House bill, however, did not change the presumptive limits on depositions and interrogatories as set forth in proposed amendments to Fed.R.Civ.P. 30, 31, and 33.

Grassley's Position

The Senate held a hearing on the proposed amendments to the civil rules on July 28, but did not introduce a bill of its own; the House bill was thought to be non-controversial and would pass in the Senate, according to Grassley's office. But on Nov. 19--just days before the Senate was scheduled to recess--Sen. Howell Heflin (D-Ala), chairman of the subcommittee on Courts and Administrative Procedure of the Senate Judiciary Committee, floated, for the first time, a proposal to amend HR 2814 by deleting entirely the caps on interrogatories and depositions.

Grassley rejected the idea of completely eliminating the caps. On Nov. 20, Heflin offered another proposal: the number of depositions permitted by the rules would be doubled--to 20 per side--and the number of interrogatories allowed would be raised from 25 to 35.

Grassley felt that deleting the mandatory disclosure provisions of Rule 26(a)(1) enjoyed broad support. He did not want to "hold hostage" the rescission of Rule 26(a)(1), and agreed, "with some reluctance" to raising the limits in Rules 30, 31, and 33 in order to ensure the passage of HR 2814, a Grassley aide said.

Later Nov. 20, Grassley told Heflin and Sen. Joseph Biden (D-Del), chairman of the Senate Judiciary Committee, that he was agreeable to an increase in the caps. But late that afternoon, he learned that Metzenbaum would only support a bill in which there were no caps on the number of depositions and interrogatories allowed.

On Nov. 22, lobbyists suggested deferring the effective date of the proposed amendments to the civil rules for six months. That delay, according to Grassley's spokesperson, was not acceptable, and in any event it became a moot point: The House of Representatives went out of session for the rest of the year. The only realistic scenario for the passage of HR 2814 would have required the Senate to approve the bill as passed by the House. That did not happen before the Senate adjourned on Nov. 24.

Metzenbaum's Concerns

A member of Metzenbaum's staff told BNA that the senator's concern stemmed from the lack of debate in the Senate over the provisions of HR 2814. Because the bill never went through the committee process in the Senate, the staffer explained, the views of those opposing the limitations on deposition and interrogatories were never fully aired.

Groups representing civil rights litigants--among them, the Legal Defense and Education Fund of the NAACP, the ACLU, and the Woman's Legal Defense Fund--told Metzenbaum that they were opposed to any limitations on interrogatories and depositions. Those groups wanted an opportunity to be heard by the Senate before any legislation was voted on, according to Metzenbaum's staffer.

To allow those views to be aired, the staffer explained, Metzenbaum proposed introducing legislation which would extend the time Congress had to act on the proposed amendments to the federal rules. An additional six months, Metzenbaum believed, would enable those groups to express their views for the Senate's consideration.

According to Metzenbaum's staff person, the failure to pass HR 2814 means that all groups dissatisfied with the changes proposed by the amendments to the civil rules may have a chance to revisit the issue. The rules will automatically take effect on Dec. 1, but, the staffer said, it is possible that change will be implemented either through the legislative process or by working in conjunction with the Rules Committee of the Judicial Conference.

Bill to Stop Change Dies

New Discovery Rules Take Effect

By Randall Samborn
National Law Journal Staff Reporter

A BILL IN Congress that would eliminate the radical mandatory-disclosure provision from amended federal court rules taking effect Dec. 1 died unexpectedly in the Senate just before the Thanksgiving break.

Supporters of the House-approved measure blamed 11th-hour pressure from plaintiffs' and civil rights lawyers who — although aligned with the defense bar against mandatory disclosure — also sought to raise or remove pending caps on the number of discovery devices in civil litigation.

Virtually assured of enactment for months, the bill was threatened with a filibuster and died in the shadow of congressional approval of both the North American Free Trade Agreement and crime legislation. The passage of the Brady Bill ended the slim hopes of proponents that a post-Thanksgiving session would provide a final chance for action on mandatory disclosure before the amended Federal Rules of Civil Procedure become law by default.

"I think that there are real good prospects for fixing the problem in the next session," said Alfred W. Cortese Jr. of the Washington, D.C., office of Chicago's Kirkland & Ellis, a spokesman for Lawyers for Civil Justice, a defense bar consortium.

But the bill's co-sponsor, Rep. William J. Hughes, D-N.J., was more pessimistic. "I can't begin to tell you how disappointed I am," said Mr. Hughes, chairman of the House Judiciary Subcommittee on Intellectual Property and Court Administration. "Once the rules go into effect, there's always the possibility, but it's not likely, that we would make any changes."

The bill, the Civil Rules Amendment Act of 1993, H.R. 2814, would de-

Continued on page 40

Bid to Limit Mandatory Disclosure Rule Fails

Continued from page 3

lete the automatic, pre-discovery disclosure requirement of Rule 26(a)(1), and it also would strip an amendment to Rule 30(b) that allows attorneys to record depositions freely instead of using court stenographers.

The House approved the measure by a voice vote Nov. 3, but Sen. Howard Metzenbaum, D-Ohio, blocked Senate action Nov. 20.

Attempts to negotiate passage, including a plan simply to defer several of the most controversial rules for six months, were unsuccessful, according to Mr. Hughes.

Streamlined Discovery?

Congress is the final hurdle in a five-step rule-making process that began more than two years ago. Most of the 38 amended civil trial rules and forms, constituting the most sweeping changes since the rules first were adopted in 1938, are technical and non-controversial. The Dec. 1 effective date coincides with the final phasing-in of the Civil Justice Reform Act of 1990, known as the Biden Bill, which requires each of the 94 federal court districts to adopt a litigation expense- and delay-reduction plan. (NLJ, May 24.)

Without intervention by Congress, the Dec. 1 changes will impose a new regime of streamlined pretrial discovery. Rule 26(a)(1), in tandem with Rule 16 and other Rule 26 provisions, would require parties to "meet and confer" and agree to a written discovery schedule two weeks before a judge issues a scheduling order or holds a conference. Ten days after meeting, litigants must disclose basic information regarding witnesses, documents, damages and insurance that is "relevant to disputed facts alleged with particularity in the pleadings."

> 'Once the rules go into effect, there's always the possibility, but it's not likely, that we would make changes.'

The rule also imposes a continuing duty to disclose, and information improperly withheld may be barred from use. It also contains a local-option clause that allows courts to exempt some or all cases by local order or rule. Amendments to Rules 30, 31 and 33 set presumptive limits of 10 depositions and 25 interrogatories per side.

If mandatory disclosure becomes law, there is concern that the federal rules will become less uniform. More than 20 district courts already are experimenting with various disclosure rules under local Biden Bill plans, while the federal court in Chicago, for example, has decided to opt out of Rule 26(a)(1)'s requirements. "In most cases it isn't necessary and creates more problems than it resolves," says U.S. District Chief Judge James B. Moran.

The amendments, which emanated from the Advisory Committee on Civil Rules, sparked a storm of protest by nearly all segments of the bar. The changes, however, won approval last year by the policy-making U.S. Judicial Conference and, subsequently, by the U.S. Supreme Court last April, despite objections to mandatory disclosure by Justices Antonin Scalia, Clarence Thomas and David Souter. The defense bar led the charge of litigators, insurers and corporate counsel who succeeded in getting a bill introduced to derail the proposal after oversight hearings last summer. (NLJ, June 28.)

Lack of Balance

Kerry Scanlon, assistant counsel for the NAACP Legal Defense and Educational Fund Inc., says that the limits on discovery also should be stricken to balance out the bill's deletion of mandatory disclosure. The stall in the Senate is "unfortunate," he says, because plaintiffs' and defense lawyers have not objected to modifying or removing the caps.

"The House took out one part of the balance and left the other part in," says Mr. Scanlon, adding that it "restricted the traditional means that plaintiffs have of getting discovery and eliminated entirely a new means that was recommended. That made the House bill very unfair to plaintiffs." He adds: "If we have to have limits, we would rather have limits with mandatory disclosure to offset the effect of the limits."

But Mr. Hughes, who opposes changing the caps, says they can help improve case management, which is the bottom-line purpose of civil justice reform efforts. "What has me baffled," he says, "is there's so much flexibility written in the local rules to allow changes in the presumptive limits and to exempt whole classes of cases."

The Senate stall prompted by the plaintiffs' and civil rights bars allowed other concerns — some unrelated to this legislation — to crop up, says Mr. Hughes, all because "one particular segment felt that they could make it a little more perfect in their eyes."

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

ALICEMARIE H. STOTLER
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CRIMINAL RULES

RALPH K. WINTER, JR.
EVIDENCE RULES

November 10, 1993

Honorable Charles E. Schumer
Chairman, Subcommittee on
Crime and Criminal Justice
United States House of Representatives
H2-362 Ford House Office Building
Washington, D.C. 20515

Dear Chairman Schumer:

In a letter dated October 20, 1993, a copy of which was sent to you, Judge Stanley Marcus and I provided an update on the actions of the Judicial Conference of the United States regarding the Federal Rules of Evidence and Criminal Procedure on the admissibility of evidence of a victim's past sexual behavior at trial and the establishment of a victim's right of allocution at sentencing. (A copy of the letter is enclosed for your convenience.)

I am writing now to inform you of the Judicial Conference's actions and concerns regarding several other proposals that would amend directly the Federal Rules of Evidence and Criminal Procedure or would otherwise affect the rule-making process. These proposals are contained in H.R. 688, the "Sexual Assault Prevention Act of 1993." If these proposals are raised during Congressional deliberations on the various pending crime bills, I am hopeful that this information will be helpful to you.

H.R. 688 would amend Evidence Rule 412 (excluding evidence of a victim's past sexual behavior in criminal and civil cases) and Criminal Rule 32 (establishing a right of victim allocution at sentencing), and would create a new Evidence Rule 416 (excluding evidence to show victim provocation). These provisions are similar to those contained in Subtitle A of Title IV of H.R. 1133, which were addressed in the enclosed October 20, 1993 letter. H.R. 688 also would add, however, new Evidence

Rules 413-415 governing the admissibility of evidence of a defendant's similar acts or crimes in child molestation and sexual assault cases and amend Criminal Rule 24(b) equalizing the number of juror peremptory challenges.

PROPOSED NEW EVIDENCE RULES 413-415

In a criminal case involving an offense alleging sexual assault or child molestation, proposed Evidence Rules 413-414 would allow the admission of evidence of the commission by the defendant of past similar sexual offenses. Under proposed Evidence Rule 415, evidence of past sexual assaults by the defendant would be admissible in a civil case.

The Advisory Committee on Criminal Rules had reviewed the proposed Rules 413-415, which were contained in earlier legislation. The Committee voted to oppose the changes at its November 1991 meeting for several reasons, including the following:

(1) Proposed Evidence Rules 413-415 would create, in effect, an exception to Evidence Rule 404(a). That rule excludes the admission of evidence of a "person's character or a trait of character ... for the purpose of proving action in conformity therewith on a particular occasion ...." Evidence Rule 404 is intended to prevent a defendant from being convicted for an alleged offense not included in the charges directly under consideration at trial. Rule 404 is under active consideration by the newly reactivated Advisory Committee on Evidence Rules.

Although character evidence of a defendant's past sexual misconduct might be relevant in determining a defendant's propensity to commit similar acts, its probative value could be substantially outweighed by the danger of unfair prejudice to the defendant. In prosecutions of sexual assault or child molestation offenses this danger is heightened. And the rationale for excluding past behavior to prove action in conformity therewith is particularly cogent.

(2) Proposed Evidence Rules 413-415 would allow the admission of evidence of the defendant's commission of another similar offense even if the defendant had been acquitted of that prior alleged sexual offense.

(3) There is insufficient empirical data that evidence of past instances of sexual assaults or child molestation is so different from other evidence of misconduct involving, for example, prior drug use, violence, firearm use, or fraud, that it should be singled out as evidence that could be admitted to prove that the defendant acted in conformity with prior behavior on a particular occasion.

(4) Proposed Evidence Rules 413-415 would permit the use of evidence of the defendant's commission of another sexual offense in the prosecution's case-in-chief. Determining whether such evidence, standing alone, would be sufficient to sustain a conviction would raise serious issues.

PROPOSED AMENDMENT TO CRIMINAL RULE 24(b)

The proposed amendment to Rule 24(b) of the Federal Rules of Criminal Procedure in H.R. 688 would equalize the number of peremptory challenges between the government, which presently has six challenges, and the defendant, which has ten challenges. The Advisory Committee on Criminal Rules and the Standing Rules Committee have considered similar amendments to Rule 24(b) on several past occasions. On each occasion, no change was adopted after the issue had been thoroughly studied and debated.

Most recently, the Standing Rules Committee in 1991 agreed with the recommendation of the Advisory Committee on Criminal Rules and rejected proposed changes to Rule 24(b). The proposal to equalize the number of challenges had been published for public comment. It received widespread negative reaction from the public, bar, academia, and the bench.

Many reasons were submitted during the public comment period for rejecting the proposal to equalize the number of challenges. First, the greater number of peremptory challenges accorded to a defendant in Rule 24 reflects a historical right. Second, the defendant's "advantage" is necessary to offset the government's overwhelming resources available to it in examining the qualifications of prospective jurors. Third, the defendant has little control over the voir dire process that is exercised by the judge in most trials. Fourth, the proposal was perceived as another attempt to whittle away the rights of a defendant. Fifth, no convincing empirical data was provided to demonstrate that the amendment was necessary.

PROPOSED RULES OF PROFESSIONAL CONDUCT FOR LAWYERS

H.R. 688 would also create a new set of Rules of Professional Conduct for Lawyers in Federal Practice. This would be rather revolutionary, as you know. Historically, the conduct of attorneys has been subject to state regulations. Virtually all states have adopted a version of the ABA Code or Model Rules of Professional Conduct. In turn, these state codes of conduct have been incorporated by nearly every federal district court into their respective local rules of court.

Although the particular provisions of H.R. 688 on the Rules of Professional Conduct have not been studied by the Standing Rules Committee, several concerns immediately emerge. As just indicated, the proposed rules of conduct involve particularly complex issues. It is essential that before proposals of this nature become national rules of practice that they be considered most deliberately by thoughtful and experienced lawyers, law professors, judges, and interested groups and organizations. It is equally important that the lawyers and litigants who will be most affected by these rules be given ample opportunity to identify problems, articulate reactions, and add suggestions. The rule-making process as implemented under the Rules Enabling Act is particularly well-suited to fulfill these expectations and should be adhered to in this case.

The local rules of federal district courts have been under review by the Standing Rules Committee since 1986 when Congress authorized and funded a Local Rules Project to study them. Until recently, the Standing Rules Committee has been focussing on and is now nearing completion of its work on the elimination of substantive inconsistencies between local and national rules of practice and procedure.

The Standing Rules Committee is charged with the duty to conduct an ongoing study and review of all matters affecting the federal rules of practice and procedure, including consideration of any proposed changes to them. In exercising this duty, the proposal in H.R. 688 on regulating attorney practice is on the agenda of the next meeting of the Standing Rules Committee for its consideration. However, the Standing Rules Committee will begin addressing the complex and controversial issues involved in the regulation of attorney practice in the federal courts in accordance with the provisions of the Rules Enabling Act.

The proposed code of conduct in H.R. 688 is inconsistent with the ABA models and would change the federal local rules of court without going through the rigors of the public rule-making process. Adherence to the Rules Enabling Act will ensure that the proposals will receive extensive scrutiny and input from a

large and experienced group of practicing attorneys, jurists, and other professionals and laypersons. This scrutiny will be particularly helpful in reviewing codes regulating the conduct of attorneys and should not be bypassed by direct legislation.

Thank you for the opportunity to advise you of the actions of the Standing Rules Committee and the Judicial Conference on these important matters.

Sincerely,

Alicemarie H. Stotler

Alicemarie H. Stotler

Enclosure

cc: Members of the Subcommittee on
Crime and Criminal Justice

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

ALICEMARIE H. STOTLER
CHAIR

PETER G. McCABE
SECRETARY

October 20, 1993

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

Dear Mr. Chairman:

We are writing to provide you with an update of recent actions taken by the Judicial Conference of the United States regarding the Federal Rules of Evidence and Criminal Procedure on the admissibility of evidence of a victim's past sexual behavior at trial and the establishment of a victim's right of allocution at sentencing.

The Judicial Conference approved the amendments to Evidence Rule 412 recommended by the Judicial Conference Committee on Rules of Practice and Procedure (Standing Committee) at its session on September 20, 1993. The amendments will be transmitted to the Supreme Court for review, and if approved by the Court, will be transmitted to Congress by May 1, 1994. The Conference did not include a proposed provision on Criminal Rule 32 that would establish explicitly a victim's right to allocution at sentencing.

Enclosed for your information are the changes to Evidence Rule 412 approved by the Judicial Conference. The Conference has acted on these amendments on an expedited basis in light of the important public policy concerns and to facilitate timely congressional review.

The amendments underwent extensive scrutiny by the public, the bar, and the judiciary. Representatives from several organizations testified at a public hearing on the amendments, including: (1) the Women's Legal Defense Fund; (2) the NOW Legal Defense and Education Fund; (3) the American College of Trial Lawyers; and (4) the New York City Bar Association. We believe the final draft of the amendments, as approved by the Judicial Conference, is a significant improvement over earlier drafts and other proposals. The amendments reflect the deliberative and exacting process contemplated by the Rules Enabling Act.

Specifically, the amendments to Evidence Rule 412 approved by the Judicial Conference address the important concerns of the proponents of change to Rule 412 more effectively than other draft proposals, including the proposals set forth in Subtitle A of Title IV of H.R. 1133, the Violence Against Women Act of 1993. We think these approved amendments to Rule 412 provide even greater privacy protections to victims of sexual offenses; they also eliminate many ambiguities found in the existing Rule 412 and thus in the relevant provisions of H.R. 1133, which are patterned on it.

The privacy interests of victims are afforded greater protections under these approved amendments to Evidence Rule 412 in the following specific ways:

(1) The Conference amendments exclude evidence of the past sexual behavior of all alleged victims of sexual offenses, including "sexual pattern witnesses" in child molestation and sexual harassment cases. The provisions in H.R. 1133 protect only the parties in a case.

(2) In civil cases, under the Conference amendments, the probative value of evidence of the victim's sexual behavior must substantially outweigh the unfair prejudice to any party and the danger of harm to any victim to be admitted. The standard of admission governing this evidence in H.R. 1133 is less restrictive and thus such evidence would be admissible more often.

(3) In criminal cases, under the Conference amendments, evidence of a victim's past sexual behavior is admissible only if it falls within two narrow exceptions or it is constitutionally required. In addition to these situations, the relevant provisions of H.R. 1133 would admit such evidence under a balancing test.

In addition, the amendments to Evidence Rule 412 as approved by the Judicial Conference would exclude all other evidence relating to an alleged victim of sexual misconduct that is offered to prove a sexual predisposition. Evidence of an alleged victim's mode of dress, speech, or life-style would not be admissible. Accordingly, the amendment excludes evidence that would be excluded under H.R. 1133's section 404.

There are other technical, but important differences between the Conference approved amendments to Evidence Rule 412 and those in the relevant provisions in H.R. 1133. We would be pleased to discuss these with you or your staff at your convenience.

The Judicial Conference also considered, but did not include, a proposed provision in Criminal Rule 32 that would have required victim allocution at sentencing. The Rules Committees were convinced that the provision was unnecessary because: (1) the court considers this information as part of the presentence report; and (2) the court may allow victim allocution in a particular case under the existing rule.

The Rules Committees also believed that a mandatory provision might be counterproductive because under the federal sentencing guidelines the victim's testimony would have very little, if any, effect on the sentence. Victims would only become more frustrated with the justice system. We understand that H.R. 1133 does not include a provision on victim allocution. However, because the Senate companion bill, S. 11, does include such a provision, we wanted to bring the action of the Judicial Conference concerning this matter to your attention.

We respectfully suggest that the proposed changes to Evidence Rule 412 included in H.R. 1133 be withdrawn to permit the remaining important stages of the Rules Enabling Act process to go forward.

Needless to say, if we can be of any assistance to you or your staff in this matter, please do not hesitate to contact either of us.

Thank you again for considering our thoughts in this important matter.

Sincerely,

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

Stanley Marcus
Chair, Ad Hoc Committee
on Gender-Based Violence

Enclosure

cc: Honorable Hamilton Fish, Jr.
Honorable Charles E. Schumer
Honorable F. James Sensenbrenner, Jr.
Honorable Patricia Schroeder

bc: Jonathan Yarowsky, Marie McGlone, Allen Erenbaum, Lisa Moreno, Lyle Nirenberg, David Yassky, and Alan Coffey

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
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WILLIAM TERRELL HODGES
CRIMINAL RULES

RALPH K. WINTER, JR.
EVIDENCE RULES

August 3, 1993

Honorable Joseph R. Biden, Jr.
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510-6275

Subject: Proposed Amendments to Rule 412 of the Federal Rules of Evidence and Rule 32 of the Federal Rules of Criminal Procedure

Dear Mr. Chairman:

I am writing to provide you with an update of recent action taken by the Judicial Conference's Committee on Rules of Practice and Procedure (Standing Committee) regarding Rule 412 of the Federal Rules of Evidence and Rule 32 of the Federal Rules of Criminal Procedure. The committee met on June 17-19, 1993, in Washington, D.C.

The committee approved, with some revisions, the amendments to Evidence Rule 412 that were proposed by the Advisory Committee on Evidence Rules and voted to transmit it to the Judicial Conference with a recommendation that it be approved and sent to the Supreme Court for adoption. The proposed amendments would extend the protection of the rule to victims in all criminal and civil cases. The final draft eliminates many ambiguities identified in earlier drafts during the committees' deliberations and is a marked improvement. A copy of the proposed amendments was furnished earlier to your staff and is enclosed for your convenience.

At its June meeting, the Standing Committee reaffirmed its position urging the Senate Committee on the Judiciary to withdraw the proposed amendments involving Evidence Rule 412 contained in S. 11, the Violence Against Women Act of 1993, and permit the remaining important stages of the Rules Enabling Act process to go forward to completion.

The Standing Committee also agreed with the recommendation of the Advisory Committee on Criminal Rules to reject a proposed amendment to Rule 32 that would provide victims the right of allocution in all criminal cases.

The Standing Committee believed that in most cases a victim allocution provision would be counterproductive. Mandating victim allocution might lead to greater victim frustration because of the sentencing guidelines' restriction, that severely limit the impact of a victim's statement. In addition, Rule 32(c)(2)(D) now provides a victim with an opportunity for direct input in the preparation of the presentence report.

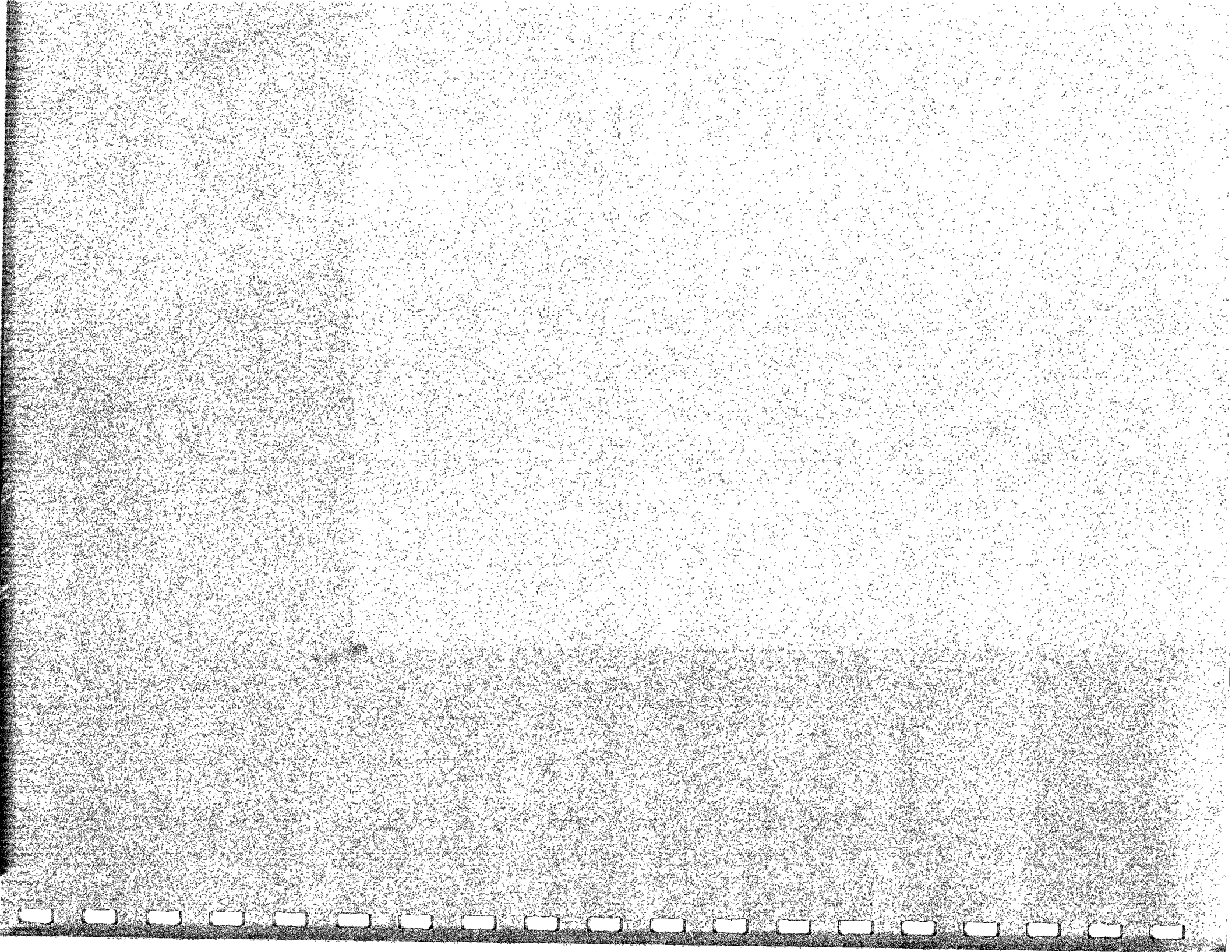
The Standing Committee did believe, however, that the exercise of victim allocution in certain cases is very salutary. It recognized that judges presently allow victims to address the court in open court in particular circumstances. The committee agreed that if in the judgment of Congress victims of certain crimes should be entitled to allocution at sentencing, then the enactment of a separate and limited statutory provision would be preferable to a general amendment to Rule 32. A conforming rules amendment limited to the statutory provision could then be drafted and considered in accordance with the Rules Enabling Act process.

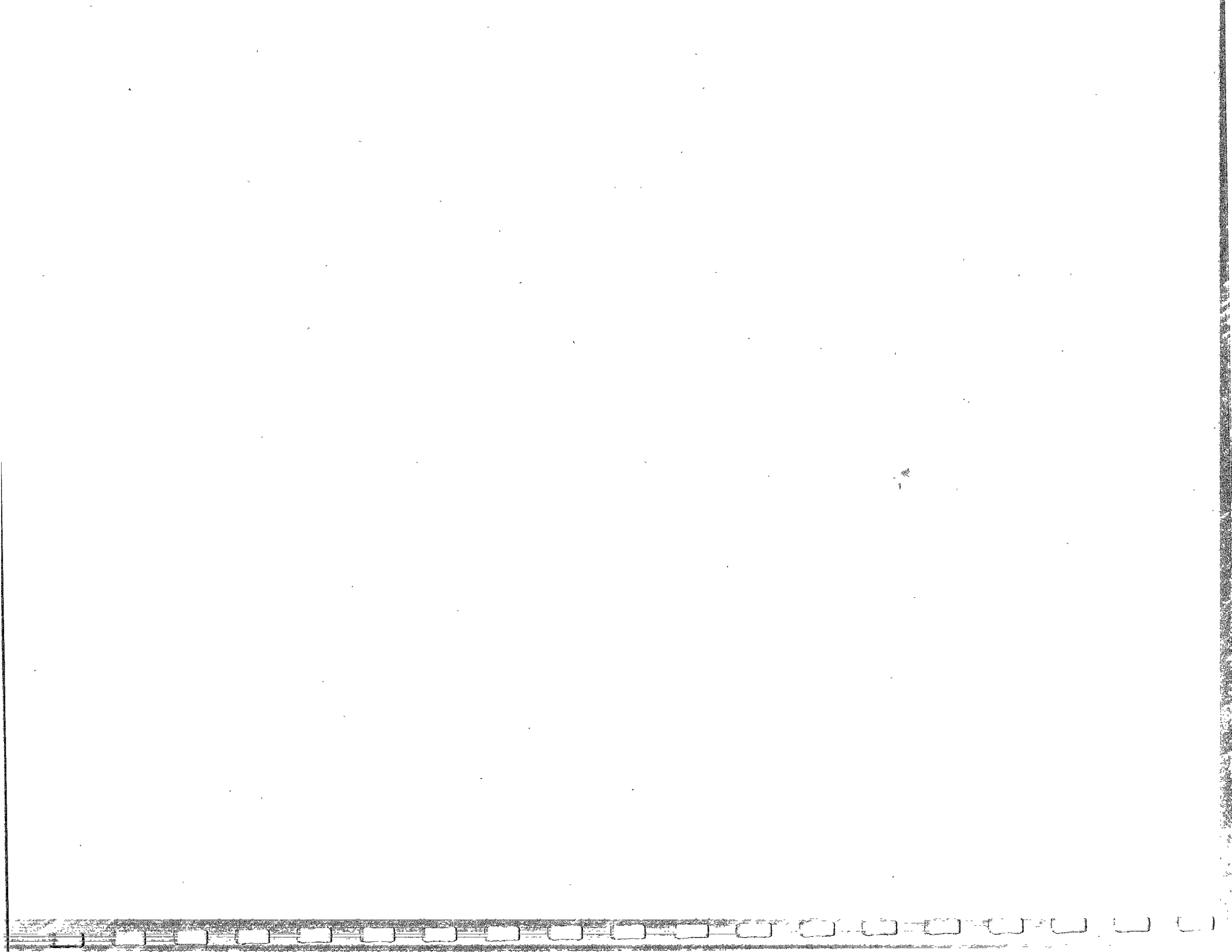
Sincerely,

Peter G. McCabe
Secretary

Enclosure

cc: Members of the Committee on the Judiciary





I

103D CONGRESS
1ST SESSION

H. R. 2814

To permit the taking effect of certain proposed rules of civil procedure, with modifications.

IN THE HOUSE OF REPRESENTATIVES

JULY 30, 1993

Mr. HUGHES (for himself and Mr. MOORHEAD) introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To permit the taking effect of certain proposed rules of civil procedure, with modifications.

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 "Civil Rules Amendments Act of 1993".

SEC. 2. MODIFICATION OF PROPOSED AMENDMENTS.

The proposed amendments to the Federal Rules of Civil Procedure which are embraced by an order entered by the Supreme Court of the United States on April 22,

1993, shall take effect on December 1, 1993, as otherwise provided by law, but with the following amendments:

(1) RULE 26.—

(A) IN GENERAL.—Proposed rule 26(a) is amended so that paragraph (1) reads as follows:

"(1) INSURANCE AGREEMENTS.—A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. For purposes of this paragraph, an application for insurance shall not be treated as part of an insurance agreement.".

(2) CONFORMING AMENDMENTS.—(A) Proposed rule 26(a)(2) is amended by striking "In addition to the disclosures required by paragraph (1), a" and inserting "A".

(B) Proposed rule 26(a)(3) is amended by striking "the preceding paragraphs" and inserting "paragraph (2)".

(C) Proposed rule 26(a)(4) is amended by striking "(1) through" and inserting "(2) and".

(D) Proposed rule 26(f) is amended by striking "to make or arrange for the disclosures required by subdivision (a)(1),".

(E) Proposed rule 26(g)(1) is amended by striking "subdivision (a)(1) or".

(3) RULE 30.—

(A) IN GENERAL.—Proposed rule 30(b)(2) is amended by striking "Unless the court orders otherwise, it may be recorded by sound, sound-and-visual, or stenographic means, and the" and inserting "Unless the court upon motion orders, or the parties agree in writing to use, sound or sound-and-visual means, the deposition shall be recorded by stenographic means. The".

(B) CONFORMING AMENDMENT.—Proposed rule 30(b) is amended by striking paragraph (3).

(4) FORM 35.—Proposed form 35 is amended—

(A) by striking paragraph (2); and

(B) by redesignating paragraphs (3) and (4) as paragraphs (2) and (3).

○

AMENDMENTS

CONTAINED IN THE SENATE

PASSED CRIME BILL

(5) for fiscal year 1998, for the discretionary category: $2,492,000,000 in new budget authority and $3,470,000,000 in outlays.

DOLE (AND OTHERS) AMENDMENT NO. 1102

Mr. DOLE (for himself, Mrs. FEINSTEIN, and Mrs. BOXER) proposed an amendment to the bill S. 1607, supra; as follows:

On page 426, after line 25 add the following:

SEC. 2907. INCREASED PENALTIES FOR ARSON.

Section 844 of title 18, United States Code, is amended—

(1) in subsection (f)—

(A) by striking "ten years, or fined not more than $10,000" and inserting "20 years, fined the greater of $100,000 or the cost of repairing or replacing any property that is damaged or destroyed"; and

(B) by striking "twenty years, or fined not more than $20,000" and inserting "40 years, fined the greater of $200,000 or the cost of repairing or replacing any property that is damaged or destroyed";

(2) in subsection (h)—

(A) in the first sentence by striking "five years" and inserting "10 years"; and

(B) in the second sentence by striking "ten years" and inserting "20 years"; and

(3) in subsection (i)—

(A) by striking "ten years or fined not more than $10,000" and inserting "20 years, fined the greater of $100,000 or the cost of repairing or replacing any property that is damaged or destroyed"; and

(B) by striking "twenty years or fined not more than $20,000" and inserting "40 years, fined the greater of $200,000 or the cost of repairing or replacing any property that is damaged or destroyed".

BYRD (AND OTHERS) AMENDMENT NO. 1103

Mr. BYRD (for himself, Mr. MITCHELL, Mr. DOLE, Mr. BIDEN, Mr. HATCH, Mr. SASSER, Mr. GRAMM, Mr. KERRY, Mr. DODD, Mr. MACK, Mr. THURMOND, Mr. DORGAN, Mr. DOMENICI, Mr. CONRAD, Mr. COHEN, Mr. D'AMATO, Mr. BRYAN, Mr. LIEBERMAN, Mr. WOFFORD, Mr. ROBB, and Mr. HOLLINGS) proposed an amendment to the bill S. 1607, supra; as follows:

At the appropriate place, insert the following:

Subtitle A—Regional Prisons and State Prisons

SEC. 1281. REGIONAL PRISONS FOR VIOLENT CRIMINALS AND VIOLENT CRIMINAL ALIENS.

(a) DEFINITIONS.—In this section—

"child abuse offense" means an offense under Federal or State law that constitutes sexual exploitation of children or selling or buying of children within the meaning of chapter 110 of title 18, United States Code.

"firearms offense" means an offense under Federal or State law committed while the offender is in possession of a firearm or while an accomplice of the offender, to the knowledge of the offender, is in possession of a firearm.

"crime of violence" means a felony offense under Federal or State law that is a crime of violence within the meaning of section 16 of title 18, United States Code.

"qualifying prisoner" means—

(A) an alien who is in this country illegally or unlawfully and who has been convicted of a crime of violence (as defined in section 924(c)(3) of title 18, United States Code) or a serious drug offense (as defined in section 924(e)(2)(A) of title 18, United States Code); and

(B) a violent criminal.

"sex offense" means an offense under Federal or State law that constitutes aggravated sexual abuse, sexual abuse, sexual abuse of a minor or ward, or abusive sexual contact within the meaning of chapter 109A of title 18, United States Code.

"violent criminal"—

(A) means a person convicted under Federal law of an offense described in, under the circumstances described in, the provisions of section 924 (c) or (e) of title 18 or section 994(h) of title 28, United States Code, or under State law for the same or a similar offense; and

(B) insofar as any of the circumstances described in an offense described in subparagraph (A) is the prior conviction of an offense, includes a person who had been adjudicated as a juvenile delinquent by reason of the commission of an act that, if committed by an adult, would constitute such an offense.

(b) CONSTRUCTION OF PRISONS.—The Attorney General shall, after consultation with state correctional administrators, construct, and operate a minimum of 10 regional prisons, situated throughout the United States, each containing space for at least 2,500 inmates. At least 75 percent of the overall capacity of such prisons in the aggregate shall be dedicated to qualifying prisoners from qualifying States.

(c) ACCEPTANCE OF PRISONERS.—Any qualifying State may apply to the Attorney General to accept any qualifying prisoner. If, in the Attorney General's judgment there are likely to be more qualifying prisoners than there is space available, then to the extent that the Attorney General deems it practicable, the Attorney General should seek to allocate space among qualifying States in a proportion similar to the number of qualifying prisoners held by that State in relation to the total number of qualifying prisoners from qualifying States.

(d) QUALIFYING STATE.—

(1) IN GENERAL.—The Attorney General shall not certify a State as a qualifying State under this section unless the State is providing—

(A) truth in sentencing with respect to any felony crime of violence involving the use or attempted use of force against a person, or use of a firearm against a person, for which a maximum sentence of 5 years or more is authorized that is consistent with that provided in the Federal system in chapter 229 of title 18, United States Code, which provides that defendants will serve at least 85 percent of the sentence ordered and which provides for a binding sentencing guideline system in which sentencing judges' discretion is limited to assure greater uniformity in sentencing;

(B) pretrial detention similar to that provided in the Federal system under section 3142 of title 18, United States Code;

(C) sentence for firearm offenders, where death or serious bodily injury results, murderers, sex offenders, and child abuse offenders that, after application of relevant sentencing guidelines, result in the imposition of sentences that are at least as long as those imposed under Federal law (after application of relevant sentencing guidelines); and

(D) suitable recognition for the rights of victims, including consideration of their victim's perspective at all appropriate stages of criminal proceedings.

(2) DISQUALIFICATION.—The Attorney General shall withdraw a State's status as a qualifying State if the Attorney General finds that the State no longer appropriately provides for the matters described in paragraph (1) or has ceased making substantial progress toward attaining them, in which event the State shall no longer be entitled to the benefits of this section, except to the extent the Attorney General otherwise directs.

(3) WAIVER.—The Attorney General may waive, for no more than one year, any of the requirements of this subsection with respect to a particular State if the Attorney General certifies that, in the Attorney General's judgment, there are compelling law enforcement reasons for doing so. Any State granted any such waiver shall be treated as a qualifying State for all purposes of this subtitle, unless the Attorney General otherwise directs.

(e) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated to carry out this section—

(1) $600,000,000 for fiscal year 1994;
(2) $600,000,000 for fiscal year 1995;
(3) $500,000,000 for fiscal year 1996;
(4) $500,000,000 for fiscal year 1997; and
(5) $600,000,000 for fiscal year 1998.

Page 303, line 21;

Subtitle B—State Prisons

SEC. 1231. BOOT CAMPS AND PRISONS FOR VIOLENT DRUG OFFENDERS.

(a) DEFINITION.—In this section, "boot camp prison program" means a correctional program of not more than 6 months' duration involving—

(1) assignment for participation in the program, in conformity with State law, by prisoners other than prisoners who have been convicted at any time of a violent felony;

(2) adherence by inmates to a highly regimented schedule that involves strict discipline, physical training, and work;

(3) participation by inmates in appropriate education, job training, and substance abuse counseling or treatment; and

(4) aftercare services for inmates following release that are coordinated with the program carried out during the period of imprisonment.

(b) ESTABLISHMENT OF GRANT AND TECHNICAL ASSISTANCE PROGRAM.—

(1) IN GENERAL.—The Attorney General may make grants to States and to multi-State compact associations for the purposes of—

(A) developing, constructing, expanding, operating, and improving boot camp prison programs to medium security prisons;

(B) developing, constructing, and operating prisons that house and provide treatment for violent offenders with serious substance abuse problems; and

(C) assisting in activating existing boot camp or prison facilities that are unutilized or underutilized because of lack of funding.

(2) TECHNICAL ASSISTANCE.—The Attorney General may provide technical assistance to grantees under this section.

(3) UTILIZATION OF COMPONENTS.—The Attorney General may utilize any component or components of the Department of Justice in carrying out this section.

(c) STATE AND MULTI-STATE COMPACT APPLICATIONS.—

(1) IN GENERAL.—To request a grant under this section, the chief executive of a State or the coordinator of a multi-State compact association shall submit an application to the Attorney General in such form and containing such information as the Attorney General may prescribe by regulation or guidelines.

(2) CONTENT OF APPLICATION.—In accordance with the regulations or guidelines established by the Attorney General, an application for a grant under this section shall—

(A) include a long-term strategy and detailed implementation plan;

(B) include evidence of the existence of, and describe the terms of, a multi-State compact for any multiple-State plan;

(C) provide a description of any construction activities, including cost estimates, that will be a part of any plan;

(D) provide a description of the criteria for selection of prisoners for participating in a boot camp prison program or assignment to a regional prison or activated prison or boot camp facility that is to be funded;

(E) provide assurances that the boot camp prison program, regional prison, or activated prison or boot camp facility that receives funding will provide work programs, education, job training, and appropriate drug treatment for inmates;

(F) provide assurances that—

(i) prisoners who participate in a boot camp prison program or are assigned to a regional prison or activated prison or boot camp facility that receives funding will be provided with aftercare services; and

(ii) a substantial proportion of the population of any regional prison that receives funds under this section will be violent offenders with serious substance abuse problems, and provision of treatment for such offenders will be a priority element of the prison's mission;

(G) provide assurances that aftercare services will involve the coordination of the boot camp prison program, regional prison, or activated prison or boot camp facility, with other human service and rehabilitation programs (such as educational and job training programs, drug counseling or treatment, parole or other post-release supervision programs, halfway house programs, job placement programs, and participation in self-help and peer group programs) that reduce the likelihood of further criminality by prisoners who participate in a boot camp program or are assigned to a regional prison or activated prison or boot camp facility following release;

(H) explain the applicant's inability to fund the program adequately without Federal assistance;

(I) identify related governmental and community initiatives that complement or will be coordinated with the proposal;

(J) certify that there has been appropriate coordination with all affected agencies; and

(K) specify plans for obtaining necessary support and continuing the proposed program following the conclusion of Federal support.

(d) LIMITATIONS ON FUNDS.—

(1) NONSUPPLANTING REQUIREMENT.—Funds made available under this section shall not be used to supplant State funds, but shall be used to increase the amount of funds that would, in the absence of Federal funds, be made available from State sources.

(2) ADMINISTRATIVE COSTS.—No more than 5 percent of the funds available under this section may be used for administrative costs.

(3) MATCHING FUNDS.—The portion of the costs of a program provided by a grant under this section may not exceed 75 percent of the total cost of the program as described in the application.

(4) DURATION OF GRANTS.—

(A) IN GENERAL.—A grant under this section may be renewed for up to 3 years beyond the initial year of funding if the applicant demonstrates satisfactory progress toward achievement of the objectives set out in an approved application.

(B) MULTIYEAR GRANTS.—A multiyear grant may be made under this section so long as the total duration of the grant, including any renewals, does not exceed 4 years.

(e) CONVERSION OF PROPERTY AND FACILITIES AT CLOSED OR REALIGNED MILITARY INSTALLATIONS INTO BOOT CAMP PRISONS AND REGIONAL PRISONS.—

(1) DEFINITION.—In this subsection, "base closure law" means—

(A) title II of the Defense Authorization Amendments and Base Closure and Realignment Act (10 U.S.C. 2687 note);

(B) the Defense Base Closure and Realignment Act of 1990 (part A of title XXIX of Public Law 101-510; 10 U.S.C. 2687 note);

(C) section 2687 of title 10, United States Code; and

(D) any other similar law.

(2) DETERMINATION OF SUITABILITY FOR CONVERSION.—Notwithstanding any base closure law, the Secretary of Defense may not take any action to dispose of or transfer any real property or facility located at a military installation to be closed or realigned under a base closure law until the Secretary notifies the Attorney General of any property or facility at that installation that is suitable for use as a boot camp prison or regional prison.

(3) TRANSFER.—The Secretary shall, upon the request of the Attorney General, transfer to the Attorney General, without reimbursement, the property or facilities covered by the notification referred to in paragraph (2) in order to permit the Attorney General to utilize the property or facilities as a boot camp prison or regional prison.

(4) REPORT.—Not later than 6 months after the date of enactment of this Act, the Attorney General shall prepare and disseminate to State and local officials a report listing any real property or facility located at a military installation to be closed or realigned under a base closure law that is suitable for use as a boot camp prison or regional prison. The Attorney General shall periodically update this report for dissemination to State and local officials.

(5) APPLICABILITY.—This subsection shall apply with respect to property or facilities located at military installations the closure or realignment of which commences after the date of enactment of this Act.

(f) PERFORMANCE EVALUATION.—

(1) EVALUATION COMPONENTS.—

(A) IN GENERAL.—Each boot camp prison, regional prison, and activated prison or boot camp facility program funded under this section shall contain an evaluation component developed pursuant to guidelines established by the Attorney General.

(B) OUTCOME MEASURES.—The evaluations required by this paragraph shall include outcome measures that can be used to determine the effectiveness of the funded programs, including the effectiveness of such programs in comparison with other correctional programs or dispositions in reducing the incidence of recidivism.

(2) PERIODIC REVIEW AND REPORTS.—

(A) REVIEW.—The Attorney General shall review the performance of each grant recipient under this section.

(B) REPORTS.—The Attorney General may require a grant recipient to submit to the Attorney General the results of the evaluations required under paragraph (1) and such other data and information as the Attorney General deems reasonably necessary to carry out the Attorney General's responsibilities under this section.

(3) REPORT TO CONGRESS.—The Attorney General shall submit an annual report to Congress describing the grants awarded under this section and providing an assessment of the operations of the programs receiving grants.

(g) REVOCATION OR SUSPENSION OF FUNDING.—If the Attorney General determines, as a result of the reviews required by subsection (f), or otherwise, that a grant recipient under this section is not in substantial compliance with the terms and requirements of an approved grant application, the Attorney General may revoke or suspend funding of the grant in whole or in part.

(h) ACCESS TO DOCUMENTS.—The Attorney General and the Comptroller General shall have access for the purpose of audit and examination to—

(1) the pertinent books, documents, papers, or records of a grant recipient under this section; and

(2) the pertinent books, documents, papers, or records of other persons and entities that are involved in programs for which assistance is provided under this section.

(i) GENERAL REGULATORY AUTHORITY.—The Attorney General may issue regulations and guidelines to carry out this section.

(j) AUTHORIZATION OF APPROPRIATIONS.—

(1) IN GENERAL.—There is authorized to be appropriated to carry out this section $2,000,000,000, to remain available until expended.

(2) USE OF APPROPRIATED FUNDS.—No more than one-third of the amounts appropriated under paragraph (1) may be used to make grants for the construction, development, and operation of regional prisons under subsection (b)(1)(B).

Subtitle C—Grants Under the Juvenile Justice and Delinquency Prevention Act of 1974

"GRANTS FOR COMMUNITY-BASED VIOLENT-JUVENILE FACILITIES

"SEC. 238. (a) IN GENERAL.—The Attorney General, through the Bureau of Prisons, may make grants to States and units of general local government or combinations thereof to assist them in planning, establishing, and operating secure facilities for violent and chronic juvenile offenders. The mandates required by the Juvenile Justice and Delinquency Prevention Act shall not apply to grants under this subtitle authorization. There are authorized to be appropriated $100,000,000 for each of fiscal years 1994, 1995, 1996, 1997, 1998.

SECTION 1. SHORT TITLE.

This Act may be cited as the "Violence Against Women Act of 1993".

SEC. 2. TABLE OF CONTENTS.

(c) CONGRESSIONAL COMMITTEE RECOMMENDATIONS.—In making appointments to the Task Force, the Attorney General shall consider the recommendations of the chairman and ranking minority members of the Committee on the Judiciary of the Senate and the Committee on the Judiciary of the House of Representatives.

(d) VACANCIES.—A vacancy on the Task Force shall be filled in the manner in which the original appointment was made.

SEC. 144. TASK FORCE OPERATIONS.

(a) MEETINGS.—The Task Force shall hold its first meeting on a date specified by the Attorney General, which date shall not be later than 60 days after the date of enactment of this Act. After the initial meeting, the Task Force shall meet at the call of the Attorney General, or its chairman-designate, but shall meet at least 6 times.

(b) CHAIRMAN.—Not later than 15 days after the members of the Task Force are appointed, the Attorney General shall designate a chairman from among the members of the Task Force.

(c) PAY.—Members of the Task Force who are officers or employees or elected officials of a government entity shall receive no additional compensation by reason of their service on the Task Force.

(d) PER DIEM.—Except as provided in subsection (c), members of the Task Force shall be allowed travel and other expenses including per diem in lieu of subsistence, at rates authorized for employees of agencies under sections 5702 and 5703 of title 5, United States Code.

SEC. 145. REPORTS.

(a) IN GENERAL.—Not later than 1 year after the date on which the Task Force is fully constituted under section 143, the Task Force shall prepare and submit a final report to the President and to congressional committees that have jurisdiction over legislation addressing violent crimes against women, including the crimes of domestic and sexual assault.

(b) CONTENTS.—The final report submitted under paragraph (1) shall contain a detailed statement of the activities of the Task Force and of the findings and conclusions of the Task Force, including such recommendations for legislation and administrative action as the Task Force considers appropriate.

SEC. 146. EXECUTIVE DIRECTOR AND STAFF.

(a) EXECUTIVE DIRECTOR.—

(1) APPOINTMENT.—The Task Force shall have an Executive Director who shall be appointed by the Chairman, with the approval of the Task Force, not later than 30 days after the Chairman is selected.

(2) COMPENSATION.—The Executive Director shall be compensated at a rate not to exceed the maximum rate of the basic pay payable for a position above GS-15 of the General Schedule contained in title 5, United States Code.

(b) STAFF.—With the approval of the Task Force, the Executive Director may appoint and fix the compensation of such additional personnel as the Executive Director considers necessary to carry out the duties of the Task Force.

(c) APPLICABILITY OF CIVIL SERVICE LAWS.—The Executive Director and the additional personnel of the Task Force appointed under subsection (b) may be appointed without regard to the provisions of title 5, United States Code, governing appointments in the competitive service, and may be paid without regard to the provisions of chapter 51 and subchapter III of chapter 53 of such title relating to classification and General Schedule pay rates.

(d) CONSULTANTS.—Subject to such rules as may be prescribed by the Task Force, the Executive Director may procure temporary or intermittent services under section 3109(b) of title 5, United States Code, at rates for individuals not to exceed $200 per day.

SEC. 147. POWERS OF TASK FORCE.

(a) HEARINGS.—For the purpose of carrying out this subtitle, the Task Force may conduct such hearings, sit and act at such times and places, take such testimony, and receive such evidence, as the Task Force considers appropriate. The Task Force may administer oaths before the Task Force.

(b) DELEGATION.—Any member or employee of the Task Force may, if authorized by the Task Force, take any action that the Task Force is authorized to take under this subtitle.

(c) ACCESS TO INFORMATION.—The Task Force may request directly from any executive department or agency such information as may be necessary to enable the Task Force to carry out this subtitle, on the request of the Chairman of the Task Force.

(d) MAILS.—The Task Force may use the United States mails in the same manner and under the same conditions as other departments and agencies of the United States.

SEC. 148. AUTHORIZATION OF APPROPRIATIONS.

There is authorized to be appropriated to carry out this subtitle $500,000 for fiscal year 1994.

SEC. 149. TERMINATION.

The Task Force shall cease to exist 30 days after the date on which its final report is submitted under section 144.

Subtitle E—New Evidentiary Rules

SEC. 151. SEXUAL HISTORY IN ALL CRIMINAL CASES.

(a) RULE.—The Federal Rules of Evidence are amended by inserting after rule 412 the following new rule:

"Rule 412A. Evidence of victim's past behavior in other criminal cases

"(a) REPUTATION AND OPINION EVIDENCE EXCLUDED.—Notwithstanding any other law, in a criminal case, other than a sex offense case governed by rule 412, reputation or opinion evidence of the past sexual behavior of an alleged victim is not admissible.

"(b) ADMISSIBILITY.—Notwithstanding any other law, in a criminal case, other than a sex offense case governed by rule 412, evidence of an alleged victim's past sexual behavior (other than reputation and opinion evidence) may be admissible if—

"(1) the evidence is admitted in accordance with the procedures specified in subdivision (c); and

"(2) the probative value of the evidence outweighs the danger of unfair prejudice.

"(c) PROCEDURES.—(1) If the defendant intends to offer evidence of specific instances of the alleged victim's past sexual behavior, the defendant shall make a written motion to offer such evidence not later than 15 days before the date on which the trial in which such evidence is to be offered is scheduled to begin, except that the court may allow the motion to be made at a later date, including during trial, if the court determines either that the evidence is newly discovered and could not have been obtained earlier through the exercise of due diligence or that the issue to which such evidence relates has newly arisen in the case. Any motion made under this paragraph shall be served on all other parties and on the alleged victim.

"(2) The motion described in paragraph (1) shall be accompanied by a written offer of proof. If necessary, the court shall order a hearing in chambers to determine if such evidence is admissible. At the hearing, the parties may call witnesses, including the alleged victim and offer relevant evidence. Notwithstanding subdivision (b) of rule 104, if the relevancy of the evidence which the defendant seeks to offer in the trial depends upon the fulfillment of a condition of fact, the court, at the hearing in chambers or at a subsequent hearing in chambers scheduled for such purpose, shall accept evidence on the issue of whether such condition of fact is fulfilled and shall determine such issue.

"(3) If the court determines on the basis of the hearing described in paragraph (2), that the evidence the defendant seeks to offer is relevant, not excluded by any other evidentiary rule, and that the probative value of such evidence outweighs the danger of unfair prejudice, such evidence shall be admissible in the trial to the extent an order made by the court specifies the evidence which may be offered and areas with respect to which the alleged victim may be examined or cross-examined. In its order, the court should consider (A) the chain of reasoning leading to its finding of relevance, and (B) why the probative value of the evidence outweighs the danger of unfair prejudice given the potential of the evidence to humiliate and embarrass the alleged victim and to result in unfair or biased jury inferences.".

(b) TECHNICAL AMENDMENT.—The table of contents for the Federal Rules of Evidence is amended by inserting after the item relating to rule 412 the following new item:

"412A. Evidence of victim's past behavior in other criminal cases:

"(a) Reputation and opinion evidence excluded.

"(b) Admissibility.

"(c) Procedures.".

SEC. 152. SEXUAL HISTORY IN CIVIL CASES.

(a) RULE.—The Federal Rules of Evidence, as amended by section 151, are amended by adding after rule 412A the following new rule:

"Rule 412B. Evidence of past sexual behavior in civil cases

"(a) REPUTATION AND OPINION EVIDENCE EXCLUDED.—Notwithstanding any other law, in a civil case in which a defendant is accused of actionable sexual misconduct, reputation or opinion evidence of the plaintiff's past sexual behavior is not admissible.

"(b) ADMISSIBLE EVIDENCE.—Notwithstanding any other law, in a civil case in which a defendant is accused of actionable sexual misconduct, evidence of a plaintiff's past sexual behavior other than reputation or opinion evidence may be admissible if—

"(1) it is admitted in accordance with the procedures specified in subdivision (c); and

"(2) the probative value of the evidence outweighs the danger of unfair prejudice.

"(c) PROCEDURES.—(1) If the defendant intends to offer evidence of specific instances of the plaintiff's past sexual behavior, the defendant shall make a written motion to offer such evidence not later than 15 days before the date on which the trial in which such evidence is to be offered is scheduled to begin, except that the court may allow the motion to be made at a later date, including during trial, if the court determines either that the evidence is newly discovered and could not have been obtained earlier through the exercise of due diligence or that the issue to which such evidence relates has newly arisen in the case. Any motion made under this paragraph shall be served on all other parties and on the plaintiff.

"(2) The motion described in paragraph (1) shall be accompanied by a written offer of proof. If necessary, the court shall order a hearing in chambers to determine if such evidence is admissible. At the hearing, the parties may call witnesses, including the plaintiff and offer relevant evidence. Notwithstanding subdivision (b) of rule 104, if the relevancy of the evidence that the defendant seeks to offer in the trial depends upon the fulfillment of a condition of fact,

the court, at the hearing in chambers or at a subsequent hearing in chambers scheduled for the purpose, shall accept evidence on the issue of whether the condition of fact is fulfilled and shall determine such issue

"(3) If the court determines on the basis of the hearing described in paragraph (2) that the evidence the defendant seeks to offer is relevant and not excluded by any other evidentiary rule, and that the probative value of the evidence outweighs the danger of unfair prejudice, the evidence shall be admissible in the trial to the extent an order made by the court specifies evidence that may be offered and areas with respect to which the plaintiff may be examined or cross-examined. In its order, the court should consider—

"(A) the chain of reasoning leading to its finding of relevance; and

"(B) why the probative value of the evidence outweighs the danger of unfair prejudice given the potential of the evidence to humiliate and embarrass the alleged victim and to result in unfair or biased jury inferences.

"(d) DEFINITIONS.—For purposes of this rule, a case involving a claim of actionable sexual misconduct, includes sexual harassment or sex discrimination claims brought pursuant to title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000(e)) and gender bias claims brought pursuant to title III of the Violence Against Women Act of 1993.".

(b) TECHNICAL AMENDMENT.—The table of contents for the Federal Rules of Evidence, as amended by section 151, is amended by inserting after the item relating to rule 412A the following new item:

"412B. Evidence of past sexual behavior in civil cases:
"(a) Reputation and opinion evidence excluded.
"(b) Admissible evidence.
"(c) Procedures.
"(d) Definitions.".

SEC. 153. AMENDMENTS TO RAPE SHIELD LAW.

(a) RULE.—Rule 412 of the Federal Rules of Evidence is amended—

(1) by adding at the end the following new subdivisions:

"(e) INTERLOCUTORY APPEAL.—Notwithstanding any other law, any evidentiary rulings made pursuant to this rule are subject to interlocutory appeal by the government or by the alleged victim.

"(f) RULE OF RELEVANCE AND PRIVILEGE.—If the prosecution seeks to offer evidence of prior sexual history, the provisions of this rule may be waived by the alleged victim."; and

(2) by adding at the end of subdivision (c)(3) the following: "In its order, the court should consider (A) the chain of reasoning leading to its finding of relevance; and (B) why the probative value of the evidence outweighs the danger of unfair prejudice given the potential of the evidence to humiliate and embarrass the alleged victim and to result in unfair or biased jury inferences.".

(b) TECHNICAL AMENDMENT.—The table of contents for the Federal Rules of Evidence is amended by adding at the end the item relating to rule 412 the following:

"(e) Interlocutory appeal.
"(f) Rule of relevance and privilege.".

SEC. 154. EVIDENCE OF CLOTHING.

(a) RULE.—The Federal Rules of Evidence, as amended by section 152, are amended by adding after rule 412B the following new rule:

"Rule 413. Evidence of victim's clothing as inciting violence

"Notwithstanding any other law, in a criminal case in which a person is accused of an offense under chapter 109A of title 18, United States Code, evidence of an alleged victim's clothing is not admissible to show that the alleged victim incited or invited the offense charged.".

(b) TECHNICAL AMENDMENT.—The table of contents for the Federal Rules of Evidence, as amended by section 152, is amended by inserting after the item relating to rule 412B the following new item:

"413. Evidence of victim's clothing as inciting violence.".

Subtitle F—Assistance to Victims of Sexual Assault

SEC. 161. EDUCATION AND PREVENTION GRANTS TO REDUCE SEXUAL ASSAULTS AGAINST WOMEN.

Part A of title XIX of the Public Health and Health Services Act (42 U.S.C. 300w et seq.) is amended by adding at the end the following new section:

"SEC. 1908A. USE OF ALLOTMENTS FOR RAPE PREVENTION EDUCATION.

"(a) PERMITTED USE.—Notwithstanding section 1904(a)(1), amounts transferred by the State for use under this part may be used for rape prevention and education programs conducted by rape crisis centers or similar nongovernmental nonprofit entities, which programs may include—

"(1) educational seminars;

"(2) the operation of hotlines;

"(3) training programs for professionals;

"(4) the preparation of informational materials; and

"(5) other efforts to increase awareness of the facts about, or to help prevent, sexual assault, including efforts to increase awareness in underserved racial, ethnic, and language minority communities.

"(b) TARGETING OF EDUCATION PROGRAMS.—States providing grant monies must ensure that at least 25 percent of the monies are devoted to education programs targeted for middle school, junior high school, and high school students.

"(c) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated to carry out this section $65,000,000 for each of fiscal years 1994, 1995, and 1996.

"(d) LIMITATION.—Funds authorized under this section may only be used for providing rape prevention and education programs.

"(e) DEFINITION.—For purposes of this section, the term 'rape prevention and education' includes education and prevention efforts directed at offenses committed by offenders who are not known to the victim as well as offenders who are known to the victim.

"(f) TERMS.—States shall be allotted funds under this section pursuant to the terms of sections 1902 and 1903, and subject to the conditions provided in this section and sections 1904 through 1909.".

SEC. 162. RAPE EXAM PAYMENTS.

(a) No State or other grantee is entitled to funds under title I of the Violence Against Women Act of 1993 unless the State or other grantee incurs the full cost of forensic medical exams for victims of sexual assault. A State or other grantee does not incur the full medical cost of forensic medical exams if it chooses to reimburse the victim after the fact unless the reimbursement program waives any minimum loss or deductible requirement, provides victim reimbursement within a reasonable time (90 days), permits applications for reimbursement within one year from the date of the exam, and provides information to all subjects of forensic medical exams about how to obtain reimbursement.

(b) Within 90 days after the enactment of this Act, the Director of the Office of Victims of Crime shall propose regulations to implement this section, detailing qualified programs. Such regulations shall specify the type and form of information to be provided victims, including provisions for multilingual information, where appropriate.

SEC. 163. EDUCATION AND PREVENTION GRANTS TO REDUCE SEXUAL ABUSE OF FEMALE RUNAWAY, HOMELESS, AND STREET YOUTH.

Part A of the Runaway and Homeless Youth Act (42 U.S.C. 5711 et seq.) is amended by—

(1) redesignating sections 315 and 317 as sections 317 and 318, respectively; and

(2) inserting after section 315 the following new section:

"GRANTS FOR PREVENTION OF SEXUAL ABUSE AND EXPLOITATION

"SEC. 316. (a) IN GENERAL.—The Secretary shall make grants under this section to private, nonprofit agencies for street-based outreach and education, including treatment, counseling, and information and referral, for female runaway, homeless, and street youth who have been subjected to or are at risk of being subjected to sexual abuse.

"(b) PRIORITY.—In selecting among applicants for grants under subsection (a), the Secretary shall give priority to agencies that have experience in providing services to female runaway, homeless, and street youth.

"(c) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated to carry out this section $10,000,000 for each of fiscal years 1994, 1995, and 1996.

"(d) DEFINITIONS.—For the purposes of this section—

"(1) the term 'street-based outreach and education' includes education and prevention efforts directed at offenses committed by offenders who are not known to the victim as well as offenders who are known to the victim; and

"(2) the term 'street youth' means a female less than 21 years old who spends a significant amount of time on the street or in other areas of exposure to encounters that may lead to sexual abuse.".

SEC. 164. VICTIM'S RIGHT OF ALLOCUTION IN SENTENCING.

Rule 32 of the Federal Rules of Criminal Procedure is amended—

(1) by striking "and" at the end of subdivision (a)(1)(B);

(2) by striking the period at the end of subdivision (a)(1)(C) and inserting "; and";

(3) by inserting after subdivision (a)(1)(C) the following new subdivision:

"(D) if sentence is to be imposed for a crime of violence or sexual abuse, address the victim personally if the victim is present at the sentencing hearing and determine if the victim wishes to make a statement and to present any information in relation to the sentence.";

(4) in the penultimate sentence of subdivision (a)(1), by striking "equivalent opportunity" and inserting "opportunity equivalent to that of the defendant's counsel";

(5) in the last sentence of subdivision (a)(1) by inserting "the victim," before "or the attorney for the Government."; and

(6) by adding at the end the following new subdivision:

"(f) DEFINITIONS.—For purposes of this rule—

"(1) the term 'victim' means any person against whom an offense for which a sentence is to be imposed has been committed, but the right of allocution under subdivision (a)(1)(D) may be exercised instead by—

"(A) a parent or legal guardian in case the victim is below the age of 18 years or incompetent; or

"(B) 1 or more family members or relatives designated by the court in case the victim is deceased or incapacitated,

if such person or persons are present at the sentencing hearing, regardless of whether the victim is present; and

"Rule 414. Inadmissibility of Evidence to Show Invitation or Provocation by Victim in Sexual Abuse Cases

"In a criminal case in which a person is accused of an offense involving conduct proscribed by chapter 109A of title 18, United States Code, evidence is not admissible to show that the alleged victim invited or provoked the commission of the offense. This rule does not limit the admission of evidence of consent by the alleged victim if the issue of consent is relevant to liability and the evidence is otherwise admissible under these rules.".

(b) TECHNICAL AMENDMENT.—The table of contents for the Federal Rules of Evidence, as amended by section 4, is amended by inserting after the item relating to rule 413 the following new item:

"414. Inadmissibility of evidence to show invitation or provocation by victim in sexual abuse cases.".

SEC. 807. NATIONAL BASELINE STUDY ON CAMPUS SEXUAL ASSAULT.

(a) STUDY.—The Attorney General shall provide for a national baseline study to examine the scope of the problem of campus sexual assaults and the effectiveness of institutional and legal policies in addressing such crimes and protecting victims. The Attorney General may utilize the Bureau of Justice Statistics, the National Institute of Justice, and the Office for Victims of Crime in carrying out this section.

(b) REPORT.—Based on the study required by subsection (a), the Attorney General shall prepare a report including an analysis of—

(1) the number of reported allegations and estimated number of unreported allegations of campus sexual assaults, and to whom the allegations are reported (including authorities of the educational institution, sexual assault victim service entities, and local criminal authorities);

(2) the number of campus sexual assault allegations reported to authorities of educational institutions which are reported to criminal authorities;

(3) the number of campus sexual assault allegations that result in criminal prosecution in comparison with the number of non-campus sexual assault allegations that result in criminal prosecution;

(4) Federal and State laws or regulations pertaining specifically to campus sexual assaults;

(5) the adequacy of policies and practices of educational institutions in addressing campus sexual assaults and protecting victims, including consideration of—

(A) the security measures in effect at educational institutions, such as utilization of campus police and security guards, control over access to grounds and buildings, supervision of student activities and student living arrangements, control over the consumption of alcohol by students, lighting, and the availability of escort services;

(B) the articulation and communication to students of the institution's policies concerning sexual assaults;

(C) policies and practices that may prevent or discourage the reporting of campus sexual assaults to local criminal authorities, or that may otherwise obstruct justice or interfere with the prosecution of perpetrators of campus sexual assaults;

(D) the nature and availability of victim services for victims of campus sexual assaults;

(E) the ability of educational institutions' disciplinary processes to address allegations of sexual assault adequately and fairly;

(F) measures that are taken to ensure that victims are free of unwanted contact with alleged assailants, and disciplinary sanctions that are imposed when a sexual assault is determined to have occurred; and

(G) the grounds on which educational institutions are subject to lawsuits based on campus sexual assaults, the resolution of these cases, and measures that can be taken to avoid the likelihood of lawsuits and civil liability;

(6) an assessment of the policies and practices of educational institutions that are of greatest effectiveness in addressing campus sexual assaults and protecting victims, including policies and practices relating to the particular issues described in paragraph (5); and

(7) any recommendations the Attorney General may have for reforms to address campus sexual assaults and protect victims more effectively, and any other matters that the Attorney General deems relevant to the subject of the study and report required by this section.

(c) SUBMISSION OF REPORT.—The report required by subsection (b) shall be submitted to the Congress no later than September 1, 1995.

(d) DEFINITION.—For purposes of this section, "campus sexual assaults" includes sexual assaults occurring at institutions of postsecondary education and sexual assaults committed against or by students or employees of such institutions.

(e) AUTHORIZATION OF APPROPRIATION.—There is authorized to be appropriated $200,000 to carry out the study required by this section.

SEC. 808. REPORT ON BATTERED WOMEN'S SYNDROME.

(a) REPORT.—The Attorney General shall prepare and transmit to the Congress a report on the status of battered women's syndrome as a medical and psychological condition and on its effect in criminal trials. The Attorney General may utilize the National Institute of Justice to obtain information required for the preparation of the report.

(b) COMPONENTS OF REPORT.—The report described in subsection (a) shall include—

(1) a review of medical and psychological views concerning the existence, nature, and effects of battered women's syndrome as a psychological condition;

(2) a compilation of judicial decisions that have admitted or excluded evidence of battered women's syndrome as evidence of guilt or as a defense in criminal trials; and

(3) information on the views of judges, prosecutors, and defense attorneys concerning the effects that evidence of battered women's syndrome may have in criminal trials.

SEC. 809. REPORT ON CONFIDENTIALITY OF ADDRESSES FOR VICTIMS OF DOMESTIC VIOLENCE.

(a) REPORT.—The Attorney General shall conduct a study of the means by which abusive spouses may obtain information concerning the addresses or locations of estranged or former spouses, notwithstanding the desire of the victims to have such information withheld to avoid further exposure to abuse. Based on the study, the Attorney General shall transmit a report to Congress including—

(1) the findings of the study concerning the means by which information concerning the addresses or locations of abused spouses may be obtained by abusers; and

(2) analysis of the feasibility of creating effective means of protecting the confidentiality of information concerning the addresses and locations of abused spouses to protect such persons from exposure to further abuse while preserving access to such information for legitimate purposes.

(b) USE OF COMPONENTS.—The Attorney General may use the National Institute of Justice and the Office for Victims of Crime in carrying out this section.

SEC. 810. REPORT ON RECORDKEEPING RELATING TO DOMESTIC VIOLENCE.

Not later than 1 year after the date of enactment of this Act, the Attorney General shall complete a study of, and shall submit to Congress a report and recommendations on, problems of recordkeeping of criminal complaints involving domestic violence. The study and report shall examine—

(1) the efforts that have been made by the Department of Justice, including the Federal Bureau of Investigation, to collect statistics on domestic violence; and

(2) the feasibility of requiring that the relationship between an offender and victim be reported in Federal records of crimes of aggravated assault, rape, and other violent crimes.

SEC. 811. REPORT ON FAIR TREATMENT IN LEGAL PROCEEDINGS.

Not later than 180 days after the date of enactment of this Act, the Judicial Conference of the United States shall review and make recommendations, and report to Congress, regarding the advisability of creating Federal rules of professional conduct for lawyers in Federal cases involving sexual misconduct that—

(1) protect litigants from a course of conduct intended solely for the purpose of distressing, harassing, embarrassing, burdening, or inconveniencing litigants;

(2) counsel against reliance on generalizations or stereotypes that demean, disgrace, or humiliate on the basis of gender;

(3) protect litigants from a course of conduct intended solely to increase the expense of litigation; and

(4) prohibit counsel from offering evidence that the lawyer knows to be false or from discrediting evidence the lawyer knows to be true.

SEC. 812. REPORT ON FEDERAL RULE OF EVIDENCE 404.

(a) STUDY.—Not later than 180 days after the date of enactment of this Act, the Judicial Conference shall complete a study of, and shall submit to Congress recommendations for amending, rule 404 of the Federal Rules of Evidence as it affects the admission of evidence of a defendant's prior sex crimes in cases brought pursuant to chapter 109A or other cases involving sexual misconduct.

(b) SPECIFIC ISSUES.—The study described in subsection (a) shall include—

(1) a survey of existing law on the introduction of prior similar sex crimes under State and Federal evidentiary rules;

(2) a recommendation concerning whether rule 404 should be amended to introduce evidence of prior sex crimes and, if so—

(A) whether such acts could be used to prove the defendant's propensity to act therewith; and

(B) whether evidence of prior similar sex crimes should be admitted for purposes other than to show character;

(3) a recommendation concerning whether evidence of similar acts, if admitted, should meet a threshold of similarity to the crime charged;

(4) a recommendation concerning whether evidence of similar acts, if admitted, should be limited to a certain time period, (such as 10 years); and

(5) the effect, if any, of the adoption of any proposed changes on the admissibility of evidence under rule 412 of the Federal Rules of Evidence.

SEC. 813. SUPPLEMENTARY GRANTS FOR STATES ADOPTING EFFECTIVE LAWS RELATING TO SEXUAL VIOLENCE.

(a) IN GENERAL.—The Attorney General may, in each fiscal year, award an aggregate amount of up to $1,000,000 to a State that meets the eligibility requirements of subsection (b).

include participants from all regions of the country and all walks of life, both public and private

DOLE AMENDMENT NO. 1105

Mr. DOLE proposed an amendment to the bill S. 1607, supra; as follows.

At the appropriate place, add the following:

SEC. 121. ADMISSIBILITY OF EVIDENCE OF SIMILAR CRIMES IN SEX OFFENSE CASES.

The Federal Rules of Evidence are amended by adding after Rule 412 the following new rules.

"Rule 413. Evidence of Similar Crimes in Sexual Assault Cases

"(a) In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant.

"(b) In a case in which the Government intends to offer evidence under this rule, the attorney for the Government shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

"(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.

"(d) For purposes of this rule and Rule 415, "offense of sexual assault" means a crime under Federal law or the law of a State (as defined in section 513 of title 18, United States Code) that involved—

"(1) any conduct proscribed by chapter 109A of title 18, United States Code;

"(2) contact, without consent, between any part of the defendant's body or an object and the genitals or anus of another person;

"(3) contact, without consent, between the genitals or anus of the defendant and any part of another person's body;

"(4) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person; or

"(5) an attempt or conspiracy to engage in conduct described in paragraphs (1)–(4).

"Rule 414. Evidence of Similar Crimes in Child Molestation Cases

"(a) In a criminal case in which the defendant is accused of an offense of child molestation, evidence of the defendant's commission of another offense or offenses of child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant.

"(b) In a case in which the Government intends to offer evidence under this rule, the attorney for the Government shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

"(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.

"(d) For purposes of this rule and Rule 415, "child" means a person below the age of fourteen, and "offense of child molestation" means a crime under Federal law or the law of a State (as defined in section 513 of title 18, United States Code) that involved—

"(1) any conduct proscribed by chapter 109A of title 18, United States Code, that was committed in relation to a child;

"(2) any conduct proscribed by chapter 110 of title 18, United States Code;

"(3) contact between any part of the defendant's body or an object and the genitals or anus of a child,

"(4) contact between the genitals or anus of the defendant and any part of the body of a child;

"(5) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on a child, or

"(6) an attempt or conspiracy to engage in conduct described in a paragraphs (1)–(5).

"Rule 415. Evidence of Similar Act in Civil Cases Concerning Sexual Assault or Child Molestation

"(a) In a civil case in which a claim for damages or other relief is predicated on a party's alleged commission of conduct constituting an offense of sexual assault or child molestation, evidence of that party's commission of another offense or offenses of sexual assault or child molestation is admissible and may be considered as provided in Rule 413 and Rule 414 of these rules.

"(b) A party who intends to offer evidence under this Rule shall disclose the evidence to the party against whom it will be offered, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trail or at such later time as the court may allow for good cause.

"(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule."

COMPREHENSIVE CHILD IMMUNIZATION ACT OF 1993

KENNEDY (AND KASSEBAUM) AMENDMENT NO. 1106

Mr. BIDEN (for Mr. KENNEDY for, himself and Mrs. KASSEBAUM) proposed an amendment to the bill (S. 732) to provide for the immunization of all children in the United States against vaccine-preventable diseases, and for other purposes; as follows:

On page 31, line 4, strike "and".

On page 31, line 8, strike the period and insert "; and".

On page 31, between lines 8 and 9, insert the following:

"(C) has in effect such laws and regulations as may be necessary to ensure the following safeguards for the rights of parents:

"(i) An exemption for the parent, upon the request of the parent, from the requirements established by the State, pursuant to this part, for the collection of data described in subsections (b) and (c) of section 2147, or the collection of any other data regarding any child of the parent that the State may require for incorporation in the State immunization registry.

"(ii) Restrictions ensuring that no information relating to a child or to the parent or guardian of a child that is collected or maintained by the State immunization registry pursuant to this part, or the national immunization surveillance program established under section 2153, will be used as a basis for the criminal prosecution or the commencement of a criminal investigation of a parent or guardian.".

On page 50, line 3, add after the period the following new sentence: "The Secretary shall give special consideration to those States that have low childhood immunization rates and that submit plans that demonstrate the State's substantial effort and commitment to improving such rates.".

On page 50, line 8, strike "If the Director" and all that follows through line 15.

On page 50, between lines 19 and 20, insert the following

"SEC. 2157. PERFORMANCE BASED GRANT PROGRAM.

"(a) ANNUAL REPORT.—Not later than July 1 of each year, a State shall prepare and submit to the Director of the Centers for Disease Control and Prevention a report that contains an estimate (based on a base population sample) of the percentage of 2-year-old residents of the State who have been fully immunized as described in subsection (c).

"(b) PAYMENTS TO STATES.—

"(1) IN GENERAL.—Subject to the availability of appropriations, the Secretary shall provide to a State that has submitted an annual report under subsection (a) that demonstrates that the State has fully immunized at least 50 percent of the 2-year-old residents of that State, with respect to the year for which the report was prepared, a payment in an amount equal to—

"(A) with respect to a State that has demonstrated the full immunization of at least 50 and less than 64 percent of all 2-year-old residents of the State, $50 multiplied by the number of fully immunized 2-year-old resident children in excess of the number of children equaling such 50 percent amount,

"(B) with respect to a State that has demonstrated the full immunization of at least 65 and less than 70 percent of all 2-year-old residents of the State, $75 multiplied by the number of fully immunized 2-year-old resident children in excess of the number of children equaling such 65 percent amount; and

"(C) with respect to a State that has demonstrated the full immunization of at least 70 and less than 91 percent of all 2-year-old residents of the State, $100 multiplied by the number of fully immunized 2-year-old resident children in excess of the number of children equaling such 70 percent amount.

"(2) USE OF FUNDS.—

"(A) CONDITION.—As a condition of receiving amounts under this section a State that uses a combination of Federal and State funds in achieving the immunization goals described in paragraph (1) shall agree to reinvest, in activities related to improving immunization services, that percentage of the payments to the State under paragraph (1) that is equal to the amount of Federal contributions to immunization services in the State as compared to the amount of the State contributions to such services.

"(B) DISCRETIONARY USE.—A State that has demonstrated that the use of State-only funds was responsible for the increase in the immunization rate which qualified such State for payments under paragraph (1), may use amounts awarded under this section for other purposes, at the discretion of the State.

"(3) VERIFICATION.—Prior to making a payment to a State under this subsection, the Secretary shall, in collaboration with the Centers for Disease Control and Prevention, verify the accuracy of the State report involved.

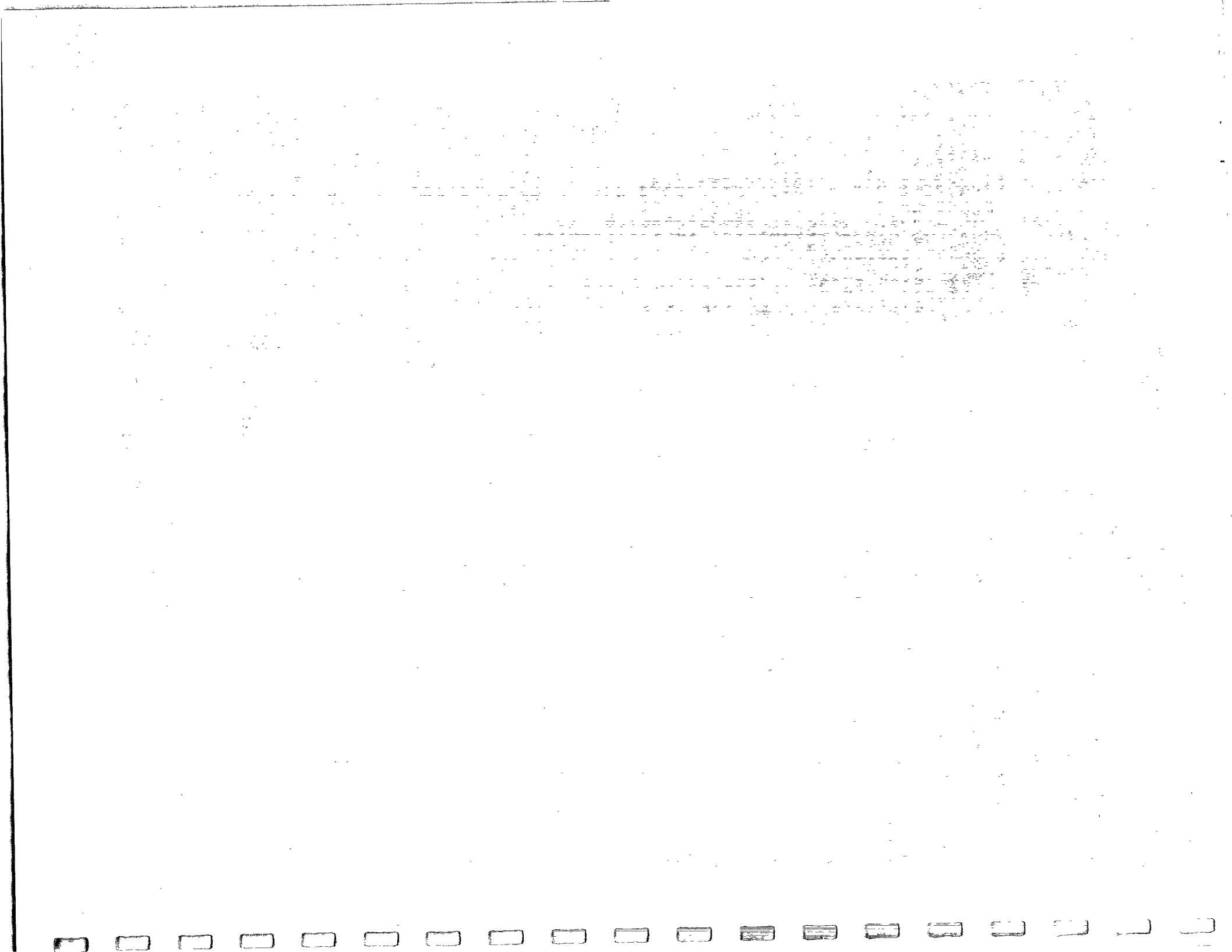
"(c) DEFINITION.—For purposes of this section, the term 'fully immunized' means a 2 year old child that has received four doses of DTP vaccine (diphtheria, tetanus, pertussis), three doses of polio vaccine, and one dose of MMR (measles, mumps, rubella) vaccine.

