# COMMITTEE ON RULES
# OF
# PRACTICE AND PROCEDURE

File Copy

San Diego, California
January 11-13, 1995

# COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
# SAN DIEGO, CALIFORNIA
# JANUARY 11-13, 1995

1. Opening Remarks of the Chair

   A. Report on actions taken by the Judicial Conference

      i. Rules amendments approved
      ii. Cameras in the courtroom and proposed amendments to Criminal Rule 53

   B. Review of existing policy on direct contacts from the public with members of the Judicial Conference regarding proposed amendments submitted by the Standing Rules Committee

   C. Coordination with Committee on Court Administration and Case Management

2. Approval of the Minutes

3. Report of the Administrative Office

   A. Legislative activity report

   B. Administrative actions

4. Report of the Federal Judicial Center

5. Report on the Ninth Circuit Local Rules Regarding Capital Cases

6. Report of the Advisory Committee on Appellate Rules

   A. Informational report on proposed amendments to Rules 26.1, 29, 35, and 41 for public comment

   B. Minutes and other informational items, including report on the status of stylizing the rules

7. Report of the Advisory Committee on Evidence Rules

   A. **ACTION** - Proposed amendments to Rules 404 and 405, as alternatives to new Evidence Rules 413-415

      i. Views of Civil and Criminal Rules Committees on Evidence Rules 413-415

ii. **ACTION** - Proposed transmittal communication from the Judicial Conference to Congress

B. **ACTION** - Proposed amendments to Rules 103 and 407 for public comment

C. **ACTION** - Notifying public of the committee's review of Evidence Rules 406, 605, and 606

D. Minutes and other informational items

8. Report of the Advisory Committee on Bankruptcy Rules

A. Informational report on proposed new Rules and amendments to Rules conforming with Bankruptcy Reform Act of 1994

i. **ACTION** - Approval of Interim Rules

B. **ACTION** - Proposed revisions to Official Forms for approval and submission to the Judicial Conference

C. Minutes and other informational items

9. Report of the Advisory Committee on Civil Rules

A. **ACTION** - Proposed amendment of Section 742, Title 46, United States Code, dealing with service of process in admiralty suits for approval and submission to the Judicial Conference

B. **ACTION** - Proposed amendments to Rules 26(c) and 43 for approval and submission to the Judicial Conference

C. **ACTION** - Proposed amendments to Rules 47 and 48 for public comment

D. Minutes and other informational items

10. Report of the Advisory Committee on Criminal Rules, Including Minutes

11. Contract with America

    A. **ACTION** - Recommendations on rules-related provisions

        i. *Common Sense Legal Reform Act*

            a. Proposed amendment to Civil Rule 11
            b. Attorney-fee shifting (American vs. English Rule)
            c. Expert testimony evidence
            d. Exclusionary evidence rule reform
            e. Securities litigation reform
            f. Notice of intent to bring lawsuit
            g. Other rules-related provisions

        ii. *Taking Back Our Streets*

            a. Proposed revision of habeas corpus provisions

12. Report of the Long-Range Planning Subcommittee

    A. Proposed *Long Range Plan for the Federal Courts* prepared by the Administrative Office

    B. Professor Stephen B. Burbank's article on rulemaking - *A Call for a Moratorium*

    C. Report of the Subcommittee

13. Report of the Subcommittee on Style

14. Next Meeting

## COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

**(Standing Committee)**

**Chair:**


Honorable Alicemarie H. Stotler
United States District Judge
751 West Santa Ana Boulevard
Santa Ana, California 92701

Area Code 714
836-2055

FAX-714-836-2062
(Short FAX)
714-836-2460
(Long FAX)


**Members:**


Honorable George C. Pratt
United States Circuit Judge
Uniondale Avenue
at Hempstead Turnpike
Uniondale, New York 11553

Area Code 516
485-6508

FAX-516-485-6582

Honorable Frank H. Easterbrook
United States Circuit Judge
219 South Dearborn Street
Chicago, Illinois 60604

Area Code 312
435-5808

FAX-312-435-7543

Honorable Phyllis A. Kravitch
United States Court of Appeals
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Area Code 404
331-6836

FAX-404-331-5884

Honorable William O. Bertelsman
Chief Judge
United States District Court
P.O. Box 1012
Covington, Kentucky 41012

Area Code 606
655-3800

FAX-606-431-0296

Honorable Thomas S. Ellis, III
United States District Judge
200 South Washington Street
Alexandria, Virginia 22320

Area Code 703
557-7817
FAX-703-557-2830

Honorable William R. Wilson, Jr.
United States District Judge
600 West Capitol Avenue, Room 153
Little Rock, Arkansas 72201

Area Code 501
324-6863

FAX-501-324-6869

Honorable James A. Parker
United States District Judge
P.O. Box 566
Albuquerque, New Mexico 87103

Area Code 505
766-1129

FAX-505-766-1283

## COMMITTEE ON RULES OF PRACTICE AND PROCEDURE (CONTD.)

| | |
|---|---|
| Honorable E. Norman Veasey<br>Chief Justice<br>Supreme Court of Delaware<br>Carvel State Office Building<br>820 North French Street, 11th Floor<br>Wilmington, Delaware 19801 | Area Code 302<br>577-3700<br><br>FAX-302-577-3702 |
| Professor Thomas E. Baker<br>Texas Tech University<br>School of Law<br>18th & Hartford, Box 40004<br>Lubbock, Texas 79409-0004 | Area Code 806<br>742-3992<br><br>FAX-806-742-1629 |
| Professor Geoffrey C. Hazard, Jr.<br>Director, The American Law Institute<br>4025 Chestnut Street<br>Philadelphia, Pennsylvania 19104-3099 | Area Code 215<br>243-1684<br><br>FAX-215-243-1664 |
| Alan W. Perry, Esquire<br>Forman, Perry, Watkins & Krutz<br>188 East Capitol Street, Suite 1200<br>P.O. Box 22608<br>Jackson, Mississippi 39225-2608 | Area Code 601<br>960-8600<br><br>FAX-601-960-8613 |
| Alan C. Sundberg, Esquire<br>Carlton, Fields, Ward, Emmanuel,<br>Smith & Cutler, P.A.<br>5th Floor, First Florida Bank Bldg.<br>P.O. Drawer 190<br>Tallahassee, Florida 32302 | Area Code 904<br>224-1585<br><br>FAX-904-222-0398 |
| Sol Schreiber, Esquire<br>Milberg, Weiss, Bershad, Hynes & Lerach<br>One Pennsylvania Plaza, 49th Floor<br>New York, New York 10119-0165 | Area Code 212<br>594-5300<br><br>FAX-212-868-1229 |
| Deputy Attorney General (ex officio)<br>Honorable Jamie S. Gorelick<br>Attn: Geoffrey M. Klineberg, Esquire<br>4111 U.S. Department of Justice<br>10th & Constitution Avenue, N.W.<br>Washington, D.C. 20530 | Area Code 202<br>514-4375<br>-2101<br><br>FAX-202-616-1239<br>-514-0467 |

**Reporter:**

| | |
|---|---|
| Professor Daniel R. Coquillette<br>Boston College Law School<br>885 Centre Street<br>Newton Centre, Massachusetts 02159 | Area Code 617<br>552-8650<br>-4393 (secy.)<br>FAX-617-547-6175 |

## COMMITTEE ON RULES OF PRACTICE AND PROCEDURE (CONTD.)

**Consultants:**

| | |
|---|---|
| Joseph F. Spaniol, Jr., Esquire<br>5602 Ontario Circle<br>Bethesda, Maryland 20816-2461 | Area Code 301<br>229-2176<br>FAX-202-273-1826 |
| Mary P. Squiers, Asst. Prof.<br>Boston College Law School<br>885 Centre Street<br>Newton, Massachusetts 02159 | Area Code 617<br>552-8851<br><br>FAX-617-552-2615 |
| Bryan A. Garner, Esquire<br>LawProse, Inc.<br>Sterling Plaza, 5949 Sherry Lane<br>Suite 1280, L.B. 115<br>Dallas, Texas 75225 | Area Code 214<br>691-8588<br><br>FAX-214-691-9294<br>(Home)-358-5380 |

**Secretary:**

| | |
|---|---|
| Peter G. McCabe<br>Secretary, Committee on Rules of Practice and Procedure<br>Washington, D.C. 20544 | Area Code 202<br>273-1820<br><br>FAX-202-273-1826 |

# JUDICIAL CONFERENCE RULES COMMITTEES

## Chairs

Honorable Alicemarie H. Stotler
United States District Judge
751 West Santa Ana Boulevard
Santa Ana, California 92701
Area Code 714-836-2055
FAX 714-836-2062 (Short FAX)
-2460 (Long FAX)

Honorable James K. Logan
United States Circuit Judge
100 East Park, Suite 204
P.O. Box 790
Olathe, Kansas 66061
Area Code 913-782-9293
FAX 913-782-9855

Honorable Paul Mannes
Chief Judge, United States
Bankruptcy Court
6500 Cherrywood Lane, Rm. 385A
Greenbelt, Maryland 20770
Area Code 301-344-8047
FAX 301-344-0385

Hon. Patrick E. Higginbotham
United States Circuit Judge
13E1 United States Courthouse
1100 Commerce Street
Dallas, Texas 75242
Area Code 214-767-0793
FAX 214-767-2727

Honorable D. Lowell Jensen
United States District Judge
United States Courthouse
1301 Clay Street, 4th Floor
Oakland, California 94612
Area Code 510-637-3550
FAX 510-637-3555

Honorable Ralph K. Winter, Jr.
United States Circuit Judge
Audubon Court Building
55 Whitney Avenue
New Haven, Connecticut 06511
Area Code 203-773-2353
FAX 203-773-2415

## Reporters

Prof. Daniel R. Coquillette
Boston College Law School
885 Centre Street
Newton Centre, MA 02159
Area Code 617-552-8650,4393
FAX-617-547-6175

Professor Carol Ann Mooney
University of Notre Dame
Law School
Notre Dame, Indiana 46556
Area Code 219-631-5866
FAX 219-631-6371

Professor Alan N. Resnick
Hofstra University
School of Law
Hempstead, New York 11550
Area Code 516-463-5930
FAX 516-481-8509

Edward H. Cooper
Associate Dean
University of Michigan
Law School
312 Hutchins Hall
Ann Arbor, MI 48109-1215
Area Code 313-764-4347
FAX 313-764-8309

Prof. David A. Schlueter
St. Mary's University of
San Antonio School of Law
One Camino Santa Maria
San Antonio, Texas 78284
Area Code 210-436-3308
FAX 210-436-3717

Margaret A. Berger
Associate Dean and
Professor of Law
Brooklyn Law School
250 Joralemon Street
Brooklyn, New York 11201
Area Code 718-780-7941
FAX 718-780-0375

Item 1A-C

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

L. RALPH MECHAM
DIRECTOR

CLARENCE A. LEE, JR.
ASSOCIATE DIRECTOR

November 2, 1994

MEMORANDUM TO THE CHIEF JUSTICE OF THE UNITED STATES
AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT

By direction of the Judicial Conference of the United States, pursuant to the authority conferred by 28 U.S.C. § 331, I have the honor to transmit herewith for the consideration of the Court proposed amendments to Rules 4, 8, 10, and 47 of the Federal Rules of Appellate Procedure. The Judicial Conference recommends that these amendments be approved by the Court and transmitted to the Congress pursuant to law.

For your assistance in considering these proposed amendments, I am also transmitting an excerpt from the Report of the Committee on Rules of Practice and Procedure to the Judicial Conference and the Report of the Advisory Committee on the Federal Rules of Appellate Procedure.

L. Ralph Mecham

Enclosures

L. RALPH MECHAM
DIRECTOR

CLARENCE A. LEE, JR.
ASSOCIATE DIRECTOR

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

November 2, 1994

MEMORANDUM TO THE CHIEF JUSTICE OF THE UNITED STATES
AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT

By direction of the Judicial Conference of the United States, pursuant to the authority conferred by 28 U.S.C. § 331, I have the honor to transmit herewith for the consideration of the Court proposed amendments to Rules 5, 40, 43, 49, and 57 of the Federal Rules of Criminal Procedure. The Judicial Conference recommends that these amendments be approved by the Court and transmitted to the Congress pursuant to law.

For your assistance in considering these proposed amendments, I am also transmitting an excerpt from the Report of the Committee on Rules of Practice and Procedure to the Judicial Conference and the Report of the Advisory Committee on the Federal Rules of Criminal Procedure.

L. Ralph Mecham

Enclosures

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

L. RALPH MECHAM
DIRECTOR

CLARENCE A. LEE, JR.
ASSOCIATE DIRECTOR

November 2, 1994

MEMORANDUM TO THE CHIEF JUSTICE OF THE UNITED STATES
AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT

By direction of the Judicial Conference of the United States, pursuant to the authority conferred by 28 U.S.C. § 331, I have the honor to transmit herewith for the consideration of the Court proposed amendments to Rules 50, 52, 59, and 83 of the Federal Rules of Civil Procedure. The Judicial Conference recommends that these amendments be approved by the Court and transmitted to the Congress pursuant to law.

For your assistance in considering these proposed amendments, I am also transmitting an excerpt from the Report of the Committee on Rules of Practice and Procedure to the Judicial Conference and the Report of the Advisory Committee on the Federal Rules of Civil Procedure.

L. Ralph Mecham

Enclosures

L. RALPH MECHAM
DIRECTOR

CLARENCE A. LEE, JR.
ASSOCIATE DIRECTOR

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

November 2, 1994

MEMORANDUM TO THE CHIEF JUSTICE OF THE UNITED STATES
AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT

By direction of the Judicial Conference of the United States, pursuant to the authority conferred by 28 U.S.C. § 331, I have the honor to transmit herewith for the consideration of the Court proposed amendments to Rules 8018 and 9029 of the Federal Rules of Bankruptcy Procedure. The Judicial Conference recommends that these amendments be approved by the Court and transmitted to the Congress pursuant to law.

For your assistance in considering these proposed amendments, I am also transmitting an excerpt from the Report of the Committee on Rules of Practice and Procedure to the Judicial Conference and the Report of the Advisory Committee on the Federal Rules of Bankruptcy Procedure.

L. Ralph Mecham

Enclosures



















Lee

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

L. RALPH MECHAM
DIRECTOR

CLARENCE A. LEE, JR.
ASSOCIATE DIRECTOR

November 9, 1994

Honorable Jon O. Newman
Chief Judge, United States
Court of Appeals
450 Main Street
Hartford, Connecticut 06103

Dear Judge Newman:

The Committee on Rules of Practice and Procedure is conducting a long-range study of the rulemaking process. All aspects of the process are being evaluated and rethought, including the procedures governing the consideration of proposed rules amendments.

I have forwarded to the Standing Committee for its consideration your letter of October 6, 1994, which suggests a change to the existing policy regarding direct communication with members of the Judicial Conference on rules-related issues. The committee will next meet on January 12-13, 1995.

Sincerely,

L. Ralph Mecham
Director

cc: Honorable Alicemarie H. Stotler
Professor Daniel R. Coquillette
Professor Thomas E. Baker

# UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

CHAMBERS OF
JON O. NEWMAN
CHIEF JUDGE
450 MAIN STREET
HARTFORD, CONN. 06103

RECEIVED
10/19/94

October 6, 1994

Mr. L. Ralph Mecham
Director
Administrative Office of the United
State Courts
One Columbus Circle
Washington, D.C. 20544

Dear Ralph:

Thank you for your letter of October 6, 1994, replying to my inquiry of September 29, 1994. Your explanation of what occurred is very helpful.

I understand the point that since proposed rules changes are put out for public comment, in some sense it is a "second bite" to open up direct presentations to members of the Judicial Conference. On the other hand, the public comment period is an opportunity to persuade the Rules Committee; any presentation to the Judicial Conference would be the first opportunity to persuade that body.

Furthermore, the rules situation is not all that different from the recommendations emanating from other Conference committees. Though their recommendations are normally not distributed for public comment, they are often distributed for comment within the judiciary. The expression of views by judges to the relevant committee apparently has not been thought to preclude presentations to members of the Conference, as we learned from the recent deluge of communications concerning the career law clerks' salary issue.

I agree with you that current practice probably ought to continue for now, but perhaps this is a matter for some further thought at some point in the future.

Sincerely,

Jon O. Newman
Chief Judge

2960

L. RALPH MECHAM
DIRECTOR

CLARENCE A. LEE, JR.
ASSOCIATE DIRECTOR

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

October 6, 1994

**VIA FACSIMILE**

Honorable Jon O. Newman
Chief Judge, United States
Court of Appeals
450 West Main Street
Hartford, Connecticut 06103

Dear Judge Newman:

This is a response to your letter of September 29 in which you said that you were "surprised to see" the following sentence in Steve Brill's statement: "We were told by the U.S. Judicial Conference staff that we should not communicate with members of the Conference prior to their meeting to remind them of the results of either their own study or our survey, so we didn't."

When I first read the statement that Brill referred to, I asked Karen Siegel who heads the "U.S. Judicial Conference Staff" if she or anyone on her staff had made such a statement to Mr. Brill. She reported that not only had none of them made such a statement but they had never talked to Mr. Brill or to any of his staff at any time.

Then contacts were made with the staff for the Court Administration and Case Management Committee, chaired by Judge Ann Williams, which presented the agenda item that was debated by the Conference on cameras in courtrooms. They also reported that they had not talked to Mr. Brill or any of his staff.

However, you will recall that there was another "cameras in the courtroom" matter on the Conference agenda. This item dealt with criminal cases and was submitted through the Standing Committee on Rules, chaired by Judge Alicemarie Stotler, from its Advisory Committee on Criminal Rules chaired by Judge Lowell Jensen. Peter McCabe, Secretary to the Rules Committees, said that he did not make the statement and did not talk to Mr. Brill or his staff. But, John Rabiej provides the principal staff support to the Advisory Committee on Criminal Rules. He said that he received a call from Tim Dyke and another attorney representing Court TV. This occurred when the proposed criminal

rules revisions were out for public comment, roughly in October 1993. The inquiry involved only the criminal rules provision and not the material submitted by the Court Administration Committee through Judge Williams. John did not say that they should not communicate with members of the Conference. But, he did not encourage it either, since to do so would have violated a Conference and Committee policy going back at least 30 years. As you may recall from your own service as a rules advisory committee chairman, this policy is meant to discourage special interests who have already testified publicly from trying to take yet another bite of the apple. The staff has been told not to encourage such special interests who wish to lobby individual members of the Conference or of the Supreme Court, which also strongly discourages such second bites at the apple by direct lobbying of members of the Court on rules matters. Therefore, John reports that he may have said that it was not appropriate to contact members of the Conference or the Supreme Court. But he did not say that they should not, must not, or could not make such contacts.

Let me reiterate that John's cautionary comments were made during the public comment period solely on the criminal rules issue back in October 1993. They did not relate to Judge William's report which was debated by the Conference.

In summary, until there is any change in Conference or Rules Committee policy regarding direct contact by interest groups with Conference or Supreme Court members, I believe that my staff is bound to follow current practice to discourage such lobbying and ex parte contacts. If ex parte statements are permitted, I presume the other interested parties should have an opportunity to respond to the ex parte statement.

Although I have never talked to Mr. Brill or his staff, I met on October 4 with Mr. Bendavid of the *Legal Times* (controlled by Mr. Bill) who is writing a story on the Conference and the AO.

Sincerely,

L. Ralph Mecham
Director

cng

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

L. RALPH MECHAM
DIRECTOR

CLARENCE A. LEE, JR.
ASSOCIATE DIRECTOR

November 2, 1994

MEMORANDUM TO THE CHIEF JUSTICE OF THE UNITED STATES
AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT

By direction of the Judicial Conference of the United States, pursuant to the authority conferred by 28 U.S.C. § 331, I have the honor to transmit herewith for the consideration of the Court proposed amendments to Rules 4, 8, 10, and 47 of the Federal Rules of Appellate Procedure. The Judicial Conference recommends that these amendments be approved by the Court and transmitted to the Congress pursuant to law.

For your assistance in considering these proposed amendments, I am also transmitting an excerpt from the Report of the Committee on Rules of Practice and Procedure to the Judicial Conference and the Report of the Advisory Committee on the Federal Rules of Appellate Procedure.

L. Ralph Mecham

Enclosures

L. RALPH MECHAM
DIRECTOR

CLARENCE A. LEE, JR.
ASSOCIATE DIRECTOR

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

November 2, 1994

MEMORANDUM TO THE CHIEF JUSTICE OF THE UNITED STATES
AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT

By direction of the Judicial Conference of the United States, pursuant to the authority conferred by 28 U.S.C. § 331, I have the honor to transmit herewith for the consideration of the Court proposed amendments to Rules 5, 40, 43, 49, and 57 of the Federal Rules of Criminal Procedure. The Judicial Conference recommends that these amendments be approved by the Court and transmitted to the Congress pursuant to law.

For your assistance in considering these proposed amendments, I am also transmitting an excerpt from the Report of the Committee on Rules of Practice and Procedure to the Judicial Conference and the Report of the Advisory Committee on the Federal Rules of Criminal Procedure.

L. Ralph Mecham

Enclosures

Item 2

# COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

Draft Minutes of the Meeting of June 23-24, 1994
Washington, D.C.

The mid-year meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held at the Thurgood Marshall Federal Judicial Building in Washington, D.C. on Thursday and Friday, June 23-24, 1994. The following members were present:

Judge Alicemarie H. Stotler, Chair
Professor Thomas E. Baker
Judge William O. Bertelsman
Judge Frank H. Easterbrook
Judge Thomas S. Ellis, III
Professor Geoffrey C. Hazard, Jr.
Judge James A. Parker
Alan W. Perry, Esquire
Judge George C. Pratt
Sol Schreiber, Esquire
Alan C. Sundberg, Esquire
Judge William R. Wilson

Representing the Department of Justice was Deputy Attorney General Jamie S. Gorelick, who attended part of the meeting on Thursday. Also participating in the meeting on behalf of the Department of Justice were Robert E. Kopp, Roger A. Pauley, Esquire, and Mary Harkenrider. Chief Justice E. Norman Veasey was unable to attend because of illness.

Supporting the committee were Professor 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 James K. Logan, Chair
Professor, Carol Ann Mooney, Reporter
Advisory Committee on Bankruptcy Rules -
Judge Paul Mannes, Chair
Professor Alan N. Resnick, Reporter
Advisory Committee on Civil Rules -
Judge Patrick E. Higginbotham, Chair
Dean Edward H. Cooper, Reporter
Advisory Committee on Criminal Rules -
Judge D. Lowell Jensen, Chair

Professor David A. Schlueter, Reporter
Advisory Committee on the Rules of Evidence -
Judge Ralph K. Winter, Chair
Dean Margaret A. Berger, Reporter

Also participating in the meeting were: Joseph F. Spaniol, Jr. and Bryan R. Garner, consultants to the committee; Mary P. Squiers, project director of the local rules project; and Judith A. McKenna of the Research Division of the Federal Judicial Center. Additional staff assistance was provided by the Rules Committee Support Office and the Office of Judges Programs of the Administrative Office.

## INTRODUCTORY REMARKS

Judge Stotler welcomed the members and thanked the chairs and reporters of the advisory committees for taking the time to participate in the entire meeting of the Standing Committee.

Judge Stotler reported that the Judicial Conference, at the committee's request, had withdrawn its position supporting in principle the offer of judgment proposal contained in S. 585, civil justice reform legislation introduced by Senator Grassley. She pointed out that she had informed the Conference that the Advisory Committee on Civil Rules was actively considering proposed amendments to Fed.R.Civ.P. 68, dealing with offers of judgment. The committee, moreover, wished to review the results of a survey by the Federal Judicial Center regarding settlement practices.