On page 61, strike out line 3 and insert the following:

SEC. 5. AMENDMENTS TO THE FEDERALLY SUPPORTED HEALTH CENTERS ASSISTANCE ACT OF 1992.",

On page 63, between lines 6 and 7, insert the following:

(d) PAYMENT OF JUDGMENTS.—Section 224(k)(2) of such Act (42 U.S.C. 233(k)(2)), as added by section 4 of the Federally Supported Health Centers Assistance Act of 1992,



AGENDA ITEM - 4
Tucson, Arizona
January 12-15, 1994

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS
WASHINGTON, D.C. 20544

L. RALPH MECHAM
DIRECTOR

CLARENCE A. LEE, JR.
ASSOCIATE DIRECTOR

JOHN K. RABIEJ
CHIEF, RULES COMMITTEE
SUPPORT OFFICE

December 14, 1993

MEMORANDUM TO MEMBERS OF THE STANDING COMMITTEE

SUBJECT: Agenda Item Regarding Proposed Rules Amendments

A copy of the table of contents of the proposed amendments, which were approved by the Standing Committee for publication, is attached. The proposed amendments were published on October 15, 1993, and sent to major legal publishing firms, e.g., West. The public comment period expires on April 15, 1994. At the request of the Advisory Committee on Appellate Rules, a special mailing of the proposed amendments to Rule 32 of the Federal Rules of Appellate Procedure was made to legal printing businesses, which invited comment on the proposed limits on briefs.

To date we have received only a handful of comments on the published rules amendments, all of which have been circulated to members of the respective advisory committees for review.

John K. Rabiej

Attachments

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

October 15, 1993

TO THE BENCH AND BAR:

The Judicial Conference Advisory Committees on the Appellate, Bankruptcy, Civil, Criminal, and Evidence Rules have proposed various amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure, and the Federal Rules of Evidence and have requested that the proposals be circulated to the bench and bar and to the public generally for comment. These proposals, included herein, are explained in the Notes prepared by the Advisory Committees.

Among the various proposed amendments, there are several proposed amendments that were common to each set of rules and drafted with substantially identical language. Specifically, Appellate Rule 47, Bankruptcy Rules 8018 and 9029, Civil Rule 83, and Criminal Rule 57 consist of parallel amendments on the use of local rules of practice and procedure. In addition, Appellate Rule 49, Bankruptcy Rule 9037, Civil Rule 84, Criminal Rule 59, and Evidence Rule 1102 consist of amendments that permit minor technical rule amendments by the Judicial Conference without having to burden the Supreme Court and Congress with reviewing such changes.

The Judicial Conference Standing Committee on Rules of Practice and Procedure **has not approved these proposals** but submits them for public comment. We request that all suggestions and comments, whether favorable, adverse, or otherwise, be placed in the hands of the Secretary as soon as convenient and, in any event, no later than April 15, 1994. All communications with respect to the proposals should be addressed to the Secretary of the Committee on Rules of Practice and Procedure, Administrative Office of the United States Courts, Washington, D.C. 20544.

In order that persons and organizations wishing to do so may comment orally on the proposed amendments, a hearing will be held on the amendments to the Appellate Rules in Denver, Colorado on March 14, 1994; to the Bankruptcy Rules in Washington, D.C. on March 25, 1994; to the Civil Rules in Dallas, Texas on April 6, 1994; to the Criminal Rules in Los Angeles, California on April 4, 1994; and to the Evidence Rules in New York, New York on May 9, 1994. **Those wishing to testify should contact the Secretary of the Committee at the above address at least 30 days before the hearing.**

These proposed amendments have not been submitted to or considered by the Judicial Conference of the United States or the Supreme Court.

Alicemarie H. Stotler
Chair

Peter G. McCabe
Secretary

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AGENDA ITEM - 5
Tucson, Arizona
January 12-15, 1994

TEXAS TECH UNIVERSITY
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December 13, 1993

MEMORANDUM FOR COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

FROM: THOMAS E. BAKER, CHAIR, SUBCOMMITTEE ON LONG RANG PLANNING

RE: PROGRESS REPORT ON SELF-STUDY T.E.B.

You will recall that at the June 1993 meeting the Standing Committee authorized our Subcommittee on Long Range Planning to undertake a thorough evaluation of the federal court rulemaking procedures that will include: (1) a description of existing procedures; (2) a summary of criticisms and concerns; (3) an assessment of how existing procedures might be improved.

The first purpose of this memorandum is to summarize what we have done and how we plan to proceed. Second, we ask for your comments and suggestions at the January 1994 meeting.

I.

We have not done much so far. Chairperson Stotler has recently approved a Subcommittee request to hire some law student research assistants to help with the self-study. I have been corresponding with Judge Easterbrook and former-Subcommittee member Justice Peterson, as well as others about how best to proceed. In this regard, former-Chair Judge Keeton, former-member Professor Wright, and former-Reporter Professor Carrington have been most forthcoming. We expect to make full use of the expertise of our Reporter, Professor Coquillette. And we expect to involve the Chairs and Reporters of the various Advisory Committees. We also hope that each of you will find the time to participate in the identification of issues and the organization of the self-study.

We have lined-up a blue ribbon group of law professors who have agreed to act as advisors:

Professor Linda S. Mullenix, University of Texas
Professor John B. Oakley, University of California, Davis
Professor Carl Tobias, University of Montana

Each of these professors has written extensively about federal court practice and procedures and each has been active in actual

rulemaking. In this regard, I have attached an article by Professor Mullenix on the Civil Justice Reform Act of 1990, Unconstitutional Rulemaking: The Civil Justice Reform Act and Separation of Powers (APPENDIX A). This should be of interest to everyone involved in federal court rulemaking. Our self-study is obliged to consider the long term effects of this statute on judicial rulemaking.

II.

In my memorandum of September 1, 1993, responding to Judge Stotler's request for suggestions for our Executive Session, I requested some discussion time for the self-study. The second purpose of this present memorandum is to prompt some discussion.

The self-study we have initiated intends to answer the questions:

What are the goals of federal judicial rulemaking procedures?

How well do the existing procedures accomplish those goals?

What are the criticisms of the way rules are made?

How might rulemaking procedures be improved?

A.

To begin to answer these self-study questions, it might be helpful to descend one level of abstraction to consider how the Standing Committee performs in relation to other entities involved in rulemaking. Ask yourself what is "good" – and what is "bad" – about the way the Standing Committee relates to the following:

- The various Advisory Committees
- Other Committees of the Judicial Conference
- The Judicial Conference
- The Congress
- The members of the Federal Judiciary
- The Executive Branch
- The State Judiciaries

– The members of the Bar, including the American Bar Association and other Bar organizations

– Other relevant organizations of lawyers and litigants and the public

B.

Another vantage on the self-study questions might be functional. Ask yourself how well you think the Standing Committee performs its assigned tasks under our formal Procedures (APPENDIX B). Ask yourself "what *is* broke and needs fixin' and what *ain't* broke and don't need no fixin'," as Judge Wilson was wont to say, back when he was a "sho'-nuff street lawyer" and before he took on the judicial ermine and ascended the woolsack. Procedure #7 reads:

> The Standing Committee shall coordinate the work of the several Advisory Committees, make suggestions of proposals to be studied by them, consider proposals recommended by the Advisory Committees, and transmit such proposals with its recommendation to the Judicial Conference, or recommit them to the appropriate Advisory Committee for further study and consideration.

How well do we perform these functions? How well do we coordinate the various Advisory Committees? How well do we guide the individual Advisory Committees? How well do we consider proposals brought before us, before and after public comment periods? How well do we advise the Judicial Conference? How might our performance of these functions be improved?

The discussion at the Executive Session, which will focus generally on the organization and performance of the Standing Committee will be relevant to the self-study. The agenda of the Joint Meeting of the Chairs of the Advisory and Standing Committees, held in Washington on November 17th, also contained several relevant items.

Your comments and suggestions will guide our efforts, as we develop our written report. That report will identify strengths and weakness in the present rulemaking procedures and will offer alternative recommendations for reforms. We expect to offer that report at the June 1994 meeting of the Standing Committee.

If you think of anything after our January meeting, or if you run across something you believe to be relevant to our self-study, please bring it to my attention.

APPENDIX A

APPENDIX A

Unconstitutional Rulemaking: The Civil Justice Reform Act and Separation of Powers

Linda S. Mullenix*

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* Bernard J. Ward Centennial Professor of Law, University of Texas School of Law. Summer research support for this Article was provided by funds from the Fred and Emily Wulff Centennial Chair in Law. The author served as Co-Reporter and Legal Counsel to the Civil Justice Advisory Group of the United States District Court for the Southern District of Texas. *See* CIVIL JUSTICE REFORM ACT ADVISORY GROUP OF THE U.S. DIST. COURT FOR THE S. DIST. OF TEX., REPORT AND PLAN (Oct. 18, 1991). The opinions expressed in this Article are the author's and do not reflect the views, opinions, or conclusions of the Advisory Group, or the judges of the Southern District of Texas.

INTRODUCTION

The continuing debate over civil justice reform, replete with colorful "lawyer-bashing," usually focuses on the purported explosion of civil litigation[1] or the venality of American lawyers.[2] Civil justice reform has proven to be such a popular political hobbyhorse that numerous office-holders and candidates made it a central theme of the 1992 electoral campaign.[3] The incessant demands for reform of civil legal services have evolved into a civil justice reform movement characterized by

1. Many commentators, however, question the validity of the "litigation explosion" problem. *See, e.g.*, L. Gordon Crovitz, *Supreme Court Exposes Journalists to the Litigation Explosion*, WALL ST. J., June 26, 1991, at A9; L. Gordon Crovitz, *The Litigation Explosion and Quayle's Time Bomb*, WALL ST. J., May 15, 1991, at A15. A debate over the so-called litigation explosion was inspired by WALTER K. OLSON, THE LITIGATION EXPLOSION: WHAT HAPPENED WHEN AMERICA UNLEASHED THE LAWSUIT (1991). *See, e.g.*, Douglas H. Ginsburg, *Law's Paradise Lost*, 90 MICH. L. REV. 1609 (1992) (book review).

2. The phenomenon of lawyer bashing is regularly debated in the media. *See, e.g.*, Tom Baxter, *Bush's Attack Bird; Dan Quayle Adds Lawyer Bashing To GOP Repertoire*, L.A. DAILY J., Aug. 20, 1991, at 6; John P. Bracken, *Current Lawyer-Bashing Undermines Attorney Role in Administering Justice*, N.Y.L.J., May 1, 1992, at S4; Terence Moran, *Calling Bush's Lawyer Bashing Bluff*, LEGAL TIMES, Sept. 14, 1992, at 27.

3. *See, e.g.*, Kevin Sack, *The 1992 Campaign: The Vice President; Quayle Says Letter Shows Lawyers 'Own' Clinton*, N.Y. TIMES, Aug. 28, 1992, at A16. During the 1992 presidential campaign, the Republican candidates and their supporters advocated civil justice reform through the broadcast media as well. *See, e.g.*, *The 92 Vote: The Vice Presidential Debate* (ABC television broadcast, Oct. 13, 1992), transcript *available in* LEXIS, Nexis Library, Script file (statement of Vice President Dan Quayle noting small businesspeople's desire for civil justice reform due to costs and delays).

the creation of advisory groups;[4] the production of white papers, reports, and studies;[5] and even executive orders for civil justice reform.[6]

In 1990, Congress responded with the Civil Justice Reform Act.[7] The Act created an advisory rulemaking group for each of the ninety-four federal district courts, and required each group to formulate an expense and delay reduction plan by the end of 1993.[8]

This Article is the conclusion to a piece published earlier in

4. *See, e.g.*, Carl Tobias, *Civil Justice Planning in the Montana Federal District*, 53 MONT. L. REV. 239 (1992) (tracking civil justice reform in Montana and nationally); Joseph C. Wilkinson, Jr., *Civil Justice Reform Act Advisory Groups in Louisiana*, 40 LA. B. J. 165 (Aug. 1992); Junda Woo, *Arizona Overhauls Civil-Justice System in an Effort to Unclog State's Courts*, WALL ST. J., June 30, 1992, at B7 (noting Arizona reform plans).

5. *See* AMERICAN BAR ASSOCIATION CONSORTIUM ON LEGAL SERVICES AND THE PUBLIC, CIVIL JUSTICE: AN AGENDA FOR THE 1990S; PAPERS OF THE AMERICAN BAR ASSOCIATION, NATIONAL CONFERENCE ON ACCESS TO JUSTICE IN THE 1990S (1989); AMERICAN BAR ASSOCIATION, CONSORTIUM ON LEGAL SERVICES AND THE PUBLIC, CIVIL JUSTICE: AN AGENDA FOR THE 1990S; REPORT OF THE AMERICAN BAR ASSOCIATION, NATIONAL CONFERENCE ON ACCESS TO JUSTICE IN THE 1990S (1989); BROOKINGS INST., JUSTICE FOR ALL: REDUCING COSTS AND DELAYS IN CIVIL LITIGATION (1989); A REPORT FROM THE PRESIDENT'S COUNCIL ON COMPETITIVENESS, AGENDA FOR CIVIL JUSTICE REFORM IN AMERICA (1991); FEDERAL COURTS STUDY COMMITTEE, REPORT (1990).

6. The executive branch has also entered the fray. *See* Exec. Order No. 12,778, 3 C.F.R. 359 (1992) (imposing civil justice reform measures on all executive branch departments and agencies).

7. Civil Justice Reform Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (codified at 28 U.S.C. §§ 471-482 (Supp. II 1990)). The Civil Justice Reform Act constitutes Title I of the Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (codified in scattered sections of 28 U.S.C.). For Congress's views on the need for this legislation, see S. REP. NO. 416, 101st Cong., 2d Sess. 13 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6802, 6852; H.R. REP. NO. 733, 101st Cong., 2d Sess. 11 (1990). For a favorable summary of the Civil Justice Reform Act by the Chairman of the Senate Judiciary Committee and chief proponent of the legislation, see generally Joseph R. Biden, Jr., *Equal, Accessible, Affordable Justice Under Law: The Civil Justice Reform Act of 1990*, 1 CORNELL J. LAW PUB. POL. 1 (1992). *But see* D. Jeffrey Campbell & Jonathan R. Kuhlman, *Civil Justice Reform Act of 1990: An Experiment Gone Awry*, 60 DEFENSE COUNSEL J. 17 (1993) (discussing the unworkability of already implemented expense and delay reduction plans); Carl Tobias, *Civil Justice Reform and the Balkanization of Federal Civil Procedure*, 24 ARIZ. ST. L.J. 1393 (1992); Carl Tobias, *Recalibrating the Civil Justice Reform Act*, 30 HARV. J. ON LEGIS. 115 (1993).

8. Civil Justice Reform Act § 103(a), (b), 104 Stat. at 5089-96. *See generally* Linda S. Mullenix, *Civil Justice Reform Comes to the Southern District of Texas: Creating and Implementing a Cost and Reduction Plan Under the Civil Justice Reform Act of 1990*, 11 REV. LITIG. 165 (1992).

this volume of the *Minnesota Law Review*.[9] The earlier piece explained that the Civil Justice Reform Act effected a revolutionary redistribution of procedural rulemaking power from the federal judicial branch to the federal legislative branch.[10] It focused on three aspects of the Act.

First, the Civil Justice Reform Act effectively overturns the Rules Enabling Act[11] by the expedient of declaring procedural rules to be substantive law, thus stripping the judicial branch of the power to prescribe internal rules of procedure for the federal courts.[12] Second, the Act violates the separation-of-powers doctrine by arrogating to Congress unprecedented authority over the internal affairs of the judiciary.[13] With inadequate legal and empirical foundation, Congress stripped the judicial branch of its important rulemaking function. Third, the Act constitutes a vast experiment in local rulemaking that undermines the central procedural reformation effected by the promulgation of the Federal Rules of Civil Procedure in 1938.[14] The 1938 procedural reformation embodied the aesthetic that the careful, informed study would lead to the adoption and amendment of simple, uniform procedural rules throughout the federal judicial system.

The reform the Civil Justice Reform Act mandates, however, is not conducive to careful, informed amendment of the Federal Rules of Civil Procedure. Moreover, it is doubtful that the ninety-four local advisory groups will recommend simple, much less uniform, rules. On the contrary, the Civil Justice Reform Act encourages, if not requires, a proliferation of local

9. Linda S. Mullenix, *The Counter-Reformation in Procedural Justice*, 77 MINN. L. REV. 375 (1992).

10. *Id.* at 379 (noting that Congress took power from judges and their expert advisors and delegated it to local lawyers and lay people). The earlier Article argues that the true significance of the Civil Justice Reform Act is not in the nuts and bolts of procedural innovation and reform that the ninety-four district advisory groups accomplish under the Act, and that most commentary, to date, focuses on these accomplishments under the legislation. *Id.* at 378-79. In June 1992, the Administrative Office of the United States Courts issued a progress report for the United States Judicial Conference on the pilot and early implementation district plans. *See* JUDICIAL CONFERENCE OF THE UNITED STATES, CIVIL JUSTICE REFORM ACT REPORT: DEVELOPMENT AND IMPLEMENTATION OF PLANS BY EARLY IMPLEMENTATION DISTRICTS AND PILOT COURTS (1992) [hereinafter CIVIL JUSTICE REFORM ACT REPORT].

11. 28 U.S.C. § 2072 (1988 & Supp. II 1990).

12. *See* Mullenix, *supra* note 9, at 379.

13. *Id.* at 382.

14. *Id.* at 380.

rules of increasing complexity and specificity.[15] Hence, the Civil Justice Reform Act is actually a counter-reformation of procedural justice.

In sum, the earlier Article argued that the implications of the Civil Justice Reform Act are dramatic, revolutionary, and probably bad. Under the Act, grassroots, amateur local rulemaking groups will recommend problematic local rules, measures, and programs based not on considered contemplative study, but rather on ill-conceived social science, anecdote, and interest-group lobbying. More significantly, the Act will contribute to the increased balkanization of federal civil procedure and transform the reigning procedural aesthetic of simplicity and uniformity into one of increasing complexity and variation.[16]

This Article examines the legal basis for the Civil Justice Reform Act. It concludes that the Act revokes the Rules Enabling Act *sub silentio* and authorizes unconstitutional rulemaking. Central to this thesis is the argument that the Civil Justice Reform Act violates the separation-of-powers doctrine by substantially impairing the federal courts' inherent Article III power to control their internal process and the conduct of civil litigation. Furthermore, Congress is wrong in declaring—as it does in the legislative history to the Act—that it has exclusive federal rulemaking power.[17] Apart from these objections, the Civil Justice Reform Act ought to be condemned for the pragmatic reason that it will irretrievably politicize federal procedural rulemaking. Whatever legal arguments may be marshalled against the Civil Justice Reform Act, this legislation also embodies deceptively high-minded but nonetheless ill-conceived public policy.

Part I of this Article examines whether the Civil Justice Reform Act violates the separation-of-powers doctrine. It first briefly canvasses the separation-of-powers decisions that deal with executive/legislative and executive/judicial branch conflicts, and concludes that these cases are not particularly useful

15. *Id.*; *see also* CIVIL JUSTICE REFORM ACT REPORT, *supra* note 10 (summarizing the array of rulemaking efforts of the pilot and early implementation districts). Furthermore, the advisory groups created under the Civil Justice Reform Act pursue their reform agendas parallel to the federal Advisory Committee on Civil Rules, which continues to draft revisions to the Federal Rules of Civil Procedure—a situation I characterize as inducing incredible procedural babel. Mullenix, *supra* note 9, at 381.

16. *See* Mullenix, *supra* note 9, at 380.

17. *Id.* at 382.

for evaluating the legislative/judicial branch conflict presented by the Civil Justice Reform Act. This Part explains that the Act poses a boundary question regarding the concurrent exercise of rulemaking powers by two separate branches of our federal government. After determining the possible methodologies a federal court might use in construing the Act's constitutionality, Part I concludes that Congress, through the Civil Justice Reform Act, has violated the separation-of-powers doctrine by exercising authority that is beyond its Article I powers, consequently intruding on powers Article III assigns to the judiciary.

Part II evaluates whether the Civil Justice Reform Act contravenes the Rules Enabling Act. This Part first explores the allocation of rulemaking powers and discusses the historical and doctrinal underpinnings of the substantive/procedural rulemaking distinction embodied in the Rules Enabling Act. The case law construing the Rules Enabling Act provides an inapt analytical framework for considering the Civil Justice Reform Act because past Rules Enabling Act challenges to court-made rules typically have posed the question whether the judiciary, in promulgating a particular rule, has violated the Rules Enabling Act. The Civil Justice Reform Act, in contrast, poses the obverse issue: whether Congress, in enacting this legislation, has transgressed its own Rules Enabling Act. Part II also discusses the implications for procedural rulemaking of Congress's 1988 amendment to the Rules Enabling Act, and concludes that, notwithstanding Congress's requirement of a more open process, the Rules Enabling Act still allocates procedural rulemaking power to the judicial branch.

Finally, Part II argues that the Senate's interpretation of the Rules Enabling Act has inverted the usual understanding of that Act and has transformed it from enabling legislation to disabling legislation. In so doing, Congress has committed two dangerous offenses: it has stripped the courts of their traditional procedural rulemaking authority, and it has changed procedural rules into substantive provisions. Thus the Civil Justice Reform Act shifts the locus of rulemaking authority away from the federal courts, where it always has been exercised, and relocates it in Congress—a branch ill-suited to judicial rulemaking. The Article closes with the author's repeated refrain that procedural rulemaking ought not to be a matter of majoritarian legislative public policy.[18]

18. *See id.* at 384; *see also* Linda S. Mullenix, *Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795, 843-57 (1991) (questioning legislative promulgation of procedural rules).

I. THE CIVIL JUSTICE REFORM ACT AND THE SEPARATION-OF-POWERS DOCTRINE

A. THE CIVIL JUSTICE REFORM ACT AS AN IDIOSYNCRATIC SEPARATION-OF-POWERS PROBLEM

The Civil Justice Reform Act presents a subtle, if not idiosyncratic, separation-of-powers problem. The Senate Judiciary Committee highlighted the peculiar nature of this problem by its repeated insistence that the Act presented no separation-of-powers problems.[19] Rather, the Senate deflected the separation-of-powers concerns the American Bar Association and the Judicial Conference raised by characterizing them as challenges "most often cloaked in separation-of-powers terms."[20] Although the Senate made some attempt to defend its rulemaking authority under the Rules Enabling Act,[21] it perfunctorily dismissed all separation-of-powers challenges.

The Senate's failure to address the separation-of-powers issue that the Civil Justice Reform Act raises is important for three reasons. First, the Senate's minimal treatment of the separation-of-powers issue suggests its inability to distinguish between the statutory question posed by the Rules Enabling Act and the more fundamental problem posed by the Constitution's mandate of separate legislative and judicial functions. Second, the Senate's pejorative characterization of the challenge as merely a "cloak," rather than a "real" argument, represents a blatant reproach of the judiciary. The Senate's heavy-handed usurpation of rulemaking authority, coupled with its dismissive attitude towards power allocation, exemplifies the very tensions the Constitution sought to resolve through the separation of powers. Third, the Senate's refusal to even consider the separation-of-powers problem represents either covert ignorance or overt disregard.[22] By failing to resolve this issue, Congress has ensured that the Civil Justice Reform Act will be vulnerable to constitutional attack.

19. *See* S. REP. NO. 416, *supra* note 7, at 9-10, *reprinted in* 1990 U.S.C.C.A.N. at 6811-13; *see also* Mullenix, *supra* note 9, at 434-35 (discussing the Senate's failure to address separation-of-powers questions raised by the American Bar Association and the Judicial Conference of the United States Courts).

20. Mullenix, *supra* note 9, at 435.

21. *Id.*

22. *Id.*

1. Some Preliminary Observations on Separation-of-Powers Interpretation

a. *The Cases and Commentary: Lessons for a Separation-of-Powers Argument*

Separation-of-powers cases, which have continued to command the attention of both the Supreme Court[23] and the commentators,[24] generally embody one of two approaches: a

23. *See, e.g.*, Touby v. United States, 111 S. Ct. 1752 (1991) (challenging Controlled Substances Act's delegation of authority to the Attorney General to list products that would subject violators to criminal prosecution); Freytag v. Commissioner, 111 S. Ct. 2631 (1991) (challenging Congress's allocation to Tax Court of authority to appoint special magistrates); Metropolitan Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc., 111 S. Ct. 2298 (1991) (challenging congressional creation and control of the Metropolitan Washington Airports Authority); Mistretta v. United States, 488 U.S. 361 (1989) (challenging Sentencing Guidelines); Morrison v. Olson, 487 U.S. 654 (1988) (challenging independent counsel scheme); Bowsher v. Synar, 478 U.S. 714 (1986) (challenging Gramm-Rudman-Hollings Act delegation of budget-cutting authority to the Comptroller General); Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833 (1986) (challenging provisions of the Commodities Exchange Act relating to pendent claims); Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982) (challenging constitutionality of provisions of the Bankruptcy Act of 1978).

24. There is an enormous literature relating to separation-of-powers issues. *See generally* SEPARATION OF POWERS—DOES IT STILL WORK? (Robert A. Goldwin & Art Kaufman eds., 1986); WILLIAM B. GWYN, THE MEANING OF THE SEPARATION OF POWERS (Tulane Studies in Political Science No. 9, 1965). For articles dealing with various aspects of separation-of-powers theory during the last decade, see generally Dean Alfange, Jr., *The Supreme Court and The Separation of Powers: A Welcome Return To Normalcy?*, 58 GEO. WASH. L. REV. 668 (1990); Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513 (1991); Stephen L. Carter, *Constitutional Improprieties: Reflections on* Mistretta, Morrison, *and Administrative Government*, 57 U. CHI. L. REV. 357 (1990) [hereinafter Carter, *Constitutional Improprieties*]; Stephen L. Carter, *The Independent Counsel Mess*, 102 HARV. L. REV. 105 (1988) [hereinafter Carter, *The Independent Counsel Mess*]; Stephen L. Carter, *From* Sick Chicken *to* Synar*: The Evolution and Subsequent De-Evolution of the Separation of Powers*, 1987 B.Y.U. L. REV. 719 [hereinafter Carter, *From* Sick Chicken *to* Synar]; Erwin Chemerinsky, *A Paradox Without Principle: A Comment on the Burger Court's Jurisprudence in Separation of Powers Cases*, 60 S. CAL. L. REV. 1083 (1987); E. Donald Elliott, *Why Our Separation of Powers Jurisprudence Is So Abysmal*, 57 GEO. WASH. L. REV. 506 (1989); Paul Gewirtz, *Realism in Separation of Powers Thinking*, 30 WM. & MARY L. REV. 343 (1989); William B. Gwyn, *The Indeterminacy of the Separation of Powers in the Age of the Framers*, 30 WM. & MARY L. REV. 263 (1989); Harold J. Krent, *Separating the Strands in Separation of Powers Controversies*, 74 VA. L. REV. 1253 (1988); Phillip A. Kurland, *The Rise and Fall of the "Doctrine" of Separation of Powers*, 85 MICH. L. REV. 592 (1986); Lewis J. Liman, *The Constitutional Infirmities of the United States Sentencing Commission*, 96 YALE L.J. 1363 (1987); Alan Morrison, *A Non-Power Looks at Separation of Powers*, 79 GEO. L.J. 281 (1990); Theodore B. Olson, *Separation of Powers and The Supreme Court: Implications and Possible Trends*, 6 ADMIN. L.J. 266 (1992); Richard J. Pierce, *Separation of Powers and the Limits of Independence*, 30 WM. & MARY L. REV. 365 (1989); Martin H. Redish & Elizabeth J. Cisar, *"If Angels Were to Govern": The Need for Pragmatic Formalism in Separation of Powers Theory*, 41 DUKE L.J. 449 (1991); Thomas O. Sargentich, *The Contemporary Debate About the Legislative-Executive Separation of Powers*, 72 CORNELL L. REV. 430 (1987); Peter L. Strauss, *Formal and Functional Approaches to Separation of Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488 (1987) [hereinafter Strauss, *Formal and Functional Approaches*]; Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984) [hereinafter Strauss, *Place of Agencies in Government*]; Paul R. Verkuil, *Separation of Powers, the Rule of Law, and the Idea of Independence*, 30 WM. & MARY L. REV. 301 (1989); Wendy E. Ackerman, Comment, *Separation of Powers and Judicial Service on Presidential Commissions*, 53 U. CHI. L. REV. 993 (1986); Candace H. Beckett, Essay, *Separation of Powers and Federalism: Their Impact on Liberty and the Functioning of Our Government*, 29 WM. & MARY L. REV. 635 (1988); Jordan Fried, Student Essay, *The Constitutionality of the U.S. Sentencing Commission: An Analysis of the Role of the Judiciary*, 57 GEO. WASH. L. REV. 704 (1989).

Professor Geoffrey P. Miller has documented the increase in interest in separation-of-powers issues in litigation, scholarly commentary, and constitutional law casebooks. Geoffrey P. Miller, *From Compromise to Confrontation: Separation of Powers in the Reagan Era*, 57 GEO. WASH. L. REV. 401, 402-07 (1989).

"formalist" or a "functionalist" approach.[25] Under the formalist approach, which stresses the independence of each branch, a court evaluates separation problems through a strict construction of the Constitution's first three articles, and finds a separation violation where a power specifically given to one branch is delegated to or exercised by another.[26] Justices who favor

25. Brown, *supra* note 24, at 1522-31 (identifying two major approaches, the "formalist" and "functionalist" models); Krent, *supra* note 24 (discussing the analytical models); *see also* Thomas W. Merrill, *The Constitutional Principle of Separation of Powers*, 1991 SUP. CT. REV. 225, 225-35 (1991) ("unpacking" the formalist and functionalist approaches); Sargentich, *supra* note 24, at 434-44 (describing formalist and functionalist perspectives); Strauss, *Formal and Functional Approaches*, *supra* note 24, at 526 (arguing that formalism is too rigid to adequately describe modern governmental structure and inconsistent with the Framers' intent); Mark Tushnet, *The Sentencing Commission and Constitutional Theory: Bowls and Plateaus in Separation of Powers Theory*, 66 S. CAL. L. REV. 581, 582-85 (1992) (arguing that the two approaches are not that different); Suzanne P. Clair, Note, *Separation of Powers: A New Look At The Functionalist Approach*, 40 CASE W. L. REV. 331, 340-42 (1989-90) (advocating functionalist approach for its malleability).

Professors Redish and Cisar identify six analytical models of the separation-of-powers doctrine: (1) a "functionalist" model, (2) a "judicial abdication" model, (3) an "originalist" model, (4) a "conflict of interest" model, (5) an "ordered liberty" model, and (6) a "pragmatic formalist" model. *See* Redish & Cisar, *supra* note 24, at 487-505 (advocating more vigorous enforcement of separation of powers).

26. For leading examples of the formalist approach to separation-of-pow-

strict constructionism and an originalist view of constitutional law also favor the formalist approach to separation questions.[27]

The functionalist approach, in contrast, posits that a complete separation of the three branches of government is impossible and that the Framers never intended such a separation. This approach is premised on the pragmatic view that contemporary American government is a system of highly interdependent branches and agencies that should not jealously guard power and prerogative, but rather share functions and tasks.[28] Justices who favor a functionalist approach to separation-of-powers questions typically couch their analysis in terms of flexibility and pragmatism.[29]

Although the separation-of-powers cases are factually and analytically varied,[30] the Supreme Court's jurisprudence allows some generalizations.[31] First, although the Court uses both the

ers questions, see *Bowsher*, 478 U.S. 714 (1986); INS v. Chadha, 462 U.S. 919 (1983); *see also* Morrison v. Olson, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting).

27. *See* Olson, *supra* note 24, at 275-76 (analyzing the three 1991 Supreme Court cases dealing with separation of powers, and identifying and forecasting a five-four split among the Justices in favor of formalist separation-of-powers theory). Olson identifies Justices Kennedy, O'Connor, Scalia, Souter, and Thomas as supporting a formalist approach. *Id.*

28. *See, e.g.*, Freytag v. Commissioner, 111 S. Ct. 2631 (1991) (upholding statute authorizing chief judge of United States Tax Court to appoint and assign special trial judges); Touby v. United States, 111 S. Ct. 1752 (1991) (upholding validity of statute delegating authority to Attorney General to schedule controlled substances); Mistretta v. United States, 488 U.S. 361 (1989) (validating power and authority of U.S. Sentencing Commission to promulgate sentencing guidelines); Morrison v. Olson, 487 U.S. 654 (1988) (sustaining office of independent counsel against a separation-of-powers challenge); Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833 (1986) (validating provisions of the Commodities Exchange Act permitting pendent claims); *see also* Krent, *supra* note 24, at 1254, 1359; Kurland, *supra* note 24, at 597-98 (discussing Madison's interpretation of Montesquieu's theory of separation of powers). *But see* Metropolitan Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc., 111 S. Ct. 2298 (1991) (applying *Chadha*'s formalist approach to invalidate Congress's creation of a review board and transfer of control of airports from Congress to local authority).

29. *See* Olson, *supra* note 24, at 275-76 (analyzing the Court's three most recent separation-of-powers cases, and identifying Justices Blackmun, Rehnquist, Stevens, and White as supporting a functionalist approach).

30. *See supra* notes 23, 26, 28.

31. Professor Brown has observed that application of the formalist approach nearly always results in a challenged measure being invalidated as a violation of separation-of-powers doctrine, while the functionalist approach almost always results in the Court's upholding the challenged measure. Brown, *supra* note 24, at 1528. The cases also routinely refer to the Federalist Paper roots of the separation-of-powers concept. *See, e.g.*, INS v. Chadha, 462 U.S. 919, 947-50 (1983) (citing THE FEDERALIST NOS. 22, 73 (Alexander Hamilton), NOS. 51, 62 (James Madison)).

functionalist and the formalist approaches, it favors the former.[32] With a few exceptions,[33] the Court routinely asserts that the Constitution contemplates shared power among the three coordinate branches, and thus rejects the idea of a rigid separation of the branches and their respective powers.[34] Thus, the Court generally views separation-of-powers theory as one of "accommodation and practicality,"[35] requiring a "pragmatic, flexible approach" that focuses on the "proper balance between the coordinate branches."[36] In addition, although each branch of government's initial interpretation of the Constitution is due great respect from the others, the Court emphasizes that it is the judiciary's province and duty to say what the law is.[37] Therefore the federal courts are not bound to follow another branch's interpretation of the Constitution.[38]

Furthermore, the Court often views separation-of-powers theory in relation to the doctrine of checks and balances, a perspective that often coincides with the functionalist view of interbranch relations.[39] Thus, the Court has suggested that the separation-of-powers doctrine complements the notion of checks and balances by institutionalizing a "self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of another."[40] Because the purpose of the system of checks and balances is to prevent one branch of government from dominating another, a court evaluating whether the separation-of-powers principle has been breached must consider whether one branch has prevented another from accomplishing its constitutionally assigned functions. When

32. Alfange, *supra* note 24, at 669-70 (discussing the development of the separation-of-powers doctrine).

33. The Supreme Court clearly has not repudiated the formalist approach to deciding separation-of-powers issues. *See, e.g.*, Bowsher v. Synar, 478 U.S. 714 (1986) (striking down budget provisions of the Gramm-Rudman-Hollings Act); INS v. Chadha, 462 U.S. 919 (1983) (striking down the one-house legislative veto).

34. Buckley v. Valeo, 424 U.S. 1, 121 (1976) (per curiam).

35. *Chadha*, 462 U.S. at 999 (White, J., dissenting).

36. Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 442-43 (1977).

37. United States v. Nixon, 418 U.S. 683, 703-05 (1974) (citing Baker v. Carr, 369 U.S. 186, 211 (1962); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).

38. *Id.* (citing Powell v. McCormack, 395 U.S. 486, 549 (1969)).

39. *See* Sargentich, *supra* note 24, at 438-44 (discussing separation-of-powers analysis in relation to moderate and extreme versions of checks-and-balances theory).

40. Buckley v. Valeo, 424 U.S. 1, 122 (1976) (per curiam).

there is potential for disruption, a court must then balance the interests involved in the allocation of power.[41]

Notwithstanding the Court's regular reliance on stock generalizations concerning basic American government, the Court also has recognized the problems in its own doctrinal elaboration of separation-of-powers theory. Because the formalist and functionalist approaches are at odds, the Court's frequent recourse to both has created a body of case law that is justly criticized for being confused and incoherent. One of the few points about which the commentators uniformly agree is that the Court's separation-of-powers jurisprudence is thoroughly muddled.[42] Indeed, even some Justices have criticized the Court's separation-of-powers doctrine as "one of the most confusing and controversial areas of constitutional law."[43]

Thus, while one may distill some broad set of fundamental principles from the Court's decisions relating to separation-of-powers theory, the overwhelming consensus of the critical academy is that the Court's application of the doctrine amounts to little more than unpredictable ad hoc justice.[44] Separation-of-powers doctrine suffers from the twin ills of indeterminacy and linguistic skepticism.[45] Furthermore, the ad hoc nature of separation-of-powers decisions makes it unlikely that the Court will defer to the suggestion of some scholars that it ground its separation-of-powers opinions in some other principled basis, such as due process[46] or ordered liberty.[47] Given the Court's doctrinal muddle and the split among the Justices in separation-of-powers cases,[48] it seems unlikely that any aggregation of Justices will soon adopt a new analytical framework advanced by the Court's academic critics.

41. *See* Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 443 (1977).

42. *See, e.g.*, Brown, *supra* note 24, at 1517 ("The Court's treatment of the constitutional separation of powers is an incoherent muddle."); Carter, *Constitutional Improprieties*, *supra* note 24, at 358-65 (discussing lack of coherent theory in recent decisions); Carter, *The Independent Counsel Mess*, *supra* note 24, at 127-28 (arguing that *Morrison* was a reversal of the Court's development of a formalist theory); Carter, *From* Sick Chicken *to* Synar, *supra* note 24, at 721 (stating that the Court has not been consistent in advocating either a formalist or a functionalist method); Chemerinsky, *supra* note 24, at 1085-86 (arguing that the Burger Court applied inconsistent methods to analyze congressional and presidential actions in separation-of-powers cases); Elliott, *supra* note 24, at 507 (arguing that the Court has failed to establish a coherent body of policy and theory regarding separation of powers); Redish & Cisar, *supra* note 24, at 450 (noting Court's "split personality" in wavering from formalist enforcement to functionalist rationalization of inter-branch incursions); Strauss, *Formal and Functional Approaches*, *supra* note 24, at 489-96 (describing confused state of recent decisions); Arthur C. Leahy, Note, Mistretta v. United States: *Mistreating the Separation of Powers Doctrine?*, 27 SAN DIEGO L. REV. 209, 221-22 (1990) (arguing that *Mistretta* indicates that *Morrison* was not a fluke, and that a return to functionalist analysis is a mistake).

Professor Brown has argued that the Court has employed only an ad hoc approach that has avoided taking a stand on the structural values of the Constitution: "It has adopted no theory, embraced no doctrine, endorsed no philosophy, that would provide even a starting point for debate." Brown, *supra* note 24, at 1531. *But see* Alfange, *supra* note 24, at 669-72 (arguing that cases like *Bowsher* were a "passing phase"); Robert L. Stern, *The Separation of Powers Cases: Not Really a Mess*, 31 ARIZ. L. REV. 461 (1989) (arguing in support of the doctrinal consistency in *Morrison* and the functionalist approach to separation-of-powers theory that decision embodies).

43. *See* Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 93 (1982) (White, J., dissenting) (citing Glidden v. Zdanok, 370 U.S. 530, 534 (1962) (Harlan, J., plurality opinion)).

b. *The Structure of a Possible Separation-of-Powers Argument Challenging the Civil Justice Reform Act*

Because the case law and commentary provide little guidance in determining a separation-of-powers violation,[49] potential litigants raising such a challenge to the Civil Justice Reform Act need to assay the strengths and weaknesses of their arguments under the competing analytical models. Moreover, because the formalist and functionalist approaches embody competing views of constitutional government,[50] litigants

44. *See supra* notes 26 and 28 (discussing varying Supreme Court interpretations of separation of powers).

45. *See, e.g.*, Redish & Cisar, *supra* note 24, at 478-79 (noting that linguistic skepticism refers to the belief that there is not one sole meaning for terms like "executive" or "legislative," and contending that while such words are capable of evolving new meanings over time, there are relatively stable, historically developed meanings that can be used to interpret the text of the Constitution).

46. *See, e.g.*, Verkuil, *supra* note 24, at 301 (arguing that due process should be used to analyze separation-of-powers cases). *But see* Pierce, *supra* note 24, at 365 (responding to and criticizing Verkuil's due process analytical framework); Redish & Cisar, *supra* note 24, at 498-502 (same).

47. *See* Brown, *supra* note 24, at 1540-65 (arguing that the concept of ordered liberty would provide guidance to courts in analyzing separation-of-powers cases). *But see* Redish & Cisar, *supra* note 24, at 502-05 (criticizing Brown's ordered liberty analytical model).

48. *See supra* note 27.

49. Scholarly proposals also lack a principled basis to provide guidance. *See, e.g.*, Brown, *supra* note 24, at 1530 (arguing that both the formalist and functionalist approaches fail to consider the purpose for separating the powers of government); Merrill, *supra* note 25, at 227 (noting that neither formalism nor functionalism provide a satisfactory account of separation-of-powers doctrine in practice, and advocating a "minimalist conception" of separation of powers).

50. *See, e.g.*, Carter, *From* Sick Chicken *to* Synar, *supra* note 24, at 722-43 (discussing the views of government implicit in the development of formalist

will find it difficult to structure a persuasive challenge without knowing which approach the Court will apply.

This dilemma applies with great force to conflicts between the judiciary and either the executive or legislative branch. Because Article III is the briefest of the three foundational Articles, a formalist challenge based on alleged incursions into the judiciary's constitutional territory may be impossible,[51] because such a challenge would necessarily rely on a theory of the federal courts' non-explicit, inherent powers. Thus, a litigant's most plausible challenge would have to be based on a functionalist view of interbranch relations.

The Civil Justice Reform Act presents an unusual separation-of-powers problem. Arguably the Act, including the assignment of rulemaking authority to advisory groups, bears all the hallmarks of a constitutionally permissible legislative action within prevailing constitutional delegation doctrine: the Act requires that each federal district court appoint the advisory group members and approve the proposed civil justice reform plans. To be successful, therefore, a separation-of-powers challenge to the Act must demonstrate that the provisions requiring judicial action are merely hollow gestures to the judicial branch's rulemaking authority, and that the procedural reforms that advisory groups recommend are congressionally-inspired, mandated, and enacted.

A separation-of-powers challenge to the Civil Justice Reform Act is likely to arise when some (disgruntled) litigant is subjected to a new rule, measure, or program that a Civil Justice Reform Act advisory group has recommended pursuant to its statutory mandates. The Civil Justice Reform Act basically requires all ninety-four federal district courts to draft civil justice expense-and-delay reduction plans.[52] The types of rules,

and functionalist views of separation of powers, which he refers to as de-evolutionary and evolutionary).

51. *See* United States v. Brainer, 515 F. Supp. 627, 631 (D. Md. 1981) (noting that unlike Articles I and II, Article III does not enumerate or describe constitutional powers), *rev'd*, 691 F.2d 691 (4th Cir. 1982). In *Brainer*, the court noted that instances in which the Supreme Court has been faced with statutes infringing on judicial independence are rare. *Id.* at 634.

52. *See* Civil Justice Reform Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (codified at 28 U.S.C. §§ 471-482 (Supp. II 1990)); *see also* CIVIL JUSTICE REFORM ACT REPORT, *supra* note 10 (progress report on development and implementation of Civil Justice Reform Act plans by pilot and early implementation districts); Biden, *supra* note 7; Mullenix, *supra* note 9, at 388-96 (describing the legislation and the congressional mandates to the advisory groups in formulating their plans); Mullenix, *supra* note 8 (same). Thirty-four district courts had implemented their plans by December 31, 1991. CIVIL JUSTICE REFORM ACT REPORT, *supra* note 10, at 2.

measures, and programs that seem ripe for challenge include differentiated case tracking systems, discovery controls and limitations (especially mandatory disclosure programs), mandatory alternative dispute resolution referrals, and fee-shifting provisions.[53] Such a challenge is especially likely in those districts where the courts have implemented new rules by applying those rules to a random (or selected) portion of the civil docket,[54] thereby imposing an element of serendipity, not to mention fundamental unfairness on some litigants.[55]

The separation-of-powers challenge to the Civil Justice Act may be simply stated:

(1) Article III assigns judicial power to the United States courts and this judicial power should be insulated from legislative or executive interference. The judicial power of the federal courts includes and has always included the power to prescribe internal procedural rules for the conduct of litigation in the federal courts. Procedural rulemaking is an inherent power of the courts. In addition, Congress itself endorsed this inherent power in the Rules Enabling Act, by statutorily conferring authority on the federal courts to promulgate procedural rules.

(2) In enacting the Civil Justice Reform Act, then, Congress impermissibly removed most, if not all of the essential attributes of rulemaking power from Article III judges and vested that power in non-Article III adjuncts to the court. Further, Congress, in enacting the Civil Justice Reform Act, raised

53. *See* Mullenix, *supra* note 9, at 395-96 nn.84-85 (describing required and recommended rules, measures, and programs of submitted plans). *See generally* CIVIL JUSTICE REFORM ACT REPORT, *supra* note 10, exhibits C and D (status of alternative dispute resolution rules and differentiated case management proposals in the reporting districts); *id.* app. I (summarizing rules, measures, and programs of 34 reporting federal districts).

54. *See, e.g.*, CIVIL JUSTICE REFORM ACT ADVISORY GROUP OF THE U.S. DIST. COURT FOR THE S. DIST. OF TEX., COST AND DELAY REDUCTION PLAN UNDER THE CIVIL JUSTICE ACT OF 1990, at 5 (1991) (provision for voluntary disclosure on experimental basis to be applied to a minimum of 10 cases for each judge (20 in Houston) per year).

55. *But see* Linda J. Rusch, *Separation of Powers Analysis as a Method for Determining the Validity of Federal District Court's Exercise of Local Rulemaking Power: Application to Local Rules Mandating Alternative Dispute Resolution*, 23 CONN. L. REV. 483 (1991) (arguing generally that local rulemaking authority does not violate separation-of-powers doctrine, and establishing a test to evaluate whether particular rules do violate separation of powers).

a danger that the Framers sought to avoid: that of the exercise of unchecked power by one branch over another. In delegating rulemaking power to civilian, non-expert advisory groups, and in statutorily requiring that these advisory groups consider and implement certain types of procedural reforms, Congress itself engaged in procedural rulemaking. This congressional exercise of a judicial function violates separation-of-power doctrine by impermissibly infringing on the power, prerogatives, and independence of the federal courts to promulgate procedural rules.

(3) The basic theme of the constitutional scheme of government is that the institutional independence of the Judiciary cannot be compromised by the actions of the other branches, and the Constitution commands that the independence of the judiciary be jealously guarded. The inherent powers of the courts, once called into existence by Article III, include the powers of the judiciary to protect itself, to administer justice, to promulgate rules for practice, and to provide process where none exists. The Civil Justice Reform Act represents a rare example of Congress involving itself deeply in the internal operations of the federal judiciary, including an implementation process controlled by forces other than the established decisionmakers within the federal court system.

2. Paradigmatic Separation-of-Powers Problems and the Constitutional Validity of the Civil Justice Reform Act

Separation-of-powers cases generally reflect three institutional conflicts among the branches. First, power struggles between the executive and legislative branches, which typically have been grounded in national crises or foreign relations issues, have yielded landmark executive/legislative separation cases.[56] Second, struggles between the executive and judicial branches often have centered on the bounds of presidential prerogative, as dramatized in the struggle over the Nixon Watergate tapes.[57] Both of these conflicts are often rooted in distinct constitutional delineations of power, and thus seem doctrinally

56. *See, e.g.*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (addressing authority of the President to seize steel mills during the Korean War and in time of economic crisis); United States v. Curtiss-Wright Corp., 299 U.S. 304 (1936) (addressing authority of the President, based on congressional delegation, to restrict arms sales to two warring countries); *see also* INS v. Chadha, 462 U.S. 919 (1983) (addressing Congress's ability to use one-House veto to overrule Attorney General's decision not to deport alien).

57. *See* United States v. Nixon, 418 U.S. 683 (1974).

clear.[58]

The third category of decisions centers on the tension between the legislative and judicial branches. These cases tend to be more factually complicated and doctrinally elusive than those involving the executive branch.[59] The Civil Justice Reform Act implicates this separation-of-powers scenario. Separation-of-powers cases centering on any of the three paradigmatic models, however, offer problematic guidance for assessing the Act's separation-of-powers problem. They do suggest, at least, that a federal court construing the Act is likely to adopt a functionalist approach to the interbranch problem the Act's legislative delegation of judicial rulemaking authority raises.

a. *Executive/Legislative Separation Problems*

The Supreme Court has used both the formalist and functionalist approaches in separation-of-powers cases involving disputes between the executive and legislative branches, but it is virtually impossible to predict which analytical model the Court will apply in any given case.[60] The cases decided under the formalist approach tend to concern easily defined problems, thus giving rise to equally easily defined solutions. In contrast, the cases decided using the functionalist approach tend to raise fuzzier issues of inherent powers, and thus encourage courts to apply balancing tests. Although neither set of paradigmatic cases is especially useful for evaluating a separation-of-powers challenge to the Civil Justice Reform Act, the functionalist cases, especially those concerning inherent powers, provide a better basis for analyzing the Civil Justice Reform Act.

Most of the core separation-of-powers cases involving executive/legislative disputes—*Bowsher v. Synar*,[61] *INS v. Chadha*,[62] and *Youngstown Sheet & Tube Co. v. Sawyer*[63]—hew to the formalist model of constitutional interpretation and are usually anchored in the express provisions of Articles I and II.[64] When

58. *But see* Erwin Chemerinsky, *Controlling Inherent Presidential Power: Providing a Framework for Judicial Review*, 56 S. CAL. L. REV. 863, 864-65 (1983) (suggesting inconsistency and vagueness in the Court's approach to "inherent" presidential power).

59. *See, e.g.*, Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982).

60. *See* Merrill, *supra* note 25, at 225-27.

61. 478 U.S. 714 (1986).

62. 462 U.S. 919 (1983).

63. 343 U.S. 579 (1952).

64. *Bowsher*, 478 U.S. at 727-34; *Chadha*, 462 U.S. at 944-59; *Northern Pipeline*, 458 U.S. at 57-87; Buckley v. Valeo, 424 U.S. 1, 120-43 (1976) (per curiam);

Article II executive powers are clearly delineated, the Court tends to render decisions that support a strong and unitary executive branch.[65] When the Court, however, cannot find an express grant of executive branch power either in Article II, or, as a delegated power, in Article I, the Court tends to favor Congress's legislative authority.[66]

The Court's formalist approach in executive/legislative cases, relying on textual support for determining separation-of-powers issues, supplies more in the way of rhetorical flourish than analytical vigor.[67] Although the Court can easily apply the formalist approach to simple cases, such as those where it can rely on specific constitutional provisions to resolve a challenged allocation of power, the analytical shallowness of the formalist method fails to provide for interbranch disputes that rely on assertions of implied or inherent powers. Obviously, the rhetorical language that characterizes many executive/legislative separation cases fails to envision or encompass interbranch problems involving the "boundary questions" of the new administrative state,[68] and what Justice Jackson called the "zone of twilight" in which the President and Congress may have concurrent authority.[69] In disputes centered on theories of concurrent or inherent power, such as would be involved in a challenge to the Civil Justice Reform Act, a federal court therefore is more likely to resort to the flexible and pragmatic functionalist approach.[70]

In *Nixon v. Administrator of General Services*,[71] the Court applied such a functionalist approach to an executive/legislative branch conflict. In *Nixon*, the executive branch claimed that the Presidential Recordings and Materials Preservation Act[72] unconstitutionally encroached upon the executive branch's inherent power to "control internal operations of the Presidential office."[73] In rejecting this vague argument, the Court articulated the prototypical functionalist standard for determining separation-of-powers issues:

> [I]n determining whether the Act disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions. Only where the potential for disruption is present must we then determine whether that impact is

Youngstown Sheet & Tube Co., 343 U.S. 579, 585-89 (1952); Humphrey's Ex'r v. United States, 295 U.S. 602, 626-32 (1935); Myers v. United States, 272 U.S. 52, 108-76 (1926).

65. *See, e.g.*, *Bowsher*, 478 U.S. at 721-34; *see also* Brown, *supra* note 24, at 1525-27 (noting that formalists also favor a strong executive branch through a 'unitary' theory of executive power).

66. *See, e.g.*, *Youngstown Sheet & Tube Co.*, 343 U.S. at 585-89.

67. Typical of the Court's rhetoric in formalist cases are pronouncements such as "[t]he Constitution sought to divide the delegated powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial." *Chadha*, 462 U.S. at 951. The Court in *Chadha* went on to note that the Constitution not only separated the three branches of government, but sought

> to assure as nearly as possible, that each branch of government would confine itself to its assigned responsibility. The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted.
>
> Although not "hermetically" sealed from one another, the powers delegated in the three branches are functionally identifiable.

Id. (citations omitted).

The Court has also stated

> [t]hat this system of division and separation of powers produces conflicts, confusion, and discordance at times is inherent, but it was deliberately so structured to assure full, vigorous, and open debate on the great issues affecting the people and to provide avenues for the operation of checks on the exercise of governmental power.

Bowsher, 478 U.S. at 722. The Court in *Bowsher* not only relied heavily on the Court's earlier formalist approach in *Chadha*, but also invoked Justice Sutherland's boilerplate statement in *Humphrey's Executor*:

> The fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others, has often been stressed and is hardly open to serious question. So much is implied in the very fact of the separation of the powers of these departments by the Constitution; and in the rule which recognizes their essential coequality.

Bowsher, 478 U.S. at 725 (quoting Humphrey's Ex'r v. United States, 295 U.S. 602, 629-30 (1935)).

68. *See* Sargentich, *supra* note 24, at 444 (defining "boundary questions" as "those concerning the constitutional status of an actor or action as legislative or executive," because "a principal element of doubt attaches to the nature of the boundary between the legislative and executive branches in the particular circumstances").

69. *Youngstown Sheet & Tube Co.*, 343 U.S. at 637 (Jackson, J., concurring); *see also* Chemerinsky, *supra* note 58, at 869-70 (criticizing Justice Jackson's concurring opinion for not supplying analytical guidance for cases involving inherent powers such as executive agreements, executive privilege, impoundment, rescission of treaties, and removal of executive officials from office).

70. *See, e.g.*, Dames & Moore v. Regan, 453 U.S. 654 (1981) (upholding President Carter's executive agreement with Iran against a separation-of-powers challenge that the Constitution did not authorize such agreements). Professor Brown argues that the Court used a functionalist approach in deciding *Dames & Moore* but that it would have reached a different conclusion under the formalist approach. *See* Brown, *supra* note 24, at 1527 n.55.

71. 433 U.S. 425 (1977).

72. Pub. L. No. 93-526, 88 Stat. 1695 (1974) (current version at 44 U.S.C. § 2107 (1988)).

73. 433 U.S. at 439-40.

justified by an overriding need to promote objectives within the constitutional authority of Congress.[74]

In general, the executive/legislative separation-of-powers cases decided under a formalist approach are not very helpful in determining whether the Civil Justice Reform Act violates separation-of-powers doctrine, because the Act does not transgress any delineated Article III power. Rather, the provisions of the Civil Justice Reform Act represent a kind of "boundary question" falling into Justice Jackson's "twilight zone" of separation-of-powers problems. The Civil Justice Reform Act entails the exercise of concurrent rulemaking authority by Congress and the judiciary, and thus its constitutionality is better assessed in the context of a theory of shared powers.

b. *Executive/Judicial Separation Problems*

The paradigmatic separation-of-powers case involving a dispute between the executive and judicial branches, *United States v. Nixon*,[75] is instructive not for what it teaches about separation of powers, but rather for Chief Justice Burger's dissenting opinion it inspired three years later in *Nixon v. Administrator of General Services*.[76] Indeed, *United States v. Nixon*, the famous Watergate tapes case, was hardly a separation-of-powers case; the decision turned more on an alleged obstruction of criminal process,[77] namely, the executive's refusal to respond to a subpoena.

Nonetheless, in *United States v. Nixon* Justice Burger appeared to ground his argument in formalist terms, invoking core Article III functions of the judiciary. Three years later in *Nixon v. Administrator of General Services*, however, Justice Brennan curiously transformed Justice Burger's decision into the archetypal functionalist approach to separation questions. Although Chief Justice Burger arguably intended to ground the Court's opinion in *United States v. Nixon* in a formalist interpretation of the separation-of-powers doctrine, his opinion waffled hopelessly between the formalist and functionalist perspectives. This ambiguous analysis opened the door for Justice Brennan's creative usurpation in the second *Nixon* case of Burger's opinion in the first.

74. *Id.* at 443 (citations omitted) (citing United States v. Nixon, 418 U.S. 683, 711-12 (1974)). Justice Brennan also agreed with the district court that the President's argument rested on an " 'archaic view of the separation of powers as requiring three airtight departments of government.' " *Id.* (quoting Nixon v. Administrator of Gen. Servs., 408 F. Supp. 321, 342 (D.D.C. 1976)).

75. 418 U.S. 683 (1974).

76. 433 U.S. 425 (1977).

77. Chemerinsky, *supra* note 24, at 1083-84 (noting that *United States v. Nixon* is the only separation-of-powers case in which the Burger Court voted against the President). *See generally* Peter E. Quint, *The Separation of Powers Under Nixon: Reflections on Constitutional Liberties and The Rule of Law*, 1981 DUKE L.J. 1, 31-34.

The conflict among the *Nixon* opinions, then, exposes the philosophical tensions between the formalist and functionalist approaches and the differing outcomes under each. Justice Brennan's adaptation in the second *Nixon* case of Chief Justice Burger's analysis in the first caused the Chief Justice to refine his view of judicial independence, thus supplying concepts that are useful for thinking about the Civil Justice Reform Act.

The first *Nixon* opinion is somewhat useful for further exegesis on separation-of-powers doctrine. Writing for a unanimous Court, Chief Justice Burger rejected President Nixon's claim of an unqualified executive privilege against a subpoena for tape recordings and documents.[78] The Court rejected the assertion that separation-of-powers doctrine itself precluded judicial review of the President's claim to executive privilege,[79] reaffirming the principle first enunciated in *Marbury v. Madison* that federal courts were assigned the task of interpreting the laws and the Constitution,[80] even when that interpretation might vary from another branch's view.[81] Using formalist terms,[82] the Chief Justice rejected the notion that the

78. United States v. Nixon, 418 U.S. at 703-13.

79. *Id.* at 703.

80. *Id.* at 703-05; *see also* Chemerinsky, *supra* note 24, at 1094-96 (noting the Burger Court's inconsistent approach to the availability of judicial review in separation-of-powers cases depending on whether the separation challenge was to executive or legislative action); Chemerinsky, *supra* note 58, at 895-900 (analyzing the availability of judicial review of inherent presidential power claims).

81. United States v. Nixon, 418 U.S. at 703-04 (citing Powell v. McCormack, 395 U.S. 486, 549 (1969); Baker v. Carr, 369 U.S. 186, 211 (1962)).

82. *Id.* at 707. The Chief Justice wrote: "The impediment that an absolute, unqualified privilege would place in the way of the primary constitutional duty of the Judicial Branch to do justice in criminal prosecutions would plainly conflict with the function of the courts under Art. III." *Id.* As is true for other portions of his opinion, Chief Justice Burger's basic formalist approach then slipped into a quintessentially functionalist perspective of interbranch relations: "In designing the structure of our Government and dividing and allocating the sovereign power among three co-equal branches, the framers of the Constitution sought to provide a comprehensive system, but the separate powers were not intended to operate with absolute independence." *Id.* (citing Justice Jackson's concurring statement in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952), regarding the interdependence of the three branches).

separation-of-powers doctrine could protect an unqualified presidential immunity from judicial process under all circumstances.[83] For Chief Justice Burger, to construe the Article II powers as absolutely shielding the executive branch from criminal process was an interpretation that would "gravely impair the role of the courts under Art. III."[84]

Had the Chief Justice stopped there, his opinion would have followed the formalist approach strictly. Instead, Chief Justice Burger offered a method to assess the degree of impairment to the respective branches caused by either overriding a claim of executive privilege or contravening judicial process.[85] In so doing, he opened the door for judges to balance competing branch interests—an essentially functionalist approach to determining separation-of-powers questions.[86] Thus, although Chief Justice Burger intended his opinion to reflect the formalist approach, he instead produced a functionalist statement of interbranch relations.[87]

This doctrinal confusion was not lost on Justice Brennan. In the second *Nixon* case, involving a dispute between the executive and legislative branches over the control of Nixon's presidential papers, Justice Brennan capitalized on Chief Justice Burger's earlier confused opinion to support the use of a balancing test.[88] In response, Chief Justice Burger noted the changed factual context and strongly protested Justice Brennan's use of his opinion in the Watergate tapes case to support a functionalist rejection of executive branch control over presidential papers.[89]

Dissenting in the second *Nixon* case, Chief Justice Burger attempted to articulate a firmer version of the formalist doctrine. He argued that separation-of-powers principles required

83. *Id.* at 706-07.

84. *Id.* at 707.

85. *See id.* at 707-13. The Chief Justice stated: "Since we conclude that the legitimate needs of the judicial process may outweigh Presidential privilege, it is necessary to resolve those competing interests in a manner that preserves the essential functions of each branch." *Id.* at 707.

86. *See id.* at 707-13. Chief Justice Burger formulated the balancing test, in the context of the Watergate tapes dispute, as follows: "In this case we must weigh the importance of the general privilege of confidentiality of Presidential communications in performance of the President's responsibilities against the inroads of such a privilege on the fair administration of criminal justice." *Id.* at 711-12.

87. *Id.* at 707-13.

88. Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 429-84 (1977).

89. *Id.* at 504-45 (Burger, C.J., dissenting).

each branch "to be free from the coercive influence of the other branches,"[90] and that the Presidential Recordings and Material Preservation Act was "an unprecedented departure from the constitutional tradition of noncompulsion."[91] He was also disturbed that Justice Brennan's majority opinion had used a functionalist approach[92] to convert "separation-of-powers principles into a simplistic rule which requires a 'potential for disruption' or an 'unduly disruptive' intrusion before a measure will be held to trench on Presidential powers."[93] Moreover, Chief Justice Burger believed that the Act violated the separation-of-powers doctrine "because it exercise[d] a coercive influence by another branch over the Presidency."[94] He argued that the critical issue was not who had acted to seize control of the papers (executive department employees), but rather who had commanded those persons to act (Congress).[95]

Chief Justice Burger also believed that the Act violated the separation-of-powers doctrine for another reason: it trenched on the inherent executive branch power to control presidential papers.[96] This portion of his dissent is emblematic of his waf-

90. *Id.* at 508-09 (citing Humphrey's Ex'r v. United States, 295 U.S. 602, 629-30 (1935); O'Donoghue v. United States, 289 U.S. 516, 530 (1933); Massachusetts v. Mellon, 262 U.S. 447, 488 (1923)). Ironically, Chief Justice Burger began his discussion of the problem with the blanket statement: "Separation of powers is in no sense a formalism." *Id.* at 507. Indicative of his analytical confusion, he then proceeded to discuss separation-of-powers doctrine in highly formalist terms. *See id.* at 507-18.

91. *Id.* at 511. Chief Justice Burger noted: "The statute commands the head of a *legislatively* created department to take and maintain custody of the appellant's Presidential papers . . . ." *Id.* The same argument applies to the Civil Justice Reform Act: the statute commands a legislatively created advisory group—albeit "appointed" by the district court—to recommend and promulgate new local procedural rules and measures. *See supra* notes 7-8 and accompanying text.

92. 433 U.S. at 511-12 (noting that in Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam), a unanimous Court had found a separation-of-powers violation without any showing of "undue disruption").

93. *Id.*

94. *Id.* at 514.

95. *Id.* at 513. Chief Justice Burger stated:

> Separation-of-powers principles are no less eroded simply because *Congress* goes through a "minuet" of directing Executive Department employees, rather than the Secretary of the Senate or the Doorkeeper of the House, to possess and control Presidential papers. Whether there has been a violation of separation-of-powers principles depends, not on the identity of the custodians, but upon which branch has commanded the custodians to act. Here, Congress has given the command.

Id.

96. *Id.* at 514-15. Chief Justice Burger argued that "[c]ontrol of Presiden-

fling between analytical models.[97]

Although the various majority and dissenting *Nixon* opinions muddle the differences between the formalist and functionalist approaches and often contradict one another, portions of these decisions are particularly relevant to a separation-of-powers challenge to the Civil Justice Reform Act. The first *Nixon* decision supports the judiciary's right to interpret the constitutionality of the Civil Justice Reform Act as a possible incursion on third branch powers; indeed, it stands as an example of the Court upholding judicial review against a challenge of another branch's prerogative.[98] In addition, Chief Justice Burger's majority opinion recognized that core Article III functions may be impaired by competing branch exercises of power. In the Watergate tapes case, that core Article III function was the court's subpoena power, and the ability of court officers to marshal evidence in a criminal prosecution.

More significant for construing the Civil Justice Reform Act, however, may be Chief Justice Burger's analysis in the second *Nixon* case where he hardened his separation-of-powers theory into familiar formalist terms of tripartite branches "'limited to the exercise of the powers appropriate to [their] own department and no other.'"[99] Significantly, he also recognized the idea of implied, inherent powers.[100]

But perhaps Chief Justice Burger's most important insight was reflected in his statement that separation-of-powers issues should not be measured against who acted, but with reference to who commanded those persons to act.[101] Applying this analysis to the Civil Justice Reform Act, Congress's delegation of procedural rulemaking authority to third branch factotums should render the Act constitutionally suspect. Under Chief Justice Burger's non-compulsion view of the separation-of-powers doctrine, if the important issue is which branch commands another to act, then arguably Congress has violated the separation-of-powers doctrine by creating advisory groups and commanding them to exercise procedural rulemaking authority.

tial papers is, obviously, a natural and necessary incident of the broad discretion vested in the President in order for him to discharge his duties." *Id.* at 515. This passage is particularly emblematic of Justice Burger's waffling between the formalist and functionalist approaches.

97. *See id.* at 514-16.

98. *See supra* note 80 and accompanying text.

99. Nixon v. Administrator of Gen. Servs., 433 U.S. at 514 (quoting Kilbourn v. Thompson, 103 U.S. 168, 191 (1880)).

100. *Id.* at 515.

101. *See supra* note 95 and accompanying text.

c. *Legislative/Judicial Separation Problems*

The cluster of cases involving separation-of-powers issues between the legislative and judicial branches—*Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*,[102] *Commodity Futures Trading Commission v. Schor*,[103] *Morrison v. Olson*,[104] and *Mistretta v. United States*[105]—share a common institutional approach to the inquiry whether a particular congressional enactment has impermissibly violated Article III.[106] These cases, which are the closest analogues to that of the Civil Justice Reform Act, typically use a functional approach when assessing challenges to Article III power.[107] Only in *Northern Pipeline* did the Supreme Court find that a congressional enactment violated the separation-of-powers doctrine by unreasonably invading Article III prerogatives.[108] Consequently, if provisions of the Civil Justice Reform Act violate the separation-of-powers doctrine, then it will be to the extent this legislation suffers constitutional defects as severe as the Bankruptcy Act of 1978[109] provisions invalidated in *Northern Pipeline*.

In *Northern Pipeline*, the Court held that Article III barred Congress from establishing legislative courts to exercise

102. 458 U.S. 50 (1982).

103. 478 U.S. 333 (1986).

104. 487 U.S. 654 (1988).

105. 488 U.S. 361 (1989).

106. *See* Brown, *supra* note 24, at 1540-46 (discussing the Court's functionalist and institutionalist approach in *Schor*, *Morrison*, and *Mistretta*).

107. Professor Brown seeks to recast the Court's functionalist approach in these cases as one truly grounded in a concern for due process. Thus, she views *Schor* as a case illustrating "how principles of due process can work their way into opinions addressing the constraints of article III," and the Court's resolution of *Morrison* as presenting "a classic due-process concern: the assurance of an impartial decisionmaker for the persons directly affected by the statutory scheme." *Id.* at 1542-43.

108. *See Mistretta*, 488 U.S. at 380-97 (upholding provisions of the Sentencing Reform Act against a separation-of-powers and impermissible delegation challenge); *Morrison*, 487 U.S. at 677-85 (upholding the constitutionality of independent counsel provisions of the Ethics in Government Act of 1976 against an Article III separation-of-powers challenge); *Schor*, 478 U.S. at 847-58 (upholding the authority of the Commodity Futures Trading Commission to promulgate regulations under the Commodity Exchange Act and to exercise jurisdiction over common law counterclaims).

109. Pub. L. No. 95-598, 92 Stat. 2549 (current version at 11 U.S.C. §§ 101-1330 (1988)).

jurisdiction over bankruptcy matters.[110] It relied on two fundamental points: that the Constitution established an independent judicial branch,[111] and that the delegation doctrine did not support Congress's assignment of adjudicative functions to legislative courts.[112] Since the Civil Justice Reform Act's legitimacy is based in large part on permissible Article I delegation doctrine, *Northern Pipeline*'s analysis of that doctrine is especially significant.

The Court's opinion in *Northern Pipeline* employed a functionalist perspective. Justice Brennan's majority decision explained that tripartite government is maintained by a system of checks and balances that serves " 'as a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of another.' "[113] Thus, intrusion into third branch prerogatives is a benchmark for unconstitutionality. Furthermore, the Court stated, the Framers intended an independent judiciary that would serve as the bulwark of the checks and balances system and guarantee an impartial adjudicatory process.[114]

Although the *Northern Pipeline* Court tacitly acknowledged that the Framers constitutionally assigned Congress the responsibility to decide the role of the lower federal courts,[115] it explained that the right to create or eliminate lower federal courts was itself circumscribed.[116] Thus, Justice Brennan wrote that "the Framers did not leave it to Congress to define the character of those courts—they were to be independent of the political branches and presided over by judges with guaranteed salary and life tenure."[117] Furthermore, Justice Brennan reasoned that where Article III applies, all legislative powers delineated in Article I are subject to it,[118] for any other conclusion would fail "to provide any real protection against the erosion of Art. III jurisdiction by the unilateral action of the political Branches."[119] Thus, the first crucial analytical basis for the Court's decision in *Northern Pipeline* was the protection of an independent judiciary against intrusion or interference from the political branches.

The Court's second basis for its decision was its rejection of the suggestion that Congress's delegation power permitted it to vest adjudicatory functions in non-Article III courts it created.[120] The Court distinguished permissible extensions of legislative power, such as the authority to create court adjuncts such as magistrates and assign them adjudicatory functions,[121] from impermissible incursions into judicial power by explaining that

> when Congress creates a statutory right, it clearly has the discretion, in defining that right, to create presumptions, or assign burdens of proof, or prescribe remedies; it may also provide that persons seeking to vindicate the right must do so before a particularized tribunal created to perform the specialized adjudicative tasks related to that right. Such provisions do, in a sense, affect the exercise of judicial power, but they are also incidental to Congress' power to define the right it created. No comparative justification exists, however, when the right being adjudicated is not of Congressional creation. *In such a situation, substantial inroads into functions that have traditionally been performed by the Judiciary cannot be characterized merely as incidental extensions of Congress' power to define rights it has created. Rather, such inroads suggest unwarranted encroachments upon the judicial power of the United States, which our Constitution reserves for Art. III courts.*[122]

Thus valid congressional actions do not violate the separation-of-powers doctrine so long as they leave " 'the essential attributes of the judicial power' " in the Article III courts,[123] and link Congress's assignment "to its legislative power to define substantive rights."[124]

Under this analysis, the Civil Justice Reform Act is consti-

110. 458 U.S. 50, 87 (1982) (holding that the original Bankruptcy Act of 1978 grant of jurisdiction to bankruptcy judges, Pub. L. No. 95-598, sec. 241(a), § 1471, 92 Stat. 2549, 2668 (current version at 28 U.S.C. §§ 151-157, 1334 (1988)) violated Article III separation-of-powers doctrine).

111. *See id.* at 57-76.

112. *Id.* at 58-87.

113. *Id.* at 57-58.

114. *Id.* at 58 ("As an inseparable element of the constitutional system of checks and balances, and as a guarantee of judicial impartiality, Art. III both defines the power and protects the independence of the Judicial branch.").

115. *Id.* at 64 n.15.

116. *Id.* at 64-76.

117. *Id.* at 64 n.15.

118. *Id.* at 73.

119. *Id.* at 74; *see also id.* at 73 ("The flaw in appellants' analysis is that it provides no limiting principle. It thus threatens to supplant completely our system of adjudication in independent Article III tribunals and replace it with a system of 'specialized' legislative courts.").

120. *Id.* at 58-87.

121. *Id.* at 77 (discussing United States v. Raddatz, 447 U.S. 667 (1980) (upholding the Federal Magistrate's Act of 1978)).

122. *Id.* at 83-84 (emphasis added). Consistent with a functionalist perspective, Justice Brennan conceded, however, that "[d]rawing the line between permissible extensions of legislative power and impermissible incursions into judicial power is a delicate undertaking, for the powers of the Judicial and Legislative Branches are often overlapping." *Id.* at 83 n.35.

123. *Id.* at 77 n.29 (quoting Crowell v. Benson, 285 U.S. 22, 51 (1932)).

124. *Id.*

tutionally defective. The Act creates no substantive rights at all. In the absence of such substantive content, Congress cannot extend its legislative powers so as to vest court adjuncts with procedural rulemaking authority. Furthermore, under *Northern Pipeline*, a congressional delegation of procedural rulemaking authority such as that required by the Act represents a "substantial [inroad] into [a] function that [has] traditionally been performed by the Judiciary."[125]

The major cases involving legislative/judicial separation-of-powers issues the Supreme Court has decided since *Northern Pipeline*—*Schor*, *Morrison*, and *Mistretta*—have relied on *Northern Pipeline*'s functionalist framework. The issue in each case was whether the particular congressional enactment constituted an "encroachment" or "aggrandizement" by one branch at the expense of the other and whether it impaired the judiciary's status as impartial and independent.[126] In each case, the Court upheld the congressional delegation of authority as neither unduly intruding on the province of the judiciary[127] nor compromising the judiciary's independent role as pervasively as did the Bankruptcy Act of 1978.[128]

Of these cases, *Mistretta* clearly is the most important precedent for assessing a challenge to the constitutionality of the Civil Justice Reform Act because the Sentencing Reform Act[129] at issue in *Mistretta* presents, in two major respects, the closest statutory analog to the Civil Justice Reform Act. Similar to the Civil Justice Reform Act's creation of the court-appointed advisory groups, the Sentencing Reform Act created the United States Sentencing Commission, an independent body located in the judicial branch.[130] In addition, Congress's delegation of authority to the Sentencing Commission to promulgate sentencing guidelines is similar to its delegation of authority to the advisory groups to promulgate procedural rules and measures.[131]

The *Mistretta* Court rejected the challenge[132] that the Sentencing Reform Act constituted an impermissible delegation of legislative power,[133] relying on the full rhetorical panoply of functional analysis.[134] After reviewing the role of the Sentencing Commission and the historical precedents for congressional delegation of rulemaking authority to the judiciary, the Court concluded that the Act did not violate the separation-of-powers doctrine because "in placing the Commission in the Judicial Branch, Congress cannot be said to have aggrandized the au-

125. *Id.* at 84.

126. *See* Mistretta v. United States, 488 U.S. 361, 371-74 (1989) (setting forth functional framework for analysis); Morrison v. Olson, 487 U.S. 654, 680, 683 (1988) (same); Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 847-49 (1986) (same).

127. *See supra* note 108.

128. *See, e.g.*, *Mistretta*, 488 U.S. at 382 (citing *Northern Pipeline* as example of Court invalidation of congressional attempt to confer Article III power on Article I judges); *Schor*, 478 U.S. at 852 (distinguishing the powers of the CFTC from the overreaching powers delegated in the Bankruptcy Act provisions).

129. Pub. L. No. 98-473, 98 Stat. 1987 (1984) (codified at 18 U.S.C. §§ 3551-3625 (1988), and 28 U.S.C. §§ 991-998 (1988)).

130. *See Mistretta*, 488 U.S. at 368. The Commission was established " 'as an independent commission in the judicial branch of the United States' " consisting of seven voting members appointed by the President with the advice and consent of the Senate. *Id.* (quoting 28 U.S.C. § 991(a) (1988)). At least three members are federal judges selected from a list recommended by the Judicial Conference; the Attorney General or his designate sits as an *ex officio*, non-voting member. *Id.* Voting members hold six-year, staggered terms, and may be removed by the President for neglect of duty, malfeasance, or good cause. *Id. See generally* Ackerman, *supra* note 24, at 993 (providing analytical framework for construing separation-of-powers challenges to various presidential commissions).

131. *See Mistretta*, 488 U.S. at 369 (discussing the Sentencing Commission's responsibility to review and revise sentencing guidelines).

132. *Id.* at 371-79. The commentary on *Mistretta* has been uniformly highly critical. *See* Carter, *Constitutional Improprieties*, *supra* note 24, at 361, 402 (disapproving majority's holding in *Mistretta*); Liman, *supra* note 24 (deeming the Sentencing Commission to be constitutionally infirm and calling for restructuring the Commission and eliminating binding effect of sentencing guidelines); Dennis E. Curtis, Comment, Mistretta *and Metaphor*, 66 S. CAL. L. REV. 607 (1992) (discussing *Mistretta* and Professor Tushnet's analysis of the merger of formalist and functionalist approaches); Mark Nielsen, Comment, Mistretta v. United States *and the Eroding Separation of Powers*, 12 HARV. J. L. & PUB. POL'Y 1049 (1989) (criticizing majority's decision as incomplete and problematic); Kristin L. Timm, Note, *"The Judge Would Then Be The Legislator": Dismantling Separation of Powers in the Name of Sentencing Reform* — Mistretta v. United States, 65 WASH. L. REV. 249 (1990) (arguing Sentencing Reform Act violates separation-of-powers principles in unconstitutionally expanding the powers of the legislature and impairing core functions of the judiciary); Fried, *supra* note 24 (discussing compromise of judicial independence raised by *Mistretta*); Janis Hillman, Recent Development, 20 ST. MARY'S L.J. 1013 (1989) (criticizing *Mistretta* because of the likely piecemeal litigation over the Guidelines' application in individual cases).

133. *Mistretta*, 488 U.S. at 371-79 (upholding Congress's delegation of authority to the Sentencing Commission as sufficiently specific and detailed to withstand challenge of impermissible delegation); *id.* at 379-84 (upholding placement of Sentencing Commission in the judicial branch and assignment of rulemaking authority as not violative of separation-of-powers doctrine).

134. *Id.* at 381-83. The Court discussed the system of coordinate branches, the need for a "pragmatic, flexible view of differentiated governmental power," and the system of checks and balances. *Id.* at 381. Further, the Court invoked the standards of aggrandizement of power, encroachment on prerogatives, as well as institutional integrity. *Id.* at 383.

thority of that Branch or to have deprived the Executive Branch of a power it once possessed."[135] Moreover, the Court held that Congress had not unconstitutionally delegated or diminished its authority.[136]

At first blush, the Court's decision in *Mistretta* would appear to validate the Civil Justice Reform Act's delegation of similar rulemaking authority. In reality, however, *Mistretta* is an inapt precedent for determining the constitutionality of that Act. Indeed, *Mistretta*'s separation-of-powers problem is the mirror-image of that presented by the Civil Justice Reform Act.

In *Mistretta*, the Sentencing Reform Act was challenged as an unconstitutional congressional delegation of substantive sentencing decisionmaking authority to the judicial branch.[137] Congress was accused of impermissibly delegating its substantive legislative authority to an independent body located in the judicial branch.[138] The Civil Justice Reform Act, in contrast, raises the issue of Congress's removal of procedural rulemaking authority from the third branch. Whatever finely-honed historical arguments the *Mistretta* majority marshals in support of the power of congressionally-delegated substantive rulemaking authority,[139] the Court in *Mistretta* nowhere acknowledges the central prohibitive feature of the Rules Enabling Act: that Congress may enact substantive laws, but that the judicial branch promulgates procedural rules.[140] Thus, the failure of

135. *Id.* at 395.
136. *Id.*
137. *Id.* at 371.
138. *Id.*
139. *Id.* at 392-95.
140. The majority opinion instead even noted the weakness of its own argument based on the rulemaking analogy:

> We agree with petitioner that the nature of the Commission's rulemaking power is not strictly analogous to this Court's rulemaking power under the enabling Acts. [sic] Although we are loathe to enter the logical morass of distinguishing between substantive and procedural rules, and although we have recognized that the Federal Rules of Civil Procedure regulate matters "falling within the uncertain area between substance and procedure, [and] are rationally capable of classification as either," we recognize that the task of promulgating rules regulating practice and pleading before federal courts does not involve the degree of political judgment integral to the Commission's formulation of sentencing guidelines.

Id. at 392 (citations omitted). The Court's admission that the Sentencing Commission was in effect making substantive rules involving a "degree of political judgment" is important, because it distinguishes *Mistretta*'s factual context from the role of the advisory groups under the Civil Justice Reform Act, where they are not.

the *Mistretta* majority to recognize this distinguishes *Mistretta* as problematic precedent for evaluating the legitimacy of the Civil Justice Reform Act.

Justice Scalia, dissenting in *Mistretta*, recognized that the nub of the separation issue turned on whether Congress was delegating substantive law-making authority to the third branch.[141] In Justice Scalia's view, such congressional delegation is constitutional only when Congress vests the judiciary with law-making authority that is ancillary to its exercise of judicial power—such as to adopt rules of procedure (his example).[142] For Justice Scalia, the law-making power of the Sentencing Commission was "not ancillary but quite naked."[143] Thus, the power that was vested in the Sentencing Commission to create sentencing guidelines was a clear violation of separation-of-powers doctrine: "The only governmental power the Commission possesses is the power to make law; and it is not the Congress."[144]

Prophetically, Justice Scalia's criticism of the *Mistretta* majority opinion anticipated congressional enactment of the Civil Justice Reform Act, the creation of the advisory groups within the judiciary, and the delegation of procedural rulemaking authority to these bodies:

> By reason of today's decision, I anticipate that Congress will find delegation of its lawmaking powers much more attractive in the future. If rulemaking can be entirely unrelated to the exercise of judicial or executive powers, I foresee all manner of 'expert bodies,' insulated from the political process, to which Congress will delegate various portions of its lawmaking responsibility.[145]

Justice Scalia also perceived the *Mistretta* decision would lead to a consequence even more deleterious than that of substantive law-making delegations. Justice Scalia believed that *Mistretta* would encourage Congress to delegate rulemaking au-

141. *Id.* at 422-27 (Scalia, J., dissenting).
142. *Id.* at 425 (citing other examples).
143. *Id.* at 421.
144. *Id.* at 422.
145. *Id.* Carrying his point further, Justice Scalia suggested:

> How tempting to create an expert Medical Commission (mostly M.D.'s, with perhaps a few Ph.D.'s in moral philosophy) to dispose of such thorny, "no-win" political issues as the withholding of life-support systems in federally-funded hospitals, or the use of fetal tissue for research. This is an undemocratic precedent that we set — not because of the scope of the delegated power, but because its recipient is not one of the three Branches of Government.