The chair pointed out that rulemaking frequently overlaps substantive issues. Accordingly, she emphasized the need for the rules committees to cooperate with other, substantive committees on the Judicial Conference on a continuing basis. To assist in coordination, the Rules Committee Support Office of the Administrative Office had circulated to the members the agendas of the other Conference committees.

Judge Stotler reported that she had been in contact with Judge Ann Williams, chair of the Conference Committee on Court Administration and Case Management, regarding the RAND Corporation's study of implementation of the Civil Justice Reform Act. She noted that the Conference may have to ask the Congress for a one-year extension of the statutory deadline to give RAND additional time to compile its data.

Professor Coquillette cautioned that the deadlines for the CJRA study were very tight and that there would not be sufficient time for the rules committees to study the RAND results carefully before the Conference has to act to meet the statutory deadline.

Several of the members stated that the Civil Justice Reform Act had caused procedural uncertainty and confusion in the district courts. The bar was expressing concern that it is difficult to determine precisely what procedures are in effect in a given district in light of the CJRA experimentation and the recent amendments to the civil rules.

## APPROVAL OF THE MINUTES OF THE LAST MEETING

**The committee unanimously approved the minutes of the January 13-14, 1994 meeting with two minor, stylistic changes.**

The chair asked the secretary to append to the minutes Mr. Rabiej's flow chart on the status of all pending rules amendments. She also recommended that the members read the draft minutes very carefully to make sure that their comments were properly characterized, since the minutes will be available to the public on computer assisted legal research services.

The committee decided not to make the minutes of the January 12, 1994 executive session public. It was agreed that if there were anything in the minutes that would be helpful for future use, the pertinent speakers could be asked to repeat their remarks for the record.

## REPORT ON LEGISLATION

Mr. Rabiej reported that the Senate-passed version of the comprehensive crime legislation pending in the Congress had 10 provisions affecting the federal rules. The House-passed version, though, was very different, since the chair and the Administrative Office had persuaded the House Judiciary Committee to adhere to the Rules Enabling Act process and not include any rule amendments in their bill.

With regard to Rule 412 of the Rules of Evidence, both houses had agreed to amend their respective bills and substitute the language of Rule 412 drafted by the Advisory Committee on the Rules of Evidence—but without the deletions made by the Supreme Court that would have eliminated the rule's application to civil cases. Therefore, it was likely that the revised rule, in the form drafted by the Advisory Committee on the Rules of Evidence and approved by the Judicial Conference, would take effect on December 1, 1994.

Mr. Rabiej reported that both House and Senate versions of the crime bill included an amendment to Fed.R.Crim.P. 32 that would provide a right of victim allocution in certain categories of criminal cases. It appeared that the revised version of the Rule 32 recently promulgated by the Supreme Court—with the victim allocution provision added—would also take effect on December 1, 1994.

## GREATER PARTICIPATION BY THE BAR

Mr. Rabiej stated that Senator Heflin would introduce legislation amending the Rules Enabling Act to require that a majority of the members of all the rules committees be practicing attorneys. The moving force behind the effort appeared to be attorney John Frank, who had also been able to convince the American Bar Association to support the change in membership.

Judge Easterbrook suggested that Senator Heflin be advised by the chair that the Standing Committee had undertaken a comprehensive self-study of the rules process that would address, among other things, the membership of the committees. He added that several former committee chairs had recommended: (1) that the Standing Committee's membership be smaller, not larger, and (2) that the chairs of the advisory committees be made *ex officio* members of the Standing Committee. Adding more lawyers to the Standing Committee would make it difficult to achieve these objectives.

Professor Hazard suggested that the rules committees should actively solicit the views of the relevant committees of the American Bar Association on rules issues. Feedback from the bar was very important, and greater outreach by the committees was necessary.

Mr. Perry stated that it would be beneficial to have more members of the bar on the committees, although there was no need for Senator Heflin's legislation.

Judge Higginbotham suggested that much of the problem with bar relations flows from the recent amendments to Rule 26, which were not well received by the bar. He recommended that the committee be more sensitive to the bar, actively solicit bar comments, and respond positively to the request for more lawyers on the committees.

Mr. Rabiej reported that, other than in unusual circumstances, the secretary generally does not receive many comments from lawyers on proposed rules changes. He stated that, in an effort to stimulate comments, the Administrative Office had selected about 2,500 attorneys at random from Martindale-Hubbell and would mail them the call for comment on proposed amendments. He also reported: (1) that he had received mailing labels from the American Bar Association, and (2) that all state bar associations were now included on the committee's mailing list.

Mr. Rabiej stated that the Administrative Office had completed a draft of a new pamphlet summarizing the proposed rules changes ready for public comment in September. He said that the attorneys were more likely to read a brief summary of the amendments than to read the full text and committee notes, as set forth in the call for comment publication. He directed the committee's attention to a copy of the proposed pamphlet, which had been distributed to the members in their folders.

Judge Stotler requested the members to look through the proposed pamphlet for style and format. She asked for their approval of the concept. She agreed that the deadline for submitting comments to the amendments should be set forth clearly on the first page of the pamphlet.

Mr. Sundberg recommended that the committee ask each state bar association to name an official liaison member to the committee, who would help channel comments on the rules.

Ms. McKenna suggested that a list of attorneys interested in the rules could be produced from the court records of attorneys who appear in federal court. She noted that the Federal Judicial Center had followed this technique, and she recommended that the committee write to these lawyers and send them a questionnaire.

## FAX FILING

Mr. Rabiej reported that the Court Administration and Case Management Committee: (1) had withdrawn its original recommendation that the Judicial Conference adopt guidelines to address fax filing in routine situations, and (2) had decided that there was no need to promulgate guidelines to address emergency filings.

Judge Stotler stated that the Standing Committee and the Automation and Technology Committee had both concurred in the recommendations of the Court Administration and Case Management Committee. Accordingly, fax filing would be limited to emergency filings and would be left up to the local courts.

## REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Professor Mooney presented the report of the advisory committee, as set forth in Judge Logan's memorandum of May 27, 1994. (Agenda Item 5)

### 1. Rules for Judicial Conference Approval

Professor Mooney reported that the advisory committee was recommending that the Standing Committee approve amendments to five rules and send them to the Judicial Conference: F.R.A.P. 4, 8, 10, 47, and 49.

F.R.A.P. 4

Professor Mooney explained that the paragraph (a)(4) rule would be amended: (1) to clarify that a party may file a notice of appeal or, if the party had filed a notice of appeal

before disposition of a pretrial motion, it may amend the previously filed notice; and (2) to conform it to proposed amendments to Fed.R.Civ.P. 50, 52, and 59, which were being amended to require that a posttrial motion be "filed" no later than 10 days after entry of judgment. No public comments were received on the proposal, and the advisory committee was recommending that the amendments be approved as published.

F.R.A.P. 8

The amendment to Rule 8 was a technical change in a cross-reference to Fed.R.Crim.P. 38 to take account of previous changes in that rule. There were no public comments on the proposal, and the advisory committee was recommending that it be approved as published.

F.R.A.P. 10

The proposed amendment to Rule 10 would conform the rule to amendments made in F.R.A.P. 4(a)(4). It would suspend the 10-day period for ordering a transcript if a timely postjudgment motion were made and the notice of appeal were suspended. There were no public comments on the proposal, and the advisory committee was recommending that it be sent forward as published.

F.R.A.P. 47

The proposed redraft of Rule 47 is the F.R.A.P. version of a suggested uniform rule specifying the authority of courts to promulgate local rules and of judges to regulate practice before them.

Professor Mooney stated that the appellate advisory committee was recommending a change from the language of the proposed uniform rule to recognize practical differences between an appellate court and a trial court. On lines 5-8 of the draft set forth on page 11 of Agenda Item 5A, the shaded language had been added by the advisory committee to provide that: "A generally applicable direction to a party or a lawyer regarding practice before a court must be in a local rule rather than an internal operating procedure or standing order." The advisory committee had deleted the language earlier, but decided to restore it as a result of the public comments.

Internal operating procedures present a problem unique to the courts of appeals. They sometimes function as local court rules, but they are not subject to the same public notice and comment requirements as local rules. Unlike the district courts and bankruptcy courts, the courts of appeals always sit in panels and do not have standing orders.

Professor Mooney stated that the advisory committee was also recommending a change in subdivision (b). The uniform provided that no sanction may be imposed causing a party to lose rights for a procedural violation unless there were actual notice of the

requirement. The advisory committee believed that the provision was directed to trial court practice and was not needed in the courts of appeals.

Judge Logan emphasized that while the Advisory Committee on Appellate Rules had approved language that varied slightly from the uniform rule in order to recognize differences from the trial courts, the substance of F.R.A.P. 47 was the same as the uniform rule. Professor Coquillette stated that divergence was acceptable as long as there were specific reasons for it.

Professor Mooney added that the advisory committee had agreed to change the word "negligent" to "nonwillful" on line 23, in accordance with the recommendation of the Advisory Committee on Bankruptcy Rules. Judge Jensen stated that the Advisory Committee on Criminal Rules had decided not to make the change, but would support either version.

Mr. Perry said that he was troubled by elimination of the non-sanctions language in the appellate rule. Its absence would be noted by the lawyers and could cause more mischief than including a sentence in the language of the rule that might be redundant. Professor Baker suggested that the rationale for not including the provision could be explained in the committee note. Judge Logan added that this could be accomplished by restoring the last sentence of the committee note reading: "There should be no adverse consequence to a party or attorney for violating special requirements relating to practice before a particular court unless the party or attorney has actual notice of those requirements."

**Mr. Schreiber moved to leave the no-sanctions sentence out of the rule and to address the matter in the committee note.**

**Mr. Perry moved to amend Mr. Schreiber's motion to restore the sentence to the rule itself. His motion was approved by a vote of 6-5.**

Professor Mooney advised that the language of the appellate version of the uniform rule would still be a little different from the bankruptcy version of the rule because it would contain no reference to the official forms and the rules of the district courts.

**The committee approved Mr. Schreiber's motion, as amended by Mr. Perry's motion, by a vote of 7-2.**

*[Note: Professor Mooney then said that this means that the committee note would NOT be amended. Yet, the committee's report includes language both in the rule and in the advisory committee note.]*

**The committee then voted unanimously to approve the amendments to Rules 4, 8, 10, and 47 and send them to the Judicial Conference. The committee also voted to approve the parallel amendments in the other sets of rules dealing with local rules of court: Bankruptcy Rules 8018 and 9029, Civil Rule 83, and Criminal Rule 53.**

F.R.A.P. 49

Professor Coquillette stated that serious policy concerns were raised by proposed new Rule 49, the appellate version of the proposed uniform rule giving the Judicial Conference authority to amend the federal rules to make technical and conforming amendments. He noted that Professor Baker had distributed a fine memorandum arguing that if the proposal were to be approved at all, it would have to be enacted by legislation, rather than through the Rules Enabling Act process.

He noted that: (1) the Advisory Committee on Bankruptcy Rules was opposed to the proposal in any form, (2) the Advisory Committee on Criminal Rules had found the proposed rule acceptable, and (3) the Advisory Committee on Civil Rules believed that the provision could only be effectuated through legislation. Judge Higginbotham added that he was personally opposed to the amendment on the merits and that it would be a political mistake to pursue the matter. Judge Logan stated that the Advisory Committee on Appellate rules had approved the proposed rule, but with reservations and without extensive debate.

Mr. Kopp pointed out that the Department of Justice had opposed the proposal in the past because its scope was uncertain.

Some members of the committee argued on the merits that the Judicial Conference should have the authority to make technical and conforming amendments, while others saw no need for the proposal. There was general agreement, however, that it would not be advisable to forward the proposed rule to the Congress.

Judge Easterbrook suggested that reliance on the supersession clause in the Rules Enabling Act to amend the Act itself was highly problematic. Legislation would be necessary to effect the change. He noted that the same issue would arise again later in the meeting in connection with the proposed amendments to Fed.R.Crim.P. 16 and their impact on the Jencks Act.

**Judge Bertelsman moved to table the proposed uniform rule on technical and conforming amendments in all sets of the rules (F.R.A.P. 49, Fed.R.Bank.P. 9037, Fed.R.Civ.P. 84, and Fed.R.Crim.P. 59). He then amended his motion to disapprove, rather than table, the proposed amendments. His motion on the amendment was approved 11-1, and the amended motion to disapprove the proposal was approved unanimously.**

Professor Coquillette explained that the action just taken would include the changes to both Fed.R.Civ.P. 83(a) and 83(b), since they are essentially similar.

**2. Rules for Publication**

Professor Mooney reported that the advisory committee was seeking authority to publish amendments to six appellate rules.

F.R.A.P. 21

Professor Mooney pointed out that Rule 21, dealing with mandamus, was before the committee for the second time. The advisory committee was seeking republication, following lengthy discussions before both the standing committee and the advisory committee on whether a trial court judge who is the subject of mandamus should have the right to appear before the court of appeals.

In amending the proposal, the advisory committee had deleted the right of the trial judge to appear before the appellate court. Thus, the judge could appear only if ordered by the court of appeals. Judge Logan and Professor Mooney stated that the advisory committee was concerned that providing a right to appear would place the trial judge in a position of advocacy. Moreover, in most cases the trial judge would have no need to appear. They pointed out that under the amendment the court of appeals could request the trial judge to appear, when appropriate.

One member emphasized that he was in favor of giving the trial judge the right to appear, at least in writing. The right would be particularly important where both parties oppose the action of the trial judge in a particular case. He also stated that the rule should require the trial judge to receive personal notice of the pleadings.

Some concern was expressed as to the meaning of the provision on lines 10-11 of the amendment that: "All parties to the proceeding in the trial court other than the petitioner are respondents for all purposes." A potential ambiguity was cited between the rule and the committee note. Lines 43-45 of the proposed rule would provide that the respondent must answer within a fixed time, while lines 27-28 of the note would explain that the court may order the judge to respond.

**The committee approved the draft rule and committee note for publication on a vote of 7-5.**

F.R.A.P. 25

Professor Mooney stated that the advisory committee had published a simple rule dealing with service by mail, but had received responses recommending that the rule be further amended to authorize service by public courier service. The advisory committee

thereupon decided to amend the rule to provide that filing of a brief or appendix under the mailbox rule may be made either by mail or by "an equally reliable commercial carrier." The rule would require a certification of service. It would also require that, when feasible, service on a party be by a manner at least as expeditious as the manner of filing with the court.

One member asked whether the postal service had expressed any views on the legality of the proposal, particularly in light of its monopoly statute. The members agreed that the postal service was free to respond to the proposal during the public comment period.

Judge Logan stated out that proposed new subparagraph 25(a)(2)(D) would authorize electronic filing of papers, and he emphasized the need for the appellate version of the rule to be uniform with the companion electronic filing amendments in the civil and bankruptcy rules.

Judge Easterbrook recommended that the amendment, at lines 28-32, be revised as follows: "A court of appeals may, by local rule, permit papers to be filed by electronic means, provided such means are consistent with any technical standards established by the Judicial Conference of the United States."

At the suggestion of Judge Ellis, the committee decided to work from the proposed Bankruptcy Rule 5005, using it as a model for an electronic filing authorization in all three sets of rules.

Professor Resnick pointed out that the bankruptcy version of the amendment used the words "standards, if any" to make it clear that individual courts could proceed with electronic filing by local rule without having to wait for the Judicial Conference to promulgate standards. He explained that the Conference's standards would deal only with technical matters. Procedural issues would have to be addressed either by national or local rule. He added that if the committee decided in the future that it would be better to have national procedural uniformity on electronic filng, it could propose a more detailed, national rule.

Professor Resnick reported that the Advisory Committee on Bankruptcy Rules was strongly opposed to fax filing, and its original draft of Rule 5005 had excluded fax filing. Nevertheless, he had been advised that the term "facsimile" was not limited to standard fax machine transmissions, but was broad enough to include certain computer to computer transmissions.

He noted that the amended rule covered signing and verification of papers, and it provided that an electronic filing constitutes "a written paper." The latter provision was necessary because the bankruptcy rules require that certain matters, such as a proof of claim, be initiated "in writing."

Judge Logan stated that the Advisory Committee on Appellate Rules could adopt the language of the proposed bankruptcy rule amendment, stopping after the words "applying these rules," *i.e.,* deleting the reference on line 21 to the Federal Rules of Civil Procedure and section 107 of the Bankruptcy Code. He added that his advisory committee could consider minor language changes, if necessary, after the public comment period.

Dean Cooper stated that the Advisory Committee on Civil Rules would likely agree with the appellate committee. But he was concerned that the civil committee had not yet addressed the specifics of the proposal. He said that drafting was complicated by recent changes in Fed.R.Civ.P. 5(e) and recent controversy concerning fax filing. Judge Higginbotham added that he believed the civil advisory committee would generally be pleased with the bankruptcy proposal.

One member expressed concern that the Standing Committee was being asked to publish a rule that had not been considered in detail by the appellate and civil committees and that the proposal would foster further diversity in local court practices. Other members suggested, however, that courts needed authority to experiment with developing technology. It was also pointed out that if the committee waited further to publish an amendment, it would be at least another year before electronic filing could be authorized in the courts.

*The discussion on electronic filing was continued later in the meeting in connection with Bankruptcy Rules 5005 and 8008.*

F.R.A.P. 26

The proposed amendment to Rule 26 would make a conforming amendment to Rule 25, allowing service by an "equally reliable commercial carrier."

The members questioned the appropriateness of the word "equally," using the postal service as the standard.

**Judge Wilson moved to adopt Rule 26 as proposed, but to strike the word "equally," both in Rule 26 and in Rule 25. The motion was approved with one dissent.**

Mr. Schreiber asked whether the additional three days authorized for a party to act after being served by mail was sufficient in light of recurring mail delivery problems. He suggested that it might be better to change the three-day provision to five days. **He thereupon moved to amend Rule 26 to increase the grace period following service by mail from three days to five days.**

Professor Resnick stated that the time periods fixed in the bankruptcy rules were generally shorter than those in the other rules. Giving a party an additional five days after service, rather than three days, could present real problems for bankruptcy practice and probably would not be acceptable to the Advisory Committee on Bankruptcy Rules.

Some members questioned the wisdom of making any change, since the bench and bar were used to the traditional three-day provision and would likely complain about what they perceived to be a needless change in the rules.

**Judge Wilson made a substitute motion to have the chair ask the advisory committees to consider the matter of increasing the time period of Rule 26(c) from three days to five days. The motion was approved by voice vote without objection.**

F.R.A.P. 27

Professor Mooney stated that Rule 27, governing motions, had been completely rewritten based on the work of the local rules project. The major changes proposed were: (1) to prohibit separate briefs on motions; (2) to impose a 20-page limit on motions and responses to motions, (3) to make it clear that the moving party had an opportunity to file a reply to a response, (4) to limit replies to 10 pages, (5) to move the provisions governing the form of motions from Rule 32 to Rule 27, so all motions requirements would be set forth in one rule, and (6) to add a new subdivision (e) providing that motions will be decided without oral argument unless the court orders otherwise.

**The committee voted unanimously to approve the revised rule for publication.**

F.R.A.P. 28

Professor Mooney stated that Rule 28 contained a companion amendment to Rule 32. It would delete subdivision (d), specifying page limits on briefs, because the limits on the length of briefs would be moved to Rule 32.

**The committee voted unanimously to approve the revised rule for publication.**

F.R.A.P. 32

Professor Mooney pointed out that Rule 32 had been discussed at length at the January 1994 meeting of the Standing Committee. She stated that substantial changes had been made in the draft following public comment and technical advice from printing companies. Professor Mooney stated that the text of the proposed amendment submitted by the advisory committee (Agenda Item 5B) should be revised to include the following additional seven changes: (1) on lines 27-28, change the typeface examples to read: "New Century Schoolbook, Bookman, and Garamond," (2) on line 40, add the words "at least" after the word "be," (3) on line 46, strike the words "in leading" and add the word "a" after the word "use," (4) on line 48, substitute the words "type matter" for the word "typeface," (5) on line 75, strike the word "any" and add the words "an original," (6) on line 76, add the word "printed" before the word "published," and (7) on line 108, strike the word "that.

Judge Logan subsequently withdrew the proposed change on line 75, deleting "an original" and restoring "any."

Professor Mooney stated that the draft: (1) expressed a preference for proportional typeface, (2) provided definitions for both proportionately spaced typeface and monospaced typeface, (3) prescribed the margins for a page, (4) set the limit for the length of the brief, expressed in the total number of words, and (5) limited the number of words on an individual page. She explained that a party filing a brief must certify the number of words in the brief, but could rely on word processing software to do so. Safe harbors would be provided, relieving a party from having to certify the word count as long as the number of pages in a brief were less than a set number.

**The committee voted unanimously to approve Rule 32 for republication.**

**3. Ninth Circuit Local Rule 22**

Judge Logan reported that the attorneys general of five states had requested the Judicial Conference to use its authority under 28 U.S.C. § 2071(c)(2) to abrogate Local Rule 22 of the Ninth Circuit. The local rule was designed to expedite the handling of death penalty cases by the court of appeals.

He explained that the attorneys general had made their recommendation in a letter to the Chief Justice, who had referred it to the chair of the Standing Committee, who had in turn referred it to the Advisory Committee on Appellate Rules. Judge Logan pointed out that the advisory committee had had little time to act on the matter and had before it only the relatively brief letter from the attorneys general and a response from the chief judge of the circuit. The committee considered the matter at its April 1994 meeting and had submitted the report and recommendations found at Agenda Item 5C.

Judge Logan stated that the advisory committee first had to determine the appropriate standard for the Judicial Conference to apply in modifying or abrogating a local court of appeals rule under 28 U.S.C. § 2071(c)(2). It decided that the Conference should only abrogate a rule if it violates federal law, and it should not void a rule simply because it does not agree with it as a matter of policy.

Second, the advisory committee had to consider the presumption to be accorded a local court rule and the manner of presenting the issues to the Conference. It decided to give the Standing Committee the full benefits of its views, even if an issue were in doubt or there were split votes among the members. Accordingly, the committee took individual votes on each of the four principal legal issues raised by the attorneys general that raised serious consistency questions.

1. Local Rule 22-4(e)(4) provides for a two-tiered in banc review—first by 11 judges and then possibly by the entire 28 judges of the court.

   The advisory committee voted 4-3 with 2 abstentions against abrogating the dual in banc procedure. Judge Logan stated that a member of the advisory committee had undertaken a legal study of the issue following the meeting and had concluded that the law on the point was not clear.

2. Local Rule 22-4(e)(2) allows a single judge to convene the court in banc. The attorneys general argued that the pertinent statute required a majority of the active judges of a court to approve an in banc hearing. The Ninth Circuit responded that a majority of the judges of the circuit had voted *in advance* that if any one judge requested an in banc review, they would vote to approve the review.

   Some members of the advisory committee agreed with the court's position on the issue but were of the view that there was a need for periodic reaffirmation of this provision by a majority of the active judges of the court, especially when the composition of the court changes.

   The advisory committee voted 4-2 with 2 abstentions to permit the single judge provision to stand, with the proviso that the Judicial Conference be informed of the committee's concern that the procedure is valid only if it enjoys the continuing support of a majority of the court.

3. Local Rule 22-3(c) provides that a certificate of probable cause and a stay of execution will be granted automatically on appeal from a first habeas corpus petition. Federal Rule of Appellate Procedure 22, however, requires action by one judge to issue a certificate of probable cause. As a practical matter, there are five judges on the Ninth Circuit court who will issue a certificate in every case. The advisory committee voted 3-1 with 4 abstentions not to abrogate the provision.