Id.

thority it did not even possess, but that until *Mistretta* had been within the true province of the judiciary:

> If an "independent agency" such as this can be given the power to fix sentences previously exercised by district courts, I must assume that a similar agency can be given the powers to adopt rules of procedure and rules of evidence previously exercised by this Court. The bases for distinction would be thin indeed.[146]

The Civil Justice Reform Act of 1990, enacted one year after *Mistretta*, fulfills Justice Scalia's prophecy. The Act creates Justice Scalia's feared "expert bodies"—the advisory groups—lodged within the judiciary, and authorizes these groups to promulgate rules of federal civil procedure. As Justice Scalia suggested, these civilian advisory groups are indeed insulated from the political process. Contrary to Justice Scalia's initial prediction, these advisory groups are not even exercising a substantive law-making function. In the Civil Justice Reform Act, Congress has exceeded the permissible law-making delegation legitimated in *Mistretta*, and stripped a core judicial function traditionally assigned to the courts. In *Mistretta*, the Supreme Court said that Congress did not violate the separation-of-powers doctrine by delegating substantive law-making authority to an independent commission lodged in the third branch.[147] *Mistretta* did not say, however, that it was permissible for Congress to strip the judiciary of one of its core functions—procedural rulemaking—and lodge this in a congressionally created, politically insulated, independent body.

B. The Civil Justice Reform Act: The Argument for a Separation-of-Powers Violation

The Supreme Court's case law confirms the critical consensus that its separation-of-powers jurisprudence is inconsistent, waffling between the formalist and functional views of constitutional government, sometimes even within a single decision. The most important cases for construing the legality of the Civil Justice Reform Act, those involving challenges to an independent judiciary, suggest that the Court favors a functional resolution of such disputes. Yet they also demonstrate that the Act is most likely to be sustained under a functional analysis, while the view most likely hostile to this legislation—as embodied in Justice Scalia's dissenting opinion in *Mistretta*—proceeds from a highly formalistic model.

146. *Id.* at 425-26.
147. *Id.* at 371.

The essential difficulty in evaluating separation-of-powers issues is the absence of a coherent methodology.[148] To fill this analytical vacuum, Professor Erwin Chemerinsky suggests the Court focus on three inquiries: whether one branch is exercising powers constitutionally committed to another; whether one branch is preventing another from performing its functions or duties; and whether one branch of government is acting in a manner that prevents sufficient review or control by another.[149] The first inquiry "requires the Court to analyze and decide what powers are committed to which branches of government and under what circumstances a branch unconstitutionally assumes the power of another."[150] Under the second inquiry, the Court must determine the functions of each branch and what constitutes an impairment of these functions.[151] The third inquiry would have the Court "analyze the opportunities for checks and review and determine what is a sufficient form of control."[152]

Professor Chemerinsky's approach to separation-of-powers cases offers a useful analytical framework that acknowledges both formal and functional concerns. Eschewing originalism as a legitimate basis for determining separation issues,[153] his proposed approach has the same analytical power and authoritative claim as Professor Redish's proposed model of "pragmatic formalism."[154] The primary rationale for this framework "is the

148. Chemerinsky, *supra* note 24, at 1109.
149. *Id.* at 1110-11.
150. *Id.* at 1110.
151. *Id.*
152. *Id.* at 1111.
153. *Id.* at 1105-09; *see also id.* at 1098-1101 (discussing originalist and non-originalist approaches to separation-of-powers questions, and proponents and critics); Redish & Cisar, *supra* note 24, at 494-97 (discussing and rejecting rigid originalist methodology for separation-of-powers cases).
154. Redish & Cisar, *supra* note 24, at 454-55 (defining concept of "pragmatic formalism"); *id.* at 474-78 (defending model of pragmatic formalism). Redish and Cisar's model of pragmatic formalism eschews the balancing test used in most functional approaches to separation-of-powers issues. *Id.* at 454. Their "street-smart" mode of interpretation rejects "rigid, abstract interpretational formulas derived from an originalistic perspective." *Id.* Instead of functional balancing, they would analyze the constitutionality of a branch's action by "definitional analysis":

> [T]he Court's role in separation of powers cases should be limited to determining whether the challenged branch action falls within the definition of that branch's constitutionally derived powers — executive, legislative, or judicial. If the answer is yes, the branch's action is constitutional; if the answer is no, the action is unconstitutional. No other questions are to be asked; no other countervailing factors are to be considered.

relative inadequacy of every conceivable doctrinal alternative as a means of ensuring the effectiveness of separation of powers."[155]

The Civil Justice Reform Act arguably violates the separation-of-powers doctrine in that Congress has impermissibly exercised procedural rulemaking authority constitutionally committed to the judiciary by Article III; that Congress is interfering with federal courts' inherent power and impairing the courts' ability to impartially adjudicate cases; and that Congress has provided insufficient judicial control or review of this improper rulemaking delegation. It remains, therefore, to supply content to each of Professor Chemerinsky's inquiries.

1. Giving Content to Article III Powers

Article III's textual brevity, which provides little guidance for Court literalists as to the proper extent of judicial authority,[156] poses a distinct problem to courts deciding separation-of-powers cases that involve the judiciary. Unlike Articles I and II, which extensively delineate the powers of Congress and the Presidency, Article III merely vests "judicial power" in the federal courts.[157] Other than providing for life tenure and prohibiting salary diminution, Article III does not indicate what constitutes this judicial power.[158]

Separation-of-power disputes relating to a definition of judicial power have instead centered on the Article III, section 2 "case or controversy" requirement.[159] These disputes typically take two forms: instances where Congress has delegated non-judicial functions to the judiciary,[160] and instances where Congress has attempted to modify the jurisdiction of the federal courts.[161] With regard to the first category, although the Court initially was reluctant to accept non-judicial functions,[162] it now generally affirms congressional delegations of various rulemaking functions to the courts.[163] Thus, the judicial power permits delegations of legislative-like authority if it is ancillary to existing judicial powers.[164]

With regard to congressional modification of federal court jurisdiction, the legal bounds of propriety are equally fuzzy. The relationship of Congress to the judiciary rests uneasily in Article III's provision for "one supreme Court, and such inferior Courts as the Congress may from time to time ordain and establish."[165] Congress, therefore, can constitutionally deter-

Id. at 454-55. While the Redish-Cisar approach has the virtues of simplicity and clarity, it nonetheless begs the question of defining branch power, which in most separation cases is the nub of the dispute. This is especially true in cases involving invocation of non-explicit, inherent branch powers.

155. *Id.* at 474.

156. *See, e.g.*, Brown, *supra* note 24, at 1543, 1545; Redish & Cisar, *supra* note 24, at 484.

157. Section 1 of Article III provides:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office.

U.S. CONST. art. III, § 1.

158. *See id.*; *see also* Alfange, *supra* note 24, at 684 (discussing the Framers' concern for guaranteeing the personal independence of judges).

159. U.S. CONST. art. III, § 2.

160. *See* Alfange, *supra* note 24, at 680-81.

161. *Id.* at 681-94.

162. *Id.* at 680 (citing Muskrat v. United States, 219 U.S. 346, 352-56 (1911), as supplying a brief history of federal court reluctance to accept non-judicial functions).

163. *Id.* (citing *Mistretta*, *Morrison*, and Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 41-50 (1825), as examples of judicial acceptance of administrative responsibilities).

164. *See* Mistretta v. United States, 488 U.S. 361, 417 (1989) (Scalia, J., dissenting). Justice Scalia's view is that Congress can determine the extent of delegated law-making, but the Court will approve such delegations only when the law-making authority is ancillary to existing exercises of judicial power. *See id.* (citing Sibbach v. Wilson & Co., 312 U.S. 1, 22 (1941) (power to adopt rules of procedure); Standard Oil Co. of New Jersey v. United States, 221 U.S. 1 (1911) (power to define what constitutes a "restraint of trade"); Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 45 (1825) (power to prescribe method in which officers execute judgments)).

165. U.S. CONST. art. III, § 1. There is a significant line of decisions dealing with problems of the scope of Article III case-and-controversy judicial power, which Justice Brennan attempted to categorize in *Northern Pipeline*. *See* Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 63-76 (1982) (discussing judicial power in terms of the types of cases and controversies the Framers assigned to an independent Article III branch, and the three situations where Article III does not bar creation of legislative courts or delegations to administrative agencies). Justice Brennan's attempt to analytically unify Article III judicial power in terms of the case-or-controversy requirement was largely unsuccessful, and criticized by the dissenters in that case, and shifting coalitions of Justices in subsequent separation cases. *See* Alfange, *supra* note 24, at 687-94 (discussing Justice Brennan's analytical model and its criticism by the dissenters and in subsequent cases).

These cases typically involve an issue concerning congressional delegation to a legislative court or administrative agency that allegedly transgresses the scope of Article III jurisdiction by conferring judicial powers on persons lacking Article III independence. *See Northern Pipeline*, 458 U.S. at 64-70. These cases provide problematic analogies for construing the Civil Justice Reform Act, which does not create a legislative court nor delegate power to an admin-

During the eighteenth and nineteenth centuries, the development of an independent federal procedure was hampered by other provisions of the Process Acts of 1789 and 1792,[207] and the Conformity Act of 1872, which required federal courts to follow state procedures in actions at law.[208] The undesirability of this arrangement ultimately led to the twentieth-century reform movement for a uniform set of federal procedural rules, which culminated in the enactment of the Rules Enabling Act in 1934.[209] Thus a long history vesting procedural rulemaking authority in the courts culminated in the Rules Enabling Act's designation of procedural rulemaking authority in judges. As Professor Paul Carrington has noted, it was the British Parliament that first embraced the idea of transferring responsibility for civil procedure to the judges themselves, and the Rules Enabling Act of 1934 is really "an imitation of the English Judicature Act of 1875" that had been imitated already by many states.[210]

Thus, the Senate Judiciary subcommittee's claim in the legislative history to the Civil Justice Reform Act that Congress has *exclusive* rulemaking power[211] is nonsense. This assertion blatantly ignores the British historical antecedents to American procedural reform, the federalists' concern with ensuring institutionally the existence of an independent judiciary, and over two hundred years of practical experience with judicial rulemaking. Our constitutional history demonstrates that from the earliest days of the republic, while Congress has exercised consistently its legislative authority under Article III to constitute the inferior federal courts, and to confer on them procedural rulemaking authority, it has not engaged in procedural rulemaking itself and can hardly lay claim to an exclusive constitutional claim to do so. Indeed, aside from only two

> practice of said courts, so as to prevent delays, and to promote brevity and succinctness in all pleadings and proceedings therein, and to abolish all unnecessary costs and expenses in any suit therein.

Id.

207. *See supra* notes 199-202 and accompanying text.

208. Act of June 1, 1872, ch. 255, §§ 5, 6, 17 Stat. 196, 197; *see* WEINSTEIN, *supra* note 193, at 64-66. It is important to keep in mind that even though federal courts were required to follow state procedural rules, those rules were themselves the product of judicially promulgated, rather than legislatively promulgated, rulemaking authority.

209. WEINSTEIN, *supra* note 193, at 66-69.

210. Paul D. Carrington, *"Substance" and "Procedure" in the Rules Enabling Act*, 1989 DUKE L.J. 281, 301.

211. S. REP. NO. 416, *supra* note 7, at 9-12, *reprinted in* 1990 U.S.C.C.A.N. at 6811-15; *see also* Mullenix, *supra* note 9, at 424-32.

anomalous, unfortunate exceptions in the last decade,[212] Congress has never exercised its so-called exclusive rulemaking power. Only in the Civil Justice Reform Act has Congress attempted to create and invoke this exclusive power.

Yet the notion that Congress has the authority to establish rules of procedure is commonly accepted.[213] This blanket assertion, asserted most recently by Congress in the legislative history to the Civil Justice Reform Act,[214] is the unfortunate consequence of rote repetition, by advocates of congressional rulemaking authority, of *dicta* in two Supreme Court cases construing the Rules Enabling Act—*Sibbach v. Wilson & Co.*[215] and *Hanna v. Plumer*.[216]

The selective use of two sentences of dicta from *Sibbach* and *Hanna* to support Congress's claim of exclusive rulemaking authority, however, ignores the significance of the entire line of cases construing the second provision of the Rules Enabling Act

212. *See* Mullenix, *supra* note 18, at 844-48 (discussing congressional revisions to FED. R. CIV. P. 4 and 35); *see also* Carrington, *supra* note 210, at 320 (suggesting that Congress's 1982 adoption of Rule 4 as a statute eliminated any separation-of-powers problem).

213. This wisdom is found in constitutional law treatises. *See, e.g.*, TRIBE, *supra* note 169, at 50 (citing Hanna v. Plumer, 380 U.S. 460, 471-72 (1965), for the proposition that "[c]onsistent with constitutional limitations, Congress clearly has authority to fix the rules of procedure, including the rules of evidence, which article III courts must apply"). It is also found in standard commentary on the rulemaking process. *See, e.g.*, WEINSTEIN, *supra* note 193, at 90 (citing Sibbach v. Wilson & Co., 312 U.S. 1, 9-10 (1941), for the proposition that "Congress's position as possessor and delegator of the rule-making power is now assumed without question by the courts"). For a discussion of the roots of this misconception, see *infra* notes 215-16.

214. *See* Mullenix, *supra* note 9, at 424-32 (discussing Senate legislative history to the Civil Justice Reform Act).

215. 312 U.S. 1 (1941). In *Sibbach*, the Court declared that: "Congress has undoubted power to regulate the practice and procedure of federal courts, and may exercise that power by delegating to this or other federal courts authority to make rules not inconsistent with the statutes or constitution of the United States . . . ." *Id.* at 9-10 (footnote omitted). This famous declaration has been quoted routinely by subsequent courts. *See, e.g.*, Mistretta v. United States, 488 U.S. 361, 387 (1989); *see also* Hanna v. Plumer, 380 U.S. 400, 471-72 (1965) (relying on *Sibbach* dictum).

216. 380 U.S. 460 (1965). In *Hanna*, the Court made a pronouncement similar to that in *Sibbach*:

> [T]he constitutional provision for a federal court system (augmented by the Necessary and Proper Clause) carries with it congressional power to make rules governing the practice and pleadings in those courts, which in turn includes a power to regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either.

Id. at 472. Proponents of congressional authority also invoke the pronouncement. *See, e.g.*, *Mistretta*, 488 U.S. at 387-88.

that "[s]uch rules shall not abridge, enlarge or modify any substantive right."[217] These cases center on the inquiry whether a particular Court-promulgated Federal Rule of Civil Procedure has violated that prohibition.[218] If the Court in fashioning a rule alters substantive rights by promulgating rules of general effect, it is engaged in unconstitutional lawmaking. This provision of the Rules Enabling Act codified the repeated provision in predecessor statutes that prohibited courts from promulgating any procedural rules that "were repugnant to the laws of the United States."[219] Thus, the *Sibbach* line of cases demonstrates only judicial efforts to clarify the distinction between substantive law and procedural rules. The body of decisional law beginning with *Sibbach* reflects a fifty-year judicial effort to clarify a meaningful distinction between substantive law and procedural rules, accompanied by a large body of academic disputation pointing out the difficulty and futility of that exercise.[220]

Since the enactment of the Rules Enabling Act, the Court has never once found a Court-promulgated rule to transgress the Enabling Act's prohibition against the exercise of substantive lawmaking authority.[221] Indeed, the Rules Enabling Act cases do not at all deal with the fundamental separation-of-powers issue implicit in every challenge to a Court-promulgated rule. Except for the dicta in *Sibbach* and *Hanna*, these cases have not addressed the constitutional allocation of rulemaking authority. Rather, they typically have been preoccupied solely with locating where along a fuzzy substance/procedure continuum a particular judicial exercise of rulemaking authority fits.[222] Thus, a constitutional challenge to the Civil Justice Reform Act cannot be resolved by recourse to the *Sibbach* line of cases, because each decision has been accomplished with reference to a judicial interpretation of the substance/procedure distinction embodied in the second provision of the Rules Enabling Act.

The Civil Justice Reform Act presents a challenge to the Rules Enabling Act's vesting of procedural rulemaking in the Supreme Court,[223] and its pre-1988 provision vesting a supervisory review role in the Congress.[224] These provisions embodied the constitutional separation-of-powers limitations on the respective allocation of rulemaking authority. As Professor Carrington has suggested, the first provision of the Rules Enabling Act was "a delegation of some federal law-making power created by Article III, which authorizes Congress to establish lower federal courts."[225] The Act's second provision, in this view, was unnecessary, because "the Court cannot make substantive rules by any means other than writing opinions in 'cases or controversies,' without taking leave of its role as defined by Article III."[226] As Professor Carrington has concluded, "[b]y shielding substantive rights from abridgment and modification, the first sentence of the Act expresses constitutional principles that derive from Article III."[227]

217. *See* 28 U.S.C. § 2072(b) (1988). Before it was amended in 1988, the Act provided: "Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution." 28 U.S.C.A. § 2072 (West 1982) (repealed 1988).

218. *See* Business Guides, Inc. v. Chromatic Communications Enters., 111 S. Ct. 922, 933-35 (1991) (Rule 11); Colgrove v. Battin, 413 U.S. 149, 162-63 (1973) (Rule 48); *Hanna*, 380 U.S. at 464-65 (Rule 4(d)(1)); Schlagenhauf v. Holder, 379 U.S. 104, 112-14 (1964) (Rule 35(a)); Sears, Roebuck & Co. v. Mackey, 351 U.S. 427, 433-35 (1956) (Rule 54(b)); Mississippi Publishing Corp. v. Murphree, 326 U.S. 438, 445 (1946) (Rule 4 (f)); *Sibbach*, 312 U.S. at 14 (Rule 35).

The possibility of a Rules Enabling Act violation has arisen in other contexts, but has not formed the basis for the Court's decision. For further discussion of the extent of the Rules Enabling Act, see, for example, *Mistretta*, 488 U.S. at 384-97 (discussing location of U.S. Sentencing Commission in the judicial branch as not violating the Rules Enabling Act); Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 27 (1988) (discussing § 1404(a) transfer statute); Marek v. Chesney, 473 U.S. 1, 36 (1985) (Brennan, J., dissenting) (discussing Rule 68); Daily Income Fund, Inc. v. Fox, 464 U.S. 523, 543-44 (1984) (Stevens, J., concurring) (discussing Rule 23.1); Miner v. Atlass, 363 U.S. 641, 654-55 (1959) (Brennan, J., dissenting) (discussing admiralty rules of procedure, in light of *Sibbach*).

219. *See* Act of March 2, 1793, ch. 22, § 7, 1 Stat. 333, 335.

220. *See, e.g.*, Stephen B. Burbank, *Hold the Corks: A Comment on Paul Carrington's "Substance" and "Procedure" in the Rules Enabling Act*, 1989 DUKE L.J. 1012; Burbank, *supra* note 178, at 1006-07; Carrington, *supra* note 210.

221. *See* cases cited *supra* note 218.

222. *See Business Guides*, 111 S. Ct. at 933-34; *Colgrove*, 413 U.S. at 156-57; *Hanna*, 380 U.S. at 463-68; *Schlagenhauf*, 379 U.S. at 113-14; *Mackey*, 351 U.S. at 433 n.5; *Murphree*, 326 U.S. at 445-46; *Sibbach*, 312 U.S. at 7-14.

223. 28 U.S.C. § 2072(a) (1988).

224. Prior to being amended in 1988, § 2072 had provided: "Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported." 28 U.S.C.A. § 2072 (West 1982) (repealed 1988).

225. Carrington, *supra* note 210, at 286.

226. *Id.* at 287.

227. *Id.* Professor Carrington makes the additional argument that the Rules Enabling Act supersession clause further confirms the constitutional al-

Although Congress, in the Civil Justice Reform Act, has claimed an exclusive rulemaking authority, there are both constitutional and statutory limitations on Congress's role in the rulemaking process. Indeed, for separation-of-powers purposes one may view the Rules Enabling Act as a codification of the constitutional limits. The constitutional limitation prevents Congress from compromising the constitutional independence of the judiciary by invading the inherent power of the judiciary to create rules of practice and procedure for the courts. The statutory limitation allocates the substantive law-making function to the legislative branch, and the procedural rule-making function to the courts.[228] Congress, under the Rules Enabling Act, possesses a supervisory role of reviewing court-promulgated rules prior to their becoming law to ensure that such rules do not trench on Congress's substantive law-making function.[229] This allocation of authority is reinforced by the judicial review process, which also ensures that the rulemaking allocation is not transgressed when the courts exercise their rulemaking power.

Whatever else may be said about the Civil Justice Reform Act, its various and detailed prescriptions to the advisory groups do not constitute substantive law-making by Congress. The provisions of the Act clearly represent a lengthy series of procedural rules. And although *Sibbach* and its progeny provide an inapt analytical framework for construing the constitutional or statutory legitimacy of the Civil Justice Reform Act, even under the most liberal view of the substance/procedure distinction these cases embody, it cannot be contended that the provisions of the Act are anything other than congressionally-commanded procedural rulemaking. In enacting this statute, then, Congress has interfered with the constitutionally-required and historically-based allocation of rulemaking authority embodied in the Rules Enabling Act.

Perhaps the best view of rulemaking authority is that it is a constitutionally- and statutorily-shared power, to be exercised in coordination by the legislative and judicial branches.[230] This perspective certainly comports with a contemporary, function-

location of lawmaking and rulemaking authority to the legislative and judicial branches, respectively. *See id.* at 322-26.

228. 28 U.S.C. § 2072(b) (1988).

229. 28 U.S.C. § 2074(a) (1988).

230. *See, e.g.*, WEINSTEIN, *supra* note 193, at 92 (arguing that for decades, if not centuries, control over practice and procedure has been the subject of concurrent jurisdiction); Levin & Amsterdam, *supra* note 180, at 3 (same); Martin, *supra* note 178, at 176-202 (discussing the view that both the Congress and the courts have authority to prescribe rules of evidence).

alist view of the separation-of-powers doctrine, under which neither branch may reasonably make an exclusive institutional claim to rulemaking authority.[231] Yet when an interbranch conflict arises, as with the Civil Justice Reform Act, the most appropriate conflict-resolving principle consistent with separation-of-powers doctrine is that "the branch to which the power has been delegated or is inherent prevails."[232] The separation-of-powers doctrine requires inherent branch power to prevail over coordinate branch delegative authority.[233] Thus, if the promulgation of procedural rules is an indispensable inherent attribute of judicial power, the exercise of that power by another branch is impermissible under the separation-of-powers doctrine.[234]

2. The 1988 Amendment to the Rules Enabling Act and Its Implications for the Civil Justice Reform Act

In 1988, Congress amended the Rules Enabling Act. The amended Act stated more succinctly the power of the Supreme Court to prescribe general rules of practice and procedure for the district courts,[235] removed the provision relating to congressional approval of judicially promulgated rules,[236] and recast the supersession clause.[237] None of the 1988 amendments, however, altered the constitutional allocation of rulemaking authority between the legislative and judicial branches. Congress retained intact the basic principle that the Supreme Court promulgates procedural rules for the federal courts. Significantly, Congress deleted all references to congressional oversight of the judicial rulemaking process.[238] More importantly,

231. *See supra* notes 103-22 and accompanying text (discussing separation problems between the legislative and judicial branches).

232. Martin, *supra* note 178, at 185.

233. *Id.* at 184.

234. *Id.* at 184-85.

235. Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 401(a), 102 Stat. 4642, 4648-50 (1988) (codified as amended at 28 U.S.C. §§ 2072-2074 (1988 & Supp. II 1990)).

236. *See id.*

237. Section 2072(b) now provides that "[s]uch rules shall not abridge, enlarge, or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect." 28 U.S.C. § 2072(b) (1988).

238. *See* Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, tit. IV, 102 Stat. 4642, 4648-52 (1988) (codified as amended at 28 U.S.C. §§ 2072-2074 (1988 & Supp. II 1990)). In 1990 Congress added a further provi-

the 1988 amendments revised the implementation section of the Rules Enabling Act to open public access to the rulemaking process.[239]

Both the Senate Judiciary subcommittee[240] and the Judicial Conference[241] exploited the 1988 amendments to the Rules Enabling Act in support of their respective views of the allocation of rulemaking authority between the legislative and judicial branches. The Senate Judiciary subcommittee interpreted the 1988 amendments to support its claim to exclusive rulemaking authority,[242] while the Judicial Conference tactically construed these revisions as a congressional reaffirmation of the basic allocation of procedural rulemaking authority in the judicial branch.[243] The Judicial Conference view is probably better, because the 1988 amendments to 28 U.S.C. § 2073 cannot be read as changing the fundamental allocation of rulemaking authority embodied in § 2072. Significantly, not only did Congress amend § 2072 without declaring itself the exclusive rulemaking authority, it also eliminated altogether any reference to its role in the rulemaking process. The 1988 amendments to § 2073 were basically political concessions to enhance democratic participation in the procedural rulemaking process, and simply cannot support a bootstrap argument for exclusive congressional authority over the procedural rulemaking process.[244]

sion to § 2072, providing that "[s]uch rules may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title." Judicial Improvements Act of 1990, Pub. L. No. 101-650, tit. III, § 315, 104 Stat. 5089, 5115 (codified at 28 U.S.C. § 2072(c) (Supp. II 1990)).

239. *See* 28 U.S.C. § 2073 (1988). The new provisions enhanced the opportunity for public participation in the judicial rulemaking process. *See generally* Paul D. Carrington, *The New Order In Judicial Rulemaking*, 75 JUDICATURE 161, 164 (1991) [hereinafter Carrington, *The New Order*] (describing the impetus of the 1988 revisions to the Rules Enabling Act). Section 2073(c)(1) provides for public meetings and minutes of proceedings. Section 2073(d)(1) requires explanatory commentary for proposed rule revisions. An attempt to require that the advisory rules committees consist of a "balanced cross section of bench and bar" was deleted from the final 1988 revisions to the Rules Enabling Act. *See* Paul D. Carrington, *Making Rules To Dispose of Manifestly Unfounded Assertions: An Exorcism of the Bogy of Non-Trans-Substantive Rules of Civil Procedure*, 137 U. PA. L. REV. 2067, 2076 n.56 (1989) [hereinafter Carrington, *Making Rules to Dispose of Manifestly Unfounded Assertions*] (citing H.R. 3550, 99th Cong., 1st Sess., 131 CONG. REC. H11,397-98 (daily ed. Dec. 9, 1985)).

240. *See* Mullenix, *supra* note 9, at 428-29.

241. *Id.* at 416-17.

242. *Id.* at 428-29.

243. *Id.* at 416-17.

244. Even so viewed, these provisions are rather meager gestures to the requirements of due process. The 1988 amendments have enhanced the judicial rulemaking process by requiring advance notice of advisory committee meetings, written minutes, and explanatory and dissenting statements regarding proposed rule revisions, as well as providing an opportunity for the public to attend committee meetings. The amendments do not, however, incorporate an opportunity to be heard, *see* 28 U.S.C. § 2073 (1988), a traditional hallmark of procedural due process in provisional remedies cases, *see, e.g.*, Fuentes v. Shevin, 407 U.S. 67, 80-81 (1972); Sniadach v. Family Fin. Corp., 395 U.S. 337, 339-42 (1969); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313-14 (1950).

B. THE CIVIL JUSTICE REFORM ACT AND THE RULES ENABLING ACT

1. The Inversion of Rulemaking Authority Embodied in the Civil Justice Reform Act

The Civil Justice Reform Act represents a peculiar and disturbing inversion of the usual allocation of rulemaking authority.[245] In separation-of-powers terms, the Rules Enabling Act codifies Congress's legislative power to enact substantive laws and the federal judiciary's judicial power to enact rules of practice and procedure for proceedings in its courts. The language of the Rules Enabling Act and the cases construing it have at a minimum always recognized this division of lawmaking and rulemaking authority.[246] The only dispute has centered on discerning which matters are "substantive" and which are "procedural."[247] But even in instances of rulemaking at the margins of the substance/procedure divide, as well as instances of clearly procedural rulemaking, the judicial branch has always retained and exercised the power over procedural rulemaking. In the Civil Justice Reform Act, in contrast, Congress has mandated purely procedural rules. The Act's various and detailed provisions do not in any way implicate Congress's substantive lawmaking powers, and it would clearly distort the Act to even suggest that it is substantive law.

The Act has, in fact, accomplished an "end run" around the usual rulemaking process.[248] But the implications of the Civil

245. Mullenix, *supra* note 9, at 379-81.

246. *See supra* notes 217-18 and accompanying text.

247. *See supra* note 222 and accompanying text.

248. Thomas E. Baker, *An Introduction To Federal Court Rulemaking Procedure*, 22 TEX. TECH L. REV. 323, 333 (1991). Professor Baker writes:

> Although previously passive, during the last two decades Congress has taken a more active role to change proposed rules and to preempt altogether the judicial rulemaking procedure. The increased Congressional involvement makes for a more persistent separation-of-powers threat from the Congressional direction. This happens when Congress passes a statute to effect a rule change and thus execute a kind of "end run" around the established regular judicial rulemaking procedures.

Justice Reform Act are even more extreme than that. Without repealing, modifying, or amending the Rules Enabling Act, Congress simply has ignored both the constitutional and the statutory allocation of rulemaking authority, and has arrogated to itself the exclusive authority to do whatever it wants, including creating procedural rules for courts. Furthermore, Congress has accomplished this feat by simply declaring all procedural rules to be of "substantive effect,"[249] a declaration that suggests Congress at least understood the need to couch its usurpation of a traditionally judicial function in terms of a legislative prerogative. If Congress is correct in its bald assertion—and it is not—then we are at the end the age of procedure, for there can be no procedural rules when all are of "substantive effect."[250]

The Rules Enabling Act exists to preserve the independence of judicial rulemaking from the political process. In the Civil Justice Reform Act, Congress has invaded the judicial function and infused the procedural rulemaking process with partisan politics. The Rules Enabling Act is just that: a statute that "enables" the Supreme Court to exercise its inherent procedural rulemaking function. Although the Constitution assigns Congress the power to create inferior courts and confer on them jurisdiction, once created these courts have inherent power to promulgate rules of practice and procedure not in contravention of substantive law. If the Rules Enabling Act did not exist, courts would still have this power. The Senate's legislative history to the Civil Justice Reform Act, however, ignores separation-of-powers doctrine and distorts the interpretation of the Rules Enabling Act to divest the federal judiciary of its long-standing procedural rulemaking authority.

2. Rulemaking as a Matter of Public Policy

The Senate Judiciary subcommittee's legislative history cites to *Sibbach*, *Hanna*, and a sentence from Judge Jack Weinstein's book on procedural rulemaking for its assertion of exclusive rulemaking authority.[251] In truth, Judge Weinstein recognized that neither branch can lay exclusive claim to

Id. He then cites as the best example of this phenomenon the then-proposed Civil Justice Reform Act. *Id.* at 333 n.58. He speculates that the bill offers a scenario that is a "worst [case] example that might not be imaginable by the judges." *Id.*

249. *See* Mullenix, *supra* note 9, at 379, 432-34, 437.

250. *Id.* at 379-82.

251. *See id.* at 426.

rulemaking authority, and that in the end this concurrent power devolved into "a policy question where a series of arguments . . . must be weighed and balanced."[252]

Judge Weinstein's outline of these countervailing policy arguments is a good one, and it provides a durable framework for thinking about the rulemaking process as a policy question. The arguments he recognized are these: first, "[t]he federal judiciary has an unprecedented history of judicial independence from the other branches,"[253] an independence that is based on the judiciary's power to formulate procedural rules. Further, "[f]or courts to surrender this power to the legislature is to give up a crucial aspect of their duty to fairly determine cases and controversies."[254] Second, the "[c]ourts have an intimate knowledge of the need for particular rules to govern court processes not possessed by the legislative branch."[255] Third, the legislature has the authority to issue general rules, and procedural "[r]ule-making must inevitably be classed as such a legislative prerogative [because] it is far closer to the people's wishes than the courts."[256] Thus, to allow the judiciary to make procedural rules would be to invite court abuses. Fourth, only the legislature is sufficiently detached from the fine details of judicial procedures to evaluate objectively the need to alter such procedures.[257] And fifth, procedural rules "inevitably affect practical substantive rights, including those adopted by Congress."[258] As such, the legislature must protect the substantive rights it provides.

Judge Weinstein does not assess the merits of his arguments, although he clearly favors more participatory process in judicial rulemaking, a position forged through his experiences in the 1970s serving on various advisory committees.[259] Yet Judge Weinstein's majoritarian preference may be viewed as a peculiar consequence of the political climate of that time, for his policy arguments fail to consider other concerns that are relevant to the rulemaking process in the 1990s. Judge Wein-

252. WEINSTEIN, *supra* note 193, at 54.

253. *Id.*

254. *Id.*

255. *Id.*

256. *Id.*

257. *Id.* at 55.

258. *Id.* Needless to say, Judge Weinstein's actual account of the relative allocation of rulemaking authority between the two branches is more highly nuanced than the legislative history to the Civil Justice Reform Act indicates.

259. *See id.* at 8-11.

stein's first two arguments are based in a separation theory of judicial independence and a model of expertise, while his last two are based in a separation theory of legislative prerogative and a model of majoritarian rule. His third argument expresses his hypothesized fear of anti-majoritarian rulemaking, summoning dreaded judicial abuses of another era.[260]

Judge Weinstein's arguments are incomplete, however, because they fail to recognize another hypothesized fear of legislated (as opposed to judicially-promulgated) procedural rules: the fear of interest group lobbying.[261] Judge Weinstein fears the creation of procedural rules by insulated judges acting on their own prejudices,[262] but others equally fear the creation of procedural rules by political actors operating pursuant to the dictates of partisan interests. In the end, the policy question relating to rulemaking allocation is not a debate between models of expertise and non-expertise, but a policy question relating to majoritarian rule.

The ultimate question is whether it is desirable to have majoritarian procedural rules. The answer to this question must be no. The judicial branch is not a majoritarian branch. It seems absurd to suggest that the populace ought to vote on, for example, summary judgment procedure, pretrial practice, or judgments notwithstanding the verdict. The constitutional role of the judiciary in deciding cases and controversies was intended to be insulated from political pressure, yet the Civil Justice Reform Act strips the judiciary of its rulemaking function and infuses partisan politics into the process of determining the

260. *Id.* (citing the "abuses that arose in early nineteenth-century England").

261. *See, e.g.*, Baker, *supra* note 248, at 337 (providing the address of the Secretary of the Committee on Rules of Practice and Procedure and urging readers to write in their suggestions and recommendations on any of the federal rules); Carrington, *The New Order*, *supra* note 239, at 161-67; Carrington, *supra* note 210, at 301-02, 326-27 (arguing that the withdrawal of procedural rulemaking from the political arena has allowed for the advancement of the interests of persons with less political power); Carrington, *Making Rules To Dispose of Manifestly Unfounded Assertions*, *supra* note 239, at 2074-79 (discussing the influence of interest group politics on proposed amendments to Rule 68); Geoffrey C. Hazard, *Undemocratic Legislation*, 87 YALE L.J. 1284 (1978) (reviewing JACK B. WEINSTEIN, REFORM OF COURT RULE-MAKING PROCEDURES (1977), and contending that lawyer-legislators have inordinate influence on the few procedural rules that do emanate from Congress); Mullenix, *supra* note 18, at 801-02, 834-44, 855-57 (arguing that partisan law reformers have abandoned the judicial arena as the forum for achieving social changes, and instead are focusing legal reform efforts on the rules and rulemaking process, with worrisome consequences).

262. WEINSTEIN, *supra* note 193, at 8-11, 54-55.

procedural rules that govern the conduct of cases. The Act represents, then, a usurpation by the majoritarian branch of a power intended to be insulated from majoritarian politics.

This is dangerous, not only as a matter of constitutional law, but also as a matter of public policy, because the Civil Justice Reform Act is a monumental step in the further politicization of the rulemaking process. Whatever may have been the failings of judicial branch rulemaking,[263] the deleterious effects of majoritarian rulemaking will be tenfold. Judges, for all their Realist infirmities,[264] at a minimum were guided in their rulemaking efforts by a commonly-shared philosophy of procedural rules.[265] The new populist rulemakers, one fears, will be guided solely by differing self-interests and special interests.

CONCLUSION

This two-part Article has attempted to describe the Civil Justice Reform Act of 1990, the political climate in which it was conceived and enacted, and the danger it presents to the constitutional allocation of authority in our government. The Civil Justice Reform Act was enacted to address an assumed but unsubstantiated crisis in civil litigation in this country. Couched in high-minded rhetoric concerning reform from "the bottom up" by "users" of the system, the legislation purports to

263. *See generally* WINIFRED R. BROWN, FEDERAL RULEMAKING: PROBLEMS AND POSSIBILITIES (1981) (discussing criticism that the Court has interpreted its rulemaking authority too broadly); Jack H. Friedenthal, *The Rulemaking Power of the Supreme Court: A Contemporary Crisis*, 27 STAN. L. REV. 673 (1975) (arguing that the shortcomings of the 1970 work product rule probably would have been prevented if the Court had properly attended to its rulemaking functions); Howard Lesnick, *The Federal Rulemaking Process: A Time For Re-Examination*, 61 A.B.A. J. 579 (1975) (arguing that the current judicial rulemaking process should be reformed to be more open and representative, and that a workable mode of congressional review be devised); Russell R. Wheeler, *Broadening Participation in the Courts Through Rule-Making and Administration*, 62 JUDICATURE 280 (1979) (arguing that judicial rulemaking has become a vehicle through which a variety of interests groups may participate in court operations); Charles A. Wright, *Procedural Reform: Its Limitations and its Future*, 1 GA. L. REV. 563 (1967) (discussing limitations characteristic of judicial rules reform).

264. *See* Carrington, *supra* note 210, at 287.

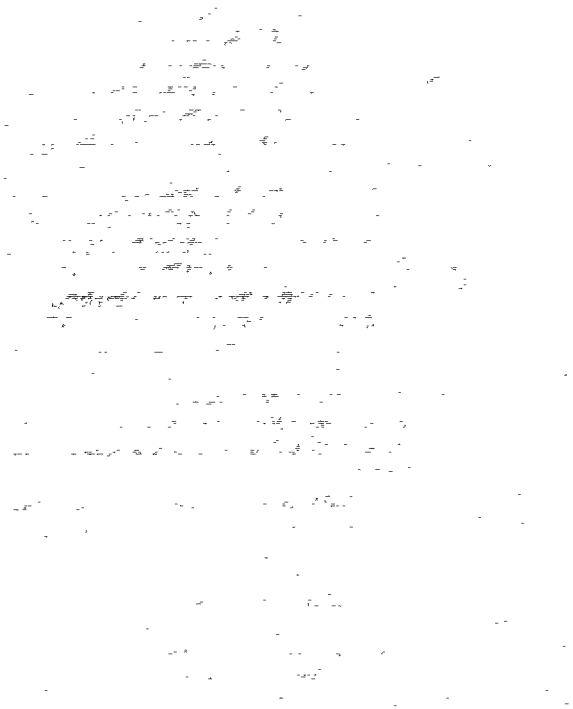
265. *See, e.g.*, Carrington, *Making Rules To Dispose of Manifestly Unfounded Assertions*, *supra* note 239, at 2079-85 (discussing the general applicability of procedural rules); Carrington, *supra* note 210, at 301-07 (describing a philosophy of procedural rulemaking characterized by the values of substantive and political neutrality, generalism, flexibility, forgiveness, integrality, and judicial professionalism).

achieve, through extensive procedural rulemaking reform, reductions in the cost and delay of civil litigation.

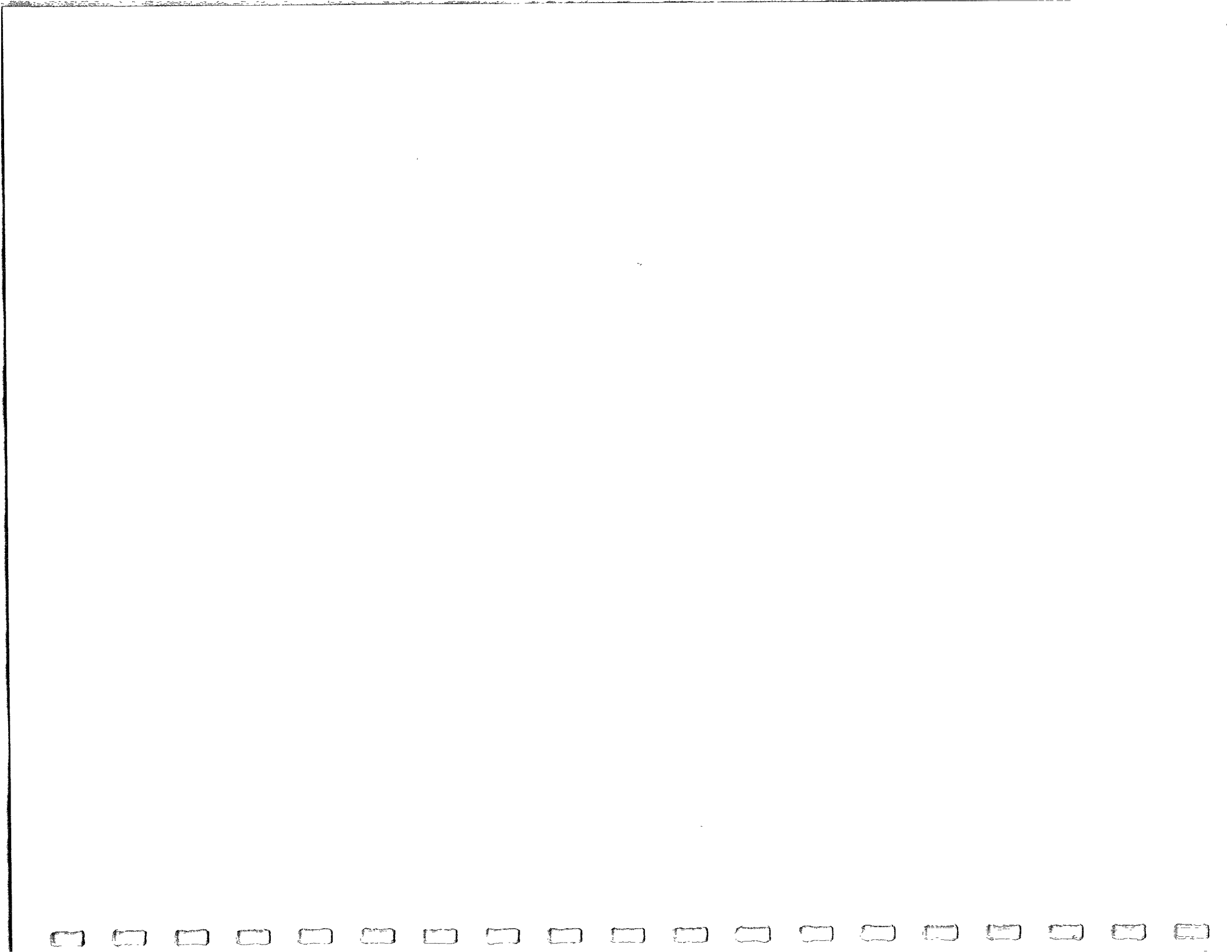
In truth, however, the Civil Justice Reform Act is a highly political piece of legislation, a cynical attempt by Congress not only to wrest procedural rulemaking authority from the judiciary, but also to achieve substantive legal change in a disguised, politically palatable fashion. The Act is not about civil justice reform at all; instead, it has effectuated a late-twentieth-century counter-reformation in procedural justice, totally undermining the progressive reforms accomplished since the promulgation in 1938 of the Federal Rules of Civil Procedure.

In wrongly declaring for itself an exclusive rulemaking authority, Congress has acted brazenly and arrogantly. In denying that any separation-of-powers issues were presented by the legislation, it has exerted a total legislative prerogative to the enduring impairment of an independent judiciary. In distorting the purpose and history of the Rules Enabling Act to justify its right to promulgate procedural rules, Congress has repealed the Rules Enabling Act *sub silentio*.

If the Civil Justice Reform Act is not declared unconstitutional, there will be no end to the continuing politicization of the judicial branch. There will be no counter-majoritarian branch, and no checks against majoritarian whim or interest group demands. All branches of government will be political, and the judicial process, too, will become subject to the loudest and most effective voices. Even the fiction of judicial impartiality in construing the law cannot possibly prevail when the process of judicial procedure is itself infused with political concerns.



APPENDIX B



PROCEDURES FOR THE CONDUCT OF BUSINESS BY THE JUDICIAL CONFERENCE COMMITTEES ON RULES OF PRACTICE AND PROCEDURE

Scope

These procedures govern the operations of the Judicial Conference Committee on Rules of Practice, Procedure, and Evidence (Standing Committee) and the various Judicial Conference Advisory Committees on Rules of Practice and Procedure in drafting and recommending new rules of practice, procedure, and evidence and amendments to existing rules.

Part I - Advisory Committees

1. Functions

Each Advisory Committee shall carry on "a continuous study of the operation and effect of the general rules of practice and procedure now or hereafter in use" in its particular field, taking into consideration suggestions and recommendations received from any source, new statutes and court decisions affecting the rules, and legal commentary.

2. Suggestions and Recommendations

Suggestions and recommendations with respect to the rules should be sent to the Secretary, Committee on Rules of Practice and Procedure, Administrative Office of the United States Courts, Washington, D.C. 20544, who shall, to the extent feasible, acknowledge in writing every written suggestion or recommendation so received and shall refer all suggestions and recommendations to the appropriate Advisory Committee. To the extent feasible, the Secretary, in consultation with the Chairman of the Advisory Committee, shall advise the person making a recommendation or suggestion of the action taken thereon by the Advisory Committee.

3. Drafting Rules Changes

a. An Advisory Committee shall meet at such times and places as the Chairman may authorize. All Advisory Committee meetings shall be open to the public, except when the committee so meeting, in open session and with a majority present, determines that it is in the public interest that all or part of the remainder of the meeting on that day shall be closed to the public and states the reason for closing the meeting. Each meeting shall be preceded by notice of the time and place of the meeting, including publication in the Federal Register, sufficient to permit interested persons to attend.

b. The reporter assigned to each Advisory Committee shall, under the direction of the Committee or its Chairman, prepare initial draft rules changes, "Committee Notes" explaining their purpose and intent, copies or summaries of all written recommendations and suggestions received by the Advisory Committee, and shall forward them to the Advisory Committee.

c. The Advisory Committee shall then meet to consider the draft proposed new rules and rules amendments, together with Committee Notes, make revisions therein, and submit them for approval of publication to the Standing Committee, or its Chairman, with a written report explaining the Committee's action, including any minority or other separate views.

4. Publication and Public Hearings

a. When publication is approved by the Standing Committee, the Secretary shall arrange for the printing and circulation of the proposed rules changes to the bench and bar, and to the public generally. Publication shall be as wide as practicable. Notice of the proposed rule shall be published in the Federal Register and copies provided to appropriate legal

publishing firms with a request that they be timely included in their publications. The Secretary shall also provide copies to the chief justice of the highest court of each state and, insofar as is practicable, to all individuals and organizations that request them.

b. In order to provide full notice and opportunity for comment on proposed rule changes, a period of at least six months from the time of publication of notice in the Federal Register shall be permitted, unless a shorter period is approved under the provisions of subparagraph d of this paragraph.

c. An Advisory Committee shall conduct public hearings on all proposed rules changes unless elimination of such hearings is approved under the provisions of subparagraph d of this paragraph. The hearings shall be held at such times and places as determined by the chairman of the Advisory Committee and shall be preceded by adequate notice, including publication in the Federal Register. Proceedings shall be recorded and a transcript prepared. Subject to the provisions of paragraph six, such transcript shall be available for public inspection.

d. Exceptions to the time period for public comment and the public hearing requirement may be granted by the Standing Committee or its chairman when the Standing Committee or its chairman determines that the administration of justice requires that a proposed rule change should be expedited and that appropriate public notice and comment may be achieved by a shortened comment period, without public hearings, or both. The Standing Committee may eliminate the public notice and comment requirement if, in the case of a technical or conforming amendment, it determines that notice and comment are not appropriate or necessary. Whenever such an exception is made, the Standing Committee shall advise the Judicial

Conference of the exception and the reasons for the exception.

5. Subsequent Procedures

a. At the conclusion of the comment period the reporter shall prepare a summary of the written comments received and the testimony presented at public hearings. The Advisory Committee shall review the proposed rules changes in the light of the comments and testimony. If the Advisory Committee makes any substantial change, an additional period for public notice and comment may be provided.

b. The Advisory Committee shall submit proposed rules changes and Committee Notes, as finally agreed upon, to the Standing Committee. Each submission shall be accompanied by a separate report of the comments received and shall explain any changes made subsequent to the original publication. The submission shall also include minority views of Advisory Committee members who wish to have separate views recorded.

6. Records

a. The Chairman of the Advisory Committee shall arrange for the preparation of minutes of all Advisory Committee meetings.

b. The records of an Advisory Committee shall consist of the written suggestions received from the public; the written comments received on drafts of proposed rules, responses thereto, transcripts of public hearings, and summaries prepared by the reporter; all correspondence relating to proposed rules changes; minutes of Advisory Committee meetings; approved drafts of rules changes; and reports to the Standing Committee. The records shall be maintained at the Administrative Office of the United States

mine the size and structure of the federal court system,[166] and this congressional power conventionally has been interpreted to include the authority to determine the jurisdiction of the lower federal courts.[167] That Congress can withdraw entire categories of federal jurisdiction is also a well-established tenet of constitutional law.[168] Article III, however, does not expressly limit congressional power over judicial jurisdiction.

United States v. Klein, which arose from the Civil War presidential pardons,[169] is the key separation-of-powers decision that limits Congress's power over federal jurisdiction. The *Klein* Court struck down an 1870 congressional proviso that essentially prescribed the judicial effect to be given to executive pardons or declarations of amnesty.[170] The Court concluded that Congress may not enact a substantive rule of decision that alters original federal court jurisdiction already conferred in a pending case;[171] to do so would breach the separation-of-powers doctrine by rendering vulnerable the institutional independence of the courts.[172] The central problem with Congress's enactment was that it did not withdraw jurisdiction over an entire category of cases, but rather only over particular cases where Congress anticipated an unfavorable outcome.[173]

A broad reading of *Klein* suggests a separation-of-powers violation where Congress, without repealing or amending the underlying statute, withdraws federal court jurisdiction in an attempt to affect the outcome of a pending case.[174] During the

istrative agency. The closest analog to the Civil Justice Reform Act advisory groups is the United States Sentencing Commission created by the Sentencing Reform Act. *See supra* notes 130-46.

166. Alfange, *supra* note 24, at 681.

167. *See* Sheldon v. Sill, 49 U.S. (8 How.) 441, 448-49 (1850); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 331-33 (1816).

168. *See Ex parte* McCardle, 74 U.S. (7 Wall.) 506, 514 (1868) (upholding statute excluding Supreme Court appellate jurisdiction over habeas corpus cases).

169. United States v. Klein, 80 U.S. (13 Wall.) 128 (1871). *See generally* PAUL M. BATOR ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 368-69 (3d ed. 1988) [hereinafter HART & WECHSLER]; LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 50-51 (2d ed. 1988) (discussing *Klein*).

170. *Klein*, 80 U.S. (13 Wall.) at 146.

171. *Id.*

172. *Id.* at 147.

173. *See* Alfange, *supra* note 24, at 683.

174. *See* HART & WECHSLER, *supra* note 169, at 27 (Supp. 1992) (commenting on Robertson v. Seattle Audubon Soc'y, 914 F.2d 1311 (9th Cir. 1990) (holding that subsections of the Northwest Timber Compromise violate the separation-of-powers doctrine under a broad reading of *Klein*)). The Supreme

legislative hearings on the Civil Justice Reform Act, the judges and the American Bar Association representative who appeared before the Senate Judiciary subcommittee cited *Klein* as the major doctrinal support for their proposition that the Act presented separation-of-powers problems as an unusual incursion on third branch power.[175]

Klein, however, offers only an oblique challenge to the Civil Justice Reform Act's legitimacy. Although the Act does affect pending and future litigation in the sense that it withdraws from federal courts their authority over procedural rulemaking, it does not literally supply any substantive rules that anticipate or would reverse a disfavored outcome in pending litigation. Rather, *Klein* is important because it articulates a principled limit on congressional interference with judicial power, thus demonstrating that congressional action may indeed constitute an assault on the courts' institutional independence. Congress's wholesale withdrawal from the courts of control over their own internal procedure in the Civil Justice Reform Act is arguably a greater congressional compromise of judicial independence than that at issue in *Klein*.

2. The Inherent Powers of the Courts

One will have difficulty grounding a separation-of-powers argument against the Civil Justice Reform Act on an explicit assignment of judicial power in Article III. Article III does not speak to the federal courts' rulemaking authority, and the cases dealing with congressional delegations of power and modification of federal court jurisdiction are largely unavailing in resolving the issue of the Act's legitimacy.[176] The Act deals with neither the substantive jurisdiction of the federal courts nor a delegation of substantive authority to a legislative court or an administrative agency. Rather, it involves the converse problem of Congress removing a power from the judicial branch and then improperly delegating it to a non-judicial body lodged within the judicial branch.

Although the Civil Justice Reform Act does not implicate an incursion into explicit judicial authority, it raises the issue of

Court refused to review the scope of *Klein* on appeal, because the Court held that Congress had amended the underlying statute. Robertson v. Seattle Audubon Soc'y, 112 S. Ct. 1407, 1414 (1992).

175. For a general overview of commentary critical of the bill given in congressional hearings, see Mullenix, *supra* note 9, at 411-24.

176. *See supra* note 165 (discussing relevant cases).

interference with functions that are a part of the judiciary's "inherent power." Any *constitutional* challenge to the Act must rest on the theory that Article III judicial powers include inherent, non-explicit powers that Congress has taken from the judiciary in violation of the separation-of-powers doctrine. While the existence of inherent executive power is well established,[177] that of inherent judicial power is much less so. Nonetheless, a doctrine of inherent judicial power exists, and courts have made recourse to it when deciding separation-of-powers cases.[178]

The Supreme Court has defined judicial "inherent powers" as those necessary for a court to function.[179] The theory posits

177. *See, e.g.*, United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 318-19 (1936) (stating that the unenumerated power of the federal government over foreign affairs rests principally with the President). *See generally* Chemerinsky, *supra* note 58, at 867-80 (reviewing cases and discussing critical commentary).

Commentators have debated the scope of these powers. *See, e.g.*, Chemerinsky, *supra* note 58, at 910 (asserting that the Supreme Court's ad hoc, unprincipled approach to inherent presidential power has contributed to the creation of an "Imperial Presidency"); Redish & Cisar, *supra* note 24, at 483-85 (rejecting theory of inherent executive power based on language of vestiture clause).

178. *See* Young v. United States *ex rel.* Vuitton et Fils S.A., 481 U.S. 787, 795-96 (1987) (federal courts possess inherent authority to initiate contempt proceedings for disobedience of their orders, and holding that "[c]ourts cannot be at the mercy of another Branch in deciding whether such proceedings should be initiated"); *see also* Michael M. Martin, *Inherent Judicial Power: Flexibility Congress Did Not Write into Federal Rules of Evidence*, 57 TEX. L. REV. 167, 181-87 (1979) (describing doctrine of inherent court power, especially with reference to ability to prescribe rules of evidence); James S. DeGraw, Note, *Rule 53, Inherent Powers, and Institutional Reform: The Lack of Limits on Special Masters*, 66 N.Y.U. L. REV. 800 (1991) (recognizing the use of inherent judicial powers to appoint adjunct special-masters); Hugh M. Favor, Jr., Comment, *Federal Courts Sanctioning Represented Parties Using Rule 11 and Their Inherent Powers: You Can Run But You Cannot Hide*, 21 CAP. U. L. REV. 225, 244-53 (1992) (discussing cases affirming the inherent power to sanction litigants and parties). *But see* Stephen B. Burbank, *Sanctions in the Proposed Amendments to the Federal Rules of Civil Procedure: Some Questions About Power*, 11 HOFSTRA L. REV. 997, 1005 (1983) (citing Roadway Express, Inc. v. Piper, 447 U.S. 752 (1980), for the proposition that inherent powers should be exercised with restraint because they are shielded from direct democratic control).

179. *See Young*, 481 U.S. at 819-20 (Scalia, J., concurring) (discussing and limiting the scope of *Hudson*'s dicta on inherent court powers); United States v. Hudson, 11 U.S. (7 Cranch) 32, 34 (1812) (holding that criminal jurisdiction over common-law crimes requires statutory authorization because it is not within implied judicial power). In *Hudson*, however, the Supreme Court observed broadly:

> Certain implied powers must necessarily result to our Courts of justice from the nature of their institution. . . . To fine for contempt — imprison for contumacy — inforce [sic] the observance of order, &c. are powers which cannot be dispensed with in a Court, because they are necessary to the exercise of all others: and so far our Courts no doubt possess powers not immediately derived from statute.

Id.

that once Congress creates federal courts and vests them with jurisdiction, it must also vest them with those powers necessary for them to administer justice[180] and to preserve their status as part of an independent branch.[181] Federal courts have thus recognized a variety of powers as inherent, including the power to regulate the practice of law,[182] to control their own proceedings and dockets,[183] to protect themselves through contempt orders from abuse or insult,[184] to impose sanctions on litigants,[185] to provide for process where none exists,[186] and to promulgate rules of practice.[187]

180. A. Leo Levin & Anthony G. Amsterdam, *Legislative Control over Judicial Rule Making: A Problem in Constitutional Revision*, 107 U. PA. L. REV. 1, 30 (1958).

181. *See* United States v. Brainer, 515 F. Supp. 627, 631-35 (D. Md. 1981) (discussing cases and authorities stressing the value of an independent judiciary entailed in inherent power cases), *rev'd*, 691 F.2d 691 (4th Cir. 1982).

182. *Id.* at 633 (citing Attorney Gen. of Maryland v. Waldron, 426 A.2d 929, 934 (Md. 1981)).

183. *See* Landis v. North Am. Co., 299 U.S. 248, 254 (1936); United States v. Correia, 531 F.2d 1095, 1098 (1st Cir. 1976); United States v. Inman, 483 F.2d 738, 740 (4th Cir. 1973) (per curiam), *cert. denied*, 416 U.S. 988 (1974).

184. *See* Young v. United States *ex rel.* Vuitton et Fils S.A., 481 U.S. 787, 795-96 (1987); Michaelson v. United States *ex rel.* Chicago, St. P., M., & O. Ry., 266 U.S. 42, 65-66 (1924); Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 450 (1911); *Ex parte* Robinson, 86 U.S. (19 Wall.) 505, 510 (1874); Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 227 (1821). *See generally* Felix Frankfurter & James M. Landis, *Power of Congress Over Procedure in Criminal Contempts in "Inferior" Federal Courts—A Study in Separation of Powers*, 37 HARV. L. REV. 1010 (1924) (finding no constitutional impediment when Congress confers contempt powers to courts).

185. *See, e.g.*, Chambers v. Nasco, Inc., 111 S. Ct. 2123, 2133-35 (1991) (federal courts possess inherent power to issue attorney fee sanctions apart from statutory or Rule 11 basis). For discussions of the Court's reliance on an inherent powers theory, see generally Rebecca G. Moore, Chambers v. Nasco, Inc.—*Judicial Discipline Wields a Big Stick*, 37 LOY. L. REV. 1043 (1992); Bryan P. Vezey, *A Federal Court Has Inherent Power To Assess Attorney Fees as a Sanction for Bad-Faith Conduct, and in a Diversity Case May Employ that Power Without Regard to the Law of the Forum State:* Chambers v. Nasco, 33 S. TEX. L. REV. 647 (1992); Goodloe Partee, Note, 14 U. ARK. LITTLE ROCK L.J. 107 (1991).

186. *Brainer*, 515 F. Supp. at 633 (quoting Attorney Gen. of Maryland v. Waldron, 426 A.2d 929, 934 (Md. 1981) (quoting State v. Cannon, 221 N.W. 603, 603-04 (Wis. 1928) (quoting *In re* Bruen, 172 P. 1152, 1153 (Wash. 1918)))).

187. Heckers v. Fowler, 69 U.S. (2 Wall.) 123, 128 (1864); Winberry v. Salisbury, 74 A.2d 406, 408-09 (N.J.), *cert. denied*, 340 U.S. 877 (1950); *see also* ROBERT E. RODES ET AL., SANCTIONS IMPOSABLE FOR VIOLATIONS OF THE FEDERAL

The unifying theme of these inherent judicial powers, which generally provide for administrative autonomy, is their necessity for the maintenance of judicial independence. In separation-of-powers terms, this dictates that the legislative branch not exercise control over the administration of judicial functions.[188] Thus, some inherent judicial powers are so fundamental that to divest the courts of them "is to make meaningless the very phrase *judicial power*."[189]

The power to prescribe adjective law is just such an inherent judicial power. Although Congress legitimately possesses a constitutional and statutory role in rulemaking, the theory of inherent court power nonetheless requires that congressional involvement in rulemaking acknowledge the "significance of a certain degree of judicial autonomy" over internal court rules of practice and procedure.[190] Thus, pursuant to the rulemaking allocation set forth in the Rules Enabling Act, "[t]he Congressional rulemaking power is validly exercised in such a way as to avoid undue interference with the execution of judicial power, thereby preserving the integrity of the doctrine of separation of powers."[191]

Thus, by delegating procedural rulemaking authority to a non-Article III advisory group lodged within the judicial branch, Congress has transgressed the Rules Enabling Act, intruded on the inherent power of the judiciary in its rulemaking function, and violated the separation-of-powers doctrine.

RULES OF CIVIL PROCEDURE 181 n.473 (1981); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 396 n.80 (1982). *But see* Burbank, *supra* note 178, at 1004 n.30 (refuting proposition that *Heckers* supports inherent rulemaking power in the federal courts).

The *Winberry* decision has engendered a substantial body of critical commentary disputing this claimed inherent power. *Compare* Benjamin Kaplan & Warren J. Greene, *The Legislature's Relation to Judicial Rulemaking: An Appraisal of* Winberry v. Salisbury, 65 HARV. L. REV. 234 (1951) (critical of court's decision) *with* Roscoe Pound, *Procedure Under Rules of Court in New Jersey*, 66 HARV. L. REV. 28, 37 (1952) (favorable to notion of inherent court rulemaking authority as supportive of judicial administration function).

188. *See* Levin & Amsterdam, *supra* note 180, at 31-32 (context of state legislative and judicial relations).

189. *See id.* at 30.

190. *Brainer*, 515 F. Supp. at 634.

191. *Id.*

II. THE CIVIL JUSTICE REFORM ACT AND THE RULES ENABLING ACT

A. THE ALLOCATION OF POWER EMBODIED IN THE RULES ENABLING ACT

1. The Doctrinal and Historical Basis of the Substance/Procedure Distinction

The first section of the Rules Enabling Act provides that "[t]he Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals."[192] The Act does not represent, however, Congress's first delegation of rule promulgation power to the courts. The Act was merely the codification at the federal level of a long series of statutory delegations of procedural rulemaking authority to the courts,[193] both here and in Britain.

British courts traditionally have possessed rulemaking authority.[194] Nineteenth-century British legal reforms anticipated the shared legislative/judicial rulemaking authority that

192. 28 U.S.C. § 2072(a) (1988). Before it was amended in 1988, the Rules Enabling Act had provided in part:

> The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and courts of appeals of the United States in civil actions, including admiralty and maritime cases, and appeals therein, and the practice and procedure in proceedings for the review by the courts of appeals of decisions of the Tax Court of the United States and for the judicial review or enforcement of orders of administrative agencies, boards, commissions, and officers.

28 U.S.C.A. § 2072 (West 1982) (repealed 1988).

193. *See* JACK B. WEINSTEIN, REFORM OF COURT RULE-MAKING PROCEDURES 55-63 (1977) (providing a historical overview of legislative rulemaking authority); Levin & Amsterdam, *supra* note 180, at 3-5; *see also* 28 U.S.C. § 2071 (1988) (providing rulemaking authority for local rules of court). *See generally* Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982) (providing history of the Rules Enabling Act); Albert B. Maris, *Federal Procedural Rule-Making: The Program of the Judicial Conference*, 47 A.B.A. J. 772 (1961) (discussing the history of judicial rule-making and the activities of the Judicial Conference); *The Rule-Making Function and The Judicial Conference of the United States*, 21 F.R.D. 117 (1957) (statements of various judges addressing congressional proposal to authorize Judicial Conference to make recommendations for revisions to Federal Rules of Civil Procedure).

194. "Before the nineteenth century each court regulated its own internal procedure with very little intervention by Parliament." R. WALKER & M. WALKER, THE ENGLISH LEGAL SYSTEM 60 (2d ed. 1970), *quoted in* WEINSTEIN, *supra* note 193, at 25.

the American Rules Enabling Act embodies. Between 1825 and 1875, Parliament took the lead in judicial reform by enacting a series of acts affecting rulemaking, the most significant of which were the Judicature Acts of 1873 and 1875.[195]

In America, the tradition of judicial procedural rulemaking began in the era of the Framers, and extends throughout American history.[196] During the colonial period the separation of judicial and legislative functions was "imperfect," but nonetheless most colonial courts modified practice and procedure "on a case-by-case basis without legislative intervention."[197] During the constitutional period, and especially in the *Federalist Papers*, the value of an independent judiciary emerged, but the federalist debates are unilluminating on the problem of the allocation of rulemaking authority in separation-of-powers terms.[198] Once the Constitution was ratified, Congress empowered the federal courts to adopt rules for practice and procedure. Thus, section 17 of the Judiciary Act of 1789 stated that the Circuit courts, as well as other federal courts, had the authority "to make and establish all necessary rules for the orderly conducting business in the said courts, provided such rules are not repugnant to the laws of the United States."[199]

Similarly, through the Process Acts of 1789 and 1792, Congress gave rulemaking authority to the Supreme Court in proceedings at common law,[200] equity, and admiralty.[201] The scope

195. WEINSTEIN, *supra* note 193, at 25. As Judge Weinstein has described:

> What evolved was a cooperative scheme for rule-making with legislative control over the overall procedural design and with authority over the details left to the courts. The Civil Procedure Act of 1833, for example, placed power in the courts to formulate procedural rules, which led to the Hilary Rules of 1834. Section 17 of the Judicature Act of 1875 authorized the judges of the Supreme Court to make rules governing procedure, and together with subsequent acts, vested this power in a committee of judges.

Id.

196. *Id.* at 36-44 (reviewing the debates at the constitutional convention relating to an independent judiciary, and the state ratification debates, THE FEDERALIST NOS. 75-82 (Alexander Hamilton)). Judge Weinstein makes the interesting argument that the ban on advisory opinions also might vitiate judicial rulemaking authority because rulemaking authority represents a similar infringement on legislative power. *Id.* at 44-55. He concludes, however, only that "[i]n the end the question of whether the legislature or the courts or both should possess the rule-making power comes down to a policy question where a series of arguments . . . must be weighed and balanced." *Id.* at 54.

197. *Id.*

198. *See* THE FEDERALIST NOS. 75-82 (Alexander Hamilton).

199. Act of Sept. 24, 1789, ch. 20, § 17, 1 Stat. 73, 83.

200. Act of Sept. 29, 1789, ch. 21, § 2, 1 Stat. 93, 93.

201. Act of May 8, 1792, ch. 36, § 2, 1 Stat. 275, 276.

of this authority was "subject . . . to such alterations and additions as the [federal] courts respectively shall in their discretion deem expedient, or to such regulations as the supreme court of the United States shall think proper from time to time by rule to prescribe to any circuit or district court concerning the same."[202] In 1793, Congress reconsidered the Process Act and placed rulemaking power in the "several Courts of the United States" and supplemented greatly the original rulemaking provisions of section 17 of the Judiciary Act of 1789 and the Process Act of 1792.[203]

Congress "sweepingly reaffirmed"[204] the power of federal courts to promulgate rules of practice and procedure in 1842.[205] The judicial rulemaking authority recognized in this statute again demonstrates that, for more than two-hundred years, Congress has long acceded to the practical authority of the courts to formulate their own procedural rules.[206]

202. *Id.*

203. Act of March 2, 1793, ch. 22, § 7, 1 Stat. 333, 335. In this enhanced version of rulemaking delegation, the Act provided:

> it shall be lawful for the several courts of the United States, from time to time, as occasion may require, to make rules and orders for their respective courts directing the returning of writs and processes, the filing of declarations and other pleadings, the taking of rules, the entering and making up judgments by default, and other matters in the vacation and otherwise in a manner not repugnant to the laws of the United States, to regulate the practice of the said courts respectively, as shall be fit and necessary for the advancement of justice, and especially to that end to prevent delays in proceedings.

Id. Judge Weinstein observes:

> The 1793 law continued the tendency of the 1792 Process Act to relax legislative control over rule-making and to expand the court's powers in that area. Although Congress retained the power to intervene to formulate rules of practice and procedure, as indicated by the phrase requiring the rules to be 'in a manner not repugnant to the laws of the United States,' the practical authority to formulate rules shifted to the courts."

WEINSTEIN, *supra* note 193, at 60 (quoting § 7, 1 Stat. at 335).

204. WEINSTEIN, *supra* note 193, at 60.

205. Act of Aug. 23, 1842, ch. 188, § 6, 5 Stat. 516, 518.

206. Thus, the 1842 statute provided that:

> the Supreme Court shall have full power and authority, from time to time, to prescribe and regulate, and alter, the forms of writs and other process to be used and issued in the district and circuit courts of the United States, and the forms and modes of framing and filing libels, bills, answers, and other proceedings and pleadings, in suits at common law or in admiralty and in equity pending in the said courts, and also the forms and modes of taking and obtaining evidence, and of obtaining discovery, and generally the forms and modes of proceeding to obtain relief, and the forms and modes of drawing up, entering, and enrolling decrees, and the forms and modes of proceeding before trustees appointed by the court, and generally to regulate the whole

Courts for a minimum of two years and shall be available for public inspection during reasonable office hours. Thereafter the records may be transferred to a Government Records Center in accordance with applicable Government retention and disposition schedules.

c. Any portion of minutes, relating to a closed meeting and made available to the public, may contain such deletions as may be necessary to avoid frustrating the purposes of closing the meeting as provided in subparagraph 3a.

d. Copies of records shall be furnished to any person upon payment of a reasonable fee for the cost of reproduction.

Part II - Standing Committee

7. Functions

The Standing Committee shall coordinate the work of the several Advisory Committees, make suggestions of proposals to be studied by them, consider proposals recommended by the Advisory Committees, and transmit such proposals with its recommendation to the Judicial Conference, or recommit them to the appropriate Advisory Committee for further study and consideration.

8. Procedures

a. The Standing Committee shall meet at such times and places as the Chairman may authorize. All Committee meetings shall be open to the public, except when the committee so meeting, in open session and with a majority present, determines that it is in the public interest that all or part of the remainder of the meeting on that day shall be closed to the public and states the reason for closing the meeting. Each meeting shall be preceded by notice of the time and place of the meeting, including publication in the Federal Register, sufficient to permit interested persons to attend.

b. When an Advisory Committee's final recommendations for rules changes have been submitted, the Chairman and Reporter of the Advisory Committee shall attend the Standing Committee meeting to present the proposed rules changes and Committee Notes.

c. The Standing Committee may accept, reject, or modify a proposal. If a modification effects a substantial change, the proposal will be returned to the Advisory Committee with appropriate instructions.

d. The Standing Committee shall transmit to the Judicial Conference the proposed rules changes and Committee Notes approved by it, together with the Advisory Committee report. The Standing Committee's report to the Judicial Conference shall include its recommendations and explain any changes it has made.

9. Records

a. The Secretary shall prepare minutes of all Standing Committee meetings.

b. The records of the Standing Committee shall consist of the minutes of Standing and Advisory Committee meetings, reports to the Judicial Conference, and correspondence concerning rules changes including correspondence with Advisory Committee Chairmen. The records shall be maintained at the Administrative Office of the United States Courts for a minimum of two years and shall be available for public inspection during reasonable office hours. Thereafter the records may be transferred to a Government Records Center in accordance with applicable Government retention and disposition schedules.

c. Copies of records shall be furnished to any person upon payment of a reasonable fee for the cost of reproduction.

AGENDA ITEM - 5A
Tucson, Arizona
January 12-15, 1994

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS
WASHINGTON, D.C. 20544

L. RALPH MECHAM
DIRECTOR

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ASSOCIATE DIRECTOR

JOHN K. RABIEJ
CHIEF, RULES COMMITTEE
SUPPORT OFFICE

December 14, 1993

MEMORANDUM TO MEMBERS OF THE STANDING COMMITTEE

SUBJECT: Agenda Item Regarding Long Range Planning

The attached material includes: (1) a three-page schedule of events and tasks adopted by the Judicial Conference Committee on Long Range Planning, and (2) a letter from Judge Otto R. Skopil, Jr., chair of the Long Range Planning Committee, to Judge Stotler inviting comments on a draft of principles supporting federal jurisdiction.

John K. Rabiej

John K. Rabiej

Attachments

Event Timeline
Long Range Planning Committee
as of 11/23/93

Date	Event	Location
completed	Status reports on major issues from subcommittees	-
1/3/94	Subcommittees distribute issue papers for Key West meeting	-
1/10-11/94	Planning Committee meeting	Key West, Florida
1/31/93	JC Committee responses due to Planning Committee	-
3/1/94	Comments due on jurisdictional principles proposal	-
3/1/94	Subcommittees distribute issue papers for N.C. meeting	-
3/3-4/94	Subcommittee A retreat on governance issues	Washington D.C.
3/14/94	Planning Committee members respond in writing to issue papers	-
3/15-16/94	Judicial Conference of U. S. meets	Washington D.C.
3/17-18/93	Possible dates of Three Branch Conference	(tbd)
3/21-23/94	Planning Committee meeting	Durham, N.C.
3/24/94	Judge Skopil and staff commence drafting long range plan	-
4/18-19/94	Planning Committee meeting (if necessary)	Kansas City Missouri

Date	Event	Location
April/May/ June/July	Coordinate specific issues with Judicial Conference committees	-
5/15/94	Send draft plan to LRPC for comment	-
7/1/94	Planning Committee members submit written comments on draft plan	-
7/18-19/94	Planning Committee meeting	San Diego, California
7/20/94	Judge Skopil and staff revise plan as required	-
8/15/94	Mail Plan broadly for comment (within and outside judiciary)	-
9/20-21/94	Judicial Conference of U.S. meets	Washington D.C.
October	Public Hearing	Philadelphia Pa.
October	Public Hearing	Chicago, Illinois
November	Public Hearing	New Orleans, La.
November	Public Hearing and Planning Committee meeting	Pasadena, California
11/15/94	Written comments due on draft plan mailed on 8/15/94	-
December	Final Planning Committee meeting	Chicago, Illinois
December	Mail final draft of plan to Planning Committee for comment	-
December	Final round of coordination with Judicial Conference committees	-

Date	Event	Location
1/15/95	Send first version of plan to Judicial Conference secretariat	-
March 95	Judicial Conference of U.S. considers long range plan	-

COMMITTEE ON LONG RANGE PLANNING
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES

232 PIONEER COURTHOUSE
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November 3, 1993

Honorable Alicemarie H. Stotler
Chair, Committee on Rules of
Practice and Procedure
United States District Court
Post Office Box 12339
Santa Ana, California 92712

Dear Judge Stotler:

I write in my capacity as chairman of the Long Range Planning Committee to provide you with a draft of the principles supporting federal jurisdiction for possible inclusion in the national long range plan. This draft has not yet received the final approval of the full Planning Committee. However, the Committee felt it was sufficiently well developed to distribute for comment.

I note that both the Criminal Law Committee and the Federal-State Jurisdiction Committee have agreed to review this draft thoroughly and to provide specific comments on it to the Planning Committee. Nonetheless, I would also like to invite your committee to comment on part or all of this draft if it wishes. However, I emphasize that there is no need for your committee to do so. I realize the Planning Committee has imposed on your committee in the past and I am reluctant to do so again. At the same time, I recognize that the scope of federal jurisdiction is a subject of interest to all judges and I wanted to give every Conference committee, including yours, an opportunity to comment if it wished.

The Planning Committee expects to complete a draft of the national plan by next summer. If you choose to submit comments on the attached draft I ask that you do so by March 1, 1994.

Please phone me if you have any questions or if you would find additional information helpful.

Sincerely,

Otto R. Skopil, Jr.

Attachment

cc: Peter G. McCabe
John K. Rabiej

DRAFT November 2, 1993

FEDERAL JURISDICTION -- RECOMMENDATIONS OF SUBCOMMITTEE B

A. Rationale for Limited Jurisdiction

1. The concept of judicial federalism is premised on the notion that the state and federal courts together comprise an integrated system for the administration of justice in the United States.

2. Historically, these two systems of courts have played different roles in our federal system. The state courts have been the primary forums for resolving civil disputes and the chief tribunals for crime enforcement. For example, more than 95% of all violent crimes are prosecuted by state and local authorities.

3. The federal courts, in contrast, have had a limited jurisdiction. Thus, historically, the jurisdiction of the federal courts has complemented, not supplanted, the jurisdiction of the state courts.

4. Theoretically, allocation of a limited and special jurisdiction for the federal courts makes sense. Unless a specific role for the federal court system is identified, there is no sound justification for having two systems. All courts could arguably be either federal or state courts.

5. If we are able to define and justify a limited jurisdiction for the federal courts, Congress should zealously guard against exceeding the theoretical boundaries of that jurisdiction - to ensure that the federal courts do not lose their reason for existence.

6. If federal courts begin to exercise, as their normal course, jurisdiction over cases traditionally allocated to the states, they will lose their specialized nature, and, in the process, lose their ability to resolve fairly and efficiently cases that we know belong in federal court. Federal courts will begin to lose their expertise over matters that are clearly within the boundaries of federal jurisdiction.

B. Goals for Federal Jurisdiction

7. It is therefore necessary to define and justify a limited, specialized jurisdiction for the federal courts. Allocating jurisdiction in a federal system should be consistent with and flow from our understanding of the benefits of having dual systems of government. In general, we believe the federal government can grapple with problems extending beyond the borders of

individual states, problems that require uniform treatment, and problems that are too sensitive or volatile at the community level for effective regulation or local enforcement. State governments, in contrast, for a variety of reasons, are better able to respond to matters of local concern, focusing on the unique impact that a problem may have on a discrete region.

8. The same principles should apply to our judicial systems. The starting point in allocating jurisdiction among the two judicial systems is identifying the core of the federal courts' jurisdiction - i.e., what kinds of matters must the federal courts handle either because no other tribunal is structurally as well-equipped or because the states have proven ineffective in handling the matters of federal character. Unless there is a special, identifiable need for federal involvement, the state courts, as the courts of general jurisdiction, are the appropriate forums.

Criminal Jurisdiction

9. Ideally, federal criminal prosecution should occur only in those instances in which state prosecution would not be as appropriate an alternative. The following five characterizations suggest those cases in which federal prosecution is most appropriate:

a) The proscribed activity constitutes an offense against the federal government itself (e.g., treason, piracies on the high seas, and counterfeiting) or its agents or against interests that are unquestionably associated with a national government (e.g., international terrorist action against U.S. citizens, interstate environmental concerns, or wildlife preservation);

b) The proscribed activity involves substantial multistate or international aspects (e.g., organized crime, multistate drug operations, multistate fraud schemes);

c) The proscribed activity, even if focused within a single state, involves a sophisticated enterprise that is most effectively prosecuted by use of federal resources or expertise (e.g., some white-collar crime, such as market fraud or market structure cases, investment cases, financial institutional fraud);

d) The proscribed activity involves serious, high-level or widespread state or local government corruption, thereby tending to undermine public confidence in the local prosecutorial and judicial branches' effectiveness in dealing with the matter;

e) The proscribed activity, because it raises highly sensitive civil rights issues in the local community, is perceived as being more objectively prosecuted within the federal system.

Civil Jurisdiction

10. Regarding civil causes of action, we recommend the following as guiding principles for Congress in assigning jurisdiction to the federal courts:

a) The matter should arise under the United States Constitution;

b) The matter should involve the foreign relations of the United States;

c) The matter should involve activities directly injurious to the federal government;

d) The matter should involve federal officials or agencies as plaintiffs or defendants;

e) The matter should involve disputes between the states;

f) The matter should affect substantial interstate or international interests;

g) The matter should involve a clear need for uniformity on an issue that the states have demonstrated an inability to deal with in a satisfactory way.

C. Specific Recommendations

1. A National Commission on the Federal Courts should be created, consisting of members from the executive, legislative, and judicial branches of federal government, as well as members from the state judiciary and academic world, to study on a continuing basis and to make periodic recommendations regarding a number of issues concerning the federal courts including, but not limited to, their appropriate civil and criminal jurisdiction. The Commission should be authorized to review conflicting statutory and federal rules interpretations, and to make recommendations for resolving those conflicts by legislative action or rule revision.

Criminal Jurisdiction

2. Existing federal criminal statutes should be reviewed toward the goal of eliminating provisions no longer serving a necessary purpose in a federal

context. More broadly, a thorough revision of the federal criminal code should be undertaken to bring the code to conformity with the goals of federal criminal prosecution articulated in Part B.

3. Undertake cooperative efforts with the states to develop a policy to determine in which system offenses should best be prosecuted, including

(a) increase federal resources to state criminal justice systems to prosecute matters now handled by federal prosecutors because of lack of state capacity;

(b) increase the practice of cross-designating both federal and state prosecutors to gain efficiencies of prosecution; and

(c) authorizing state courts to adjudicate certain federal crimes for which there currently is no statutory grant of concurrent jurisdiction. Under this proposal, for example, federal prosecutions of local drug activity and some violent crime currently prosecuted under Project Triggerlock would be prosecuted in state court. Adopting this recommendation would require Congress to repeal 18 U.S.C. § 3231, which makes federal criminal jurisdiction an exclusively federal matter; and to replace it with a statute granting the state courts concurrent jurisdiction over some federal crimes.

4. Through Executive Branch promulgation, formulate binding standards for prosecutive guidelines that are consistent with the jurisdictional boundaries for federal criminal prosecution articulated in Part B. The potential for harsher federal sentencing policies and the greater capacity in the federal prisons should be insufficient grounds by themselves to warrant prosecution under a federal, rather than state, criminal statute.