   A motion was made to recognize that the court's procedure in effect constituted a standing order by a single judge to grant a certificate of probable cause and a stay of execution in every first petition in a death penalty case. Viewed in this light, the procedure was valid, subject to the qualification of continuing reaffirmation noted earlier. The motion passed by a vote of 5-0 with 3 abstentions.

4. Local Rule 22-1 applies the death penalty procedures to related civil proceedings. It was pointed out that the issue of the authority of a federal judge to grant a stay of execution when a habeas corpus petition is not pending before the judge was being considered by the Supreme Court in the

McFarland case. Accordingly, the advisory committee voted unanimously to make no recommendation concerning the validity of the procedures as applied to non-habeas corpus cases.

The members agreed that the petition of the attorneys general had raised fundamental issues of first impression regarding the authority of the Judicial Conference to abrogate local rules and the procedures and standards for doing so. Several members expressed the need to focus first on the role and responsibilities of the committee and the Conference under the 1988 revisions to the Rules Enabling Act. After making that review, it could proceed to consider the merits of the arguments of the attorneys general.

One member stated that the matter was extraordinarily important from a process standpoint and would establish precedent for future petitions. The attorneys general's proposal was also said to invoke sensitive political and policy concerns regarding capital punishment.

Three members stated that there was a clear conflict between the Ninth Circuit rule and governing national law. Others pointed out that while there may be facial inconsistencies, the Ninth Circuit had drafted its rule to deal with the practical problem that some of its judges always vote against capital punishment.

Several members insisted that the committee needed additional information and further briefing in order to make an informed decision on the matter. They suggested that the attorneys general and the circuit be requested to prepare formal briefs on the issues and perhaps be invited to address the committee. On the other hand, two members saw no need for additional information and were prepared to vote immediately that parts of the Ninth Circuit local rule be abrogated.

**Judge Wilson moved to invite both sides to submit additional information. He then accepted an amendment to his motion by Professor Baker that the committee's reporter provide a bench memorandum that would address all the issues of process and substance for consideration by the committee.**

**The motion, as amended, was approved by voice vote with one objection.**

Professor Coquillette suggested that notices be sent to the five attorneys general and the Ninth Circuit by July 15 requesting additional briefing. Notices would also be sent to the chief judges of the circuits and the Solicitor General. Written input should be received from the attorneys general by September 15, and a response from the Ninth Circuit should be due by October 15. The reporter's bench memorandum for the committee could be sent to the Standing Committee by November 15, giving the members about two months to study the issues.

## REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Jensen presented the report of the advisory committee, as set forth in his memorandum of May 17, 1994. (Agenda Item 9)

### 1. Rules for Judicial Conference Approval

Fed.R.Crim.P. 5 and 40

Judge Jensen stated that the proposed amendment to Rule 5 would carve out an exception to the rule eliminating the requirement that the Government follow the procedural requirements of the rule in cases where a defendant is charged with a violation of the Unlawful Flight to Avoid Prosecution statute. (18 U.S.C. § 1073) As a result of a public comment, the advisory committee decided to recommend adding a conforming change in Rule 40. The advisory committee decided that there was no need to seek public comment on the conforming change.

**The committee voted unanimously by voice vote to approve the amendments to Rules 5 and 40 and send them to the Judicial Conference for approval.**

Fed.R.Crim.P. 43

Judge Jensen explained that the current rule allows *in absentia* sentencing if the defendant flees before verdict. The proposed amendment would authorize *in absentia* sentencing also where the defendant fails to appear for imposition of sentence. In addition, the rule would be amended to extend to organizational defendants.

Judge Easterbrook pointed out that the language of the rule included an incomplete sentence. He recommended: (1) adding the word "and" to line 31, after the word "both," and deleting the word "may" on line 32, and (2) substituting the word "permits" for the word "permit" on line 32.

**Professor Hazard moved to approve the changes in Rule 43(b) and send them to the Conference. The committee approved the changes, including Judge Easterbrook's modifications, with one objection.**

Fed.R.Crim.P. 46 and 49

Judge Jensen stated that the proposed amendments in the two rules were purely technical. The amendment to Rule 46(i)1) would correct an erroneous cross-reference to the Bail Reform Act. The correct reference is to 18 U.S.C. § 3142, rather than 18 U.S.C. § 3144. The amendment to Rule 49(e) would delete a reference to a statute, dealing with a notice of a dangerous offender, which had been repealed. He stated that there was no need to seek public comment on either technical correction.

He added that the judiciary had asked the Congress to correct these mistakes through legislation. He recommended that the amendments be approved by the Judicial Conference conditioned upon the pending statute not being enacted.

**The amendments were approved unanimously by the committee.**

Fed.R.Crim.P. 53

Judge Jensen noted that the portion of the advisory committee's April meeting dealing with Rule 53, *i.e.,* cameras in the courtroom, had been televised on C-Span. He reported that the advisory committee had voted to seek Judicial Conference approval of the amendment, as published. The amendment would authorize cameras in the courtroom in criminal cases only under guidelines promulgated by the Conference.

He also recommended that the advisory committee be involved in drafting the Conference's guidelines. He emphasized the need for the advisory committee to work closely with the Court Administration and Case Management Committee, and he reported that he had appointed a subcommittee of the advisory committee to begin consideration of proposed guidelines.

Some participants expressed strong opposition to cameras in the courtroom as a matter of policy, asserting that they adversely influence courtroom behavior. They argued that while courtroom proceedings are the people's business and should be open, it did not follow that television cameras should be allowed in the courtroom. They also questioned the accuracy and depth of studies showing that cameras did not effect courtroom behavior.

One member argued, to the contrary, that he had had extensive and favorable experience with cameras in the state courts. He stated that the dangers cited by opponents of courtroom cameras had simply not occurred.

Another member recommended that the proposed amendment be deferred pending the final results of the Federal Judicial Center study on cameras in civil cases and action by the Court Administration and Case Management Committee.

Mr. Rabiej stated that it was his understanding that the Court Administration and Case Management Committee had just met and had decided to depart in some degree from the recommendations of the Federal Judicial Center. Judge Stotler said that it was important to find out what that committee had decided and requested that appropriate documents from the Court Administration and Case Management Committee be obtained promptly.

One member suggested that the central issue was whether to give the Judicial Conference the same authority over criminal cases that it had over civil cases. He argued that the Conference should be allowed to experiment with cameras in criminal cases, if it so chose. Judge Jensen added that this was precisely the position of the advisory committee, *i.e.,* that the flat prohibition on cameras in criminal cases should be removed and the Conference given authority to regulate cameras on the same basis in both civil and criminal cases.

**The committee voted 7-6, with the chair breaking the tie, to send the proposed amendment to Rule 53 to the Judicial Conference for approval.**

Judge Jensen added that the proposal should be accompanied by notes suggesting that the Advisory Committee on Criminal Rules wanted to be actively involved in drafting the Conference guidelines implementing the rule.

Mr. Perry moved to delete from the committee note paragraphs 2 and 4, which stated that the debate over cameras in the courtroom had subsided. He accepted an amendment to his motion from Judge Easterbrook to add a sentence to the third paragraph of the note to say that: "This gives the Judicial Conference equal authority over civil and criminal cases."

**The committee approved without objection the amended motion to delete paragraphs 2 and 4 and add a sentence to paragraph 3 of the committee note.**

**2. Rules for Publication**

Fed.R.Crim.P. 16

Judge Jensen stated that the advisory committee was proposing two amendments to Rule 16—one minor and one major. The first, initiated by the Department of Justice, would require reciprocal discovery for the government when the defendant makes a motion under Rule 12.2, based on a defense of mental condition.

**The committee voted without objection to approve the proposed amendment for publication.**

The second proposed amendment would require the government to disclose information about government witnesses to the defendant seven days before trial. Judge Jensen stated that the amendment had been approved by the advisory committee in the fall of 1993, but had been delayed at the express request of the attorney general. It had been deferred again in January 1994 at the request of the Department of Justice. At the April 1994 meeting of the advisory committee, the Department had asked once again that it be delayed for further consideration.

Judge Jensen pointed out that the advisory committee had made several changes in the proposed amendment since last presented to the Standing Committee. At the request of the Department of Justice, the advisory committee had eliminated the requirement that the government disclose the addresses of witnesses. Accordingly, only names and statements of government witnesses must be disclosed to the defendant before trial.

The rule also was changed by the advisory committee to give the court discretion to determine the amount of reciprocal disclosure the defendant must provide when there has been a partial refusal to disclose by the government.

Judge Jensen recognized that the amendment presented a facial conflict with the Jencks Act. He argued, though, that the rule was not really inconsistent with the legislation. The Act did not bar disclosure: it governed only the timing of disclosure. He pointed out that there had been a number of other changes in the criminal rules, many initiated by the Department of Justice, requiring disclosure of government witness information before trial, such as at suppression hearings and detention hearings.

Deputy Attorney General Gorelick stated that it was necessary to balance the fairness of court proceedings against the deep concern of the Department of Justice over danger to government witnesses. She pointed out that the danger had been increasing, and the government had been forced to withdraw charges in a growing number of cases because of the fear of injury or death to witnesses.

Ms. Gorelick stated that the attorney general was more committed to openness than any of her predecessors and wanted the opportunity to ensure enforcement of the highest standards of prosecution conduct—but through internal Executive Branch mechanisms, rather than court rules.

She argued that there were substantive problems with the rule as drafted, which would lead to a greatly enhanced incidence of litigation over discovery obligations. She pointed to the following:

1. The rule would require that names and statements of witnesses be disclosed seven days before trial, while in capital cases they have to turned over only three days before trial.

2. Plea bargaining efforts would be undermined by the proposal.

3. The rule, as drafted, would permit the United States attorney to refuse disclosure only for two designated reasons. It would not allow nondisclosure for other, valid reasons—such as economic hardship to witnesses or pressure on witnesses.

4. Sanctions for failure to comply would be left to the discretion of the court. The court, however, should not sanction government counsel unless the failure were intentional.

5. The rule was silent as to the timing of the defendant's reciprocal disclosure to the government. Yet it was inflexible in providing that the government must disclose witness information seven days before trial.

Ms. Gorelick emphasized that the proposed amendment was in conflict with the Jencks Act. Moreover, it would be inappropriate to rely on the supersession provision of the Rules Enabling Act to overrule the Jencks Act.

She reported that since the last meeting of the Standing Committee, the Department of Justice had conducted a survey of all United States attorney offices to determine their disclosure practices. The vast majority routinely provide discovery well in advance of trial. Although some offices may not be making appropriate disclosure, the Department would address their procedures through internal guidelines. The Department was working to develop uniformity in prosecution policies and was receiving positive feedback from judges regarding their efforts to ensure compliance by prosecutors.

In summary, Ms. Gorelick argued against publishing the proposed amendment to Rule 16 for public comment so the Department could obtain further information and manage problems internally. She added that if the rule went forward there would be a very strong reaction from the prosecution community, which was very much opposed to the proposed amendment. The Congress, moreover, would not be expected to approve the rule.

Some members of the committee agreed with Ms. Gorelick that there were no significant problems in their districts and that prosecutors were responsible in providing discovery to the defendant. Others argued, however, that there were in fact problems caused by prosecutors and that the rule was necessary to ensure fundamental fairness.

Some members suggested that the rule should be published for public comment, but that a more convincing explanation was needed to deal with the problem of the amendment's apparent conflict with the Jencks Act.

Four members stated that the proposal was in direct conflict with the Jencks Act and could only become law by reliance on the supersession clause. Three members suggested that the supersession clause itself was probably unconstitutional. One member stated that the conflict with the Jencks Act should be highlighted in the document distributed to bench and bar. The public should be invited specifically to comment on both the conflict and the supersession clause and its constitutionality. One member argued, however, that the committee should not publish a rule whose legality it questioned, just to obtain public views.

**The committee voted 7-2 to approve the proposed amendment for publication. It voted 8-1 to approve the committee note.**

Fed.R.Crim.P. 32

Judge Jensen explained that the proposed amendment to the rule, giving a court authority to order forfeiture before judgment, had been approved by the advisory committee at the request of the Department of Justice.

**The committee voted unanimously to approve the proposed amendment for publication.**

**3. Other Rules Issues**

Fed.R.Crim.P. 10 and 43

The proposed amendments would allow videoconferencing of arraignments and other pretrial sessions. Judge Diamond, chairman of the Defender Services Committee of the Judicial Conference, had responded during the public comment period requesting the advisory committee to defer approval of the amendments pending completion of a pilot program testing videoconference.

Judge Jensen reported that the advisory committee had decided, at Judge Diamond's request, not to seek Judicial Conference approval of the amendments at this time.

Fed.R.Crim.P. 16

Judge Jensen stated that the Judicial Conference's March 1993 report on the federal defender program had recommended that an amendment be considered to Rule 16 to provide copies of certain discoverable materials to the defense and allocate discovery costs between the government and the defendant. He reported that the advisory committee had decided that the proposal should be handled by statute, rather than rule. Accordingly, the advisory committee did not approve a proposed change in the rule.

## REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Professor Resnick presented the report of the advisory committee, as set forth in Judge Mannes' memorandum of May 16, 1994. (Agenda Item 6)

### 1. Rules for Judicial Conference Approval

Professor Resnick pointed out that the proposed amendments to Rules 8018 and 9029—the bankruptcy version of the proposed uniform rule on local rules of court—had been adopted by the committee earlier in the meeting, during its discussion of Federal Rule of Appellate Procedure 47.

### 2. Rules for Publication

Professor Resnick stated that the advisory committee was seeking authority to publish amendments to 12 rules.

Fed.R.Bank.P. 1006

The rule presently authorizes filing fees to be paid in installments. The amendment would allow the Judicial Conference's administrative fee also to be paid in installments.

Fed.R.Bank.P. 1007

The amendment would provide that a debtor would not have to file new schedules and statements when a case is converted from any chapter of the Bankruptcy Code to any other chapter.

Fed.R.Bank.P. 1019

Subdivision (7) would be abrogated to conform the rule with proposed changes in Rule 3002.

Fed.R.Bank.P. 2002

A number of changes, mostly technical, were being requested by the advisory committee. Two changes were not technical. Paragraph (f)(8) would be amended to eliminate the need for the clerk of court to mail copies of the summary of a chapter 7 trustee's final account to all creditors. Paragraph (h) would be changed in several minor respects. It would permit a court in a chapter 7 case, once the deadline for filing a proof of claim had passed, to order that notices be mailed only to those creditors who have filed a proof of claim.

Fed.R.Bank.P. 2015

The amendment would clarify that in a chapter 12 case or chapter 13 case the debtor would not have to file an inventory of the debtor's property unless the court so orders.

Fed.R.Bank.P. 3002

Paragraph (c)(6) would be abrogated and a new paragraph (d) added to make the rule conform with section 726 of the Bankruptcy Code.

Under section 726, there are instances in which a creditor who has filed a tardy proof of claim may share in distributions. The way Rule 3002 is presently drafted, however, is inconsistent with the statute. It does not allow tardily filed claims to share in the distribution. The proposed language of the amendment is somewhat awkward, but it tracks the statutory language.

Fed.R.Bank.P. 3016

The advisory committee would abrogate subdivision (a) because it could have the effect of extending the debtor's exclusive period to file a chapter 11 plan without court approval. Section 1121(d) of the Bankruptcy Code requires court approval.

Fed.R.Bank.P. 4004

Subdivision (c) would be amended to delay the debtor's discharge in a chapter 7 case if there were a pending motion to extend the time for filing a complaint objecting to discharge or if the debtor had not paid the filing fees in full.

Fed.R.Bank.P. 7004

The rule would be amended to conform with recent changes in Fed.R.Civ.P. 4.

Fed.R.Bank.P. 9006

The rule would be amended to conform to the proposed changes in Rule 3002, the abrogation of Rule 2002(a)(4), and the renumbering of Rule 2002(a)(8).

**The committee unanimously approved these rules for publication.**

Fed.R.Bank.P. 5005 and 8008

The two rules would be amended to authorize local court rules to allow papers to be filed, signed, or verified by electronic means. Rule 5005(a) would govern electronic filing of papers in bankruptcy cases and proceedings. Rule 8008(a) would govern bankruptcy

appeals and the bankruptcy appellate panels. The amendments are parallel to proposed Federal Rule of Appellate Procedure 25(a)(2)(D) and Federal Rule of Civil Procedure 5(e).

Professor Mooney stated that the Advisory Committee on Appellate Rules had considered the issue of electronic filing, but it had not considered the specific language of the proposed amendments. She and Judge Logan, however, were confident that the appellate committee would approve the language proposed by the Advisory Committee on Bankruptcy Rules.

Dean Cooper said that he would prefer a slightly restyled rule, as follows:

> "A court by local rule may permit a document to be filed, signed, or verified by electronic means, which must be consistent with any technical standards established by the Judicial Conference of the United States. An electronic filing under this rule has the same effect as a written filing."

Professor Resnick replied that there was a difference in meaning between the proposed bankruptcy rule and Dean Cooper's language regarding a "written paper" vis a vis a "written filing." He recommended that Bankruptcy Rule 5005 be published exactly as is.

**Judge Easterbrook moved to publish: (1) Bankruptcy Rule 5005 as drafted by the Advisory Committee on Bankruptcy Rules, (2) F.R.A.P. 25 in the same style as the proposed bankruptcy rule, and (3) Civil Rule 5(e) as drafted by Dean Cooper. The committee approved the motion unanimously.**

## REPORT OF THE ADVISORY COMMITTEE ON THE RULES OF EVIDENCE

Judge Winter presented the report of the advisory committee, as set forth in his memorandum of May 18, 1994. (Agenda Item 7)

### 1. Rule for Judicial Conference approval

Judge Winter reported that the advisory committee's proposed redraft of Rule 412, dealing with the relevance of past behavior in sex offense cases, had been approved by the Judicial Conference in September 1993. The Court, however, had withheld approval of those portions of the proposal that would extend the rule's reach to civil cases.

The Chief Justice had written to the chair of the Executive Committee of the Conference stating that some members of the Court were concerned that the proposed amendment might violate the Rules Enabling Act by abridging, enlarging, or modifying substantive rights in civil cases. The amendment might also be inconsistent with *Meritor Savings Bank v. Vinson*, encroaching on the rights of defendants in civil sexual harassment

cases. The Chief Justice's letter suggested that the Judicial Conference or the Standing Committee might wish to revisit the rule in light of the Court's concerns.

Judge Winter reported that the advisory committee at its May meeting had examined these issues. It had found no violation of the Rules Enabling Act and no overruling of the *Meritor* decision. Accordingly, it voted to resubmit the original proposal for Judicial Conference approval.

He also suggested that Judicial Conference action might be unnecessary because the Congress was expected to enact the provision approved by the Judicial Conference in September 1993 as part of the pending omnibus criminal legislation. Under the circumstances, he stated that the advisory committee could wait on resubmission of the proposal.

**The committee voted to table further action on Rule 412 until its January 1995 meeting.**

**2. Rules for Publication**

Judge Winter reported that the advisory committee was continuing its review of the entire body of the Federal Rules of Evidence. It had made a tentative decision not to offer amendments to 25 of the rules. In deciding not to amend these rules, the advisory committee was concerned that it had had very little input from the bench, bar, and public—either to amend or not to amend the 25 rules.

He pointed out that the Judicial Conference's procedures governing the rules committees did not address decisions not to amend rules. The advisory committee believed, though, that its tentative decision not to amend certain rules should be subject to the same procedure for public comment as its tentative decisions to propose amendments.

**The committee voted unanimously to approve publication of the tentative decision of the advisory committee not to amend 25 rules of evidence. It voted further to publish the report of the advisory committee as it appeared in Agenda Item 7A, without providing in the report the full title of each rule.**

## REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Higginbotham presented the report of the advisory committee, as set forth in his memorandum of May 25, 1994. (Agenda Item 8)

**1. Rules for Judicial Conference Approval**

Fed.R.Civ.P. 50, 52, and 59

Judge Higginbotham reported that since the Standing Committee had approved the amendments to Rule 83 earlier in the meeting and had rejected the amendments to Rule 84, the only remaining civil rules item was the package of amendments to Rules 50, 52, and 59.

He stated that the advisory committee had received virtually no responses from the public to the proposed amendments when they were published. They would establish a consistent period in which to file posttrial motions, running 10 days from the entry of judgment. At the request of the Advisory Committee on Bankruptcy Rules, a reference to Rule 6 had been added to the committee notes to each of the three rules.

**The committee approved the proposed amendments to three rules.**

**2. Information Items**

Judge Higginbotham reported that the advisory committee had been asked to amend Rule 47 to allow attorneys to conduct voir dire in civil cases. He stated that, even though the Judicial Conference had traditionally been opposed to requiring attorney voir dire, the matter needed to be reexamined in light of recent Supreme Court decisions limiting attorney discretion on peremptory challenges. He added that the advisory committee would consider a possible amendment permitting attorneys to supplement the court's own voir dire.

Judge Jensen stated that lawyer participation may be even more important in criminal cases. Accordingly, the Advisory Committee on Criminal Rules would examine Fed.R.Crim.P. 24 at its next meeting.

Judge Higginbotham reported that the civil advisory committee had pulled back its proposed amendments to Rule 23, dealing with class actions. The committee was continuing to study the legal and practical issues surrounding class actions. It was soliciting the views of experienced lawyers and had requested the Federal Judicial Center to conduct a national study of the use of class actions.

Judge Higginbotham reported that legislative consideration of Rule 26(c) and protective orders was continuing. Concern had been expressed in the Congress regarding abuse of protective orders, especially where issues of public health and safety might be involved. He stated that he had tried to explain to Senators and their staff that important privacy interests were at stake and that discovery normally took place among the parties outside the courthouse. Unfortunately, the proposed legislation in the Senate would require

courts to make express judicial findings that public health and safety would not be adversely affected before issuing a protective order.

## REPORT OF THE SUBCOMMITTEE ON STYLE

Judge Pratt reported that the style subcommittee had been reorganized as a result of Judge Stotler's becoming chair of the Standing Committee and the end of Professor Wright's term on the committee. He stated that the subcommittee now consisted of himself, Judge Parker, Professor Hazard, and Mr. Spaniol, with Bryan Garner as a consultant. The subcommittee would continue to welcome assistance from former members and from the reporters and staff.

Judge Pratt reported that the subcommittee had completed its work on a preliminary style redraft of the civil rules and had presented it to the Advisory Committee on Civil Rules. Judge Higginbotham stated that the advisory committee had begun a detailed review of the document in January 1994 and was continuing its work on style revision.

Judge Pratt stated that Bryan Garner had made considerable progress in redrafting the appellate rules in improved style. The redraft would be reviewed by the style subcommittee shortly and then presented to the Advisory Committee on Appellate Rules. He added that no timetable had been set for redrafting the criminal rules.

Judge Pratt stressed that it was important to inject style considerations as early as possible in the rules amendment process. He noted that Mr. Garner had prepared guidelines for drafting court rules, reflecting the decisions and conventions of the style subcommittee. They had been given to each of the advisory committees, and the reporters were using it. The guidelines were being published by the Administrative Office for use in many other settings, and they were a valuable contribution that could improve the readability of rules and statutes, and writing generally. He also pointed out that Mr. Garner would continue to be available to assist the advisory committees.

He suggested that in the future the style subcommittee would submit its comments on proposed amendments during the public comment period. Its views would be included in the Gap Report, like other comments.

## REPORT OF THE LONG RANGE PLANNING SUBCOMMITTEE

Professor Baker presented the report of the subcommittee. (Agenda Item 10)

He reported that the Standing Committee had authorized the planning subcommittee to conduct a self-study of the mission and procedures of the rules committee. As part of the study, the subcommittee had distributed a questionnaire soliciting information from

individuals and organizations on the way that rules are made. The responses were included in the agenda report, and a bibliography of rules literature had been prepared.