5. Request that Congress include with each enactment a Judicial Impact Statement, which would include a calculation of the costs to the federal government of the increased caseload resulting from proposed legislation. Also request that Congress, when considering legislation that would shift jurisdiction to the state courts, to prepare Judicial Impact Statements, to calculate the impact, financial and otherwise, on the states of the increased caseload.

Civil Jurisdiction

6. Take steps to diminish the impact of diversity jurisdiction:

(a) Eliminate diversity jurisdiction, except in suits involving aliens and in interpleader suits (28 U.S.C. § 1335), and in suits

in which the petitioner can clearly demonstrate local prejudice in the relevant state court. Diversity jurisdiction should also be retained in order to consolidate and resolve mass tort litigation. The traditional "complete diversity" requirement should be relaxed in order to promote, when appropriate, consolidation of all or most related litigation. Congress should enact the necessary enabling legislation.

Alternatively, or additionally, the following recommendations should be adopted:

(b) Eliminate in-state plaintiff diversity jurisdiction;

(c) Undertake a fullscale study, including pilot projects as appropriate, of the desirability and impact of shifting federal appellate review of diversity cases to state appellate courts (which will require encouraging states to revise their constitutions to permit such review); and

(d) Limit diversity jurisdiction (i) by requiring litigants to undertake a more rigorous showing that the jurisdictional amount-in-controversy requirement has been satisfied, (ii) by raising the amount-in-controversy level and indexing the new floor amount to the rate of inflation, (iii) by excluding punitive damages from the calculation of the amount-in-controversy requirement, or (iv) by doing all the above;

7. Encourage states to adopt certification procedures, where such do not currently exist, whereby federal courts could submit novel or difficult state law questions to state supreme courts;

8. Assign categories of fact-intensive cases for decision in the first instance to administrative judges or forums or to Article I courts. For example, Congress should enact Judge Weis's dissenting recommendations contained in the Federal Courts Study Committee Report at pages 58-59 (which two other members of the Committee joined) concerning the resolution of disability claims under the Social Security Act. Judge Weis's proposal contemplates a thorough administrative review by a Benefits Review Board of decisions by ALJs, with full review of the Board's decision by the District Court and discretionary review of questions of law by the Courts of Appeals and Supreme Court. Another example would be to provide agency jurisdiction over certain kinds of ERISA cases; e.g., those involving review of welfare (as opposed to pension) claims under the ERISA statute;

9. Broaden and strengthen agency review of disputes within the agency's jurisdiction. For example, the EEOC should be required to provide careful scrutiny of EEO claims before issuing right-to-sue letters. Additionally,

agencies should be encouraged to mediate and resolve disputes at the agency level;

10. Congress through legislation should prohibit agencies from adopting a policy of non-acquiescence to the precedent established in a particular circuit, which some agencies, such as the Department of Health and Human Services, have followed (see discussion of non-acquiescence in FCSC Report at pages 59-60). Congress should also prohibit agencies from attempting through relitigation to provoke inter-circuit conflict over an issue if, for instance, the first three circuits to deal with the issue have adopted a uniform precedent;

11. Eliminate certain federal civil jurisdiction, such as provided by the Federal Employers' Liability Act, the Jones Act, or railway employees legislation, on grounds that the states have proven effective in resolving worker compensation disputes in other industries and occupations;

12. Request that Congress include with each enactment a Judicial Impact statement, which would include a calculation of the costs to the federal government of the increased caseload resulting from proposed legislation. Also request that Congress, when considering legislation which would shift jurisdiction to the state courts, prepare Judicial Impact Statements to calculate the impact, financial and otherwise, on the states of the increased caseload.

13. Congress should also require legislative staff of all substantive committees of Congress and the Office of Legislative Counsel in the Senate and the House, when reviewing proposed legislation for technical problems, to satisfy to the greatest extent possible a legislative "checklist" covering items such as the following:

- the appropriate statute of limitations;
- whether a private right of action is contemplated;
- whether pre-emption of state law is intended;
- the definition of key terms;
- severability;
- whether a proposed bill would repeal or otherwise circumscribe, displace, impair, or change the meaning of existing federal legislation;

- whether state courts are to have concurrent jurisdiction and, if so, whether and to what extent an action would be removable to federal court;

- the types of relief available;

- whether retroactive applicability is intended;

- the conditions for any award of attorney's fees authorized;

- whether exhaustion of administrative remedies is a prerequisite to any civil action authorized;

- the conditions and procedures relating to personal jurisdiction over persons incurring obligations under the proposed legislation;

- the viability and/or effect of private arbitration and other dispute resolution agreements under enforcement and relief provisions; and

- whether any administrative proceedings provided for are to be formal or informal.

The legislative check list could also provide for consideration of:

- whether any time deadline for judicial action appearing in proposed legislation is necessary and, if so, reasonable;

- in the case of proposed legislation providing for judicial review by a multi-judge panel, whether the same policy objectives could be achieved by providing for single-judge review; and

- whether the statute applies to the territories, the District of Columbia, and the Commonwealth of Puerto Rico, as well as the states or other governmental unit.

ORAL PRESENTATION

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

ROBERT E. KEETON
CHAIRMAN

PETER G. McCABE
SECRETARY

CHAIRMEN OF ADVISORY COMMITTEES

KENNETH F. RIPPLE
APPELLATE RULES

EDWARD LEAVY
BANKRUPTCY RULES

SAM C. POINTER, JR.
CIVIL RULES

WILLIAM TERRELL HODGES
CRIMINAL RULES

RALPH K. WINTER, JR.
EVIDENCE RULES

VIA FAX
October 6, 1993

MEMORANDUM TO CHAIRS AND REPORTERS OF ADVISORY COMMITTEES ON BANKRUPTCY, CIVIL, AND CRIMINAL RULES

SUBJECT: Facsimile Filing Guidelines

I am writing to advise you that the Judicial Conference deferred adoption of the facsimile filing guidelines proposed by the Committee on Court Administration and Case Management and approved the following recommendation at its September 1993 session:

> The Judicial Conference referred to the Committee on Rules of Practice and Procedure, in coordination with the Committees on Automation and Technology and Court Administration and Case Management, for a report to the September 1994 Conference, the question of whether, and under what technical guidelines, filing by facsimile on a routine basis should be permitted.

The filing guidelines considered by the Conference were much improved over the original draft guidelines and included substantial changes suggested by the rules committees' reporters at the June 1993 Standing Rules Committee. Nonetheless, the guidelines raised serious problems.

The Advisory Committee on Appellate Rules met soon after the September Conference session and voted to publish for public comment a revised abbreviated set of facsimile filing guidelines. Many of the items contained in the revised guidelines were excluded and left to local rules. A copy of the revised guidelines approved by the Appellate Rules Committee for publication is attached for your information.

It appears that at least some members of the Judicial Conference were pressing the Rules Committees for expedited action. In light of the Conference's action, I am requesting that you advise me whether it is feasible for your committee to

approve for publication for public comment the filing guidelines, as revised by the Appellate Rules Committee, and any necessary rules amendments in time for the November 1, 1993 scheduled publication date.

I am also sending to you a copy of a memorandum from Judge Robert E. Keeton describing the Judicial Conference actions.

Please call (TEL 202-273-1820) or fax (FAX 202-273-1826) your response to John Rabiej.

Alicemarie H. Stotler

Attachments

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

ROBERT E. KEETON
CHAIRMAN

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WILLIAM TERRELL HODGES
CRIMINAL RULES

RALPH K. WINTER, JR.
EVIDENCE RULES

September 23, 1993

MEMORANDUM TO THE HONORABLE ALICEMARIE H. STOTLER

FROM: ROBERT E. KEETON

SUBJECT: *Judicial Conference Action of 9/20/93 on FAX Filing*

I write to confirm and supplement my oral report to you about the Judicial Conference action of September 20, 1993, on fax filing.

The formal action was adoption of the following motion made by Chief Judge Mikva:

> The Judicial Conference referred to the Committee on Rules of Practice and Procedure, in coordination with the Committees on Automation and Technology and Court Administration and Case Management, for a report to the September 1994 Conference, the question of whether, and under what technical guidelines, filing by facsimile on a routine basis should be permitted.

Judge Mikva's explanation of his motion included a comment that I interpreted as meaning the Rules Committee may need to be exposed to a little heat from the Judicial Conference to get it moving. This comment was made after I had explained that the Rules Enabling Act process would require a minimum of four months - and preferably a longer period - for public comment, as well as consideration by Advisory Committees and the Standing Committee both before and after the period of public comment. Judge Mikva had earlier supported my comment that for the Judicial Conference to bypass the Rules Enabling Act process would be an embarrassment to our continuing efforts to get Congress not to do that in other matters of greater significance than fax filing. Thus, when I put his several comments together, I infer that he, at least, and perhaps many others among those who contributed to the substantial majority voting for Judge Mikva's motion, are pressing the Rules Committees to find a way to expedite the Rules Enabling

Act process so a proposal can be ready for the Judicial Conference to adopt it (or vote to send it on to the Supreme Court and Congress, if rules amendments are required) at the September 1994 meeting of the Judicial Conference.

Is it possible to proceed that rapidly, consistent with the requirements of the Rules Enabling Act? The answer may depend on what the proposal is and how controversial it turns out to be in the Bench and Bar. In any event, however, in order to be well prepared for the September 1994 Conference meeting, you will need to be able to demonstrate that the Rules Committees have done their best to comply with both the letter and spirit of the September 1993 vote.

If you wait for a vote of the Standing Committee (at its January 1994 meeting) to approve publication of a draft for comment, the comment period could not commence before February or March and could not close before May or June. That would be too late for reconsideration by the Advisory Committees in time to have their recommendations before the Standing Committee at its June 1994 meeting, when it would need to act in order to have a recommendation before the Judicial Conference in September 1994.

If you want to consider requesting the Standing Committee to approve publication by telephone vote before the Committee meets in January 1994, the key obstacle is the necessity of stirring the Advisory Committees to prepare almost immediately, for publication, a suitable draft or drafts of proposed rules amendments (it might need to be more than a single draft, because the Bankruptcy Committee strongly believes it has special reasons for not allowing local option for fax filings in bankruptcy clerks' offices).

Judge Boyle from Rhode Island (the district judge member of the Judicial Conference from the First Circuit) made the point both in the meeting and more fully to me outside the meeting that if we have either a rule of procedure, or a Judicial Conference guideline, or both, regarding fax filing, probably it should also deal with fax service by lawyer upon lawyer. Fax service may be less difficult to deal with because of the consensual context - both lawyers must have fax machines and machines that are compatible before it can happen. But problems may nevertheless arise about how quick and reliable the service will be, and we may get a fair amount of public comment about any proposed rule on fax service.

I have two comments as an ex officio member of the Subcommittee on Style (through September 30 only, of course).

First, on the flight down to Washington on September 20, I was reading over the latest draft of "GUIDELINES FOR FILING BY FACSIMILE," Agenda F-7 (Appendix A), which you will note bears a striking similarity to the high-pressure draft done by the conscripts we sent off to a separate room to work while the Standing Committee was meeting in June. In part II (2) you will see a proposed style change I interlined to deal

with what seemed to me an ambiguity. In the Conference session, somebody raised a question about whether II (2) meant the fax machine had to be in the Clerk's office? Before I could answer, "Clearly not," others said, "Yes, of course." For me, this was a clear demonstration of the Standing Committee's point that the current draft is still imperfect.

Second, my other interlineations on the attached draft (changing the title to "Guidelines for Facsimile Transmission" and proposing associated changes) are suggestions I was thinking about, as a means of avoiding conflicts between guidelines and rules, before the discussion this morning (September 23) in the meeting of the Advisory Committee on Appellate Rules. By one or more separate communications, you will receive more information about the very constructive recommendations of that Committee.

I will leave further distribution of this memorandum to your discretion.

Bob

Robert E. Keeton

Attachments

GUIDELINES FOR FACSIMILE TRANSMISSION

I. General Purpose and Scope:

(1) Purpose of the Guidelines: The Guidelines for Facsimile Transmission are the standards established by the Judicial Conference of the United States to assist those court that permit their clerks, under the Federal Rules of Appellate, Civil, Criminal and Bankruptcy procedure, to receive documents for filing by means of facsimile transmission.

(2) Compliance with Rules of Procedure: These Guidelines for Facsimile Transmission are designed to guide the activities of litigants and court personnel relating to facsimile transmission consistent with, and where authorized by, all applicable rules of procedure adopted under 28 U.S.C. §§ 2072 and 2075. They do not amend, modify, or excuse noncompliance with any applicable rules.

II. Definitions:

(1) "Facsimile transmission" means sending a copy of a document by a system that encodes a document into electronic signals, transmits these electronic signals, and reconstructs the signals so a duplicate of the original document can be printed at the receiving end.

(2) "Receive by facsimile" means a clerk's receiving by one or the other of the following means: (a) receiving by a facsimile machine in the clerk's office a facsimile transmission of a document; (b) receiving in the clerk's office a document sent by facsimile transmission to a facsimile machine located outside the clerk's office.

(3) "Facsimile machine" means a machine, used to transmit or receive documents, that meets the standards stated in part III of these guidelines.

(4) "Fax" is an abbreviation for "facsimile" and, as indicated by the context, may refer to a facsimile transmission or to a document so transmitted.

III. Technical Requirements:

For purposes of these guidelines, in order for courts to receive by facsimile the following technical requirements must be met.[1]

(1) Facsimile Machine Standards:

(a) A facsimile machine must be able to send or receive a facsimile transmission using the international standard for scanning, coding, and transmission established for Group 3 machines by the Consultative Committee of International Telegraphy and Telephone of the International Telecommunications Union (CCITT), in regular resolution.

(b) The receiving unit must be connected to and print through a printer using xerographic technology, or a facsimile modem that is connected to a personal computer that prints through a printer using xerographic technology. Only plain paper (no thermal paper) facsimile machines may be used.

(2) Additional Facsimile Standards for Senders:

(a) Each sender must have the following equipment standards:

(i) CCITT Compatibility - Group 3[2]

(ii) Model Speed - 9600-2400 bps (bits per second) with automatic stepdown; and

(iii) Image Resolution - standard 203 x 98.

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[1] The Administrative Office will monitor technological advances and will recommend modifications to these guidelines when necessary.

[2] Group 3 fax machines are currently the most common, accounting for 97% of the devices on the market. Group 3 compatibility is mandatory for public applications at the present time. Group 3 fax can utilize the public telephone network (voice grade lines) and does not require special data lines. Group 3 fax devices transmit at under 1 minute per page, may have laser printing capability, and use various standard data compression techniques to increase transmission speed.

(b) A facsimile machine used to send documents to a clerk of the court must be able to produce a transmission record, as proof of transmission at the time transmission is completed.

IV. **Resource Availability:** No additional personnel (FTE's) or funds for equipment will be made available due to a court's adoption of a fax filing policy. Courts should be aware of the potential burdens on the clerk's office and should examine thoroughly the potential impact on the court before adopting a fax policy.

V. **Fees:**

(1) Payment of filing fees and any additional charges prescribed or authorized by the Judicial Conference for the use of the facsimile filing option shall be made in a manner determined by the Administrative Office.

(2) If a court authorizes the filing of papers by facsimile on a routine basis, the clerk must ensure that appropriate filing fees and any additional charges are paid.

(3) Other Fees for Filing by Fax[3]

(a) When documents are received on the court's fax equipment, the court shall collect the following fees, in addition to any other filing fees required by law:

For the first ten pages of the document, excluding the cover sheet and special handling instruction sheet $5.00

For each additional page . . . . . $ .75

Any necessary copies to be reproduced by the court, for each page[4] . . . . . $ .50

(b) No fees are to be charged for services rendered on behalf of the United States or any agency or any official of the United States acting in his or her

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[3] These fees may be collected once the Judicial Conference approves amendments to the Miscellaneous Fee Schedules promulgated under 28 U.S.C. §§ 1913, 1914, and 1930.

[4] See Miscellaneous Fee Schedule.

official capacity.

VI. Regulations (other than machine standards) Applicable to Parties and their Lawyers:

Regulations concerning when facsimile filing is permitted, the forms and methods to use, and recordkeeping requirements should be the subject of local rules of the courts that permit such filing. Following are sample local rules that may be appropriate to control facsimile filings in United States Courts of Appeals

MODEL LOCAL COURT RULES FOR FACSIMILE FILING

25.1 *Facsimile Filing.* The court will accept for filing a paper transmitted by facsimile (fax) subject to the Guidelines for Facsimile Transmission established by the Judicial Conference of the United States and the provisions of ____Cir. R. 25.2 through 25.9. The following documents are inappropriate for fax filing and will not be accepted except in emergency situations cleared with the clerk in advance: _____.

25.2 *Transmission to the Clerk.* A paper may be faxed to the clerk for filing. A faxed document must satisfy the requirements of the Federal Rules of Appellate Procedure and the rules of this court except that only one copy should be faxed, unless the clerk requests additional copies. Color cover requirements are waived; Cir. R. 25.5 governs the signature.

* * OR * *

25.2 *Transmission to the Clerk.* A paper may be faxed to the clerk for filing if authorized by the Court in a particular case or by the clerk in an emergency or other appropriate circumstance. Unless authorized in advance, a paper faxed to the clerk will not be accepted for filing. A paper faxed after advance authorization must satisfy the requirements of the Federal Rules of Appellate Procedure and the rules of this court except that only one copy should be faxed, unless the clerk requests additional copies. Color cover requirements are waived; Cir. R. 25.5 governs the signature.

25.3 *Transmission to a Fax Filing Agent.* A paper may be faxed to a private person or entity (fax filing agent) for filing with the clerk. When a fax filing agent presents a faxed paper for filing, it must be of laser quality and satisfy all requirements of the Federal Rules of Appellate Procedure and the rules of this court except that Cir. R. 25.5 governs the signature.

25.4 *When Filing is Complete.* Fax transmission to a fax filing agent or to the clerk does not constitute filing. Filing is complete only when a <u>faxed</u> paper is received by the clerk.

25.5 *Signature.* A paper faxed to a fax filing agent or to the clerk will be filed subject to receipt by the clerk of an <u>identical</u> signed original within 3 days.

* * OR * *

25.5 *Signature.* The image of an original signature on a faxed paper constitutes an original signature for filing purposes. If the original signed document is not filed, it must be retained by the attorney of record or the party originating the document until the litigation concludes.

25.6 *Copies.* A party faxing a paper to the clerk for filing, before the end of the next business day must deliver to the clerk or send by first class mail the number of copies required by the Federal Rules of Appellate Procedure or the rules of this court. The copies must be identical in all respects to the faxed paper filed. If circumstances require, however, the clerk may make copies of faxed papers and charge the filing party for the number of copies required by the applicable rule.

25.7 *Cover Sheet.* A paper faxed directly to the clerk must be have a fax cover sheet (in addition to any other cover required by the rules) showing the following:

a. the name of the case and the case number, if known;
b. the title of the document or documents being faxed;
c. the sender's name, address, telephone number and fax number;
d. the number of pages, including the cover sheet, being faxed;
e. the date and time faxed;
f. billing or charge information for court fees; and
g. whether acknowledgment of receipt is requested.

This cover sheet will not count against page limitations otherwise applicable to the document.

25.8 *Acknowledgment of Receipt.* If the sender so requests in writing on the cover sheet required by Cir. R. 25.7, the clerk will acknowledge receipt of papers faxed directly to the clerk by faxing the sender a copy of the cover sheet. The clerk also will note any transmission defect on the copy of the cover sheet before faxing it to the sender.

25.9 *Fees.* Before the end of the next business day after a paper is faxed to the clerk for filing, any applicable filing fees, including the fax filing fees, must be delivered to the clerk or sent to the clerk by first class mail. When a paper is faxed to a fax filing agent, the fax filing agent must pay any applicable fees at the time the agent presents the paper for filing.

25.10 *Manner of Service.* A paper may be served by fax and service is complete upon transmission. Before the end of the next business day, however, the sender must deliver or send by

first class mail to the party served by fax, an identical copy. Proof of service by fax must include a certification of the fax number to which the paper was transmitted and of the separate mailing or delivery, in addition to the requirements of Fed. R. App. P. 25(d).

Fax Filing

1. Background

Judge Keeton explained the need to get a proposal ready, if possible, for consideration by the Judicial Conference in September 1994. That meant that if any rule amendments are needed, they must be approved by the Advisory Committee at the September meeting and published by November 1 along with the rules approved by the Standing Committee at its June meeting. Judge Keeton stated that approval for publication of any proposed rule changes bearing on facsimile filing would likely be handled by the Standing Committee by telephone.

In order to facilitate that process Judge Keeton had prepared and distributed the previous evening a redraft of existing Rule 25. He worked from the draft of the rule just approved by the Judicial Conference for submission to the Supreme Court. Judge Keeton's redraft read as follows:

Rule 25. Filing and Service.

(a) Filing.

(1) A paper required or permitted to be filed in a court of appeals must be filed with the clerk. Filing may be accomplished

(A) by mail addressed to the clerk;

(B) by facsimile transmission, by means meeting the standards then in effect under Guidelines for Receiving Facsimile Transmissions promulgated by the Judicial Conference of the United States, if the court of appeals by local rule or by order in a particular case has approved facsimile transmission; or

(C) by filing with a single judge, with that judge's permission, a motion that may be granted by a single judge, in which event the judge must note thereon the filing date and give it to the clerk.

(2) Filing is not timely unless the paper is received by the clerk or the single judge, or the facsimile transmission is received by the clerk, within the time fixed for filing, except that briefs and appendices are treated as filed on the date of mailing if the most expeditious form of delivery by mail, other than special delivery, is used.

(3) A paper filed by an inmate confined in an institution is timely filed if deposited in the institution's internal mail system on or before the last day for filing. Timely filing of a paper by an inmate confined in an institution may be shown by a notarized statement or declaration (in compliance with 28 U.S.C. § 1746) setting forth the date of deposit and stating that first-class postage has been prepaid.

(4) The clerk must not refuse to accept for filing any paper presented

for that purposed solely because it is not presented in proper form as required by these rules or by any local rule or practice.

* * * * *

(c) Manner of Service. Service may be personal, by mail, or by facsimile transmission if permitted by the court of appeals by local rule or by order in a particular case. Personal service is complete on delivery of a copy to a clerk or other responsible person at the office of counsel. Service by mail is complete on mailing. Service by facsimile transmission is complete upon electronic acknowledgement of receipt by means meeting the standards then in effect under Guidelines for Receiving Facsimile Transmissions promulgated by the Judicial Conference of the United States.

(d) Proof of Service.

[insert, in line 43 of the draft approved by the Judicial Conference in September 1993, after "Mailing" the words "or facsimile transmission," and in line 44, after "mailed" the words "or transmitted."]

Judge Keeton indicated that he would ask the Committee to focus first on the redraft of Rule 25. He noted, however, that the Committee also must look at the Guidelines for Facsimile Filing that were presented to the Judicial Conference. Judge Keeton stated his belief that the Guidelines need further revision.

Judge Keeton indicated that he would like the Committee to consider whether there are any parts of the Guidelines that should be included in the rules. He stated that it would be desirable to avoid inclusion of material in the rules that does not need to be there. Inclusion in the rules of technical standards governing the types of machinery to be used, etc. would be especially undesirable because amendment of the rules is both cumbersome and time consuming and it would be difficult for the rules to keep pace with technological advancements.

Judge Keeton indicated that authorizing the Judicial Conference to amend the Guidelines without review by the Supreme Court and Congress presents an issue similar to the one the Committee previously discussed concerning delegation to the Administrative Office of printing standards. He indicated, however, that he believes there is a strong argument that establishing technical standards in Guidelines promulgated by the Judicial Conference is not inconsistent with the Rules Enabling Act. Judge Keeton stated, however, that the Committee might want to consider that issue.

In addition to any question about the Rules Enabling Act, Judge Keeton, said that he also was concerned about accessibility of the Guidelines. He indicated that he would like the Guidelines to be printed for public comment at the same time as the proposed rule amendments. He also believes that the Guidelines should be transmitted to both

the Supreme Court and Congress. He further suggested that they might be printed as an appendix to the rules or in the notes.

As a last matter, Judge Keeton suggested that he would like to further amend his redraft of the Guidelines. His original objective had been to remove any mention of "filing" from the Guidelines because he believes that all "filing" rules should be contained in the rules. As a consequence, he had changed the title from "Guidelines for Filing by Facsimile" to "Guidelines for Receiving by Facsimile." He indicated that he thought a better title would be "Guidelines for Facsimile Transmission."

For clarification Judge Logan asked about the origin of the Guidelines. Judge Keeton responded that the original draft had been prepared by the Court Administration Committee. Judge Logan then asked whether it would be appropriate for a rules committee to suggest changes in the Guidelines. Judge Keeton responded that he believes such recommendations would be appropriate. In fact, the draft from which he was working was altered last summer by a working group composed of the advisory committee reporters who redrafted the Guidelines in an attempt to minimize the conflicts between the Guidelines and the rules. Judge Keeton reported that there had been some sentiment at the Standing Committee's June meeting to simply disapprove the draft Guidelines because of the conflicts between the Guidelines and the rules. Judge Keeton had opposed a simple rejection of the Guidelines because he feared that there would be members of the Judicial Conference who favored getting the guidelines in place and might adopt them as originally drafted rather than suffer any further delay. Therefore, he had organized the drafting subgroup during the Standing Committee meeting.

Discussion followed concerning possible problems with the Rules Enabling Act. Judge Keeton believes that delegation by rule to the Judicial Conference of power to fashion guidelines differs from the Committee's earlier problems with delegation of printing standards. In this instance, the Judicial Conference has already promulgated Guidelines. Those Guidelines permit the courts to accept facsimile filings in emergencies. The current proposal is, therefore, simply to amend those Guidelines. So, the Conference has already taken an affirmative position on its power to promulgate guidelines.

With regard to the proposed amendments to Rule 25, Judge Keeton suggested that there be another change to Rule 25(e) to accommodate the fact that parties are often required to provide multiple copies of the document filed. Judge Keeton suggested adding the following language to Rule 25(e):

> "and, when facsimile transmission is permitted, may allow extra copies to be presented within a reasonable time after the facsimile transmission is received."

That addition would allow a clerk to refuse to receive more than one copy by facsimile transmission and require that the party follow the facsimile transmission with hard copies.

Judge Logan asked whether the style subcommittee would be able to review the draft rules before publication. Judge Keeton stated that Mr. Brian Garner and the style subcommittee would be occupied with the Civil Rules Committee until after that committee's meeting in late October. Therefore, the amendments would be prepared for publication without review by the style committee.

Having finished its preliminary discussion, the Committee turned its attention to the task of approving some version of Rule 25 and of the Guidelines.

2. Guidelines vs. Rules

Judge Ripple discussed the importance of the distinction between information that should be in the Guidelines versus that which should be included the national rules. Judge Ripple emphasized that he would like to keep everything that a practitioner needs to know in the rules. In contrast, he stated that provisions regulating court conduct need not be in the rules and, therefore, could appropriately be included in the Guidelines. Judge Ripple questioned whether the material in parts V, VI, and VII of the draft Guidelines should be there. He stated that a requirement that certain items be included on a cover sheet is so basic that it should be found in either the national or local rules.

Judge Keeton suggested the possibility that some of the information in the Guidelines could be placed in a form that would follow the rules. Mr. Munford suggested that placing the Guidelines in an appendix to the rules might also serve the same purpose. Judge Keeton indicated, however, that the drawback of either approach is that amendment of either a form or appendix requires the full procedures under the Rules Enabling Act.

Judge Williams noted that if everything a practitioner needs to know should be in the rules rather than the Guidelines, then even all the technical standards in part III of the draft Guidelines would need to be in the rules.

Mr. Munford pointed out that not all information that practitioners need is included in the rules. With regard to the fee for filing a notice of appeal, the rules simply refer to the statute setting the fee. The amount of the fee is not included in the rules. Judge Keeton stated that the statute actually does not set the fee; the statute authorizes the Judicial Conference to set the fee schedule and, in fact, the fee schedule set by the Conference is not as readily accessible as he would like. Parties and lawyers who are unfamiliar with the fee schedule usually receive the information from the clerk's office.

Judge Ripple argued that the last sentence of existing Rule 25(a) means that the technical standards need not be included in the rule. That sentence states: "A court of appeals may, by local rule, permit papers to be filed by facsimile or other electronic means, provided such means are authorized by and consistent with standards established

by the Judicial Conference of the United States." That sentence was approved by Congress and has the force and effect of law. The intent of that sentence was to authorize the Judicial Conference to establish technical standards. Further, the technical standards do not impact the daily practice of law. Rather, a practitioner acquiring a piece of machinery has a one time question about whether the equipment meets the federal standards. Judge Ripple argued that parts V, VI, VII, and VIII(1) & (2) should be in the rules.

Mr. Froeb and Mr. Munford indicated agreement with Judge Ripple's basic principle that directions to practitioners should be easily accessible. Mr. Froeb asked, however, whether it is important that all the information enumerated in part VII of the Guidelines be on the cover page of a fax transmission. Mr. Strubbe replied that the court probably needs all of that information. Judge Keeton asked whether it is truly necessary that all of the information be included on the fax cover sheet as distinguished from the rest of the document. Judge Keeton suggested that perhaps all of part VII could be omitted.

Judge Logan suggested that both parts V (Original Signature) and VI (Transmission Record) should be included in the national rules but that perhaps all other matters could be covered by local rules.

Mr. Kopp suggested breaking the whole issue down into two tracks. The courts that are interested in permitting fax filings on a routine basis need guidelines so that they can do so. As soon as there are guidelines those courts can proceed by local rule. While there may be some need for uniformity in this area as in others, the only matter as to which there is urgency is the technical standards. Therefore, he suggested that the rules process may proceed to develop uniform national rules but not on such a fast track as the guidelines.

Judge Keeton responded that it would be consistent with the objectives of the Court Administration Committee to have a national rule that authorizes local facsimile filing rules. He expressed continuing concern, however, about the possibility that there might be an intervening standard (the Guidelines) that would restrict a local court's authority to develop such rules. In other words, there remains the possibility that even if a national rule grants broad authority to fashion local rules, the Guidelines could be adopted and narrow the scope of local rulemaking authority on the topic.

Judge Keeton stated that it might be possible to retain parts I, II, and III of the Guidelines, along with Rule 25(a)(1)(B), and recommend that the rest of the matters currently covered by other parts of the Guidelines could be referred to the local courts for adoption as local rules.

Judge Logan agreed. Because Rule 25(a) requires a local rule, it can be the responsibility of the circuit adopting such a rule to include in it all information needed

by a lawyer who files by fax. He suggested, therefore, that the national rule need do nothing more than authorize local rules permitting fax filing. Eventually the Committee may feel ready to establish national standards but because of the newness of the entire process this may be an appropriate topic for local experimentation.

Judge Keeton suggested that if the Committee favors such an approach it should make a recommendation as to the limitations of the guidelines. That is, the Committee should identify that material that it believes is appropriate for the Guidelines and recommend that all other matters be covered either by national or local rule.

Judge Ripple then stated that the first question the Committee should address is whether, as a matter of principle, matters that affect the conduct of practitioners should be in rules rather than the Guidelines. If the vote is that such matters should be incorporated in the rules, then it would be appropriate to discuss whether they should be in the national rules or local rules. If the vote is that it is not necessary to include practitioner related directions in rules, then the Committee could discuss simple coordination of all the information.

To move the discussion along Judge Ripple moved that all matters concerning the conduct of litigation should be in either national or local rules. Judge Logan seconded the motion. Judge Williams asked whether the motion was subject to Judge Ripple's earlier *caveat* on technical requirements such as the type of machines. Judge Ripple replied affirmatively.

Mr. Kopp voiced strong agreement with the motion. He pointed to the original signature provision in the proposed Guidelines. That provision says that if the original signed document is not filed, it must be maintained until the litigation concludes. Mr. Kopp stated that any such requirement should be as accessible as possible and, therefore, should be included in a rule.

Mr. Froeb agreed in principle but argued that there are many matters that practitioners know intuitively and it may not be necessary to have all of the detailed directions currently found in the Guidelines.

The discussion having concluded, Judge Ripple called for a vote on the motion to include directions to practitioners in rules rather than the Guidelines. The motion passed unanimously.

3. National Rule vs. Local Rules

Following the decision-making matrix he had announced earlier, Judge Ripple stated that the next question was whether any necessary directions to practitioners should be in national or local rules. He suggested that Judge Keeton's draft of Rule 25 serve as a starting point and he specifically asked the Committee to focus on draft Rule

25(a)(1)(B). Judge Ripple noted that the language of that subparagraph differs from the corollary provision in current Rule 25(a) and he asked Judge Keeton whether he intended to accomplish something different. Judge Keeton stated that his intent was the same but that he had simply attempted to restructure the rule in the manner of the style subcommittee. Given that understanding, Judge Ripple suggested that the Committee discuss whether some matters should be governed by national rule and whether others (and which ones) could be subject to local variation.

On the basis of prior discussion, Judge Ripple suggested that one possibility would be to recommend that:

1. the national rules simply continue to authorize local rules;
2. the Guidelines include only parts I, II, and III of the current draft guidelines (*i.e.*, all practitioner conduct should be excised from the Guidelines); and
3. local rules be used to regulate practitioner conduct.

Mr. Froeb moved that approach; the motion was seconded by Judge Hall.

Judge Hall suggested that the Committee might expedite the local rules process by sending the circuits a model rule. The suggestion was taken as a friendly amendment to the motion.

Judge Logan expressed support for the motion. He focused upon the original signature requirement. While he had originally thought that such a requirement should be in the national rule, upon reflection he had changed his mind. Because it is necessary to have a local rule authorizing facsimile filing, he thought that it would not be inappropriate for some courts to say that a person who files by fax must file the original by next mail while others might be content to allow the party to simply retain the original until the conclusion of the litigation.

Vote was taken on the motion and it passed unanimously. Judge Ripple summarized the Committee's understanding of that vote as follows: 1) the question of practitioner conduct with respect to facsimile filing should be covered by local rule, at least for the near future; 2) the Committee adopted that approach because local experimentation would provide an opportunity to perfect the local rules before going to a national rule; and 3) the Committee would prepare a model rule or checklist to be used by the circuits in the development of their local rules.

4. The Guidelines

The discussion then turned to the draft Guidelines and an effort to identify those provisions that should remain in the Guidelines and those that should be excised.

Upon examining part I, Mr. Strubbe suggested that part I paragraph (3) might arguably govern attorney conduct and therefore should be excised from the Guidelines. That provision is entitled "Prohibited Documents" and provides:

Papers may not be sent by facsimile transmission to the court for filing unless the court has expressly authorized such transmissions by local rule or by order in a particular case. In addition, bankruptcy petitions and schedules may not be sent by facsimile transmission.

Judge Keeton offered a proposed modification of that provision which he thought could make its retention consistent with the Committee's intent:

A communication by facsimile transmission must not be treated by a clerk as received for filing unless the court has expressly authorized facsimile transmission by local rule or by order in a particular case.

Judge Ripple noted that even the amended provision comes close to the line that the Committee had decided to draw. If the effort is to keep the Guidelines fairly stark, perhaps this could be eliminated from them.

Mr. Munford stated that he believed that any such provision would conflict with the Rule 25 provision prohibiting a clerk from refusing to file a document because it is not in proper form.

Judge Ripple moved that part I paragraph (3) be deleted from the Guidelines. Judge Logan seconded the motion. It passed unanimously.

The discussion moved to part II of the Guidelines. Judge Keeton suggested that his handwritten material be substituted for part II paragraph (2). Judge Keeton's proposed part II paragraph (2) would define "Receive by facsimile" as follows:

(2) "receive by facsimile" means a clerk's receiving by one or the other of the following means:

(A) receiving by a facsimile machine in the clerk's office of a facsimile transmission of a document;

(B) receiving in the clerk's office a printed copy of a document sent by facsimile transmission to a facsimile machine located outside the clerk's office."

Judge Keeton indicated that the latter provision would allow a local rule to receive a document lacking an original signature because it was sent to a fax machine outside the clerk's office and that document was presented for filing.

Mr. Munford asked whether the provision for documents received by a facsimile machine located outside the clerk's office has anything to do with facsimile filing. He stated that in his view it makes no difference whether a document has a facsimile of a signature or an original signature. Mr. Munford further indicated that in his opinion the clerk would not be free to refuse a document under the new provision in Rule 25 prohibiting a clerk from refusing to file a document because it fails to comply with a requirement of form. The Committee discussed the issue and there was clear division of opinion. Judge Ripple concluded that the signature question clearly must be addressed

in the model local rule.

Judge Keeton's redraft of part II subparagraph (2)(B) was amended by deleting the words "printed copy of a" so that it read, "receiving in the clerk's office a document sent by facsimile transmission to a facsimile machine located outside the clerk's office." Having approved that change, part II was unanimously approved for retention in the Guidelines.

The Committee then turned its attention to part III of the Guidelines, the technical requirements provisions. Judge Logan noted that it governs sending as well as court receipt of facsimile transmissions. Judge Ripple noted once again his belief that Rule 25 currently authorizes the Judicial Conference to establish such technical standards and that Judge Keeton's redraft of Rule 25(a)(1)(B) retains that provision.

Because Committee attention had returned to Rule 25, Judge Keeton noted that if the title of the Guidelines is changed to Guidelines for Facsimile Transmission then there would need to be a language change in Rule 25(a)(1)(B). In the second line of that paragraph the word "receiving" should be stricken as well as the "s" at the end of the word transmission in the third line. The same changes were approved in 25(c).

Mr. Kopp asked whether the technical requirements in Part III should apply to transmission to an outside agency as well as those directly to a court. The Reporter stated that clearly some of them should apply even to the outside agency because they affect the quality of the document received. The Committee concluded that the provisions of part III should be retained in the Guidelines.

The Committee considered part IV governing resource availability. Part IV indicates that courts will not receive additional personnel or funds for equipment due to adoption of a fax filing policy. Because that part of the Guidelines is so clearly addressed to the courts and not to practitioners, there was agreement that it belongs in the Guidelines.

Judge Ripple moved that part V -- dealing with original signatures -- be made part of the model rule because it deals with practitioner conduct; Judge Boggs seconded the motion. The motion passed unanimously.

For clarification, Mr. Strubbe asked whether the rules should require, as the Guidelines suggest, that in the absence of a local rule authorizing facsimile transmissions on a regular basis, a court order would be necessary to permit facsimile filing. Mr. Strubbe noted that in his court such requests are currently handled by the clerk's office rather than by a judge. Judge Ripple suggested that when preparing a model local rule, that issue will need to be addressed, but that the Committee's current concern was simply to determine which material should remain in the Guidelines and which should be excised.

Judge Ripple moved that part VI -- dealing with transmission records -- should be deleted from the Guidelines and considered as part of the rulemaking process. The motion was seconded by Mr. Munford. Mr. Froeb suggested that such a requirement would be unnecessary even in the rules. The motion passed unanimously.

Judge Ripple then moved that part VII -- dealing with cover sheets -- should be deleted from the Guidelines and made part of the rulemaking process; Judge Hall seconded the motion. It passed unanimously.

The Committee focused upon part VIII, dealing with collection of filing fees and authorizing additional fees for facsimile filing. Mr. McCabe pointed out that the pertinent statutes, §§ 1913, 1914, 1915, and 1930, say that the Judicial Conference shall prescribe all fees and the clerks may only charge fees authorized by the Judicial Conference. Judge Keeton concluded that the statutory directives make it unnecessary to include the provisions in part VIII in either the national or local rules. Judge Ripple moved that part VIII be left intact and that it be retained in the guidelines; the motion was seconded and passed unanimously.

At 10:30 a.m. the Committee took a 15 minute break.

Judge Ripple continued the discussion of facsimile filing by noting that although the Guidelines make no mention of "service" by fax, some members of the Judicial Conference anticipated that the rules would address the question of service by facsimile. Judge Ripple suggested that in light of the decisions already made by the Advisory Committee, it would be consistent to let local rules govern service by facsimile, at least in the first instance. He asked the Committee, therefore, to turn to Judge Keeton's draft of Rule 25(c) and suggested that the first sentence be adopted. "Service may be personal, ~~or~~ by mail, or by facsimile transmission if permitted by the court of appeals by local rule or by order in a particular case." The last sentence of Judge Keeton's draft of that paragraph was considered unnecessary. Judge Keeton explained that he had drafted the last sentence before the Committee's decision to omit from the Guidelines any matter bearing on an attorney's conduct.

Judge Ripple moved adoption of the first amended sentence. It was seconded by Judge Hall and unanimously approved.

Judge Logan volunteered to head the subcommittee to draft a model local rule. He expressed the desire to complete the work within the next month. He asked the Reporter, Judge Hall, and Judge Boggs to join him on the subcommittee.

Judge Logan asked whether the Committee had adopted the change in 25(c) and the additional sentence in 25(e). Judge Keeton stated that in light of the items taken out of the Guidelines, there were no substantive changes made by his draft except the one sentence in 25(c) dealing with service. Therefore, it was concluded that only the one

sentence change in Rule 25(c) needed to go out for publication.

At the conclusion of the discussion of the fax filing issues there was approximately one hour remaining in the meeting time. Judge Ripple suggested that the Committee spend that time discussing Item 91-25, regarding the contents of a suggestion for rehearing in banc, and Item 92-4, adding intercircuit conflict as a basis for granting hearing or rehearing in banc, because the Committee had recently worked on other amendments to the in banc rule, Rule 35.

Item 91-25

The Local Rules Project recommended that the Advisory Committee examine local rules adopted by nine circuits which outline the form of a suggestion for in banc determination. When responding to the Local Rules Project, the Fifth Circuit recommended that the Advisory Committee consider adoption of 5th Cir. R. 35. The Advisory Committee initially discussed both suggestions at its December 1991 meeting. At that time the Committee expressed no strong interest in specifying the contents of a suggestion for in banc consideration. Since that time, however, two members of the Advisory Committee had indicated interest in the earlier proposals.

The Reporter began the discussion by explaining the two drafts presented in her memorandum. Draft one, found at page 4, involved some reorganization of the rule as well as one major substantive change in subdivision (b). The heart of the draft was a new requirement that a petition for in banc review must begin with a statement demonstrating that the case meets the criteria for in banc consideration. It said that a petition must begin with a statement that either

> (1) the panel decision conflicts with a decision of the United States Supreme Court or of the court to which the petition is addressed (citations to the conflicting case or cases is required) and that consideration by the full court is necessary to secure and maintain uniformity of the court's decisions; or
>
> (2) the appeal involves one or more questions of exceptional importance; each such question must be concisely stated, preferably in a single sentence.

Draft two, beginning at page seven of the memorandum, would require the same statement demonstrating that the case is appropriate for in banc consideration and also added a list of items that must be included in any such petition, for example a corporate disclosure statement, statements of the issues and of the case. It also included a length limitation applicable to all such petitions.

Judge Ripple suggested that the Committee first consider whether it is interested in making the sort of changes suggested in either of the Reporter's drafts and then address the Solicitor General's suggestion.

Judge Logan expressed a preference for draft one if any changes are to be made.

Minutes
Civil Rules Advisory
Committee
October 21 to 23, 1993

Facsimile Filing

Under the current form of Civil Rule 5(e), papers may be filed by facsimile transmission "if permitted by rules of the district court, provided that the rules are authorized by and consistent with standards established by the Judicial Conference of the United States." The amended version of Rule 5(e), now pending in Congress and slated to become effective on December 1, 1993, embraces electronic filing as well: "A court may, by local rule, permit papers to be filed by facsimile or other electronic means if such means are authorized by and consistent with standards established by the Judicial Conference of the United States." The amended version adopts the language of Appellate Rule 25(a), which authorizes local court of appeals rules for facsimile or electronic filing.

In September, 1993, the Judicial Conference deferred action on a recommendation of the Committee on Court Administration and Case Management that courts be authorized to adopt local rules permitting facsimile filing on a routine basis. Detailed Guidelines for Filing by Facsimile were included with the recommendation. The Judicial Conference referred the recommendation to the Committee on Rules of Practice and Procedure, in coordination with the Committees on Automation and Technology and Court Administration and Case Management, for a report to the September, 1994 Conference.

The Appellate Rules Advisory Committee met immediately after the Judicial Conference action. As reported to this Committee, the Appellate Rules Committee recommended that the Judicial Conference adopt a significantly abbreviated version of the Guidelines recommended by the Committee on Court Administration and Case Management. The Guidelines no longer would refer to "filing," but instead would govern "facsimile transmission." The Guidelines would establish technical requirements and set filing fees. The provisions on resource availability, original signatures, transmission records, and cover sheets would be deleted from the Guidelines and incorporated in a model local rule. This change was recommended on the view that practicing lawyers should not be required to resort to Judicial Conference Guidelines for rules governing practice and procedure. Lawyers naturally look to the national rules and local rules for guidance, and should not be at risk of innocent departures from an unfamiliar source of regulation.

Extensive discussion was devoted to the proper balance between national rules adopted through the Enabling Act process and local rules, as viewed through the special role of Civil Rule 5(e) and Appellate Rule 25(a). These questions parallel the general debate over the role of uniform national rules and local rules, but with the specific difference created by the provisions of Rules 5(e) and 25(a). It is clear that the Judicial Conference does not intend to

bypass Enabling Act procedures by adopting national rules in the guise of "Guidelines." The guideline device cannot be used to replace or modify the national rules. As one rough approximation, Judicial Conference guidelines or standards should not attempt to tell lawyers how to practice. Rules 5(e) and 25(a), however, have been adopted through the Enabling Act procedure. Civil Rule 5(e), at least, was meant to achieve a special balance between local autonomy and national uniformity. The provision for local rules permitting filing by facsimile transmission was adopted because of the perception that there are significant variations in local conditions. Some courts have the equipment and staff necessary to handle facsimile filing. Some courts do not. Rather than attempt to force a choice on all courts, requiring that all or none permit facsimile filing, the question was left to local option. At the same time, the provision for standards established by the Judicial Conference was adopted to serve several purposes. The Conference can, at the outset, determine the appropriate time for permitting local adoption of routine facsimile filing practices. Present Conference standards limit facsimile filing to compelling circumstances or to local practices established before May 1, 1991. The Conference can authorize wider adoption of routine facsimile filing. Second, the Conference can adopt standards that ensure that local rules will not degenerate into a variety of conflicting requirements that could prove particularly troubling to practitioners who resort to facsimile transmission from distant places. Third, the Conference procedure, aided by various committees and advised by the Administrative Office staff, can respond to rapid changes of technology in ways far better than the formalized Enabling Act process. As an immediately relevant example, it may prove wise to authorize routine facsimile filing even though the time has not yet come to authorize routine filing by other electronic means.

The sense of the Committee was that the background of Civil Rule 5(e) and Appellate Rule 25(a) is important in determining the appropriate approach to facsimile filing. Local rules, authorized by 28 U.S.C. § 2071, can govern local practice but must be consistent with rules prescribed under § 2072. Local rules regulating facsimile transmission and filing are consistent with Rules 5(e) and 25(a) — rules adopted under § 2072 — only if "authorized by and consistent with standards established by the Judicial Conference of the United States." To the extent that national uniformity is desirable, Judicial Conference Standards can incorporate mandatory provisions to be included in any local rule authorized by the standards. These strictures in the Standards would not be an exercise of rulemaking power. Instead, the Standards would fulfill the purpose of Rules 5(e) and 25(a) that local rules not lead to substantial disuniformity.

The Committee believes that in fact national uniformity is

very important. The attempt to limit Judicial Conference standards to bare technical provisions is unwise. Instead, the standards should establish uniform terms to be incorporated in local rules. Provisions governing signatures, transmission records, cover sheets, and time of filing are obvious examples.

The Committee was strongly of the view that whatever action the Judicial Conference takes, the product should be captioned as "Standards," the term used in Civil Rule 5(e) and Appellate Rule 25(a), not "Guidelines."

The Committee also agreed unanimously that at least the first sentence of proposed Guideline I(3) should remain in the Standards. This sentence states that papers may not be sent by facsimile transmission for filing unless authorized by local rule or by order in a particular case. If the Committee's approach is adopted, this sentence should state explicitly that the local rule must be consistent with the terms set out in the Standards. The Committee did not have any view on the second sentence of the proposal, which would prohibit facsimile transmission of bankruptcy petitions and schedules.

The Committee discussed briefly the question whether the time has come for routine facsimile filing. Possible problems were noted, and good experiences were recounted. No Committee recommendation was made.

The Committee did not have time, nor adequate advance preparation, to work on the details of the proposed Standards or the Model Local Rule 25 being drafted by the Appellate Rules Advisory Committee. Only two questions were discussed.

Signature requirements were discussed briefly. The Committee was confident that so long as a Judicial Conference Standard authorizes filing by facsimile transmission, the facsimile image of a signature satisfies the signature requirements of the Civil Rules. Rule 5(e) is adequate authority. The local rule provisions of the Standards should state that the facsimile signature satisfies a signature requirement. (The Committee did not directly address the question whether the local rule should provide that an original copy be maintained until the litigation concludes.)

Time-of-filing questions also were discussed briefly. Two problems were noted. One is that transmission, particularly of lengthy documents, may take some time. It may be desirable to establish the time of filing by some precise event such as the time of receiving the first image, the time of receiving the complete document, or some mid-point average. The other is the problem of transmissions received outside regular business hours of the clerk's office. Support was expressed for the view that

transmissions received outside regular business hours should be treated as filed at the time the clerk's office next opens. Some tension was noted, however, with the desire to adjust practices to the possibilities created by new technology. If it is relatively easy to treat papers as filed at the time a facsimile transmission is received, perhaps that adjustment should be made. Whatever answer is best, a clear answer should be given.

Facsimile Service

The Committee was advised that the Appellate Rules Advisory Committee is preparing a draft rule authorizing service by facsimile transmission. The draft is scheduled for immediate publication for public comment. The Committee approved the proposal that the request for comment include an observation that similar changes may be made in other national rules. This observation may stimulate such extensive comment as to provide an adequate foundation for recommending adoption of facsimile service provisions in the Civil Rules. The Committee left for future consideration the nature and extent of possible differences between facsimile service in the course of district court litigation and facsimile service in the conduct of appeals.

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

AGENDA ITEM - 8
Tucson, Arizona
January 12-15, 1994

December 10, 1993

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

FROM: Honorable Paul Mannes, Chair
Advisory Committee on Bankruptcy Rules

SUBJECT: Report of the Advisory Committee on Bankruptcy Rules

The Advisory Committee on Bankruptcy Rules does not submit any matters for action by the Standing Committee at its meeting to be held on January 13-14, 1994.

At its meetings held in February and September of 1993, the Advisory Committee considered and approved for recommendation to the Standing Committee proposed amendments to Bankruptcy Rules 2015, 3016, 4004, and 8002(c), but has decided to delay presentation of these amendments to the Standing Committee. The reasons for delaying presentation of these amendments are (1) these proposed amendments are not urgent and could await the Advisory Committees' consideration of other amendments that are on the agenda for the next Advisory Committee meeting, (2) a package of amendments to 18 Bankruptcy Rules became effective on August 1, 1993, (3) other amendments regarding Rules 8002 and 8006 were approved by the Judicial Conference in September and have been forwarded to the Supreme Court for promulgation in 1994, and (4) we are in the middle of a public comment period regarding the proposed uniform amendments to Bankruptcy Rules 8018, 9029, and 9037 (local rules, standing orders, and technical amendments) that have been published for comment last month. The Advisory Committee wants to avoid confusion that could be caused by amending rules too frequently and by having different packages of amendments in different stages of the rules-making process at the same time.

The Advisory Committee met once since the Standing Committee's last meeting. A preliminary draft of the minutes of the Advisory Committee meeting held on September 13-14, 1993, is enclosed. These minutes will be presented to the Advisory Committee for approval at its next meeting.

The Advisory Committee's subcommittee on technology will be meeting on January 20-21, 1994, to discuss, among other items, issues relating to electronic filing. The next meeting of the Advisory Committee will be held on February 24-25, 1994.

ADVISORY COMMITTEE ON BANKRUPTCY RULES

PRELIMINARY DRAFT
Minutes of the Meeting of September 13 - 14, 1993

Jackson Hole, Wyoming

The Advisory Committee on Bankruptcy Rules met at 9:00 a.m. on September 13, 1993, in a conference room of the Jackson Lake Lodge in Jackson Hole, Wyoming. The following members were present:

Circuit Judge Edward Leavy, Chairman
Circuit Judge Alice M. Batchelder
District Judge Adrian G. Duplantier
District Judge Joseph L. McGlynn, Jr.
Bankruptcy Judge James J. Barta
Bankruptcy Judge Paul Mannes
Bankruptcy Judge James W. Meyers
Kenneth N. Klee, Esquire
Ralph R. Mabey, Esquire
Herbert P. Minkel, Jr., Esquire
Gerald K. Smith, Esquire
Henry J. Sommer, Esquire
Professor Charles J. Tabb
Professor Alan N. Resnick, Reporter

One committee member was unable to attend: District Judge Harold L. Murphy.

The following persons also attended all or a part of the meeting:

District Judge Thomas S. Ellis, III, member, Committee on Rules of Practice and Procedure, and liaison with this Committee
John E. Logan, Director, Executive Office for United States Trustees, U.S. Department of Justice
Peter G. McCabe, Assistant Director for Judges Programs, Administrative Office of the U.S. Courts
Richard G. Heltzel, Clerk, U.S. Bankruptcy Court for the Eastern District of California
John K. Rabiej, Chief, Rules Committee Support Office, Administrative Office of the U.S. Courts
Patricia S. Channon, Attorney, Bankruptcy Division, Administrative Office of the U.S. Courts
James H. Wannamaker, Attorney, Bankruptcy Division, Administrative Office of the U.S. Courts
Elizabeth C. Wiggins, Research Division, Federal Judicial Center

The following summary of matters discussed at the meeting should be read in conjunction with the various memoranda and other written materials referred to, all of which are on file in

the office of the Secretary to the Committee on Rules of Practice and Procedure.

References to the Standing Committee are to the Committee on Rules of Practice and Procedure. References to the Bankruptcy Rules or the Rules are to the Federal Rules of Bankruptcy Procedure. References to the Official Forms are to the Official Forms prescribed by the Judicial Conference pursuant to Bankruptcy Rule 9009. References to the Civil Rules are to the Federal Rules of Civil Procedure. References to the Appellate Rules are to the Federal Rules of Appellate Procedure. References to the Criminal Rules are to the Federal Rules of Criminal Procedure. References to the Evidence Rules are to the Federal Rules of Evidence.

Votes and other action taken by the Advisory Committee and assignments by the Chairman and the Chairman-designate appear in **bold.**

Preliminary Matters

The Chairman opened the meeting by welcoming two new members, Judge Batchelder and Professor Tabb, and requesting that all attendees introduce themselves. The Chairman recognized Judge Mannes, who has been appointed by the Chief Justice to serve as the next chairman of this Committee. The Chairman announced that Judge Alicemarie H. Stotler has been appointed as chair of the Standing Committee.

Mr. Sommer moved that the draft minutes of the February, 1993, meeting be approved. **The Committee approved the minutes by voice vote.**

Standing Committee

The Reporter stated that the Standing Committee approved the proposed amendments to Bankruptcy Rules 8002 and 8006 at its meeting in June, 1993. The amendments were to be submitted to the Judicial Conference the next week.

The Standing Committee has directed the publication for public comment of a proposed uniform rule on local rules and standing orders. As revised by the reporters for the advisory committees on the Civil, Criminal, Appellate, and Bankruptcy Rules, the uniform rule would be incorporated in Bankruptcy Rules 9029 and 8018. The Chairman expressed concern that this Committee had not considered the revised amendments, although the Chairman and the Reporter helped draft the revision.

The Standing Committee also directed the publication of a uniform rule on technical amendments to the Civil, Criminal, Appellate, and Bankruptcy Rules. The proposed uniform rule, which would be Bankruptcy Rule 9037, would authorize the Judicial Conference to make certain technical, nonsubstantive changes in the rules without approval from the Supreme Court and the Congress. The Reporter stated that this Committee was the only advisory committee to oppose the proposed uniform rule. Several members of the Committee expressed concern about how strictly technical amendments would be defined. The Reporter stated that he has been assured that each of the advisory committees will have input in future rule changes. Judge Ellis stated that he does not anticipate that future amendments would be adopted over the adamant opposition of this Committee.

The Reporter stated that the Style Committee of the Standing Committee expects to complete redrafting the entire body of the Civil Rules by the end of the year and then will turn to the Appellate Rules. Afterwards, this Committee will have to review those bankruptcy rules which incorporate the revised rules by reference.

As a result of this Committee's work on the revision of Rule 8002, discrepancies were discovered in the references to the deadlines for post-judgment motions. Civil Rules 50, 52, and 59 require that the motions be "made" or "served" within a certain time, whereas the Bankruptcy Rules require that the motions be "filed" by the deadline. The Reporter stated that the Civil Rules will be revised to conform to the use of "filed" in the Bankruptcy Rules.

The Reporter stated that both this Committee and the Standing Committee had opposed the proposed liberalization of the guidelines for filing by facsimile. Although the Committee on Court Administration and Case Management has insisted on going forward with consideration of the changes, it has accepted a revised draft prepared by the reporters for the rules committees. If adopted by the Judicial Conference, the revised guidelines would apply in bankruptcy matters when adopted by the local court and where authorized by the Rules, i.e., in adversary proceedings pursuant to Rule 7005. Mr. Mabey expressed concern that the proposed new guidelines exclude petitions and proofs of claim, creating a negative inference that other papers in bankruptcy cases may be filed by facsimile.

The Committee discussed filing by facsimile and by electronic transmission, and how original signatures could be accommodated by the two processes. Mr. Klee stated that an original signature is important for both Rule 9011 sanctions and perjury prosecutions. Mr. Minkel expressed concern that an electronic claim might be misplaced more easily than a piece of paper. Mr. Heltzel stated that there is the same potential for

misplacing either one. He said electronic dockets are backed up on the computer's hard disk, on tapes stored in the clerk's office, and on tapes stored off the premises. Mr. Minkel stated that the Committee should consider electronic filing in the context of the paper flow and the integrity of the record, especially in large cases in which the court may use a contractor to maintain some of the case papers.

The Chairman stated that it is important for the Committee to move forward and exercise leadership on the issue of electronic filing. He suggested that a subcommittee prepare an overview of where the Committee wants to go with electronic filing. Judge Mannes stated that he saw no reason to displace the existing Technology Subcommittee and indicated that he would charge it with preparing such an overview. He asked Mr. Minkel and Mr. Sommer to help prepare the overview. Several members suggested that a demonstration of the new technology similar to the one given by Gordon Bermant of the Federal Judicial Center (FJC) would be useful in this process.

Bankruptcy Forms

Ms. Channon stated that many of the forms in the Bankruptcy Forms Manual, which was published in 1988, have been updated but the new versions have not been included in the manual. She stated she expects a draft revision of the manual to be prepared within a year. The new version will be in a single volume including limited instructional material and will be available through the Government Printing Office.

Service of Process

The Reporter reviewed this Committee's action in freezing the version of Civil Rule 4 incorporated by reference in Rule 7004 as that in effect on January 1, 1990. A number of amendments to the civil rule are scheduled to take effect on December 1, 1993, but may blocked or changed by the Congress. The Committee agreed to review the amendments in their final form after they have taken effect.

The Reporter discussed S. 201, which was introduced by Senator Helms, and S. 540, a comprehensive bankruptcy bill introduced by Senators Heflin and Grassley. Each bill would modify the requirements for service of process on certain defendants in bankruptcy cases. The Chairman of the Standing Committee has written Senator Helms to oppose enactment of S. 201 and Francis F. Szczebak, the chief of the Bankruptcy Division, has testified against the service of process provisions in S. 540. The Committee discussed the prospects for the passage of

the two bills and whether additional comments should be directed to the Judiciary Committee.

Amendments to Civil Rule 26

A number of amendments to the Civil Rules will become effective on December 1, 1993, unless the Congress provides otherwise. The Reporter described the mandatory disclosure provision in Rule 26(a), as amended, and the mandatory meeting of the parties required by the amendment to Rule 26(f). Bankruptcy Rule 7026 applies Rule 26 in adversary proceedings and Bankruptcy Rule 9014, in turn, incorporates Rule 7026 in contested matters.

Mr. Rabiej stated that 20 districts have mandatory early disclosure as part of their civil justice expense and delay reduction plan. The Reporter stated that he believes the mandatory discovery provisions may be inappropriate in bankruptcy motions practice. Although both Rule 26(a) and Rule 26(f) authorize the court to opt out of the mandatory provisions by local rule or court order, he said the bankruptcy courts may not know about the changes in time to do so.

The Committee discussed the need to advise the bankruptcy courts of the situation. Congressman Hughes has introduced a bill to revise the amendment to Rule 26(a). Mr. McCabe stated that he is reluctant to distribute a memorandum on the changes until the Congress has acted or the amendments have taken effect without Congressional action. Judge Meyers moved to direct the Reporter to prepare a memorandum to the bankruptcy courts on the problem. Judge Mannes seconded the motion. The Reporter stated that it may be inappropriate for him to do so without taking the matter to the Standing Committee. The Administrative Office, however, could communicate with the district and bankruptcy judges on the changes and include a model local rule. Judge Mannes moved to amend the motion. Judge Meyers accepted the change. The Committee agreed that no vote was necessary because such a directive is outside the Committee's functions. The Reporter agreed to help prepare such a memorandum, if asked.

Pioneer Investment Services

The Reporter discussed the Supreme Court's application of the excusable neglect standard in Pioneer Investment Services v. Brunswick Associates, 113 S.Ct. 1489, to permit the late filing of proofs of claim based on perceived shortcomings in the form used to inform creditors of the deadline for filing claims. The Reporter outlined recent changes in Official Form 9. He stated that he believes the new official form is sufficient to meet the Supreme Court's requirements but could be improved further. The

Committee discussed further changes to make the form easier to understand.

Mr. Klee moved that the Committee make technical changes in Official Form 9 to be implemented forthwith in response to the Pioneer Investment decision. The Reporter stated that the changes could be presented to the Standing Committee in December and the Judicial Conference in March. He cautioned that the form had been amended several times in recent years and should not be changed again unless necessary. The Reporter stated that some judges might interpret an amendment as an indication that the Committee believes that the current form does not comply with Pioneer Investment.

Judge Barta stated that the form should be improved, even at the risk that some judges would view the change as a concession that the existing form is not good enough. Professor Tabb suggested that the Committee defer revising the form if it intends to review all of the forms in an effort to incorporate plain language. Judge Mannes called the question. The Chairman stated that the motion called for changes in the form to be presented to the next meeting of the Standing Committee. The motion failed by a vote of 4-7. Judge Mannes stated that he would refer the matter to the Forms Subcommittee.

Rule 3002

The Reporter outlined the Committee's consideration of Rule 3002 over the last few years, the apparent conflict between the rule and section 726(a)(3) of the Bankruptcy Code, the court's decision in In re Hausladen, and Judge Mannes' exchange of letters with Professor Lawrence P. King on behalf of the ad hoc subcommittee of bankruptcy judges. Judge Mannes expressed concern about the discharge of claims held by unnoticed and unknowing creditors and about the problems faced by a chapter 13 trustee when a late claim is filed after the trustee has made payments under a confirmed plan. For purposes of discussion, Judge Mannes moved the adoption of the Reporter's draft amendment included in the meeting materials. Judge McGlynn seconded the motion.

Speaking against the adoption of his own draft, (which was presented for discussion purposes only), the Reporter stated that deleting the reference to the "allowance" of claims would be essentially adopting the rationale of Hausladen, with which he disagrees. The Reporter stated that there is no urgency to fixing the section 726 "glitch". Mr. Sommer stated that Hausladen and its prodigy would create chaos in chapter 13, even without priority for late-filed claims. Professor Tabb said it is imperative that the rule continue to speak to "allowance".

Mr. Smith stated that he believes the Bankruptcy Code can be interpreted along the lines of Hausladen. He said that the rules could create a regime to allow tardy creditors to share in the distribution, although he was nct sure how all of the potential problems would be resolved. The Reporter stated that a number of courts have expressed due process concerns about the treatment of tardy claims in chapter 13 and, as a result, allow those claims to share in the distribution or find them nondischargeable. Judge Mannes stated that it is not obvious that the claims are nondischargeable. The Reporter stated that, if the motion passes, he would like an opportunity to revise the draft to include some of the comments during the discussion. Judges Mannes and McGlynn agreed to the change in their motion. Mr. Klee stated that it could be catastrophic if the Hausladen concept carried over to chapter 11. **The motion failed by a vote of 3-6.**

Judge Ellis stated that Rule 3002 is not right as it currently exists. Mr. Sommer moved to amend Rule 3002 along the lines of subsection (a)(2) of the Reporter's draft which is set forth on page 58 of item VI of the agenda materials. **The motion passed by a vote of 8-0.** The Reporter stated that he would prepare a draft for discussion at the next meeting.

Professor Tabb moved to adopt the new subsection (c)(6) as set out on page 16 of the agenda materials for item VI. Judge Barta seconded the motion. The Reporter proposed that the Committee take a tentative vote, the Reporter prepare a memorandum on what the draft does, and the Committee take a final vote. The Committee agreed to follow that procedure.

Mr. Klee opposed the motion as an improper effort to codify due process in the form of a rule. The Reporter stated that many courts would find that they have no authority to extend the time for filing claims and that, as a result, due process requires that the claim not be discharged. Mr. Smith stated that the concept of paying a late creditor makes sense and that the plan could provide for doing so. Mr. Sommer stated that a late claim could be paid now under three different scenarios: 1) the debtor files a claim for the tardy creditor; 2) the creditor files a late claim, no one objects, and the trustee pays it; or 3) the debtor provides in the plan for late claims. The Reporter stated that the negative inference of the draft would stop the wide-spread practice of treating late claims as timely. **The motion failed by a vote of 3-8.** The Reporter agreed to do another draft and Judge Mannes agreed to place it on the agenda for the next meeting. The sole purpose of the draft will be to make Rule 3002 consistent with section 726 of the Bankruptcy Code regarding tardily-filed claims.

Rule 4008

The Reporter stated that there is no way for the court to know that a reaffirmation agreement will be filed -- and that a hearing should be scheduled -- if there is no deadline for filing the agreement. The matter was discussed at the last meeting and the Reporter offered a draft amendment to require that the agreement be filed within 10 days after the discharge is entered and that the reaffirmation hearing be held within the Rule 4008(a) period. Mr. Sommer moved to adopt the draft and Mr. Smith seconded the motion. Mr. Heltzel said the debtor generally does not get the discharge until seven days after its entry -- if everything goes right.

The Reporter suggested extending the time for the hearing and Mr. Heltzel suggested making the deadline for filing the agreement earlier, perhaps tied to the date for the meeting of creditors, because no-asset cases are closed shortly after the entry of the discharge. The Chairman stated that closing the case does not deprive the court of jurisdiction. Judge Mannes stated that he favored making the deadline 60 days after the meeting of creditors. He said there is no need to protect people who make a reaffirmation agreement and then shelve it. Mr. Sommer amended his motion to adopt the concept of the draft and to discuss the timing later. Mr. Smith accepted the amendment. **The motion failed by a vote of 4-7.**

Rule 8002(c)

The Reporter discussed Judge Kressel's suggestion that Rule 8002(c) be amended to require that any motion to extend the appeal period be filed within ten days after the entry of the judgment. Judge Mannes moved to adopt the draft amendment prepared by the Reporter. **The motion passed on a unanimous vote.**

Rule 1007(c)

The Reporter presented a draft amendment to delete the reference to chapter 7 in the third sentence of Rule 1007(c), which was promulgated when different schedules were used in chapter 13 cases. Mr. Klee questioned the use of the phrases "the pending case" and the "superseding case" as being inconsistent with the concept of a converted case being the same case before and after conversion. The Reporter said the phrases are used in a number of rules and that the matter could be referred to the Style Committee. He stated that he would prefer to change a number of rules at once, rather than acting piecemeal.

Judge Mannes moved to table the draft amendment. The motion carried. Judge Leavy suggested that the Reporter prepare substitute language, which could be considered at the next meeting. The Committee agreed.

Rule 5007

Mr. Klee stated that an attorney may need to obtain a transcript of a hearing in the bankruptcy court on an expedited basis in order to prepare a pleading or an appeal. Despite this, he stated that a supervisor in the Central District of California refused to honor his request for one. Mr. Klee moved to amend Rule 5007 to state that a party has a right to obtain a copy of the transcript on an expedited basis. Judge Duplantier stated that the rules can not make people behave. The motion failed for lack of a second.

Rule 7001

The Reporter discussed Mr. Klee's proposal to amend Rule 7001(3) to permit the sale of jointly-owned property and Rule 7001(7) to permit the issuance of an injunction or other equitable relief through a plan of reorganization without filing an adversary proceeding. The Reporter opposed amending Rule 7001(3) because selling a non-party's home should require more than inclusion in a plan. He stated that the Rule 7001(7) amendment was a closer call and that many chapter 11 plans do include injunctive relief. Mr. Klee stated that, because Rule 7001(8) includes a "carve out" for subordination, it ought to include other "carve outs" as appropriate.

The Committee discussed the use of injunctions to channel litigation to an insurance fund, to enjoin non-contributing partners in partnership cases, and to enjoin creditors from pursuing non-debtor guarantors. Judge Duplantier stated that he was surprised that plan proponents could take away those sorts of rights without filing a complaint and summons, and giving the affected parties a chance to answer. Mr. Mabey stated that the court decisions had generally supported the first two types of injunctions as long as they did not violate due process. He said the rule is possibly misleading or in conflict with these decisions. The Reporter stated that the injunction should be in both the plan and the confirmation order in order to give notice to the affected creditor.

Mr. Klee moved to adopt his draft revision of Rule 7001(7) with a further amendment to require that the injunction be included in both the plan and the confirmation order. Mr. Mabey questioned the repetition in the draft. Mr. Klee agreed to revise the draft to parallel the construction of Rule 7001(8).

Mr. Mabey seconded the motion, as amended. The Chairman stated that the amendment "superloads" the definition of adversary proceedings with what is permissible in a plan, which should be decided separately. Mr. Minkel stated that the amendment limits the mischief that a court might do in a major case. Judge Meyers stated that the proposal was prompted by In re Commercial W. Fin. Corp., which was decided in 1985 and has not caused a problem so far. Mr. Heltzel stated that the definition of adversary proceedings is a revenue issue because of the filing fees. The motion failed by a vote of 4-7.

Rule 9024

Mr. Klee stated that he had prepared an amendment to Rule 9024 out of concern that some courts where using the rule to do more than was intended. Since then, in In re Cisneros, the Ninth Circuit had upheld the use of Rule 9024 and Civil Rule 60 to vacate a chapter 13 discharge based on mistake, despite the provisions of section 1328(e). Mr. Klee asked that his proposal be held in abeyance until the next meeting, in order that he could consider the opinion and whether to go forward. The Committee agreed.

Rule 3010

Mr. Klee stated that the absence of a provision in Rule 3010 specifying the minimum distribution in a chapter 11 or chapter 9 case implies that the court cannot set a minimum. He said he would be happy if the rule just left it to the plan. The Reporter stated that he believes the proponent of a plan who does not want to make small payments can so provide in the plan.

The Reporter stated that it is dangerous for the Rules to specify what can or cannot be included in a plan. Furthermore, he said, by limiting small payments, the proposed amendment could impair classes of claims. Mr. Klee said he intended only to prohibit a series of small payments, not a one-time distribution. At the request of the chairman, Mr. Klee moved that a draft amendment be prepared for the next meeting. Mr. Minkel seconded the motion. Mr. Ellis stated that, if the Bankruptcy Code permits such a plan provision, there's no need for a rule to say that it can be done.

The Committee discussed how it views possible changes in the Rules. Mr. Minkel stated that, if the rules are not broken, the Committee should not try to fix them and that the Standing Committee does not want a number of piecemeal changes if there's no concern by the bench and bar. Mr. Mabey disagreed. He stated that the Code has gone through a revolution while the Rules went through an evolution. He said there are plenty of situations in

which the Committee ought to take a look at the Rules in a serious and fundamental way. Mr. Smith stated that he believes the Rules are "stop gap" ones which should be subject to a thorough review as a long range project.

Judge Ellis stated that it is not prudent to send a number of insignificant changes to the Standing Committee at every meeting, but that the type of changes proposed by Mr. Klee are within the ambit of what the Standing Committee intends for this Committee to do. The Reporter said it's a difference between protocol and substance. He said Mr. Klee was absolutely right to bring the proposals to the Committee, but that he, the Reporter, disagreed with them as a matter of substance. Mr. Klee withdrew the motion and Mr. Minkel withdrew his second.

Rule 1001

Mr. Klee stated that he suggested that the Reporter draft an amendment adding the word "proceedings" to Rule 1001 in order to clarify that the Bankruptcy Rules apply whenever a bankruptcy matter is before a trial court, regardless of whether a bankruptcy judge or a district judge is presiding. The Reporter presented two drafts. One draft added references to the district courts, bankruptcy courts, and bankruptcy appellate panels, and the other added references both to the courts and to civil proceedings arising under title 11 or arising in or related to cases under title 11.

The Committee discussed whether the proposed amendments would apply the Bankruptcy Rules to a civil action related to a bankruptcy case but filed in another district before the bankruptcy petition was filed. Mr. Klee stated that he would withdraw the proposal because no courts are misinterpreting the existing rule. At the request of Mr. Sommer, the Reporter agreed to review the wording of Rule 1001 in light of the Tenth Circuit's decision in In re Graham.

Rule 2002(h)

Glenn M. Gregorcy, the chief deputy clerk of the United States Bankruptcy Court for the District of Utah, has suggested that Rule 2002(h) be amended to include notices to file claims against a surplus in chapter 7 cases. Mr. Logan requested that the matter be set over to the next meeting. Judge Mannes suggested that a Rule 3015(g) notice of a plan modification only be given to creditors who have filed claims if the modification is filed after the time to file claims has expired. He requested that the two proposals be considered at the same time. The Committee agreed.

Rule 3009

One of the amendments which were effective on August 1, 1993, deleted the requirement that the court approve the trustee's proposed distributions in a chapter 7 case. Some disputes have arisen over what notices have to be sent and exactly what is the trustee's final report and account as that phrase is used in the Bankruptcy Code and Rules. Mr. Logan stated that he would report to the Committee at its next meeting on the protocol which is being developed in an effort to avoid double noticing.

Plain English Forms

Mr. Sommer stated that many notices sent out in bankruptcy cases are unintelligible to people who are not attorneys despite the fact that the bankruptcy courts probably have more pro se parties than any other part of the court system. He discussed efforts by the state courts to put parties on notice that their rights and property may be affected by a motion or other pleading and to give them some guidance on what they must do to oppose the motion or pleading. Mr. Sommer, who stated that the bankruptcy courts have dealt with this matter to varying degrees in their local rules, offered a generic notice for use in contested matters.

It was suggested that it is time for a new Forms Subcommittee to be organized and that the proposal could be referred to that group. Mr. Sommer accepted the suggestion and the Committee agreed.

Official Form 14

The Reporter stated that he was asked at the last meeting to prepare alternative draft revisions of Official Form 14, Ballot for Accepting or Rejecting Plan, to include comments by several members of the Committee. He presented one draft which could be used whether or not the ballot covers multiple plans and a pair of alternative forms, one of which would be used to vote on single plans and one to vote on multiple plans.

The Reporter cautioned against changing the form if all of the Official Forms are to be revised a year from now. Mr. Klee said the language of the drafts is a good improvement over the current form. He suggested that the last sentence of the first paragraph be in bold type and the addition of a statement that the ballot must be returned in a timely manner. Professor Tabb suggested that the matter be referred to the new Forms Subcommittee. There was no objection to doing so.

Official Form 5

Judge Jellen has suggested amending Official Form 5, Involuntary Petition, to require that the petitioner or petitioners allege the facts which are the basis of their eligibility to file the petition pursuant to section 303 of the Code. Mr. Minkel stated that the proposal might conflict with Rule 1003(b) and moved to reject the suggestion. The motion carried without any dissenting votes.

Technology Subcommittee

Judge Barta presented the report from the Technology Subcommittee.

Judge Barta stated that Robert Fagan of the FJC is heading a team which is preparing an interactive video training program on the Civil Rules. The program, which is aimed at deputy clerks, will be completed early in 1994. A similar interactive program is planned on the Bankruptcy Rules. Judge Barta asked if the Technology Subcommittee could serve as a liaison with the Bankruptcy Rules project. Judge Mannes stated that he would respond.

Mr. Heltzel stated that the contract had been awarded for the Bankruptcy Noticing Center and that the first courts would go on line late this fall. He stated that the Bankruptcy Automated Noticing System (BANS) courts would be the first to use the new system in which notice information will be transmitted to the contractor, which will print, sort, and mail the notices.

Judge Barta stated that Rule 9036 became effective on August 1, 1993, and has been well received. Mr. Heltzel has developed a model agreement between the court and creditors to implement electronic noticing. Mr. Heltzel said a three phase acknowledgment process will be used in which creditors or their agents acknowledge 1) receipt of some data, 2) specifically what data they received, and 3) whether the debtor is someone to whom they issued credit or who owes them money. If the creditor does not acknowledge the debt, the clerk's office informs the debtor. Mr. Heltzel stated that the system has been set up so that it requires virtually no human intervention on the court side.

Mr. Minkel stated that electronic noticing benefits both the court and the creditor, but that the creditor receives greater benefits. He asked when the courts will start charging for the service. Mr. Heltzel stated that the courts do not anticipate charging for the service. Mr. Sommer asked if electronic noticing was covered by the fee for electronic access to court information. Mr. Heltzel said electronic noticing is not covered by the access fee because the electronic notice only includes the

information in the paper notice. It does not include information on other creditors.

Mr. Smith asked whether the electronic notice includes the scheduled amount of the debt. Mr. Heltzel said neither the paper notice nor the electronic one has the amount. Mr. Klee asked whether, if the court directs a party to give notice, the party would have to do so electronically. Mr. Heltzel said that was not intended. Ms. Channon said the party may be able to contract with the noticing center to do so in the future.

Conclusion & Adjournment

Judge Mannes stated that the next meeting is scheduled for Memphis on February 24 - 25, 1994, and that the following meeting is tentatively set for September, 1994. He asked that Committee members consider where that meeting should be held.

The Chairman thanked Judge Ellis for his interest and for representing the Standing Committee. The Chairman thanked Mr. Rabiej for making the arrangements for the meeting and Mr. Mabey for entertaining the Committee members at his ranch. He thanked the Administrative Office for its support of this Committee and Mr. Logan and Mr. Heltzel for serving as liaisons with the Committee. Judge Mannes, in turn, thanked the Chairman for his three years of "world class" service in that position and for the caliber of the meetings during his tenure as chairman.

There being no further business, the meeting was adjourned at 11:20 a.m. on September 14, 1993.

Respectfully submitted,

James H. Wannamaker, III
Attorney
Division of Bankruptcy

AGENDA ITEM - 9
Tucson, Arizona
January 12-15, 1994

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS
WASHINGTON, D.C. 20544

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ASSOCIATE DIRECTOR

JOHN K. RABIEJ
CHIEF, RULES COMMITTEE
SUPPORT OFFICE

December 15, 1993

MEMORANDUM TO Members of the Standing Committee

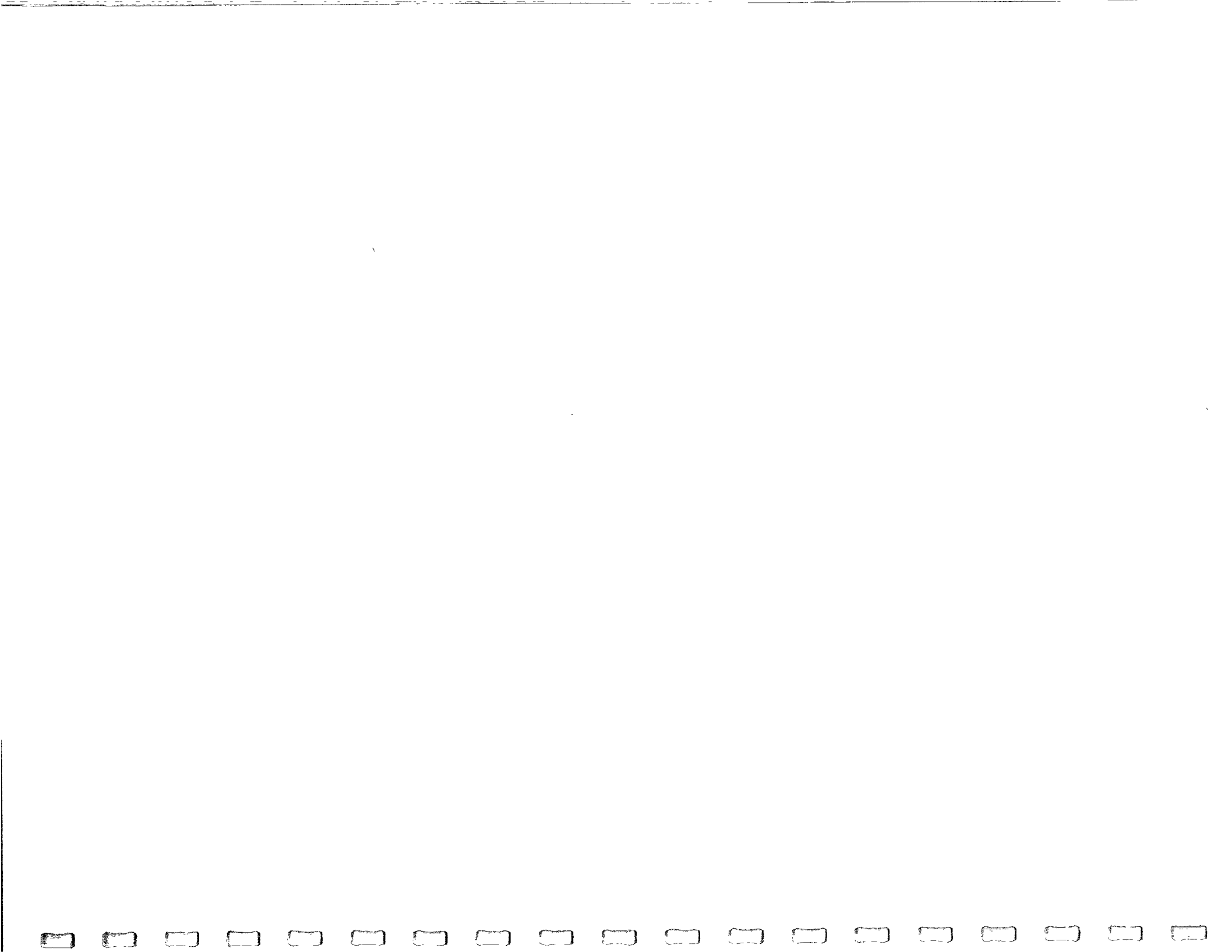
SUBJECT: Report of the Advisory Committee on Evidence Rules

As requested by Professor Margaret A. Berger, I have attached the minutes from the September 30, October 1 and 2, 1993, meeting of the Advisory Committee, the agenda from that meeting, a memorandum from Judge Winter and Professor Berger, and a letter from the United States Department of Justice, Criminal Division to Judge Winter.