Professor Baker stated that the subcommittee intended to have a final report submitted to the Standing Committee for consideration at its January 1995 meeting. There would likely be four parts to the report: (1) a description of current rulemaking procedures, (2) criticisms and concerns, (3) a discussion and responses to the criticisms, and (4) possible recommendations and alternatives. He agreed to make the materials available to the advisory committees.

## REPORT OF THE LOCAL RULES PROJECT

Professor Coquillette stated that the six reporters had met and agreed upon a standard format for preparing advisory committee reports to the Standing Committee. They had also discussed style issues and were working towards a standard pagination system for the agenda books.

He reported that the local rules project had completed a uniform numbering system for local civil rules that was being implemented in many district courts. It was also proceeding to propose a uniform numbering system for local criminal rules. Judge Stotler stated that Judge Jensen and she had a letter prepared to distribute to all district courts regarding the study of local criminal rules.

Professor Coquillette reported that the Advisory Committee on Bankruptcy Rules was preparing a numbering system for the local bankruptcy rules.

Professor Coquillette also reported that he had been asked by the Standing Committee to examine all the local rules dealing with attorney admission and conduct.

## NEXT MEETING OF THE COMMITTEE

**The next meeting of the committee, to be held in San Diego, was scheduled for Thursday and Friday, January 12-13, 1995, with a working dinner on Wednesday night, January 11.**

Judge Stotler held the dates for the June 1995 meeting of the committee in abeyance.

*[She later fixed the dates of the meeting, to be held in Washington, D.C., as July 5-7.]*

Judge Stotler concluded the meeting by thanking the reporters for their excellent and timely work. She also thanked the consultants and the staff of the Administrative Office for their invaluable contributions.

Respectfully submitted,

Peter G. McCabe
Secretary

Item 3A

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 1, 1994

MEMORANDUM TO STANDING COMMITTEE

SUBJECT: *Legislative Activity Report*

Two Acts that directly affected federal rules were enacted late in the 103rd Congress, including the Violent Crime Control and Law Enforcement Act and the Bankruptcy Reform Act. Several other bills involving the rulemaking process were considered but not enacted during the second session of the 103rd Congress. The following discussion briefly describes the rules-related provisions in the legislation, and the communications with Senate and House leaders advising them of the committees' positions.

I. Violent Crime Control and Law Enforcement Act of 1994 (P.L. No. 103-322)

On September 13, 1994, the President signed the Violent Crime Control and Law Enforcement Act. The Act amended Rules 32 and 46 of the Federal Rules of Criminal Procedure and Rule 412 of the Federal Rules of Evidence. The amendments to Criminal Rule 32 and Evidence Rule 412 modified revised versions of those rules, which were prescribed by the Supreme Court in April 1994. The Act added a victim allocution provision to Criminal Rule 32 and extended a victim's privacy protections under Evidence Rule 412 to civil cases. The amendments to Criminal Rule 46 corrected a cross-reference citation.

The amendments in the Act to Evidence Rule 412 substituted the Judicial Conference approved version for the revised version approved by the Supreme Court, which did not include the civil case provision. The Congressional Conference Report noted that:

> The Conferees intend that the Advisory Committee Note on Rule 412, as transmitted by the Judicial Conference of the United States to the Supreme Court on October 25, 1993, applies to Rule 412 as enacted by this section. This section, which modifies Rule 412 of the Federal Rules of Evidence as transmitted to the Congress by the United States Supreme Court, is enacted pursuant to the Rules Enabling Act.

The amendments to the rules in the Act became effective on December 1, 1994, the same date that the amendments to the Federal Rules of Appellate and Criminal Procedure and to the Evidence Rules - prescribed by the Supreme Court and transmitted to Congress in April 1994 - became effective.

The Act also created three new Evidence Rules 413-415, but the effective date of the rules was deferred for at least 180 days (March 12, 1995) pending study and alternative recommendations by the Judicial Conference. The new rules would admit "evidence of the defendant's commission of another offense or offenses of sexual assault" or of child molestation in a criminal or a civil case involving the same type of offense. The Act explicitly provided that the Rules Enabling Act would not apply to the Conference's consideration of an alternative recommendation to the new rules.

If the Conference submits alternative recommendations by February 10, 1995, the effective date of Evidence Rules 413-415 will be delayed until July 10, 1995. Senator Biden and Congressmen Hughes and Schumer expressed strong opposition to the new rules and were primarily responsible for adding the provision delaying the effective date. The remarks of Senator Biden opposing and Senator Dole supporting the rules are attached. (See attachment A.) The recommendations of the Advisory Committee on Evidence Rules on this matter are set out later in this agenda.

Finally, the Judicial Conference was tasked with evaluating and reporting to Congress its views on whether the Federal Rules of Evidence should be amended to protect confidentiality of communications between a victim of a sexual offense and a therapist or a trained counselor. No specific time deadline for completion of the study was fixed in the Act.

On May 24, 1994, Judge Stotler wrote to the Senate and House conferees on the crime bill advising them of the action taken by the Supreme Court approving amendments to Evidence Rule 412 and Criminal Rule 32. (See attachment B.) The letter also identified a supersession problem with the effective date of the amendments to the rules in the legislation, which predated the effective date of the Supreme Court-approved amendments to the same rules.

A later communication was sent on July 15, 1994, to each Congressional conferee on the crime bill expressing the committees' opposition to new Evidence Rules 413-415, which were being proposed for the first time to be inserted in the bill. (See attachment C.) On several past occasions the rules committees had expressed their opposition to these same rules, which were contained in earlier bills.

II. Bankruptcy Reform Act of 1994 (P.L. No. 103-394)

The Bankruptcy Reform Act was signed on October 22, 1994. Two provisions affect the Bankruptcy Rules. Section 104 of the Act changes the effective date of prospective amendments to the Bankruptcy Rules from August 1 to December 1 of a given year, consistent with the effective date of changes to other rules. Section 114 amends Bankruptcy Rule 7004 to require special service of process on insured depository institutions.

On August 1, 1994, Judge Stotler wrote to members of the Subcommittee on Economic and Commercial Law of the House Judiciary Committee expressing opposition to the amendment of Rule 7004. A copy of the letter was later sent to all Senate and House conferees on the bill. (See attachment D.) Congressional staff were also advised that the original provision in the bill would have set November 1 of a given year as the effective date of prospective amendments, instead of December 1. The effective date provision was eventually amended.

III. Judicial Amendments Act of 1994 (P.L. No. 103-420)

The Judicial Amendments Act was signed on October 25, 1994. The Act extends for two years the authority of pilot courts to conduct court-annexed arbitration programs. Another provision extends for one year the submission by the Judicial Conference of its report evaluating the plans developed by the courts under the Civil Justice Reform Act.

IV. S. 2212

At its June 1994 meeting, the committee was advised that Senator Heflin introduced S. 2212. The untitled bill would require each of the five Judicial Conference advisory rules committees and the Standing Committee to have a majority of members of the practicing bar.

On July 12, 1994, Judge Stotler wrote to Senator Heflin advising him of the committee's position on this issue. A copy of the letter is attached. (See attachment E.) No further action on the bill was taken during the 103rd Congress.

V. Sunshine in Litigation Act (S. 1404)

The provisions of S. 1404 would permit the issuance of a protective order under Civil Rule 26 only on a certification by the judge that no public safety issue was involved. On April 20, 1994, Judge Patrick E. Higginbotham appeared and testified

before the Subcommittee on Courts and Administrative Practice of the Senate Committee on the Judiciary. In August 1994, Judge Higginbotham wrote to Senator Kohl, who introduced the bill, and advised him of the committee's actions regarding proposed amendment to Rule 26(c).

A mark-up of the bill in the Senate Judiciary subcommittee was scheduled late in the Congressional session, but was canceled. Senator Kohl indicated that he would defer seeking action on the bill while he reviewed the actions of the rules committees.

John K. Rabiej

Attachments

ATTACHMENT A

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

September 23, 1994

MEMORANDUM TO ADVISORY COMMITTEE ON EVIDENCE RULES

SUBJECT: *Senator Dole's Remarks on New Evidence Rules 413-415 and Section-by-Section Analysis*

I am attaching the remarks of Senator Dole on new Evidence Rules 413-415, which he made on the floor of the Senate on September 20, 1994. Senator Dole notes that the new rules would permit the admission of evidence of uncharged offenses in sexual assault and child molestation cases. In addition, he notes that no time limit on uncharged offenses is imposed by the rules.

Senator Dole refers to a comprehensive section-by-section analysis of Evidence Rules 413-415, which was contained in a previous crime bill supported by President Bush's administration. A copy of the analysis is also attached.

John K. Rabiej

Attachments

(Cite as: 140 Cong. Rec. S12990-01)
Congressional Record --- Senate
Proceedings and Debates of the 103rd Congress, Second Session
Tuesday, September 20, 1994

## *S12990 SIMILAR-OFFENSE EVIDENCE

Mr. DOLE.

Mr. President, the crime legislation signed into law last week contains a critical reform designed to protect the public from crimes of sexual violence: new Federal rules of evidence establishing a general presumption that evidence of past similar offenses in sexual assault and child molestation cases is admissible at trial.

Congresswoman SUSAN MOLINARI and I initially proposed this reform in February 1991 in the Women's Equal Opportunity Act, and we later reintroduced it in the Sexual Assault Prevention Act bills of the 102d and 103d Congresses. The proposal also enjoyed the strong support of the administration in the 102d Congress, and was included in President Bush's violent crime bill of that Congress, S. 635. This Chamber passed the proposed rules on Nov. 5, 1993, by a vote of 75 to 19, as an amendment to the crime bill. The House of Representatives endorsed the same rules on June 29, 1994, by a vote of 348 to 62, through a motion to instruct conferees offered by Representative MOLINARI.

The enacted rules are substantially identical to our earlier proposals. Provisions that temporarily defer the effective date of the new rules, pending a report by the Judicial Conference, were added in order to accommodate procedural objections raised by opponents of the reform. However, regardless of what the Judicial Conference may recommend, the new rules will take effect within at most 300 days of the crime bill's enactment, unless repealed or modified by subsequent legislation.

The need for these rules, their precedential support, their interpretation, and the issues and policy questions they raise have been analyzed at length in the legislative history of this proposal. Two earlier statements deserve particular attention:

The first is section 801 of the section-by-section analysis of S. 635, which President Bush transmitted to Congress in 1991. That statement appears on pages S3238 through S3242 of the CONGRESSIONAL RECORD for March 13, 1991.

The second is the prepared text of an address-entitled "Evidence of Propensity and Probability in Sex Offense Cases and Other Cases"-by Senior Counsel David J. Karp of the Office of Policy Development of the U.S. Department of Justice. Mr. Karp presented this statement on behalf of the Justice Department to the Evidence Section of the Association of American Law Schools on January 9, 1993. The statement provided a detailed account of the views of the legislative sponsors and the administration concerning the proposed reform, and should also be considered an authoritative part of its legislative history.

These earlier statements address the issues raised by this reform in

considerable detail. In my present remarks, I will simply emphasize the following points:

The new rules will supersede in sex offense cases the restrictive aspects of Federal rule of evidence 404(b). In contrast to rule 404(b)'s general prohibition against evidence of character or propensity, the new rules for sex offense cases authorize admission and consideration of evidence of an uncharged offense for its bearing "on any matter to which it is relevant." This includes the defendant's propensity to commit sexual assault or child molestation offenses, and assessment of the probability or improbability that the defendant has been falsely or mistakenly accused of such an offense.

In other respects, the general standards of the rules of evidence will continue to apply, including the restrictions on hearsay evidence and the court's authority under evidence rule 403 to exclude evidence whose probative value is substantially outweighed by its prejudicial effect. Also, the government, or the plaintiff in a civil case, will generally have to disclose to the defendant any evidence that is to be offered under the new rules at least 15 days before trial.

The reform effected by these rules is critical to the protection of the public from rapists and child molesters, and is justified by the distinctive characteristics of the cases to which it applies. In child molestation cases, for example, a history of similar acts tends to be exceptionally probative because it shows an unusual disposition of the defendant-a sexual or sado-sexual interest in children-that simply does not exist in ordinary people. Moreover, such cases require reliance on child victims whose credibility can readily be attacked in the absence of substantial corroboration. In such cases, there is a compelling public interest in admitting all significant evidence that will shed some light on the credibility of the charge and any denial by the defense.

Similarly, sexual assault cases, where adults are the victims, often turn on difficult credibility determinations. Alleged consent by the victim is rarely an issue in prosecutions for other violent crimes-the accused mugger does not claim that the victim freely handed over his wallet as a gift-but the defendant in a rape case often contends that the victim engaged in consensual sex and then falsely accused him. Knowledge that the defendant has committed rapes on other occasions is frequently critical in assessing the relative plausibility of these claims and accurately deciding cases that would otherwise become unresolvable swearing matches.

The practical effect of the new rules is to put evidence of uncharged offenses in sexual assault and child molestation cases on the same footing as other types of relevant evidence that are not subject to a special exclusionary rule. The presumption is that the evidence admissible pursuant to these rules is typically relevant and probative, and that its probative value is not outweighed by any risk of prejudice.

In line with this judgment, the rules do not impose arbitrary or artificial restrictions on the admissibility of evidence. Evidence of offenses for which the defendant has not previously been prosecuted or convicted will be

admissible, as well as evidence of prior convictions. No time limit is imposed on the uncharged offenses for which evidence may be admitted; as a practical matter, evidence of other sex offenses by the defendant is often probative and properly admitted, notwithstanding substantial lapses of time in relation to the charged offense or offenses. See, e.g., United States v. Hadley, 918 F.2d 848, 850-51 (9th Cir. 1990), cert. dismissed, 113 S.Ct. 486 (1992) (evidence of offenses occurring up to 15 years earlier admitted); State v. Plymate, 345 N.W.2d 327 (Neb. 1984) (molestations more than 20 years earlier admitted).

Finally, the effectiveness of the new rules will depend on the faithful execution by judges of the will of Congress in adopting this critical reform. The courts should liberally construe the rules so that the defendant's propensities, as well as questions of probability in light of the defendant's past conduct, can be properly assessed.

# SECTION-BY-SECTION ANALYSIS

# OF

# EVIDENCE RULES 413-415

(Cite as: 137 Cong. Rec. S3191-02, *S3238)

## VIII. SEXUAL VIOLENCE AND CHILD ABUSE

### Sec. 801. Admissibility of Evidence of Similar Crimes in Sexual Assault and Child Molestation Cases

In cases where the defendant is accused of committing an offense of sexual assault or child molestation, courts in the United States have traditionally favored the broad admission at trial of evidence of the defendant's prior commission of similar crimes. The contemporary edition of Wigmore's treatise describes this tendency as follows (IA Wigmore's Evidence s 62.2 (Tillers rev. 1983)):

"<T>here is a strong tendency in prosecutions for sex offenses to admit evidence of the accused's sexual proclivities. Do such decisions show that the general rule against the use of propensity evidence against an accused is not honored in sex offense prosecutions? We think so.

"<S>ome states and courts have forthrightly and expressly recogniz<ed> a " lustful disposition" or sexual proclivity exception to the general rule barring the use of character evidence against an accused. . . . <J>urisdictions that do not expressly recognize a lustful disposition exception may effectively recognize such an exception by expansively interpreting in prosecutions for sex offenses various well-established exceptions to the character evidence rule. The exception for common scheme or design is frequently used, but other exceptions are also used."

More succinctly, the Supreme Court of Wyoming observed in Elliot v. State, 600 P. 2d 1044, 1047-48 (1979):

"<I>n recent years a preponderance of the courts have sustained the admissibility of the testimony of third persons as to prior or subsequent similar crimes, wrongs or acts in cases involving sexual offenses. . . . <I>n cases involving sexual assaults, such as incest, and statutory rape with family members as the victims, the courts in recent years have almost uniformly admitted such testimony."

The willingness of the courts to admit similar crimes evidence in prosecutions for serious sex crimes is of great importance to effective prosecution in this area, and hence to the public's security against dangerous sex offenders. In a rape prosecution, for example, disclosure of the fact that the defendant has previously committed other rapes is frequently critical to the jury's informed assessment of the credibility of a claim by the defense that the victim consented and that the defendant is being falsely accused.

The importance of admitting this type of evidence is strill greater in child molestation cases. Such cases regularly present the need to rely on the testimony of child victim-witnesses *S3239 whose credibility can readily be attacked in the absence of substantial corroboration. In such cases, the public interest in admitting all significant evidence that will illumine the credibility of the charge and any denial by the defense is truly compelling.

Notwithstanding the salutary tendency of the courts to admit evidence of

other offenses by the defendant in such cases, the current state of the law in this area is not satisfactory. The approach of the courts has been characterized by considerable uncertainty and inconsistency. Not all courts have recognized the area of sex offense prosecutions as one requiring special standards or treatment, and those which have adopted admission rules on varying scope and rationale.

Moreover, even where the courts have traditionally favored admission of " similar crimes evidence" in sex offense prosecutions, the continuation of this approach has been jeopardized by recent developments. These developments include the widespread adoption by the states of codified rules of evidence modeled on the Federal Rules of Evidence, which make no special allowance for admitting similar crimes evidence in sex offense cases. They also include the limitation of evidence of other sexual activity by the victim under "rape victim shield laws," which has given rise to an argument that it would be unfair or inappropriate to be more permissive in admitting evidence of the commission of other sex crimes by the defendant.

Section 801 of title VIII would amend the Federal Rules of Evidence to ensure an appropriate scope of admission for evidence of similar crimes by defendants accused of serious sex crimes. The section adds three new Rules (proposed Rules 413, 414, and 415), which state general rules of admissibility for such evidence. The proposed new rules would apply directly in federal cases, and would have broader significance as a potential model for state reforms.

The remainder of this explanation of section 801 is set out in several parts. Part A briefly discusses the meaning and operation of the proposed new rules of evidence. Part B sets out the background of these rules in terms of the historical development and contemporary formulation of the rules of evidence, and explains why legislation addressing this issue is particularly critical at this point in time. Part C discusses the adequacy of the formulation of the proposed rules to meet concerns about the possibility of undue prejudice or other unfairness to defendants, and sets out affirmative considerations supporting the rules. Part D responds to the argument that "rape victim shield laws," which limit admission of evidence of other acts by the victim, entail a like restriction on admission of similar crimes evidence in relation to the defendant. Part E responds to other objections that might be raised to the proposal.

## A. The Proposed Rules

Proposed Rule 413 relates to criminal prosecutions for sexual assault. Paragraph (a) provides that evidence of the defendant's commission of other sexual assaults is admissible in such cases. If such evidence were admitted under the Rule, it could be considered for its bearing on any matter to which it is relevant. For example, it could be considered as evidence that the defendant has the motivation or disposition to commit sexual assaults, and a lack of effective inhibitions against acting on such impulses, and as

evidence bearing on the probability or improbability that the defendant was falsely implicated in the offense of which he is presently accused. These grounds of relevance are more fully discussed in part C infra.

Paragraph (b) of proposed Rule 413 generally requires pre-trial disclosure of evidence to be offered under the Rule. This is designed to provide the defendant with notice of the evidence that will be offered, and a fair opportunity to develop a response. The Rule sets a normal minimum period of 15 days notice, but the court could allow notice at a later time for good cause, such as later discovery of evidence admissible under the rule. In such a case, it would, of course, be within the court's authority to grant a continuance if the defense needed additional time for preparation.

Paragraph (c) makes clear that proposed Rule 413 is not meant to be the exclusive avenue for introducing evidence of other crimes by the defendant in sexual assault prosecutions, and that the admission and consideration of such evidence under other rules will not be limited or impaired. For example, evidence that could be offered under proposed Rule 413 will often be independently admissible for certain purposes under Rule 609 (impeachment) or Rule 404(b) (evidence of matters other than "character").

Paragraph (d) defines the term "offense of sexual assault." The definition would apply both in determining whether a currently charged federal offense is an offense of sexual assault for purposes of the Rule, and in determining whether an uncharged offense qualifies as an offense of sexual assault for purposes of admitting evidence of its commission under the Rule. The definition covers federal and state offenses involving the types of conduct prohibited by the chapter of the criminal code relating to sexual abuse (chapter 109A of title 18, U.S. Code) in light of subparagraph (1), and other federal and state offenses that satisfy the general criteria set out in subparagraphs (2)-(5).

Rule 414 concerns criminal prosecutions for child molestation. Its provisions are parallel to those of the sexual assault rule (Rule 413), and should be understood in the same sense, except that the relevant class of offenses is child molestations rather than sexual assaults. The definition of child molestation offenses set out in paragraph (d) of this Rule differs from the corresponding definition of sexual assault offenses in Rule 413 in that (1) it provides that the offense must be committed in relation to a child, defined as a person below the age of fourteen, (2) it includes the child exploitation offenses of chapter 110 of the criminal code within the relevant category, and (3) it does not condition coverage of offenses on a lack of consent by the child-victim.

Rule 415 applies the same rules to civil actions in which a claim for damages or other relief is predicated on the defendant's alleged commission of an offense of sexual assault or child molestation. Evidence of the defendant's commission of other offenses of the same type would be admissible, and could be considered for its bearing on any matter to which it is relevant.

## B. Background in the Law of Evidence

The common law has traditionally limited the admission of evidence of a defendant's commission of offenses other than the particular crime for which he is on trial. This limitation, however, has never been absolute. The Supreme Court has summarized the general position of the common law on this issue as follows:

"Alongside the general principle that prior offenses are inadmissible, despite their relevance to guilt . . . the common law developed broad, vaguely defined exceptions-such as proof of intent, identify, malice, motive, and plan-whose application is left largely to the discretion of the trial judge. . . . In short, the common law, like our decision in <Spencer v. Texas>, implicitly recognized that any unfairness resulting from admitting prior convictions was more often than not balanced by its probative value and permitted the



prosecution to introduce such evidence without demanding any particularly strong justification. (Marshall v. Lonberger, 459 U.S. 422, 438-39 n.6 (1983))."

The Federal Rules of Evidence-which went into effect in 1975-follow the general pattern of traditional evidence rules, in that they reflect a general presumption against admitting evidence of uncharged offenses, but recognize various exceptions to this principle. One exception is set out in Rule 609. Rule 609 incorporates a restricted version of the traditional rule admitting, for purposes of impeachment, evidence of a witness's prior conviction for felonies or crimes involving dishonesty or false statement. The other major provision under which evidence of uncharged offenses may be admitted is Rule 404(b). That rule provides that such evidence is not admissible for the purpose of proving the "character" of the accused, but that it may be admitted as proof concerning any non-character issue:

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Rule 404(b), however, makes no special allowance for admission of evidence of other "crimes, wrongs, or acts" in sex offense prosecutions. There was perhaps little reason for the framers of the Federal Rules of Evidence to focus on this issue, since sex offense prosecutions were not, at the time, a significant category of federal criminal jurisdiction.

This omission has been widely reproduced in codified state rules of evidence, whose formulation has been strongly influenced by the Federal Rules. The practical effect of this development is that the authority of the courts to admit evidence of uncharged offenses in prosecutions for sexual assaults and child molestations has been clouded, even in states that have traditionally favored a broad approach to admission in this area.

The actual responses of the courts to this development have varied. For example, in State v. McKay, 787 P.2d 479 (Or. 1990), in which the defendant was accused of molesting his stepdaughter, the court admitted evidence of prior

acts of molestation by the defendant against the girl. The court reached this result by stipulating that evidence of a predisposition to commit sex crimes against the victim of the charged offense was not evidence of "character" for purposes of the state's version of Rule 404(b), although it apparently would have regarded evidence of a general disposition to commit sex crimes as impermissible "character" evidence.