The Advisory Committee on Evidence Rules does not submit any matters for action by the Standing Committee.

John K. Rabiej

John K. Rabiej



ADVISORY COMMITTEE ON EVIDENCE RULES

Minutes of the Meeting of September 30 - October 2, 1993

New Orleans, Louisiana

The Advisory Committee on the Federal Rules of Evidence met September 30, October 1 and 2 in the Courthouse for the Fifth Circuit Court of Appeals in New Orleans, Louisiana. The following members of the Committee were present:

Circuit Judge Ralph K. Winter, Jr., Chairman

Circuit Judge Jerry E. Smith

District Judge Fern M. Smith

District Judge Milton I. Shadur

Federal Claims Judge James T. Turner

Chief Justice Harold G. Clarke

Professor Kenneth S. Broun

Gregory P. Joseph, Esq.

John M. Kobayashi, Esq.

Dean James K. Robinson

Magistrate Judge Wayne D. Brazil

Professor Stephen A. Saltzburg

Roger Pauley, Esq.

Professor Margaret A. Berger, Reporter

The following persons also attended all or a part of the meeting:

Hon. Alicemarie H. Stotler

Dean Daniel R. Coquillette

Irvin B. Nathan, Esq.

William B. Eldridge, Esq.

John K. Rabiej

Judge Winter called the meeting to order at 8:30 a.m. on September 30, 1993. He suggested that the Committee discuss policy issues at this meeting and leave specific redrafting issues for the next meeting of the committee. A copy of the Agenda for the meeting is attached.

Carnegie Committee Report and Rules of that Management.

The Committee first considered a number of proposals that might have an impact on the Rules of Evidence: the Carnegie Commission Report, and Rules of Trial Management. A number of suggestions were made that in light of the Daubert opinion more thought should be given to Rule 706 and its interrelationship with the special master rule in the Federal Rules of Civil Procedure, as well as commentary to Rule 706 explaining how court-appointed experts could be used in connection with pre-trial proceedings. Professor Saltzburg suggested taking up the Carnegie report in connection with Article VII. Judge Winter said he would put Article VII on the agenda at the next meeting. He also asked that the liaison members ask their committees whether any problems exist.

Judge Winter stated that undertaking to draft Rules of Trial Management without input from the other Advisory Committees would be impossible, and questioned whether the ABA's proposal really amounted to rules. Judge Stotler volunteered to talk to the other committees about the desirability of continuing further with this project. Professor Saltzburg felt that this might be a

subject that the Federal Judicial Center could handle. Judge Shadur suggested the possibility of moving toward a proposal for a standardized pretrial order. Professor Broun, however, thought that orders should be thought of in the context of problems with a particular rule such as the Article VII rules. Judge Winter expressed a good deal of skepticism about drafting Rules of Trial Management.

Sentencing Guidelines.

The Committee then discussed whether the Committee should consider the advisability of drafting evidentiary rules that would apply at the sentencing phase. Judge Winter explained that prior to the Sentencing Guidelines judges were free to disregard any evidence they wished to ignore whereas now they must take into account certain factors spelled out by the guidelines. Judge Winter repeated the jurisdictional argument that appears on p. 6 of his memorandum of June 22, 1993, which is attached. He also cautioned that if the Sentencing Commission does not like proposals by the Evidence Committee, the Commission will go to Congress and get a statute passed.

Roger Pauley explained that §18 U.S.C. 3661 was in effect before the Sentencing Guidelines were developed and that the note to the statute states that there was no intent to modify the original approach which allows otherwise inadmissible evidence such as hearsay to be used. Consequently, it cannot be said that Congress disregarded this issue when it enacted the Sentencing Guidelines.

Judge Shadur pointed out that a judge never had to make factual findings prior to the Sentencing Guidelines. Once factual findings have to be made it becomes essential to define appropriate rules of evidence. Professor Saltzburg stated that this was an extremely important issue that the Evidence Committee could approach but that it was not only an evidentiary issue. One should assume that the Sentencing Commission would have to be a partner in any endeavor to consider evidentiary rules. Mr. Nathan agreed that the issue of evidentiary rules for the sentencing process is extremely important and that he thinks that the Committee has jurisdiction.

Judge Shadur pointed out that no one is suggesting that all evidentiary rules would apply in sentencing. Professor Saltzburg questioned whether evidentiary rules can solve the problems created by making relevant conduct admissible. Professor Broun suggested an inquiry into whether issues and problems exist that could be dealt with in evidentiary terms.

Mr. Eldridge offered to have the Federal Judicial Center gather information about sentencing. The Committee debated at some length whether it should solicit views from knowledgeable persons. The Committee agreed that the Chair of the Committee should send a request that would make no promises about redrafting Rule 1101 but that would merely solicit suggestions about whether problems exist.

Updating rules. The Committee discussed whether it can update notes without amending rule. Mr. Pauley explained that

the Sentencing Commission has taken the position that it can change commentary without changing rules. The Criminal Rules Committee has refused to take such an approach. Mr. Pauley suggested that perhaps one could republish rule without making a change and then amend the notes. The Committee agreed to revisit this issue in the context of a concrete rule like Rule 404.

The Department of Justice Proposal. Mr. Pauley proposed adoption of the Department of Justice proposal set forth in his memorandum of June 15, 1993, which is attached. This proposal would make admissible an expert's report of an analysis of a substance, object or writing. Mr. Joseph pointed out that the proposed rule is one of admissibility rather than a new hearsay exception. Judge Fern Smith objected that the provision does nothing more than can be achieved through a stipulation; defense counsel will object to such a rule because they will be afraid that even if one drafts a very narrow exception, lawyers will start to insert all kinds of imaginative material into the report. Magistrate Judge Brazil noted that the provision would apply to civil cases as well, and would be inconsistent with the proposed amendments to Rule 26 in terms of notice and timing requirements.

Mr. Pauley responded that perhaps one would wish to limit the rule to the DEA and ballistics reports and make the provision part of Rule 803(8). He stated that the DEA finds such a rule useful and few defense counsel object. Dean Robinson responded that this was really a rule that made something presumptively

admissible and that defense counsel might fear being labeled as obstructionist. Judge Shadur found a real problem because the report, pursuant to the draft, would get into the jury room; one might want to have it read but not admitted. Professor Broun was concerned that it was premature to take up this proposal which ought to be considered in connection with Articles 7-9. Mr. Nathan agreed that the proposal needed to be fine-tuned.

Judge Winter then proposed working through particular articles of the Rules, beginning with Article IV, to identify particular problems that the Committee wish to have the reporter address.

ARTICLE IV.

Rules 401-403. The Committee had no problems with Rules 401-403.

Rule 407. The Committee then turned Rule 407, the subsequent remedial measures rule on which the Reporter had prepared a memorandum that was distributed with the agenda for the meeting. It pointed out that there is a split in the circuits since the 10th Circuit views the issue as raising Erie concerns that should be resolved in terms of the forum's substantive law. The memorandum also pointed out that although the other federal circuits, to the extent that they have addressed the issue, bar subsequent remedial measures evidence in products liability cases regardless of the particular cause of action, a majority of the states allow such evidence to be admitted at least in certain types of products liability actions.

This federal-state dichotomy obviously produces some forum shopping by plaintiffs and the removal of state instituted actions to federal court by defendants.

Judge Fern Smith observed that were the Committee to require deference to state law, it would become even more difficult to settle or try a products liability action with plaintiffs from a number of different states. Mr. Joseph suggested not amending the rule, but Mr. Kobayashi objected to the forum-shopping that exists in the 10th circuit. The Committee took a straw vote on four possible resolutions:

1. To leave the circuit split - 3 votes

2. To adopt the 10th circuit rule - 0

3. To adopt the majority state rule and allow the evidence - 0

4. To amend Rule 407 so that the bar would apply in products liability cases, with perhaps some exceptions for recall letters - 5

The Reporter was directed to consider redrafting the rule to add "culpable conduct, defectiveness of a product, or unreasonableness of a design." It was also agreed that the Note should point out the low probative value of the evidence (because changes may be made for other reasons) and the prejudicial impact of this type of evidence, and that the Note should be careful to take into account that state law may allow in evidence on issue of feasibility if the substantive rule is that a defendant is liable when a better alternative exists.

The Committee agreed not to vote on the amendment but to consider what the appropriate language should be in light of tort law issues at the next meeting. Dean Robinson raised the question of whether the rule should be clarified as to meaning of "the event."

Rule 404. Sex crimes. There was no sentiment in the Committee for amending Rule 404 to allow evidence of defendant's prior sexual behavior in a prosecution for a sexual offense against an adult or child. Among the sentiments expressed was that this was not a federal problem, a concern about prejudice, and that action by the Committee would be unlikely to affect Congress. The Committee was advised by John Rabiej that a bill now pending before the Senate Committee on the Judiciary that would amend Rule 404 with regard to sex crimes is unlikely to pass. According to Roger Pauley, however, it is still too early to make predictions about the bill's passage.

Civil cases. The Committee next considered whether the Rule 404(a) exceptions should be extended to civil cases. Although members of the Committee discussed a number of hypothetical situations in which it would not be unreasonable to treat civil cases like criminal cases, the Committee ultimately decided that it was too difficult to draw a line and too much of a waste of time. Accordingly Rules 404(a)(1) and Rules 404(a)(2) should remain unchanged.

As there have been a few cases in which courts extended the exceptions to civil cases, the Committee also considered the

desirability of clarifying the rule by adding "in criminal cases" at the beginning of each exception. Rule 404(a)(2) also should contain a phrase "except as provided in Rule 412." The Committee discussed whether these are technical amendments that therefore would not have to go through public hearings. On the other hand, Judge Winter pointed out that the full rule-making process could be used as there are a few aberrant cases, and no great need for hurry in clarifying the rule.

The Huddleston standard. The Committee discussed whether either Rule 404(b) or Rule 104(a) should be redrafted so as to overrule the Supreme Court's holding in Huddleston v. United States, 485 U.S. 681 (1988) holding that the proof of "other crimes" evidence is governed by Rule 104(b) and not by Rule 104(a). Although Mr. Pauley questioned whether the Committee could change the burden of proof, the Committee unanimously agreed that changing the standard of proof for the admissibility of evidence is a different issue than changing the ultimate burden of proof, and that the former question is within the authority of the Committee.

Three different suggestions were made as to how to overcome the Huddleston holding, and it was agreed that the Reporter would prepare a draft on all three variations together with an accompanying Advisory Committee Note for consideration at the next meeting of the Committee. The three possible solutions were:

1. To make Rule 404(b) subject to Rule 104(a) by amending

Rule 104(a).

2. To require a "clear and convincing" standard for the admission of Rule 404(b) evidence.

3. To require that in the case of Rule 404(b) evidence the usual balance required by Rule 403 would be reversed so that the burden would be on the prosecution to demonstrate that the evidence must be more probative than prejudicial.

If controverted. The Committee also decided that it would take up at the next meeting a redraft of Rule 404(b) that would deal with the issue of limiting the prosecution's ability to put in evidence on an issue that the defendant has conceded. A possible way of doing this would be to add "if controverted" to the rule. Other possibilities might be to limit the change to "stipulations read to the jury" or "unless conceded by the defendant." The Reporter will draft a number of variations.

Rule 410. The Department of Justice brought to the Committee's attention a recent decision in the Ninth Circuit, United States v. Mazzonata, which held that the government may not impeach the defendant with statements that fall within Rule 410 after he failed to abide by a cooperation agreement. Most circuits have allowed impeachment under these circumstances. The Committee agreed that this was a matter for the Criminal Procedure Committee in the first instance since the text of Rule 410 also appears in the Criminal Procedure Rules as Rule 11(e)(6).

Rule 405. The Committee agreed that the rule had to be

changed by making it subject to Rule 412. It was decided not to alter the rule otherwise as the rule was not causing problems. It was also agreed not to add cross-references to other rules that might be implicated for fear of causing problems.

Rule 408. A number of members of the Committee raised a number of issues that they wish to have explored for the next meeting: timing issues, i.e. when does a dispute arise that triggers the rule? (the Committee wants the Rule to apply as quickly as possible); to what extent does Rule 408 apply in a second lawsuit? should there be a different rule for admissibility and discoverability and should the rule refer to this issue? if there was a dispute as to liability only does this mean that a statement may not be admitted to show the parties' agreement about a floor with regard to the amount in dispute? to what extent can one use for impeachment statements from settlement negotiations that break down? if one party perceives that there is a problem and begins talking to an agency such as the SEC, will a third party be able to get these statements?

The Committee wishes to consider a series of hypotheticals next time in the context of two questions: 1. Does Rule 408 now cover this situation; 2. Should Rule 408 cover this situation?

ARTICLE VI

Rules 601-606. The Committee did not identify any articular problems with these rules.

Rule 607. The Committee requested the Reporter to look at the cases to determine whether any particular problems were

arising with respect to impeaching one's own witness.

Rule 608. The Committee agreed that the Rule had been badly drafted but concluded that it should not be amended as the language has acquired a recognized meaning as the result of use. Because evidentiary rules have to be reacted to quickly in a courtroom they should not become too wordy or too different.

Rule 609. The Committee agreed that although issues exist about specific crimes that may be used for impeachment and about whether the prosecution may inquire into the nature of the crime, the Rule has caused such controversy in Congress in the past that one should not open a Pandora's box by recommending changes to Rule 609.

Rule 611. A number of suggestions were made with respect to clarifying the rule. One suggestion was to amend subdivision (c) so as to clarify that the examination that occurs after an adverse witness is examined by the proponent should not be in the nature of cross-examination. One possibility is to rephrase the rule in terms of who "adduces" the testimony. The Note should also be clarified to explain that "impeachment may, of course, require leading questions." The Committee decided not to revisit the proper scope of cross-examination.

Rule 612. Should one make it clearer that if the opponent chooses to introduce the evidence used for refreshing, the evidence is being admitted for impeachment purposes only? The Reporter will look at the cases to determine if such a change would amount to more than an academic exercise. Mr. Robinson

agreed to send the Reporter a copy of the Michigan rule that accomplishes this.

Rule 613. The Committee wants to look further at whether the rule makes sense in light of the lack of correspondence that now exists between impeachment and substantive use because of Congressional changes to the hearsay exemption for prior statements.

Rule 614. The Committee discussed the advisability of adding a provision relating to questioning by jurors and whether such a provision should contain limitations such as requiring the questions to be in writing and giving the lawyers an opportunity to object. Instead of specific questions might the jurors indicate subject matter as to which they want more information and why? The Committee was concerned that the problems might not be the same in criminal and civil cases. The Reporter was requested to report further on these issues and to consider the possibility of model jury instructions.

Rule 615. The Committee did not find any serious problems with Rule 615.

ARTICLE I.

Rule 103. Should one rewrite the rule to deal separately with bench-tried and jury tried cases? Should there be a procedure for referring in limine motions to a judge other than the one who will preside at trial? The Committee decided that it wished to revisit at its next meeting the Supreme Court's decision in Luce v. United States, 469 U.S. 38 (1984) which holds

that a defendant waives an objection to a trial judge's pretrial ruling refusing to exclude defendant's prior convictions unless the defendant testifies at trial.

Rule 104. Should one revise subdivision (a) to add that rulings on the admissibility of hearsay are governed by this provision? Are there any other categories of evidence that should be added to the subdivision or to the Note?

With regard to subdivision (b) the Reporter was directed to consider whether a problem exists because the rule states "admit" even though it is intended to be subject to Rule 403.

Rule 105. The rule states that a court, "upon request," shall restrict evidence, etc. The Committee wished further inquiry into whether a court may do so on its own and whether the rule as written cause problems.

ARTICLE II

Rule 201. Members of the Committee observed that the rule was not used sufficiently and that there is a conflict between subdivisions (f) and (g) if the court takes judicial notice on appeal.

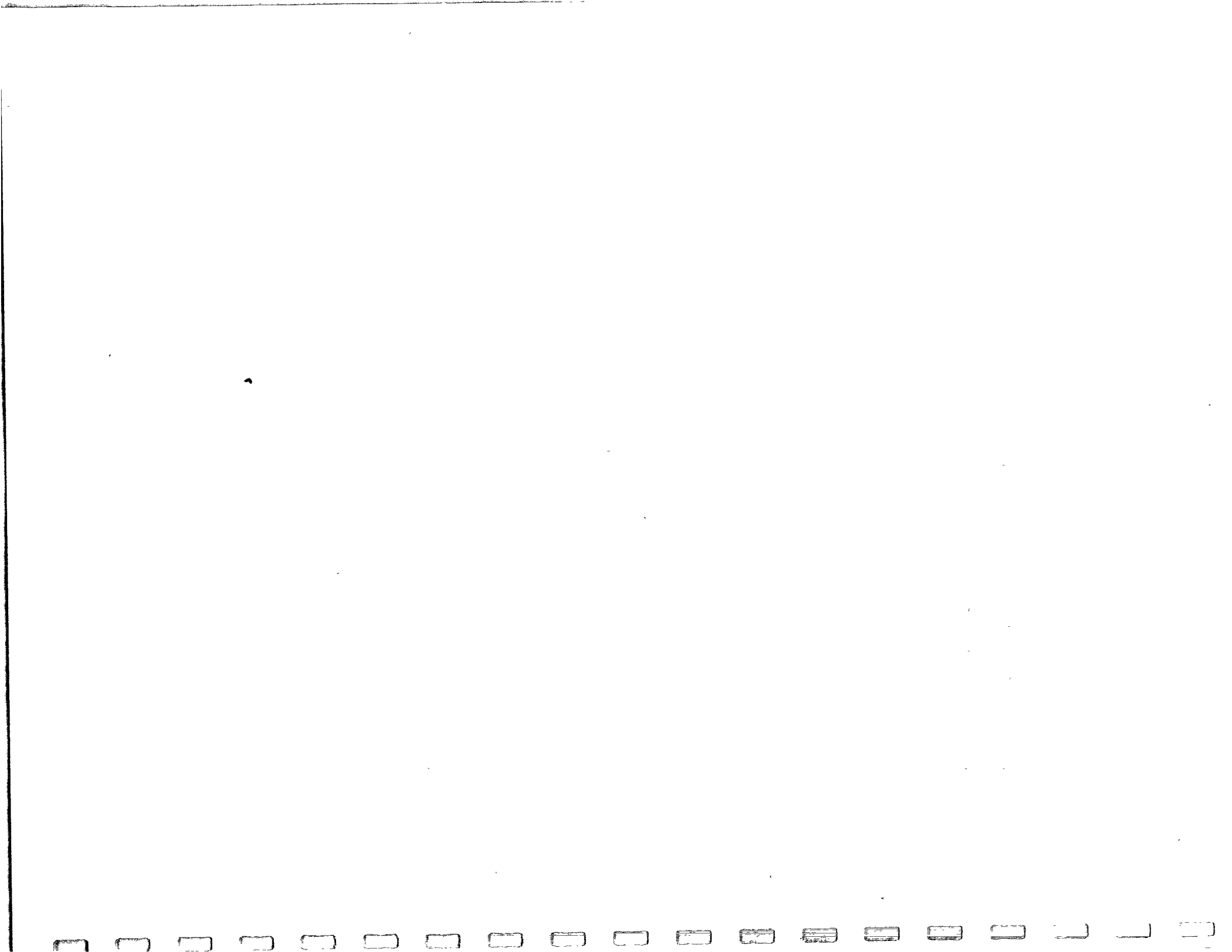
ARTICLE III

After discussion, the Committee agreed that it would not be desirable to add a rule on criminal presumptions.

Miscellaneous matters. The Committee approved Rule 84(b) on technical amendments which will become subdivision (b) of Rule 1102.

The Committee discussed at various times the importance of

leaving a record of its decisions including its decisions not to amend particular provisions. One possibility that was suggested was to write a report to be published in F.R.D. Another recurring issue during the meeting was the extent to which the Advisory Committee Notes should be updated. It was agreed that if a rule is changed, the commentary could be updated -- as by adding a relevant Supreme Court holding -- even if the rule was not changed with regard to the matter updated. The majority of the Committee did not favor updating a Note in the absence of a revision to the rule.



1. Carnegie Commission Report.

This item was discussed in the June 22 memo, and materials relating to it accompanied that memo.

2. Rules of Trial Management.

This item was discussed in the June 22 memo, and materials relating to it accompanied that memo.

3. Rules of Evidence and Sentencing Proceedings: Rule 1101.

This item was discussed in the June 22 memo. No accompanying materials were sent.

4. Updating or Modifying Commentaries.

This item was discussed in the June 22 memo. No accompanying materials were sent. Professor Berger's memo on Rule 404 issues, which is included in this package, provides a concrete issue concerning the updating or modifying of Commentaries.

5. Rule 803(6).

This matter was raised in a letter to the Chair from Roger Pauley. That letter is among the materials accompanying this memo and agenda. Whether we should take up the merits of Roger's proposal at this meeting or hold it in abeyance until we address Article VIII is a threshold issue.

6. Article IV: Rules 401-412.

This item includes any outstanding policy or drafting issue regarding these rules. Accompanying this memo and agenda are memoranda from Professor Berger on Rules 404, 405, and 407. Also accompanying it is a draft law review article by Professor Reed

of Widener University School of Law that is waiting publication in the Texas Law Review. You will be receiving a draft of another law review article from John Rabiej. That article is by Professor Park of Minnesota Law School and will be published in the Minnesota Law Review.

7. Other Items of Business.

Other matters of business will be discussed at this time.

8. Article VI: Rules 601-615.

If we get to this item, it will include all policy and drafting issues regarding these rules.

To: THE ADVISORY COMMITTEE ON THE RULES OF EVIDENCE
From: JUDGE WINTER and PROFESSOR BERGER
Re: MEETING OF STANDING COMMITTEE; MISCELLANY; FUTURE AGENDA
Date: JUNE 22, 1993

1. Rule 412

We attended the recent meeting of the Standing Committee on Rules of Practice and Procedure which met on June 17-19. The Committee approved in somewhat different format most of the substance of Rule 412 as drafted by us. The version of Rule 412 and Committee Note that is to be submitted to the Judicial Conference is at Supplement A. The principal issue raised by the Standing Committee was whether the rule would prevent the prosecution from offering pattern evidence. The resultant draft thus provides for the admission of evidence of specific instances of sexual behavior by the victim with respect to the accused when offered by the prosecution. See subsection (b)(1)(B). The Standing Committee also adopted the view that pattern evidence offered by a plaintiff in a civil case must meet the balancing test of subsection (b)(2).

2. Carnegie Commission Report

The Standing Committee adopted a recommendation of its Subcommittee on Long-Range Planning that the Evidence Committee review the Carnegie Commission Report on Science and Technology in Judicial Decision Making. The recommendation of the Standing Committee's Long-Range Planning Subcommittee and the Carnegie Commission Report are at Supplement B.

3. Rules of Trial Management

The Standing Committee adopted the recommendation of its

Long-Range Planning Subcommittee that the Evidence Committee coordinate efforts among the Civil Rules Committee, the Criminal Rules Committee, and itself to study the concept of general rules of trial management. This recommendation was prompted both by the interest of the Standing Committee's Chair, Judge Keeton, and adoption by the ABA of Standards of Trial Management. Materials relating to the Long-Range Planning Subcommittee's recommendation and the ABA standards are at Supplement C.

4. Role of Advisory Committees

The Standing Committee also discussed its role and the role of the Advisory Committees with regard to the future. Most of this discussion concerned the workings of the Standing Committee and do not directly concern us. However, a couple of members of the Standing Committee expressed the view that far too many amendments to the various rules are being proposed by the Advisory Committees. Another member indicated to one of us at dinner that there has been considerable apprehension that the Evidence Committee would be a "troublemaker" and that that apprehension caused the delay in the creation of the Committee. None of this, of course, is to suggest that we fail to act when we conscientiously believe amendments should be proposed. We should be ready, however, to demonstrate the basis for our believing that particular amendments are necessary.

5. Expert Testimony

Justice Michael Zimmerman of the Utah Supreme Court (formerly a member of the Civil Rules Committee and a proponent

of amending Fed. R. Evid. 702) has sent Judge Winter a copy of an article in the ABA Journal concerning a "footprint expert" whose "expert" testimony had no basis in science or, apparently, common sense. At the trial court level, however, she appears never to have had her testimony excluded as lacking any basis, a rather scary fact. Because the article attributes the admission of her testimony to the adoption of the Federal Rules of Evidence, we are attaching a copy of the article at Supplement D.

6. Thoughts Regarding Future Agenda

A formal agenda will be sent out in early September. At its recent meeting, the Standing Comittee sent out for public comment provisions regarding "technical" amendments (and certain other matters) to all federal rules. If adopted, these provisions would be added to the Rules of Evidence (and the Appellate, Civil, Criminal and Bankruptcy Rules, as well). We will have to consider these matters soon, probably at our winter meeting. The provisions may be found at Supplement E.

Judge Winter believes that our review should generally proceed Article by Article because amendments to a particular rule may be informed by, or have ramifications for, other parts of an Article. For example, our discussion of Rule 412 raised questions concerning Rule 405. After considering the suggestions received from committee members and some reading of commentators who have called for our creation, Judge Winter has tentatively designated Article IV as the first to be considered, because there are numerous amendments suggested by members of the

Committee and commentators, and there are conflicts among courts as to the interpretation of the various rules in Article IV. Moreover, Congress is considering an amendment with regard to Rule 404 admitting pattern evidence in rape cases and may ask us to give expedited consideration to this issue. Once Article IV has been considered, we will probably take up Article VI. It is possible, however, that the Supreme Court's decision in Daubert may suggest that we consider amendments to Article VII, in which case we might take that up first.

There are other items that should also be considered at the next meeting. First, can we, and should we, propose amendments regarding the Rules of Evidence to govern sentencing proceedings? The Sentencing Commission may well regard that as its exclusive province. It has thus issued the following policy statement:

> §6A1.3. Resolution of Disputed Factors (Policy Statement)
>
> (a) When any factor important to the sentencing determination is reasonably in dispute, the parties shall be given an adequate opportunity to present information to the court regarding that factor. In resolving any reasonable dispute concerning a factor important to the sentencing determination, the court may consider relevant information without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy.
>
> (b) The court shall resolve disputed sentencing factors in accordance with Rule 32(a)(1), Fed. R. Crim. P. (effective Nov. 1, 1987), notify the parties of its tentative findings and provide a reasonable opportunity for the submission of oral or written objections before imposition of sentence.

COMMENTARY

In pre-guidelines practice, factors relevant to sentencing were often determined in an informal fashion. The informality was to some extent explained by the fact that particular offense and offender characteristics rarely had a highly specific or required sentencing consequence. This situation will no longer exist under sentencing guidelines. The court's resolution of disputed sentencing factors will usually have a measurable effect on the applicable punishment. More formality is therefore unavoidable if the sentencing process is to be accurate and fair. Although lengthy sentencing hearings should seldom be necessary, disputes about sentencing factors must be resolved with care. When a reasonable dispute exists about any factor important to the sentencing determination, the court must ensure that the parties have an adequate opportunity to present relevant information. Written statements of counsel or affidavits of witnesses may be adequate under many circumstances. An evidentiary hearing may sometimes be the only reliable way to resolve disputed issues. See United States v. Fatico, 603 F.2d 1053, 1057 n.9 (2d Cir. 1979). The sentencing court must determine the appropriate procedure in light of the nature of the dispute, its relevance to the sentencing determination, and applicable case law.

In determining the relevant facts, sentencing judges are not restricted to information that would be admissible at trial. 18 U.S.C. § 3661. Any information may be considered, so long as it has "sufficient indicia of reliability to support its probable accuracy." United States v. Marshall, 519 F. Supp. 751 (D.C. Wis. 1981), aff'd, 719 F.2d 887 (7th Cir. 1983); United States v. Fatico, 579 F.2d 707 (2d Cir. 1978). Reliable hearsay evidence may be considered. Out-of-court declarations by an unidentified informant may be considered "where there is good cause for the nondisclosure of his identity and there is sufficient corroboration by other means." United States v. Fatico, 579 F.2d at 713. Unreliable allegations shall not be considered. United States v. Weston, 448 F.2d 626 (9th Cir. 1971).

The Commission believes that use of a preponderance of the evidence standard is appropriate to meet due process requirements and policy concerns in resolving disputes regarding application of the guidelines to the facts of a case.

> If sentencing factors are the subject of reasonable dispute, the court should, where appropriate, notify the parties of its tentative findings and afford an opportunity for correction of oversight or error before sentence is imposed.

The sole statutory basis for the Commission's statement that the Rules of Evidence do not apply to sentencing proceedings appears to be 18 U.S.C. § 3661. However, that provision is a rule of relevance and says nothing about exclusionary rules. It thus states:

> No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.

If the exclusionary rules are "limitations on information" then Section 3661 commands that nothing may be excluded in a sentencing hearing, and that seems ridiculous.

Our authority, on the other hand, is derived from 28 U.S.C. § 2072, which reads:

> (a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals.
>
> (b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

Our authority to determine the evidentiary rules for sentencing proceedings thus seems fairly clear. Whether we should depart from the Sentencing Commission's approach is a

different question, however.

Second, some of the commentaries accompanying the Rules of Evidence may have been rendered obsolete by subsequent case law over the last eighteen years. Is there a method of updating or modifying commentary without amending the particular rule? The problem is that revision of the Advisory Committee Notes might be viewed as altering the meaning of the Rule in question without going through a process that includes review by the Supreme Court and a legislative veto by the Congress.

Finally, a number of you expressed a desire to take up privilege issues. Judge Winter has no objection to that but questions whether consideration of rules of privilege should have a high priority. Privilege rules cannot be adopted through the general rulemaking process, i.e., recommendation by the Supreme Court subject to legislative veto by both houses. Rather, they must be affirmatively promulgated by the Congress. See 28 U.S.C. § 2074(b). This creates a substantial danger that when the Committee takes up rules of privilege, it will engage in a lot of heavy lifting without result. We would be happy to hear different views on this question.

U. S. Department of Justice

Criminal Division

Washington, D.C. 20530

JUN 15 1993

Honorable Ralph K. Winter, Jr.
Audubon Court Building
55 Whitney Avenue
New Haven, Connecticut 06511

Dear Judge Winter:

I am writing on behalf of the Department of Justice to request inclusion on the agenda of the Advisory Committee on the Federal Rules of Evidence at its upcoming meeting of a proposal to create a new Rule of Evidence under which an expert's report of the analysis of a substance, object, or writing would be admissible as a kind of business record, unless either party wished to call the expert.

The proposal, which originated with the Drug Enforcement Agency (DEA), was inspired by a provision in Chapter 33 of the District of Columbia Code relating to controlled substance violations. The DEA is responsible for analyzing all drug evidence seized by the Washington, D.C. Metropolitan Police Department. Because of the nature and volume of the seizures and subsequent prosecutions, DEA encouraged the enactment some years ago of what is now D.C. Code § 33-556, which provides as follows:

> In a proceeding for a violation of this chapter, the official report of chain of custody and of analysis of a controlled substance performed by a chemist charged with an official duty to perform such analysis, when attested to by that chemist and by the officer having legal custody of the report and accompanied by a certificate under seal that the officer has legal custody, shall be admissible in evidence as evidence of the facts stated therein and the results of that analysis. A copy of the certificate must be furnished upon demand by the defendant or his or her attorney in accordance with the rules of the Superior Court of the District of Columbia or, if no demand is made, no later than 5 days prior to trial. In the event that the defendant or his or her attorney subpoenas the chemist for examination, the subpoena shall be without fee or cost and the examination shall be as on cross-examination.

The constitutionality of this provision under the Confrontation Clause has been upheld by the District of Columbia Court of Appeals. See Howard v. United States, 473 A.2d 835 (1984). The court described the provisions of D.C. Code § 33-556 as "within the ambit of the business records exception" to the hearsay rule. 473 A.2d at 838. In discussing whether evidence admitted pursuant to the provision bore sufficient indicia of reliability to satisfy the purpose of the Confrontation Clause, the court noted that identifying a controlled substance is determined by a well recognized chemical procedure and the reports thus produced contain objective facts rather than opinions. Moreover, chemists who conduct such examinations do so routinely, generally have little interest in the outcome of a case, and are under a duty to make accurate reports. Finally, D.C. Code § 33-556 does not preclude the defendant from inquiring into the reliability of the test, since he may subpoena the chemist and subject him to crossexamination.

The same or similar factors are present with respect to other expert examinations such as ballistics and handwriting examinations: recognized standards exist for the analyses which therefore result in reports that contain objectively obtained facts, and such experts normally have no interest in or reason to falsify the outcome of a particular analysis. Most important, the amendment we are suggesting has a provision allowing the defendant in a criminal case to subpoena the expert and subject him or her to cross-examination.

The practical significance of the District of Columbia statute on which our proposal is modeled is that DEA chemists -- unless subpoenaed -- do not have to appear personally in court to testify to the results of their tests of controlled substances, thereby saving not only their time but that of the parties and the courts. No witness is even required to authenticate the report because the D.C. Code provision has been interpreted as "extend[ing] admissibility of a chemist's report from the business records exception to a business records-type subset of the official records exception to the hearsay rule." Giles v. District of Columbia, 548 A.2d 48, 54 (D.C. App. 1988). Thus, in cases where a defendant has no desire to contest the chemist's report, but for tactical reasons does not want to stipulate to its conclusions, the D.C. Code provision sets out an efficient way to introduce the evidence. [1]

The same is true with similar reports of other experts. Frequently in federal trials the results of expert analyses are not contested. Our proposal would allow the introduction, by either side, of the expert's testimony in such a situation without the necessity (but preserving the opportunity) of calling the expert,

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[1] Of course, there may also be situations in which the government does not wish to introduce the evidence by stipulation but would prefer not to take the time to call the chemist.

a saving of time for both the court and the expert. Since the rationale for the amendment does not depend on whether the expert is employed by the government, our proposal would allow such an uncontested introduction in cases of tests by private sector experts as well.

We think that the best way to accomplish this is to amend Rule 803(6) of the Federal Rules of Evidence. Specifically, we recommend that the current Rule 803(6) be redesignated 803(6)(a), and that new subsections (b), (c), and (d) be added as follows:

> (b) An official report of chain of custody and of an analysis of a substance, object, or writing, performed by an expert with an official duty to perform such analysis, shall, when attested to by that expert and by another person (if any) having legal custody of the report, be admissible as evidence of the facts stated therein and the results of that analysis. Authentication of an official report offered under this subsection may be made pursuant to Rule 902.
>
> (c) A report of chain of custody and of an analysis of a substance, object, or writing, performed by an expert who performed such analysis in the course of a regularly conducted business activity, shall, when attested to by that expert and by another person (if any) having custody of the report, be admissible as evidence of the facts stated therein and the results of that analysis.
>
> (d) If a party plans to offer a report pursuant to subsections (b) or (c), a copy of the report shall be furnished to every other party or his attorney not later than five days prior to trial. If the expert is subpoenaed for examination, the expert must be found qualified as such before the introduction of the report. If the expert or custodian is subpoenaed for examination, the subpoena shall be without fee or cost and the examination shall be as on cross-examination.

We note that the final sentence of subsection (b) of our proposal, which states that authentication of such an official report may be accomplished pursuant to Rule 902, is to make clear that such a report, although allowed into evidence under the "business records" exception to the hearsay rule, is to be treated as if it were admitted under exception 8 (public records), and self-authenticated, such as with an official seal, rather than by calling a witness. This is consistent with the court's statement in Giles, quoted above with respect to reports admitted under the D.C. rule, that the rule is really a subset of the official records exception.

Your and the other Committee members' consideration of this matter is deeply appreciated.

Sincerely,

Roger A. Pauley, Director
Office of Legislation
Criminal Division

cc: Margaret A. Berger

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

AGENDA ITEM - 10
Tucson, Arizona
January 12-15, 1994

TO: Honorable Alicemarie Stotler, Chair, and Members of the Standing Committee on Rules of Practice and Procedure

FROM: Honorable James K. Logan, Chair
Advisory Committee on Appellate Rules

DATE: December 10, 1993

The Advisory Committee on Appellate Rules has one new proposal for the Standing Committee to review. At its September meeting the Advisory Committee reviewed the proposed Guidelines for Filing by Facsimile that were presented to the Judicial Conference at its fall meeting. The Advisory Committee recommends a number of changes in the Guidelines and has developed Model Local Rules governing fax filing. The Committee intends to offer the model rules for consideration by those courts of appeals that wish to permit facsimile filing. Copies of both the amended Guidelines and the proposed Model Rules are attached to this memorandum. The Committee discussion about these items is summarized at pages 1-3 and 28-38 of the minutes of the September meeting, which are also attached to this memorandum.

This memorandum will outline the status of the various projects recently completed by and under consideration by the Advisory Committee.

I. On December 1, 1993, amendments to Fed. R. App. P. 3, 3.1, 4, 5.1, 6, 10, 12, 15, 25, 28, and 34 and to Forms 1, 2, and 3 became effective.

Amendments to Rules 3(c), 12, and 15 and Forms 1, 2, and 3 deal with the Torres problem and the question of sufficient identification of the parties filing a notice of appeal or petition for review. The amendment to Rule 3 allows an attorney representing more than one party to indicate which parties are appealing without naming them

*The material on fax filing has been removed and inserted in agenda item #7, "Proposed Standards on Facsimile Transmissions."

individually as long as it is objectively clear which parties intend to appeal. The amendment to Rule 15, however, requires that each petitioner be named because a petition for review of an agency decision is the first filing in any court and is, therefore, analogous to a complaint in which all parties must be named. Rule 12 is amended to require a representation statement, a non-jurisdictional document in which an attorney who represents more than one party on appeal names each party represented by the attorney. Forms 1, 2, and 3 are amended to include cross-references to the appropriate rules concerning identification of the parties.

Amendments to Rules 3(d), 4(a)(4), 4(b) and 6 are intended to eliminate the trap that 4(a)(4) created for a litigant who filed a notice of appeal before the disposition of one of the posttrial motions enumerated in that paragraph and also eliminate related problems in criminal and bankruptcy cases. Rule 4(a)(4) treated such a notice of appeal as null and required the litigant to file a new notice after disposition of the motion. If a party failed to file a new notice of appeal, the court of appeals lacked jurisdiction to hear the appeal. The amendments hold a notice of appeal filed before disposition of the posttrial motion in abeyance and the notice ripens into an effective notice upon disposition of the last posttrial motion.

In addition Rule 4 is amended in a number of other ways:

A. Paragraph (a)(2) is amended to treat all notices of appeal filed after announcement of a decision or order but before formal entry of such order as if the notice of appeal had been filed after such entry.

B. Paragraph (a)(4) is amended to treat motions under Rule 60 that are made within 10 days after entry of judgment as if they were motions under Rule 59. This eliminates the difficulty of determining whether a posttrial motion made within 10 days after entry of judgment is a Rule 59(e) motion, which tolls the time for filing an appeal, or a Rule 60 motion, which does not.

C. Paragraph (a)(4) is amended further to exclude motions for attorney's fees from the class of motions that extend the time for filing a notice of appeal.

D. Subdivision (b) is amended by adding motions for judgment of acquittal to the list of tolling motions. Such motions are the equivalent of Fed. R. Civ. P. 50(b) motions which toll the running of time for appeal in civil cases.

E. To make it clear in criminal cases that a notice of appeal need not be filed before entry of judgment, another amendment to 4(b) states that an appeal may be taken within 10 days after the entry of an order disposing of a tolling motion, or within 10 days after the entry of judgment, whichever is later.

F. Subdivision (b) is further amended to allow a sentencing court to act under Fed. R. Crim. P. 35(c) to correct an arithmetical, technical, or other clear error in sentencing even if a notice of appeal has been filed.

Amendments to Rules 4(c) and 25 make papers filed by an inmate confined in an institution timely if deposited in the institution's internal mail system, with postage prepaid, on or before the filing date.

The amendments to Rule 3.1 and 5.1 reflect the change in title from magistrate to magistrate judge.

The amendment to Rule 10 corrects a printing error.

The amendment to Rule 28 requires an appellant's brief to include a statement of the standard of review.

The amendment to Rule 34 eliminates the requirement that an opening argument include a statement of the case.

II. The Judicial Conference of the United States approved proposed amendments to Fed. R. App. P. 1, 3, 5, 5.1, 9, 13, 21, 25, 26.1, 27, 28, 30, 31, 33, 35, 38, 40, 41, and 49. Those proposed amendments have been forwarded to the Supreme Court for its consideration.

The proposed amendments to Rule 3, 5, 5.1, 13, 21, 25, 26.1, 27, 30, 31, and 35 deal with the number of copies of documents that must be filed with a court of appeals. The amendments generally include identical language stating that an original and a certain number of copies must be filed "unless the court requires the filing of a different number of copies by local rule or by order in a particular case." The amendments to Rules 3, 13, and 35, however, differ from the others in that they do not establish a baseline number of copies. The amendments to Rule 3 and 13 require an appellant to file sufficient copies of a notice of appeal to enable the district court to serve each party with a copy. Amended Rule 35, governing in banc hearings, provides that the number of copies will be prescribed by local rule. Because the number of copies needed in an in banc proceeding is directly related to the number of judges on the court, establishing the number by local rule is the most sensible approach.

Rule 9 governing review of a release decision in a criminal case has been completely rewritten. The proposed amendments recognize the government's ability to appeal release decisions. The amendments also require a party seeking review to supply the court with certain basic documents: a copy of the district court's order regarding release and its statement of reasons; and, if the appellant questions the factual basis for the district court's order, a transcript of the release proceedings in the district court. In addition, subdivision (b) clarifies those instances in which review may be sought by

motion rather than by notice of appeal.

Another proposed amendment to Rule 25 provides that a clerk may not refuse to file a paper solely because it is not presented in proper form.

The proposed amendment to Rule 28 requires that a brief include a summary of argument.

Rule 33 governing appellate conferences has been completely rewritten. The proposed amendments make a number of changes: 1) the court may require parties to attend the conference in appropriate cases; 2) settlement of the case is a possible conference topic; 3) persons other than judges may preside over a conference; and 4) an attorney must consult with his or her client before a settlement conference and obtain as much authority as feasible to settle the case.

The proposed amendments to Rule 38 require that before a court of appeals may impose sanctions, the person to be sanctioned must have notice and an opportunity to respond.

A proposed amendment to Rules 40 lengthens the time for filing a petition for rehearing from 14 to 45 days in civil cases involving the United States or its agencies or officers. A companion amendment to Rule 41 would key the time for issuance of the mandate to the expiration of the time for filing a petition for rehearing unless such a petition is filed, in which case the mandate issues 7 days after the entry of the order denying the motion.

Another proposed amendment to Rule 41 requires a motion for a stay of mandate to show that a petition for certiorari would present a substantial question and that there is good cause for a stay.

Proposed Rule 48 authorizes the use of special masters in the courts of appeals.

III. On November 1, 1993, proposed amendments to Fed. R. App. P. 4, 8, 10, 21, 25, 32, 47, and 49 were published for comment.

The proposed amendments to Rule 4 provide that a party who wants to obtain review of an alteration or amendment of a judgment must either file a notice of appeal or amend a previously filed notice. The amendments also provide that a posttrial motion must be "filed" no later than 10 days after entry of judgment in order to affect the finality of the judgment and extend the period for filing a notice of appeal. This change is a

companion to proposed amendments to Fed. R. Civ. P. 50, 52, and 59.

The amendment to Rule 8 conforms a cross-reference to Fed. R. Crim. P. 38 to previous amendments to that Rule.

The amendment to Rule 10 suspends the 10-day period for ordering a transcript if a timely postjudgment motion is made and a notice of appeal is suspended under the new amendments to Fed. R. app. P. 4(a)(4).

The proposed amendments to Rule 21 provide that the trial judge is not named in a petition for mandamus and is not treated as a respondent. The amendments also provide that the judge shall be represented *pro forma* by counsel for the party opposing relief. The judge is, however, permitted to appear to oppose issuance of the writ if the judge chooses or if the court of appeals orders the judge to do so.

One proposed amendment to Rule 25 provides that in order to file a brief using the mailbox rule, first-class mail is sufficient. Another proposed amendment permits a court of appeals by local rule or by order in a particular case, to permit service by facsimile.

The proposed amendments to Rule 32 are being republished to elicit additional comments about the printing provisions. The published draft states that if a brief is not commercially printed it must be produced 1) with no more than 11 characters per inch or 2) in 11 point type or larger and with an average or no more than 300 words per page. A footnote to the rule indicates, however, that the Committee is considering alternative printing provisions.

The proposed amendments to Rule 47 and 49 are the result of the collaborative efforts of all of the advisory committees to develop uniform rules governing local rules and technical amendments.

IV. At its September 1993 meeting the Advisory Committee approved in substance changes to Rules 27, 29, and 35 but specific language has not yet been approved. The Committee also has made recommendations concerning the Guidelines for Facsimile Transmission and has been working to develop model local rules for those courts of appeals that wish to permit fax filing.

An extensive rewriting and updating of Rule 27 governing motions practice has been discussed and several changes have been approved but the actual redrafting is not yet complete. Judge Stephen Williams chairs the subcommittee that has been working

on Rule 27.

In addition, the Committee has approved numerous changes in Rule 29 governing the filing of amicus briefs. The Reporter has been asked to prepare a final draft for consideration at the spring meeting.

Changes to Rule 35, governing in banc proceedings, also have been approved by the Committee but not yet finalized. In light of the fact that additional changes to Rule 35 will be forthcoming soon, the Advisory Committee requested that Judge Keeton withdraw the proposed amendments to Rule 35 from the packet published on November 1. The Committee thought it preferable to publish all its recommended changes at one time; Judge Keeton concurred.

A number of other items were on the Committee's agenda for its fall meeting but because the Committee spent more than a half day discussing fax filing, several items were postponed until the spring meeting.

A copy of the draft minutes for the fall meeting and of the Advisory Committee's table of agenda items, its "docket," are attached to this report for your information. At the Advisory Committee's September meeting, Chief Judge Sloviter suggested that the Committee circulate the table of agenda items to the circuits to keep them informed of the status of the various items under consideration. I agreed to do so and will be circulating it to the chief judges.

The Appellate Rules Committee meeting has been scheduled for April 25 and 26 in Denver.

MINUTES OF THE MEETING
OF THE ADVISORY COMMITTEE ON APPELLATE RULES
SEPTEMBER 22 & 23, 1993

Judge Ripple called the meeting to order at 8:40 a.m. in Rooms B and C of the Education Center in the Federal Judiciary Building, in Washington, D.C.. In addition to Judge Ripple the Committee Chair, the following Committee members were present: Judge Danny Boggs, Mr. Donald Froeb, Judge Cynthia Hall, Judge James Logan, Chief Justice Arthur A. McGiverin, Mr. Luther Munford, and Judge Stephen Williams. Mr. Robert Kopp and Mr. Mark Levy attended on behalf of Solicitor General Days. Judge Robert Keeton, Chair of the Standing Committee, and Chief Judge Dolores Sloviter, Liaison from the Standing Committee to the Advisory Committee, were present. Mr. Strubbe, the Clerk of the Seventh Circuit, attended on behalf of the clerks. Professor Mooney, the Reporter, was present. Mr. Peter McCabe - the Secretary, Mr. John Rabiej - Chief of the Rules Support Office, Mr. Paul Zingg - Mr. McCabe's assistant, Mr. John Hennemuth of the Administrative Office, and Mr. Joseph Spaniol were present along with Ms. Judy McKenna of the Federal Judicial Center.

Judge Ripple began by introducing Judge Logan as the chair designate of the Committee. Judge Ripple welcomed Mr. Levy, the Deputy Attorney General representing the Solicitor General. Judge Ripple also welcomed Judge Keeton and Chief Judge Sloviter from the Standing Committee, and Mr. Spaniol, the former Clerk of the Supreme Court of the United States and long time secretary to the rules committees.

Judge Ripple stated that his objective at this meeting was to complete work on as many items on the docket as possible.

Judge Ripple asked Judge Keeton to report on the Judicial Conference meeting held earlier in the week. Judge Keeton reported that Chief Judge Breyer of the First Circuit had placed appellate rules 28, 38, 40, and 41 on the discussion calendar for the Judicial Conference meeting. Both Judge Keeton and Judge Ripple spoke with Chief Judge Breyer prior to the Judicial Conference meeting and convinced him that the Advisory Committee had considered suggestions that he had made early in the development of some of those rules. As a result of those discussions, Chief Judge Breyer was persuaded that it was not necessary to retain the appellate rules on the discussion calendar. The Chief Justice, however, said that the rules could not be removed from the discussion calendar without unanimous consent. Unanimous consent was forthcoming at the meeting as a result of which all appellate rules would be forwarded to the Supreme Court.

Judge Keeton also reported that the Court Administration Committee had urged the Judicial Conference to approve fax filing guidelines so that those courts desirous of permitting fax filings on a routine basis my adopt local rules authorizing such filings. At last summer's Standing Committee meeting, the Committee had discussed fax filing

guidelines prepared by the Court Administration Committee and the Committee on Automation. The Standing Committee was troubled by the initial draft because it contained provisions that ordinarily would be contained in the rules. For example, the guidelines defined "filing" in the context of fax filing. As a result, a rump committee put together by Judge Keeton studied the guidelines and made suggestions for change. It was those revised guidelines that were presented to the Judicial Conference by the Court Administration Committee for approval.

In spite of the revisions made during the Standing Committee meeting, Judge Keeton had urged the Judicial Conference not to approve even the revised guidelines. He noted that the guidelines would impose procedural requirements (such as maintaining an original signed document until the conclusion of the litigation) that are not found in the rules, and that adoption of the guidelines would result in the imposition of those requirements without compliance with the Rules Enabling Act procedures. Judge Keeton had pointed out that in light of the ongoing struggle to convince Congress not to bypass the Rules Enabling Act process by passing direct amendments to the rules, it could prove embarrassing to the Judicial Conference to approve what are in effect rules amendments without following the Rules Enabling Act procedures. As a result of Judge Keeton's arguments, the Judicial Conference passed a motion to delay action on the fax filing guidelines until September 1994.

Judge Keeton pointed out to the Advisory Committee that in order to have a recommendation ready for the Judicial Conference by fall 1994 and to comply with the Rules Enabling Act procedures, any necessary rule amendments would need to be published before the Standing Committee's January 1994 meeting. He further noted that drafts of the further revised guidelines and rule amendments would need to be prepared in the next month or two and approved on an expedited basis for publication.

Judge Keeton stated that the key task of the Advisory Committees would be to modify the guidelines so that they do not conflict with the rules of procedure. Judge Keeton indicated that he had a rough redraft of the guidelines that he would offer for the Committee's consideration later in the meeting.

Judge Keeton further stated that in private conversation with Judge Boyle during the Judicial Conference meeting, Judge Boyle indicated that if fax transmissions to court clerks are going to be regulated, he hoped the rules also would address fax service.

Chief Judge Sloviter, who also had attended the Judicial Conference, stated that she was reasonably convinced that the fax guidelines would have been approved but for Judge Keeton's forceful arguments. In her opinion, the argument that approval of the guidelines would undercut the Rules Enabling Act was the persuasive factor. Both Judge Keeton and Chief Judge Sloviter stated that the Judicial Conference is impatient with the long length of time between generation of an idea and its presentation to the Conference.

Judge Ripple indicated that in light of those developments the Committee would devote whatever time was necessary the following morning to consideration of the guidelines and rule amendments.

Judge Ripple returned to Judge Keeton's opening remarks about the rules placed on the discussion calendar for the Judicial Conference. During discussions preceding the meeting of the Judicial Conference, Judge Ripple learned that there had been some confusion arising from the fact that the Advisory Committee's GAP report did not summarize comments submitted to the Committee when early drafts were circulated to the Chief Judges for comment. When it was explained that a GAP report only summarizes the comments received during the formal comment period and not those generated by initial consultation with the circuits during the process of developing a proposal, Chief Judge Breyer stated that he hoped this experience would not cause the committee to discontinue the process of consultation that it often uses. Judge Ripple stated his belief that the process of consultation with the circuits has been extremely useful to the Committee and should be continued in those instances where the Committee believes it would be appropriate.

Judge Ripple stated that Chief Judge Breyer did express concern, however, about the notice requirements in the proposed amendments to Rule 38. Chief Judge Breyer sees a need for an expeditious way that a court of appeals can bring a misstep to the attention of an attorney without the punitive aspects currently associated with "sanctions." Because imposition of sanctions can have implications for an attorney's career, due process and fairness concerns enter the picture; Chief Judge Breyer, however, believes that there should be some means by which a court can bring matters to the attention of counsel that do not result in a mark against the attorney's professional reputation. Judge Ripple stated that he had promised Chief Judge Breyer that his concerns would be added to the Committee's docket and referred to Judge Boggs' subcommittee on sanctions and would, in due course, be considered by the full committee.

Before turning to the items on the agenda for the meeting, Judge Ripple indicated that items 91-6 and 91-15 had been circulated as possible "dead list" items and that all votes had indicated that no further action was needed. He stated that unless a member voiced objection, both items would be stricken from the docket. No objections were heard.

Item 91-28

Item 91-28 is a proposal to redraft and update Rule 27, the rule governing motions. Judge Ripple indicated that Item 91-28 was being taken out of turn because Judge Williams, who chaired the sub-committee on this item, would need to leave before the close of the meeting that afternoon in order to attend a reception for his colleague Judge Ginsburg.

Judge Ripple indicated that the Department of Justice had prepared a draft for the Committee's consideration and he had assigned the draft to a subcommittee for study and solicitation of the views of the circuits'. Judge Ripple stated that at this meeting the Committee should be ready to make substantive decisions. He and Judge Logan agreed that once the substantive decisions are made the subcommittee should work with the Reporter to come up with a refined text for the Committee's next meeting. Because Judge Williams chaired the subcommittee, Judge Ripple asked him to lead the discussion.

Judge Williams indicated that his memorandum of September 8 was a composite of all the written comments he had received on the draft. The comments were arranged topically and in the order that the topics appear in the draft. Judge Williams proposed that each topic be addressed in turn.

1. Nature of Motions

The first suggestion, appearing at the top of page 3 of the memorandum, was that the rule should state that "an application for . . . relief shall be made by filing a motion." The current appellate rule and the civil rules include such statements. Because the suggestion was Mr. Munford's, Judge Ripple asked him whether something like the first sentence of the existing rule would be sufficient. Mr. Munford replied that it would except that it may not be necessary to include the direction that a motion be accompanied by proof of service because Rule 25 generally requires proof of service to accompany papers presented for filing. After a brief discussion, Mr. Munford moved that the draft be amended to include such a statement; Mr. Kopp seconded the motion. It passed by a vote of 7 in favor, two opposed.

2. The Question of Oral Motions

Judge Williams then asked the Committee to turn to pages 4 and 5 of his memorandum and that portion of the draft rule stating that motions must be in writing except for motions made in open court with opposing counsel present. Judge Williams indicated that there was general approval of the requirement that motions be in writing but that the exception for motions made in open court in the presence of opposing counsel had generated some opposition.

The First Circuit opposed the exception because the tapes of its proceedings are destroyed and the court would have no record of the motion. Judge Williams stated that in his seven years on the court of appeals the only motions made before him in open court have been for an attorney to appeal *pro hac vice*. He further indicated, however, that if a more substantive motion were made in open court, the court would be free to order that the tapes be preserved.

Judge Logan indicated that the Tenth Circuit's experience is that some motions

do not need to be reduced to writing. For example, if at oral argument the court wishes to discuss points not developed in the parties' briefs, counsel often ask permission to file supplemental materials. In such instances the court enters an order setting the date for the filing of such materials; no other writing seems necessary.

Chief Judge Sloviter stated that in the Third Circuit when something such a Judge Logan described occurs, the crier enters minutes and the docket reflects what has occurred.

Mr. Strubbe stated that the Seventh Circuit has a form that is given to the judges' law clerks and the clerks note any order made by the court. The clerk of the court enters the order on the docket so that the clerks' office knows to expect additional documents.

Mr. Munford indicated that in the Fifth Circuit counsel do not have access to the records of the proceedings in court and if a provision as broad as the draft were used, all sorts of motions would be made in open court.

Judge Ripple indicated that there are four possible approaches to the question:

1. no oral motions;
2. oral motions are permitted in open court but discouraged;
3. oral motions are permitted in open court but must be memorialized by submission in writing; or
4. motions must always be in writing.

Judge Sloviter suggested a fifth possibility: that oral motions be permitted only by leave of the panel.

Mr. Levy suggested yet another possibility: that oral motions be limited to housekeeping matters.

Mr. Froeb stated that he has never encountered a problem with oral motions and that the rules should not be cluttered with provisions governing insignificant or non-existent problems.

Judge Ripple indicated that he would like to take a straw vote in order to advance the discussion.

1. The proposal that oral motions would never be permitted was opposed unanimously.
2. The proposal that oral motions be permitted only as to procedural matters was favored by two members and opposed by five.
3. The suggestion that the consent of the court be required for any oral motion was favored by six members and opposed by two.

Mr. Kopp reminded the members that the draft was an attempt to create a national rule. The DOJ draft was prepared in light of the fact that oral motions are permitted in some circuits and reflects a belief that an umbrella rule should accommodate existing practices.

Judge Logan summarized the discussion by noting that there was consensus that there should be some leeway so that trivial oral motions need not be reduced to writing. As an example, he stated that a lawyer's request at oral argument to share argument time with co-counsel typically would be considered and acted upon at that time and there would be no need to create a paper record on that issue. He suggested that the details of the drafting could be left to the sub-committee and that perhaps the problem could be most satisfactorily addressed in the committee notes.

The discussion pointed out that some circuits permit motions for extension of time to be made over the telephone to the clerk. Mr. Munford stated that the 5th Circuit permits such motions to be made over the telephone but must be followed up in writing. Mr. Kopp stated that his draft did not intend to disturb such practices. The committee unanimously agreed that a court should be able to delegate authority to the clerk to handle procedural or housekeeping matters telephonically.

Mr. Munford questioned the need for the opening phrase of the draft rule which says "[e]xcept where otherwise specifically provided by these Rules" motions shall be in writing. Because there are no contrary provisions in the FRAP, he suggested that the phrase may be unnecessary.

3. Documents that Must Accompany a Motion

Judge Williams asked the Committee to turn to pages 6 and 7 of the memorandum dealing that portion of the draft rule governing the documents that must accompany a motion. He noted that Rule 27 currently says that a motion must "set forth the order or relief sought" and that language can be read to imply that a moving party must provide a proposed order along with the motion. The Justice Department's draft deletes the language without stating that a proposed order is not desired. Judge Keeton pointed out that the Civil Rules strongly discourage submission of proposed orders unless the court directs otherwise. The Committee agreed that it should be made clear that no proposed order is desired.

With regard to "supporting papers" the DOJ draft includes the following three subparagraphs

(a) Affidavits should contain factual information only. Affidavits containing legal argument will be treated as memoranda of law.
(b) A copy of the lower court opinion or agency decision shall be included as a separately identified exhibit by a moving party seeking substantive relief.

(c) Exhibits attached should be only those necessary for determination of the motion.

Judge Williams asked whether it is appropriate to include such provisions in the national rules or whether they really are simply helpful suggestions to counsel.

Judge Ripple stated that a motion should be a self-contained packet of materials and that if it is necessary to call the clerk's office to get a copy of the lower court opinion etc., the time for deciding a motion may be significantly lengthened.

Mr. Froeb stated that he thought a lawyer would automatically include the necessary supporting papers but that if that is not so, perhaps the sort of directions included in the draft are necessary.

Mr. Kopp stated once again that he attempted to develop a draft that would be complete enough that the circuits would not feel a need to supplement it.

Judge Ripple summarized the options and asked the Committee to express its preliminary preferences.

1. The first option would be to stop after the statement that "[i]f a motion is supported by affidavits or other papers, they shall be served and filed with the motion" and not provide any further instructions. Three members favored that approach.

2. A second option would be to simply direct that all necessary supporting documents should be appended. One member favored that approach.

3. A third option would be to put all such directions in the committee notes. No member favored that approach.

4. A fourth option would be to take the approach taken in the DOJ draft. Five members favored that approach.

Given the preference for the fourth option, Judge Ripple called for a vote on that approach. Retention of the draft language was approved by a vote of six in favor and three opposed.

Judge Williams noted that Mr. Munford had suggested a slight adjustment in the language of the DOJ draft (a)(2)(c) but Mr. Munford requested that his suggestion be referred to the drafting subcommittee.

4. Briefs

Judge Williams directed the Committee's attention to the comments on page 8 concerning briefs. The DOJ draft deletes the language in the current rule stating that a motion may be supported by a brief.

The Federal Circuit commented that it explicitly prohibits the filing of briefs and Mr. Munford had suggested that if the intent is to ban separate briefs, then the rule should so state. Judge Logan said that the Tenth Circuit had discussed this issue and concluded that a motion and supporting arguments should be contained in a single document.

The single document approach was unanimously approved but several members indicated that the committee note should explain that a motion itself may contain supporting arguments. Mr. Spaniol noted that Supreme Court Rule 21 uses the single document approach and that its language might prove helpful in the drafting process.

5. Page Limitation

Judge Williams moved onto the page limitation provisions and comments discussed on pages 9 and 10 of his memorandum. Professor Mooney summarized the status of Rule 32, noting that a new proposal would be published on November 1. The new proposal would include a words per page limitation, although Judge Easterbrook had written to the Committee suggesting that characters per brief or words per brief would be preferable to words per page.

During discussion of the status of Rule 32, Chief Judge Sloviter noted that if the members of the Advisory Committee are confused about where certain rules proposals are in the pipeline, that those circuits that are not represented on the Committee are even more confused. She suggested that the table of agenda items should be circulated to the circuits or at least to the rules committees in the circuits. Both Judge Ripple and Judge Logan agreed that circulation of the table would be helpful. Judge Ripple further suggested that the Chair's letter to the Chief Judge should suggest that it be circulated to the rules committee.

Judge Williams suggested that given the uncertain development of Rule 32, it may be difficult to proceed with such provisions in Rule 27.

Judge Keeton suggested that the problem might be finessed by providing that a motion or response to a motion cannot exceed 1/2 the length permitted for a principal brief under Rule 32 and that a reply to a response cannot exceed 1/4 of that length.

Judge Ripple suggested separating the discussion concerning the length of a reply from that concerning the length of a motion or response. He thought that some

members might take the position that the rule should not authorize a reply to a response and that discussion of replies might muddy the discussion of Judge Keeton's proposal. The Committee concurred.

Judge Hall noted that the Ninth Circuit has reduced the length of a brief from 50 pages to 35 pages. Judge Ripple stated that under Judge Keeton's proposal, to the extent that a circuit has authority to limit the length of its briefs, it would correspondingly limit the length of its motions.

Judge Logan said that when the Tenth Circuit reviewed the DOJ draft, the Tenth thought that the suggested twenty page limit was too long.

Mr. Kopp replied that motions vary from minor to very major (such as a motion for summary affirmance or a motion to dismiss for lack of jurisdiction) so that in some contexts a motion is more important than the brief. The twenty page limit was proposed as a fair compromise. Mr. Kopp stated that Judge Keeton's draft is a good way to finesse the fact that Rule 32 is in flux but Mr. Kopp further noted that if the committee consensus was that the limit on a motion should be 20 pages, one would end up with a awkward fraction.

Chief Judge Sloviter said that the disadvantage of Judge Keeton's proposal is that the motion rule would not be self-contained; one would need to refer to another rule to know the limit. She also said that the number of pages for a motion has never posed the sort of problem that has been encountered with the length limitations on briefs.

Mr. Froeb agreed that the motion rule should be as free-standing as possible. With regard to the specific number of pages, he suggested that the real question is how many motions to exceed the page limits do the courts want to receive. Because there are motions of the type that may decide the appeal, if the page limit is set too low, there will be many requests to exceed the limit. Mr. Froeb suggested that a mid-line number should be settled upon so that there will not be an excessive number of motions to exceed the limit.

Mr. Munford stated that he liked separating the page limit question from the typeface issue. He believes that it is preferable to have the motions rule as self-contained as possible and that it would be good to have the page limit in Rule 27 but that the typeface question could await the Rule 32 resolution.

Judge Hall stated that in her experience there has not been a problem with the length of motions. In her experience, the length of a motion has generally been commensurate with the difficulty of the issues presented. She has been more troubled by the attachments being either excessive or insufficient. She expressed willingness to do without a page limit.

Judge Logan said that the Tenth Circuit was concerned that once a page limit is established, lawyers would tend to use the maximum number of pages permitted. The Tenth Circuit, therefore, favored a shorter limit which would force parties who wish to file a longer motion to seek court permission to file a longer document.

Judge Williams said that lawyers do tend to use the entire 50 pages allowed for briefs whether the issues warrant it or not, but that his experience has been different with motions and that the D.C. Circuit has had a page limit on motions ever since he has been on the court. He further stated that he rarely receives a motion to exceed the page limits.

Mr. Kopp stated that the draft includes a page limitation to eliminate the need for local rules establishing limitations. He also believes that the existence of a limit usually provides an incentive to carefully structure one's writing. He stated, however, that he would rather have no limit than a 15 page limit. In his opinion, too many motions cannot be adequately supported in 15 pages but that 20 or 25 pages is usually sufficient.

Judge Ripple called for a straw vote on the three options posed:
1. Three members favored imposing no limit.
2. Two members favored using Judge Keeton's proportional approach.
3. Four members favored using a twenty page limit.

Given that outcome, Judge Ripple called for a final vote on options one and three. Four members voted for no page limit. Five members voted for a twenty page limit.

Judge Williams noted that the DOJ proposed 27(a)(4), on page 11 of his memorandum, deals with typeface questions. Judge Ripple suggested that the Committee not attempt to deal with that issue until Rule 32 is resolved because Rules 27(a)(4) and 32 should use the same approach. Mr. Spaniol noted that Rule 32(b) purports to establish format requirements for motions. He suggested that the Committee should determine whether the format requirements should be in both rules or only one, and which one and, if they are to be both places, they clearly should use similar or identical language.

Judge Logan suggested that Rule 27(a)(4) should simply cross-reference Rule 32(b). Mr. Munford countered by suggesting that it would be preferable to include the formatting information for motions in Rule 27 and to eliminate Rule 32(b). Judge Ripple responded, however, that Rule 32(b), deals with petitions for rehearing and other documents as well as with motions. There was discussion about whether a cross-reference to 32(b) would make the binding and cover requirements of Rule 32(a) applicable to motions. Judge Williams suggested that removing motions from 32(b) might be preferable. Mr. Spaniol suggested using the language of Supreme Court Rule 34 so that a motion would be "stapled or bound at the upper left hand corner." The working out of this problem was left to the drafting subcommittee.

6. Responses that Request Affirmative Relief

Judge Williams asked the Committee to turn to page 13 of the memorandum dealing with responses to motions. He noted that there are two issues that the Committee must address: the first is whether the rule should allow a party to combine a response to a motion with a request for affirmative relief and second, if the answer to the first question is yes, then page limits for such a document must be established.

The DOJ proposal allowing combined documents was based upon a D.C. Circuit Rule. Judge Williams stated, however, that such combined documents are rare and that he could not cite any example where the D.C. rule either caused or solved any problem. Judge Williams said, however, that the rule is useful because there often is substantial overlap of arguments in the response and in the request for affirmative relief.

Mr. Kopp said that when a lawyer is not simply opposing a motion but also is asking for summary affirmance, it is not clear how the documents should be structured. Because the arguments overlap, it is not clear whether the response should be followed by a one page motion or whether the response should conclude with a paragraph asking for summary affirmance. If it is decided to include the request for relief in a response, Mr. Kopp noted that it is important that the caption alert the court to the request for relief.

Mr. Munford stated that in his opinion, the problem is too obscure to address in a national rule.

Judge Ripple called for a straw vote as to whether the rule should provide that a response may include a request for affirmative relief. Four members voted in favor of doing so, and five opposed. Given the opposition, Mr. Kopp suggested that the topic be addressed in the comment saying either that there must be a separate motion for affirmative relief or that the motion may be combined with the response. Mr. Levy pointed out that with a separate motion, the original movant would have the opportunity to respond.

Because the previous vote had been that the rule need not specifically address the combined document question, Judge Ripple asked for a clarifying vote on whether the Committee substantively supports the idea of a combined response and request for cross-relief even though the rule does not speak about it. Seven members indicated that they do support that approach. Therefore, the drafting subcommittee should try to address the matter in the notes to the extent appropriate. Mr. Froeb indicated that in drafting the rule it is important to keep in mind that many lawyers want to be the last party to speak.

7. Replies

Judge Williams asked the Committee to turn to page 15 of his memorandum and to proposed Rule 27(a)(6) dealing with a reply to a response. The DOJ draft allows a reply to be filed within three days after service of a response.

Judge Williams indicated that he finds replies very useful to clarify a point that appears for the first time in the response. He was surprised, therefore, to find opposition to the practice.

Judge Logan said that the Tenth Circuit's opposition was based upon its belief that most motions are relatively simple and that a reply is not needed and simply delays the ruling on the motion.

Mr. Kopp stated that if the rule does not authorize a reply and the party believes that it is needed, the party will file a motion for permission to reply.

Mr. Strubbe said that his circuit has always refused to file a reply to a response to a motion unless the panel wants a reply and orders one.

Mr. Levy said that a movant wants assurance that the court will not act before the movant has a chance to reply or at least to move for permission to reply. He expressed the opinion that it is only fair to provide the moving party with the last word.

Judge Keeton pointed out that although the draft says that a reply must be filed within three days after service, the time for reply is really much longer -- probably a minimum of eight days. Rule 26(c) provides three additional days after service by mail and that in some instances there would be an additional two days because of the week-end. So, the delay is more significant than the draft indicates.

Judge Williams pointed out, however, that the party with the right to reply is the moving party. If there is urgency to decide the motion, the moving party could waive the right to reply or act very quickly or the motion panel could shorten the time.

Judge Ripple asked the Committee to vote on whether the national rule should provide an opportunity to reply. Five members favored having a provision for a reply; four opposed it. Given that vote, he asked the Committee to vote on the three day period for filing a reply; all members voted in favor of that time limit.

Judge Williams pointed out that the DOJ draft, page 9 of his memorandum, proposed a seven page limit on a reply. Judge Williams suggested that if the motion and response are to be limited to 20 pages, that the reply should be one-half of that or 10 pages. Judge Ripple treated the suggestion as a motion and he seconded it; the Committee approved it unanimously.

8. Procedural Relief

The Committee then turned its attention to page 17 of the memorandum dealing with procedural orders. The DOJ draft, like current Rule 27, permits the court to dispose of a motion for procedural relief before a response to the motion is filed. The primary issue addressed in the comments on the draft is how "timely opposition to the motion that is filed after the motion is granted in whole or in part" should be treated. The DOJ draft said that it would be "treated as a motion to vacate the order." The Federal Circuit and the Seventh Circuit treat such responses as moot and the opposing party must file a motion to reconsider if he or she wants to the court to reexamine the appropriateness of the relief granted.

Judge Ripple outlined the possible approaches to the question. First, the response to the motion may be treated as a motion to vacate the order and ruled upon (the DOJ proposal). Second, the response may be treated as moot and not ruled upon. Third, if the party wants to press his or her opposition to the motion, the party must file a motion for reconsideration which addresses the court's order granting the motion. A straw vote was taken and the approach taken in the draft received no support. There was consensus, however, that the rule should address the need to file a motion for reconsideration.

The Committee broke for lunch at noon.

The meeting resumed at 1:20 p.m.

Judge Williams indicated that with regard to the DOJ proposed Rule 27 subdivision (b), governing procedural orders, there were some miscellaneous points to be discussed. Judge Posner had asked whether the language on lines 8 and 9 of the draft requiring "[a]ny party adversely affected by such action" to file a motion for reconsideration, referred only to decisions made by the clerk or to any order on a motion. The Committee generally agreed that it should be clarified that the requirement applies to all orders.

Judge Posner had also suggested that the rule clarify whether a party can suggest an in banc hearing on a motions matter. Rule 35 states that there may be an in banc hearing on an "appeal or other proceeding" and the general consensus of the Committee was that Rule 35 authorizes in banc consideration of a motion. The Committee, however, was hesitant to be more specific about the ability of a party to request in banc consideration either in the text of Rules 35 or 27 or in Committee Notes. The Committee feared that such a change might be taken as an invitation to request in banc consideration of motions. Judge Logan made a motion that the Committee make no changes either in the text or the Committee Notes; Mr. Munford seconded the motion. Six members voted in favor of the motion; no one opposed it.

Mr. Munford withdrew his suggestion (p. 17) that clerks be limited to deciding unopposed motions.

9. Power of a Single Judge to Entertain Motions

Judge Williams directed the Committee's attention to DOJ proposed subdivision 27(c) (p. 19) dealing with the power of a single judge to entertain motions and noted that it had elicited no unfavorable comments. The Committee also had no comments.

10. Number of Copies

Judge Williams asked the Committee to turn to page 20 and DOJ proposed subdivision 27(d) dealing with the number of copies of motion papers that must be filed. The Reporter pointed out that the DOJ prepared its proposal prior to the time that the Committee had generally addressed the number of copies problems. The Committee had made consistent changes in all of the rules dealing with numbers of copies and those amendments, including an amendment to Rule 27(d), were approved by the Judicial Conference earlier in the week and would be forwarded to the Supreme Court for its consideration. The Committee decided that no further changes should be made Rule 27(d).

11. Oral Argument

Judge Williams turned to page 22 of his memorandum and DOJ proposed subdivision 27(e) stating that motions will be decided without oral argument unless the court orders otherwise. Once again, there was no opposition to this proposal and the Committee had no suggestions to offer.

12. Preemption of Circuit Rules

Judge Williams then directed the Committee's attention to page 23 of the memorandum and DOJ proposed subdivision 27(f) concerning preemption. The DOJ draft suggests that the provisions of Rule 27 should preempt local rulemaking on motions. Judge Williams and Mr. Munford noted that the Committee had rejected a similar preemption provision when it was proposed for Rule 32. They said that whether the national rules should preempt local rulemaking is a generic issue and saw no justification for treating it differently in the context of motions than with regard to briefs. Judge Williams moved to delete subdivision (f); Chief Justice McGiverin seconded the motion. Mr. Kopp stated that the issue had been given a thorough airing during the discussions of Rule 32 and that he would defer to the Committee's earlier judgment. The Committee passed the motion unanimously.

Mr. Munford pointed out that the Second Circuit requires that a party file a notice of motion form. He suggested that the Rule be amended to state that a notice of

motion is not required. The members of the Committee generally agreed that it would be a good idea to eliminate that practice. Mr. Munford moved that the Committee proposal include a provision that no notice of motion should be required; he suggested that it might be placed with the provision stating that briefs are not required. Judge Williams seconded the motion and it was approved unanimously.

Judge Ripple thanked Judge Williams for all his work on this item and asked the subcommittee composed of Judge Williams, Mr. Froeb, and Mr. Munford, to remain in place to continue working on Rule 27.

Item 91-23

Item 91-23 is a suggestion that each side file a single brief in consolidated or multi-party appeals. The Reporter had prepared three basic drafts for the Committee's consideration and she briefly explained them as follows:

1. Draft one simply encourages a single brief.

2. Draft two requires a single brief to the greatest extent practicable and requires a party who files a separate brief to include a certificate stating the reasons it was necessary.

3. Draft three requires a single brief unless the court orders otherwise.

In the event that the Committee considers it appropriate to distinguish between civil and criminal cases, she had drafted variations on drafts two and three that gave the parties greater discretion to file separate briefs in criminal cases.

Chief Judge Sloviter stated that the Third Circuit has a variation requiring a party filing a separate brief to pay a separate filing fee.

Mr. Munford opened the discussion by expressing his hesitation to support any of the drafts. He stated that coordinating the preparation of briefs with other parties would be fraught with problems. As an example he stated that in a medical malpractice case where a patient visits four different hospitals and is misdiagnosed in all four, even though all the hospitals are on the same side of the case they will have different interests and their attorneys may have conflict of interest problems. In his experience when parties can file a single brief, they often do so. He suggested that the Committee make no change or adopt the Eleventh Circuit's one lawyer, one brief rule or the Third Circuit's rule that when a joint appeal is filed there be only one brief (a one fee, one brief rule).

Mr. Froeb strongly concurred. He said that he would rather have the number of

pages be divided by the number of parties on one side than be forced to join in a brief that he considered substandard.

Chief Justice McGiverin said that the Iowa Rule of Appellate Procedure 14(j) is the same as FRAP 28(i) and it works very well; therefore, he also favored making no changes.

Mr. Levy agreed. In many cases there are differences in the legal arguments made by parties on the same side, as well as differences of strategies. Furthermore, he indicated that he would be loathe to disclose publicly the reasons why the parties are unable to file a consolidated brief because often they are matters of strategy that the parties should not be required to disclose and upon which the judges should not be asked to rule.

Judge Williams stated his desire to join the practitioners based upon his experience in attempting to do collaborative academic work. He did state that he finds Rule 28(i) a little chilly in that it simply permits joinder in a single brief. For that reason he stated a preference for draft one which encourages the filing of a single brief.

Judge Hall spoke in favor of draft three. The Ninth Circuit currently has a local rule requiring parties in a civil case to file a joint brief to the greatest extent practicable and encouraging the filing of a joint brief in criminal cases. She does not find those provisions helpful and believes that something stronger is needed. She further stated that she believes the problem is even greater in criminal cases than in civil cases.

Judge Ripple noted that in some cases the legal arguments may be virtually identical but the real problem with cooperation is that the abilities of the lawyers are unequal and the reason they do not collaborate is unspoken -- the better lawyer will not give in and allow the weaker one to write any portion of the brief.

Mr. Kopp said that he understands why the court would not want to be drowned in repetitive paper but that good advocates know that it is better to get together because their single brief will have stronger impact. He suggested that there might be ways to address the problem other than by rule. For example, he suggested that if parties file duplicative briefs that both of them would not be awarded full costs. He further suggested that the Committee Note state that the court expects that in the interest of good advocacy parties will cooperate in the preparation of a single brief.

Mr. Munford said that Mississippi tried giving parties a choice between cooperating in the preparation of a single brief or dividing the pages between the parties on the same side. The problem with that approach is that there is nothing to bargain with; if a party wants his or her own pages there is nothing you can do about it. In criminal cases, he believes that the 6th Amendment and the increasingly stringent rules

on conflicts of interest are the driving force that require the defendants to have separate lawyers in the first place. He indicated that it would be ironic for one set of rules to say that each criminal defendant must have his or her own lawyer but when they get to the appellate court the defendants must file only one brief.

Judge Logan moved the adoption of draft one. Judge Boggs seconded the motion. Mr. Kopp asked whether that was the proper juncture to discuss the treatment of the government. He stated that he is not sure that it is appropriate even to encourage the government to file a single brief with a private party because the government is supposed to represent an independent interest. Encouraging the government to file a consolidated brief with a private party would send the message that a private party has a role in shaping the position of the government.

Judge Boggs stated that there are cases in which the government is involved in litigation as a property holder and in those cases the government is not unlike any other private party. In his opinion, draft one would not say anything affirmatively improper.

Mr. Kopp suggested that a Committee Note might cure his hesitation. The note might indicate that because of its duty to represent the public interest, a governmental party might find it inappropriate in most instances to join in a brief with a private party and that must be taken into consideration in applying the language of the rule.

Mr. Levy indicated that even when the government is a private property, it may be inappropriate to treat the government like any other party. There are special limitations upon the government. The government often does not assert certain arguments or defenses that a private party would assert and the process of consultation concerning the arguments that will be made in a government brief is quite different. In his opinion, it would send the wrong signal to encourage the government to join in a brief with other parties.

Judge Hall stated that government briefs are not the problem but noted that there are judges on her circuit who object to any special treatment for the government. For that reason, she believes that it is better to leave it to the court to decide whether the government would be required to join in a brief with a private party rather than flag the special treatment. She stated that draft one is milder than the Ninth Circuit's rule which is ineffective and she questioned whether it is worth making a change.

Judge Logan concurred that it may not be worth going through the whole rulemaking process to change from a rule stating that the parties may file a single brief, to one that encourages filing a single brief. Even after the change the rule would only include precatory language. Judge Logan, therefore, withdrew his motion.

Mr. Munford made a motion to leave the rule as it stands; Mr. Froeb seconded the motion. The motion passed by a vote of five in favor and four in opposition.

Item 91-24

In its response to the Local Rules Project, the Fifth Circuit suggested that the Advisory Committee on Appellate Rules consider amendment of Rule 29 governing a brief of an amicus curiae. The Fifth Circuit suggested that Rule 29 should specify which of the items required by Rule 28 for briefs of parties should be included in an amicus brief; that Rule 29 should establish a page limit for an amicus brief, and that Rule 29 should permit an amicus brief to be filed later than the brief of the party supported by the amicus.

The Reporter prepared two drafts for the Committee's consideration. Draft one was an entire rewriting of Rule 29. In addition to specifying the items that must be included in an amicus brief, draft one provided that an amicus brief may be filed 15 days after the brief of the party supported by the amicus and may not exceed 20 pages. Allowing the amicus to file after the party would avoid needless repetition of the party's arguments in the amicus brief and make the shorter page limits realistic. The rest of the briefing schedule, however, would be extended. Draft two was similar to draft one except that it required the amicus to file its brief at the same time as the party supported.

As a preliminary matter Chief Judge Sloviter asked the Committee to consider whether it wants to continue to permit an amicus brief to be filed with the consent of all parties. Sometimes whether a court will permit participation by an *amicus curiae* is hotly contested and there have been members of her court who have written dissents from decisions to permit participation of an *amicus curiae*. The provision in Rule 35 that permits the filing of an amicus brief upon consent of the parties imposes reading on a court even if there is no receptivity to it.

Mr. Munford also posed a number of questions:

1. He asked whether the rule should include standards for granting leave to participate as an *amicus curiae*. He noted that the Supreme Court Rule suggests that leave will be granted only if the amicus truly has something to add.
2. He noted that the Fifth Circuit rule states that an amicus brief should avoid repetition of facts and legal arguments contained in the principal brief. Since that is the purpose for the delay, he asked whether such language should be included at least in draft one.
3. With regard to draft one, he asked whether the time for the responsive brief should run from the time the court grants the motion for leave to file the amicus brief rather than from the filing date of the brief and motion for leave to file.

Judge Logan noted that the drafts pose four new questions: 1) whether an amicus should be able to file a reply brief;
2) whether there should be a page limitation for an amicus brief; 3) when the brief

should be filed; and,
4) whether the brief should accompany the motion seeking leave to file.