In Elliot v. State, 600 P. 2d 1044 (1979), the Supreme Court of Wyoming reached a broader result supporting admission, despite a state rule that was essentially the same as Federal Rule 404(b). This was also a prosecution for child molestation. Evidence was admitted that the defendant had attempted to molest the older sister of the victim of the charged offense on a number of previous occasions. The court reconciled this result with Rule 404(b) by indicating that proof of prior acts of molestation would generally be admissible as evidence of *S3240 "motive"-one of the traditional "exception" categories that is explicitly mentioned in Rule 404(b). Id. at 1048-49.

In contrast, in Getz v. State, 538 A.2d 726 (1988), the Supreme Court of Delaware overturned the defendant's conviction for raping his 11 year old daughter because evidence that he had also molested her on other occasions was admitted. The court stated that "a lustful disposition or sexual propensity exception to <Rule> 404(b)'s general prohibitions . . . is almost universally recognized in cases involving proof of prior incestuous relations between the defendant and the complaining victim," but that "courts which have rejected this blanket exception have noted that in the absence of a materiality nexus such propensity evidence is difficult to reconcile with the restrictive language of <Rule> 404(b)." The court went on to hold that the disputed evidence in the case was impermissible evidence of character and could not be admitted under the state's Rule 404(b).

The foregoing decisions illustrate the increased jeopardy that the current formulation of the Federal Rules of Evidence has created for effective prosecution in sex offense cases. While the law in this area has never been a model of clarity and consistency, the widespread adoption of codified state rules based on the Federal Rules has aggravated its shortcomings. In jurisdictions that have such codified rules, the courts are no longer free to recognize straightforwardly the need for rules of admission tailored to the distinctive characteristics of sex offense cases or other distinctive categories of crimes. Important evidence of guilt may consequently be excluded in such cases.

Where the courts do admit such evidence, it may require a forced effort to work around the language and standard interpretation of codified rules that restrict admission, or may depend on unpredictable decisions by individual trial judges to allow admission under other "exception" categories. The establishment of clear, general rules of admission, as set out in proposed Rules 413-415, would resolve these problems under current law in federal proceedings, and would provide a model for comparable reforms in state rules of evidence.

## C. Evidence of Motivation and Probability

Rules restricting the admission of evidence of uncharged misconduct by the defendant have traditionally been justified on two main grounds:

First, there is the concern over lack of fair notice to the defendant, if evidence of "bad acts" with which he has not formally been charged could freely be offered at trial. In the absence of limitations on such evidence, it has been argued, "a defendant could be confronted at trial with evidence implicating him in an unpredictable range of prior acts of misconduct extending over the whole course of his life, and would be denied a fair opportunity to prepare a defense to the accusations he would face at trial." The Admission of Criminal Histories at Trial, 22 U. Mich. J.L. Ref. 707, 728 (1989).

Second, there is the concern that evidence of other offenses or misconduct by the defendant is likely to be prejudicial or distracting, and that the potential for prejudice and distraction outweighs its probative value. Statements of this concern are sometimes accompanied by assertions that such evidence is of little probative value, merely being an indication of the defendant's "character." In light of the potential such evidence holds for prejudicing the defendant, it is argued, the general authority of the trial judge to exclude evidence that is unduly prejudicial or distracting (F.R.E. 403) is inadequate, and categorical rules of exclusion must be adopted for such evidence.

The first concern-relating to fair notice-can readily be answered in connection with proposed Rules 413-15. The Rules do not authorize an open-ended enquiry into all the "bad acts" the defendant may have committed in the course of his life, but only admit evidence of other serious criminal acts which are of the same type as the offense with which the defendant is formally charged. More importantly, the Rules specifically require prior disclosure to the defendant of the evidence that will be offered against him.

The second general concern about evidence of uncharged acts-a risk of prejudice or distraction that generally outweighs its probative value-is also adequately addressed by the limitations on the admission of evidence under the proposed rules. The rules do not admit evidence that merely indicates that the defendant is generally of "bad character," or even that he has a general disposition to engage in crime. Rather, to be admissible, the evidence must relate to other crimes by the defendant that are of the same type-sexual assault or child molestation-as the crime with which he is formally charged.

In general, the probative value of such evidence is strong, and is not outweighed by any overriding risk of prejudice. The relevance of such evidence will normally be apparent on at least two grounds-as evidence that the defendant has the motivation or disposition to commit such offenses, and as evidence of the improbability that the defendant has been falsely or mistakenly accused of the crime.

Evidence of Motivation. One of the traditional "exception" categories that hass been explicitly carried forward in F.R.E. 404(b) is admission of evidence of "other crimes, wrongs, or acts" to establish "motive." For example, in a

prosecution for embezzlement, evidence may be admitted of other acts by the defendant which indicate that he was in financial straits, to show that he would have had a motive or committing a crime that offered monetary gain. Or in a prosecution for a hate crime-such as a lynching or assault with apparent racial motivation-evidence may be admitted of other acts by the defendant that manifest a general animosity towards the victim's racial group for the purpose of establishing motive.

The admissibility of evidence of similar crimes under the proposed new rules is analogous to the current "motive" exception, and is justifiable on similar grounds. The proposed sexual assault rule (Rule 413), as noted above, does not indiscriminately admit evidence of other bad things the defendant may have done, but only evidence of his commission of other criminal sexual assaults. In other words, the evidence must be of such a character as to indicate that the defendant has the unusual combination of aggressive and sexual impulses that motivates the commission of such crimes, and a lack of effective inhibitions against acting on such impulses.

Where there is evidence that the defendant has such impulses-and has acted on them in the past-a charge of sexual assault has far greater plausibility than if there were no evidence of such a disposition on the part of the defendant. See generally The Admission of Criminal Histories at Trial, 22 U. Mich. J.L. Ref. 707, 725-26 (1989). This seems to be the main point underlying the judicial decisions that have straightforwardly admitted evidence of similar crimes in sex offense cases as evidence of the defendant's "lustful disposition."

The case for admission on these grounds is equally strong, if not stronger, in child molestation cases. Evidence of other acts of molestation indicates that the defendant has a type of desire or impulse-a sexual or sado-sexual interest in children-that simply does not exist in ordinary people. In such cases, the evidence is generally relevant as proof of "motive" in common sense terms, and admission could normally be sustained even under the current Rules on a sufficiently broad reading of the "motive" exception category. See Elliott v. State, 600 P.2d 1044, 1048-49 (Wyo. 1979).

Evidence of Improbability. Existing exceptions to the general presumption against admitting evidence of uncharged offenses are sometimes justified on grounds of probability (in Wigmore's terminology, the "doctrine of chances"). For example, one of the "exception" categories mentioned in F.R.E. 404(b) is for proof of "intent." Under this exception, evidence of similar crimes may be admitted to rebut a defense that the defendant engaged in allegedly criminal conduct accidentally, or otherwise lacked the state of mind required for its commission. The rationale commonly given for this exception is the probative value such evidence has on account of the inherent improbability that a person will innocently or inadvertently engage in similar, potentially criminal conduct on a number of different occasions. See Imwinkelried, Uncharged Misconduct Evidence s 5.05 (1984).

Probabilistic reasoning of this type is not limited to proof of the mental element of the offense, but may also be used to support the admission of

evidence establishing the defendant's commission of the charged criminal conduct:

"<For example, suppose> that the defendant is charged with arson. The defendant claims that the fire was accidental. The cases routinely permit the prosecutor to show other acts of arson by the defendant and even nonarson fires at premises owned by the defendant. In these cases, the courts invoke the doctrine of chances. The courts reason that as the number of incidents increases, the objective probability of accident decreases. Simply stated, it is highly unlikely that a single person would be victimized by so many similar accidental fires in a short period of time. The coincidence defies common sense and is too peculiar. (Imwinkelried, Uncharged Misconduct Evidence s 4.01 (1984))."

Turning to the case of sex offense prosecutions, similar considerations of probability provide support for a general rule of admission for similar crimes evidence. It is inherently improbable that a person whose prior acts show that he is in fact a rapist or child molester would have the bad luck to be later hit with a false accusation of committing the same type of crime, or that a person would fortuitously be subject to multiple false accusations by a number of different victims. These points may be seen more clearly by considering the major elements of a sex offense prosecution.

In general, to obtain a conviction for a sexual assault, the government must prove that (1) the alleged sexual conduct actually took place, (2) the victim did not consent, (3) the defendant was the person who engaged in the conduct, and (4) the defendant acted with the culpable state of mind required for the commission of the offense. The elements in a child molestation case are similar, except that proof of non-consent by the victim is normally not required.

With respect to the third and fourth elements-the defendant's identity as the perpetrator and satisfaction of the mental element-similar crimes evidence will often be admissible even under a codified rule modeled on F.R.E. 404(b). Proof of "identity", *S3241 and proof of "intent" or "knowledge," are explicitly mentioned as examples of permissible "non-character" uses of such evidence in the Rule.

In comparison, admission of such evidence on the first and second issues-the occurrence of the alleged act and the victim's lack of consent-is more problematic under a codified rule of this type. However, on these issues as well, similar crimes evidence is likely to have a high degree of probative value on grounds of probability.

For example, consider a case in which the defense attacks the victim's assertion that she did not consent, or represents that the whole incident was made up by the victim. Suppose further that there is practically conclusive evidence that the defendant has in fact committed one or more sexual assaults on other occasions, such as a prior conviction of the defendant on a charge of rape. In the presence of such evidence, the defense's claim of consent, or claim that the whole incident did not occur, would usually amount to a contention that the victim fabricated a false charge of rape against a person

who just happened to be a rapist. The improbability of such a coincidence gives similar crimes evidence a high degree of probative value, and supports its admission, in such a case.

As a second example, consider a case like that described above, but with similar crimes evidence of a less conclusive character. For example, suppose the evidence is the testimony of another woman that the defendant raped her on a different occasion, though the defendant has not been prosecuted for that offense. In such a case, the defendant's alleged commission of rape on the earlier occasion, as well as his guilt of the presently charged offense, would be open to question.

Nevertheless, the "doctrine of chances" legitimately applies to such a case as well. If the defense concedes that the earlier rape occurred, then the case is essentially the same as the preceding one. If the defense disputes both the charged offense and the uncharged offense, this amounts to a claim that not just one but two women have made false charges of rape against the defendant. Here as well, the improbability of multiple false charges gives similar crimes evidence of high degree of probative value.

The force of the argument from improbability may be reduced if there is reason to believe that the formal charge and the accusation of an uncharged offense were not generated independently of each other. For example, where the identity of the offender is an issue, it may appear that a witness' identification of the defendant as the man who raped her could have been influenced by knowledge that the victim of the charged offense had previously identified the same man as her assailant.

In such a case, however, the defense would be free to bring out the possible connection of the charges, and the jury would consider that factor in assessing the significance of the evidence. Similar crimes evidence under the proposed rules is no different in this respect from other forms of regularly admissible evidence, whose normal probative force may also be reduced by special factors in some cases. In relation to evidence admissible under the proposed rules, as with other forms of evidence, the general standards of the Rules of Evidence and the processes of adversarial presentation and testing of evidence can properly be relied on to provide a fair picture of the relevant facts as the basis for the jury's decision.

### D. The Import of Rape Victim Shield Laws

Within the past twenty years, virtually all American jurisdictions have adopted "rape victim shield laws," which limit enquiry in rape trials into the past sexual history of the victim. The shield laws have overturned earlier evidentiary rules and doctrines which tended to be highly permissive in allowing exploration of the victim's prior sexual activity in rape cases.

The pertinent provision in federal law is F.R.E. 412, which generally bars the admission in federal sexual abuse prosecutions of evidence of the victim's past sexual behavior. The Rule recognizes exceptions to this general presumption of non-admissibility for cases where admission of such evidence is

constitutionally required or other specified circumstances give it an unusually high degree of relevance.

The argument has been made that the elimination of broad rules of admission for other acts of the victim in rape cases makes it improper to continue or adopt broad rules of admission for uncharged acts of the accused. If the victim is not to be taxed with evidence of unrelated conduct on her part, the argument goes, why should the defendant be taxed with evidence of other things he has done, which also have no direct relationship to the charged offense?

This argument, however, is not well-founded. The rules of evidence do not generally aim at a superficial neutrality between rules of admission affecting the victim and the defendant. Rather, the formulation of such rules must depend on a rational consideration of the relevant policies. The sound policies that underlie the rape victim shield laws provide no support for comparable restrictions in relation to the conduct of the defendant. The differences between the two contexts include the following:

First, there is a basic difference in the probative value of the evidence that is subject to exclusion under such rules. In the ordinary case, enquiry by the defense into the past sexual behavior of the victim in a rape case will show at most that she has engaged in some sexual activity prior to or outside of marriage-a circumstance that does not distinguish her from most of the rest of the population, and that normally has little probative value on the question whether she consented to the sexual acts involved in the charged offense. In contrast, evidence showing that the defendant has committed rapes on other occasions places him in a small class of depraved criminals, and is likely to be highly probative in relation to the pending charge. The difference in typical probative alone is sufficient to refute facile equations between evidence of other sexual behavior by the victim and evidence of other violent sex crimes by the defendant.

Second, the rape victim shield laws serve the important purpose of encouraging victims to report rapes and cooperate in prosecution by not requiring them to undergo public exposure of their personal sexual histories as a consequence of doing so. Rules limiting disclosure at trial of the defendant's commission of other rapes do not further any comparable public purpose, because the defendant's cooperation is not required to carry out the prosecution.

Third, the victim shield laws serve the important purpose of safeguarding the privacy of rape victims. The unrelated sexual activity of the victim is generally no one's business but her own, and should not be exposed in the absence of compelling justification. In contrast, violent sex crimes are not private acts, and the defendant can claim no legitimate interest in suppressing evidence that he has engaged in such acts when it is relevant to the determination of a later criminal charge.

### E. Other Issues

This final part of this explanation of section 801 addresses two further

objections to the proposed rules-the objection that the prosecutor should be barred from introducing evidence of uncharged offenses in order to require him to formally charge all the offenses he wishes to prove at trial, and the objection that fairness to the defendant or other policies require that some time limit be imposed on the uncharged offenses that could be admitted under the proposed rules.

The decision whether to charge an offense. With respect to the first objection, it should be noted that the prosecutor has practical incentives to charge fully, regardless of any compulsion arising from the rules restricting evidence of uncharged misconduct. Charging a larger number of counts tends to reduce the risk that the defendant will be entirely acquitted if the jury is not persuaded concerning a particular charge or charges. Moreover, charging more counts creates the possibility of conviction on a larger number of counts, and conviction on a larger number of counts tends to result in a higher penalty. Under the federal sentencing guidelines, for example, uncharged offenses may be given some weight in sentencing, but the largest determinants of the sentence are normally the offenses for which the defendant is convicted and his record of prior convictions.

Moreover, even if it were thought that additional incentives or requirements were needed to ensure fuller charging of available offenses, a general presumption against admitting evidence of uncharged offenses would be an unsound means of promoting this objective. In many cases it is impossible, or undesirable for entirely legitimate reasons, to charge certain offenses, but admitting evidence of such offenses is valid and important for their bearing on a charged offense.

For example, the uncharged offenses may have taken place in a different jurisdiction. This would occur in a state prosecution of a rapist or child molester whose earlier known crimes were committed in a different state. It would also occur in a federal prosecution of a rapist or molester whose earlier offenses were committed within the jurisdiction of a state or states, but outside of federal jurisdiction. In such a case, it is legally impossible for the prosecutor to charge the earlier offenses; if they are to be disclosed in the prosecution, it must be through uncharged misconduct evidence.

A second example is situations in which there is insufficient evidence or other practical difficulties in prosecuting all of the defendant's prior offenses as separate counts, but the evidence regarding the earlier offenses is legitimately relevant to proof of the charged offense.

A common fact-pattern of this type involves fathers or stepfathers who are accused of molesting their daughters. The formally charged offenses in such a case may be limited to a particular act of molestation or a limited number of acts that happened to come to the attention of an adult witness (such as the defendant's wife). However, the victim will often testify in such a case that the molestation had been going on for a long time. A sister or sisters of the victim of the charged offense may also testify that the father had molested them as well over an extended period of time.

Charging all the prior offenses in such a case may be neither feasible nor

desirable. The acts of molestation may number in the hundreds; the victim may be unable to recall most of them with any specificity; and the evidence supporting them individually would only be the uncorroborated testimony *S3242 of a child victim-witness. Nevertheless, evidence that the charged offense was part of a broader pattern of molestation may be important to put the charge in perspective, and most courts have admitted such testimony by the victim. See, e.g., State v. Graham, 641 S.W. 2d 102, 104-05 (Mo. 1982). As Getz v. State, 538 A.2d 726 (Del 1988), illustrates, however, a court may regard such admission as problematic or simply prohibited under the restrictive standards of Rule 404(b).

Time limitation. Proposed Rules 413-15 do not place any particular time limit on the unchanged offenses that may be offered in evidence. The view underlying this formulation is that a lapse of time from the uncharged offense may properly be considered by the jury for any bearing it may have on the evidence's probative value, but that there is no justification for categorically excluding offenses that occurred before some arbitrarily specified temporal limit.

There is no magic line in time beyond which similar crimes evidence generally ceases to be relevant to the determination of a pending charge. This point is reflected in the current formulation of Rule 404(b), which does not specify any particular limit for admitting "non-character" evidence under the various categories it enumerates.

While there does not appear to be any precedent supporting a definite time limit on similar crimes evidence, some judicial decisions have given weight to the question of temporal proximity in a more flexible manner in deciding on the admission of such evidence in sex offense prosecutions. However, the rationales for this approach in such cases do not necessarily apply in connection with the proposed new rules. The admission of such evidence in past decisions has usually depended on ad hoc applications of other "exception" categories, such as proof of "a common scheme or plan," which comes with their own built-in limitations. If admission is thought to depend on a showing that the charged offense and uncharged offenses were part of a single on-going plan to engage in a series of sexual assaults, then too large a temporal spread among the offenses may weigh against such a finding. The theories of relevance underlying the proposed rules, however, do not depend on such a determination.

Concerns over fair notice to the defendant might also be thought to support a restrictive approach to admitting evidence of older offenses, on the view that there is a greater risk of unfair surprise if the defendant is initially confronted at trial with evidence of events that are far removed in time from the charged offense. Under the proposed rules, however, this concern is adequately met by the requirement of prior disclosure to the defendant of the evidence that will be offered.

Under the current rule admitting prior convictions for purposes of impeachment, as formulated in F.R.E. 609, prior convictions are presumptively inadmissible if they fall beyond a ten-year time period. However, the traditional version of the impeachment rule automatically admitted evidence of

prior felony and crimen falsi convictions without limitation of time, on the view that temporal proximity (or the lack of it) should go to probative value rather than admissibility. The validity of the codified federal rule's contrary approach is open to question. See generally The Admission of Criminal Histories at Trial, 22 U. Mich. J.L. Ref. 707, 769 (1989).

Moreover, the impeachment rule has sometimes been criticized on the ground that it theoretically admits prior convictions only for the limited purpose of impeachment, but that the jury may realistically consider this information as affirmative evidence of guilt once it is admitted. The suspicion that evidence admitted pursuant to the rule may be misused for purposes that are not legally authorized may partially explain the view that additional restrictions on the range of admissible convictions should be imposed, including the presumptive time limit that now appears in Rule 609.

No similar considerations support a time limit on admission under proposed Rules 413-15. The basic scope of the proposed rules is narrower than the impeachment rule in that their application is confined to sexual assault and child molestation cases, and only evidence of crimes of the same type as the charged offense may be shown. Within this clearly defined range, the normal probative value of similar crimes evidence is sufficiently great to support a general rule of admission, and consideration of such evidence for its bearing on any matter to which it is relevant. In contrast to the impeachment rule, there is no risk that evidence admitted under the proposed new rules will be considered for a prohibited purpose, since the rules do not limit the purposes for which such evidence may be considered.

# SENATOR BIDEN'S REMARKS

# IN OPPOSITION TO

# NEW EVIDENCE RULES 413-415

Mr. GRAMM. Your mama did not tell you that you need to listen to that nice man from Texas?

Mr. BIDEN. My mama told me, just be thankful that nice man from Texas, who disagrees with me a lot, does not have his mama's gun when he is debating. That is what my mama told me.

I kid-and I want to say it; I say it enough publicly, and it is said with affection-I occasionally kid and call my distinguished friend from Texas, to distinguish him from Senator GRAHAM from Florida, I refer to him as Barbed Wire GRAMM. And he has never taken offense to that. I want him to know that the distinguished Senator and I have a little bit of disagreement on these bills, but not nearly as much as is portrayed.

Mr. DOLE. Mr. President, I thank the Senator from Texas. I think he is making a very valid point with reference to the matter he just discussed.

Mr. President, I want to say a few words in support of the amendment offered by my distinguished colleague from Texas, Senator GRAMM. Unbelievably, the recent crime conference rejected Republican proposals to establish mandatory Minimum penalties for vicious criminals who sell drugs to minors and who use a gun in the Commission of a crime.

Another proposal rejected by the conference was one that I offered to the crime bill last November and which passed the Senate by an overwhelming vote of 75 to 19-with a bipartisan group of 39 Republicans and 36 Democrats expressing support. This proposal amended the Federal rules of evidence to allow the introduction of evidence of prior offenses of rape and child molestation in prosecutions for these same offenses. We had a debate on the floor on that. It was adopted again in a bipartisan way.

Ask any prosecutor, and he or she will tell you how important similar-offense evidence can be. In a rape case, for example, disclosure of the fact that the defendant has previously committed other rapes is often crucial, as the jury attempts to assess the credibility of a defense claim that the victim consented and the defendant is being falsely accused.

Similar-offense evidence is also critical in child molestation cases. These cases often hinge on the testimony of the child-victims, whose credibility can be readily attacked in the absence of other corroborating evidence. In such cases, it is crucial that all relevant evidence that may shed some light on the credibility of the charge be admitted at trial.

Unfortunately, Mr. President, the Federal Rules of evidence reflect a general presumption against let me repeat-against-admitting evidence of uncharged offenses. This presumption has been widely reproduced in State rules of evidence, whose formulation has been strongly influenced by the Federal rules.

Take the 1988 case of Getz versus State. In Getz, the Supreme Court of Delaware overturned the defendant's conviction of raping his 11-year-old daughter because evidence that he had also molested her on other occasions was improperly admitted. The court went on to hold that the disputed evidence was impermissible evidence of "character" and could not be admitted under the

State's evidentiary standards. The tragic result: the defendant walked.

Similar tragedies have been repeated in other courts and in other States.

Yes, the Federal rules of evidence have been around since 1975, but that does not mean they should not be changed when the need arises. For when someone is out there committing sex crime after sex crime, committing child molestation after child molestation, it is this Senator's view that this evidence should be admitted at trial without a protracted legal battle over what is admissible and what is not.

If you turn on television today, if you read the morning newspaper, or listen to the radio you have heard the sad story of 7-year-old Megan Kanka, who was recently strangled near her home in Mercer County, NJ. The police have arrested a twice-convicted sex offender. According to press reports, the person arrested for this vicious crime had been sentenced to 10 years in prison, but was released after serving just 6 years.

Should the killer's prior offenses be admitted at trial? You bet. Are these offenses relevant to the charge. Of course.

Mr. President, I am aware that even if my proposal became law, it would affect only Federal cases. State cases would still be governed by State rules of evidence. Nonetheless, the Federal Government has a leadership role to play in this area. Once the Federal rules are amended, it's possible-perhaps even likely-that the States may follow suit and amend their own rules of evidence as well.