Judge Hall stated that it also would be helpful to establish a standard for accepting an amicus brief. Mr. Munford pointed out that Supreme Court Rules 37.1 and 37.4 attempt to do that. Sup. Ct. R. 37.1 states:

> An *amicus curiae* brief which brings relevant matter to the attention of the Court that has not already been brought to its attention by the parties is of considerable help to the Court. An amicus brief which does not serve this purpose simply burdens the staff and facilities of the Court and its filing is not favored.

Sup. Ct. R. 37.4 requires that the motion for leave to file must:

> concisely state the nature of the applicant's interest and set forth facts or questions of law that have not been, or reasons for believing that they will not be, presented by the parties and their relevancy to the disposition of the case.

Judge Ripple moved the adoption of language similar to Sup. Ct. R. 37.1 as prefatory to FRAP Rule 29. Mr. Munford seconded the motion. The motion passed unanimously.

1. Time for Filing an Amicus Brief

Judge Ripple then suggested that the Committee address the question of the time for filing an amicus brief. Draft one permits an amicus to file its brief 15 days after the principal brief of the party supported. Draft two requires the amicus brief to be filed within the time for filing the party's brief.

Judge Logan expressed a preference for requiring the amicus to file within the same time as the party because that requirement leaves the briefing schedule undisturbed.

Judge Williams said that he had no preference as to the time for filing the brief but he strongly urged that the rule establish a time for filing the motion for leave to file.

Mr. Kopp noted that the 15 day delay in draft one is modeled on the D.C. Circuit Rule which was adopted in an attempt to shorten amicus briefs. If the amicus files after the party, the amicus will know what the party has said and the amicus can focus its brief more closely. The staggered filing schedule permits the court to have a tighter page limit than otherwise would be reasonable.

Judge Logan stated that most amicus briefs do not attempt to cover ground not

covered by the party. Rather, they usually say in effect that there is a major interest group which concurs with the position of the party. Usually they simply state their interest and argue their one major point.

Judge Boggs said that an amicus frequently propounds a legal theory that the litigant does not believe is the most promising theory and as to which the litigant is unwilling to devote space. Judge Ripple agreed and said that in such cases the efforts of the party and the amicus are coordinated. In such cases the 15 day period is not necessary because the party and the amicus are aware of each other's arguments.

Mr. Froeb indicated that in any event, fifteen days is not sufficient time for an amicus to get the party's brief, read it, and write the amicus brief. The focusing that the staggered schedule hopes to achieve may be unrealistic given the short interim period.

Mr. Levy countered by observing that the staggered period gives the party some opportunity to have influence upon the amicus brief -- an opportunity that is effectively foreclosed when both are busy preparing briefs on the same schedule.

Judge Ripple called for a preliminary vote on whether there should be a staggered briefing schedule under which an amicus files later than the party he or she supports. Six members favored a staggered schedule and one member opposed that approach.

Given that vote, Judge Ripple asked the Committee to address the length of the delay. He noted that if the period is 15 days, when an amicus brief is filed in support of an appellee the reply brief would be due before the amicus brief. An appellant would file his or her reply without knowing whether an amicus brief will be filed in support of the appellee and without an opportunity to address the arguments made by the amicus.

Discussion followed about using a 7, 10, or 14 day delay and the effect of Rule 26(a) on time computation and about whether the responding party's time should begin to run from the filing of the motion for leave to file, assuming that the brief must accompany the motion, or from the time the court grants the motion.

Given that the Committee had not yet voted on whether the proposed brief must accompany a motion for leave to file, Judge Keeton suggested that resolution of that issue might ease the discussion about the running of the time for a responsive brief and thence about the length of the stagger. Seven members indicated that if a staggered briefing schedule were used, they would require that the proposed brief be filed with the motion.

Mr. Munford indicated that even with that requirement he believes the time should not begin to run until the court grants the motion. In some circuits leave to file is not routinely granted, the responding party, therefore, needs to know whether the

amicus brief is accepted before the party can finish its brief.

Chief Judge Sloviter expressed strong opposition to any proposal that would delay the briefing schedule. Letting an amicus brief delay the briefing schedule would be, she observed, letting the tail wag the dog.

Mr. Froeb noted that in his state system, the amicus must indicate that all the briefs are in and that the amicus has read them before it moves for leave to file. If the party wants to respond to something said by the amicus, the party must file a motion for leave to respond. He indicated that the system seems to work fine and that there is no delay in the regular briefing schedule.

Mr. Kopp indicated that the staggered system can work but that there should be no more than minimal delay in the briefing schedule. He concluded, therefore, that the responding party's time should begin to run when the motion and proposed brief are lodged.

Mr. Levy pointed out that under that scenario, an appellee may need to respond before the court grants an amicus leave to file. The party may use part of its brief to respond to an amicus brief that may never be accepted.

Judge Logan moved that there should not be any delay in the briefing schedule even though an amicus brief is filed on a staggered schedule. Most of the time the amicus brief will be received early enough for the party to include a response in its brief. If, however, significant new arguments are raised in the amicus brief, the party could file a motion requesting adequate time to respond. Judge Hall seconded the motion. Mr. Munford opposed the motion because the appellee will respond to the principal brief and use the filing of an amicus brief as an excuse to get the last brief in the case. Judge Logan pointed out that the court need not permit the response unless it thinks there is sufficient need for it. Judge Hall stated that in her experience the Ninth Circuit does not permit anyone respond to an amicus brief other than at oral argument.

Judge Ripple pointed out that the purpose of the 15 day stagger period is to let everyone know what everyone else is arguing in the case. If there is a 15 day stagger period but the briefing schedule is not delayed, achievement of that goal is undercut substantially. He suggested that the stagger period may be more accommodating to amicus briefs than is necessary and that the Committee might reconsider the wisdom of the 15 day delay.

Mr. Munford moved that the time for filing a responsive brief should run from the filing of the motion by the amicus for leave to file its brief. Specifically, he suggested that lines 60 through 62 of draft one, page 6, be amended to read: "Unless otherwise ordered, for purposes of Rule 31(a), the time for filing the next brief runs from the filing of the motion for leave to file. Mr. Munford stated that he would like to separate the

stagger issue from the question of whether the briefing schedule is otherwise extended. He would like to retain the stagger even if the briefing schedule is not extended at all. His motion dealt only with the briefing schedule. Mr. Kopp seconded the motion.

Judge Logan, however, moved for reconsideration of the 15 day stagger. He further proposed adding a new sentence at the end of subdivision (e) of draft two on page 10 of the memorandum. Subdivision (e) of the draft states that "[a]n amicus brief must be filed within the time allowed for filing the principal brief of the party supported. If the amicus does not support either party, the brief must be filed within the time allowed for filing the appellant's brief." Judge Logan suggested adding: "A court may permit later filing, in which event it must specify the period within which an opposing party may answer." That would make it clear that if a court permits an amicus to file a brief after the party supported, it can allow additional time for any responsive briefs. Mr. Froeb seconded the motion.

Judge Ripple called for a vote on Mr. Munford's motion. It was defeated; only two members favored the motion and five opposed it.

Judge Ripple then asked the Committee to consider Judge Logan's motion. Mr. Levy asked what would happen if an amicus brief is filed at the same time as the appellant's brief but the motion for leave to file is not granted within the time for filing the appellee's brief. Mr. Levy asked whether the appellee should respond to the arguments made by the amicus. Judge Logan said that if the amicus brief raises an issue that is important enough that a response to the argument is warranted, the appellee should treat the issue in his or her brief even though the court has not yet ruled on the motion for leave to file. He recognized that the court may never admit the amicus brief but stated that if the argument raised by the amicus is important, it needs to be met in any event.

Mr. Munford asked for clarification as to whether Judge Logan intended only to require that the motion for leave be filed within the time for filing the brief of the party supported, or whether he also intended to require the brief to accompany the motion. Judge Logan, responded that he intended the latter.

Mr. Munford also asked about the time for filing an amicus brief in support of a petition for rehearing. He pointed out that the current rule does not tie the time for filing to the principal brief, rather it requires an amicus brief to be filed within the time allowed the party whose position the amicus supports. Judge Logan responded that he intended to require filing within the time allowed for filing the principal brief of the party supported. He said that he has never seen an amicus brief in support of a petition for rehearing and if one were submitted it should be accompanied by a motion for leave to file it.

The discussion having concluded, Judge Ripple called for a vote on the motion. It

passed by a vote of seven in favor and one opposed.

2. Standards

Judge Ripple asked the Committee to consider lines 15 and 16 on page 9 which provide that a motion for leave to file must state "the reasons why an amicus brief is desirable." He suggested that the language from Sup. Ct. R. 37.4 should be substituted for lines 15 and 16. That language is: "The motion shall concisely state the nature of the applicant's interest and set forth facts or questions of law that have not been, or reasons for believing that they will not be, presented by the parties and their relevancy to the disposition of the case." He suggested that the Supreme Court language would provide the judge with some standards and also would guide the lawyer in fulfilling the requirement on lines 15 and 16. Judge Hall seconded the motion.

The Committee discussed the extent to which an amicus can raise new issues. The consensus was that an amicus cannot raise an issue not preserved by a party but that an amicus can provide additional arguments supporting a party's position on an issue. The question before a court of appeals, however, is usually much broader than that before the Supreme Court. Mr. Munford suggested that the language should be altered so that the amicus need only show that the facts or "arguments" have not been "adequately presented" by the party. Judge Keeton pointed out, however, that the Supreme Court will hear only the issues on which it has granted certiorari; whereas, the question before a court of appeals is whether the judgment of the district court is correct. Judge Ripple pointed out that Mr. Munford's language retains the idea that an amicus is subject to the laws of waiver and preservation of issues.

Judge Ripple's motion, as amended, passed unanimously.

3. Page Limitation

The next issue considered was the imposition of a page limit on amicus briefs. Both drafts impose a twenty page limit. Judges Boggs and Hall moved adoption of that limit.

Judge Ripple asked the Justice Department representatives whether 20 pages is long enough. Mr. Kopp said that in most instances it would be but that 25 might be more helpful.

Judge Logan spoke in favor of the motion noting that an amicus brief typically focuses on one issue and 20 pages is sufficient.

The Reporter pointed out that the draft permits the court to order otherwise either by local rule or by order in a particular case. Therefore, local rules such as the D.C. rule that permits 25 pages would not be in conflict with the national rule.

The motion passed by a vote of seven in favor, none in opposition, and one abstention.

4. Contents

Judge Logan requested that the Committee consider the language in the draft at the top of page 10 concerning the items that must be included in an amicus brief. He noted that the draft specifies the items that may be omitted but that he would prefer that the rule state positively those items that should be included.

The Reporter stated that a positive statement could be modeled on Sup. Ct. R. 37.6 which states that an amicus brief generally must comply with the requirements for parties' brief "except that it shall be sufficient to set forth . . .". The Reporter indicated, however, that she probably would advice adding a requirement that an amicus brief should include a table of contents and a table of authorities.

Judge Logan moved that the rule should list the items that should be included in an amicus brief in a fashion similar to that of Sup. Ct. R. 37.6. The items that he wanted included were: the interest of the amicus, the argument, and the conclusion as well as a table of contents and a table of authorities. Mr. Froeb seconded the motion. Judge Ripple suggested that requiring a summary of argument would be helpful in screening the briefs. Judge Logan amended his motion to include a summary of argument.

Mr. Munford remarked that the Sup. Ct. R. is confusing and does not clearly tell an amicus what should be included or excluded. While he had no objection to using a positive approach, he suggested that the rule should make it clear whether an amicus needs to do such things as file a certificate of interest. He thought that the list given was incomplete because it does not cover such topics as covers, typeface, form, etc. The Reporter responded that she understood the motion to include the cross-references in the draft at lines 19 and 20, so that the brief must comply with Rule 26.1, 28 and 32. Mr. Munford suggested that it would be clearer to state that an amicus must comply with 26.1 and 32, but with respect to Rule 28 a brief need only include . . .. Judge Logan and Mr. Froeb agreed to that amendment.

Mr. Levy asked whether an amicus actually needs to comply with Rule 26.1. He asked whether it would be grounds for recusal if a judge had some interest in an amicus or its related businesses? Chief Judge Sloviter stated that if participation of an amicus could cause disqualification of a judge, that may serve as grounds for refusing to allow the amicus to file a brief.

The discussion strayed into the question of whether the membership of a trade association could disqualify a judge if the association participates as an amicus. Mr. Munford suggested that 26.1 was aimed at parties and that a national trade association

with hundreds of members could not be expected to list all of its members every time it files an amicus brief.

Judge Boggs asked whether the recusal rules are applied with respect to an amicus given that the rules are aimed at disqualifying a judge with a financial interest in the outcome of the case. Judge Ripple and Chief Judge Sloviter said that a number of judges in their circuits treat the rules as applicable even though a judge may have no direct financial stake because of the appearance of impropriety that may arise if a judge sits on a case and the judge has an interest in an amicus or one of its affiliates. Of course, there is a difference between the participation of a large association such as the National Association of Manufacturers and the participation of a single corporation or small group of corporations. It is difficult to say that it would be improper for a judge to sit if N.A.M. is the amicus and if the judge owns stock in any U.S. manufacturing corporation. If however, the amicus group is composed of ten corporations and the judge owns stock in one or two of them, the appearance of impropriety may well arise.

Mr. Munford suggested that the issue be delayed until the Committee discusses the "affiliates" issue under 26.1. Chief Judge Sloviter suggested that the Advisory Committee should check with the Ethics Committee. She believes that a ruling has been issued on the question of whether the participation of an amicus may disqualify a judge.

Judge Hall stated that the Ninth Circuit believes that an amicus may disqualify a judge and for that reason she believes it is important to require the amicus to provide a certificate of interest with the brief.

Mr. Spaniol said that Sup. Ct. R. 29.1 exempts amicus briefs from the disclosure requirement. The comment, however, prompted discussion about whether the Supreme Court is required by law to obtain disclosure statements.

Mr. Munford moved that Judge Logan's motion be amended to delete the corporate disclosure requirement for amicus briefs. The motion died for want of a second. Judge Logan stated that he failed to second the motion because Rule 26.1 requires the naming only of parent corporations, subsidiaries, and affiliates. In his opinion the language of the rule does not require the naming of the members of a large trade association.

Judge Ripple called for a vote on Judge Logan's motion that the draft be amended to positively state the items that must be included in an amicus brief. The motion passed unanimously.

Mr. Levy stated that the discussion revealed a difference of opinion with regard to the application of Rule 26.1 to trade associations. Judge Ripple asked the Reporter to add a discussion of that issue to the Committee's docket.

5. Amicus Brief in Support of a Petition for Rehearing

The last issue discussed with respect to amicus briefs was whether a court should accept an amicus brief offered in support of a petition for rehearing. Judge Ripple indicated that his circuit receives such briefs. Little attention may be paid to a case until the court enters its judgment. Thereafter, an amicus may join the party in trying to explain the error of the decision.

Judge Hall asked whether the question should be limited to petitions for rehearing or also should include requests for an in banc hearing or rehearing. Judge Ripple responded that he hoped the Committee would address all such issues.

Mr. Munford suggested amending the draft rule so that it uses the language in the current rule requiring an amicus to file within the time allowed the party supported. There would be no express reference to the party's principal brief or to petitions for rehearing, etc. but the language would be broad enough to encompass all such instances. He further suggested that it is unnecessary to discuss instances in which an amicus supports neither party. Several judges responded, however, that there many instances in which an amicus takes no position as to affirmance. Mr. Munford therefore suggested that the sentence be amended to state that in such instances the amicus must file within the time allowed the appellant – dropping the reference to the appellant's principal brief.

Judge Logan expressed hesitation to specifically mention that an amicus brief may be filed in support of a petition for rehearing. He feared that any such statement would encourage the filing of such briefs. On the other hand, he expressed support for Mr. Munford's language changes that would make the rule broad enough to cover the timing of such briefs. Judge Ripple suggested that a vote be taken on whether specific mention should be made of the possibility of filing an amicus brief in support of a petition for rehearing, etc. Five members supported that approach and two members opposed it.

Mr. Munford suggested that the language of lines 33 and 34 should be amended in accordance with his earlier suggestion. The Committee agreed. With regard to the second sentence, Mr. Munford noted that there could be difficulty with simply requiring a party that does not support either party to file within the time allowed the appellant. In some situations there is no appellant; for example, in a petition for mandamus. He suggested that the amicus be required to file within the time allowed the appellant or petitioner.

Mr. Froeb asked whether an amicus brief must confine itself to the record. He said that in his experience an amicus often attempts to raise facts that are not part of the record. He asked whether the rule should deter or prohibit the introduction of matters that are not part of the record.

Judge Ripple pointed out that the difference between constitutional facts and adjudicative facts can become quite blurry with an amicus. Discussion of background or contextual facts is permissible but that an amicus should not be talking about adjudicative facts that are part of the cause of action.

Judge Keeton expressed strong hesitation to address the issue. He said that the typical, useful amicus brief deals with constitutional facts or legislative facts -- facts about the economic, social, or political realities that have a bearing on the law making decision. It would be a very complex area to deal with in a rule.

Because she would not be able to attend the meeting the next day and was concluding her term as liaison to the Committee, Chief Judge Sloviter thanked the Committee for its hospitality and Judge Ripple thanked her for her valuable participation.

Judge Keeton distributed documents for the Committee's consideration in connection with the discussion it would have the following morning concerning facsimile filing.

The meeting adjourned at 5:00 p.m..

The meeting resumed at 8:30 a.m. on September 23rd in rooms B & C of the Education Center of the Federal Judiciary Building.

Judge Ripple opened the morning by outlining the matters he hoped to discuss during the remainder of the meeting. He indicated that the first matter for discussion would be the special assignment from the Judicial Conference dealing with filing by facsimile. Upon completion of that discussion, he stated that he would take up items 91-25 and 92-4, both of which deal with Rule 35 and suggestions for rehearing in banc. Because the Committee had already approved some changes to Rule 35, Judge Ripple thought it would be desirable to complete all other items bearing on the in banc rule so that all changes could move forward together. Judge Ripple indicated that he would reserve some time at the end of the meeting for the Reporter to discuss the items listed as "Report Items" on the agenda.

Judge Ripple then asked Judge Keeton to begin the discussion of the facsimile filing materials.

Fax Filing

1. Background

Judge Keeton explained the need to get a proposal ready, if possible, for consideration by the Judicial Conference in September 1994. That meant that if any rule amendments are needed, they must be approved by the Advisory Committee at the September meeting and published by November 1 along with the rules approved by the Standing Committee at its June meeting. Judge Keeton stated that approval for publication of any proposed rule changes bearing on facsimile filing would likely be handled by the Standing Committee by telephone.

In order to facilitate that process Judge Keeton had prepared and distributed the previous evening a redraft of existing Rule 25. He worked from the draft of the rule just approved by the Judicial Conference for submission to the Supreme Court. Judge Keeton's redraft read as follows:

Rule 25. Filing and Service.

(a) Filing.

(1) A paper required or permitted to be filed in a court of appeals must be filed with the clerk. Filing may be accomplished

(A) by mail addressed to the clerk;

(B) by facsimile transmission, by means meeting the standards then in effect under Guidelines for Receiving Facsimile Transmissions promulgated by the Judicial Conference of the United States, if the court of appeals by local rule or by order in a particular case has approved facsimile transmission; or

(C) by filing with a single judge, with that judge's permission, a motion that may be granted by a single judge, in which event the judge must note thereon the filing date and give it to the clerk.

(2) Filing is not timely unless the paper is received by the clerk or the single judge, or the facsimile transmission is received by the clerk, within the time fixed for filing, except that briefs and appendices are treated as filed on the date of mailing if the most expeditious form of delivery by mail, other than special delivery, is used.

(3) A paper filed by an inmate confined in an institution is timely filed if deposited in the institution's internal mail system on or before the last day for filing. Timely filing of a paper by an inmate confined in an institution may be shown by a notarized statement or declaration (in compliance with 28 U.S.C. § 1746) setting forth the date of deposit and stating that first-class postage has been prepaid.

(4) The clerk must not refuse to accept for filing any paper presented

for that purposed solely because it is not presented in proper form as required by these rules or by any local rule or practice.

* * * * *

(c) Manner of Service. Service may be personal, by mail, or by facsimile transmission if permitted by the court of appeals by local rule or by order in a particular case. Personal service is complete on delivery of a copy to a clerk or other responsible person at the office of counsel. Service by mail is complete on mailing. Service by facsimile transmission is complete upon electronic acknowledgement of receipt by means meeting the standards then in effect under Guidelines for Receiving Facsimile Transmissions promulgated by the Judicial Conference of the United States.

(d) Proof of Service.

[insert, in line 43 of the draft approved by the Judicial Conference in September 1993, after "Mailing" the words "or facsimile transmission," and in line 44, after "mailed" the words "or transmitted."]

Judge Keeton indicated that he would ask the Committee to focus first on the redraft of Rule 25. He noted, however, that the Committee also must look at the Guidelines for Facsimile Filing that were presented to the Judicial Conference. Judge Keeton stated his belief that the Guidelines need further revision.

Judge Keeton indicated that he would like the Committee to consider whether there are any parts of the Guidelines that should be included in the rules. He stated that it would be desirable to avoid inclusion of material in the rules that does not need to be there. Inclusion in the rules of technical standards governing the types of machinery to be used, etc. would be especially undesirable because amendment of the rules is both cumbersome and time consuming and it would be difficult for the rules to keep pace with technological advancements.

Judge Keeton indicated that authorizing the Judicial Conference to amend the Guidelines without review by the Supreme Court and Congress presents an issue similar to the one the Committee previously discussed concerning delegation to the Administrative Office of printing standards. He indicated, however, that he believes there is a strong argument that establishing technical standards in Guidelines promulgated by the Judicial Conference is not inconsistent with the Rules Enabling Act. Judge Keeton stated, however, that the Committee might want to consider that issue.

In addition to any question about the Rules Enabling Act, Judge Keeton, said that he also was concerned about accessibility of the Guidelines. He indicated that he would like the Guidelines to be printed for public comment at the same time as the proposed rule amendments. He also believes that the Guidelines should be transmitted to both

the Supreme Court and Congress. He further suggested that they might be printed as an appendix to the rules or in the notes.

As a last matter, Judge Keeton suggested that he would like to further amend his redraft of the Guidelines. His original objective had been to remove any mention of "filing" from the Guidelines because he believes that all "filing" rules should be contained in the rules. As a consequence, he had changed the title from "Guidelines for Filing by Facsimile" to "Guidelines for Receiving by Facsimile." He indicated that he thought a better title would be "Guidelines for Facsimile Transmission."

For clarification Judge Logan asked about the origin of the Guidelines. Judge Keeton responded that the original draft had been prepared by the Court Administration Committee. Judge Logan then asked whether it would be appropriate for a rules committee to suggest changes in the Guidelines. Judge Keeton responded that he believes such recommendations would be appropriate. In fact, the draft from which he was working was altered last summer by a working group composed of the advisory committee reporters who redrafted the Guidelines in an attempt to minimize the conflicts between the Guidelines and the rules. Judge Keeton reported that there had been some sentiment at the Standing Committee's June meeting to simply disapprove the draft Guidelines because of the conflicts between the Guidelines and the rules. Judge Keeton had opposed a simple rejection of the Guidelines because he feared that there would be members of the Judicial Conference who favored getting the guidelines in place and might adopt them as originally drafted rather than suffer any further delay. Therefore, he had organized the drafting subgroup during the Standing Committee meeting.

Discussion followed concerning possible problems with the Rules Enabling Act. Judge Keeton believes that delegation by rule to the Judicial Conference of power to fashion guidelines differs from the Committee's earlier problems with delegation of printing standards. In this instance, the Judicial Conference has already promulgated Guidelines. Those Guidelines permit the courts to accept facsimile filings in emergencies. The current proposal is, therefore, simply to amend those Guidelines. So, the Conference has already taken an affirmative position on its power to promulgate guidelines.

With regard to the proposed amendments to Rule 25, Judge Keeton suggested that there be another change to Rule 25(e) to accommodate the fact that parties are often required to provide multiple copies of the document filed. Judge Keeton suggested adding the following language to Rule 25(e):

> "and, when facsimile transmission is permitted, may allow extra copies to be presented within a reasonable time after the facsimile transmission is received."

That addition would allow a clerk to refuse to receive more than one copy by facsimile transmission and require that the party follow the facsimile transmission with hard copies.

Judge Logan asked whether the style subcommittee would be able to review the draft rules before publication. Judge Keeton stated that Mr. Brian Garner and the style subcommittee would be occupied with the Civil Rules Committee until after that committee's meeting in late October. Therefore, the amendments would be prepared for publication without review by the style committee.

Having finished its preliminary discussion, the Committee turned its attention to the task of approving some version of Rule 25 and of the Guidelines.

2. Guidelines vs. Rules

Judge Ripple discussed the importance of the distinction between information that should be in the Guidelines versus that which should be included the national rules. Judge Ripple emphasized that he would like to keep everything that a practitioner needs to know in the rules. In contrast, he stated that provisions regulating court conduct need not be in the rules and, therefore, could appropriately be included in the Guidelines. Judge Ripple questioned whether the material in parts V, VI, and VII of the draft Guidelines should be there. He stated that a requirement that certain items be included on a cover sheet is so basic that it should be found in either the national or local rules.

Judge Keeton suggested the possibility that some of the information in the Guidelines could be placed in a form that would follow the rules. Mr. Munford suggested that placing the Guidelines in an appendix to the rules might also serve the same purpose. Judge Keeton indicated, however, that the drawback of either approach is that amendment of either a form or appendix requires the full procedures under the Rules Enabling Act.

Judge Williams noted that if everything a practitioner needs to know should be in the rules rather than the Guidelines, then even all the technical standards in part III of the draft Guidelines would need to be in the rules.

Mr. Munford pointed out that not all information that practitioners need is included in the rules. With regard to the fee for filing a notice of appeal, the rules simply refer to the statute setting the fee. The amount of the fee is not included in the rules. Judge Keeton stated that the statute actually does not set the fee; the statute authorizes the Judicial Conference to set the fee schedule and, in fact, the fee schedule set by the Conference is not as readily accessible as he would like. Parties and lawyers who are unfamiliar with the fee schedule usually receive the information from the clerk's office.

Judge Ripple argued that the last sentence of existing Rule 25(a) means that the technical standards need not be included in the rule. That sentence states: "A court of appeals may, by local rule, permit papers to be filed by facsimile or other electronic means, provided such means are authorized by and consistent with standards established

by the Judicial Conference of the United States." That sentence was approved by Congress and has the force and effect of law. The intent of that sentence was to authorize the Judicial Conference to establish technical standards. Further, the technical standards do not impact the daily practice of law. Rather, a practitioner acquiring a piece of machinery has a one time question about whether the equipment meets the federal standards. Judge Ripple argued that parts V, VI, VII, and VIII(1) & (2) should be in the rules.

Mr. Froeb and Mr. Munford indicated agreement with Judge Ripple's basic principle that directions to practitioners should be easily accessible. Mr. Froeb asked, however, whether it is important that all the information enumerated in part VII of the Guidelines be on the cover page of a fax transmission. Mr. Strubbe replied that the court probably needs all of that information. Judge Keeton asked whether it is truly necessary that all of the information be included on the fax cover sheet as distinguished from the rest of the document. Judge Keeton suggested that perhaps all of part VII could be omitted.

Judge Logan suggested that both parts V (Original Signature) and VI (Transmission Record) should be included in the national rules but that perhaps all other matters could be covered by local rules.

Mr. Kopp suggested breaking the whole issue down into two tracks. The courts that are interested in permitting fax filings on a routine basis need guidelines so that they can do so. As soon as there are guidelines those courts can proceed by local rule. While there may be some need for uniformity in this area as in others, the only matter as to which there is urgency is the technical standards. Therefore, he suggested that the rules process may proceed to develop uniform national rules but not on such a fast track as the guidelines.

Judge Keeton responded that it would be consistent with the objectives of the Court Administration Committee to have a national rule that authorizes local facsimile filing rules. He expressed continuing concern, however, about the possibility that there might be an intervening standard (the Guidelines) that would restrict a local court's authority to develop such rules. In other words, there remains the possibility that even if a national rule grants broad authority to fashion local rules, the Guidelines could be adopted and narrow the scope of local rulemaking authority on the topic.

Judge Keeton stated that it might be possible to retain parts I, II, and III of the Guidelines, along with Rule 25(a)(1)(B), and recommend that the rest of the matters currently covered by other parts of the Guidelines could be referred to the local courts for adoption as local rules.

Judge Logan agreed. Because Rule 25(a) requires a local rule, it can be the responsibility of the circuit adopting such a rule to include in it all information needed

by a lawyer who files by fax. He suggested, therefore, that the national rule need do nothing more than authorize local rules permitting fax filing. Eventually the Committee may feel ready to establish national standards but because of the newness of the entire process this may be an appropriate topic for local experimentation.

Judge Keeton suggested that if the Committee favors such an approach it should make a recommendation as to the limitations of the guidelines. That is, the Committee should identify that material that it believes is appropriate for the Guidelines and recommend that all other matters be covered either by national or local rule.

Judge Ripple then stated that the first question the Committee should address is whether, as a matter of principle, matters that affect the conduct of practitioners should be in rules rather than the Guidelines. If the vote is that such matters should be incorporated in the rules, then it would be appropriate to discuss whether they should be in the national rules or local rules. If the vote is that it is not necessary to include practitioner related directions in rules, then the Committee could discuss simple coordination of all the information.

To move the discussion along Judge Ripple moved that all matters concerning the conduct of litigation should be in either national or local rules. Judge Logan seconded the motion. Judge Williams asked whether the motion was subject to Judge Ripple's earlier *caveat* on technical requirements such as the type of machines. Judge Ripple replied affirmatively.

Mr. Kopp voiced strong agreement with the motion. He pointed to the original signature provision in the proposed Guidelines. That provision says that if the original signed document is not filed, it must be maintained until the litigation concludes. Mr. Kopp stated that any such requirement should be as accessible as possible and, therefore, should be included in a rule.

Mr. Froeb agreed in principle but argued that there are many matters that practitioners know intuitively and it may not be necessary to have all of the detailed directions currently found in the Guidelines.

The discussion having concluded, Judge Ripple called for a vote on the motion to include directions to practitioners in rules rather than the Guidelines. The motion passed unanimously.

3. National Rule vs. Local Rules

Following the decision-making matrix he had announced earlier, Judge Ripple stated that the next question was whether any necessary directions to practitioners should be in national or local rules. He suggested that Judge Keeton's draft of Rule 25 serve as a starting point and he specifically asked the Committee to focus on draft Rule

25(a)(1)(B). Judge Ripple noted that the language of that subparagraph differs from the corollary provision in current Rule 25(a) and he asked Judge Keeton whether he intended to accomplish something different. Judge Keeton stated that his intent was the same but that he had simply attempted to restructure the rule in the manner of the style subcommittee. Given that understanding, Judge Ripple suggested that the Committee discuss whether some matters should be governed by national rule and whether others (and which ones) could be subject to local variation.

On the basis of prior discussion, Judge Ripple suggested that one possibility would be to recommend that:

1. the national rules simply continue to authorize local rules;
2. the Guidelines include only parts I, II, and III of the current draft guidelines (*i.e.*, all practitioner conduct should be excised from the Guidelines); and
3. local rules be used to regulate practitioner conduct.

Mr. Froeb moved that approach; the motion was seconded by Judge Hall.

Judge Hall suggested that the Committee might expedite the local rules process by sending the circuits a model rule. The suggestion was taken as a friendly amendment to the motion.

Judge Logan expressed support for the motion. He focused upon the original signature requirement. While he had originally thought that such a requirement should be in the national rule, upon reflection he had changed his mind. Because it is necessary to have a local rule authorizing facsimile filing, he thought that it would not be inappropriate for some courts to say that a person who files by fax must file the original by next mail while others might be content to allow the party to simply retain the original until the conclusion of the litigation.

Vote was taken on the motion and it passed unanimously. Judge Ripple summarized the Committee's understanding of that vote as follows: 1) the question of practitioner conduct with respect to facsimile filing should be covered by local rule, at least for the near future; 2) the Committee adopted that approach because local experimentation would provide an opportunity to perfect the local rules before going to a national rule; and 3) the Committee would prepare a model rule or checklist to be used by the circuits in the development of their local rules.

4. The Guidelines

The discussion then turned to the draft Guidelines and an effort to identify those provisions that should remain in the Guidelines and those that should be excised.

Upon examining part I, Mr. Strubbe suggested that part I paragraph (3) might arguably govern attorney conduct and therefore should be excised from the Guidelines. That provision is entitled "Prohibited Documents" and provides:

Papers may not be sent by facsimile transmission to the court for filing unless the court has expressly authorized such transmissions by local rule or by order in a particular case. In addition, bankruptcy petitions and schedules may not be sent by facsimile transmission.

Judge Keeton offered a proposed modification of that provision which he thought could make its retention consistent with the Committee's intent:

A communication by facsimile transmission must not be treated by a clerk as received for filing unless the court has expressly authorized facsimile transmission by local rule or by order in a particular case.

Judge Ripple noted that even the amended provision comes close to the line that the Committee had decided to draw. If the effort is to keep the Guidelines fairly stark, perhaps this could be eliminated from them.

Mr. Munford stated that he believed that any such provision would conflict with the Rule 25 provision prohibiting a clerk from refusing to file a document because it is not in proper form.

Judge Ripple moved that part I paragraph (3) be deleted from the Guidelines. Judge Logan seconded the motion. It passed unanimously.

The discussion moved to part II of the Guidelines. Judge Keeton suggested that his handwritten material be substituted for part II paragraph (2). Judge Keeton's proposed part II paragraph (2) would define "Receive by facsimile" as follows:

(2) "receive by facsimile" means a clerk's receiving by one or the other of the following means:

(A) receiving by a facsimile machine in the clerk's office of a facsimile transmission of a document;

(B) receiving in the clerk's office a printed copy of a document sent by facsimile transmission to a facsimile machine located outside the clerk's office."

Judge Keeton indicated that the latter provision would allow a local rule to receive a document lacking an original signature because it was sent to a fax machine outside the clerk's office and that document was presented for filing.

Mr. Munford asked whether the provision for documents received by a facsimile machine located outside the clerk's office has anything to do with facsimile filing. He stated that in his view it makes no difference whether a document has a facsimile of a signature or an original signature. Mr. Munford further indicated that in his opinion the clerk would not be free to refuse a document under the new provision in Rule 25 prohibiting a clerk from refusing to file a document because it fails to comply with a requirement of form. The Committee discussed the issue and there was clear division of opinion. Judge Ripple concluded that the signature question clearly must be addressed

in the model local rule.

Judge Keeton's redraft of part II subparagraph (2)(B) was amended by deleting the words "printed copy of a" so that it read, "receiving in the clerk's office a document sent by facsimile transmission to a facsimile machine located outside the clerk's office." Having approved that change, part II was unanimously approved for retention in the Guidelines.

The Committee then turned its attention to part III of the Guidelines, the technical requirements provisions. Judge Logan noted that it governs sending as well as court receipt of facsimile transmissions. Judge Ripple noted once again his belief that Rule 25 currently authorizes the Judicial Conference to establish such technical standards and that Judge Keeton's redraft of Rule 25(a)(1)(B) retains that provision.

Because Committee attention had returned to Rule 25, Judge Keeton noted that if the title of the Guidelines is changed to Guidelines for Facsimile Transmission then there would need to be a language change in Rule 25(a)(1)(B). In the second line of that paragraph the word "receiving" should be stricken as well as the "s" at the end of the word transmission in the third line. The same changes were approved in 25(c).

Mr. Kopp asked whether the technical requirements in Part III should apply to transmission to an outside agency as well as those directly to a court. The Reporter stated that clearly some of them should apply even to the outside agency because they affect the quality of the document received. The Committee concluded that the provisions of part III should be retained in the Guidelines.

The Committee considered part IV governing resource availability. Part IV indicates that courts will not receive additional personnel or funds for equipment due to adoption of a fax filing policy. Because that part of the Guidelines is so clearly addressed to the courts and not to practitioners, there was agreement that it belongs in the Guidelines.

Judge Ripple moved that part V -- dealing with original signatures -- be made part of the model rule because it deals with practitioner conduct; Judge Boggs seconded the motion. The motion passed unanimously.

For clarification, Mr. Strubbe asked whether the rules should require, as the Guidelines suggest, that in the absence of a local rule authorizing facsimile transmissions on a regular basis, a court order would be necessary to permit facsimile filing. Mr. Strubbe noted that in his court such requests are currently handled by the clerk's office rather than by a judge. Judge Ripple suggested that when preparing a model local rule, that issue will need to be addressed, but that the Committee's current concern was simply to determine which material should remain in the Guidelines and which should be excised.

Judge Ripple moved that part VI -- dealing with transmission records -- should be deleted from the Guidelines and considered as part of the rulemaking process. The motion was seconded by Mr. Munford. Mr. Froeb suggested that such a requirement would be unnecessary even in the rules. The motion passed unanimously.

Judge Ripple then moved that part VII -- dealing with cover sheets -- should be deleted from the Guidelines and made part of the rulemaking process; Judge Hall seconded the motion. It passed unanimously.

The Committee focused upon part VIII, dealing with collection of filing fees and authorizing additional fees for facsimile filing. Mr. McCabe pointed out that the pertinent statutes, §§ 1913, 1914, 1915, and 1930, say that the Judicial Conference shall prescribe all fees and the clerks may only charge fees authorized by the Judicial Conference. Judge Keeton concluded that the statutory directives make it unnecessary to include the provisions in part VIII in either the national or local rules. Judge Ripple moved that part VIII be left intact and that it be retained in the guidelines; the motion was seconded and passed unanimously.

At 10:30 a.m. the Committee took a 15 minute break.

Judge Ripple continued the discussion of facsimile filing by noting that although the Guidelines make no mention of "service" by fax, some members of the Judicial Conference anticipated that the rules would address the question of service by facsimile. Judge Ripple suggested that in light of the decisions already made by the Advisory Committee, it would be consistent to let local rules govern service by facsimile, at least in the first instance. He asked the Committee, therefore, to turn to Judge Keeton's draft of Rule 25(c) and suggested that the first sentence be adopted. "Service may be personal, ~~or~~ by mail, or by facsimile transmission if permitted by the court of appeals by local rule or by order in a particular case." The last sentence of Judge Keeton's draft of that paragraph was considered unnecessary. Judge Keeton explained that he had drafted the last sentence before the Committee's decision to omit from the Guidelines any matter bearing on an attorney's conduct.

Judge Ripple moved adoption of the first amended sentence. It was seconded by Judge Hall and unanimously approved.

Judge Logan volunteered to head the subcommittee to draft a model local rule. He expressed the desire to complete the work within the next month. He asked the Reporter, Judge Hall, and Judge Boggs to join him on the subcommittee.

Judge Logan asked whether the Committee had adopted the change in 25(c) and the additional sentence in 25(e). Judge Keeton stated that in light of the items taken out of the Guidelines, there were no substantive changes made by his draft except the one sentence in 25(c) dealing with service. Therefore, it was concluded that only the one

sentence change in Rule 25(c) needed to go out for publication.

At the conclusion of the discussion of the fax filing issues there was approximately one hour remaining in the meeting time. Judge Ripple suggested that the Committee spend that time discussing Item 91-25, regarding the contents of a suggestion for rehearing in banc, and Item 92-4, adding intercircuit conflict as a basis for granting hearing or rehearing in banc, because the Committee had recently worked on other amendments to the in banc rule, Rule 35.

Item 91-25

The Local Rules Project recommended that the Advisory Committee examine local rules adopted by nine circuits which outline the form of a suggestion for in banc determination. When responding to the Local Rules Project, the Fifth Circuit recommended that the Advisory Committee consider adoption of 5th Cir. R. 35. The Advisory Committee initially discussed both suggestions at its December 1991 meeting. At that time the Committee expressed no strong interest in specifying the contents of a suggestion for in banc consideration. Since that time, however, two members of the Advisory Committee had indicated interest in the earlier proposals.

The Reporter began the discussion by explaining the two drafts presented in her memorandum. Draft one, found at page 4, involved some reorganization of the rule as well as one major substantive change in subdivision (b). The heart of the draft was a new requirement that a petition for in banc review must begin with a statement demonstrating that the case meets the criteria for in banc consideration. It said that a petition must begin with a statement that either

> (1) the panel decision conflicts with a decision of the United States Supreme Court or of the court to which the petition is addressed (citations to the conflicting case or cases is required) and that consideration by the full court is necessary to secure and maintain uniformity of the court's decisions; or
>
> (2) the appeal involves one or more questions of exceptional importance; each such question must be concisely stated, preferably in a single sentence.

Draft two, beginning at page seven of the memorandum, would require the same statement demonstrating that the case is appropriate for in banc consideration and also added a list of items that must be included in any such petition, for example a corporate disclosure statement, statements of the issues and of the case. It also included a length limitation applicable to all such petitions.

Judge Ripple suggested that the Committee first consider whether it is interested in making the sort of changes suggested in either of the Reporter's drafts and then address the Solicitor General's suggestion.

Judge Logan expressed a preference for draft one if any changes are to be made.

He thinks that the detail specified in draft two is unnecessary. He questioned, however, the need to make any changes. Mr. Munford agreed that the level of detail in draft two is unnecessary.

Judge Hall said that she likes draft one but would like to add to it the page limitation in draft two.

Consensus developed to concentrate on draft one but to include the page limitation in draft two.

With regard to moving the paragraph dealing with length from draft two, it was suggested that subdivision (b) of draft one be structured in the same way as draft two. That is, that subdivision (b) should have two paragraphs: paragraph (1) dealing with the contents of the petition and paragraph (2) dealing with length. It was further suggested that if paragraph (b)(2) (lines 34-38) were moved to draft one, that it be shortened so that it ends after the words "15 pages" on line 35. Several judges indicated, however, that they find a table of contents and authorities important in such petitions and that those items should not count against the page limits.

Judge Ripple indicated that the intent of a limitation on length is to limit the number of pages that a judge must read and consider in deciding the case. He said that the items excepted from the page limit in the draft generally are important to have in a petition for rehearing in banc and help a judge to understand and organize the material in the text. Judge Logan asked whether it would be sufficient to limit the petition to 15 pages "of text." He feared that the explicit exceptions in the draft for corporate disclosure statements, tables of contents, and table of authorities would raise an inference that a petition should contain those items and it is not the practice in the Tenth Circuit to include them.

Mr. Munford suggested using the language in the petition for rehearing rule, Rule 40(b). The limitation does not have any exclusions. It says:

> The petition shall be in a form prescribed by Rule 32(a), and copies shall be served and filed as prescribed by Rule 31(b) for the service and filing of briefs. Except by permission of the court, or as specified by local rule of the court of appeals, a petition for rehearing shall not exceed 15 pages.

The possibility of including no page limit in Rule 35 was also considered on the theory that Rule 40(b) would govern because a request for in banc consideration is, in 99% of the cases, a petition for rehearing. (The other 1% are those cases in which there is a request that the initial hearing be in banc.)

Because Rule 40 focuses heavily on petition for panel rehearing, both Mr. Munford and Judge Williams stated that there should be a separate length limitation in

Rule 35 even if it were only a cross-reference to Rule 40(b). Mr. Munford suggested, however, that Rule 35 may need to require a corporate disclosure statement because new judges will be participating and they need to be informed about the parties affiliates.

Judge Ripple summarized the alternatives before the Committee as follows:

1. the page limitation provisions in draft two could be moved in their entirety to draft one;
2. a petition could be limited simply to fifteen pages;
3. a petition could be limited to fifteen pages of text; or
4. the length provision could simply cross-reference or be modeled upon Rule 40(b).

Judge Ripple called for a straw vote indicating each member's preference. Alternative one received one vote; alternatives two and three each received two votes; and alternative three received four votes.

After additional discussion, a final vote was taken on the options receiving the most support during the discussion, options three and four. On final vote, a limitation to fifteen pages of text received four votes, and a provision modeled on Rule 40(b) received five votes. The provision approved specifically stated that

> Except by permission of the court, or as specified by local rule of the court of appeals, a petition for hearing or rehearing in banc may not exceed 15 pages excluding those pages excluded by Rule 28(g).

Item 92-4

The Committee then addressed the Solicitor General's suggestion that intercircuit conflict should be made an explicit ground for granting an in banc hearing.

Mr. Kopp recounted the history of the proposal which has been narrowed since it was originally submitted by Solicitor General Starr and which, in its present form, has the support of current Solicitor General Days. He noted that four circuits already have rules or internal operating procedures that recognize a conflict with another circuit as a legitimate basis for granting a rehearing in banc. Existing Rule 35(a) provides that a matter of "exceptional importance" is grounds for a rehearing in banc and that language allows a petitioner to argue that intercircuit conflict raises an issue to the level of exceptional importance. Mr. Kopp noted that the proposal would not require a court to grant an in banc hearing whenever there is an intercircuit conflict. It would simply make it clear that the existence of such a conflict is an appropriate consideration weighing in favor of granting in banc review and may help a lawyer to focus his or her argument.

Mr. Kopp also used broader philosophical arguments to support the proposal. The existence of an intercircuit conflict means that federal law is being interpreted differently in different parts of the country simply because there is an administrative

division of the federal courts into circuits. Although the Supreme Court is the institution intended to resolve such conflicts, given the limited ability of the Supreme Court to grant certiorari there are conflicts among the circuits that are not being resolved by the Supreme Court. In an era when significant structural reforms, such as the intercircuit tribunal, are being proposed to deal with this problem, Mr. Kopp argued that it would be better for the existing courts to use every device they have at their disposal to address the problem before there is consideration of major restructuring.

Mr. Kopp moved that the Solicitor's proposal be incorporated in draft one. Judge Ripple seconded the motion.

Judge Logan indicated that he would include a reference to intercircuit conflict in (b)(2) - that an appeal involving one or more questions of exceptional importance may be appropriate for in banc hearing. He indicated, however, that he would not include such a reference in (b)(1) - that when a panel decision is in conflict with a decision of the U.S. Supreme Court or of the court to which the appeal is addressed an in banc rehearing is appropriate. The panel issuing a decision, obviously does not believe that it conflicts with holdings of the United States Supreme Court or of the circuit, because it would be inappropriate to issue such a decision. However, a panel may enter a decision in direct conflict with a decision of another circuit. Because the former are grey and the latter may be clear, Judge Logan stated that he feared inclusion of a reference in (b)(1) to panel decisions in conflict with decisions in other circuits might give rise to an inference that an in banc hearing must be granted whenever a panel decision conflicts with the opinion of another circuit.

Judge Ripple expressed general support for the proposal but agreed with Judge Logan's reservation. Mr. Kopp emphasized that the draft was not intended to make the granting of a hearing in banc mandatory.

Because the draft had been prepared prior to the Item 91-24 drafts, it was not integrated with those new drafts. The Reporter asked Mr. Kopp for clarification as to whether the proposal was to amend Rule 35(a) or (b). Mr. Kopp responded that the proposal is to amend 35(a) but that if it were accepted, some adjustments would need to be made to 35(b). He emphasized again that the proposed amendment to 35(a) was not intended to create any category of mandatory in banc review, and that any such implication should be avoided.

Judge Williams suggested that intercircuit conflict might be treated as a separate category of cases as to which in banc review would be appropriate.

Judge Ripple indicated that there seemed to be a consensus that the Rule should include some reference to intercircuit conflict as grounds for granting rehearing in banc. Given the late hour and the fact that the Committee had decided upon a new draft of Rule 35, he suggested that the Committee take a vote in principle on the suggestion and

ask the Reporter to work out the language for consideration at the next meeting. Judge Boggs so moved and Judge Hall seconded the motion. The motion passed unanimously.

Mr. Strubbe indicated that the caption to (a) probably should be changed from "When Hearing or Rehearing in Banc Will Be Ordered" to "When Hearing or Rehearing in Banc May Be Ordered." Judge Ripple also suggested that on page 6, line 40 probably also needs revision. The provision that "a vote need not be taken to determine whether the cause will be heard or reheard in banc unless a judge requests a vote" could permit a senior judge or a judge sitting by designation to call for a vote on a rehearing in banc.

The Reporter noted that proposed amendments to Rule 35 were forwarded to the Standing Committee last summer and are scheduled to be published this fall. She inquired whether it would be appropriate to request that those proposals not be published at this time but be held until these additional changes to Rule 35 are ready for publication; that would allow all changes to be published at the same time and avoid confusion.

Mr. Rabiej stated that the Standing Committee had given the Chairman discretion to determine the publication date of the proposed amendment so that Judge Keeton had authority to withhold publication of any or all of the rules. Judge Keeton approved the withdrawal of the Rule upon the request of the Advisory Committee.

Miscellaneous

The Reporter circulated the latest version of the "uniform" rules on technical amendments and uniform numbering of local rules. She described the changes that had been made since the last time the Advisory Committee reviewed the rules. The changes were made to conform the appellate version to the versions approved by the Standing Committee last June. She asked that if any members had any strong objections to any of the provisions, they contact her as soon as possible in view of the November 1 publication date.

The Reporter also indicated that the November 1 publication packet would include a FRAP proposal that had not been previously considered by the Advisory Committee. The proposal conforms Rule 4(a)(4) to changes proposed in Civil Rules 52, 59, and 60. Those rules are currently inconsistent as to whether posttrial motions must be "served" within 10 days, "filed" within 10 days, or "served and filed" within 10 days. The Civil Rules Committee will publish proposed amendments requiring that all ten day posttrial motions must be "filed" within 10 days. Conforming amendments to Fed. R. App. P. 4(a)(4) will also be published.

As the Committee prepared to adjourn, Judge Logan expressed his appreciation for Judge Ripple who has served the Committee as Reporter, Member, and Chair, for fourteen or fifteen years. Mr. Froeb was also concluding his six year term on the

Committee, and Judge Logan expressed his gratitude to him for all his work. There was a round of applause for both.

Judge Ripple wished Judge Logan good luck and thanked Mr. Rabiej for all his work. Judge Ripple also thanked Judge Keeton for all of his support and all that he did to make the Rules Committees run smoothly and effectively.

Respectfully submitted,

Carol Ann Mooney

Advisory Committee on the Federal Appellate Rules
Table of Agenda Items -- Revised December 1993

FRAP Item	Proposal	Source	Current Status
86-19	Amendment of Rule 38 to afford appellant opportunity to respond to proposed award of damages or costs.	Standing Committee & Chicago Council of Lawyers	Drafts considered by Committee, Chair to contact Circuits re current practices and possible possible committee action 10/89 Further research requested 10/90 Approved for submission to Standing Committee 12/91 Approved by Standing Committee for publication 1/92 Approved for resubmission to Standing Committee 4/93 Approved for submission to Judicial Conference 6/93 Approved by Judicial Conference 9/93
86-23	Accommodation by rule the difficulty prisoners have in receiving notice of a magistrate's report in time to file their objection.	Hon. Dolores Sloviter (CA-3)	Under study by reporter Held over for further discussion 10/92 Draft to be sent to Chief Judges, Committee of Staff Attorneys, and Committee of Defenders 4/93
86-24	Rule to permit sanctioning of attorneys for bringing frivolous appeals.	Chief Justice Vincent McKusick (ME)	See notes under item 86-19 and 92-8 Subcommittee appointed to monitor; no need for action at this time 4/93 C.J. Breyer's suggestion submitted to sub-committee 9/93, see item 93-8

FRAP Item	Proposal	Source	Current Status
89-5	Amendment of FRAP 35(c).	Mr. Robert St. Vrain (CA-8)	Under study by reporter Discussion with Supreme Court Clerk to precede any further action 10/90 Additional drafts requested 12/91 Approved for submission to Standing Committee 4/92 Standing Committee requested that Advisory Committee reconsider 6/92 Draft approved for submission to Standing Committee 4/93. Check all other FRAP for cross-references to "suggestions" for rehearing in banc Approved by Standing Committee for publication to bench and bar 6/93 Publication delayed pending completion of Items 91-25 and 92-4, 9/93
90-1	Amend FRAP 35(b) and (c) to change "suggestion" for an in banc to a "petition" for an in banc.	Hon. Jon Newman (CA-2) Mr. St. Vrain (CA-8)	Under study See notes under item 89-5
91-2	Amend rules 40(a) and 41(a) to lengthen time for filing a petition for rehearing in civil cases involving the U.S.	Solicitor General, Kenneth Starr	Approved for submission to Standing Committee 12/91 Approved by Standing Committee for publication 1/92 Approved for resubmission to Standing Committee 4/93 Approved by Standing Committee for submission to the Judicial Conference 6/93 Approved by Judicial Conference 9/93
91-3	Final decision by rule/expanding interlocutory appeal by rule.	Federal Courts Study Committee Judicial Improvement Act of 1990, P.L. No. 101-650; and Federal Courts Administration Act of 1992, P.L. No. 102-572	Discussion on-going 4/91 Consideration of interlocutory review of rulings on class certification. Referral from Civil Rules Committee 6/93

FRAP Item	Proposal	Source	Current Status
91-4	Typeface, re: rule 32.	Mr. Greacen (CA-5)	Reporter asked to draft language 12/91 Approved for submission to Standing Committee 11/92 Approved by Standing Committee for publication to bench and bar 12/92 Advisory Committee approved new drafts for submission to Standing Committee for re-publication 5/93 Standing Committee approved new draft for re-publication 6/93 Published 11/93
91-5	Use of special masters in courts of appeals.	Hon. Kenneth Ripple Hon. Gilbert Merritt Hon. Delores Sloviter	Reporter asked to draft language 12/91 Approved for submission to Standing Committee 10/92 Approved by Standing Committee for publication to bench and bar 12/92 Approved for resubmission to Standing Committee 4/93 Approved by Standing Committee for submission to the Judicial Conference 6/93 Approved by Judicial Conference 9/93
91-6	Amendment of Rule 39 to allocate word processing equipment costs between producing originals and producing "copies." Martin v. United States, 931 F.2d 453 (7th Cir. 1991).	Hon. Kenneth Ripple	Further discussion requested 12/91 Mr. Strubbe asked to collect information 10/92 No further action deemed appropriate 9/93
91-8	Amendment of Rule 25 so that whenever service is accomplished by mailing, the proof of service shall include the addresses to which the papers were mailed.	Local Rules Project	Approved for submission to Standing Committee 12/91 Approved by Standing Committee for publication 1/92 Approved for resubmission to Standing Committee 4/93 Approved by Standing Committee for submission to Judicial Conference 6/93 Approved by Judicial Conference 9/93

FRAP Item	Proposal	Source	Current Status
91-9	Amendment of Rule 32(a) to require counsel to include their telephone numbers on the covers of briefs and appendices.	Local Rules Project	Approved for submission to Standing Committee 12/91 Approved by Standing Committee for publication 1/92 Approved for resubmission to Standing Committee 4/93 Approved by Standing Committee for submission to Judicial Conference 6/93 Approved by Judicial Conference 9/93
91-11	Amendment of Rule 42 re: authority of clerks to return or refuse documents that do not comply with federal or local rules.	Local Rules Project	Reporter asked to prepare draft 12/91 Approved for submission to Standing Committee 10/92 Approved by Standing Committee for publication to bench and bar 12/92 Approved for resubmission to Standing Committee 4/93 Approved by Standing Committee for submission to Judicial Conference 6/93 Approved by Judicial Conference 9/93
91-12	Amendment of Rule 33.	Local Rules Project	Judge Hall, Judge Logan, Mr. Kopp, & Reporter asked to develop drafts 12/91 Approved for submission to Standing Committee 10/92 Approved by Standing Committee for publication to bench and bar 12/92 Approved for resubmission to Standing Committee 4/93 Approved by Standing Committee for submission to Judicial Conference 6/93 Approved by Judicial Conference 9/93

FRAP Item	Proposal	Source	Current Status
91-13	Amendment of Rule 41 to provide a uniform standard for granting a stay of a mandate.	Local Rules Project	Reporter asked to draft language 12/91 Approved for submission to Standing Committee 10/92 Approved by Standing Committee for publication to bench and bar 12/92 Approved for resubmission to Standing Committee 4/93 Approved by Standing Committee for submission to Judicial Conference 6/93 Approved by Judicial Conference 9/93
91-14	Amendment of Rule 21 so that a petition for mandamus does not bear the name of the district judge and the judge is represented pro forma by counsel for the party opposing the relief unless the judge requests an order permitting the judge to appear.	Local Rules Project	Reporter asked to draft language 12/91 Approved for submission to Standing Committee 10/92 Standing Committee referred the proposal back to to Advisory Committee for further consideration 12/92 New draft approved for submission to Standing Committee 4/93 Approved by Standing Committee for publication to bench and bar 6/93 Published 11/93
91-15	Uniform effective date for local rules.	Local Rules Project	Further study recommended 12/91 No further action deemed appropriate 9/93
91-17	Uniform plan for publication of opinions.	Local Rules Project & Federal Courts Study Committee	Further study recommended 12/91

FRAP Item	Proposal	Source	Current Status
91-22	Amend Rule 9(a) or (b) to specify the type of information that should be presented to a court in bail matters.	CA-5 in response to Local Rules Project	Adopted in substance, Reporter asked to draft language 12/91 Approved for submission to Standing Committee 10/92 Approved by Standing Committee for publication to bench and bar 12/92 Approved for resubmission to Standing Committee 4/93 Approved by Standing Committee for submission to Judicial Conference 6/93 Approved by Judicial Conference 9/93
91-23	Single brief for each side in consolidated or multi-party appeals.	CA-4 in response to Local Rules Project	For future discussion 12/91 No further action deemed appropriate 9/93
91-24	Page limits for and contents of amicus briefs.	CA-5 in response to Local Rules Project	For future discussion 12/91 Approved in substance; Reporter to prepare new draft 9/93
91-25	Amendment of Rule 35 to specify contents of suggestions for rehearing in banc.	CA-5 in response to Local Rules Project	For future discussion 12/91 Approved in substance; Reporter to prepare new draft 9/93
91-26	Amendment of Rule 28 to require a summary of argument, any claim for attorney's fees with statutory basis & amendment of Rule 32	Advisory Committee in response to Local Rules Project	For future discussion 12/91 Mr. Kopp and Mr. Strubbe asked to assist reporter 12/91 Summary of argument -- approved for submission to Standing Committee 10/92 Attorney fees -- no further action deemed appropriate 10/92 Summary of argument -- approved by Standing Committee for publication 12/92 Approved for resubmission to Standing Committee 4/93 Summary of argument amendment -- approved by Standing Committee for submission to Judicial Conference 6/93 Approved by Judicial Conference 9/93

FRAP Item	Proposal	Source	Current Status
91-27	Number of copies.	Local Rules Project	Reporter asked to draft language 12/91 Mr. Kopp, Mr. Strubbe, & Mr. Spaniol asked to study chart question 12/91 Approved for submission to Standing Committee 10/92 Approved by Standing Committee for publication to bench and bar 12/92 Approved for resubmission to Standing Committee 4/93 Approved by Standing Committee for submission to Judicial Conference 6/93 Approved by Judicial Conference 9/93
91-28	Updating Rule 27	Advisory Committee	Mr. Kopp asked to prepare memo 12/91 Held over 10/92 Subcommittee appointed 4/93 Approved in substance; subcommittee to prepare new draft 9/93
92-1	Amendment of Rule 47 to require that local rules follow uniform numbering system and delete repetitious language.	Standing Committee	Draft requested 1/92 Approved for submission to Standing Committee 4/92 Standing Committee referred to Committee of Reporters 6/92 New draft approved 10/92 Uniform language developed by Standing Committee--referred to Advisory Committee for incorporation 12/92 Approved by Advisory Committee for submission to Standing Committee 4/93 Approved by Standing Committee for publication to bench and bar 6/93 Published 11/93

FRAP Item	Proposal	Source	Current Status
92-2	Amendment permitting technical amendments without full procedures.	Standing Committee	Draft requested 1/92 Draft discussed 4/92; discussion ongoing New draft approved 10/92 Uniform language developed by Standing Committee--referred to Advisory Committee for incorporation 12/92 Approved by Advisory Committee for submission to Standing Committee 4/93 Approved by Standing Committee for publication to bench and bar 4/93 Published 11/93
92-4	Amendment of Rule 35 to include intercircuit conflict as ground for seeking in banc.	Solicitor General Starr	Subcommittee consisting of Judges Logan and Williams and Mr. Kopp to consult with Reporter Report from FJC pending 1/93 On hold pending views of Solicitor General 4/93 Approved in substance; subcommittee to prepare new draft 9/93
92-5	Amendment of Rule 25 re "most expeditious form . . . except special delivery".	Advisory Committee	Approved for submission to Standing Committee 4/93 Approved by Standing Committee for publication to bench and bar 6/93 Published 11/93
92-8	Amendment of Rule 38 re: 1) defining "frivolous"; 2) whether responsibility falls on the client or the attorney; 3) requiring a court to state reasons.	Alan B. Morrison, Esq.	Subcommittee appointed to monitor; no need for action at this time 4/93
92-9	Amendment of Rule 10(b)(1) to conform to 4(a)(4).	Advisory Committee on Bankruptcy Rules	Approved for submission to Standing Committee 4/93 Approved by Standing Committee for publication to bench and bar 6/93 Published 11/93

FRAP Item	Proposal	Source	Current Status
92-10	Reconsideration of some of the language of amended Rule 4(a)(4).	Standing Committee	Approved for submission to Standing Committee 4/93 Approved by Standing Committee for publication to bench and bar 6/93 Published 11/93
92-11	Consideration of local rules that do not exempt government attorneys from being required to join court bar or from paying admission fees.	Attorney General Barr and Standing Committee	On hold pending views of Solicitor General 4/93
93-1	Conflict between Civil Rule 9(h) & 28 U.S.C. § 1292(a)(3) re: interlocutory appeal of admiralty cases with non-admiralty claims.	Hon. Edward Becker (CA-3)	Awaiting initial Committee discussion
93-2	Amend Rule 8(c) re: cross-reference to Crim. R. 38.	Department of Justice	Approved for submission to Standing Committee 4/93 Approved by Standing Committee for publication 6/93 Published 11/93
93-3	Amend Rule 41 re: 7-day period for issuance of mandate.	Advisory Committee	Awaiting initial Committee discussion
93-4	Amend Rule 40 re: length of time for stay of mandate.	Advisory Committee	Awaiting initial Committee discussion
93-5	Amend Rule 26.1 to delete use of term "affiliate."	Mr. Joseph Spaniol	Awaiting initial Committee discussion
93-6	Amend Rule 41 re: effective date of mandate	Solicitor General Days	Awaiting initial Committee discussion

FRAP Item	Proposal	Source	Current Status
93-7	The Houston v. Lack problem in the context of a petition for review of an agency decision	Mr. Munford	Awaiting initial Committee discussion
93-8	Fax Filing	Judicial Conference	Initial discussion 9/93 Amendment of Rule 25(c) published 11/93 Subcommittee appointed to draft model local rules 9/93
93-9	Means short of sanctions to reprimand attorneys	Hon. S. Breyer (CA-1)	Referred to Judge Boggs subcommittee on sanctions 9/93
93-10	Applicability of Rule 26.1 to trade assoc.	Advisory Committee	Awaiting initial Committee discussion
93-11	Rule permitting party to submit draft opinions as appendix to brief	Hon. E. Peterson (Sup. Ct. OR)	Awaiting initial Committee discussion

AGENDA ITEM - 11
Tucson, Arizona
January 12-15, 1994

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

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

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

SUBJECT Report on Proposed and Pending Rules of Criminal Procedure

DATE: December 9, 1993

I. INTRODUCTION.

At its meeting in October 1993, the Advisory Committee on the Rules of Criminal Procedure acted upon proposed amendments to several Rules of Criminal Procedure. The Committee also adopted two internal operating procedures for reconsidering previously rejected amendments and for entertaining oral comments on proposed amendments from members of the public. This report addresses those proposals and recommendations to the Standing Committee. A copy of the minutes of that meeting are attached along with a copy of the proposed rule amendments.

II. RULES OF CRIMINAL PROCEDURE PUBLISHED FOR PUBLIC COMMENT.

Pursuant to action by the Standing Committee at its Summer 1993 meeting, proposed amendments in the following rules have been published for public comment: Rule 5. Initial Appearance Before the Magistrate Judge; Rule 10. Arraignment; Rule 43. Presence of the Defendant; Rule 53. Regulation of Conduct in the Court Room; Rule 57. Rules by District Courts; and finally Rule 59. Effective Date; Technical Amendments. A hearing on these amendments has been set for April 4, 1994 in Los Angeles; the deadline for comments is April 15, 1994.

III. PROPOSED AMENDMENTS TO THE RULES OF CRIMINAL PROCEDURE.

After years of debate, the Advisory Committee has approved a proposed amendment to Rule 16 which requires the government, upon request by the defendant, to disclose the names, addresses, and statements of its witnesses at least seven days before trial. As discussed in the minutes and the Committee Note accompanying the proposed amendment, in 1974 Congress rejected a similar amendment proposed by the Supreme Court after a vigorous protest from the Department of Justice. In the intervening years, similar amendments have been proposed, debated, and rejected by the Advisory Committee. The attached amendment was approved by an overwhelming vote of the Committee members (9 to 1). The Committee believes that the amendment is appropriate and that it strikes the appropriate balance between assuring witness safety and the need for defense pretrial discovery. The Committee also believes that the amendment will result in more efficient operation of criminal trials.

In summary, the proposed amendment to Rule 16 creates a presumption that the defense is entitled to discovery of the government's witnesses, their addresses, and their statements. The rule recognizes, however, that the government may refuse to disclose that information, in whole, or in part, by filing a nonreviewable, *ex parte*, statement with the court stating why it believes, under the facts of the particular case, that disclosing the information will threaten the safety of a person or risk the obstruction of justice. The amendment also includes a provision for reciprocal pretrial witness disclosure by the defense.

The Committee anticipates that some may argue that the amendment is at odds with the Jencks Act, 18 U.S.C. § 3600 et seq., and therefore is in conflict with Congress' view that disclosure of a witness' statements should not be disclosed prior to that witness testifying at trial. As pointed out in the Committee's Note, over the years Congress has approved a number of amendments expanding federal criminal discovery -- including broadened pretrial discovery for the prosecutor. The Committee believes that the proposed amendment is in harmony with the rationale of the Jencks Act. At the same time, the Committee is sensitive to following the Rules Enabling Act process and recognizes that ultimately, Congress can accept or reject the amendment.

The Advisory Committee recommends that the Standing Committee approve the publication of the proposed amendment for public comment.

IV. REPORT ON PROPOSAL TO IMPLEMENT FACSIMILE GUIDELINES

The Advisory Committee also considered the Judicial Conference's proposed facsimile guidelines. The Committee concluded that no amendments to the Federal Rules of Criminal Procedure were needed at this time because Criminal Rule 49(d) incorporates by reference any such guidelines in the Civil Rules. Although the Committee determined that no further action on the guidelines was needed at this time, it did reach a consensus that the proposed guidelines should include authorization to restrict the hours during which facsimile transmissions might be received by the court, e.g., regular business hours.

V. CONSIDERATION OF INTERNAL OPERATING RULES.

In response to several earlier discussions, the Advisory Committee acted on the recommendations of a subcommittee which had been tasked with considering two issues, internal to committee operations: (1) Whether the Advisory Committee should permit interested persons to appear and speak on proposed amendments and (2) Whether any conditions should be imposed on reconsidering a proposed rule change which has been rejected.

With regard to the first issue, the Committee adopted the subcommittee's proposal that:

> All suggestions and proposals are to be submitted in writing by interested persons and oral testimony and statements are limited to public hearings only, and not business meetings. This does not preclude Committee members from asking questions of proponents or opponents who are attending the business meeting.

With regard to the second issue, the Committee adopted the following recommendation:

> The reporter, in preparing copies and summaries of all written suggestions or proposals, identify those that are similar to ones that have been rejected and to the extent practicable, provide a summary of the reasons for the rejection appearing in the Committee's minutes.

The consensus of the Committee was that as part of its task of continously reviewing the rules of criminal procedure, the same or similar proposal might be repeatedly offered over the course of several meetings or years and that changes in the law or Committee composition might result in a proposal finally being adopted. Rather than adopting a strict limit on resubmissions of proposed amendments, the reporter is tasked with providing a summary to the members indicating what, if any, reasons were given for prior rejections.

Attachments:

Proposed Amendments to Rule 16
Minutes of the October 1993 Meeting

Rule 16. Discovery and Inspection[1]

(a) GOVERNMENTAL DISCLOSURE OF EVIDENCE.

(1) Information Subject to Disclosure.

* * * * *

(F) NAMES, ADDRESSES AND STATEMENTS OF WITNESSES. At the defendant's request in a non-capital case, the government, no later than seven days before trial, must disclose to the defendant, the names and addresses of the witnesses the government intends to call during its case in chief, together with any statements of such witnesses as defined in Rule 26.2(f). Such disclosure need not be made if (i)

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1. New matter is underlined and matter to be omitted is lined through.

the attorney for the government has a good faith belief that pretrial disclosure of some or all of this information will threaten the safety of a person or lead to an obstruction of justice, and (ii) submits to the court, ex parte and under seal, an unreviewable statement setting forth the names of the witnesses and the reasons why the government believes that the information cannot safely be disclosed.

* * * * *

(2) *Information Not Subject to Disclosure.* Except as provided in paragraphs (A), (B), (D), ~~and~~ (E)~~,~~ and (F) of subdivision (a)(1), this rule does not authorize the discovery of inspection of reports, memoranda,

or other internal government documents made by the attorney for the government or other government agents in connection with the investigation or prosecution of the case.

* * * * *

(b) THE DEFENDANT'S DISCLOSURE OF EVIDENCE.

(1) *Information Subject to Disclosure.*

* * * * *

(D) NAMES, ADDRESSES, AND STATEMENTS OF WITNESSES. If the defendant requests disclosure under subdivision (a)(1)(F) of this rule, and the government complies, the defendant, at the request of the government, must disclose to the government prior to trial the names,

addresses, and statements of witnesses -- as defined in Rule 26.2(f) -- the defense intends to call during its case in chief. The government may not make such a request if it has filed an ex parte statement under subdivision (a)(1)(F).

* * * * *

COMMITTEE NOTE

No subject has engendered more controversy in the Rules Enabling Act process over many years than discovery. In 1974, the Supreme Court approved an amendment to Rule 16 that would have provided pretrial disclosure to a defendant of the names of government witnesses, subject to the government's right to seek a protective order. Congress, however, refused to approve the rule in the face of vigorous opposition by the Department of Justice. In recent years, a number of proposals have been made to the Advisory Committee to reconsider the rule approved by the Supreme Court. The opposition of the Department of Justice has remained constant, however, as it has argued that the threats of harm to witnesses and obstruction of justice have increased over the years along with the increase in narcotics offenses, continuing criminal

enterprises, and other crimes committed by criminal organizations.

The Committee has recognized that government witnesses often come forward to testify at risk to their personal safety, privacy, and economic well being. The Committee recognized, at the same time, that the great majority of cases do not involve any such risks to witnesses.

The Committee shares the concern for safety of witnesses and third persons and the danger of obstruction of justice. But it is also concerned with the practical hardships defendants face in attempting to prepare for trial without adequate discovery, as well as the burden placed on court resources and on jurors by unnecessary trial delay. The Federal Rules of Criminal Procedure recognize the importance of discovery in situations in which the government might be unfairly surprised or disadvantaged without it. In several amendments -- approved by Congress since its rejection of the proposed 1974 amendment to Rule 16 regarding disclosure of witnesses -- the rules now provide for defense disclosure of certain information. See, e.g., Rule 12.1, Notice of Alibi; Rule 12.2, Notice of Insanity Defense or Expert Testimony of Defendant's Mental Condition; and Rule 12.3, Notice of Defense Based Upon Public Authority. The Committee notes also that both Congress and the Executive Branch have recognized for years the value of liberal pretrial discovery for defendants in military criminal prosecutions. *See* D. Schlueter, *Military Criminal Justice: Practice and Procedure*,§ 10(4)(A) (3d ed. 1992)(discussing automatic prosecution disclosure of government witnesses and

statements). Similarly, pretrial disclosure of witnesses is provided for in most State criminal justice systems where the caseload and the number of witnesses is much greater than that in the federal system.

The arguments against similar discovery for defendants in federal criminal trials seem unpersuasive and ignore the fact that the defendant is presumed innocent and therefore is presumptively as much in need of information to avoid surprise as is the government. The fact that the government bears the burden of proving all elements of the charged offense beyond a reasonable doubt is not a compelling reason for denying a defendant adequate means for responding to government evidence. In providing for enhanced discovery for the defense, the Committee believes that the danger of unfair surprise to the defense and the burden on courts and jurors will be reduced in many cases and that trials in those cases will be fairer and more efficient.

The Advisory Committee regards the amendment to Rule 16 as a reasonable step forward and as a rule which must be carefully monitored. In this regard it is noteworthy that the amendment rests on three assumptions which are as follows: First, the government will act in good faith, and there will be cases in which the evidence available to the government will support a good faith belief as to danger although it does not constitute "hard" evidence to prove the actual existence of danger. Second, in most cases judges will not be in a better position than the government to gauge potential danger to witnesses. And third, post-trial litigation as to the sufficiency of government reasons

in every case of an ex parte submission under seal would result in an unacceptable drain on judicial resources.

Subdivision (a)(1)(F). The Committee considered several approaches to discovery of witness names and statements. In the end, it adopted a middle ground between complete disclosure and the existing Rule 16. The amendment requires the government to provide pretrial disclosure of names and addresses of witnesses and their statements unless the attorney for the government submits, ex parte and under seal, to the trial court written reasons, based upon the facts relating to the individual case, why some or all of this information cannot safely be disclosed. The amendment adopts an approach of presumptive disclosure that is already used in a significant number of United States Attorneys offices. While the amendment recognizes the importance of discovery in all cases, it protects witnesses and information when the government has a good faith basis for believing that disclosure will pose a threat to the safety of a person or lead to an obstruction of justice.

The provision that the government provide the names, addresses, and statements no later than seven days before trial should eliminate some concern about the safety of witnesses and some fears about possible obstruction of justice. The seven-day provision extends only to noncapital cases; currently, the government is required in such cases to disclose the names of its witnesses at least three days before trial. The Committee believes that the difference in the timing requirements is justified in light of the fact that any danger to witnesses would

be greater in capital cases.

The amendment provides that the government's ex parte submission of reasons for not disclosing the requested information will not be reviewed, either by the trial or the appellate court. The Committee considered, but rejected, a mechanism for post-trial review of the government's statement. It was concerned that such *ex parte* statements could become a subject of collateral litigation in every case in which they are made. While it is true that under the rule the government could refuse to disclose a witness' name, address, and statements even though it lacks sufficient evidence for doing so in an individual case, the Committee found no reason to assume that bad faith on the part of the prosecutor would occur. The Committee was certain, however, that it would require an investment of vast judicial resources to permit post-trial review of all submissions. Thus, the amendment provides for no review of government submissions. No defendant will be worse off under the amended rule than under the current version of Rule 16, because the current version of Rule 16 allows the government to keep secret the information covered by the amended rule whether or not it has a good faith reason for doing so.

Perhaps the most critical aspect of the amendment is the requirement that the government is required to disclose the statements of its witnesses before trial, unless it files a statement indicating why it cannot do so. On its face, the amendment appears to create a potential conflict with the Jencks Act, 18 U.S.C. § 3500 which only requires the government to disclose its

witnesses' statements at trial, *after* they have testified. But in fact the amendment is entirely consistent with the Jencks Act which recognizes the value of discovery. It is also consistent with other amendments to other Federal Rules of Criminal Procedure, approved by Congress, which extend the spirit of the Jencks Act to defense discovery of statements at some pretrial proceedings. *See, e.g.*, 26.2(g) and pretrial discovery of expert witness testimony. In proposing the amendment to Rule 16 the Committee was fully cognizant of the respective roles of the Judicial, Legislative, and Executive branches in amending the rules of procedure and believed it appropriate to offer this important change in conformity with the Rules Enabling Act. 28 U.S.C. §§ 2072 and 2075.

It should also be noted that the amendment does not preclude either the defendant or the government from seeking protective or modifying orders from the court under subdivision (d) of this rule.

Subdivision (b)(1)(D). The amendment, which provides for reciprocal discovery of defense witness names, addresses, and statements, is triggered by full compliance with a defense request made under subdivision (a)(1)(F). If the government withholds any information requested under that provision, it may not take advantage of the reciprocal discovery provision. The amendment provides no specific deadline for defense disclosure, as long as it takes place before trial starts.

MINUTES
of
THE ADVISORY COMMITTEE
on
FEDERAL RULES OF CRIMINAL PROCEDURE

October 11 & 12, 1993
San Diego, California

The Advisory Committee on the Federal Rules of Criminal Procedure met in San Diego, California on October 11 and 12, 1993. These minutes reflect the actions taken at that meeting.

CALL TO ORDER

Judge Jensen, Chair of the Committee, called the meeting to order at 9:00 a.m. on Monday, October 11, 1993 at the Le Meridian Hotel in San Diego, California. The following persons were present for all or a part of the Committee's meeting.

Hon. D. Lowell Jensen, Chair
Hon. B. Waugh Crigler
Hon. Sam A. Crow
Hon. W. Eugene Davis
Hon. Wm. Terrell Hodges
Hon. George M. Marovich
Prof. Stephen A. Saltzburg
Mr. John Doar, Esq.
Mr. Tom Karas, Esq.
Ms. Rikki J. Klieman, Esq.
Mr. Edward Marek, Esq.
Mr. Roger Pauley, Jr., designate of Mr. John C. Keeney, Acting Assistant Attorney General

Professor David A. Schlueter
Reporter

Also present at the meeting were Judge Alicemarie H. Stotler and Mr. Bill Wilson, chair and member respectively of the Standing Committee on Rules of Practice and Procedure; Mr. John Rabiej, Mr. Paul Zingg, and Ms. Anne Rustin of the Administrative Office of the United States Courts and Mr. James Eaglin from the Federal Judicial Center. Judge Rodriguez was not able to attend the meeting.

I. INTRODUCTION AND COMMENTS

Judge Jensen, newly appointed chair of the Committee, welcomed the attendees and recognized Judge Hodges for his outstanding contributions as outgoing chair of the Committee. Following a brief response of gratitude from Judge Hodges, Judge Jensen recognized the contributions of Mr. Marek and Mr. Doar who were also leaving the Committee after many years of service. The Committee also extended its congratulations to Mr. Wilson who had recently received Senate confirmation as a federal district judge.

II. APPROVAL OF MINUTES OF COMMITTEE'S APRIL 1993 MEETING

After noting a typographical error on page 14 of the minutes, concerning the date of the Committee's October 1992 meeting, Judge Marovich moved that the minutes for the April 1993 meeting be approved. Mr. Karas seconded the motion which carried by a unanimous vote.

III. REPORT OF SUBCOMMITTEE ON COMMITTEE PROCEDURES

Judge Crow reported that his subcommittee, comprised of Judge Jensen, Ms. Klieman, Mr. Marek, and Mr. Pauley, had considered two issues raised at the Committee's April 1993 meeting: (1) Whether the Committee should permit interested persons to appear and speak on proposed amendments and (2) Whether any conditions should be imposed on reconsidering a proposed rule change which has been rejected. He provided a brief background of several problems which had arisen in conjunction with proposed amendments. For example, interested parties have from time to time requested permission to address personally the Committee in an attempt to persuade the members to adopt, or reject, a particular proposal. The subcommittee recognized that although some proposals might not be susceptible to "oral testimony" from interested parties, the rule making process should be open to public scrutiny. To address this issue, the subcommittee offered three alternative proposals:

1. *Recommendation:* The Advisory Committee should adopt the subcommittee's recommendation to require all suggestions and proposals submitted by interested persons to be in writing and to limit oral testimony or statements to public hearings only and not business meetings. This

recommendation does not preclude Committee members from asking questions of proponents or opponents who are attending the business meeting.

2. *First Alternative Recommendation:* The Advisory Committee adopt the subcommittee's first alternative recommendation to require all suggestions and proposals submitted by interested persons be in writing and to allow oral testimony at business meetings in support of or in opposition to written proposals upon advance written request and cause shown.

3. *Second Alternative Recommendation:* The Advisory Committee adopt the subcommittee's second alternative recommendation to stay with the status quo but monitor closely the current practice of oral testimony at business meetings and reconsider the above recommendations when circumstances further warrant it.

Judge Crow noted that some members of the subcommittee had expressed the dissenting view that a flat prohibition on any oral presentations would be viewed as contradictory to the public policy of the keeping the Committee's work open to the public. Those members, he noted, favored leaving to the Chair the question of whether oral testimony should be presented at a particular meeting.

Judge Crow thereafter moved that the Committee adopt the subcommittee's recommendation. Judge Davis seconded the motion.

In the discussion which followed, Judge Hodges noted that there was growing pressure on proponents to appear and argue their cause before the Committee. Noting the mixed history of hearing from proponents, he observed that it is often touchy and difficult to decide who should be permitted to address the Committee. He believed that it was important to give some guidance to the Chair and that he favored the first recommendation. He stated that proponents can offer written suggestions and that to permit oral testimony might politicize the meetings.

In response to a question from Judge Crigler, Judge Stotler indicated that no other Committee has articulated

any clear procedure for hearing testimony or oral presentations at business meetings. And she could not recall the issue ever arising in the Standing Committee.

The Reporter informed the Committee that he often receives telephone inquiries from individuals and organizations about the possibility of personally pleading their cause for a particular amendment and that he refers them to the Chair. Ms. Klieman noted that she had been lobbied on at least one proposal and feared that there could be a bombardment of oral testimony. Mr. Wilson spoke in favor of permitting oral arguments on particular proposals and Mr. Marek commented generally on the question of whether the public is even aware of the Committee's agenda. He was informed that that information is available to the public.

Professor Saltzburg favored the first proposal which permitted the option of questions from the Committee. Judge Hodges provided a more detailed description of the need for clear guidance on who should be permitted to appear before the Committee and Judge Stotler added that the Standing Committee would be considering internal rules of procedure for conducting its business. She also suggested that it would be beneficial to prepare an annual report indicating what, if any, action had been taken on various proposals. And it was essential, she added, that the public be aware of the agenda.

The Committee voted unanimously to approve the subcommittee's first recommendation. Mr. Rabiej indicated that he would coordinate the notice of the agendas and at the suggestion of Mr. Pauley, it was decided that the recommendation should be drafted as a bylaw of the Advisory Committee.

Thereafter, Mr. Pauley moved to forward the recommendation and action to the Standing Committee. Judge Crigler seconded the motion which carried by a unanimous vote.

Judge Crow presented the subcommittee's recommendation regarding the possibility of reviving proposed amendments which have been previously rejected by the Committee. He noted that the problem had not been encountered enough to make any judgment as to whether repeated proposals are purposeful or merely coincidental. He also noted that the subcommittee questioned whether it would be advisable to place restrictions on repeated proposals. The subcommittee, he stated, had decided to propose the following recommendation:

The Advisory Committee adopt the subcommittee's

recommendation that the reporter in preparing copies and summaries of all written suggestions or proposals identify those that are similar to ones that have been rejected and, to the extent practicable, provide a summary of the reasons for the rejection appearing in the Committee's minutes.

Judge Crow moved that the recommendation be adopted. Professor Saltzburg seconded the motion.

In the discussion that followed the motion, Crigler expressed concern about reconsideration of rejected amendments and Mr. Marek raised the question of what would constitute "rejection" of a particular proposal. Judge Marovich expressed the view that the Committee should keep it simple, e.g., the Committee would normally not be amenable to continued discussion about a proposal which had been rejected. He also noted that the Committee procedures should not be tuned too finely.

The Committee ultimately voted unanimously in support of the motion. Professor Saltzburg moved that the recommendation be forwarded to the Standing Committee and Mr. Marek seconded the motion. The motion carried by a unanimous vote.

IV. CRIMINAL RULE AMENDMENTS UNDER CONSIDERATION

A. Rules Approved by the Supreme Court and Pending Before Congress

The Reporter indicated that amendments to the following rules had been approved by the Supreme Court and had been forwarded to Congress:

Rule 12.1 (discovery of statements)
Rule 16(a) (discovery of experts)
Rule 26.2 (production of statements)
Rule 26.3 (mistrial)
Rule 32(f) (production of statements)
Rule 32.1 (production of statements)
Rule 40 (commitment to another district)
Rule 41 (search and seizure)
Rule 46 (production of statements)
Rule 8, Rules Governing Section 2255 Proceedings
Technical Amendments (use of term "magistrate judge") throughout the Rules

Barring any action by Congress, these amendments will go into effect on December 1, 1993.

B. Rules Approved by the Judicial Conference and Being Forwarded to the Supreme Court

The Reporter informed the Committee that amendments to Rules 16(a)(1)(A)(statements or organizational defendants), 29(b)(delayed ruling on judgment of acquittal), 32(sentence and judgment), and 40(d)(conditional release of probationer) were approved by the Standing Committee at its June 1993 meeting and that the Judicial Conference had also approved the amendments. They will be transmitted to the Supreme Court in the near future.

C. Rules Approved by the Standing Committee for Public Comment

The Reporter also informed the Committee that the Standing Committee in June 1993 approved for publication and comment amendments to the following rules: Rule 5 (exemption for persons arrested for unlawful flight to avoid prosecution), Rule 10 (in absentia arraignments), Rule 43 (in absentia pretrial sessions; in absentia sentencing); and Rule 53 (cameras in the courtroom). The deadline for public comments is April 15, 1994.

The Reporter indicated that the Litigation Section of the American Bar Association had requested extra time to comment on the proposed amendments, in particular Rule 53. Following a brief discussion during which it was noted that the deadline of April 15 would provide the opportunity to review any public comments at the Committee's Spring meeting. No action was taken on the letter.

D. Other Criminal Procedure Rules Under Consideration by the Committee

1. Rule 6, Secrecy Provisions of Rule re Reporting Requirements.

The Reporter informed the Committee that Mr. David Cook of the Administrative Office had raised the issue of whether Rule 6 would be violated if all indictments, sealed and unsealed, were reported to the Administrative Office. Mr. Rabiej provided some background information on the request. Both Mr. Marek and Mr. Pauley expressed concern over the possible release of any information concerning sealed indictments. Mr. Pauley noted that reporting sealed indictments could be especially problematic where the public was aware that a grand jury was meeting on a big case.

Judge Crow questioned whether the Committee should even be considering the issue. His concern was echoed by Judge Jensen who noted that the Committee should not render advisory opinions on rule interpretations. Judge Marovich moved that the Committee decline to act on the issue and Mr. Doar seconded the motion, which carried by a unanimous vote.

2. Rule 16, Disclosure of Witness Names.

Judge Jensen provided a brief overview of a proposal before the Committee to amend Rule 16 to require the government to disclose the identity and statements of its witnesses before trial. He noted that the proposal, which had been presented by Professor Saltzburg and Mr. Wilson at the April 1993 meeting, had been deferred at the request of Attorney General Janet Reno who had requested time to study the issue. On August 4, 1993, Attorney General Reno wrote to then chair, Judge Hodges, indicating her opposition to any effort to amend Rule 16 to require such disclosure. In support of her position she attached a detailed memo prepared by Mr. Pauley; that memo critiqued a draft amendment prepared by Professor Saltzburg and Mr. Wilson. Judge Jensen noted that the Reporter had prepared an alternate draft.

Mr. Wilson offered brief comments on each of the two drafts and observed that the Department of Justice will apparently not change its views on discovery.

Addressing the draft that he had prepared, Professor Saltzburg noted that the Committee had spent a long time on this issue and that the proposed amendment was an important one. After summarizing the thrust of his draft, Professor Saltzburg noted the long-standing opposition by the Department of Justice and that they were candid enough to reject any suggested changes. He observed, however, that there is no real dispute that discovery encourages efficient trials. The Department recognizes that point, he noted, because it had itself successfully proposed amendments to rules which benefit the prosecution. Professor Saltzburg also observed that the system is more complicated and that this amendment would be a first important step toward making criminal trials more effective. He noted that the draft presented a balance between protecting witnesses and the defendant's right to prepare for trial.

Professor Saltzburg moved that the Committee approve the substance of his draft which would require the government to disclose to the defense seven days before trial the names and statements of its witnesses. Excluded from his motion was any reference to disclosure of co-

conspirator statements. Mr. Karas seconded the motion.

In the lengthy discussion which followed Mr. Pauley provided an in-depth analysis of why the motion should be defeated. He agreed that the Department has agreed to a number of amendments in the past but that it felt very uncomfortable with the proposed amendment. This amendment, he said, was unacceptable to the Department and indicated that it would exert all of its energy at every stage of the rule making process to defeat the amendment. He added that the amendment potentially infringes on the Rules Enabling Act because Congress has already spoken on the issue in the Jencks Act. The Committee, he stated, should therefore defer to Congress and avoid the appearance of an end run. If the proponents have enough political clout, they should seek an amendment through Congressional action. Mr. Pauley also took exception to any suggestion that trials are currently unfair. The Department also wants fair and efficient trials but that the current state of affairs does not present any problems worthy of an amendment. He indicated the fear that the amendment would dampen the willingness of witnesses to come forward and testify. In that regard he observed that the amendment would needlessly invade the privacy interests of the witnesses. Finally, he noted a number of technical problems with the draft, which he had explained in more detail in the memo accompanying Attorney General Reno's letter.

The Reporter briefly introduced an alternative draft noting that the draft contained no reference to production of the government witness statements and no specific procedure for government counsel declining to disclose the evidence. He noted that his draft provided that counsel could use Rule 16(d) to obtain protective orders. That draft did not include any procedure for post-trial review of a decision to not disclose the witnesses.

Mr. Pauley responded by noting that the Department was even more opposed to the Reporter's draft and that it was definitely not a compromise.

Judge Marovich expressed concern about the tone of the Department of Justice's memo and that the Committee would probably lose the battle in Congress. In very strong language, he expressed concern about suggestions that the judiciary would not be able to fairly determine whether a witness' name should be disclosed. He noted that eventually the government would have to disclose its witnesses and that if the Department has good faith reasons for not disclosing the witnesses before trial, they should be able to request an exception to the general rule of disclosure. Judge Marovich added that he is familiar with state discovery

practices and that there is no real danger to government witnesses. He also observed that early disclosure does have a positive impact on trials.

Mr. Marek expressed the view that the Saltzburg/Wilson proposal was a compromise. The key, he said, would be that the Committee Note provide guidance on what constitutes "good faith" on the part of the prosecutor in not disclosing a name. He also noted that the Reporter's draft was less satisfactory because it did not make provision for disclosure of witness statements. He noted that the proper avenue for amending Rule 16 is through the Rules Enabling Act, and not going directly to Congress. Reading from pertinent provisions in the Committee Note accompanying a similar amendment forwarded to Congress in 1974, Mr. Marek noted the importance of pretrial discovery. He also reminded the Committee that the Department of Justice had sought amendments broadening government discovery in Rules 12.1 and 12.3.

Mr. Pauley responded briefly by observing that judges do have concerns about witness safety and can decide whether a sufficient showing has been made by the prosecutor.

Addressing the issue of witness safety, Judge Davis commented that the issue cannot be ignored and that it is not always easy for the prosecution to articulate good cause. But the increase in the case load means that discovery will become more important. He expressed approval of the Reporter's draft amendment and the possibility of a reciprocity provision for the government. Finally, he suggested that the prosecutor's reasons for not disclosing a witness should be unreviewable.

Ms. Klieman noted that she has represented both the government and the defense and that she is not necessarily biased in favor of defendants. She stated that the danger factor is real, not only to the witness but also to the family. But the government has options available for protecting witnesses. Ms. Klieman expressed agreement with Judge Marovich's views on discovery in state practice and added that it would be false to assume that there are more dangers to persons in the federal system. The danger is no different and the Saltzburg/Wilson proposal accounts for that. She noted that the participants should count on good faith of the prosecutor. Drawing on the fact that she has worked on both sides, she could not think of a case where discovery did not promote efficiency. She also indicated that the Reporter's draft fell short of the needed reform. The defendant needs the witness' statements before trial. Finally, she indicated support for inclusion of a reciprocity provision.

Mr. Wilson recounted a case in which a client was innocent and there was clearly no danger to the government witnesses. He noted that the issue of potential danger to witnesses is a very small part of the federal criminal system.

Mr. Doar noted his general reluctance to change the rule and that he did not agree with Judge Marovich's view that judges are better able to decide whether a witness is in danger. He also indicated disagreement with Mr. Wilson's point that the issue of witness safety is not important. Finally, he questioned the need for a provision for post-trial review of the prosecutor's reasons for not disclosing a witness' name.

Professor Saltzburg responded that it would probably not be necessary to include such a provision and that his proposal was intended to include checks and balances on both sides. He added that the proposal should include a provision which recognizes the possible danger to third persons.

Judge Crow disagreed with the view that the attorneys should not be trusted. He agreed that the amendment should require disclosure of names and addresses but was not sure that it should extend to disclosure of statements. He also expressed approval of a reciprocity provision and favored deletion of a post-trial review procedure.

Judge Crigler indicated that he had mixed views on the Saltzburg/Wilson proposal. He did not believe that the Reporter's draft went far enough but was concerned about possible post-trial litigation concerning the prosecutor's decision not to disclose a witness' name. While he agreed with Judge Crow's views about trusting counsel to do the right thing, he was concerned about starting a debate with Congress on criminal discovery.

Judge Marovich stated that there will be no confrontation with Congress unless the Department of Justice wants it. He agreed with those who are opposed to including a post-trial review provision. The real deterrent to abuse of the option of not disclosing a witness is the fact that prosecutors want to maintain credibility.

Professor Saltzburg withdrew his earlier motion and made a substitute motion, with the consent of Mr. Wilson, that the Committee approve in principle an amendment which would require the prosecutor to disclose a witness' name, address, and statement but would not include a provision for post-trial review of the prosecutor's decision not to

disclose. He suggested that the Committee wait on the issue of reciprocity.

Mr. Pauley expressed concern for the timing requirements, noting that in capital cases the prosecution need not disclose a witness' name until three days before trial.

The Committee voted 8 to 2 in favor of Professor Saltzburg's motion.

Following a brief adjournment, Professor Saltzburg presented a draft amendment to the Committee which covered the key points raised in the earlier discussion. Mr. Pauley again urged the Committee to shorten the time for disclosure to three days before trial. Following additional drafting and style suggestions, the Committee voted 9 to 1 to approve the draft amendment and forward it to the Standing Committee for approval and publication.

In later discussion concerning issues to be included in the accompanying Committee Note, it was suggested that the Committee Note make clear that nothing in the amendment is intended to change the protective order provision in Rule 16(d). Mr Pauley also suggested that the Note include a reference to the fact that witnesses often testify at the risk of not only physical injury but also at the risk of economic reprisal.

3. Rule 16, Disclosure to Defense of Information Relevant to Sentencing.

The Reporter informed the Committee that pending amendments to the Commentary for § 6B1.2 (Policy Statement on Standards for the Acceptance of Plea Agreements) recommend that before the defendant enters a guilty plea, the government should first disclose sentencing information which is relevant to the guidelines. He indicated that although the Sentencing Commission did not intend to confer any substantive rights on the defendant through the changed policy statement, the change is apparently intended to encourage plea negotiations that realistically reflect probable outcomes. Mr. Pauley urged the Committee to reject any proposed amendments to the Rules concerning disclosure of sentencing evidence. He noted that the issue had been raised three years earlier and that the Department of Justice had also opposed it then. The Department was concerned that enormous amounts of litigation would be generated through a requirement to disclose sentencing evidence. Noting that the defense receives such information under current practice, he also expressed concern that the

plea bargaining system would break down.

The Committee took no action on the issue.

4. Rule 16, Proposal to Require Government to Identify Materials Relevant to Defendant.

Mr. Marek recommended that the Committee consider Judge Donald E. O'Brien's proposal to amend Rule 16. The gist of the proposal is that Rule 16 be amended to require the government to provide an index, guide or some other device to assist defense counsel in sorting through and identifying documents or information relevant to the case. He noted that Judge O'Brien is a member of the Judicial Conference's budget committee and that he is very concerned about costs associated with pretrial discovery.

Judge Hodges provided background information on a proposal by Judge Donald E. O'Brien first presented to the Committee at its Fall 1992 meeting in Seattle. The proposal was inspired, at least in part, by accounts of young court-appointed lawyers being presented with a room full of documents. From a cost-efficiency standpoint, Judge O'Brien believed that the time and expense of going through massive documents only to find little or no relevant evidence was not justifiable. At the Committee's Fall 1992 meeting, Mr. Doar moved to adopt the proposal. But it failed for lack of a second.

Judge O'Brien, and several others supporting his proposal (Professor Ehrhardt, Judge William Young, and Magistrate Judge John Jarvey) made an oral presentation at the Committee's Spring 1993 meeting in Washington, D.C. urging the Committee to reconsider its position. Although no action was taken on the renewed proposal, Judge Hodges indicated to Judge O'Brien that the matter would be added to the Committee's Fall 1993 meeting agenda. In the meantime, Attorney General Reno had addressed the proposal in her letter on Rule 16 (which the Committee discussed in conjunction with proposed amendments re disclosure of government witnesses).

Judge Crigler indicated that any work product objections that the government might have would be waived when defense counsel was shown the government storage area and that under the civil rules there is no specific authority to require production of any sort of a "roadmap" for locating the pertinent documents.

In an extensive discussion of the issue, Mr. Pauley opposed the proposal. He noted that there was ambiguity in

the proposal and that the Attorney General had provided the Committee with a number of compelling reasons why the proposal was inappropriate and that the defense should not count on an organizational index. Mr. Doar indicated that presenting a chronological list of pertinent documents would be helpful.

Judge Jensen indicated that the matter would be deferred until the Committee's Spring 1994 meeting and appointed a subcommittee (Ms. Klieman, Chair, Judge Davis, Judge Marovich, and Mr. Pauley) to study the proposal more fully.

5. Rule 40, Treating FAX Copies as Certified.

The Committee considered a proposal filed by Magistrate Judge Wade Hampton that the rules be amended to provide that faxed certified documents of indictments, arrest warrants, or other instruments be considered as "certified." Following a brief discussion of the proposal, Judge Crigler noted that the proposal seemed to be adequately covered in the rules and moved that the Committee reject the proposal. Mr. Marek seconded the motion which carried by a unanimous vote.

6. Rule 41, Proposed Deletion of Requirement that Warrant be Issued by Authority Within District.

The Committee considered a proposal filed by Mr. J.C. Whitaker, a federal law enforcement employee, who recommended that Rule 41 be amended to delete the territorial limitations. He noted in his letter that such limitations create hardships for law enforcement officers who must now obtain a search warrant from an authority in district where the property is located, or will be located. The Reporter informed the Committee that the territorial limitation issue had been considered by the Committee when it amended Rule 41 several years ago to cover property moving into, or out of, a district.

The proposal failed for lack of a motion.

7. Rules Governing Section 2254 Cases; Proposed Legislation Affecting Rules.

Mr. Rabiej informed the Committee that Congress was considering amendments to Sections 2242 and 2254 and that depending on the final draft, there could be direct impact on the Rules Governing Section 2254 cases. He added that he

would keep the Committee apprised of any further developments.

E. Rules and Projects Pending Before Standing Committee and Judicial Conference

1. Rule 57, Materials Regarding Local Rules.

The Reporter apprised the Committee that the Reporter for the Standing Committee, Dean Coquillette, was coordinating the drafting and publication of an amendment to Rule 57 which addresses the uniform numbering of local rules and guidance on imposing sanctions for failure to follow a local internal operating procedure or standing order. He indicated that the drafting was complete and that the rule would be published for public comment in the near future. The deadline for those comments will be April 15, 1994

2. Rule 59, Proposed Amendments Concerning Technical Amendments by Judicial Conference.

The Reporter also informed the Committee that the Standing Committee had approved amendments to Rule 59, and its counterparts in the other rules, and that they would be published for public comment in the near future. The amendment would permit the Judicial Conference to make technical changes to the rules without the need for Congressional action. The deadline for comments on this amendment is April 15, 1994.

3. Report on Proposal to Implement Facsimile Guidelines.

Judge Jensen informed the Committee that the Judicial Conference was in the process of compiling guidelines on facsimile filings. He indicated that Judge Stotler, incoming chair of the Standing Committee, had requested each of the Advisory Committees to apprise her of whether it would be feasible for the each Committee to approve for publication for public comment (1) the filing guidelines, as revised by the Appellate Rules Advisory Committee, and (2) any necessary amendments to the procedure rules. Judge Stotler provided additional background information on the guidelines. The Reporter indicated that amending the criminal rules themselves was not as critical because Criminal Rule of Procedure 49(d) simply incorporates by reference any such guidelines in the Civil Rules of Procedure. Following additional discussion, the Committee authorized Judge Jensen to apprise the Standing Committee of

the sense of the Committee's observations, i.e., the recommendation that the guidelines include authorization to restrict the hours during which facsimile transmissions might be received by the court.

Judge Crigler indicated that he would be opposed to any facsimile guidelines which did not include some reference to filing during business hours. Following further brief discussion, the Committee was in general agreement that no further action on the guidelines was warranted at this time.

V. REPORT ON EVIDENCE ADVISORY COMMITTEE

Professor Saltzburg, who serves on the Evidence Advisory Committee as a liaison with the Committee, reported that the Evidence Committee had met for three days and discussed a wide range of possible topics for amendments. He noted that the Committee had agreed that no amendments would be suggested unless there was a real problem with the current evidence rule and the amendment would clearly improve the rule. He indicated that the Committee would be considering Rule 404(b) vis a vis Rule 104, i.e., whether the judge should decide finally if there was sufficient evidence showing an extrinsic act.

He noted that the Committee would also consider Rule 410 regarding the practice of a defendant waiving the right, as part of plea bargaining, to object to use of those statements for impeachment purposes. A recent Ninth Circuit decision in *United States v. Mezzanatto* indicated that the defendant may not waive Rule 410. The Evidence Committee had requested the views of the Committee on whether any amendments would be appropriate to Rule 410 and or Rule of Criminal Procedure 11, which contains similar language.

Professor Saltzburg also reported that the Evidence Committee would be considering possible amendments to Rule 614 which would permit questioning by jurors and a possible amendment to Rule 1101(d) concerning possible application of the evidence rules at sentencing.

Following brief discussion about the Committee's role in addressing potential evidence issues impacting on the criminal rules. Professor Saltzburg moved that Rule 410 and Rule 11 be tabled until the next meeting. Judge Davis seconded the motion which carried by a unanimous vote.

Professor Saltzburg and Judge Jensen expressed the view that they believed it inappropriate to amend any criminal procedure rule to provide for juror questioning. Professor Saltzburg thereafter moved that the issue be tabled until

the Spring 1994 meeting. Judge Crigler seconded the motion which carried by a unanimous vote.

Mr Wilson indicated that he believed that some provision should be made for entertaining objections to juror questions out of the presence of the jury. For example, an amendment might be made to Rule 26 which addresses the taking of testimony.

VI. DESIGNATION OF TIME AND PLACE OF NEXT MEETING

Judge Jensen announced that the next meeting of the Committee would be held in Washington, D.C. on April 18 & 19, 1994 at the Thurgood Marshall Federal Judiciary Building.

The meeting adjourned on Tuesday, October 12, 1993.

Report to Standing Rules Committee of Advisory Committee on Civil Rules

December 1, 1993

The minutes of our October meeting are attached. The minutes were prepared by Dean Cooper and reviewed by me. They supply much of the detail behind this report.

Action Items

(1) Facsimile filing and service occupy an uncertain ground. (See minutes pp. 2-5). We understand that the Standing Committee is working on Judicial Conference standards on filing, in cooperation with the reporters for the several Advisory Committees. Our minutes reflect strong feelings about some points. If facsimile filing standards are on the Standing Committee agenda in January, we ask that our views be considered. We agreed that if the Appellate Rules Advisory Committee publishes for comment a rule authorizing service by facsimile transmission, the notice and request for comment can include an observation that similar changes may be made in other national rules. We did not face the question whether publication of a draft appellate rule and comment would be sufficient to support adoption of a civil rule without a separate period for public comment.

(2) The Court Administration and Case Management Committee recommended in September that the Judicial Conference approve the concept embodied in pending offer-of-judgment legislation. The recommendation included consideration by the Standing Committee of the choice between recommending legislation and recommending action

through the Rules Enabling Act process. This committee is studying possible amendments of Civil Rule 68, which provides for offers of judgment. We believe that it is premature to endorse legislative action. The Court Administration Committee sought endorsement of the legislation. We replied that the Civil rules Committee had not decided whether the topic should be approached by legislation or rule. The Court Administration Committee reframed its recommendation to endorse the concept, recognizing the need for the Rules Committee to consider the rulemaking question.

(3) Section 6 of the Civil Justice Report Act of 1993, S. 585, 103d Cong., 1st Sess., would limit the use of expert witnesses in civil actions by requiring a showing of good cause for use by any party of more than one witness on the same issue. This question should be addressed through the Rules Enabling Act process, not by legislation.

Information Items

Matters that remain on the agenda for further action:

(1) Rule 23. (See minutes at pp. 11-14). There have been some style refinements in the version presented to the Standing Committee in June 1993. This Committee concluded that Rule 23 should be considered further at its April 1994 meeting to give several new members full opportunity to review the proposal. The proposed changes are important, complex, and likely to prove controversial.

(2) Rule 53. (See minutes at pp. 15-19). Rule 53 was drafted with an eye to trial uses of special masters. We have begun to study the use of special masters for pretrial purposes, and perhaps for decree-enforcement purposes as well. There is a strong sense that Rule 53 does not support many uses now being made of special masters. Specific draft proposals will be considered at the April 1994 meeting.

(3) Rule 68. (See minutes at pp. 20-25). Rule 68 has been before the Committee at recent meetings. Dean Cooper has prepared a thoughtful paper treating the subject at a recent symposium on Civil Rules at N.Y.U. We received many helpful observations from trial lawyers, judges, and academics. Further action has been postponed pending completion of a study of settlement experience by the Federal Judicial Center. The information gained by this study may be useful in determining whether action should be taken on Rule 68. The current proposal would provide limited attorney fee remedies for rejection of an offer that is better than the judgment. It raises many questions beyond the prediction whether it is possible to stimulate earlier settlements. Once the study is completed, the Committee will again consider this proposal, the possibility of adopting alternative incentives to bolster Rule 68, the possibility of doing nothing, and the possibility of recommending that Rule 68 be abrogated.

(4) Sealing orders. (See minutes at pp. 28, 29). The Committee reviewed a proposal that orders sealing court records be limited to a period of 25 years unless cause can be shown for a

longer period. Although the Committee decided not to take action on this proposal, it also decided that it should continue to study the use of orders that seal court papers. Present practices seem to vary widely. The Civil Rules now address the topic only with respect to discovery protective orders. The Standing Committee offered changes to Rule 26(c) for public comment on October 15, 1993. The topic is vast, and it may prove difficult to separate orders that seal papers from orders that limit access to trial. This project will be long-term and may conclude without recommending new rules.

(5) CJRA and the Federal Rules. We are examining the tension between plans filed under CJRA and the Federal Rules as part of a larger concern over the difficulty of accommodating national and local rulemaking in our federal system.

Matters that have been dropped for the time being: Amendment of Rule 4(m) to shorten the 120-day period allowed for service of summons and complaint was discussed. It was concluded that the period allowed should be at least 90 days, and that any possible gain from such a tinkering change would not repay the effort of determining whether the change might be desirable.

Matters that remain on the agenda for possible further action:

(1) Particularized pleading rules. (See minutes at pp. 6-9). We considered the decision in Leatherman v. Tarrant Cty. Narcotics Intell. & Coord. Unit, 113 S.Ct. 1160 (1993), and concluded that it

would be premature to suggest new rules requiring more particularized pleading. One reason for deferring action was a desire to see the effects of new Civil Rule 11 and the interactive effects of Rule 26(f) meetings and Rule 26(a)(1) disclosure with their possible incentives for more particularized pleading.

(2) Style. (See minutes at pp. 31-34). The Committee continued to work on the Style Subcommittee draft of restyled rules. Much important work has been done. Collective examination of these successive drafts absorbs much time. The Committee will meet again in February for three days to work on the draft. The goal is to improve the style of the rules without making any substantive changes in meaning apart from those required to resolve ambiguities. Our work today makes plain that this is a difficult task requiring multiple reviews by different persons. Once a completely reviewed draft is available, the Committee will form recommendations as to the best use to be made of the draft. Our present plans include a limited and informal distribution for comment of the draft after the February meeting, or thereafter when practicable.

Patrick E. Higginbotham
Chair, Advisory Committee on Civil Rules
December 1, 1993

MINUTES

ADVISORY COMMITTEE ON CIVIL RULES

October 21, 22, 23, 1993

The Advisory Committee on Civil Rules met on October 21, 22, and 23, 1993, at the Park Hyatt Hotel, San Francisco. The meeting was attended by Judge Patrick E. Higginbotham, Chair, and Committee Members Judge Wayne D. Brazil; Judge David S. Doty; Carol J. Hansen Fines, Esq.; Francis H. Fox, Esq.; Assistant Attorney General Frank W. Hunger; Mark O. Kasanin, Esquire; Judge Paul V. Niemeyer; Judge Anthony J. Scirica; and Phillip A. Wittmann, Esq. Judge Sam C. Pointer attended as outgoing chair. Judge Alicemarie H. Stotler and Judge Robert E. Keeton attended as chair and outgoing chair of the Standing Committee. Also present were Bryan A. Garner, Esq., consultant to the Standing Committee; Peter McCabe, John K. Rabiej, Mark Shapiro, and Judy Krivit of the Administrative Office; William Eldridge and John Shapard of the Federal Judicial Center; and Edward H. Cooper, Reporter. Observers included Robert Campbell, Esq., and Alfred W. Cortesese, Jr., Esq.

Judge Higginbotham led the committee in expressions to Judge Pointer of thanks and appreciation for his devoted and enormously productive service as chair.

The minutes of the May, 1993 meeting were approved.

Discussion of legislative consideration of the pending Civil Rules amendments led to discussion of Civil Justice Reform Act plans. It will not be long – two years – before a massive effort will be needed to evaluate experience under local plans. The lessons learned from this experience may make it possible to incorporate successful experiments in national rules, restoring a greater level of uniformity in procedure across the district courts. It was noted that at the most recent count, 48 CJRA plans had been filed; 26 of them included disclosure provisions cast in a variety of forms. Early experience seems to be favorable, although in the Northern District of California there is some dissatisfaction with the suspension of discovery until the Rule 26(f) conference.

Facsimile Filing

Under the current form of Civil Rule 5(e), papers may be filed by facsimile transmission "if permitted by rules of the district court, provided that the rules are authorized by and consistent with standards established by the Judicial Conference of the United States." The amended version of Rule 5(e), now pending in Congress and slated to become effective on December 1, 1993, embraces

electronic filing as well: "A court may, by local rule, permit papers to be filed by facsimile or other electronic means if such means are authorized by and consistent with standards established by the Judicial Conference of the United States." The amended version adopts the language of Appellate Rule 25(a), which authorizes local court of appeals rules for facsimile or electronic filing.

In September, 1993, the Judicial Conference deferred action on a recommendation of the Committee on Court Administration and Case Management that courts be authorized to adopt local rules permitting facsimile filing on a routine basis. Detailed Guidelines for Filing by Facsimile were included with the recommendation. The Judicial Conference referred the recommendation to the Committee on Rules of Practice and Procedure, in coordination with the Committees on Automation and Technology and Court Administration and Case Management, for a report to the September, 1994 Conference.

The Appellate Rules Advisory Committee met immediately after the Judicial Conference action. As reported to this Committee, the Appellate Rules Committee recommended that the Judicial Conference adopt a significantly abbreviated version of the Guidelines recommended by the Committee on Court Administration and Case Management. The Guidelines no longer would refer to "filing," but instead would govern "facsimile transmission." The Guidelines would establish technical requirements and set filing fees. The provisions on resource availability, original signatures, transmission records, and cover sheets would be deleted from the Guidelines and incorporated in a model local rule. This change was recommended on the view that practicing lawyers should not be required to resort to Judicial Conference Guidelines for rules governing practice and procedure. Lawyers naturally look to the national rules and local rules for guidance, and should not be at risk of innocent departures from an unfamiliar source of regulation.

Extensive discussion was devoted to the proper balance between national rules adopted through the Enabling Act process and local rules, as viewed through the special role of Civil Rule 5(e) and Appellate Rule 25(a). These questions parallel the general debate over the role of uniform national rules and local rules, but with the specific difference created by the provisions of Rules 5(e) and 25(a). It is clear that the Judicial Conference does not intend to bypass Enabling Act procedures by adopting national rules in the guise of "Guidelines." The guideline device cannot be used to replace or modify the national rules. As one rough approximation, Judicial Conference guidelines or standards should not attempt to tell lawyers how to practice. Rules 5(e) and 25(a), however, have been adopted through the Enabling Act procedure. Civil Rule 5(e),

at least, was meant to achieve a special balance between local autonomy and national uniformity. The provision for local rules permitting filing by facsimile transmission was adopted because of the perception that there are significant variations in local conditions. Some courts have the equipment and staff necessary to handle facsimile filing. Some courts do not. Rather than attempt to force a choice on all courts, requiring that all or none permit facsimile filing, the question was left to local option. At the same time, the provision for standards established by the Judicial Conference was adopted to serve several purposes. The Conference can, at the outset, determine the appropriate time for permitting local adoption of routine facsimile filing practices. Present Conference standards limit facsimile filing to compelling circumstances or to local practices established before May 1, 1991. The Conference can authorize wider adoption of routine facsimile filing. Second, the Conference can adopt standards that ensure that local rules will not degenerate into a variety of conflicting requirements that could prove particularly troubling to practitioners who resort to facsimile transmission from distant places. Third, the Conference procedure, aided by various committees and advised by the Administrative Office staff, can respond to rapid changes of technology in ways far better than the formalized Enabling Act process. As an immediately relevant example, it may prove wise to authorize routine facsimile filing even though the time has not yet come to authorize routine filing by other electronic means.

The sense of the Committee was that the background of Civil Rule 5(e) and Appellate Rule 25(a) is important in determining the appropriate approach to facsimile filing. Local rules, authorized by 28 U.S.C. § 2071, can govern local practice but must be consistent with rules prescribed under § 2072. Local rules regulating facsimile transmission and filing are consistent with Rules 5(e) and 25(a) — rules adopted under § 2072 — only if "authorized by and consistent with standards established by the Judicial Conference of the United States." To the extent that national uniformity is desirable, Judicial Conference Standards can incorporate mandatory provisions to be included in any local rule authorized by the standards. These strictures in the Standards would not be an exercise of rulemaking power. Instead, the Standards would fulfill the purpose of Rules 5(e) and 25(a) that local rules not lead to substantial disuniformity.

The Committee believes that in fact national uniformity is very important. The attempt to limit Judicial Conference standards to bare technical provisions is unwise. Instead, the standards should establish uniform terms to be incorporated in local rules. Provisions governing signatures, transmission records, cover sheets, and time of filing are obvious examples.

The Committee was strongly of the view that whatever action the Judicial Conference takes, the product should be captioned as "Standards," the term used in Civil Rule 5(e) and Appellate Rule 25(a), not "Guidelines."

The Committee also agreed unanimously that at least the first sentence of proposed Guideline I(3) should remain in the Standards. This sentence states that papers may not be sent by facsimile transmission for filing unless authorized by local rule or by order in a particular case. If the Committee's approach is adopted, this sentence should state explicitly that the local rule must be consistent with the terms set out in the Standards. The Committee did not have any view on the second sentence of the proposal, which would prohibit facsimile transmission of bankruptcy petitions and schedules.

The Committee discussed briefly the question whether the time has come for routine facsimile filing. Possible problems were noted, and good experiences were recounted. No Committee recommendation was made.

The Committee did not have time, nor adequate advance preparation, to work on the details of the proposed Standards or the Model Local Rule 25 being drafted by the Appellate Rules Advisory Committee. Only two questions were discussed.

Signature requirements were discussed briefly. The Committee was confident that so long as a Judicial Conference Standard authorizes filing by facsimile transmission, the facsimile image of a signature satisfies the signature requirements of the Civil Rules. Rule 5(e) is adequate authority. The local rule provisions of the Standards should state that the facsimile signature satisfies a signature requirement. (The Committee did not directly address the question whether the local rule should provide that an original copy be maintained until the litigation concludes.)

Time-of-filing questions also were discussed briefly. Two problems were noted. One is that transmission, particularly of lengthy documents, may take some time. It may be desirable to establish the time of filing by some precise event such as the time of receiving the first image, the time of receiving the complete document, or some mid-point average. The other is the problem of transmissions received outside regular business hours of the clerk's office. Support was expressed for the view that transmissions received outside regular business hours should be treated as filed at the time the clerk's office next opens. Some tension was noted, however, with the desire to adjust practices to the possibilities created by new technology. If it is relatively easy to treat papers as filed at the time a facsimile transmission is received, perhaps that adjustment should be made. Whatever

answer is best, a clear answer should be given.

Facsimile Service

The Committee was advised that the Appellate Rules Advisory Committee is preparing a draft rule authorizing service by facsimile transmission. The draft is scheduled for immediate publication for public comment. The Committee approved the proposal that the request for comment include an observation that similar changes may be made in other national rules. This observation may stimulate such extensive comment as to provide an adequate foundation for recommending adoption of facsimile service provisions in the Civil Rules. The Committee left for future consideration the nature and extent of possible differences between facsimile service in the course of district court litigation and facsimile service in the conduct of appeals.

Particularized Pleading

The pleading questions raised by Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 1993, 113 S.Ct. 1160, were discussed at the May, 1993 meeting and continued on the agenda for further discussion.

Discussion began with a review of the development of the Fifth Circuit pleading practices that were involved in the Leatherman decision. It was noted that in practice many courts have exacted heightened pleading requirements in specific types of litigation. Common examples are antitrust, RICO, and securities claims. Most often these heightened pleading requirements are imposed without any explicit articulation or justification.

Turning to the Leatherman decision, it was noted that the Court took pains to state that it was not dealing with pleading with respect to official immunity. There was some speculation that perhaps it remains open to require some form of allegations in the complaint that address and negate obvious issues of official immunity.

The general values of notice pleading were reviewed. One suggestion was that notice pleading should not be encouraged. District courts should be encouraged, on this view, to adopt local rules requiring more elaborate pleadings, with more fact content, for specific categories of cases. One example is provided by multiple and overlapping product liability cases that have national document depositories. A plaintiff who files a new case knows every conceivable theory; why not force disclosure of which theories are advanced in this case? Another member of the committee urged that tightened pleading requirements would promote more economical disposition of litigation. The process of course

would entail increased motion practice, but the overall savings would be significant. Another committee member observed that notice pleading often is frustrating in product liability and admiralty litigation, and that contention discovery is expensive and time-consuming. Similar views were expressed by observing that most plaintiffs and defendants agree that the federal procedural system "is broke." They spend vast amounts on discovery, first; on pleading, second; and on trial, least. More particularized pleading could help reduce expenditures at later stages of the process.

These views were reinforced by the observation that for many years, the Committee has been willing to reconsider and continually revise discovery rules. Perhaps the time has come to recognize that notice pleading is not so firmly enshrined as to be beyond reconsideration. At the same time, it was noted that discovery has become the process through which parties can get an early grasp of a case, requiring disclosure of what is involved. Functionally, it is like heightened pleading.

Doubts were expressed, however, about the prospect that much can be done with pleading requirements. Rule 12(b)(6) motions often are denied with directions to amend the complaint; how many cases really are finally dispatched at the pleading stage, or should be, is a real question. More problems may be encountered, indeed, with over-stated, over-long pleadings than with uninformative terse pleadings.

A response was offered that to the extent that more detail is needed, contention interrogatories can do it; this response was coupled with the observation that it is better to make as few Rules amendments as possible. It also was urged that local rules imposing variations in pleading requirements would be disastrous. Variations in present practice often respond to the views individual judges have of the desirability of specific forms of litigation; local rules could perpetuate these responses.

The cost of pleading motions also was emphasized. Some committee members believe that stricter pleading rules will give rise to many more pleading motions, testing not simply the entire complaint but each part of the complaint. It is not just that pleading motions can be extremely expensive. It also is that motions can be made to delay access to evidence, to delay overall progress of the litigation, and to increase expense for the adversary. Control of the evidence often is with defendants, who have these incentives to make pleading motions. If changes are made that will encourage pleading motions, care should be taken to ensure effective means of controlling the relationship to discovery so that important discovery can go forward. Summary judgment practice is a better alternative because it ensures adequate

discovery opportunities. In a variety of ways, we have been attempting to encourage "meet and confer" practices, in large part as an effort to civilize the early stages of litigation. Lawyers do prepare for pretrial conferences, and are likely to prepare for discovery plan meetings. Heightened pleading requirements would be in tension with this effort. Heightened pleading requirements also might reduce the number of cases that "self-destruct" without ever requiring an investment of judicial time; we should not be eager for that result.

The relationship between pleading and discovery also involves the observation that in taking control of the discovery process, judges regularly enforce disclosure. They require the parties to tell what the case is about, not for purposes of dismissal but for purposes of shaping discovery.

Pretrial conference practice also must be taken into account. Proposed Rule 26(f) is expressly geared to the scheduling conference. The purpose of discovery plan conferences is, in large part, to force a productive, informal, and inexpensive exchange of information about the real nature of the case. Perhaps it makes sense to wait to see whether this procedure, coupled with more active use of pretrial conference orders, can reduce the occasional costs of notice pleading. Repeated amendments to Rule 16 have been designed to encourage more active use of pretrial conference procedures. Judges who have insisted on early conferences find that lawyers cooperate and that real benefits follow. Perhaps all that is needed is some means of encouraging greater use of tools already in the Rules. Adding provisions that encourage more pleading motions may be less satisfactory.

Pleading by pro se litigants was discussed separately. It is difficult to know whether pleading rules can accomplish anything constructive in sorting through these cases. The Fifth Circuit has had good results from the practice of sending magistrate judges to the prisons, so that pro se prisoner plaintiffs can explain directly what their cases are about.

It also was observed that forgiving pleading practices may be influenced by our frequent reliance on litigation as a means of supplementing public enforcement of public policies. To the extent that we are concerned with more than immediate private interests, we may be more reluctant to dismiss litigation for inadequate pleading. At the same time, it was remembered that many of the areas that seem to involve de facto heightened pleading requirements involve such public policies — antitrust, securities, and like litigation are common illustrations.

Various possible means of incorporating heightened pleading requirements into the rules were discussed.

The possibility of increasing the Rule 9 categories of claims that must be pleaded with particularity seemed undesirable to virtually all committee members who spoke to the question. There is a real risk that imposing specific pleading requirements for specific legal theories will be seen as a substantive decision that these theories are disfavored. The number of categories that might be added is without apparent limit, and can easily change over time as experience accumulates with each individual category. Appropriate degrees of particularity may vary from one subject to another, and be difficult to specify in advance. The requirement of Rule 9(b) that fraud be pleaded with particularity may seem distinctive in this respect because of the belief that even a bare allegation of fraud can do damage outside the litigation itself.

Rule 8 is an obvious place to lodge heightened pleading requirements. Rule 8(a)(2), requiring a short and plain statement of the claim, is an obvious starting place. One model, not directly discussed, would require pleading "in sufficient detail to show" that the pleader is entitled to relief. The cognate provisions of Rule 8(b), requiring a short and plain statement of defenses, and perhaps 8(c), also may deserve elaboration. Rule 8(e) provides another possible location. If Rule 8(e) is amended, it may be possible to refer directly to the purpose of the amendment by requiring pleading sufficient to support decision of motions under Rules 12(b), (c), (d), or (f). Changes of this sort might be designed to exact only a small incremental tightening of pleading standards, or could be more ambitious.

An alternative approach would be amendment of the Rule 12(e) provisions governing motions for more definite statement. This approach would have the advantage of permitting case-specific, court-controlled determinations whether more detailed pleading is likely to provide a suitable opportunity for pretrial disposition. The increased judicial involvement required to achieve this advantage might be well repaid, but there is an obvious risk that the investment would not be repaid.

After wondering whether present Rules 8 and 12 have much effect on the ways judges dispose of cases, the committee concluded that no present action seems warranted. The pending revisions of Rule 11 may bear on the need for action in the future. Pleading topics will remain on the agenda for continuing study.

Rule 4(m)

It has been suggested to the Committee that the 120-day period for service established by current Rule 4(j), to be renumbered as Rule 4(m) in the 1993 amendments, is too long.

Several members of the committee suggested that the 120-day

period has not presented any problems. It provides a useful docket-clearing device for a small number of cases. There may be occasions in which multiple defendants are named and it is useful to have time after serving some defendants to find out whether others should be dropped.

It was suggested that 90 days would be the minimum workable period. A reduction from 120 days to 90 days, however, seems the sort of adjustment that should be made only if there is a clear problem to be fixed.

A particular question was raised about the relationship between Rule 4(m) and Rule 12(b)(5). If a motion to dismiss for failure to make timely service under Rule 4(m) is treated as a Rule 12(b)(5) motion to dismiss for insufficiency of service of process, Rules 12(g) and (h)(1) seem to forfeit a personal jurisdiction objection that is not joined with the Rule 4(m) motion. Something may turn on the question whether the personal jurisdiction objection is "then available" if service has not been made at all by the time of the motion. The Committee concluded — without attempting to decide what the answer may be — that it is not appropriate to consider this problem now.

The Committee concluded that there is no present need to study further the 120-day period set by Rule 4(m).

Rule 23

The Committee began work on Rule 23 in response to a request from the ad hoc committee on asbestos litigation. The initial basis for consideration was provided by a model approved by the Litigation Section of the American Bar Association. (The TIPS section of the ABA opposed endorsement of this model by the ABA; the resolution was that the Litigation Section could support the model, but not as an ABA proposal.) As revised on the basis of discussions at earlier Committee meetings, a proposed amendment was taken to the Standing Committee for discussion at the June, 1993 meeting. Because the amendment is complex and likely to become controversial, the chair of this Committee suggested to the Standing Committee that the time available for consideration by the Standing Committee at that meeting was not sufficient to allow full exploration of the issues raised by the amendment. It also was noted that this Committee would have several new members in the near future, and that it might be desirable to have the benefit of their consideration before moving toward publication of a proposal for comment. No action was taken by the Standing Committee, and the amendment remains on the agenda of this committee.

Discussion began with recognition that the draft amendment may, in large part, simply describe and validate actual practice

under the current rule, permitting more express focus on what really works. At the same time, it gives the judge more power over notice, opt-out or opt-in choices, and the like. The already large power of the district court will be expanded. And class actions may become available in circumstances that do not now permit certification. Asbestos litigation may serve as an example of current developments. In one recent massive proceeding, settlements in excess of $2 billion were reached by classes of present claimants and future claimants. The parties assert a "limited fund" class; much turns on resolution in state court litigation of a dispute involving denial of insurance coverage. If the insurers prevail, the defendant "will be gone." The future claimants are those who have been exposed to asbestos but who have not filed claims. Certification of a pure "futures class" is questionable under the present rule. The amendments will make it easier to certify future classes.

The framework of present practice shows de facto aggregation by "commodification" of claims. An illustration was offered of a small 3-lawyer firm whose 3,000 class clients are nothing but names in a computer file. The longstanding pressures toward aggregation may be building to a head, with significant movement in the last few months. Class action practice is a major part of this movement, but it must be considered within the setting of potential changes in underlying substantive and remedial law. Efforts to achieve greater uniformity in awards for pain and suffering, for example, could have an obvious impact on administration of aggregated litigation.

A forerunner of the current draft has been circulated to an ad hoc list of practicing lawyers and academics, selected primarily from a list of those who appeared at a single day of the hearings on the proposals that led to the 1993 Civil Rules amendments. There has not been extensive reaction. There was no apparent sentiment favoring more dramatic changes in class action practice. Academics generally seemed to favor the basic structure of the proposal. Less enthusiasm was shown by practicing attorneys, both those commonly representing plaintiffs and those commonly representing defendants. A very common reaction is that lawyers have learned to live with the present rule, and do not need to devote ten years to educating themselves and judges in a new rule. It is common to speculate that any time saved in reducing litigation over the distinctions between (b)(1), (b)(2), and (b)(3) classes will be offset by an equal increase in litigation aimed directly at the points now reached indirectly through categorization. Notice, opt-out, and opt-in choices are very important. The increased level of district court discretion, indeed, may lead to an increase in total litigation addressed to class action procedure. There also is concern that more flexible notice provisions will be used to add increased notice costs to

actions that now are (b)(1) or (2) classes, and to provide inadequate notice in actions that now are (b)(3) classes. The provision for opt-in classes is opposed by many who fear that it will allow judges to defeat effective use of class actions to enforce disfavored substantive principles. The requirement that a class representative be willing is questioned as an almost-certain defeat of most defendant class actions.

It also was noted that opposition may come in forms that defy common stereotypes. Defendants, for example, may favor certification of classes of future claimants as a means of establishing repose. Plaintiff class attorneys, on the other hand, may oppose such classes in the belief that greater recoveries will be available after claims fully mature. The current proposal does not explicitly address future classes, but is sufficiently flexible that it seems to permit them.

One possible modification of the proposed amendment was discussed. It would be possible to add an eighth factor to proposed Rule 23(b), explicitly allowing denial of class certification on the ground that the costs of administration would outweigh the private and public benefits of enforcing the underlying claim. A point of departure for drafting could be found in the Uniform Class Action Rule promulgated by the National Conference of Commissioners on Uniform State Laws. It was concluded that this addition would not be desirable. The superiority requirement of proposed Rule 23(a)(5) provides flexibility to respond to these concerns. A more explicit provision might lead to denial of class actions in "(b)(1)" settings, and would be difficult to restrain by appellate review.

The best means of pursuing further deliberation were discussed. The proposal has been with the Committee for some time. It seems carefully balanced to many Committee members. It is anticipated that although the proposal seems balanced and reasonably conservative to many Committee members, there will be more explicit and hostile reaction when it is formally published for comment. It was agreed that the formal publication and public comment process should not be initiated by recommendation to the Standing Committee until the Advisory Committee is confident that the proposal is desirable. The formal process should not be used to launch trial balloons. It is possible to begin with a formal request for public comment on the need to revise Rule 23, as was done before preparing the proposed 1993 amendment of Rule 11. As an alternative, it is possible to undertake a widespread informal circulation. Or the proposal could be published with a request for comment on suggested alternative draft provisions.

The possibility of widespread informal circulation was thought dangerous by some members because of the risk that it may cause

positions to crystalize without thought, entrenching opposition that would be mollified by a more open deliberative process. It was noted that many lawyers have commented in the past that only a small fraction of the practicing bar have any generalized experience with class actions. Most lawyers who have handled class actions have experience in only one or two substantive fields. The problems encountered in class actions, however, seem to be distinctively different across different substantive fields. It may be better to focus on processes that will provide open and simultaneous expressions from a cross-section of experienced lawyers.

This discussion led to discussion of the extent to which changes can be made following publication and public comment without need for repeating the publication and public comment process. One argument advanced by opponents of the disclosure provisions proposed in the 1993 amendments to Rule 26(a)(1) was that the final proposal was different from the published proposal, and had not been republished for additional comment. The principle urged in responding to this argument was that the final proposal was merely a reduced version of the original proposal; that the original contained all of the duties included in the final proposal, and more in addition. That principle seems right to the Committee, but account must be taken of the potential need for republication in determining whether a proposal is ready for publication.

The discussion of Rule 23 closed with the conclusion that, in part because there are several new Committee members, the proposed amendment should be retained on the agenda for further discussion at the next Committee meeting. It was recognized that the draft changes the nature of the certification process. The process is made more open-ended and discretionary by elevation of the superiority requirement to subdivision (a)(5), transformation of the subdivision (b) categories into factors that inform the superiority decision, reduction of the predominance of common questions test from a prequisite in (b)(3) class actions to a factor that simply bears on superiority, increased flexibility as to opting out and opting in, increased flexibility as to notice requirements, and other changes. These changes will generate uncertainty during a significant period of learning the new rule. They will reduce the opportunities for appellate control of discretionary district court decisions. They may generate more complexity even in the long run than the certification process should have to bear.

Additional materials will be supplied to the Committee to assist preparation for renewed discussion of Rule 23 at the next meeting.

Rule 53

Discussion of Rule 53 began with a relatively lengthy introductory description of the questions that might be faced.

Rule 53 governs the appointment of special masters in terms that seem to focus primarily on trial. For many years now courts have made increasing use of masters before and after trial. Before trial, discovery tasks seem to be those most often assigned to masters, but it is not uncommon to assign broader responsibilities for supervising pretrial case management or for facilitating settlement. After trial, masters are used to supervise enforcement of complex decrees, particularly in "institutional reform" litigation. Enforcement tasks at times seem to require extensive, expert, and detailed familiarity with the institution and the problems that may require reformulation of a decree as implementation is attempted. The responsibilities imposed on the master may call for nonlegal expertness as much as — or more than — legal skills. The means used to gather information may go beyond those familiar to ordinary adversary litigation.

These pretrial and post-trial uses of masters raise a number of questions that are not addressed by Rule 53. The central questions go to authority to rely on masters, the extent to which judicial power can be delegated and the terms of review by the judge that must be observed, the distinctions that may be appropriate between delegation to masters and delegation to magistrate judges, the propriety of ex parte communications between master and judge, the occasions that justify appointment of masters, the persons who qualify to be appointed and grounds for disqualification, the extent to which rules of judicial ethics apply to masters, the ability of masters to demand evidence from the parties or even to seek out evidence independently, and the terms of compensation and liability for paying compensation.

The best means of addressing these questions are uncertain. There are distinct advantages in amending Rule 53, not only because Rule 53 is familiar as the rule regulating masters but also because there are great efficiencies in maintaining a single rule that addresses all of the common issues that affect use of masters for any purpose. If Rule 53 amendments are pursued, it will be important to catch all of the cross-references to Rule 53(b) in other rules. There are equally apparent advantages in establishing independent rules governing pretrial and decree-enforcement masters. Pretrial masters might be governed by provisions in the discovery rules, but Rule 16 may be a more suitable location because pretrial master responsibilities may extend beyond discovery. Perhaps a new Rule 16.1 would be most appropriate. Decree-enforcement masters might be dealt with by provisions in the "judgments" section of the rules, perhaps as a new Rule 66.1

following Rule 66 on receivers. If separate rules are adopted for pretrial and decree-enforcement masters, it still may be possible to establish a single set of provisions governing common issues for incorporation into the separate rules.

Thought also must be given to coordinating special master practice with appointment of expert witnesses under Evidence Rule 706. There are some indications that court-appointed experts have been used for purposes of advising courts in ways that go beyond testimony presented in open court. If such practices are emerging, much remains to be learned about them before it can be determined whether explicit rule provisions are needed. In like vein, there are indications of occasional practices in appointing experts as judicial assistants by means outside Evidence Rule 706. The economist-law clerk is one example. Again, much more must be learned before the rulemaking process can be undertaken.

Some recent appellate decisions appear to be constricting use of special masters, particularly in the pretrial setting. These decisions afford the immediate occasion for addressing the question through the rulemaking process.

General discussion followed this introduction.

The first and recurring question was the extent of actual reliance on special masters for pretrial and decree-enforcement proceedings. Most of the discussion focused on pretrial matters. Some members of the committee reported that they had no experience with pretrial masters; in the districts in which they practice, judicial duties are delegated only to magistrate judges, not special masters. Others reported extensive use, reflecting inability of the magistrate judge corps to handle all of the pretrial work that needs to be done. The Northern District of California makes extensive use of masters, perhaps because the docket is studded with complicated intellectual property cases. Masters are used to supervise discovery, to handle other pretrial management tasks, and to facilitate settlement. As a very special illustration, one committee member who is supervising consolidated pretrial proceedings has appointed a special master to handle communications and coordination with courts in 48 states dealing with related litigation. Masters also are used to supervise disposition of class action judgments. One concern may be that adopting formal rules may invite increased use of masters by making the practice seem easier and more ordinary. Rule amendments should be framed to ensure that reliance on masters remains exceptional.

To the extent that masters are appointed because of limits on available magistrate judge time as well as district judge time, one possibility may be to expand the number of magistrate judges. If there is only occasional need, it might be possible to establish a

roving corps of magistrate judges available for assignment to specific tasks without regard to ordinary district lines. The problem in large part is one of the limits of judicial time in relation to the demand. Magistrate judge positions were created to respond to burdens on judicial time, and have become essential. Regularization of special master practices may in turn encourage the system to rely on ad hoc appointment of nonjudicial officers in a way that soon becomes another indispensable part of the system. This prospect argues for caution in approaching rules that may expand reliance on masters.

The view was expressed that pretrial use of special masters is essentially unregulated by the Civil Rules. The history of Rule 53 shows explicit consideration of this possibility and equally explicit rejection. As the rules now stand, it is necessary to rely on theories of inherent power. Rule 53 provides at most an analogy to regulate some of the questions that arise. And there are many important questions.

Cost is one of the broad questions posed by resort to special masters. In the competition for scarce judicial resources and attention, litigants who can afford to pay may be nudged toward use of special masters. This phenomenon may be seen as a desirable movement toward "user pays" methods of defraying the costs of adjudication. One incidental benefit is that a greater share of public judicial capacity is freed for use by others. It may seem instead to give an unfair advantage to wealthy parties who can afford to bypass the queue for judicial disposition. Even worse, it may seem to impose disadvantages on litigants who cannot really afford the cost of masters inflicted by court order. The experience in federal equity practice before the use of masters was severely curtailed by the 1912 rules was offered as a warning. There are real risks in routine delegation to masters who manage to spend inordinate amounts of time, generating inordinate fees and providing inexpert service.

The question of compensation rates was noted. Experience in the committee reflected rates as high as $300 an hour, and as low as $50 to $75 an hour for monitors selected to review decree enforcment problems. In one case fees were set lower than the parties agreed upon in anticipation that the master's fees might be argued as support for increased statutory fees. One judge observed that masters are commonly selected from "retired judges companies" who provide private judicial services, with expenses prepaid by the parties on an equal sharing basis but eventually taxed as costs.

It was observed that the nexus between Evidence Rule 706 and masters may run in two directions. Not only may a master become in effect a witness; an expert witness may be appointed and asked to assume the duties of a master. If these questions are addressed,

it should be in coordination with the Evidence Rules Advisory Committee. Some judges use experts in Evidence Rule 104(a) hearings to help decide whether to consider evidence from another expert; there may be some risk of a continual regression. There may be a more direct interdependence if a special master is appointed for discovery or other pretrial chores with an eye to paving the way toward Rule 104(a) hearings.

There may be significant distinctions between appointment of a master with consent of all the parties and appointment over the objection of one or more parties. When all parties consent, the practice may seem similar to arbitration. Indeed, some private contracts provide for court appointment of arbitrators upon failure of the parties to agree; these relationships do not involve special masters. Nonetheless, there may remain issues that should be addressed. Apart from the questions of qualification, compensation, scope of reference, communication with the trial judge, applicability of the principles of judicial ethics, and the like, one specific illustration was the question of immunity from liability. Might there be a distinction between consensual masters and others with respect to the availability of judicial immunity? Could the result turn on the decision whether to embody the consent in a formal appointment order? And of course consent of the parties is not alone enough; the court must consent and appoint a master if the master is to participate in administering the court's power. And at the outer limits of likely practice, Article III imposes limits on delegation that cannot be overcome by consent. Even consensual masters, moreover, may become caught up in conflicts. The master may appear before the same judge as advocate in another case, or may become involved in another case as counsel opposing one of the parties or attorneys in the master case.

The need for rules amendments may depend in part on the extent of inherent power to appoint masters. Reliance on inherent power, however, does not provide any ready means of regularizing practice. Inherent power, moreover, is an elusive concept. To the extent that inherent power depends on some measure of necessity, it may not carry very far in justifying appointment of masters, particularly if a party objects.

Finally, discussion turned to the form of possible rules. A highly detailed model governing many aspects of pretrial master appointments was considered as a model. The view was expressed that it is better to rely on more cryptic and general rules, with comments on some matters of detail in the Note. It also was suggested that amendments to any rule should make it clear that reliance on masters should remain exceptional in all settings.

The location of rule amendments was left open. Rule 16 offers one obvious choice; as renumbered by the 1993 amendments, Rule

16(c)(8) could be amended to include specific authorization for appointment of pretrial special masters. Another possibility would be to work within the discovery rules; this possibility is particularly attractive if it is concluded that most other pretrial chores should be discharged by a magistrate judge or district judge. Rule 53, although a trial rule, might be amended at least to establish general provisions that govern masters appointed under any rule.

The prospect of addressing Evidence Rule 706 as well, in coordination with the Evidence Rules Committee, was found too complex to be addressed immediately.

The conclusion of the discussion was that models of possible rule amendments should be prepared, perhaps with alternative versions responding to the possible choices between Rule 16, the discovery rules, and Rule 53. Decree-enforcement questions are to be postponed unless the process of drafting amendments for discussion leads inexorably to such problems. The basic approach is to use simple and general terms in the rules, leaving questions of detail for the Notes.

Rule 68

A proposal to revise Rule 68 advanced by Judge Schwarzer, Director of the Federal Judicial Center, has been reviewed at the November, 1992, and May, 1993, meetings of the Committee. In addition, the Court Administration and Case Management Committee has endorsed the provision of the Civil Justice Reform Act of 1993, S. 585, that would enact this proposal as legislation. The Court Administration Committee has urged that the Committee on Rules of Practice and Procedure report to the March, 1994 session of the Judicial Conference on the appropriateness of considering this matter through the Rules Enabling Act process.

Discussion of this proposal began with the observation that Rule 68 has received much attention over time. There also has been much discussion of more direct fee-shifting proposals. Initial support for moving toward a "British" fee-shifting system seems to be waning. One reason for concern is the heavy reliance we place on private litigation to accomplish public ends; this "private attorney general" approach would be impaired by putting plaintiffs at risk of paying defense attorney fees. As economists have studied fee shifting in greater detail, moreover, they have identified realistic settings in which fee shifting can deter settlement.

The difficulties that inhere in the present proposal arise in part from the fact that it strikes out in a new direction. This proposal would be a creative and predictive exercise of the

rulemaking power, not an adoption, validation, and refinement of practices that have emerged in the courts. It may be that economists — who have begun to study offer-of-judgment sanctions seriously — can help by identifying party incentives and motivations that are not intuitively obvious. Common-sense evaluation of economic diagnoses remains important, however. The more refined reaches of game theory, for example, may be more sophisticated than the motives that actually drive behavior.

Following this introduction, the Reporter reviewed the purposes and character of the current proposal. The central feature of the proposal is adoption of a sanction that provides for limited attorney fee shifting. The assumption is that something can be done to increase the number of cases that settle, and to accelerate the time of settlement in cases that now settle. There also seems to be a belief that fairness requires compensation to a party for expenses incurred after making an unsuccessful offer to settle on terms more favorable to its adversary than the judgment. The mechanism designed to serve these purposes would shift reasonable post-offer fees, but subtract the benefit that results from the difference between offer and judgment and limit the maximum award to the amount of the judgment. A simple set of figures was used to illustrate both the "benefit-of-the-judgment" and "cap" features:

Defendant Offer	$50,000	$50,000
Post-offer def fees	15,000	55,000
Judgment	40,000	40,000

The award in the left column is $5,000: The actual reasonable $15,000 fee is reduced by the $10,000 difference between offer and judgment. The award in the right column is $40,000: The actual reasonable $55,000 fee is first reduced by the $10,000 difference between offer and judgment, leaving a $45,000 figure; and then "capped" at $40,000 as the amount of the judgment. The plaintiff nets $35,000 in the first setting, and the defendant is in the same position as if the $50,000 offer had been accepted. The plaintiff gets nothing in the second setting, but is not out-of-pocket, and the defendant is $5,000 worse off than had the offer been accepted.

Economic theory can identify situations in which this system would encourage settlement, and other situations in which it would deter settlement. Theory has not yet reached a point at which the distribution of actual impacts can be predicted.

Strategic use of this system is often predicted, and difficult to control. Since multiple offers are allowed, and indeed encouraged, many lawyers who have reviewed the proposal predict that early offers will be made for the purpose of affecting bargaining positions in later negotiations, not for the purpose of

prompting settlement.

The predicted impact of the system may depend on the character of the underlying litigation. "Big" cases for high stakes may be relatively immune from this form of settlement incentive; other incentives will overwhelm offer-of-judgment sanctions. In small-stakes cases, plaintiffs who have relatively few resources and who are risk-averse may feel compelled to settle on terms that do not reflect the fair settlement value of their claims.

It also is possible to question the value of early settlement. If the proposal encourages parties to settle without undertaking the discovery and other information-gathering efforts that otherwise would be made, early settlements may reflect ignorance rather than fair appraisal of the dispute.

The intrinsic value of settlement also can be questioned. Some litigants may seek judgment, not the present money equivalent of probability-adjusted possible outcomes. The theory that we should increase incentives to settle may not take sufficient account of this question.

With this introduction, discussion began with speculation about the characteristics of cases that settle. It was noted that although more than 90% of all filed cases disappear without trial, many of them disappear for reasons other than settlement. Settlement is most likely in cases that are approached by the parties from a cost/benefit analysis. Most of these cases likely settle now. Those that survive may involve stakes beyond money judgments. With large and uncertain damages, and uncertainty as to liability, settlement may be difficult to predict. The risk of losing everything may make it attractive to settle on terms that do not correspond to a dispassionately calculated predicted value. And cases involving multiple parties may be more difficult to settle, at least as to all defendants. The rules of setoff, contribution, and like incidents of joint, joint and several, or several liability are important. The multi-defendant antitrust action is an illustration of a pattern in which it is common to settle with all but one or two deep-pocket defendants as a means of financing a big-scale trial. Settlements among most parties do not avoid the need for trial.

But there may be cases in which settlement remains possible. A very small sample considered by the Federal Judicial Center found trials in cases in which the defendant expected to pay more than the plaintiff expected to win, so that settlement should have been possible. Cases involving a single defendant and relatively clear damages at a reasonably low level may be particularly suitable for settlement. Personal injury cases in which the dispute centers on damages also may be cases likely to be influenced by Rule 68

revisions.

It was urged that we should pursue this topic to see whether it is possible to encourage early settlement. Some regular litigants are frustrated by the difficulty of achieving early settlement. Incentives can help. California practice relies on shifting payment of expert witness fees as incentives in the offer-of-judgment rule. This incentive has helped induce settlements. Offers are routinely made, and the consequences are regularly considered in evaluating the offers. Offers are made even in cases involving relatively poor parties who may not be able to satisfy a judgment for sanctions, since the judgment can be traded off in the process of settling an appeal.

The offsetting concerns about the fairness of settlement also were explored. Fear was expressed that exposure to potentially substantial Rule 68 consequences could distort settlement calculations. An individual plaintiff with a legitimate claim, anxious for full discovery to evaluate and assert the claim, may feel undue pressure to settle on terms that do not seem intrinsically attractive. This fear was expressed on the basis of experience both in representing plaintiffs and in representing defendants. The relatively great economic power of many defendants in relation to many plaintiffs may lead to unfair results. This observation led to the suggestion that perhaps sanctions should be imposed for making an offer that is less favorable than the judgment.

The most direct view about the value of settlement was that it is a mistake to view trial as a pathological event, resulting from settlement miscalculations by the parties. The system is designed to provide trials. Systems designed to deter parties from going to trial are unwise; what is to be feared is not an ineffective rule, but a rule that is too effective in coercing settlements.

Related doubts were expressed in the observation that protracted experience with attempts to encourage settlement suggests that rule-driven approaches are not likely to work. The current rule has little effect outside of statutory fee-shifting cases, because costs are not likely to be significant in relation to stakes. Economists grossly exaggerate the rationality of the settlement process. In many personal injury cases the damages are not capable of calculation. It is not fair to attach consequences to failure to guess right in response to a Rule 68 offer when there is no sound basis for predicting probable judgments.

These views led many to believe that the proposed amendments may involve matters of substance. To the extent that they seem to move part-way toward adoption of the "British Rule" that the loser pays the winner's attorney fees, there may be more direct and

better ways of making the move.

It also was suggested that offer-of-judgment provisions work effectively only in cases in which rejection can defeat the right to recover statutory attorney fees. In such cases it can create a conflict of interest between attorney and client if statutory fees are an important guarantee of fee payment. On the other hand, it also can help reduce conflicts of interest in cases in which settlement is thwarted by the attorney's desire to pursue greater fees through litigation.

Fee-shifting sanctions may have a perverse consequence if a party who rejects a formal offer seeks to reduce the danger of fee liability by increasing expenses in an effort to win a more favorable judgment.

John Shapard of the Federal Judicial Center described the questionnaire they plan to use in an effort to gain more information about the settlement process. He began by noting that it is easier to understand the proposed Rule 68 amendments as creating a choice for the offeror. The offeror can choose to stand on the judgment, without any attorney fee award, or can choose the offer with an adjustment for attorney fees. Thus if the defendant offers $50,000 and judgment is $40,000, the defendant will choose to pay the judgment if post-offer fees are $10,000 or less, and will choose to pay the $50,000 offer less post-offer fees if the fees exceed $10,000. This rationale would support rule language that avoids the need to determine reasonable post-offer fees whenever the offeror elects to accept the judgment. This rationale, on the other hand, may lend support to arguments that the Rule affects substantive rights.

Mr. Shapard also noted that plausible offers under a fee-shifting statute may restrain incentives to run up expenses by imposing responsibilities on an adversary. A party who may have to compensate such expenses may hesitate to inflict them.

The proposed questionnaire, which has been reviewed with a subcommittee of this Committee, is intended in part to find out how many cases that do not now settle might have settled. It also hopes to find out whether cases that do settle might be settled earlier. It has been opened out from earlier versions so as to solicit reactions to other possible revisions of Rule 68. Although the broader inquiry may help gather lawyer reactions to an array of possible sanctions, drafting the questionnaire in this form is more difficult. The survey population will seek to reach all lawyers who participated in 600 cases selected at random. There will be 100 tort cases that went to trial and 100 that settled; 100 contract cases that tried and 100 that settled; and 100 "other" cases that tried and 100 that settled. A separate questionnaire

will be designed for statutory-fee shifting cases.

It was asked whether the survey is something that should inform consideration of Rule 68 amendments, or whether the first questions should be addressed as a matter of philosophy rather than probable impact. It was pointed out that one of the motives for undertaking the survey is that legislation has been introduced to enact the capped-benefit-of-the-judgment proposal; the survey has meaning outside of possible use by this Committee.

A motion was made and seconded that this Committee not ask the Federal Judicial Center to undertake the proposed survey. Discussion of this motion included the observation that the Court Administration and Case Management Committee has already approved the principle embodied in the proposed Rule 68 amendments, and has asked for a report on the wisdom of addressing the matter through the Rules Enabling Act process. The proposed statute does not fit well with the Rules; it would overlap Rule 68, and does not attempt to adjust the overlap. We should know more about the possible impact of Rule 68 before seeking to cut off the Rulemaking process.

Further discussion resulted in a suggestion that most members of the Committee would, if put to the question, agree to several points. First, the Committee is not now prepared to go ahead with the proposed revision of Rule 68. Second, that to whatever extent the Judicial Conference has approved the basic elements of this proposal on recommendation of the Court Administration and Case Management Committee, it should reconsider. In addition, it should note the need to adapt any legislation that may be adopted to the incidents of Rule 68 as it stands now, including its impact on attorney fee-shifting statutes. Third, the question of allocating responsibility between legislation and the Rules Enabling Act process is difficult. There may be substantive elements to attorney fee shifting in this setting that counsel action by Congress. At the same time, the proposal bears directly on a procedure that has been adopted through the Enabling Act process, and there are great benefits to consideration through this deliberate and multi-stage process. This summary was approved on motion, as described below.

On vote, the motion that the Committee not recommend to the Federal Judicial Center that it undertake the proposed survey failed, seven votes against and two votes for.

A motion was then made to recommend that the Federal Judicial Center undertake two surveys, including one focusing on the use of Rule 68 in statutory fee-shifting cases. The motion included approval of the three points summarized in the next-to-preceding paragraph. The motion carried, nine votes for and no votes against.

Two final suggestions were made. One was that the actions of the Committee leave it open to consider abrogating Rule 68. The second was that any Rule 68 revision should address the possible issue preclusion effects of a Rule 68 judgment.

Liaison to Evidence Rules Committee

Judge Brazil reported as liaison member from this Committee on the New Orleans meeting of the Evidence Rules Committee.

The Evidence Rules Committee plans to review all the Evidence Rules. Proposed revisions to Rule 412 are going forward now.

The Evidence Rules Committee began with proposals that it consider the topic of "trial management." It considered the possibility of providing guidance and perhaps encouragement for management of litigation at the trial stage. The possibilities of proceeding by way of formal rules, guidelines, or educational efforts were considered and found difficult to evaluate. It was concluded that the Civil Rules Committee is the more appropriate body to initiate study of these matters, but that it will be desirable for the Evidence Rules Committee to participate in the process. Joint projects, or initiatives by the Civil Rules Committee, will be welcome.

The Evidence Rules Committee also considered the relationship between Civil Rule 53 masters and Evidence Rule 706 court-appointed expert witnesses. The Evidence Rules Committee will study the 700 series rules, but believes that the initiative with respect to masters and experts should come from the Civil Rules Committee with respect to all questions other than experts appointed to testify at trial.

Many issues will be studied involving Evidence Rule 408 on the admissibility of statements and offers in settlement. Among the issues will be identification of communications that count as made for the purpose of settlement; admissibility in one case of communications made in another case; and what exceptions might be made based on finding different purposes for the communications. Sealed settlements also will be studied, recognizing that these questions may involve the Civil Rules Committee.

Regulation of juror questions at trial will be studied. Again, this topic may overlap with the Civil Rules Committee.

Finally, there was substantial debate over Evidence Rule 404(b) dealing with other crimes, wrongs, or acts. The questions included whether there should be an Evidence Rule 104(a) hearing requirement before bad acts can be used for any purpose; whether findings should be required as to the relative probative value and

effects of the evidence; and whether a criminal defendant can concede an issue to avoid admission of such evidence.

Finally, it was noted by a member of this Committee that pending legislation would adopt a limit on the number of expert witnesses that can be used at trial. It was moved and seconded that this Committee oppose adopting such limits by legislation rather than the Rules Enabling Act process. The motion passed unanimously.

Sealing Records

Judge J. Rich Leonard wrote on behalf of the joint committee on Court Records established by the Administrative Office and the Federal Judicial Center. He noted that the records schedule adopted in 1982 by the Judicial Conference requires that designated court case files be preserved, but that there is an impasse between orders that seal records without any time limit and the refusal of the National Archives to accept records that cannot be made available by a specific date. He recommended that the various rules committees consider rules amendments setting 25 years as the presumed expiration date of sealing orders. Civil Rule 43 could be amended, for example, by adopting a new subdivision: "**(g) Expiration of sealing orders.** An order sealing court records expires 25 years after final judgment unless the order or a later order sets a different expiration date."

The Committee decided that the time has not come to worry about the National Archives problem. Legislation may be a suitable mans of addressing the record storage problem. It was noted that a provision setting a presumed expiration period would simply prompt careful lawyers to ask for perpetual sealing, or sealing for periods so long as to be perpetual for any practical purpose. And it was suggested that most judges probably assume now that sealing orders are perpetual.

The questions raised by this proposal, however, involve much deeper issues of access to court records. Members of the committee noted that different courts around the country follow quite different policies in directing that records be sealed. A wide variety of records may be sealed, including pleadings, summary judgment materials, transcripts, and settlement papers. Sealing orders at times are used to protect privilege materials. The topic has been enormously controversial in state courts. Special problems arise in litigation consolidating actions governed by different state laws; one member of the committee reported that in consolidated litigation involving the laws of 48 different states he had adopted the expedient of requiring disclosure according to the law of the least protective state — once an item is disclosed under that law, it is available as a practical matter in all other

cases.

The Committee has recently considered legislation dealing with public access to settlement agreements in litigation with the United States or United States agencies, and concluded that legislation is the proper means of addressing that problem.

Sealing orders in more general terms, however, seem a suitable topic for Civil Rules action. The topic is important. The Committee concluded that these questions should remain on the agenda for further study, instructing the Reporter to provide information for discussion at the next meeting.

Proposed Amendments To Be Published

It was reported that earlier Rules amendment proposals will be published for public comment. Rules 26(c)(3), 43, 50, 52, 59, 83, and 84 are in the package. The versions of Rules 83 and 84 initially proposed by this Committee have been revised by the Reporter of the Standing Committee, working with the Reporters for the various advisory committees, to achieve uniformity. Public hearings have been set for Dallas, Texas, at 2:00 p.m. on April 6, 1994.

Style amendments

The Committee resolved itself into Committee of the Whole to work on style revisions of the Civil Rules developed by the Style Subcommittee of the Standing Committee, working with Bryan A. Garner. The history of the process was noted. The initial draft of the Style Subcommittee did not include the 1993 Civil Rules amendments that were then in process of adoption. Judge Pointer, as chair of this Committee, revised all of the 1993 amendments to conform to the style of the draft. This Committee was divided into three subcommittees that each studied one portion of the draft. Suggestions from these subcommittees were incorporated in the draft. The product of this process went back to the Style Subcommittee; working with Bryan Garner, the Style Subcommittee developed the draft now before this Committee.

The nature and purpose of the style project were discussed throughout the deliberations of the Committee of the Whole. It was concluded that it is worthwhile to pursue restyling through to the point of establishing a well-polished document that restyles all of the Civil Rules. The purpose of the project is to make the rules more accessible to the lawyers, judges, and even pro se litigants who must work with them. The Rules have many ambiguities and failures of clarity that can be corrected. The Civil Rules have been chosen as the demonstration project. The Style Subcommittee has grown increasingly enthusiastic as the project has developed,

finding the drafts much easier to use and understand than the current rules. The purpose throughout has been simply to improve clarity, recognizing that resolution of identified ambiguities may effect changes in meaning but seeking as far as possible to resolve each ambiguity in favor of the most likely intended meaning. Once a uniform style has been attained, all future revisions will follow this style.

The use to be made of the final document, however, remains uncertain. The most ambitious program would be to publish the document for public comment with an eye to adoption of the complete revision all at once. This possibility has been contemplated by the Standing Committee from the beginning. This Committee would report the final restyled draft to the Standing Committee with a recommendation for adoption as with any other Civil Rules changes. Upon approval by the Standing Committee, with such changes as it might find desirable, the draft would be published for comment. If this course were followed, the period for public comment should be longer than the ordinary period to ensure as full comment as possible on the ways in which changes made for the purpose of clarification might effect unintended changes in meaning. Even then, there are risks of confusion, and a certainty that changes in language will generate litigation over arguments that meanings have been changed. It also may be unwise to attempt to seek public comment on any rules amendments designed to change rules meaning during the period for comment on the style proposal. Public comment on the style proposal could easily absorb all the available time and energy of this Committee.

It was noted that inadvertent substantive changes may be made. The drafts represent an intent to identify each recognized ambiguity and to state the reasons for its resolution. It was suggested, however, that if any of the changes have any substantive effect, the project will generate great resistance. Each time this Committee has studied portions of a draft, significant numbers of possible substantive changes have been found. This experience has demonstrated the difficulty of avoiding unintentional changes in meaning, and has sharpened the sense that a cautious approach may be desirable in determining the use to be made of the final product.

The effort to revise all the rules at one time responds to the belief that it is better to use style conventions that are constant across the full set of rules.

Consideration also must be given to other foreseeable work in deciding the use to be made of the final style draft. In relatively short order, the results of local civil justice delay and expense reduction plans will be available for study. This Committee must be deeply engaged in the process of sorting through

the successful innovations and separating the unsuccessful ones, with an eye to incorporation of the successful practices in the Civil Rules. Much time and energy will be required for this work.

The Committee concluded that it is important to produce as clean a style draft as possible. A motion that the Committee not attempt to finish work on the style draft at this meeting passed unanimously. It was agreed that a separate meeting should be held for the sole purpose of working on the style draft. The potential impact of the style draft is enormous; great care must be taken to ensure that no changes of meaning are effected. The work cannot be rushed. Judge Pointer agreed to incorporate into a single draft the suggestions that have been made by members of the Style Subcommittee and marked on the current working draft. This new draft will provide the basis for discussion at the style meeting.

Further discussion of the steps to be taken after finishing a style draft concluded without resolution. It may prove desirable to circulate the draft for informal comment, but the form and scope of the circulation cannot be determined without deciding on the purpose of the circulation. If it is decided to pursue submission to the Standing Committee with a recommendation for publication through the regular Rules Enabling Act process, it may be better to follow that path without extensive prior circulation. If it is decided to hold the draft as a model to be incorporated in individual rules as amendments are made for other purposes, wider informal circulation may be desirable.

Specific drafting rules were noted. One problem that has not been fully resolved is the "hanging indent," in which an unnumbered flush block of text follows numbered and inset portions. It would be better not to come back to the margin after inset items. This problem arises in part from the attempt to preserve well-known Rule numbers. Rule 12(b)(6), for example, is to remain numbered as Rule 12(b)(6). This problem arises perhaps 20 times in the current draft. Recognizing that hanging indents can create ambiguity, efforts should be made to eliminate them.

A number of specific style issues were discussed.

In Rule 1, the draft changes the provision that the Rules "shall be construed" to "should be" construed. It was suggested that the revision should adopt "must be" construed to create rights. The response was that "should" is appropriate because the language is hortatory. A motion to retain "should" passed by seven votes for, one vote against.

In various rules, the draft refers to the place where a court "sits." It was concluded that "is located" is the appropriate term.

It has been agreed that "party" is a neutral term; a party can be referred to by "that," "who," and other flexible words.

In draft Rule 4(d)(4), a change from requests addressed to a defendant "outside any judicial district of the United States" to "not within any judicial district of the United States" was accepted. Parallel changes are appropriate in other places.

Draft Rule 5(c)(1)(C) carries forward an ambiguity of the current rule. The provision that filing and service on the plaintiff constitutes due notice to the parties seems, as observed in the footnote, awkward if answers to cross-claims and replies to defendants' pleadings are served only on the plaintiff. The style draft does not attempt to resolve this question.

Discussion of Rules 12(g) and (h) led to the conclusion that they mean two things: If a Rule 12(b) motion is made, it must include or waive all defenses then available under paragraphs (2), (3), (4), or (5). If no Rule 12(b) motion is made, these defenses must be included in the answer or waived. The style draft should reflect this meaning.

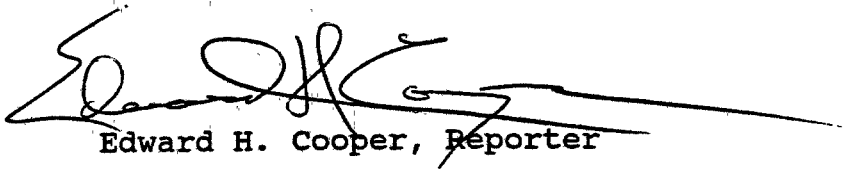
Rule 13(i), on first examination, seems to have no independent meaning. If it serves as no more than a cross-reference to Rules 42(b) and 54(b), perhaps it should be deleted. The Reporter is to study the question and report.

Discussion of Rule 14 renewed an earlier discussion of the need to preserve antique provisions that have served purposes now vanished. Rule 7(c), for example, abolishes demurrers, pleas, and exceptions for insufficient pleading. This provision was useful when the rules were first adopted. It is no longer necessary to emphasize the absence of Rules providing for demurrers, pleas, and exceptions for insufficient pleading. For the moment, the approach to these provisions will be to note them with the question whether they continue to serve any purpose.

Future Meetings

Future meetings of the Committee were set. A meeting will be held February 21, 22, and 23, 1994, in Sea Island, Georgia, to discuss the style revision draft. The next meeting for regular business will be held April 28, 29, and 30, 1994, in Washington, D.C. The following regular meeting was tentatively set for October 20, 21, and 22, 1994, in New Orleans, Louisiana. As noted above, a hearing on published Rules amendments is scheduled for April 6, 1994, in Dallas, Texas.

Respectfully submitted,



Edward H. Cooper, Reporter

ORAL PRESENTATION

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DIRECTOR

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ASSOCIATE DIRECTOR

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UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
CHIEF, RULES COMMITTEE
SUPPORT OFFICE

December 23, 1993

MEMORANDUM TO MEMBERS OF THE STANDING COMMITTEE

SUBJECT: Executive Session Agenda, January 12, 1994

At Judge Stotler's request, I am transmitting a copy of the Agenda for the Executive Session of the Committee on Rules of Practice and Procedure to be held at 3:00 p.m. on January 12, 1994, in the Cottonwood Room of the Westin Hotel. For your information I have also attached the following materials relating to the Executive Session Agenda.

(1) *Federal Rulemaking: Problems and Possibilities*, a dated but still useful publication of the Federal Judicial Center. It contains information on the history and background of the rulemaking process, as well as, a discussion of the role of the Supreme Court (see Agenda item I.A.2.) and of the Congress (see Agenda item I.B.) in the rulemaking process.

(2) Various materials discussing *Procedures for the Conduct of Business by the Judicial Conference Committees on Rules of Practice and Procedure* which relate to Agenda item I.A-E.