So, Mr. President, I urge my colleagues to support the Gramm amendment. It restores some of the mandatory minimum penalties. It restores the important changes to the Federal rules of evidence. An it undoes some of the damage caused by the conference committee.

THE PRESIDING OFFICER. The Senator from Texas.

Mr. GRAMM. Mr. President, I am happy to have this statement as part of my amendment. It tries to get at exactly the repeat, violent felons; what I am trying to get at. I appreciate the Republican leader's leadership as usual.

Mr. BIDEN. Mr. President, I have just received a copy of the amendment. And I do not say that critically. I say that only by way of explanation, in case I leave something out that I am unaware of that has been included in the amendment.

Let me tell you about three things.

First of all, let me talk about the part I agree with Senator GRAMM about. A number of my colleagues, Senators THURMOND and SIMPSON on the Republican side among others, Senator SIMON and Senator KENNEDY and Senator LEAHY and a number on this side of the aisle, have all found some great difficulty with some of the unintended consequences of minimum mandatory sentences that we have passed in the past. So they came to me when we were debating the crime bill on the floor, Democrat and Republican, and said let us come up with a proposal how to deal with these aberrations. We do not want the second-year medical student who has had an exemplary record, has been a model student, a model citizen, a model child through school, a model young adult, because of being found in a circumstance one time to have to go to jail for 10 years without probation or parole for something that we would not send a dealer to jail for for that long,

* * * * *

penalties.

There is another amendment that we debated hotly. I think it is absolutely, positively the wrong thing to do. It would stand on its head, as they say, 800 years of English jurisprudential thinking on admissible evidence. It says, translated in terms of how it really works, if a man is accused of a crime and the charge is a sex crime against a woman or a child, the way it works now the prosecutor can say: "This person here, John Doe, I allege raped Mary Smith. And John Doe is a bad guy. Your Honor, I want to seek permission to enter into evidence acts, prior convictions or similar crimes to show a pattern and practice that this guy operates under, to prove to you-to lend credibility to the fact that this is the guy who did this to this woman."

Under our system the judge looks carefully at that and says, "Is this a pattern? Does this give you any insight? Is this prejudicial?" Sometimes lets that stuff in and sometimes does not.

What Senator GRAMM wants to do on behalf of Senator DOLE-which we defeated in the conference-is to say the prosecutor can say: "You know, if I can go out and find anybody"-this is literally true now, I am not making this up-"if I can find anybody, from any time in the defendant's past, who alleged that the defendant did anything similar to the crime for which he was charged, I, the prosecutor, can go get that person, bring them into court and say, 'When John Smith, the defendant here who is now 47 years old-when you went out on a date with him when he was 15 years old, what did he do to you?'"

And now a 42-year-old can say, "Well, 27 years ago, I remember John forcibly tried to make love to me."

It is incredibly prejudicial. Under our system, for 800 years, we developed these Rules of Evidence because they work. Why do they work? They get at the truth. That is the purpose of them. And to allow total, uncorroborated, unsubstantiated testimony about something that could have happened-anything-from the day before to 50 years before into a trial, I think, absolutely violates every basic tenet of our system.

Remember, I am the guy who wrote this crime bill. I am not "Mr. Soft On Crime." I am the guy who put these death penalties in this bill. I am the guy who added these penalties for all these other things in the bill. But this is crazy.

If the person has a pattern, if he has been convicted of similar crimes, if he has been engaged in that kind of activity and there have been complaints, there are ways to bring that in. There are ways with our present evidentiary rules to bring that in, as I say, to the Presiding Officer, who is an accomplished lawyer himself. There are ways to do that. But not this, just waiving all existing rules.

One other thing. Let me tell you what we did here. Notwithstanding the fact I think it is crazy, and that is just my opinion, we have a system whereby when we are going to change the Federal Rules of Evidence-we set up a system a long time ago. The Judicial Conference sets up an advisory committee. The way it works is they suggest changes in the rules, the Judicial Conference meaning Federal judges. We have a system we put in place because it made sense a long

time ago. Federal judges come along and say we should change the Rules of Evidence the following way. And then if we, the U.S. Congress, do not act to stop those changes, essentially those changes become law.

So in this case, what I say we should do is let us go to the judges, let us go to the experts and say, "Does this approach of Senator DOLE make any sense? Study it, take a look at it, and come back and tell us whether we should change the Rules of Evidence."

That is how we have changed the Rules of Evidence in the 22 years I have been here. There are no fundamental changes in the Rules of Evidence that have been sui generis, that have been spontaneous, that have come from the floor. They come from legal scholars and judges sitting down and saying we *S10278 should change the Rules of Evidence the following way.

So if it is any consolation-it probably would not be because I think they will agree with me, but maybe I am wrong-if it is any consolation to my friends on the Republican side, there is the ability in the request of the Senate and the House to ask the Judicial Conference to take a look at these rules changes-and they are in fact doing that. That is the orderly way in which we should do this, rather than haphazardly, willy-nilly, on the floor of the U.S. Senate, in a conference on the floor of the Congress, changing these Rules of Evidence, with all due respect, that a lot of people do not fully understand the significance of.

Let me ask a rhetorical question of the Presiding Officer: What do you think would happen if there were no fifth amendment and I came on the floor of the U.S. Senate and submitted an amendment to the Constitution called the fifth amendment? And I said, essentially, the fifth amendment says that nobody should have to make a case against themselves. How many votes do you think that would get on the floor of the Senate? And especially with the public the way they are today, ready to listen to the Rush Limbaugh malarkey and all that right-wing garbage, they would all go, "Oh, no, fifth amendment; that's ridiculous."

I wonder how many people would think if I walked on the floor in this atmosphere today and offered the fourth amendment saying the Government cannot engage in an unreasonable search and seizure of your property, I wonder how many votes I would get.

I wonder if people listening to this ask themselves-as Barry Goldwater would say, in your heart you know whether he is right. In your heart, what do you think would happen if we put the Bill of Rights up for a vote today? What do you think the Rush Limbaughs of the world today would do with the Bill of Rights? Do you think they would sustain them?

Thank God, there were people like Madison. Thank God there were people like the Founding Fathers, who debated these things called the Bill of Rights.

But I ask a very serious question. I ask those of you on the floor, what do you think would happen if we had a referendum on this floor on the Bill of Rights? How many people would vote for them? Then I ask you the rhetorical question: What country would this be if there were no Bill of Rights?

When you start changing fundamental Rules of Evidence, you start affecting fundamental questions that, on the surface, are awfully hard to explain. For

how could I be against allowing Mary Smith, who said, "John Doe did that to me, too," from coming into court and saying that? How could I be against that, the author of the Violence Against Women Act, the guy who spent more of his waking hours dealing with the problem of violence against women, presuming to say, than any man or woman serving in the U.S. Congress today. How can I be against that? The same way I could be for a fifth amendment. The same way I could be for a fourth amendment. But the public "ain't" ready for that today, because they all want instant answers, instant answers, instant answers.

It is very appealing to put up this bogeyman of this horrible rapist, which there are horrible rapists. That is why in this bill I increased the penalties for rapists.

The Senator said he did not understand what was in this bill that was of any consequence; I mean, this is a soft-on-crime bill.

I ask unanimous consent to print in the RECORD a list of those added penalties beyond the death penalty.

There being no objection, the list was ordered to be printed in the RECORD, as follows:

ATTACHMENT B

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

ALICEMARIE H. STOTLER
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

JAMES K. LOGAN
APPELLATE RULES

PAUL MANNES
BANKRUPTCY RULES

PATRICK E. HIGGINBOTHAM
CIVIL RULES

D. LOWELL JENSEN
CRIMINAL RULES

RALPH K. WINTER, JR.
EVIDENCE RULES

May 24, 1994

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

Dear Mr. Chairman:

I write to request your assistance to prevent amendment of the federal rules of practice and procedure outside the Rules Enabling Act process in your consideration of the House-passed H.R. 4092 and the Senate-passed H.R. 3355, "Violent Crime Control and Law Enforcement Act." In my March 30, 1994 letter to you I had advised you of the Judicial Conference's positions on the proposed rules amendments contained in the bills. I would like to restate those views and update the status of the Judicial Conference consideration of amendments to Evidence Rule 412 in light of the Supreme Court's recent action.

H.R. 4092 contains one section that pertains to the rules and amends Rule 32 of the Federal Rules of Criminal Procedure. H.R. 3355 contains ten separate sections that would amend rules directly or otherwise affect the rulemaking process. They generally pertain to Evidence Rule 412, regarding the privacy concerns of a victim of sexual offense, (e.g., §§ 3251-54, and 3706) and Criminal Rule 32, regarding a victim's opportunity to address the court during sentencing (e.g., §§ 901 and 3264).

The other relevant sections in H.R. 3355, including §§ 831, 3711, and 3712, either involve the admission of evidence of the defendant's commission of a past sexual offense or otherwise generally affect the rulemaking process. A table of the bill's pertinent sections is enclosed for your information. I am also enclosing two letters that discuss the concerns of the Judicial Conference's rules committees with amendments in H.R. 3355 as they had been included in previously considered bills.

A set of proposed amendments to Evidence Rule 412 and Criminal Rule 32 has been making its way through the demanding Rules Enabling Act (Act) process and will now automatically take effect, unless altered explicitly by Congress, on December 1, 1994.

The subject matter of Evidence Rule 412 is complex. The rules committees struggled with various versions of Evidence Rule 412, frequently parsing with meticulous care individual words and clauses, to fashion the very best possible rule that would protect the legitimate privacy of victims under virtually all conceivable circumstances. In so doing, the committees identified and corrected serious problems with the existing rule. Unfortunately, the defects of the current rule have been carried over into the proposed amendments in H.R. 3355, i.e., §§ 3251-54.

Both the Judicial Conference approved amendments to Evidence Rule 412 and the amendments in H.R. 3355 would extend privacy protections to a victim of sexual offense in civil cases - an area of developing law. The Judicial Conference's Advisory Committee on Evidence Rules and the Committee on Rules of Practice and Procedure (Standing Committee) carefully reviewed a substantial number of comments and alternative proposals from academics and bar groups in drafting this particularly complicated provision.

On April 29, 1994, the Supreme Court of the United States submitted to Congress the amendments to Evidence Rule 412 as proposed by the Judicial Conference, but the Court withheld that portion of the amendments that would apply the rule to civil cases. In a separate letter to Judge John F. Gerry, chairman of the Executive Committee of the Judicial Conference, the Chief Justice noted the concerns of some members of the Court that the proposed amendments might exceed the scope of the Court's authority under the Rules Enabling Act.

The Judicial Conference's Advisory Committee on Evidence Rules met in New York City on May 9-10, 1994. The Committee carefully reconsidered at length the proposed amendments to Rule 412 in light of the comments and concerns expressed in the Chief Justice's letter to Judge Gerry. The Committee concluded that the proposed amendments were within the scope of the Supreme Court's authority.

The Evidence Advisory Committee has now resubmitted the portion of the originally proposed amendments to Rule 412 that were withheld by the Supreme Court and has recommended that the Standing Committee transmit them to the Judicial Conference for submission back to the Supreme Court. The reasons for the Committee's conclusions are set out in a second Committee Note, which is enclosed. The Standing Committee is meeting on June 23-25, 1994, while the Conference is meeting on September 20-21, 1994.

In addition to amendments to Evidence Rule 412, sections 3254 and 3706 of H.R. 3355 would add new rules that would exclude the admission of a victim's clothing as inciting violence or evidence to show provocation by a victim in a sexual abuse case. The Judicial Conference-approved amendments to Rule 412 cover these situations and would exclude evidence relating to an alleged victim of sexual misconduct that is offered to prove a victim's sexual predisposition. For example, evidence of an alleged victim's mode of dress, speech, or life-style would not be admissible.

Section 831 of amended H.R. 3355 would add three new Evidence Rules that would allow consideration of evidence of a "defendant's commission of another offense or offenses of sexual assault ... for its bearing on any matter to which it is relevant." The Conference rules committees considered similar proposals, but did not accept them. The committees were concerned about the proposals' fairness and the lack of supporting empirical data, particularly if evidence of the past sexual history of a victim was being excluded. Other reasons for the committees' actions are set forth in the enclosed letters.

Sections 3711 and 3712 of H.R. 3355 would require the Judicial Conference to report to Congress within 180 days on creating rules governing professional conduct of lawyers and to recommend changes to Evidence Rule 404. Both issues are controversial and complicated. The Conference rules committees are reviewing the proposals, but recommended changes to rules cannot be studied and acted on within these timeframes consistent with the Rules Enabling Act.

Although amendments to Criminal Rule 32 were also approved by the Judicial Conference, no provision requiring victim allocution was included. The rules committees concluded that a provision requiring victim allocution is unnecessary. Courts now consider this information as part of the presentence report and now may, and do, allow victim(s) to address the court in appropriate cases. Moreover, requiring allocution in all cases could be counterproductive because under the federal sentencing guidelines the victim's testimony would have very little, if any, effect on the sentence. The Standing Committee believed, however, that a separate amendment to title 18 to allow a victim allocution for discrete criminal offenses would be a matter entirely within Congress' prerogative.

The amendments proposed by the Judicial Conference to Rule 32 have now been approved by the Supreme Court and will become effective on December 1, 1994. Both H.R. 3355 and H.R. 4092, however, include an amendment to the existing Rule 32, which would authorize victim allocution. A legislative amendment of Rule 32 should take into account the future effective date of the amendments approved by the Supreme Court. Unless specifically directed otherwise, any intervening amendment of the rules would presumably be superseded on December 1, 1994.

The amendments to Evidence Rule 412 and Criminal Rule 32 are in the final stages of the rulemaking process. The Supreme Court's action in withholding a portion of the proposed amendments to Evidence Rule 412 highlights the complexity involved in amending the rules. Approval of legislation that would directly amend these rules would effectively bypass the Rules Enabling Act process. Your assistance in maintaining the integrity of the Rules Enabling Act process is appreciated.

Sincerely yours,

Alicemarie H. Stotler

Enclosures

cc: Senate Conferees on the Crime Bill

ATTACHMENT C

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

ALICEMARIE H. STOTLER
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

JAMES K. LOGAN
APPELLATE RULES

PAUL MANNES
BANKRUPTCY RULES

PATRICK E. HIGGINBOTHAM
CIVIL RULES

D. LOWELL JENSEN
CRIMINAL RULES

RALPH K. WINTER, JR.
EVIDENCE RULES

July 15, 1994

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:

On June 29, 1994, the House of Representatives voted to approve a motion instructing its conferees on H.R. 3355 (Omnibus Crime Control Act) to accept language in the Senate crime bill that would make evidence of a defendant's history of similar sexual offenses admissible in a sexual assault or child molestation case. We urge you not to approve this provision in your consideration of the conference bill.

Section 831 of Senate-passed H.R. 3355 would create three new evidence rules. New Evidence Rule 413 would admit "evidence of the defendant's commission of another offense or offenses of sexual assault" in a sexual assault criminal case. Evidence Rule 414 would admit analogous evidence in a child molestation criminal case, while Evidence Rule 415 would admit both types of evidence in a civil case. Each of the new rules would effectively establish an exception to Evidence Rule 404. That rule now allows evidence of the past conduct of a defendant to be admitted under very limited circumstances and purposes.

The Advisory Committees on Criminal Rules and Evidence Rules considered similar proposals contained in earlier legislative bills, but did not accept them. As part of its comprehensive review of all the evidence rules, however, the Evidence Rules committee is soliciting comment from the bench, the bar, and the public on its tentative decision not to approve any amendments to Evidence Rule 404. Requests for comment will be contained in major legal periodicals and circulated individually to over 10,000 persons and organizations for a six-month period.

The creation of three new evidence rules without the input of the bench, the bar, and the public would be particularly unfortunate in light of the advisory rules committees' preliminary rejection of these proposals on the merits. The advisory committees were especially concerned about the proposals' fairness because amendments to Evidence Rule 412 become effective on December 1, 1994, unless Congress acts otherwise.

The amendments to Evidence Rule 412 would prohibit the admission of evidence of the past sexual history of an alleged victim of a sexual offense. One of the key reasons for prohibiting this type of evidence under Rule 412 applies in a sexual assault or child molestation case when admission of evidence of the defendant's commission of past similar offenses is being considered. Character evidence of a defendant's past sexual conduct might be relevant in determining the defendant's propensity to commit similar acts, in much the same way that the past sexual history of an alleged victim can be argued to be relevant in a sexual assault case. But the probative value of past similar offenses often is substantially outweighed by the clear danger of unfair prejudice to the defendant.

The danger of improper inferences and of unfair harm to an alleged victim in a sexual assault case prompted the change to Evidence Rule 412. In prosecutions of a defendant for a sexual assault or child molestation offense, this danger of unfairness is no less apparent and underlies the committees' opposition.

The danger of the proposed new evidence rules is heightened, moreover, because they would allow the admission of evidence of the defendant's commission - not conviction - of a similar past offense. Evidence of past acts could be admitted even if the defendant had been acquitted of that prior alleged sexual offense. Virtually any accusation of a sexual offense, although entirely uncorroborated and never leading to formal charges, might be admissible. In addition, the proposed new evidence rules would permit the use of this evidence in the prosecution's case-in-chief. Whether evidence of the commission of similar past offenses, standing alone, might be sufficient to sustain a conviction would pose serious issues.

There is insufficient empirical data demonstrating that evidence of a past sexual assault or child molestation is so different from evidence of similar acts in other criminal offenses - for example, prior offenses involving drugs, illegal firearms, fraud, or violence - that it should be singled out as particularly probative.

Finally, the new rules would place a defendant, who is alleged to have committed a sexual offense, on a substantially inequitable footing with the plaintiff. For example, a plaintiff seeking monetary damages in a sexual harassment case would

be permitted to introduce evidence of the defendant's past sexual history. But under Evidence Rule 412, as amended, a defendant could not introduce evidence of the plaintiff's past sexual history to rebut the same allegations.

The Judicial Conference rules committees appreciate the important and sensitive public policy concerns involved in these evidentiary areas. We share your concern for protecting the privacy of a sexual offense victim and have approved changes to Evidence Rule 412 to further those interests. As a matter of fundamental fairness, however, changes to the rules allowing admission of evidence of a defendant's past similar offense in a sexual offense case should not be approved.

Thank you for your consideration of these important matters.

Sincerely yours,

Alicemarie H. Stotler

cc: House Conferees on the Crime Bill

ATTACHMENT D

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

ALICEMARIE H. STOTLER
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

JAMES K. LOGAN
APPELLATE RULES

PAUL MANNES
BANKRUPTCY RULES

PATRICK E. HIGGINBOTHAM
CIVIL RULES

D. LOWELL JENSEN
CRIMINAL RULES

RALPH K. WINTER, JR.
EVIDENCE RULES

July 12, 1994

Honorable Howell Heflin
Chairman, Subcommittee on
Courts and Administrative Practice
Committee on the Judiciary
United States Senate
223 Hart Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

The Judicial Conference Committee on Rules of Practice and Procedure (Standing Committee) held its biannual meeting in Washington, D.C., on June 23-25, 1994. At its meeting, the committee considered S. 2212, the bill you introduced on June 20, 1994, which would require each of the five Judicial Conference advisory rules committees and the Standing Committee to have a majority of members of the practicing bar.

The Standing Committee shares the concerns underlying your bill. The active participation of the bar is indispensable in the rulemaking process. The attorneys' contributions in developing and drafting the best possible rules of practice and procedure for the courts are invaluable.

Adding more practicing attorneys on the rules committees might increase bar participation. It might also lead to adverse consequences with self-interest groups vying for greater attention and more appointments to the committees. We believe that the better approach is to elicit more feedback from the general bar during the rulemaking process, particularly during the public comment stage.

Proposed amendments to the rules are widely circulated to the bench, bar, and public requesting comment. The rules committees carefully consider each comment received on the proposals. And the amendments are revised frequently or rejected in light of the helpful suggestions submitted. The committees have found the testimony of practitioners at public hearings, which are scheduled whenever rules amendments are proposed, to be of immense help. Unless the rule amendment is particularly controversial, however, the number of comments or requests to testify often is not large. This may very well be because the proposed amendments are well-received by the bar and the public. The general low rate of comment from the bar is nonetheless a matter of concern. And it is in this area that we believe greater efforts in eliciting bar participation would be most productive.

The Standing Committee has already begun taking steps to encourage more members of the bar to participate in the rulemaking process. Presidents of State bar associations will be requested to select a representative to serve as consultants to the Standing Committee. These consultants will be responsible for commenting on proposed amendments to the rules. We are also expanding our mailing list, which now contains roughly 10,000 individuals and organizations who receive our requests to comment on proposed rules amendments. Many more local bar associations and attorneys who have an active practice in the federal courts are being added to the list. In addition, all relevant sections of the American Bar Association have been targeted to receive the call for comment on proposed amendments to the rules.

In addition to increasing comment from the bar on proposed rules amendments, the rules committees have considered more direct participation at their meetings by non-committee bar members. For example, the Advisory Committee on Civil Rules has invited members of the practicing bar to discuss their experiences with specific areas of law under consideration. At a recent meeting, John P. Frank, Francis E. McGovern, and Herbert M. Wachtell talked about their personal experiences in class action law suits.

The composition of the rules committees themselves has changed recently with added representation of the practicing bar. The Civil Rules Committee now has five members of the practicing bar, including the Department of Justice representative, and seven judges, including a State supreme court justice. Determining the "right" make-up of the rules committees has never been easy. An across the boards increase in the number of attorneys as suggested in your bill would raise serious questions. It would, for example, require added representatives from the Department of Justice on the Advisory Committee on Criminal Rules, who would presumably act in concert and voice a single position. In addition, since the respective rules committees are already quite large, increasing the number of members may lead to inefficient decision-making.

Whether increased bar representation on the rules committees is more appropriate than the current complement of practicing attorneys and judges is now under active consideration by the judiciary as part of a larger self-study undertaken by the Standing Committee as authorized at its January 1994 meeting. The self-study requested comments from the public on a wide range of issues and three distinguished professors currently serve as reporters to the subcommittee chair, Professor Thomas E. Baker of Texas Tech University, School of Law. The committee will discuss the composition of the rules committees, including the responses on this issue received from the public during its self-study, at its next meeting in January 1995.

We recognize and appreciate your strong commitment over the years to the Rules Enabling Act rulemaking process. We look forward to working with you on our mutual concerns in improving the rulemaking process.

Sincerely yours,

Alicemarie H. Stotler

cc: Honorable Charles E. Grassley
Chairs of the Advisory Rules Committees

bc: L. Ralph Mecham

ATTACHMENT E

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

ALICEMARIE H. STOTLER
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

JAMES K. LOGAN
APPELLATE RULES

PAUL MANNES
BANKRUPTCY RULES

PATRICK E. HIGGINBOTHAM
CIVIL RULES

D. LOWELL JENSEN
CRIMINAL RULES

RALPH K. WINTER, JR.
EVIDENCE RULES

August 10, 1994

Honorable Jack Brooks
Chairman, Subcommittee on Economic
and Commercial Law
United States House of Representatives
B-353 Rayburn House Office Building
Washington, D.C. 20515

Dear Mr. Chairman:

On April 21, 1994, the Bankruptcy Amendments Act of 1994 (S. 540), was passed by the Senate and later referred to your subcommittee for further action. I write to request your assistance in deleting § 112, which would require special service of process in certain cases.

Section 112 of S. 540 adds subdivision (h) to Rule 7004 of the Federal Rules of Bankruptcy Procedure. It would require, in an adversary proceeding or contested matter, that service of a summons and complaint or motion on an insured depository institution be made by certified mail, with certain exceptions. Under the present rule, service of process on all business entities, including insured depository institutions, may be made by ordinary first class mail.

We are concerned by the amendments contained in § 112 for two reasons. First, the amendment of Bankruptcy Rule 7004 by a provision in S. 540 would be a significant departure from the procedures of the Rules Enabling Act, 28 U.S.C §§ 2071-2077. Second, a requirement that service be made by certified mail would be unnecessarily expensive and burdensome for debtors and trustees of insolvent estates and would reduce the estate assets available for distribution to creditors.

Rule 7004 governs service requirements in bankruptcy cases for contested matters and adversary proceedings, and it incorporates by reference most of the provisions in Rule 4 of the Federal Rules of Civil Procedure in effect on January 1, 1990. On December 1, 1993, comprehensive amendments to Civil Rule 4 became effective. In light of the far-reaching nature of the amendments to Civil Rule 4, the

Advisory Committee on Bankruptcy Rules considered carefully the extent to which the changes in Civil Rule 4 should apply to bankruptcy proceedings under Rule 7004. The advisory committee has prepared a preliminary draft of proposed amendments to Rule 7004, which will be published for comment under the procedures described below.

During its review, the advisory committee examined the changes to Rule 7004 proposed under a prior version of § 112 of S. 540, but did not include them for the following reasons. Service on business entities by ordinary first class mail to the attention of an officer, or a managing or general agent, has been permitted in bankruptcy proceedings since 1976. It has worked well. The advisory committee has not received any information from a depository institution alleging injury or other disadvantages incurred as a result of service of process under the present rules.

Service of process by certified mail, as required under S. 540, would also result in significant unnecessary expense due to the additional costs of certified mail. In addition to increasing costs of commencing adversary proceedings, S. 540 would increase the costs of making motions in contested matters because Rule 9014 makes Rule 7004 applicable in these matters. The increased expense would burden insolvent estates and would reduce the assets available for distribution to creditors.

Service of process by certified mail in civil cases was rejected by Congress in 1982. At that time, the Supreme Court promulgated amendments to Civil Rule 4 to provide service of process by certified or registered mail, together with notice and acknowledgment of receipt form. Critics argued that certified or registered mail would not be an appropriate way to effectuate service. Signatures might be illegible or might not match the name of the defendant, or it might be difficult to determine whether mail had been "unclaimed" or "refused." In light of the concerns, Congress postponed the effective date of the amendments to Civil Rule 4 and eventually enacted a different set of amendments. Under the Federal Rules of Civil Procedure Amendments Act of 1982 (P.L. 97-462), Civil Rule 4 was amended to permit a summons and complaint, together with the notice and acknowledgment of receipt form, to be served by ordinary mail.

For all these reasons, the advisory committee determined not to require service of process by certified mail in its preliminary draft of proposed amendments to Rule 7004.

Because of ongoing technological changes, it will be possible, given sufficient resources, to assure that all notices issued by the clerk of the bankruptcy court are sent to one address for a particular creditor. Bankruptcy Rule 9036, which became effective on August 1, 1993, provides that notice may be given under certain circumstances by electronic transmission. This results in far greater efficiency at a

reduced cost at both ends. A proposed amendment to Rule 5005 that will be published for comment later this summer would implement further technological advances by permitting the filing of documents by electronic means. Additional amendments that will improve practice and procedure by use of technological advances, including the possible use of electronics for service of process, will be explored in the future through the Rules Enabling Act process. The enactment of a statute requiring service by certified mail would inhibit this effort by tying service of process to obsolete methods.

At its June 1994 meeting, the Standing Committee approved the recommendation of the Advisory Committee on Bankruptcy Rules to publish proposed amendments to Rule 7004 for public comment. The proposed amendments will be widely disseminated by various publishers of legal materials and will be sent directly to roughly 6,000 members of the bench and bar. The public comment period will begin in September and expire in February 1995. In addition to receiving written comments, a public hearing will be scheduled to allow anyone to urge the advisory committee to adopt the changes contained in the S. 540 amendments.

After the public comment period has expired, the advisory committee will review the proposed amendments afresh in light of the comments and testimony received regarding them. The proposed amendments, with or without revision, will be submitted to the Standing Committee, the Judicial Conference, the Supreme Court, and the Congress for review and approval. This elaborate review process ensures that every proposed rule amendment receives attention from all possible perspectives.

Rules amendments by legislation, such as the changes made to Rule 7004 by S. 540, frustrate the intent of the Rules Enabling Act and render redundant the work of the volunteer lawyers, professors, and judges who serve on the Standing Committee and the five advisory committees. The Rules Enabling Act and the procedures of the Judicial Conference implementing the Act provide a method to assure that each proposed new rule or amendment of a rule receives wide and thorough consideration to produce the best possible rules of procedure.

I respectfully request your support for deleting § 112 from S. 540. I appreciate your consideration of this request.

Very truly yours,

Alicemarie H. Stotler

Alicemarie H. Stotler, Chair

cc: Subcommittee on Economic and Commercial Law

Item 3B

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 6, 1994

MEMORANDUM TO STANDING COMMITTEE

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

## ADMINISTRATIVE ACTIONS

The following report briefly outlines some of the major initiatives undertaken by the office to improve its support function to the rules committees.

### A. Record Keeping

Under the *Procedures for the Conduct of Business by the Judicial Conference Committees on Rules of Practice and Procedure* all rules-related records must "be maintained at the Administrative Office of the United States Courts for a minimum of two years and ... thereafter the records may be transferred to a government record center...."

All rules-related documents from 1935 through 1989 have been entered on microfiche and indexed. The documents for 1990 have been sent to a government record center. Congressional Information Services (CIS) will enter the documents on microfiche and incorporate them into existing indexes. The documents for 1991 are currently being catalogued and boxed for shipment to a government record center. The microfiche collection has proven useful to us in researching prior committee positions. The public has also made use of the collection. At least two law schools have purchased the collection after professors from those schools used our collection.

The office is continuing its efforts to develop better methods and procedures in monitoring and retrieving rules-related records and materials. We have hired a consultant to assess our needs and recommend an automated tracking and retrieval system. The consultant met with staff and provided an interim report on the status

of the project. It will issue its final report shortly, recommending the type of hardware (e.g. upgraded PC's, scanners, etc.) and software (off-the-shelf or custom designed) and the projected cost.

In the meantime we have improved our ability to acknowledge and follow-up each comment or suggested rule change. As each comment or suggestion is received it is stamped with the initials of the type of rule (e.g. AP for Appellate Rules, BK for Bankruptcy Rules, etc.), given a number if a comment or an alphabetical letter if a suggestion, and logged into a WordPerfect chart which tracks the date received, the specific rule addressed, the name of the commentator, the date of the acknowledgement, and the date of the follow-up letter. The system worked very well during the recent spate of comments on the Congressionally proposed Evidence Rules 413-415. The office received, acknowledged, and forwarded 85 comments to the Advisory Committee on Evidence. The consecutive numbering of comments enabled the members of the committee to determine instantly that they had received all comments. We have sent follow-up letters to each individual and organization that commented on those Evidence Rules.

B. Distribution of Proposed Rule Changes

Our plans for improving the distribution of proposed rule amendments for public comment are progressing well. We have reformatted the title page of the publication containing proposed amendments to the rules. The new format highlights the comment-seeking purpose of the publication and indicates which rules are being amended.

In August Judge Stotler sent a letter to the president of each state bar requesting that it designate a point of contact to the rules committee to solicit and coordinate that state bar's comments on the proposed amendments. The Standing Committee's outreach to the organized bar has been successful. To date, 26 state bars have designated a point of contact. Follow-up letters have been sent to those state bars that have not yet responded.

We have added approximately 200 attorneys and 100 lawyer professors selected on a random basis to the mailing list. An additional 200 attorneys and 100 professors will be added every six months until the list contains 2,500 names. If an individual does not comment on rules amendments published for comment for three years, the name will be removed from the list and replaced. We have also updated the names and addresses on the existing mailing list eliminating the names of deceased or retired practitioners and correcting addresses.

We will continue to monitor the level of response to the request for comment and take steps as necessary to improve our circulation of rules-related materials.

C. Tracking Rule Amendments

We have updated the color coded time chart, and it will be distributed at the meeting.

The office has forwarded the minutes of the Fall 1993 committees' meetings to several legal publishers. The minutes from those meetings should be available on-line by the end of this month. The minutes of the Spring 1994 committees' meetings will be forwarded to the publishers later this month.

D. Miscellaneous

In July we faxed notification to the courts of the effective date of the amendments to the Bankruptcy Rules. In September we notified the courts of rules amendments contained in the *Violent Crime Control and Law Enforcement Act*. In November we sent a memorandum to the courts informing them of the amendments scheduled to become effective on December 1, 1994.

On November 2, 1994, we delivered to William Suter, Clerk of the Supreme Court, the proposed amendments to the Federal Rules of Appellate Procedure, Bankruptcy Procedure, Civil Procedure, and Criminal Procedure, which were approved by the Judicial Conference at its September 1994 session.

At the request of Lloyd Hysan of the Supreme Court, we prepared in electronic form a clean version of the 1993 amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure. We have made arrangements with William Suter to provide the Supreme Court with a diskette containing a clean version of proposed rule amendments early each spring.

John K. Rabiej

Item 4

THE FEDERAL JUDICIAL CENTER
THURGOOD MARSHALL FEDERAL JUDICIARY BUILDING
ONE COLUMBUS CIRCLE, N.E.
WASHINGTON, DC 20002-8003

WILLIAM B. ELDRIDGE, DIRECTOR
RESEARCH DIVISION

TEL.: 202-273-4071 ext 348
FAX: 202-273-4021

December 8, 1994

# MEMORANDUM

TO : Honorable Alicemarie Stotler

FROM : William B. Eldridge

SUBJECT : Research Support from the Federal Judicial Center

In 1994, most of the Research Division's work continued to be in support of committees of the Judicial Conference. The list below, drawn from work performed during the current year, is representative of work that, in my judgment, has substantial relevance to issues now before or likely to come before the various rules committees. Naturally, most of these rules-relevant projects have been undertaken in response to committee requests; they are listed first. Quite often, however, work performed for other committees will have aspects touching on the interests of rules committees. When that is the case, we try to keep all informed of our activities and findings. I have included some examples of such work at the end of this memorandum. I hope these examples will illustrate the kinds of support we are prepared to provide. Of course, demands on the Center's resources affect what we are able to do, but it is rare for us to receive requests that cannot be accommodated. There are no elaborate procedures for requesting assistance. Usually a staff member from this division is present at meetings of rules committees. A request directed to a staffer on site is enough to launch the process. If no one from the Center is present, a phone call to me will serve.

## RULES COMMITTEES

### Advisory Committee on Appellate Rules

***Intercircuit Conflict as a Ground for En banc***

A report to the Committee providing information on the experience of four federal courts of appeals that allow suggestions for rehearing en banc to be based on the fact that the panel's determination of an issue conflicts with one or more decisions by other federal courts of appeals.

### Advisory Committee on Bankruptcy Rules

***Rule 26 disclosure practices***

Reports on implementation by district and bankruptcy courts of the December 1993 disclosure amendments to Rule 26 of the Federal Rules of Civil Procedure. The reports were delivered to the Committee on Practice and Procedure, the appropriate Advisory Committees and the Committee on Court Administration and Case Management. The reports showed substantial opting out and deferral of implementation.

### Advisory Committee on Civil Rules

***Voir dire practices in federal courts***

Report on a survey of district judges' voir dire practices, undertaken at the request of the Committee chair was delivered to the Committee and to the Advisory Committee on Criminal Rules and the Committee on Court Administration and Case Management.. The report showed that practices vary widely but that participation by lawyers has increased substantially since the Center's earlier study on this subject.

***Rule 23 class actions***

A study now underway to assist the Committee's consideration of proposed amendments to Rule 23 of the Federal Rules of Civil Procedure that would facilitate the filing and management of class actions by expanding the trial judge's discretion to certify a class and to select the appropriate form of notice to the class.

***Rule 26 disclosure practices***

See above under Advisory Committee on Bankruptcy Rules

***Rule 26(c) protective orders***

This project responds to congressional and judicial interests in federal district court practices that restrict access to court records in civil cases, e.g., protective orders restricting disclosure of discovered information, sealed settlement agreements, and orders that seal cases in their entirety. A preliminary report delivered to the Committee, describes protective order activity in three federal district courts and the Texas state courts (Texas has adopted a judicial rule regulating the use of protective orders when public interests are involved). A final report will be available in the spring of 1995.

***Rule 49 special verdicts and general verdicts with interrogatories***

The Center's final report to the Committee on this project, to be delivered in February 1995, .address issues such as how frequently and in what types of cases special verdicts and general verdicts with interrogatories are used; why judges use or decline to use them; and problems in the logical and linguistic construction of the verdict forms and accompanying jury instructions. The report will also contain suggested guidelines for using these alternative forms.

**Advisory Committee on Criminal Rules**

***Closed Circuit Pretrial Hearings***

The Center began a study of the Federal Bureau of Prisons' pilot efforts to conduct detention and other pretrial hearings via closed circuit television. The project is designed as a multi-year effort that is intended to provide the Committee with information essential to its consideration of proposed rules revisions that would facilitate expanded use of this technological capability.

## OTHER COMMITTEES

**Committee on Administration of the Bankruptcy System**

***Bankruptcy In Forma Pauperis***

The Center began a major study of the three year Congressionally-mandated pilot to examine the impact of waiving filing fees in chapter 7 cases for debtors who are unable to pay fees by installments. The pilot will, among other things, provide experience with local rules governing procedure that should inform decisions about whether and how to regulate practice through national rules.

***Model jury instructions for bankruptcy***

In response to actions by the Congress and interest from the Chair of the Bankruptcy Committee, staff of the Center and the Bankruptcy Division began designing a new project aimed at developing model jury instructions for adversary proceedings in bankruptcy courts.

**Committee on Court Administration and Case Management**

***Appellate Commissioners***

The Center completed an appraisal of a Ninth Circuit proposal for creating a new position of Appellate Commissioner who would be authorized to perform a range of duties to relieve demands on judge time. The study focused on Washington State's appellate commissioner program. Implementation of a national program based on the Washington model could raise a number of issues for the Appellate Rules Committee.

## Committee on the Criminal Law

***Risk Assessment***

The Center is developing a statistical risk assessment tool for use by federal probation officers to classify their supervision caseloads. The Center's study focuses on a cohort of 3,700 offenders sentenced in 1989. The final results of the study are scheduled to be presented to the Committee in early 1995.

## Committee on Federal-State Relations

***Assessment of districts' practices with partial filing fees***

At the Committee's request, a report was provided outlining practices in districts that impose a partial filing fee in lieu of allowing a petitioner to proceed without paying a filing fee.

cc: John Rabiej

Item 5

HARVARD LAW SCHOOL

CAMBRIDGE · MASSACHUSETTS · 02138

November 30, 1994

Members of the Committee on
Rules of Practice and Procedure.
Chairs and Reporters of
Advisory Committees
Judicial Conference of the
United States

Dear Colleagues:

Please find attached my "Bench Memo" on Ninth Circuit Local Rule 22, as requested. Judge Stotler kindly provided an extra two weeks so that I could incorporate the excellent suggestions made by individual members of the Advisory Committee on Appellate Rules. This has now been done. I have also received invaluable assistance and advice from Frank Easterbrook, Pat Higginbotham, Joe Spaniol, and my loyal research assistant, Eric Bjorgum.

I should note that I have taken some positions on the legal issues presented by the Brief of the Attorneys General, but, in good law clerk style, I have left the final resolution to the judgment of the Committee. Indeed, there are strong arguments to be made for both abstention and abrogation, and the individual comments from members of both this Committee and the Advisory Committee on Appellate Rules have been evenly divided between these options. I do have personal views on the ultimate policy choice, but I have left these out of the memorandum. Instead, I have laid out the arguments on both sides, as fairly as I can.

Chief Judge Wallace has offered to send a "representative of the Court," if requested. Judge Stotler's current inclination is not to request such a "representative" unless other members of the Committee see a need.

I look forward to seeing you all in San Diego.

Very best regards,

Daniel R. Coquillette
Reporter,
Committee on Rules of Practice
and Procedure

DRC:djw

HARVARD LAW SCHOOL

CAMBRIDGE · MASSACHUSETTS · 02138

# M E M O R A N D U M

**TO:** Committee on Rules of Practice and Procedure

**FROM:** Daniel R. Coquillette, Reporter

**DATE:** November 30, 1994

**RE:** Ninth Circuit Local Rule 22

## I. INTRODUCTION

On March 11, 1994, five attorneys general from capital punishment states in the Ninth Circuit wrote to Chief Justice Rehnquist to challenge Ninth Circuit Local Rule 22 as "inconsistent" with "Federal Law," pursuant to 28 U.S.C. § 331. The matter was referred by the Chief Justice to the Standing Committee on March 29, 1994 for "appropriate action."

At the Standing Committee meeting on June 24, 1994 it was decided to offer all parties an opportunity to provide full information. The Attorneys General of Arizona, California, Nevada and Oregon filed a printed brief on September 14, 1994 (the "Brief"), and Chief Judge J. Clifford Wallace of the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit") filed a reply on October 15, 1994 (the "Reply").

At the same meeting, I was asked to prepare this written summary and evaluation of the legal arguments presented, together with a description of the Standing Committee's options.

## II. SUMMARY

The Brief requests that the Standing Committee recommend to the Judicial Conference of the United States (the "Conference") that Local Rule 22 of the Ninth Circuit, governing "death penalty cases," be abrogated or modified as "inconsistent" with "Federal law" pursuant to the Conference's authority under 28 U.S.C. §331, as amended on November 19, 1988. The Brief identifies nine grounds for abrogation or modification, and these are discussed at length below. My recommendation, following suggestions made by many members of this Committee and the Advisory Committee on Appellate Rules, is that this Committee should not set aside Local Rule 22 on

policy grounds or for inconsistencies on which there are genuine doubts and disagreement. Such matters should be resolved in favor of the validity of the local rule where, as in this case, the rule governs a matter of great importance and reflects many months of negotiation, public comment and compromise.

Applying this standard, my conclusion is that seven of the nine challenges in the Brief should be resolved in favor of the rule. Two challenges, however, involve serious difficulties. The provision of Local Rule 22 permitting a single judge to convene an en banc hearing without a vote taken in that case of a majority of the active circuit judges on its face violates 28 U.S.C. § 46(c), and Fed. R. App. P. 35(a). Further, the provision of Local Rule 22 providing for automatic issuance of a certificate of probable cause on first petitions (if the district court has failed to do so), violates 28 U.S.C. §2253 as construed by the Supreme Court in Barefoot v. Estelle, 463 U.S. 880, 892-893 (1983). To find these provisions "consistent" with "Federal law" under 28 U.S.C. §331 would make the term "consistent" useless in the screening of local rules, contrary to the clear mandate of the Congress in amending 28 U.S.C. §331 on November 19, 1988. See also 28 U.S.C. §2071 (c),(1),(2).

This does not mean that the Standing Committee must recommend abrogation or modification of Local Rule 22 to the Judicial Conference. Section 331 states that the Conference "may modify or abrogate any such rule found inconsistent . . . " Both the Brief and the Reply address the question of whether the Committee should recommend abstention to the Conference and permit this controversy to be resolved by litigation. In addition, the Advisory Committee on Appellate Rules discussed this issue at its latest meeting in Washington on October 27, 1994.

The arguments for and against abstention are set out at length below. In the end, I would strongly recommend against unilateral Conference modification of a rule that has such importance. The only viable options are to abrogate the rule and send the matter back to the Ninth Circuit to prepare a new rule, or to abstain and await a challenge through the courts. These two options represent a major policy choice for the Committee and the Conference.

## III. DISCUSSION

### A. PROCEEDINGS AND RECORD

On February 14, 1994, the Ninth Circuit adopted Local Rule 22 pursuant to 28 U.S.C. § 2071 (originally codified as the Act of March 2, 1793, ch. 22, § 7, 1 Stat. 335). A full text of Local Rule 22 is set out in the Appendix of the Brief, pages 1-12.

On March 11, 1994 the Attorney General of Washington wrote to

the Chief Justice of the United States in his capacity as Chairman of the Judicial Conference requesting that "the Judicial Conference of the United States exercise its statutory authority to modify and abrogate . . . Local Rule 22, pursuant to 28 U.S.C. §§ 331, 2071 (c)(2)." On the same day, this request was joined by the Attorneys General of Arizona, California, Nevada, and Oregon, all states within the jurisdiction of the Ninth Circuit with capital punishment.

On March 29, 1994 the Chief Justice answered these letters by referring the matter to the Committee on Rules of Practice and Procedure "for appropriate action." In turn, the Committee's Chair, Judge Alicemarie H. Stotler, referred the matter to the Advisory Committee on Appellate Rules ("Advisory Committee") for guidance. The Advisory Committee had before it both the letter of the Attorneys General of March 11, 1994 and a reply letter for Chief Judge J. Clifford Wallace of the Ninth Circuit, dated April 12, 1994.

The Advisory Committee discussed the matter at length during its April, 1994 meeting in Denver, Colorado. The Advisory Committee took a number of "straw votes," which are recorded in the Minutes of the Advisory Committee, April 25, 26, 1994. Two members, one from the Ninth Circuit and one from the Department of Justice, abstained throughout and two more expressed concern that the "materials presented . . . were not adequate to reach the merit of the issues." (Minutes, 21). As a result, there was never a majority vote of five out of eight for any proposition except for one. The Advisory Committee did vote, 5 to 0 with 3 abstaining, that both "standing votes" and "standing orders" to convene en banc courts and to issue certificates of probable clause must, at the least, always be updated. This was termed the "dead hand" problem. (See Minutes, 17, 20).

The matter was then discussed by the Committee on Rules of Practice and Procedure at its meeting in Washington, D.C. on June 23-24, 1994. In light of the Advisory Committee's concern about inadequate information and the expressed willingness of both the Attorneys General and the Ninth Circuit to supplement the record and provide "a full briefing on each of the issues", the Standing Committee voted to permit the concerned parties a chance to provide additional information and legal argument, and to postpone full consideration of the matter until the Committee's meeting in San Diego on January 12-14, 1995. See Letter of Chief Judge J. Clifford Wallace, March 28, 1994; Letter of the Attorneys General, June 17, 1994; and Letter from Judge Stotler on behalf of the Standing Committee to the Attorneys General and Chief Judge Wallace, August 1, 1994.

Subsequently, the Brief was submitted by the Attorneys General of Arizona, California, Nevada and Oregon on September 14, 1994 and the Reply was submitted by Chief Judge J. Clifford Wallace on

October 15, 1994. In addition, a further discussion occurred at the meeting of the Advisory Committee on Appellate Rules in Washington on October 27, 1994, focusing solely on the issue of whether abstention or abrogation was proper assuming, arguendo, that Local Rule 22 was found to be "inconsistent" with "Federal Law." (Minutes, 11-21). The comments by individual members of the Advisory Committee were evenly divided between the two options. A vote was not requested or taken.