(3) Various materials discussing the relationship of the Standing Committee wit other committees of the Judicial Conference of the United States. Thes items relate to Agenda item II.D.2. They include a letter from Judge Ann C Williams, Chair, Committee on Court Administration and Case Managemer to the Judicial Conference's Executive Committee, which raises issues

Executive Session Agenda

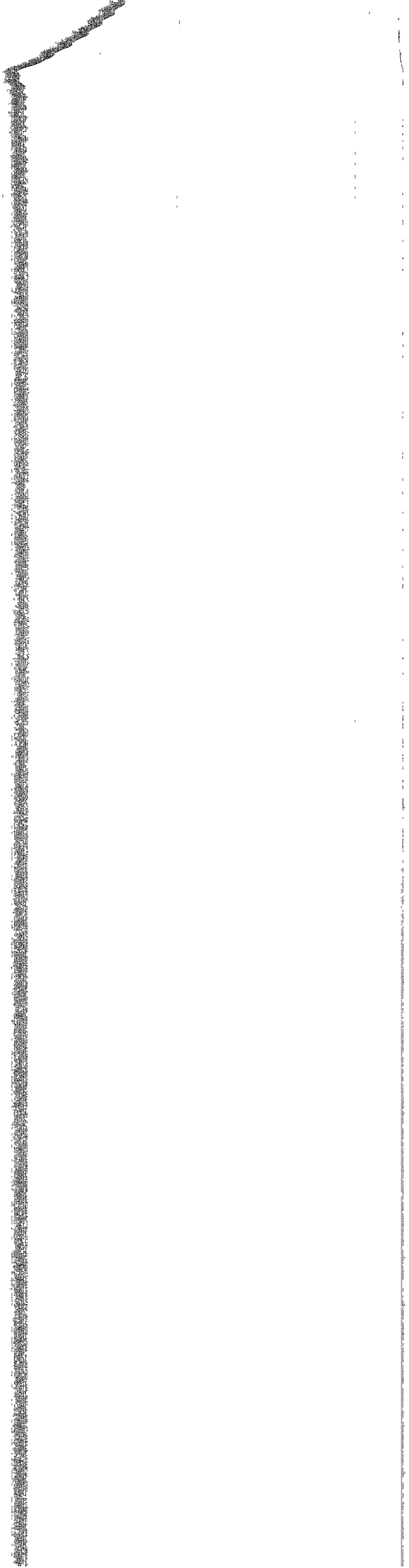
concerning the proper roles of her committee and the rules committees in the implementation of the Civil Justice Reform Act. The Executive Committee resolves any questions regarding the appropriate jurisdiction of Conference committees.

Please be advised spouses/guests are welcome at the Group Dinner during the Executive Session. Spouses/guests are also welcome at the formal dinner on Thursday January 13, 1994. Information regarding the menus and location of both dinners will be sent to you under separate cover.

John K. Rabiej

Attachments

cc: Honorable Robert E. Keeton
Professor Charles Alan Wright



COMMITTEE ON RULES OF PRACTICE & PROCEDURE
Executive Session
January 12, 1994
Outline for Agenda

I. The Role of the Standing Committee:

A. As to Judicial Conference.

Statutory

... Such standing committee shall review each recommendation of any other committees so appointed and recommend to the Judicial Conference rules of practice, procedure, and evidence and such changes in rules proposed by a committee appointed under subsection (a)(2) of this section as may be necessary to maintain consistency and otherwise promote the interest of justice.

28 U.S.C §2073 (b).

Judicial Conference

To carry on a continuous study of the operation and effect of the general rules of practice and procedure.

> Review reports and recommendations submitted by the five Advisory Committees and approve, modify, disapprove or return those recommendations to the Advisory Committees, as appropriate.
>
> Transmit to the Judicial Conference proposed rules changes, together with Committee Notes relating thereto, and a summary indicating which proposed changes were the subject of substantial controversy.
>
> Review and make recommendations to the Judicial Conference with regard to legislation affecting rules of practice and procedure.
>
> Coordinate the work of the Advisory Committees, and make suggestions of proposals to be studied by them.

Orientation for New Committee Chairs, JCUS, November 17, 1993; Tab 3, p. 13.

Judicial Conference "Procedures"

8. Procedures

* * * * *

> c. The Standing Committee may accept, reject, or modify a proposal. If a modification effects a substantial change, the proposal will be returned to the Advisory Committee with appropriate instructions.
>
> d. The Standing Committee shall transmit to the Judicial Conference the proposed rules changes and Committee Notes approved by it, together with the Advisory Committee report. The Standing Committee's report to the Judicial Conference shall include its recommendations and explain any changes it has made.

"Procedures For the Conduct of Business By The Judicial Conference Committees on Rules of Practice and Procedure."

B. As to Supreme Court.

The members of the advisory and standing committees are carefully named by THE CHIEF JUSTICE, and I am quite sure that these experienced judges and lawyers take their work very seriously. It is also quite evident that neither the standing committee nor the Judicial Conference merely rubber stamps the proposals recommended to it. . . .

Some of us, however, have silently shared Justice Black's and Justice Douglas' suggestion that the enabling statutes be amended

> to place the responsibility upon the Judicial Conference rather than upon this Court. . . . The Committees and Conference are composed of able and distinguished members and they render a high public service. It is they, however, who do the work, not we, and the rules have only our imprimatur. . . .

Statement of JUSTICE WHITE, Communication from THE CHIEF JUSTICE OF THE UNITED STATES, April 22, 1993; House Document 103-74, p. 98, et seq.

C. Politics and Timing: Too much Change or Too Little?

D. Procedures: Too Slow and Thorough or Too Fast and Superficial?

E. Relations with Congress, the Executive Branch, and Outside Interest Groups.

1. Increase in Political Involvement in Rulemaking: Should this Require a Change in Meeting Procedures?
   Should our proposed rules changes be expressly sent to Congress?
2. Coordination with Legislative Sub-Committees and their Counsel.
3. Coordination with the Justice Department.
4. The "Educational Function" of the Rules Committee vis-a-vis Congress.
5. Administrative Office Legislative Support.
6. Input from Lobbying Groups, Including ATLA, the ABA, the Court Reporters, etc.

II. The Roles of the Standing Rules Committee (SRC) and Advisory Committees (AC)[1]

A. Regular Circulation of Committee Actions:

1. Pre-meeting exchange, for AC meetings, of:

   a. last SRC minutes;
   b. agendae of other AC (future) meetings;
   c. minutes of other AC (past) meetings;
   d. Interim/occasional Chair reports.

2. Pre-meeting exchange, for SRC meetings, of:

   a. All of the above;
   b. Text of proposed rules changes, if any;
   c. SRC members' comments thereon to:

      (1) all other SRC members;
      (2) SRC Liaison member to AC;
      (3) Chair(s) of particular AC's;
      (4) Responses from non-SRC members to corresponding SRC member.

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[1] Excerpt from Agenda of Joint Meeting of Chairs of Advisory and Standing Committees, scheduled for November 17, 1993, at Judicial Conference Orientation Meeting in Washington , D. C.

d. AC reports provided 30 days in advance of SRC meeting to allow for pre-meeting exchange.

B. Re-styling the Rules:

1. By whom; who has final approval?

2. When should the product be published for comment? Should it be connected with substantive re-writing?

C. Regular Reports by Chairs -- publication in FRD or elsewhere;

D. All Committees vis-a-vis the Judicial Conference:

1. Speaking with one voice;

2. Coordinating with other USJC Committees; What are the potential consequences of the Rand Study and the conclusions of the Civil Justice Reform Act experiment; how will the results be incorporated into the rules?

3. Satisfying U. S. Supreme Court concerns.

E. All Committees vis-a-vis Bench, Bar, & Public:

1. Load Committee minutes (approved set) on electronic data-bases for research and general information;

2. Chair's published interim reports;

3. Ensuring availability to public of AC meeting agendae before AC meetings;

4. Would some joint meetings, whether for Publication & Comment phases, or otherwise, be desirable?

F. Liaison Members to AC's:

1. Role: hands-off? fully involved? separate report?

2. Liaison to Evidence Committee -- should there be one?

III. Standing Committee Meetings

A. Meeting management:

1. Parliamentarian?
2. Would a Vice-Chair, named by Chief Justice, be advisable?
3. "Testimony" from public members in attendance at business meeting: the Criminal Rules Committee resolution against, October meeting;
4. Must <u>everything</u> be acted on, i.e., Tabled, Rejected; Adopted; or "Noted"; or, should items be carried on a secondary list for future (re-)consideration?
5. Would a uniform method of recording action be desirable?

B. Re-drafting on the spot -- when to and not to?

1. The "procedures" require that if Standing Committee modifications effect a "substantial change," the proposal will be returned to the Advisory Committee with appropriate instructions.

2. The "procedures" also require that the Standing Committee's report to the Judicial Conference shall "explain any changes it has made."

3. Should we require pre-meeting statements of amendments to be proposed, objections, or dissents?

C. Times (Days of meeting)

Proposal: Pre-meeting dinner Wednesday 7-8 p.m., with overview by Reporter and Secretary of agenda for Thursday and Friday. Ascertain desires and interests of Standing Committee members and adjust allotted time accordingly. Re-arrange order of AC reports if necessary. Adjourn 12-2 p.m. on Friday.

D. Places of Meetings

Proposal: Scenic, interesting, law school campuses. Good for budget and might be good for public relations.

Agenda F-19 (Summary)
Rules
September 1993

SUMMARY OF THE

REPORT OF THE JUDICIAL CONFERENCE COMMITTEE

ON THE RULES OF PRACTICE AND PROCEDURE

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

1. Approve the proposed amendments to Rules 1, 3, 5, 5.1, 9, 13, 21, 25, 26.1, 27, 28, 30, 31, 33, 35, 38, 40, 41, and 48 of the Federal Rules of Appellate Procedure and transmit them to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress pursuant to law.....pp. 2-5

2. Approve the proposed amendments to Rules 8002 and 8006 of the Federal Rules of Bankruptcy Procedure and transmit them to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress pursuant to law.....p. 6

3. Approve the proposed amendments to Rules 16, 29, 32, and 40 of the Federal Rules of Criminal Procedure and transmit them to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmit to Congress pursuant to law.....pp. 6-9

4. Approve the proposed amendments to Rule 412 of the Federal Rules of Evidence and transmit the proposal to the Supreme Court for its consideration with the recommendation that it be adopted by the Court and transmitted to Congress pursuant to law.....pp. 10-11

5. Not approve the adoption of proposed Guidelines for Filing by Facsimile in their present form.....pp. 13-14

The remainder of the report is for information and the record.

Agenda F-19
Rules
September 1993

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

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

Your Committee on Rules of Practice and Procedure met in Washington, D.C. on June 17-19, 1993. All members of the Committee attended the meeting. Philip B. Heymann, Deputy Attorney General, attended part of the meeting, with Messrs. Roger Pauley and Dennis G. Linder representing him in his absence. The Reporter to your Committee, Dean Daniel R. Coquillette and the Secretary to the Committee, Peter G. McCabe, also participated in the meeting.

Also present were Judge Kenneth F. Ripple, Chair, and Professor Carol Ann Mooney, Reporter, of the Advisory Committee on Appellate Rules; Judge Edward Leavy, Chair, and Professor Alan N. Resnick, Reporter, of the Advisory Committee on Bankruptcy Rules; Chief Judge Sam C. Pointer, Jr., Chair, and Dean Edward Cooper, of the Advisory Committee on Civil Rules; Judge William Terrell Hodges, Chair, and Professor David A. Schlueter, Reporter, of the Advisory Committee on Criminal Rules; and Judge Ralph K. Winter, Jr., Chair, and Dean Margaret A. Berger, Reporter, of the Advisory Committee on Evidence Rules.

Also present were John K. Rabiej, Chief, Rules Committee Support Office of the Administrative Office of the United States Courts; Professor Mary P. Squiers, Director of the Local Rules Project; and Bryan Garner and Joseph F. Spaniol, Jr., consultants to the Subcommittee on Style. Other staff from the Administrative Office and the Federal Judicial Center as well as various members of the public also attended the meeting as observers.

I. Amendments to the Federal Rules of Appellate Procedure.

The Advisory Committee on the Rules of Appellate Procedure submitted to your Committee proposed amendments to Appellate Rules 1, 3, 5, 5.1, 9, 13, 21, 25, 26.1, 27, 28, 30, 31, 32, 33, 35, 38, 40, 41, and 48 together with Committee Notes explaining their purpose and intent. The proposed amendments were circulated to the bench and bar for comment in December 1992. A scheduled public hearing on the proposed amendments was canceled because no one requested to testify.

The proposed amendments to Rules 3, 5, 5.1, 13, 21, 25(e), 26.1, 27, 30, 31, and 35 would establish national standards controlling the number of copies of documents that must be filed with the court of appeals, subject to local court approved variations. The amendments were derived from the work of the local rules project.

The provision prescribing the title of the rules, now found in Rule 48, would be transferred to Rule 1. The proposed changes to Rule 9 would accommodate appeals by the government from a court order releasing a defendant prior to trial or after judgment of

conviction. The changes would also require a party seeking review to provide the court with a copy of the district court's order, its statement of reasons, and a transcript of the release decision, if the appellant challenges the factual basis of the court's decision.

The proposed amendments to Rule 25(a) would prohibit a clerk from refusing to accept papers for filing because of form deficiencies. The provision is similar to Civil Rule 5(e) and proposed Bankruptcy Rule 5005(a).

Under revised Rule 25(d), the proof of service would include the address to which papers were mailed or to which they were delivered. Your Committee voted to eliminate the proposed provision in Rule 25(d) regarding the clerk's duty to file papers absent proper acknowledgement or proof of service. The provision appeared unnecessary and could cause confusion. The proposed amendments to Rule 28 would require the appellant to include a summary of argument in the brief.

The proposed amendments to Rule 32 would affect the form and format requirements governing appellate briefs. They would also clarify the limits on the length of a brief. Your Committee voted to defer transmission of the proposed amendments to Rule 32 and approve republication of the rule to focus public comment on the appropriate standards to measure the length of a brief, i.e., the average number of words or characters per page.

Rule 33 would be revised to authorize the court to require parties to attend appeal conferences and address any matter that may aid in the disposition of the proceedings, including

simplification of the issues and the possibility of settlement. The proposed amendments would authorize the court to designate a judge or other person to preside over the appeal conference.

The proposed amendments to Rule 38 would require a court to provide notice and an opportunity to respond before imposing sanctions for the filing of a frivolous appeal. Your Committee was concerned that it would burden a court if it were required to give notice in each instance. Thus, the Committee voted to change the proposal to require that the notice be given either by the court or by the moving party in a separately filed motion.

Rule 40 would be revised to lengthen the time for filing a petition for rehearing in civil cases involving the United States. The proposed amendments to Rule 41 would make conforming changes consistent with other rule changes involving the time for the issuance of the mandate of the court. In addition, the changes would require parties to file a proof of service at the same time a motion for a stay of mandate is filed.

The title provision in Rule 48 would be moved to Rule 1, and an entirely new provision on masters would be inserted in its place. The proposed amendments to Rule 48 would authorize a court to appoint a special master to make recommendations on ancillary matters, e.g., application for fees or eligibility for Criminal Justice Act status on appeal.

The proposed amendments to the Federal Rules of Appellate Procedure, as recommended by your Committee, appear in Appendix A together with excerpts from the Advisory Committee report

summarizing the comments received, the committee's review of the issues presented, and the changes made in the published draft.

> **Recommendation:** That the Judicial Conference approve proposed amendments to Appellate Rules 1, 3, 5, 5.1, 9, 13, 21, 25, 26.1, 27, 28, 30, 31, 33, 35, 38, 40, 41, and 48 and transmit them to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress pursuant to law.

The Advisory Committee also submitted proposed amendments to Appellate Rules 4, 8, 10, 21, 25, 32, 35, and 41, and recommended that they be published for public comment. The proposed amendments to Rules 4, 8, 10, and 25 are technical or represent conforming changes. Rule 21 would be revised to establish procedures governing an application for a writ of mandamus directed to a trial judge. It would eliminate the trial judge's name from the application. It would also authorize pro forma representation for the trial judge unless the trial judge desires personal representation or the court directs otherwise. Proposed amendments to Rules 32, 35, and 41 would treat a request for a rehearing in banc the same as a petition for a panel rehearing with respect to the finality and tolling of judgment period for filing a petition for writ of certiorari.

Your Committee voted to circulate the proposed amendments to the bench and bar for comment. The timing of the publication was left to the discretion of the Advisory Committee.

III. Amendments to the Federal Rules of Bankruptcy Procedure.

The Advisory Committee on Bankruptcy Rules submitted proposed amendments to Bankruptcy Rules 8002 and 8006 together with Committee Notes explaining their purpose and intent. The proposed amendments were circulated to the bench and bar for comment in December 1992. The scheduled public hearing on the amendments was canceled because no one requested to testify.

The proposed amendments to Rules 8002 and 8006, along with conforming changes to the Appellate and Civil Rules, are intended to designate a single event that initiates tolling periods in the Appellate, Bankruptcy, and Civil Rules for certain post-trial motions. Your Committee voted to make several stylistic changes to the proposed amendments. An excerpt from the Advisory Committee report and the proposed amendments, as amended, are set forth in Appendix B.

> **Recommendation:** That the Judicial Conference approve the proposed amendments to Bankruptcy Rules 8002 and 8006 and transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress pursuant to law.

III. Amendments to the Federal Rules of Criminal Procedure.

The Advisory Committee on Criminal Rules submitted to your Committee proposed amendments to Criminal Rules 16, 29, 32, and 40 together with Committee Notes explaining their purpose and intent. The proposed amendments were circulated for public comment in late December 1992 on an expedited four-month timetable to coincide with the timetable for amendments to Evidence Rule 412. A public

hearing on the proposed amendments was held in Washington, D.C. on April 22, 1993.

The Advisory Committee received a substantial number of comments on the proposed amendments to Criminal Rule 32, particularly from probation officers who were concerned about the time deadlines imposed on the completion of presentence reports. In light of these concerns, the Advisory Committee eliminated the reference to the specific time set for the completion of a presentence report and substituted the existing provision, which requires the report to be completed before the sentence is imposed "without unreasonable delay." Specific time periods regulating other stages of the sentencing process, however, were retained in the proposed amendments. The Advisory Committee also retained the proposed amendment's presumption that a probation officer's sentencing recommendation be disclosed to the parties, despite the recommendation of the Committee on Criminal Law to retain the current rule's presumption against disclosure.

The Advisory Committee made several other changes to the original draft regarding the responsibilities and authority of probation officers during the sentencing process. Among other things, the changes would provide defendant's counsel with a reasonable opportunity, instead of an entitlement, to attend any interview with a probation officer, and they would authorize a probation officer to arrange, rather than to require, meetings with defendant's counsel. In addition, your Committee made stylistic changes to the proposed amendments.

Your Committee agreed with the Advisory Committee's conclusion that a victim allocution provision in Rule 32 was unnecessary because a court now has the discretion to permit a victim to speak at sentencing. Mandating victim allocution might lead to greater victim frustration because of the sentencing guidelines restrictions, which limit the impact of a victim's statement. Your Committee, however, eliminated as unnecessary several sections of the Committee Note, which would have explained in detail these and other reasons for not including the victim allocution provision in the Rule.

The proposed changes to Rules 16, 29, and 40 are relatively minor. The proposed change to Rule 16 would explicitly extend the discovery and disclosure requirements of the rule to organizational defendants. The changes to Rule 29 would permit the reservation of a motion for a judgment of acquittal made at the close of the government's case in the same manner as the rule now permits for motions made at the close of all the evidence. Changes to Rule 40 would clarify the authority of a magistrate judge to set conditions of release in those cases where a probationer or supervised releasee is arrested in a district other than the district having jurisdiction.

The proposed amendments to the Federal Rules of Criminal Procedure, as recommended by your Committee, appear in Appendix C together with an excerpt from the Advisory Committee report.

Recommendation: That the Judicial Conference approve proposed amendments to Criminal Rules 16, 29, 32, and 40 and transmit them to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress pursuant to law.

The Advisory Committee also submitted proposed amendments to Criminal Rules 5, 10, 43, and 53, and recommended that they be published for public comment. The proposed amendment to Rule 5 would exempt from the Rule's requirements prosecutions initiated under the Unlawful Flight to Avoid Prosecution (UFAP) statute, because a United States attorney rarely prosecutes defendants under the statute. UFAP is used primarily to assist state law enforcement officers in apprehending and holding alleged state law offenders. Rules 10 and 43 would be amended to allow video teleconferencing of certain pretrial proceedings with the approval of the court. The proposed changes to Rule 43 would also allow the court to sentence a defendant in absentia who flees after the trial has begun. Finally, the proposed amendment to Rule 53 would permit broadcasting of proceedings under guidelines to be adopted by the Judicial Conference. A Conference approved pilot program permitting broadcasts of proceedings in civil cases is presently underway.

Your Committee made stylistic changes and voted to circulate the proposed amendments to the bench and bar for comment. In order to establish an orderly time for publication, your Committee also authorized the Advisory Committee to consult with the other advisory committees and determine the time to distribute the proposed amendments for public comment.

IV. Amendments to the Federal Rules of Evidence.

The Advisory Committee on Evidence submitted to your Committee proposed amendments to Evidence Rule 412 together with Committee Notes explaining their purpose and intent. The proposed amendments would clarify and extend the protection of the rule to victims of sexual misconduct in all criminal and civil cases.

Your Committee was advised that legislation had been considered during the last Congressional session that would bypass the rulemaking process by directly amending Evidence Rule 412. To address the Congressional concern for prompt action your Committee, at the request of the Judicial Conference's Ad Hoc Committee on Violence Against Women, agreed to expedite the rulemaking process to enable Congress to consider the proposed amendments to Rule 412 during the 103rd Congressional session.

The original draft of the amendments to Evidence Rule 412 was prepared by the Advisory Committee on Criminal Rules in consultation with the Advisory Committee on Civil Rules. The proposed amendments would expand the protection of the rule to all criminal and civil cases. They were circulated for public comment under an expedited timetable in late December 1992 for a four-month period. A public hearing was held on the amendments by the newly reactivated Advisory Committee on Evidence Rules in Washington, D.C. on May 6, 1993.

Based on the comments received and the testimony at the hearing, the Advisory Committee on Evidence revised and restructured the original proposal. In particular, the committee

clarified the operation and effect of the amendments in civil cases and on third party witnesses. The Committee Note was also substantially revised to clarify the meanings of several phrases used throughout the rule and explain the precise extent of the rule's protections. The changes to the original draft did not alter, however, the principal purpose of the amendments, which was to protect the privacy interests of a victim of a sexual offense in all civil and criminal cases. Your Committee adopted several additional revisions, including language explicitly allowing the prosecutor to introduce evidence of prior sexual acts by the defendant with the victim.

The proposed amendments to Rule 412 of the Federal Rules of Evidence appears in Appendix D.

> **Recommendation:** That the Judicial Conference approve the proposed amendments to Rule 412 of the Federal Rules of Evidence and transmit the proposal to the Supreme Court for its consideration with the recommendation that it be adopted by the Court and transmitted to Congress pursuant to law.

V. Report of the Advisory Committee on Civil Rules.

The Advisory Committee on Civil Rules submitted proposed amendments to Civil Rules 26, 43, 50, 52, and 59 and recommended that they be published for public comment. Proposed changes to Rule 23 were also submitted for discussion but without a request for immediate publication.

The proposed changes to Rule 26 would clarify the authority of a court to dissolve or modify a protective order. Several factors would be listed for the court to consider in making its decision, including the impact on the public. Rule 43 would be changed to

allow a court to view the testimony of a witness via audio or video transmission during a trial in open court. Finally, the proposed amendments to Rules 50, 52, and 59 would set uniform time periods to file certain post-trial motions consistent with the proposed changes to the Appellate and Bankruptcy Rules.

Your Committee voted to circulate the proposed amendments to the bench and bar for comment after slightly revising the changes to Rules 50, 52, and 59 to achieve uniformity with the changes in the Appellate and Bankruptcy Rules. The timing of the publication was left to the discretion of the Advisory Committee because of the possibility of confusion resulting from the large package of rules amendments now pending before the Congress.

VI. Technical Amendments and Conformance of Local Rules with National Rules.

Your Committee reviewed draft uniform provisions prepared by the committees' reporters that would: (1) authorize the Judicial Conference to make technical corrections and conforming amendments to the rules directly, without action by the Supreme Court and the Congress; (2) authorize the Judicial Conference to prescribe a uniform numbering system that must be followed in the local court rules, and (3) permit the imposition of a sanction for noncompliance with certain local court procedures only if a party has had actual notice of the requirement. The uniform provisions would be included in the following rules: (1) Rules 47 and 49 of the Federal Rules of Appellate Procedure; (2) Rules 8018, 9029, and 9037 of the Federal Rules of Bankruptcy Procedure; (3) Rules 83 and 84 of the Federal Rules of Civil Procedure; and (4) Rules 57

and 59 of the Federal Rules of Criminal Procedure. The Advisory Committee on Evidence was requested to determine whether the proposed amendments should be included in the Federal Rules of Evidence.

The amendments proposed by the Advisory Committee on Civil Rules included an additional provision that would relieve a party, who failed through negligence to comply with a local rule imposing a requirement of form, from any loss of rights. Your Committee voted to circulate the proposed amendments with the addition of the provision recommended by the Advisory Committee on Civil Rules to the bench and bar for comment.

VII. Proposed Guidelines For Filing by Facsimile.

At the request of the Committee on Court Administration and Case Management, your Committee reviewed proposed Guidelines for Filing by Facsimile. Under Appellate Rule 25, Bankruptcy Rule 7005 (incorporating the civil procedures in adversary proceedings), Civil Rule 5, and Criminal Rule 49 (incorporating the civil procedures), papers may be filed with the court by "facsimile transmission if permitted by rules of the (court), provided that the rules are authorized by and consistent with standards established by the Judicial Conference of the United States." In 1991, the Conference issued very restrictive guidelines that allow facsimile filing only in compelling circumstances or where it had been authorized previously by a court. The proposed guidelines would liberalize the opportunity of courts to authorize filing by facsimile.

Your Committee requested each of the Advisory Committees to determine whether the proposed guidelines were inconsistent with the federal rules. After considerable discussion, your Committee voted to recommend against adoption of the proposed Guidelines for Filing by Facsimile in their present form.

The reporters to the respective advisory committees attempted to draft an acceptable revision of the proposed guidelines. After examining the draft of the reporters, your Committee is of the view that many issues would still remain that require careful consideration before approval of a revised draft could be recommended. In particular, concerns were raised regarding potential abuse by pro se litigants, the likelihood that extensive local rulemaking would be necessary to resolve issues left outstanding under the guidelines, and the consequences for failing to comply with specific provisions of the guidelines, e.g., using equipment not prescribed by the guidelines.

> **Recommendation:** That the Judicial Conference not approve the adoption of the proposed Guidelines for Filing by Facsimile in their present form.

VIII. Report of the Subcommittee on Long-Range Planning.

Your Committee discussed the request of the Long-Range Planning Committee for its views on the size of the Article III judiciary. After careful consideration, your Committee determined that any cap or limitation on the size of the federal judiciary would have no material effect on the Rules Enabling Act process or the federal rules. Accordingly, your Committee voted not to take a position as a committee on this issue.

IX. Report to the Chief Justice on Proposed Amendments Generating Substantial Controversy.

In accordance with the standing request of the Chief Justice, a summary of the proposed amendments generating substantial controversy is set forth as Appendix E.

Respectfully submitted,

Thomas E. Baker
William O. Bertelsman
Frank H. Easterbrook
Thomas S. Ellis, III
Alan W. Perry
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Alan C. Sundberg
Philip B. Heymann
William R. Wilson
Charles Alan Wright

Robert E. Keeton, Chairman

Appendix A: Proposed Amendments to the Federal Rules of Appellate Procedure

Appendix B: Proposed Amendments to the Federal Rules of Bankruptcy Procedure

Appendix C: Proposed Amendments to the Federal Rules of Criminal Procedure

Appendix D: Proposed Amendments to the Federal Rules of Evidence

Appendix E: Proposed Rules Amendments Generating Substantial Controversy

Agenda F-19
(Appendix E)
Rules
September 1993

PROPOSED RULES AMENDMENTS GENERATING SUBSTANTIAL CONTROVERSY

At its meeting on June 17-19, 1993, the Committee on Rules of Practice and Procedure reviewed the proposed rules amendments submitted by four advisory committees and with few exceptions voted unanimously to recommend their adoption. A summary of the proposals generating substantial controversy is set forth below.

I. Federal Rules of Appellate Procedure.

None of the proposed rules caused significant controversy either in the Advisory Committee or in the Standing Committee, and none generated significant comment during the publication period.

The Standing Committee made several technical and stylistic changes that were not controversial. Rule 38 is the only rule that was substantially changed by the Standing Committee. The Advisory Committee had recommended that Rule 38 require that a court of appeals give notice and opportunity to respond before it could impose sanctions. The Standing Committee amended the rule to provide that if sanctions are requested in a separately filed motion, the court need not give notice.

The amendments to Rule 28 require that a brief include a summary of argument. Only three comments were submitted, and all of them opposed the proposal. The Advisory Committee, however, believes that a summary would be useful in a variety of ways and decided not to make any changes in the proposed amendment. The Committee further noted that a number of circuits have local rules requiring a summary of argument and that those circuits report satisfaction with the requirement. The Standing Committee unanimously approved the Advisory Committee's proposal.

The amendments to Rules 40 and 41 lengthen from 14 to 45 days the time for filing a petition for rehearing in a civil case involving the United States. The NLRB opposes the amendment because it may delay the effectiveness of enforcement orders. The NLRB believes that an enforcement order becomes effective only upon issuance of the mandate. Because the extension of time for petitioning for rehearing will delay the issuance of the mandate, the effective date of an enforcement order will also be delayed. The Committee decided to make no change in the proposed amendment because, when necessary, that court can direct that the mandate issue forthwith. The Standing Committee unanimously approved the Advisory Committee's proposal.

II. Federal Rules of Criminal Procedure.

The only proposal generating controversy concerned the proposed amendments to Rule 32, which is being completely reorganized. Within that rule there were several points of debate. Most of the comments on the proposal were from probation officers, who were concerned about the impact that the rewritten rule might have on their practices.

First, as originally published for comment, Rule 32(a) included a 70-day maximum time limit for completing the sentencing procedures. Almost all the commentators criticized any fixed deadline for completing what can be a time-consuming process. After carefully considering those comments, the Criminal Rules Advisory Committee modified the proposed amendments to the rule to provide, as it does now, that a sentence should be imposed "without unnecessary delay." The proposed rule would continue to apply internal time limits for completing the component parts of the sentencing procedures; but even those limits may be shortened or lengthened for good cause. Thus, each court will continue to have flexibility in setting time limits for sentencing.

Second, a number of probation officers expressed concern about the delays that might result if the defendant were given the right to have defense counsel present during any interviews conducted by the probation officer. Still other commentators endorsed the idea of having counsel present; in their view, counsel's presence would avoid later misunderstandings. Again, the Advisory Committee considered the criticisms of the proposed rule and modified it slightly to provide that counsel will be given a reasonable opportunity to be present. That should ensure that counsel will not be permitted to delay the proceedings unduly by not being available for the interview.

Finally, the Advisory Committee was aware that Congress is considering an amendment to Rule 32 to require a court to apprise victims of certain crimes of the right to make a statement during sentencing. As published, the Committee Note to Rule 32 included a specific statement indicating that the Committee had considered, and rejected, an explicit right of victim allocution in the rule. Although the Committee was sensitive to the interest of some victims in the sentence to be imposed, it also recognized a number of difficulties that the Committee ultimately concluded outweighed any value to the victim in personally addressing the court.

First, under guideline sentencing (which takes victim impact into account), the court has very limited sentencing discretion once the applicable guideline range, which is usually below the maximum sentence allowed by statute, has been determined. In most cases, therefore, the views of the victim would have little or no

impact upon the sentence, thereby producing a likelihood of victim frustration rather than victim satisfaction.

Additionally, if the victim's allocution persuaded the court to consider a possible departure from the guideline sentencing range, due process might require notice and an opportunity to contest that result under Burns v. United States, _____ U.S. _____ 111 S.Ct. 2182 (1991). This could substantially complicate and delay the sentencing hearing. There is also a problem in the federal system in identifying victims who would have the right to allocution. Although a single victim of a violent crime is easily identified, federal criminal law covers a broad range of both violent and non-violent conduct, which often results in numerous victims. In such cases, it simply would not be feasible to extend the right of allocution to all victims.

Finally, the Committee also took into account existing law and procedures to keep victims informed of the progress of the case, permit the victim to be present at all stages of the judicial proceeding including sentencing, and provide an opportunity for direct input in the preparation of the presentence report. See Rule 32(b)(4)(D). See also, 42 U.S.C. §§ 10601, et seq. (enumerated victims' rights include, inter alia, the right to be notified of court proceedings and the right to confer with the attorney for the Government).

III. Federal Rules of Bankruptcy and Evidence.

The proposed amendments to two Bankruptcy Rules and one Evidence Rule did not generate substantial controversy. The Standing Committee made technical and stylistic revisions to each proposal.

DUPLICATE OF CONGRESSIONAL RECORD

ATTACHMENT TO AGENDA ITEM 7

DEALING WITH PROPOSED RULES AMENDMENTS

PENDING IN THE SENATE PASSED CRIME BILL

November 19 (legislative day, November 2), 1993

Ordered to be printed as passed

In the Senate of the United States,

November 19 (legislative day, November 2), 1993.

Resolved, That the bill from the House of Representatives (H.R. 3355) entitled "An Act to amend the Omnibus Crime Control and Safe Streets Act of 1968 to allow grants to increase police presence, to expand and improve cooperative efforts between law enforcement agencies and members of the community to address crime and disorder problems, and otherwise to enhance public safety", do pass with the following

AMENDMENT:

Strike out all after the enacting clause and insert:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Violent Crime Control and Law Enforcement Act of 1993".

SEC. 2. TABLE OF CONTENTS.

The following is the table of contents for this Act:

or an alien admitted for permanent residence in the United States who travels in foreign commerce, or conspires to do so, for the purpose of engaging in any sexual act (as defined in section 2245) with a person under 18 years of age that would be in violation of chapter 109A if the sexual act occurred in the special maritime and territorial jurisdiction of the United States shall be fined under this title, imprisoned not more than 10 years, or both.".

SEC. 825. SENSE OF CONGRESS CONCERNING STATE LEGISLATION REGARDING CHILD PORNOGRAPHY.

It is the sense of the Congress that each State that has not yet done so should enact legislation prohibiting the production, distribution, receipt, or simple possession of materials depicting a person under 18 years of age engaging in sexually explicit conduct (as defined in section 2256 of title 18, United States Code) and providing for a maximum imprisonment of at least 1 year and for the forfeiture of assets used in the commission or support of, or gained from, such offenses.

Subtitle E—Rules of Evidence, Practice and Procedure

SEC. 831. ADMISSIBILITY OF EVIDENCE OF SIMILAR CRIMES IN SEX OFFENSE CASES.

The Federal Rules of Evidence are amended by adding after Rule 412 the following new rules:

"Rule 413. Evidence of Similar Crimes in Sexual Assault Cases

"(a) In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant.

"(b) In a case in which the Government intends to offer evidence under this rule, the attorney for the Government shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

"(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.

"(d) For purposes of this rule and Rule 415, "offense of sexual assault" means a crime under Federal law or the law of a State (as defined in section 513 of title 18, United States Code) that involved—

"(1) any conduct proscribed by chapter 109A of title 18, United States Code;

"(2) contact, without consent, between any part of the defendant's body or an object and the genitals or anus of another person;

"(3) contact, without consent, between the genitals or anus of the defendant and any part of another person's body;

"(4) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person; or

"(5) an attempt or conspiracy to engage in conduct described in paragraphs (1)–(4).

"Rule 414. Evidence of Similar Crimes in Child Molestation Cases

"(a) In a criminal case in which the defendant is accused of an offense of child molestation, evidence of the defendant's commission of another offense or offenses of child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant.

"(b) In a case in which the Government intends to offer evidence under this rule, the attorney for the Government shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

"(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.

"(d) For purposes of this rule and Rule 415, "child" means a person below the age of fourteen, and "offense of child molestation" means a crime under Federal law or the law of a State (as defined in section 513 of title 18, United States Code) that involved—

"(1) any conduct proscribed by chapter 109A of title 18, United States Code, that was committed in relation to a child;

"(2) any conduct proscribed by chapter 110 of title 18, United States Code;

"(3) contact between any part of the defendant's body or an object and the genitals or anus of a child;

"(4) contact between the genitals or anus of the defendant and any part of the body of a child;

"(5) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on a child; or

"(6) an attempt or conspiracy to engage in conduct described in paragraphs (1)–(5).

"Rule 415. Evidence of Similar Acts in Civil Cases Concerning Sexual Assault or Child Molestation

"(a) In a civil case in which a claim for damages or other relief is predicated on a party's alleged commission of conduct constituting an offense of sexual assault or child

molestation, evidence of that party's commission of another offense or offenses of sexual assault or child molestation is admissible and may be considered as provided in Rule 413 and Rule 414 of these rules.

"(b) A party who intends to offer evidence under this Rule shall disclose the evidence to the party against whom it will be offered, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

"(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule."

Subtitle F—Sexually Violent Predators

SEC. 841. SHORT TITLE.

This subtitle may be cited as the "Sexually Violent Predators Act".

SEC. 842. FINDINGS.

Congress finds that—

(1) there exists a small but extremely dangerous group of sexually violent persons who do not have a mental disease or defect;

(2) persons who are sexually violent predators generally have antisocial personality features that—

sexually violent predator required to register under this section.

(d) IMMUNITY FOR GOOD FAITH CONDUCT.—Law enforcement agencies, employees of law enforcement agencies, and State officials shall be immune from liability for any good faith conduct under this section.

TITLE IX—CRIME VICTIMS

Subtitle A—Victims' Rights

SEC. 901. VICTIM'S RIGHT OF ALLOCUTION IN SENTENCING.

Rule 32 of the Federal Rules of Criminal Procedure is amended by—

(1) striking "and" following the semicolon in subdivision (a)(1)(B);

(2) striking the period at the end of subdivision (a)(1)(C) and inserting in lieu thereof "; and";

(3) inserting after subdivision (a)(1)(C) the following:

"(D) if sentence is to be imposed for a crime of violence or sexual abuse, address the victim personally if the victim is present at the sentencing hearing and determine if the victim wishes to make a statement and to present any information in relation to the sentence.";

(4) in the second to last sentence of subdivision (a)(1), striking "equivalent opportunity" and insert-

ing in lieu thereof "opportunity equivalent to that of the defendant's counsel";

(5) in the last sentence of subdivision (a)(1) inserting "the victim," before "or the attorney for the Government."; and

(6) adding at the end the following:

"(f) DEFINITIONS.—For purposes of this rule—

"(1) 'victim' means any individual against whom an offense for which a sentence is to be imposed has been committed, but the right of allocution under subdivision (a)(1)(D) may be exercised instead by—

"(A) a parent or legal guardian in case the victim is below the age of eighteen years or incompetent; or

"(B) one or more family members or relatives designated by the court in case the victim is deceased or incapacitated;

if such person or persons are present at the sentencing hearing, regardless of whether the victim is present; and

"(2) 'crime of violence or sexual abuse' means a crime that involved the use or attempted or threatened use of physical force against the person or property of another, or a crime under chapter 109A of title 18, United States Code.".

"(a) The court may order the probation service of the court to obtain information pertaining to the amount of loss sustained by any victim as a result of the offense, the financial resources of the defendant, the financial needs and earning ability of the defendant and the defendant's dependents, and such other factors as the court deems appropriate. The probation service of the court shall include the information collected in the report of presentence investigation or in a separate report, as the court directs."; and

(4) by adding at the end thereof the following new subsection:

"(e) The court may refer any issue arising in connection with a proposed order of restitution to a magistrate or special master for proposed findings of fact and recommendations as to disposition, subject to a de novo determination of the issue by the court.".

SEC. 903. SENSE OF THE CONGRESS CONCERNING THE RIGHT OF A VICTIM OF A VIOLENT CRIME OR SEXUAL ABUSE TO SPEAK AT AN OFFENDER'S SENTENCING HEARING AND ANY PAROLE HEARING.

It is the sense of the Congress that—

(1) the law of a State should provide for a victim's right of allocution at a sentencing hearing and

at any parole hearing if the offender has been convicted of a crime of violence or sexual abuse;

(2) such a victim should have an opportunity equivalent to the opportunity accorded to the offender's counsel to address the sentencing court or parole board and to present information in relation to the sentence imposed or to the early release of the offender; and

(3) if the victim is not able to or chooses not to testify at a sentencing hearing or parole hearing, the victim's parents, legal guardian, or family members should have the right to address the court or board.

Subtitle B—Crime Victims' Fund

SEC. 911. AMOUNTS OF FUNDS FOR COSTS AND GRANTS.

Section 1402(d)(2) of the Victims of Crime Act of 1984 (42 U.S.C. 10601(d)(2)) is amended—

(1) by striking "and" at the end of subparagraph (A);

(2) by striking the period at the end of subparagraph (B) and inserting a semicolon; and

(3) by adding at the end the following new subparagraphs:

"(C) 1 percent shall be available for grants under section 1404(c); and

(b) DELEGATION.—Any member or employee of the Commission may, if authorized by the Commission, take any action that the Commission is authorized to take under this subtitle.

(c) ACCESS TO INFORMATION.—The Commission may request directly from any executive department or agency such information as may be necessary to enable the Commission to carry out this subtitle, on the request of the Chair of the Commission.

(d) MAILS.—The Commission may use the United States mails in the same manner and under the same conditions as other departments and agencies of the United States.

SEC. 3248. AUTHORIZATION OF APPROPRIATIONS.

There is authorized to be appropriated to carry out this subtitle $500,000 for fiscal year 1994.

SEC. 3249. TERMINATION.

The Commission shall cease to exist 30 days after the date on which its final report is submitted under section 3244.

Subtitle E—New Evidentiary Rules

SEC. 3251. SEXUAL HISTORY IN ALL CRIMINAL CASES.

(a) RULE.—The Federal Rules of Evidence are amended by inserting after rule 412 the following new rule:

"Rule 412A. Evidence of victim's past behavior in other criminal cases

"(a) REPUTATION AND OPINION EVIDENCE EXCLUDED.—Notwithstanding any other law, in a criminal case, other than a sex offense case governed by rule 412, reputation or opinion evidence of the past sexual behavior of an alleged victim is not admissible.

"(b) ADMISSIBILITY.—Notwithstanding any other law, in a criminal case, other than a sex offense case governed by rule 412, evidence of an alleged victim's past sexual behavior (other than reputation and opinion evidence) may be admissible if—

"(1) the evidence is admitted in accordance with the procedures specified in subdivision (c); and

"(2) the probative value of the evidence outweighs the danger of unfair prejudice.

"(c) PROCEDURES.—(1) If the defendant intends to offer evidence of specific instances of the alleged victim's past sexual behavior, the defendant shall make a written motion to offer such evidence not later than 15 days before the date on which the trial in which such evidence is to be offered is scheduled to begin, except that the court may allow the motion to be made at a later date, including during trial, if the court determines either that the evidence is newly discovered and could not have been obtained earlier through the exercise of due diligence or that the issue to

which such evidence relates has newly arisen in the case. Any motion made under this paragraph shall be served on all other parties and on the alleged victim.

"(2) The motion described in paragraph (1) shall be accompanied by a written offer of proof. If necessary, the court shall order a hearing in chambers to determine if such evidence is admissible. At the hearing, the parties may call witnesses, including the alleged victim and offer relevant evidence. Notwithstanding subdivision (b) of rule 104, if the relevancy of the evidence which the defendant seeks to offer in the trial depends upon the fulfillment of a condition of fact, the court, at the hearing in chambers or at a subsequent hearing in chambers scheduled for such purpose, shall accept evidence on the issue of whether such condition of fact is fulfilled and shall determine such issue.

"(3) If the court determines on the basis of the hearing described in paragraph (2), that the evidence the defendant seeks to offer is relevant, not excluded by any other evidentiary rule, and that the probative value of such evidence outweighs the danger of unfair prejudice, such evidence shall be admissible in the trial to the extent an order made by the court specifies the evidence which may be offered and areas with respect to which the alleged victim may be examined or cross-examined. In its order, the court should consider (A) the chain of reasoning leading to its finding of

relevance, and (B) why the probative value of the evidence outweighs the danger of unfair prejudice given the potential of the evidence to humiliate and embarrass the alleged victim and to result in unfair or biased jury inferences.".

(b) TECHNICAL AMENDMENT.—The table of contents for the Federal Rules of Evidence is amended by inserting after the item relating to rule 412 the following new item:

"412A. Evidence of victim's past behavior in other criminal cases:
"(a) Reputation and opinion evidence excluded.
"(b) Admissibility.
"(c) Procedures.".

SEC. 3252. SEXUAL HISTORY IN CIVIL CASES.

(a) RULE.—The Federal Rules of Evidence, as amended by section 3251, are amended by adding after rule 412A the following new rule:

"Rule 412B. Evidence of past sexual behavior in civil cases

"(a) REPUTATION AND OPINION EVIDENCE EXCLUDED.—Notwithstanding any other law, in a civil case in which a defendant is accused of actionable sexual misconduct, reputation or opinion evidence of the plaintiff's past sexual behavior is not admissible.

"(b) ADMISSIBLE EVIDENCE.—Notwithstanding any other law, in a civil case in which a defendant is accused of actionable sexual misconduct, evidence of a plaintiff's past sexual behavior other than reputation or opinion evidence may be admissible if—

"(1) it is admitted in accordance with the procedures specified in subdivision (c); and

"(2) the probative value of the evidence outweighs the danger of unfair prejudice.

"(c) PROCEDURES.—(1) If the defendant intends to offer evidence of specific instances of the plaintiff's past sexual behavior, the defendant shall make a written motion to offer such evidence not later than 15 days before the date on which the trial in which such evidence is to be offered is scheduled to begin, except that the court may allow the motion to be made at a later date, including during trial, if the court determines either that the evidence is newly discovered and could not have been obtained earlier through the exercise of due diligence or that the issue to which such evidence relates has newly arisen in the case. Any motion made under this paragraph shall be served on all other parties and on the plaintiff.

"(2) The motion described in paragraph (1) shall be accompanied by a written offer of proof. If necessary, the court shall order a hearing in chambers to determine if such evidence is admissible. At the hearing, the parties may call witnesses, including the plaintiff and offer relevant evidence. Notwithstanding subdivision (b) of rule 104, if the relevancy of the evidence that the defendant seeks to offer in the trial depends upon the fulfillment of a condition of

fact, the court, at the hearing in chambers or at a subsequent hearing in chambers scheduled for the purpose, shall accept evidence on the issue of whether the condition of fact is fulfilled and shall determine such issue.

"(3) If the court determines on the basis of the hearing described in paragraph (2) that the evidence the defendant seeks to offer is relevant and not excluded by any other evidentiary rule, and that the probative value of the evidence outweighs the danger of unfair prejudice, the evidence shall be admissible in the trial to the extent an order made by the court specifies evidence that may be offered and areas with respect to which the plaintiff may be examined or cross-examined. In its order, the court should consider—

"(A) the chain of reasoning leading to its finding of relevance; and

"(B) why the probative value of the evidence outweighs the danger of unfair prejudice given the potential of the evidence to humiliate and embarrass the alleged victim and to result in unfair or biased jury inferences.

"(d) DEFINITIONS.—For purposes of this rule, a case involving a claim of actionable sexual misconduct, includes sexual harassment or sex discrimination claims brought pursuant to title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000(e)) and gender bias claims brought pursuant

to title XXXIV of the Violence Against Women Act of 1993.".

(b) TECHNICAL AMENDMENT.—The table of contents for the Federal Rules of Evidence, as amended by section 3251, is amended by inserting after the item relating to rule 412A the following new item:

"412B. Evidence of past sexual behavior in civil cases:
"(a) Reputation and opinion evidence excluded.
"(b) Admissible evidence.
"(c) Procedures.
"(d) Definitions.".

SEC. 3253. AMENDMENTS TO RAPE SHIELD LAW.

(a) RULE.—Rule 412 of the Federal Rules of Evidence is amended—

(1) by adding at the end the following new subdivisions:

"(e) INTERLOCUTORY APPEAL.—Notwithstanding any other law, any evidentiary rulings made pursuant to this rule are subject to interlocutory appeal by the government or by the alleged victim.

"(f) RULE OF RELEVANCE AND PRIVILEGE.—If the prosecution seeks to offer evidence of prior sexual history, the provisions of this rule may be waived by the alleged victim."; and

(2) by adding at the end of subdivision (c)(3) the following: "In its order, the court should consider (A) the chain of reasoning leading to its finding of relevance; and (B) why the probative value of the evi-

dence outweighs the danger of unfair prejudice given the potential of the evidence to humiliate and embarrass the alleged victim and to result in unfair or biased jury inferences.".

(b) TECHNICAL AMENDMENT.—The table of contents for the Federal Rules of Evidence is amended by adding at the end the item relating to rule 412 the following:

"(e) Interlocutory appeal.
"(f) Rule of relevance and privilege.".

SEC. 3254. EVIDENCE OF CLOTHING.

(a) RULE.—The Federal Rules of Evidence, as amended by section 3252, are amended by adding after rule 412B the following new rule:

"Rule 413. Evidence of victim's clothing as inciting violence

"Notwithstanding any other law, in a criminal case in which a person is accused of an offense under chapter 109A of title 18, United States Code, evidence of an alleged victim's clothing is not admissible to show that the alleged victim incited or invited the offense charged.".

(b) TECHNICAL AMENDMENT.—The table of contents for the Federal Rules of Evidence, as amended by section 3252, is amended by inserting after the item relating to rule 412B the following new item:

"413. Evidence of victim's clothing as inciting violence.".

by an agency of the United States or appropriated funds of the United States; and

"(ii) does not include any retirement, welfare, Social Security, health, disability, veterans benefit, public housing, or other similar benefit, or any other benefit for which payments or services are required for eligibility.

"(B) 'veterans benefit' means all benefits provided to veterans, their families, or survivors by virtue of the service of a veteran in the Armed Forces of the United States.".

SEC. 3706. INADMISSIBILITY OF EVIDENCE TO SHOW PROVOCATION OR INVITATION BY VICTIM IN SEX OFFENSE CASES.

(a) RULE.—The Federal Rules of Evidence, as amended by section 3254, are amended by adding after rule 41
the following new rule:

"Rule 414. Inadmissibility of Evidence to Show Invitation o Provocation by Victim in Sexual Abuse Cases

"In a criminal case in which a person is accused o an offense involving conduct proscribed by chapter 109A title 18, United States Code, evidence is not admissible show that the alleged victim invited or provoked the con mission of the offense. This rule does not limit the admi sion of evidence of consent by the alleged victim if the iss

of consent is relevant to liability and the evidence is otherwise admissible under these rules.".

(b) TECHNICAL AMENDMENT.—The table of contents for the Federal Rules of Evidence, as amended by section 4, is amended by inserting after the item relating to rule 413 the following new item:

"414. Inadmissibility of evidence to show invitation or provocation by victim in sexual abuse cases.".

SEC. 3707. NATIONAL BASELINE STUDY ON CAMPUS SEXUAL ASSAULT.

(a) STUDY.—The Attorney General shall provide for a national baseline study to examine the scope of the problem of campus sexual assaults and the effectiveness of institutional and legal policies in addressing such crimes and protecting victims. The Attorney General may utilize the Bureau of Justice Statistics, the National Institute of Justice, and the Office for Victims of Crime in carrying out this section.

(b) REPORT.—Based on the study required by subsection (a), the Attorney General shall prepare a report including an analysis of—

(1) the number of reported allegations and estimated number of unreported allegations of campus sexual assaults, and to whom the allegations are reported (including authorities of the educational insti-

(1) the efforts that have been made by the Department of Justice, including the Federal Bureau of Investigation, to collect statistics on domestic violence; and

(2) the feasibility of requiring that the relationship between an offender and victim be reported in Federal records of crimes of aggravated assault, rape, and other violent crimes.

SEC. 3711. REPORT ON FAIR TREATMENT IN LEGAL PROCEEDINGS.

Not later than 180 days after the date of enactment of this Act, the Judicial Conference of the United States shall review and make recommendations, and report to Congress, regarding the advisability of creating Federal rules of professional conduct for lawyers in Federal cases involving sexual misconduct that—

(1) protect litigants from a course of conduct intended solely for the purpose of distressing, harassing, embarrassing, burdening, or inconveniencing litigants;

(2) counsel against reliance on generalizations or stereotypes that demean, disgrace, or humiliate on the basis of gender;

(3) protect litigants from a course of conduct intended solely to increase the expense of litigation; and

(4) prohibit counsel from offering evidence that the lawyer knows to be false or from discrediting evidence the lawyer knows to be true.

SEC. 3712. REPORT ON FEDERAL RULE OF EVIDENCE 404.

(a) STUDY.—Not later than 180 days after the date of enactment of this Act, the Judicial Conference shall complete a study of, and shall submit to Congress recommendations for amending, rule 404 of the Federal Rules of Evidence as it affects the admission of evidence of a defendant's prior sex crimes in cases brought pursuant to chapter 109A or other cases involving sexual misconduct.

(b) SPECIFIC ISSUES.—The study described in subsection (a) shall include—

(1) a survey of existing law on the introduction of prior similar sex crimes under State and Federal evidentiary rules;

(2) a recommendation concerning whether rule 404 should be amended to introduce evidence of prior sex crimes and, if so—

(A) whether such acts could be used to prove the defendant's propensity to act therewith; and

(B) whether evidence of prior similar sex crimes should be admitted for purposes other than to show character;

(3) a recommendation concerning whether evidence of similar acts, if admitted, should meet a threshold of similarity to the crime charged;

(4) a recommendation concerning whether evidence of similar acts, if admitted, should be limited to a certain time period, (such as 10 years); and

(5) the effect, if any, of the adoption of any proposed changes on the admissibility of evidence under rule 412 of the Federal Rules of Evidence.

SEC. 3713. SUPPLEMENTARY GRANTS FOR STATES ADOPTING EFFECTIVE LAWS RELATING TO SEXUAL VIOLENCE.

(a) IN GENERAL.—The Attorney General may, in each fiscal year, award an aggregate amount of up to $1,000,000 to a State that meets the eligibility requirements of subsection (b).

(b) ELIGIBILITY.—The authority to award additional funding under this section is conditional on certification by the Attorney General that the State has laws or policies relating to sexual violence that exceed or are reasonably comparable to the provisions of Federal law (including changes in Federal law made by this Act) in the following areas:

(1) Provision of training and policy development programs for law enforcement officers, prosecutors,

REPORT TO THE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

FROM THE

SUBCOMMITTEE ON LONG RANGE PLANNING

JUNE 1993

Introduction: This is the second annual Report from the Subcommittee on Long Range Planning. In the first part of this Report, the Subcommittee offers three Action Items for consideration by the Standing Committee: (1) a referral of the Carnegie Commission Report on Science and Technology to the Advisory Committee on the Rules of Evidence; (2) a request that the Advisory Committee on the Rules of Evidence consider the feasibility of drafting "Rules of Trial Management"; and (3) a proposal that the Subcommittee prepare a self-study of the overall rulemaking procedures for review by the Standing Committee. The second part of this Report is informational, with two purposes. First, the Subcommittee will identify long range proposals currently being considered by the Standing Committee and the several Advisory Committees. Second, the Subcommittee will describe its own ongoing efforts.

The Subcommittee has three action items for consideration by the Standing Committee and, for the sake of convenience, they are placed at the beginning of this Report. Brief discussion follows each item and background materials are attached as Appendices to this Report.

> Action Item #1: The Subcommittee recommends that the Standing Committee request that the new Advisory Committee on the Rules of Evidence review the Report of the Carnegie Commission on Science, Technology, and Government, Science and Technology in Judicial Decision Making -- Creating Opportunities and Meeting Challenges (March 1993). The Advisory Committee should be asked to report back to the Standing Committee with recommendations for rules or procedures, if deemed appropriate. Additionally, the Advisory Committee might suggest how the Standing Committee, in turn, might respond to the Carnegie Commission Report more generally within the context of the committee structure of the Judicial Conference.

The Carnegie Commission on Science, Technology, and Government was formed in 1988 to address the changes needed in organization and decision-making at all levels of government to

deal effectively with the transforming effects of science and technology. The next year the Commission formed a Task Force on Judicial and Regulatory Decision Making. The Task Force participated in the work of the Federal Courts Study Committee and its follow-on efforts culminated in the March Report. For general information on these long-term issues, a copy of the Executive Summary of the Report is attached as Appendix A.

One of the principal findings of the Carnegie Commission Report is "[a] judge has adequate authority under the present Federal Rules of Civil Procedure and of Evidence to manage [science and technology] issues effectively. . . . ." p. 36. While this is the most relevant finding related to our task of federal rulemaking, the Subcommittee believes it is appropriate for the Standing Committee to undertake some comprehensive evaluation of the Carnegie Commission Report. The Report has a great deal to say about how the federal courts ought to approach issues of science and technology and the Standing Committee is the entity within the Third Branch that has the chief responsibility for proposing national practices and procedures. The Subcommittee also believes that the Advisory Committee on the Rules of Evidence is the appropriate forum for the initial review of the Carnegie Commission Report as well as any available background papers. Of course, consultation with the other Advisory Committees is appropriate and should be expected prior to the presentation of any proposal for consideration by the Standing Committee.

> Action Item #2: The Subcommittee recommends that the Standing Committee request that the Advisory Committee on the Rules of Evidence coordinate a joint effort among the various Advisory Committees to study Judge Keeton's concept of "Rules of Trial Management."

In his memorandum of September 1, 1992, Judge Keeton wrote Judge Pratt (Subcommittee on Numerical and Substantive Integration) and Professor Baker (Subcommittee on Long Range Planning) to suggest the idea of formulating "rules of proof" that would incorporate "rules of evidence" but would go beyond them to include other aspects of trial management. His suggestion was tied to the ABA Standards for Trial Management adopted in February 1992, although Judge Keeton has been an advocate of the approach at least as long as he has been the Chair of the Standing Committee. A copy of his memorandum is attached as Appendix B.

The Subcommittee suggests that the new Advisory Committee on the Rules of Evidence be asked to coordinate a joint effort with the Advisory Committee on the Civil Rules and the Advisory Committee on the Criminal Rules to study this idea and, if it is determined to have merit, to bring forward appropriate recommendations. This is a recommendation for study. The

Subcommittee does not endorse or reject the concept of "megarules." The Subcommittee is persuaded, however, that one of the Advisory Committees ought to be designated to take the lead so that the proposal is not left to languish in rules limbo.

> Action Item #3: The Subcommittee requests authorization from the Standing Committee to undertake a thorough evaluation of the federal court rulemaking procedures that will include: (1) a descriptive narrative of existing procedures; (2) a summary of the extant criticisms of the existing procedures; and (3) an assessment of the existing procedures and the criticisms, with recommendations how federal court rulemaking might be improved.

There are a number of reasons why the Subcommittee believes that this proposed study is appropriate and timely.

Each year, the Standing Committee is obliged to undertake a self-evaluation for the Judicial Conference. This is rendered somewhat pro forma by the statutory mandate that the Judicial Conference appoint the Standing Committee. 28 U.S.C. § 2073(b). But the point is that the Standing Committee purportedly is under some obligation to evaluate the general rulemaking procedures apart from specific rules of procedure.

Since its creation in 1991, the Judicial Conference's Committee on Long Range Planning has sought to encourage long range planning in all aspects of judicial administration, including rulemaking. The Standing Committee has assigned primary responsibility for long range planning in rulemaking to this Subcommittee. The January 1992 Report from the Standing Committee to the Committee on Long Range Planning described "the chief functions of the Subcommittee" to include "serv[ing] as a focus for taking the long range view in rules and procedures" as well as "gather[ing] proposals that go beyond the rulemaking norm[s] in terms of breadth or time frame." A general inquiry into the rulemaking procedures meets both these criteria.

It is difficult to overstate the long term significance for rulemaking of the Civil Justice Reform Act of 1990, Pub. L. No. 101-650, §§ 101-105, 104 Stat. 5089-98 (1990). Professor Mullenix may or may not be guilty of exaggeration, but she has provocatively insisted that the implications of this legislation "will be dramatic and widespread for years to come":

> The central importance of the Civil Justice Reform Act is this: the Act has effected a revolutionary redistribution of the procedural rulemaking power from the federal judicial branch to the legislative branch. Congress has taken procedural rulemaking power away from judges and their expert advisors and delegated it to local lawyers. By the expedient of declaring

> procedural rules to be substantive law, Congress has effectively repealed the Rules Enabling Act. Congress has by fiat stripped the judicial branch of a power that uniquely bears on the judicial function: the power to prescribe internal rules of procedure for federal courts. By legislative stealth in enacting the Civil Justice Reform Act, Congress is continuing to transform the Advisory Committee on Civil Rules into a quaint, third-branch vestigial organ.

Linda S. Mullenix, The Counter-Reformation in Procedural Justice, 77 Minn. L. Rev. 375, 379 (1992). Professor Mullenix is on the faculty at the University of Texas School of Law and serves as the co-reporter and legal counsel to the Civil Justice Advisory Group for the Southern District of Texas. A copy of her article is attached as Appendix C. Others have made similar, dark predictions about the future of judicial rulemaking. The Subcommittee believes that this legislation and its aftermath of local rulemaking, at the very least, oblige the Standing Committee to consider how best to monitor developments, identify promising innovations, and propose national rule improvements. Indeed, even the innovations that fail at the local level will offer valuable data for would be reformers of the rules. See Carl Tobias, Judicial Oversight of Civil Justice Reform, 140 F.R.D. 49 (1992) (suggesting that the Judicial Conference must somehow "completely and carefully evaluate the reports and the plans developed and make appropriate suggestions for change." Id. at 56). This consideration is best undertaken in the larger context of a study of rulemaking procedures.

Each of you has received a copy of the April 22, 1993, transmission from the Supreme Court to the Congress of the most recent rules amendments. Justice White's separate statement expressed a high Court discomfort on the part of some Justices with the present rulemaking procedures and described a preference that "the enabling statutes be amended 'to place the responsibility upon the Judicial Conference rather than on this Court.'" Statement of Justice White at 3 (April 22, 1993). One reading of the Dissenting Statement by Justice Scalia, filed on behalf of himself and Justices Souter and Thomas, is that those three Justices may implicitly agree with Justice White's general apprehension about the Supreme Court's role in rulemaking. Dissenting Statement of Justice Scalia at 7 (April 22, 1993). The Dissenting Statement did explicitly question the effect on judicial rulemaking procedures from the Civil Justice Reform Act: "Any major reform of the discovery rules should await completion of the pilot programs authorized by Congress . . . ." Id. at 6. A general study of rulemaking procedures would be expected to respond to these concerns.

While a process purportedly based on disinterested expertise should not be expected to be governed by public opinion, there is

no denying the reality that during recent periods of public comment many prominent judges, lawyers, and commentators expressed frustration over specific rule proposals and have protested the way rules are being made under present procedures. The controverted public commentary over the recently proposed changes in Fed. R. Civ. Pro. 11, which was noted in Justice Scalia's Dissenting Statement, is but one example. To refresh your memory, Appendix D contains some articles critical of the existing rulemaking procedures and an editorial from the National Law Journal suggesting that national rulemaking ought to defer to the local rulemaking under the Civil Justice Reform Act. Not that long ago, Senior District Judge John L. Kane, District of Colorado, addressed the American Corporate Counsel Association's annual meeting to say:

> To my knowledge, a brand new conceptualization of what procedure should do and should be has yet to be attempted. . . . Accordingly, I propose that judges, legislators and lawyers of today undertake to abolish all rules of civil, criminal and appellate procedure and the attendant rules of evidence. I suggest in their place a unified system which eliminates the entire concept of responsive pleading as well as its accompanying pervasive discovery and scenario trials followed by totality of circumstances appeals.

John L. Kane, Procedural Reform and the Costs of Litigation, A.C.C.A. Docket 36, 38 (Fall 1990) (A copy was distributed to all members of the Standing Committee in November 1990). These calls for reform of federal court rulemaking from those outside the process provide another justification for undertaking a thorough self-evaluation.

Those directly involved with rulemaking likewise have raised questions concerning rulemaking procedures. In his December 17, 1992, letter to Judge Keeton previously distributed, the Chair of the Advisory Committee on Civil Rules characterized as worthy of the "highest priority" a list of issues that included: "Maintaining the independence of the federal rules process and streamlining the process to make it more effective." For additional relevant expressions of concern, see Appendix E which contains: (1) an interview from the Third Branch with Judge Keeton describing the procedures and expressing "concern[] that bills continue to be introduced in Congress to amend federal rules directly by statute, bypassing the Rules Enabling Act process"; (2) a letter dated March 8, 1993, from Judge Easterbrook to Reporter Coquillette analyzing the rulemaking sequence and suggesting changes in the scheduling process; (3) a letter dated July 31, 1992, from Judge Stotler to Judge Keeton entitled "Philosophy of Task" raising broad issues about how the rulemaking procedures ought to be conducted; (4) a letter dated January 20, 1993, from former Reporter Carrington to Professor Baker discussing the respective roles of the Standing Committee

and the Advisory Committees. What these items have in common is a concern about the rulemaking process as a process. These are the kind of concerns that are not fully addressed in the consideration of specific rules changes. These are the kind of concerns that would be best addressed in a self-study of rulemaking.

The self-study being proposed will ask the questions: What are the goals of federal judicial rulemaking procedures? How well do the existing procedures accomplish those goals? What are the criticisms of the way federal rules are made? Are the criticisms valid in terms of the goals of rulemaking? How might rulemaking procedures be improved?

The proposed report would be in three parts: (1) a descriptive narrative of existing rulemaking procedures, including some institutional history as background; (2) a summary of the extant criticisms of the existing procedures, including the views of participants and non-participants alike; and (3) an assessment of the existing procedures and the criticisms, specifying how federal court rulemaking might be improved. The immediate audience for the Subcommittee report would be the Standing Committee, which would review the report and make any recommendations to the Judicial Conference. It is anticipated that a draft report could be prepared by the June 1994 meeting of the Standing Committee.

Of course, before the Subcommittee would undertake this task, the Standing Committee must agree that it would be worthwhile.

The remaining items in this Report are informational items only, although the Subcommittee welcomes suggestions and comments from the Standing Committee and the Advisory Committees.

Long range matters pending before the Standing Committee. The most noteworthy development since the last report of the Subcommittee was the creation of a new Advisory Committee on the Rules of Evidence. The new Advisory Committee is chaired by Judge Ralph K. Winter and the Reporter is Professor Margaret A. Berger.

Last year the Standing Committee created two new subcommittees: the Subcommittee on Style and the Subcommittee on Long Range Planning. These subcommittees have become fully operational. The Subcommittee on Style has undertaken the formidable task of reviewing all of the Federal Rules for clarity and consistency in style. The Subcommittee has developed standards for its use, as well as for the consideration by the various Advisory Committees. It has reviewed all proposed amendments to the Federal Rules and is in the process of reviewing all of the existing Federal Rules of Civil Procedure.

The Subcommittee on Long Range Planning convenes regularly to articulate those issues that deserve discussion and review over the long term. It continues to work with the Long Range Planning Committee of the Judicial Conference to coordinate planning efforts and to utilize resources most effectively.

One of the suggestions developed over the course of several memoranda by Judge Keeton was the formation of a new Subcommittee on Substantive and Numerical Integration of the Federal Rules of Procedure. This Subcommittee, chaired by Judge Pratt, reviewed several alternative proposals on integration of the rules and met to discuss future plans. The Subcommittee intends to remain in existence but has decided to table its efforts for the short term, given the development of the district court plans pursuant to the Civil Justice Reform Act and other activities of the Advisory Committees and the Standing Committee.

Upon the recommendation of the Subcommittee on Long Range Planning, at the December 1992 meeting, the Standing Committee referred four recent comprehensive studies for evaluation by the various Advisory Committees: (1) Federal Courts Study Committee Report; (2) A.L.I. Complex Litigation Project; (3) A.B.A. Blueprint to Improve the Civil Justice System; and (4) President's Council on Competitiveness Plan to Improve the Civil Justice System. Additionally, the Standing Committee formally referred the Report of Subcommittee #3 of the Long Range Planning Committee to the various Advisory Committees for comment and study. These documents are currently under review.

Several other pending proposals may be described as long range. The Standing Committee may be interested in examining the rules and standards concerning professional responsibility and admission to the bar to determine the advisability of developing one uniform set of guidelines for all attorneys practicing before the federal courts. The Local Rules Project continues to strive for the implementation of its final report. Specifically, it seeks to obtain uniform numbering of all local rules and the rescission of those rules that simply duplicate existing law as well as those that directly conflict with existing law. The Project also intends to monitor these developments in light of the Civil Justice Reform Act.

Long range matters pending before the Advisory Committee on Appellate Rules. In December 1992, the Advisory Committee responded in detail to the request from the Judicial Conference Committee on Long Range Planning and that letter was distributed previously to members of the Standing Committee. Three areas of long range and broad scope consideration may be highlighted. First, the Advisory Committee continues its work with the Local Rules Project. The majority of the circuits have renumbered their rules to correspond to the national rules and several circuits have reviewed their rules and eliminated language that

merely duplicated the national rules. The Advisory Committee has advanced several proposals for change in the national rules based upon successful local rules. Related proposals will be presented at the June 1993 meeting of the Standing Committee. Second, the Advisory Committee is studying how best to respond to the Congressional amendment to the Rules Enabling Act that authorizes rulemaking to define the jurisdictional requirement of an appealable final judgment and to expand the instances of permissible interlocutory appeals. Third, the Rules of Appellate Procedure are next on the agenda of the Subcommittee on Style, as part of the effort to simplify and clarify the language of the entire body of rules. Other miscellaneous items currently under consideration by the Advisory Committee include: procedures related to prisoners' mail; procedures for panel and en banc rehearing; the effects of wordprocessing technology on figuring costs; mandamus procedures; motions practice; study of intercircuit and intracircuit conflicts; and reconsideration of the mail-box rule.

Long range matters pending before the Advisory Committee on Bankruptcy Rules. One of the Advisory Committee's most significant long-range planning initiatives has to do with advances in technology. Three years ago, the Advisory Committee formed a Subcommittee on Technology to study ways to improve the administration of bankruptcy cases by using technological advances. For example, the most recent package of rules changes included new Rule 9036 which provided for electronic noticing to parties instead of traditional mailing of paper notices. Other technological advances currently being considered include the use of facsimile machines for filing documents and the use of electronic scanners and compact disk technology to read and store documents. Another long range matter currently is pending before the Advisory Committee's Subcommittee on Local Rules. The Subcommittee and the Bankruptcy Division of the Administrative Office are working to develop a uniform numbering system for local rules. Another long range effort is to achieve a greater uniformity among the various sets of federal rules that deal with analogous issues. For example, the Advisory Committee recently redrafted Bankruptcy Rule 8002 to make it conform to amendments to Appellate Rule 4. Finally, the Advisory Committee is monitoring a comprehensive bankruptcy bill now pending before Congress (S. 540) that, among other things, would create a new experimental chapter 10 to cover small business organizations and would establish a commission to review and make recommendations for revisions to the Bankruptcy Code.

Long range matters pending before the Advisory Committee on Civil Rules. In its December 1992 report to the Long Range Planning Committee of the Judicial Conference, the Advisory Committee identified six long-term goals: achieving the proper balance between national uniformity and local variation; improving federal rulemaking and maintaining its independence;

improving the organization, integration, consistency, and style of the Civil Rules; proposing amendments to accommodate advances in technology; enhancing procedures to encourage settlement and to facilitate alternative dispute resolution; and refining procedures to facilitate the disposition of complex litigation. Two particular examples are timely. First, the Advisory Committee and the Subcommittee on Style are currently working together on a comprehensive re-styling of the entire set of Civil Rules. Much progress has been made. Second, as part of the ongoing effort to accommodate technological advances, the Advisory Committee is considering amendments to Rule 43 to allow the contemporaneous transmission of testimony from a witness off-site from the courtroom.

Long range matters pending before the Advisory Committee on the Rules of Evidence. This newly-established Advisory Committee is organizing itself and establishing procedures and an agenda.

Long range matters pending before the Advisory Committee on Criminal Rules. The Advisory Committee reports that recent developments in several areas of criminal procedure portend long-range consideration in rulemaking. The long-range agenda includes reconsideration of criminal discovery, sentencing procedures and jury selection procedures. Among these, criminal discovery may be one of the most controversial and likely will occupy the Advisory Committee. Currently, Rule 16 is being re-examined. The Advisory Committee is preparing, along with the Subcommittee on Style, to conduct a complete review of the Rules of Criminal Procedure in their entirety, as part of the overall re-styling of each of the different sets of federal rules.

Liaison with the Long Range Planning Committee of the Judicial Conference. In a letter dated October 26, 1992, and distributed in the materials for the December 1992 meeting of the Standing Committee, Judge Otto R. Skopil, Jr., Chair of the Committee on Long Range Planning of the Judicial Conference wrote Judge Keeton requesting a review of a list of planning issues and recommendations from the Standing Committee. Judge Keeton solicited comments from the Chairs and Reporters of the various Advisory Committees. In a letter dated January 8, 1993, and distributed to all members of the Standing Committee, Judge Keeton transmitted those comments and offered his own reactions and suggestions. This detailed correspondence need not be rehearsed here, except to note that the effort at liaison continues at this level.

In a letter dated November 25, 1992, and distributed to the Standing Committee with the materials for the December 1992 meeting, Judge Becker, Chairman of Subcommittee #3 of the Long Range Planning Committee offered some follow-up on the letter from Judge Skopil mentioned in the preceding paragraph. Judge Becker's letter included a report listing issues and related

possibilities for long range consideration. As noted above, at the December 1992 meeting the Standing Committee referred this letter and list directly to the various Advisory Committees for comment and study.

Matters currently under consideration by the Subcommittee. There are several matters currently under consideration by the Subcommittee on Long Range Planning. These may be simply listed here. Parentheticals indicate the Subcommittee member(s) with primary responsibility.

(a) There have been some developments with the proposed "paperless court" concept. The Committee on Automation and Technology of the Judicial Conference has approved a recommendation for developing one or more prototype in-court experiments of electronic document processing technology. The purposes are to determine the feasibility of allowing attorneys to file pleadings and associated documents electronically and to determine the usefulness and desirability of relying on electronic files in judges' chambers. Previously, the Committee's Chairman, District Judge J. Owen Forrester, suggested that rule changes likely will be proposed. Now the Committee has approved a recommendation that the Standing Committee consider the desirability of amending Fed. R. Civ. Pro. 5 to permit filing "by other electronic means" [besides facsimile]. The Committee on Judicial Improvements has appointed a subcommittee to begin drafting guidelines on electronic filing. These efforts are being monitored. (Keeton)

(b) The Article III Judges Division of the Administrative Office is developing guidelines and standards for an "automated courtroom" for testing the integration of computer-aided transcription software and exhibit imaging software. Some districts already have implemented real-time court reporting and at least one district has an imaging system for exhibits. The Ninth Circuit expects to establish automated courtroom capacity in every district where volume and complexity of court business would justify the expenditures. These developments are being monitored. (Baker)

(c) Several environmental organizations have requested that the Standing Committee allow the filing of legal pleadings on double-sided paper and require use of "unbleached" paper to reduce the amount of paper as well as the environmental impact of the paperwork in federal courts. The Subcommittee has requested some evaluation of these ideas from the Administrative Office of the U.S. Courts. (Keeton)

(d) The Reporter of the Standing Committee, Dean Daniel R. Coquillette, and Professor Mary P. Squiers are supervising the creation and maintenance of a bibliography of the secondary literature on federal procedures. This ongoing bibliography will include the various studies of the FJC and other similar agencies and organizations, as well as books and articles. It will be organized along the same lines as the different sets of rules. The Subcommittee will review the bibliography to identify long range proposals for rules changes. (Coquillette, Squiers & Baker)

(e) The Civil Justice Reform Act of 1990, Pub. L. No. 101-640, 104 Stat. 5089, began a new experiment in local rulemaking aimed at reducing the expense and delay in civil litigation. Congressional and judicial expectations are that some of the experimental procedures may be developed into national rules changes. The Committee on Court Administration and Case Management of the Judicial Conference was delegated primary oversight responsibility to conduct the statutory duty of review and evaluation in anticipation of the Judicial Conference's report to Congress. The Subcommittee is attempting to monitor these developments. (Baker & Coquillette)

Respectfully submitted,

Subcommittee on Long Range Planning

Thomas E. Baker, Chair
Frank H. Easterbrook
Edwin J. Peterson

Robert E. Keeton, ex officio
Daniel R. Coquillette, ex officio

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

Memorandum

TO: Judge Robert E. Keeton, Chairman, and Committee on Rules of Practice and Procedure

FROM: Daniel R. Coquillette and
Mary P. Squiers

RE: Advisory Committees' Responses to Filing by Facsimile Guidelines

DATE: June 11, 1993

The Committee on Court Administration and Case Management proposed Filing by Facsimile Guidelines which were originally submitted to the Judicial Conference for consideration at its March 1993 session. These guidelines were then withdrawn from the Judicial Conference agenda to provide an opportunity for the Advisory Committees and the Standing Committee to consider them. Judge Keeton is interested in learning the Advisory Committees' views on these Guidelines, generally, and on what changes, if any, the Committees would like to see made in them. The Judicial Conference will consider these Guidelines at its September session.

Reporters from the Advisory Committees on Civil and Bankruptcy Rules provided comment on these Guidelines. Copies of their communications are attached as Appendices A and B, respectively. Both the Civil and Bankruptcy Advisory Committees had insufficient time to fully consider the Guidelines and offer concrete changes. Accordingly, the letters from these Reporters contain some general views from Committee members and the Reporters' thoughts on the Guidelines; they do not contain any formal response from the Committees.

What follows is a short discussion of the communications from each of the Reporters. This brief synopsis is not intended to completely capture their views; for that, please see the Appendices.

The Civil Rules Committee had the Guidelines on the agenda of its May meeting but they did not come up for discussion. The letter from Ed Cooper, the Reporter, contains his thoughts. He first raises a broad issue concerning whether the existence of the Guidelines requires amendment of the Civil Rules. For example, Civil Rules 7(b)(3) and 11 requiring a "signature" may need change.

Six other possible problems with specific language of the Guidelines are raised in the letter. Each of these is identified below, with a designation as to where it is set forth in the Guidelines.

1. Guideline II. The language "filing is complete when the document is filed by the clerk" may be problematic. He suggests using "received by the clerk" or some other substitute. He also suggests a reference in the guidelines authorizing a judge to accept a paper for filing.

2. Guideline VII(1). He questions whether special provisions are needed when a document is transmitted by a private fax filing agency.

3. Guideline VIII(1)(d). If a complaint can be filed by fax, there should probably be a notation that a case number is not required on a complaint.

4. Guideline X(1). He questions whether providing for mandatory striking of pleadings is too harsh a sanction for non-receipt of payments.

5. Guideline X(1). There are two alternatives for when an after-hours fax is deemed filed. He questions whether it may be desirable to reduce those options to one.

6. Guideline XI(8). Whether "an incomplete transmission" can fix the filing date is left for the local rules. He questions whether the vagaries of this guideline can be minimized.

The Bankruptcy Rules Committee received the Guidelines at its February meeting. No formal action was taken at that meeting. The letter from Alan Resnick, the Reporter, consists of some views of individual Committee members and his thoughts.

The general sense of the Bankruptcy Rules Committee was that fax filings were inappropriate in bankruptcy cases. Several reasons were put forth. First, use of fax filings would be a step backwards for the bankruptcy courts since these courts are encouraging the use of electronic filings, rather than hard copy filings. Second, there is widespread availability of overnight delivery services which should obviate the need for speedy transmission except where people have waited until the very last day; the effort and expense of using fax transmission for the small number of people who would actually need it outweighs that need. Lastly, even if such transmission is beneficial in other cases, the large number of papers in bankruptcy cases makes it unworkable for the bankruptcy courts.

It was also pointed out that the Civil Rules, read in conjunction with the Bankruptcy Rules, permit fax filing in adversary proceedings only. The Guidelines, however, seem to anticipate that fax filings may be permitted in other cases. See Guideline IX.

Five other possible problems with specific language of the Guidelines are raised in the letter. Each of these is identified below, with a designation as to where it is set forth in the Guidelines.

1. Guideline I. The definition of a fax filing is confusing because it is not a filing at all. He suggests that the definition be changed to a fax transmission.

2. Guideline II. He points out a potential problem with the language in the Guideline that indicates that a document is considered filed only after it is "filed by the clerk." He suggests that different language be used.

3. Guideline VII. He questions whether special provisions are needed when a document is transmitted by a private fax filing agency. He suggests complete deletion of this Guideline.

4. Guideline VIII. He questions why a private fax filing agency should be required to file a cover sheet since the agency is simply acting as a messenger. He also questions why the cover sheet is not filed since it is required to be transmitted to the clerk.

5. Guideline XI. He worries that this provision will open the door for extensive local rulemaking. He worries that there are many opportunities for endless variations with respect to fax filing.

This, he suggests, is inconsistent with the trend toward greater uniformity among districts.

Members of the Appellate Rules Committee reviewed the Guidelines and made comments. These are set forth in the letter from the Reporter of that Committee, Carol Ann Mooney. The Committee did not discuss, or reach a consensus, on the issues raised in the letter. Each of these comments is set forth briefly below, with a designation as to the relevant Guideline.

1. Guideline I(1). The definition of "facsimile transmission" may not be accurate.

2. Guideline I(1) and (2). The terms "facsimile filing" and "filing by fax" should be deleted because they are confusing. Such a deletion would require changes in various portions of the Guidelines. (I.e., Guideline III: first sentence; Guideline IV: first sentence; Guideline VI; Guideline X: first sentence; and, Guideline XI: paragraphs 1, 3, and 6.)

3. Guideline V(2). This provision requires that the original signed document be returned for "the maximum allowable time to complete the appellate process." The comment suggests that the papers be retained until the appellate process comes to an end.

4. Guideline VII. The comment on this Guideline suggests that it be moved to the end of the Guidelines and that appropriate reference be made within it as to which of the previous Guidelines apply to private fax filing agencies.

5. Guideline X(1). A suggestion is made to allow courts to refuse fax filings of notices of appeal as well as complaints to avoid the fee collection problem.

6. Guideline X(2). A comment is made questioning why the fees are so high and why they are arranged in inverse order. In addition, a suggestion is made that the section be made clearer with respect to the Guideline's applicability. Specifically, it is noted that having to collect fees for faxes transmitted only on an ad hoc basis may not be worthwhile.

7. Lastly, a suggestion is made that the Guidelines include a provision for pre-transmission authorization.

The Criminal Rules Committee members were polled by a memorandum dated May 25, 1993 concerning the Guidelines. Judge Hodges reported the results of the poll in a letter to Judge Keeton dated June 4, 1993: "An overwhelming majority of the members of the Advisory Committee have endorsed the view that this proposal is acceptable."