B. CHALLENGES TO LOCAL RULE 22 APPROPRIATE FOR CONFERENCE ACTION

The two arguments raised by the Attorneys General set out below establish an "inconsistency" with "Federal Law" appropriate for Conference review pursuant to 28 U.S.C. § 331. Both involve an issue that the Advisory Committee on Appellate Rules termed the "dead hand" problem, i.e. putting a vote "on record" to automatically grant a certificate of probable cause or to grant review en banc. (See Advisory Committee Minutes. April 25, 26, 1994, pages 17, 19- 20).[1]

1. Rule 22 "Violates the Majority Vote Required to Determine Whether An Appeal Should Be Heard En Banc" Contrary to 28 U.S.C. § 46 (c) and Fed R. App. P. 35 (a). [Brief, 11-24]

Federal law 28 U.S.C. § 46 (c) provides:

> "(c) Cases and controversies shall be heard and determined by a court or panel of not more than three judges (except that the United States Court of Appeals for the Federal Circuit may sit in panels of more than three judges if its rules so provide), unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in regular active service, or such number of judges as may be prescribed in accordance with section 6 of Public Law 95-486(95-486 (92 Stat. 1633) [28 USCS § 41 note], except that any senior circuit judge of the circuit shall be eligible to participate, at his election and upon designation and assignment pursuant to section 294(c) of this title [28 USCS § 294(c)] and the rules of the circuit, as a member of an in banc court reviewing a decision of panel of which such judge was a member."

---

[1] "[T]he local rule is a standing order by a single judge to grant a certificate of probable cause in every first petition in a death penalty case and, as such, the rule is subject to the same "dead hand" problem noted in conjunction with the provision permitting the convening of an en banc court on request of a single judge." Minutes, 19.

Rule 35 (a), Fed. R. App. P. provides:

> "Rule 35. Determination of Causes by the Court In Banc
> (a) When Hearing or Rehearing in Banc Will Be Ordered. A majority of the circuit judges who are in regular active service may order that an appeal or other proceeding be heard or reheard by the court of appeals in banc. Such a hearing or rehearing is not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance."

Both Title 28 and Rule 35 require a majority vote of circuit judges who are in regular active service to obtain *en banc* review in any particular case. The statute and the rule also emphasize the exceptional nature of en banc review. Rule 35 states "such a hearing or rehearing is not favored and ordinarily will not be ordered except (1) when consideration by a full court is necessary to secure or maintain uniformity of its decisions or (2) where the proceeding involves a question of exceptional importance." (Emphasis added.) It is a matter of fact that there are many hundreds of capital cases under review by courts within the Ninth Circuit. There are 222 capital cases now pending on direct appeal to the California Supreme Court alone. (Brief, 5). The mere fact that a case involves the death sentence, without more, does not make it automatically "exceptional." See Barefoot v. Estelle, 463 U.S. 880, 892-893 (1983).

Local Rule 22 provides, in relevant part:

> "(e) En banc Procedures Regarding Certificate of Probable Cause and Stays of Execution.
>
> * * *
>
> (2) Any active judge of the court may request that the en banc court review the panel's order. The request shall be supported by a statement setting forth the requesting judge's reasons why the order should be vacated. Such a request for rehearing en banc shall result in en banc review. The en banc court, if time permits, may set a schedule in which other judges may respond to the points made in the request for en banc review. The clerk shall notify the parties that the matter will receive en banc review, and will identify the members of the en banc court."

These provisions are defended by Chief Judge Wallace because Local Rule 22 itself was adopted by "a majority of the circuit judges in regular active service. See Reply, 3-4. He argues that

"[t]he statute does not require . . . that the ordering of an en banc hearing always be by majority vote taken separately in each individual case." Reply, 3.

The Attorneys General disagree and provide an extensive legislative history of Section 46 (c) and a number of cases to establish the contrary. Brief, 11-25. The Supreme Court itself observed that "the decision whether to hear or rehear a case in banc . . . can only be reached by voting," using the singular. Moody v. Albemarle Paper Co., 417 U.S. 622, 626. More importantly, both Rule 35 (a) and Section 46 (c) use the singular: "an appeal or other proceeding" and "hearing or rehearing." Prior attempts to circumvent Section 46, such as by allowing senior judges to sit without statutory authorization, have been rigorously disapproved by the Supreme Court. See United States v. American-Foreign Steamship Corp., 363 U.S. 685, 689-91 (1960). Voting in advance for a rule is not the same as deciding whether a particular case is worthy of an en banc hearing on its particular facts and law.

2. Rule 22 "Eliminates the Statutory Role of Judicial Discretion On Whether a Certificate of Probable Cause Should Issue," Contrary to 28 U.S.C. § 2253, [Brief, 27-31]

On March 10, 1908, Congress introduced the requirement of "a certificate of probable cause" as a precondition for an appeal to a court of appeals from a final order in a *habeas corpus* proceeding arising from a state process. As the Attorneys General rightly point out, this was to restrict " frivolous *habeas* appeals filed for delay purposes." (Brief, page 28). See the extensive history in Barefoot v. Estelle, 463 U.S. 880, 892 (1983). Federal law 28 U.S.C. §2253 now reads as follows:

> "§ 2253. Appeal
>
> In a *habeas corpus* proceeding before a circuit or district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit where the proceeding is had.
>
> * * * *
>
> An appeal may not be taken to the court of appeals from the final order in a *habeas corpus* proceeding where the detention complained of arises out of process issued by a State court, unless the justice or judge who rendered the order or a circuit justice or judge issues a certificate of probable cause. (June 25, 1948, ch 646, § 1, 62 Stat. 967; May 24, 1949, ch 139, § 113, 63 Stat. 105; Oct. 31, 1951, ch 655, § 52, 65 Stat. 727.)."

The Supreme Court, in Barefoot v. Estelle, supra, emphasized that a certificate of probable cause requires a determination on the merits, and that the petitioner must make a "substantial showing of the denial of [a] federal right." Id., 463 U.S. at 893 (internal quotation and citations omitted). Nor should the certificate issue automatically in a capital case. "In a capital case, the nature of the penalty is a proper consideration in determining whether to issue a certificate of probable cause, but the severity of the penalty does not in itself suffice to warrant the automatic issuing of a certificate." Id., 463 U.S. at 893 (internal quotation and citation omitted.)

Local Rule 22 (3)(c) provides:

> "(c) Stays of Execution and Certificate of Probable Cause. On the first petition, if a certificate of probable cause and a stay of execution have not been entered by the district court or if the district court has issued a stay of execution that will not continue in effect pending the issuance of this court's mandate, upon application of the petitioner a certificate of probable cause will be issued and a stay of execution will be granted by the death penalty panel pending the issuance of its mandate. When the panel affirms a denial or reverses a grant of a first petition, it shall enter an order staying the mandate pursuant to FRAP 41(b)."

On its face, the provision contradicts the provisions of 28 U.S.C. § 2253 and the language of Barefoot v. Estelle set out above. See also Lozada v. Deeds, 498 U.S. 430, 421-32 (1991) and Gacy v. Page, 24 F. 3d 887, 888 (7th Cir. 1994). The Honorable Frank H. Easterbrook, a member of the Standing Committee, stated the issue exactly in a letter to this Reporter:

> "I understand the impetus behind both Local Rule 22-3(c) and Local Rule 22-4(e)(2) to be that a sufficient number of judges on the court, after looking at the facts and law, will vote for CPC, stay, and en banc hearing, that the intermediate steps can be dispensed with, saving time. This may be true as a matter of fact (especially given the fact that a prisoner may seek a CPC and stay from one judge after another until he finds one willing to afford that relief), but it is an argument for a change in the law rather than an argument that the local rule complies with the law as it exists."

Letter of October 4, 1994, page 5.

C. CHALLENGES TO LOCAL RULE 22 NOT APPROPRIATE FOR CONFERENCE ACTION

Federal law 28 U.S.C. §331 states that the Judicial Conference "shall review rules prescribed under section 2071 . . . for consistency with Federal law." (emphasis added). This duty is mandatory, and the verb is "shall". The next sentence states that the Judicial Conference "may modify or abrogate any such rules so reviewed found inconsistent in the course of such a review." This is a discretionary power, and the verb is "may."

The different wording in the statute between the "review" function of the Judicial Conference and its abrogation powers has led to different standards in "reviewing" local rules for suggested improvements from what would be appropriate for actual abrogation. For example, to meet its mandatory statutory obligation to review rules prescribed under 28 U.S.C. §2071, the Judicial Conference, through the Standing Committee, established the Local Rules Project in 1987. This project has studied all civil local rules, and is now studying all criminal local rules. Where local rules "arguably" undercut uniform federal rules, or a federal statute, or where such rules just repeat federal law unnecessarily, the Local Rules Project has recommended reconsideration by district courts or circuit judicial councils under 26 U.S.C. § 2071(c)(1).[2]

But unilateral abrogation or modification of a rule by the Judicial Conference under 28 U.S.C. § 331 is a different matter. This is particularly true in a case, such as this, where the challenged rule was the result of much negotiation and is of great importance.[3] Here the standard should be abrogation or modification only when the rule's "inconsistency" with a "Federal law" is direct and inescapable.

Applying this standard, the following seven challenges by the Attorneys General do not warrant action by the Judicial Conference.

1. Local Rule 22 "Will Likely Result in More Delay and Litigation." [Brief, 4-5]

The Attorneys General Commence their arguments by noting the "high number of capital cases which will be subject to Ninth Circuit Local Rule 22" and their concern that the rule "may adversely impact the judicial process." They note the potential for "more delay and litigation," particularly due to the likelihood of more en banc reviews combined with the automatic issuance of

---

[2] See Memorandum, Local Rules Project, January 3, 1992, circulated March 30, 1994 to the Standing Committee.

[3] See Minutes, Advisory Committee on Appellate Rules, October 27, 1994.

certificates of probable cause on a first habeas petition. "If the certificate of probable cause must be issued on a first habeas petition (after a district court judge has denied it) why should so many appellate resources be expended to consider potentially nonmeritorious appeals or issues?" *Brief*, 5.

As noted before, Judicial Conference review under 28 U.S.C. §331 is limited to "consistency with Federal law," not issues of policy or empirical measures of efficiency. If the Judicial Conference believes that, as a policy matter, procedures in capital cases could be better addressed by new and different uniform federal rules, it can always initiate reforms through the Rules Enabling Act procedures of 28 U.S.C. §2072-2074, commencing with the Advisory Committee on Appellate Rules. As Chief Judge Wallace notes in his Reply, there was ample opportunity to consider policy arguments during the Ninth Circuit's own rule making process and "many, if not all, of the points raised by the Attorneys General were addressed." Reply, pages 1-2.

2. Local Rule 22 "Constitutes 'An Exercise of Legislative Power' and Therefore Raises Separation of Power Questions." [Brief, 5-7.]

The Attorneys General argue that Local Rule 22 "embodies policy choices which only Congress can make." But Local Rule 22 was made pursuant to a Congressionally enacted scheme, 28 U.S.C. §2071, which provides that "all courts established by Act of Congress may ... prescribe rules for the conduct of their business" so long as "such rules shall be consistent with Acts of Congress and rules of practice and procedural prescribed under section 2072 of this title." 28 U.S.C. §2071. Local Rule 22 was made in a manner consistent with Rule 47 of the Federal Rules of Appellate Procedure, which was enacted in turn pursuant to the Rules Enabling Act, 28 U.S.C. §2072, §2073 and §2074. The mere fact that a procedural rule affects substance does not make it invalid if it is appropriately enacted under a Congressional mandate. See Walker v. Armco Steel Corp., 446 U.S. 740, 752-53 (1980); Hanna v. Plumer, 380 U.S. 460, 472-73 (1965). Cf. I.N.S. v. Chadha, 462 U.S. 919, 952 (1983). To the extent Local Rule 22 conflicts with existing federal statutes or uniform federal rules adopted under 28 U.S.C. §2072, it violates U.S.C. §2071 and/or Fed. R App. p. 47, and the Judicial Conference may act under 28 U.S.C. §331. But this is all done pursuant to Act of Congress. There is no "separation of powers" question as a distinct issue.

3. Local Rule 22 "Permits Two Levels of En Banc Review Contrary to Federal Law." [Brief, 8-12]

The Attorneys General argue that Local Rule 22 violates 28 U.S.C. §46 (c) and Fed. R. App. P. 35 because it "permits the possibility of two levels of en banc review: a 'limited' en banc review consisting of 11 judges and a 'full' en banc review

consisting of all 28 active judges."

28 U.S.C. §46(c) provides, in relevant part, as follows:

> "Cases and controversies shall be heard and determined by a court or panel of not more than three judges... unless a hearing or rehearing before the court in banc is ordered by a majority of circuit judges... A court in banc shall consist of all circuit judges in regular active service, or such number of judges as may be prescribed in accordance with section 6 of Public Law 95-486 (82 Stat. 1633)"...

Public Law 95-482, §6, enacted in 1978, states in relevant part:

> "Any court of appeals having more than 15 active judges ... may perform its en banc function by such number of members of its en banc court as may be prescribed by rule in the court of appeals."

The Attorneys General argue that the language and legislative history of these statutes "reveal that the Congress has authorized only one opportunity for en banc review..." (Brief, 8). The primary argument for this position is the use of the singular "a hearing or rehearing" in 28 U.S.C. §46(c) and in Fed.R.App. P. 35. (Rule 35 reads, in relevant part, that "a majority of the circuit judges ... may order that an appeal or other proceeding be heard or reheard by the court of appeals in banc. Such a hearing or rehearing is not favored...")

Local Rule 22-4(3)(4) provides that:

> "(4) Any active judge may request a rehearing of the decision of the en banc court by all the actives judges of the court. If no stay is in effect, such judge may issue a temporary stay. The 11-judge en banc court by majority vote may vacate such a temporary stay, and there will be no stay in effect unless a stay is granted by the full court."

While this provision does, indeed, permit two levels of "en banc" review, there is nothing in the "plain language" of 28 U.S.C. §46(c), Pub.L.No. 95-485, §6, 92 Stat. 1633 (1973), or Fed.R.App. 35 that prohibits this device. The purpose of en banc review is to maintain uniformity within the circuit while allowing the three judge panel to efficiently hear the vast majority of cases. U.S. v. American-Foreign S.S. Corp., 363 U.S. 685, 689-90 (1960). Federal law 28 U.S.C. §46(c) "is simply a grant of power to order hearings or rehearings en banc . . .; [it] does not compel that court to adopt any particular procedure governing the exercise of trust power." Western Pacific Railroad Corp. v. Western Pacific

Railroad Co., 345 U.S. 247, 207 (1953).[4]

Nor does the legislative history provided by the Attorneys General succeed in narrowing the words in the statutes as enacted. Judge Easterbrook correctly observes that:

> "The brief not only chooses the least reliable form of history -- statements by individual legislators -- but also misinterprets it. Statements of the form "we have not authorized more than one en banc court" deal with the question whether there may be administrative divisions: for example, one group of judges hearing cases from Mississippi, Texas, and Louisiana, and a second group hearing cases from Florida, Alabama, and Georgia. Congress was to authorize administrative divisions for the Fifth Circuit in 1980, preceding its split in 1982. The Ninth Circuit has not constituted internal divisions.

---

[4] Judge Easterbrook has advanced a second argument. For example, it could be argued that sequential en banc hearings -- one by the 11-judge panel and the second by a full complement of active judges violates 28 U.S.C. §46(c) because the 11-judge panel is a second "panel" in violation of the clause that "cases and controversies shall be heard by a court or panel of not more than three judges." 28 U.S.C. §46(c). Easterbrook observes:

> "Although the argument is persuasive if it ends at this point, another provision is pertinent. Even after an en banc court has filed its opinion and entered its judgment, the losing party is entitled to file a petition for rehearing. Fed. R. Ap. P. 40(a) gives the loser 14 days measured from the entry of judgment, an event that occurs after the 11-judge en banc sits. For the 11-judge limited en banc does not "review" or "rehear" the 3-judge panel's decision. That decision is vacated; the 11-judge court hears a direct appeal from the decision of the district court. When it is done, the loser may seek rehearing. At this point, the court of appeals is entitled under Pub. L. 95-482 to decide by local rule the number of judges who will act on the petition for rehearing. I do not see any textual obstacle to prescribing that 11 judges will act on the initial en banc decision but that all 28 will sit if rehearing is granted. So long as rehearing of an en banc decision is allowed, the possibility of three decisions by the court of appeals (one by a panel, two by an en banc court) is endemic. How many judges sit on each of the en banc stages is for the court to decide by local rule. Thus I think that the Ninth Circuit's rule is consistent with law in this respect." (Letter to Reporter, October 4, 1994)

> To say that there may be only one "court" is not to say how many times this court may revisit a given case, or how many judges sit on that court. (Letter to Reporter October 4, 1994)

In addition, this whole issue seems to be of little significance in practice. As Chief Judge Wallace notes "since the adoption of Ninth Circuit Rule 35-3 in 1982 [providing 11-judge en banc review] only one judge request for full-court review has been made, and that was withdrawn. A full-court review has never been approved." Reply, 3. All in all, this challenge to Local Rule 22 does not establish a clear cut violation of statutory language or policy, and appears to be of no practical importance.

4. Local Rule 22 Authorizes Stays of Execution in Non-Habeas Cases "Contrary to The Anti-Injunction Act" [28 U.S.C. §2283]. [Brief. 25-27]

The Attorneys General argue that Local Rule 22 violates federal law because it "permits the use of established habeas corpus stays and procedures for non-habeas corpus proceedings." Brief, 25. They refer specifically to Local Rule 22-1 which states:

> "The following rules apply to all proceedings within the jurisdiction of this court in: ... (b) any related civil proceedings challenging the conviction or sentence of death, or the time, place, or manner of execution, as being in violation of federal law, including proceedings filed by the prisoner or by someone else on his or her behalf."

In general, federal court stays of state court proceedings are prohibited by the Anti-Injunction Act, 28 U.S.C. §2283, which provides:

> "A court of the United States may not grant an injunction to stay proceedings in a state court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

The Attorneys General acknowledge that 28 U.S.C. §2251 authorize federal stays in habeas corpus proceedings, but assert that Local Rule 22 violates the Anti-Injunction Act to the extent it applies to "any related civil proceedings." (Brief, 25).

Chief Judge Wallace replies that the purpose of Local Rule 22-1(6) is not to increase authorized stays, but to prevent extension of stays.

> "Our intent in referring related civil proceedings to the

> death penalty panel is to prevent obstructive delays by making sure that civil attacks on pending executions will be handled by the panel already intimately familiar with the case. This change in our rules came about as a result of the Harris litigation, in which a district judge issued a stay of execution in a related civil class action proceeding. Normal review of that stay would have taken longer than it did under the death penalty rules. The three-judge panel's previous experience and the en banc court's preparedness ensure fairness both to the litigants and to the state."
>
> (Reply, 5)

The Anti-Injunction Act, 28 U.S.C. §2283, refers only to stays of "proceedings in a state court." It could be argued that a stay for execution does not stay a "court proceeding," but enjoins executive action.[5] A better argument is that 42 U.S.C. § 1983, the Civil Rights Act, provides a separate federal statutory justification for stays against a state judicial process. See Mitchum v. Foster, 407 U.S. 225, 242-43 (1972). Indeed, it was a civil rights action which was brought at the last minute in the Harris case. See Gomez v. United States District Court for the Northern Distract of California, 503 U.S. ___, 112 S.Ct. 1652, 1653 (1992). Defendants' lawyers attempt to "play off" civil rights actions, pursuant to 42 U.S.C. § 1983, against habeas actions, pursuant to 28 U.S.C. §2254, by arguing that §2254 deals only with "custody" and that execution is not "custody." Thus a civil rights action under 42 U.S.C. §1983 is appropriate.[6]

---

[5] This distinction is only "arguable". With regard to the predecessor of the current Anti-Injunction Statute, the Supreme Court held that: "It applies alike to action by the court and by its ministerial officers; applies not only to an execution issued on a judgment, but to any proceeding supplemental or ancillary taken with a view to making the suit or judgment effective." Hill v. Martin, 296 U.S. 393, 403 (1935). Further, in more recent cases, circuit courts have held that it applies to executions of judgments against defendants. See, e.g., Jos. L. Muscarelle, Inc. v. Central Iron Mfg. Co., C.A.3 (N.J.) 1964, 328 F.2d 791 (injunction against execution or any other proceeding to enforce state judgment is forbidden as well as one against prosecution of state litigation to obtain judgment); Golden Dawn Shops, Inc. v. Department of Housing and Urban Development, D.C.Pa.1971, 333 F.Supp. 874 (§2283 applies to enforcement of state court judgments).

[6] See e.g., Preiser v. Rodriguez, 411 U.S. 475 (1973) (challenge to fact or duration of confinement wrongly brought under the Civil Rights Act and should have been brought under § 2254); Fielding v. LeFevre, 548 F.2d 1102 (1977) (challenge to sentence

Under these conditions, it is reasonable to assign both 28 U.S.C. § 2254 and 42 U.S.C. §1983 actions to the same panel operating under the same rule. Where the conflict with the plain wording of 28 U.S.C. §2283 is arguable, the Judicial Conference should not interfere.

5. Local Rule 22 "Exceeds the Authority Of A Single Circuit Judge to Stay A State Court Proceeding" and thus "Violates the Anti-Injunction Act." [Brief, 34-38].

The Attorneys General also argue that Local Rule 22 violates the Anti-Injunction Act (28 U.S.C. §2283) because "the stay authority under the local rule exceeds the authority to a single circuit judge to act in habeas cases considered on appeal" and there is no other "statutory authority ... to justify this unprecedented, broad power for single circuit judges to stay state court proceedings." Brief, 34.

Local Rule 22-1(b), 22-4(d)(5), 22-4(e)(3) and 22-4(e)(4) permits single judges who are not on the death penalty panel or special en banc panel to issue stays under certain conditions. The Attorneys General argue that these judges are not "a justice or judge before whom a habeas corpus proceeding is pending" under 28 U.S.C. §2251. Thus, there is a violation of the Anti-Injunction Act, 28 U.S.C. §2283.

Chief Judge Wallace disagrees:

> "Contrary to the suggestion of the Attorneys General, Ninth Circuit Rule 22 does not grant substantial authority for single-judge stays during litigation on subsequent petitions. Instead, our rules make the need for a single-judge temporary stay to preserve the status quo unnecessary except in the extraordinary situation where the three-judge panel and the already selected en banc court are unavailable, or have not yet ruled, and execution is imminent. The judge issuing such a temporary stay in these rare instances is one entitled to vote on the question of full-court review of the habeas matter pending before the court; he or she is therefore a judge "before whom a habeas corpus proceeding is pending" within the meaning of 28 U.S.C. §2251. The death penalty panel and the en banc court retain full control over the

---

based on potential abuse in prison wrongly brought under §2254 and should have been brought under Civil Rights Act). This incongruity with the statutory law provides an opportunity for prisoners and their attorneys to bring actions under the broader equitable standards of the Civil Rights Act. 42 U.S.C. § 1983; See Mitchum v. Foster, 407 U.S. 225, 242 (1972).

case and have the authority to vacate the temporary stay by majority vote."

(Reply, 7)

Assuming that 28 U.S. §2283 applies to stays of executions, as well as "proceedings in a state court," the Attorneys General still fail to establish a clear violation of federal law. As discussed before, 28 U.S.C. §2251 does constitute an exception to the Anti-Injunction Act. See Ex Parte Royall, 117 U.S. 241, 248-49 (1886); Mitchum v. Foster, 407 U.S. 225, 234-35 (1972). The relevant section of 28 U.S.C. §2251 reads as follows:

> "A justice or judge of the United States before whom a habeas corpus proceeding is pending, may, before final judgment or after final judgment of discharge, or pending appeal, stay any proceeding against the person detained in any State court or by or under the authority of any State for any matter involved in the habeas corpus proceeding."

It certainly can be argued, as Chief Judge Wallace does, that "[t]he Judge issuing such a temporary stay in these rare instances [under Local Rule 22-4(d)(5)] is one entitled to vote on the question of full-court review in the habeas matter pending before the court..." [Reply, 7]. "[H]e or she is therefore a judge 'before whom a habeas corpus proceeding is pending' within the meaning of 28 U.S.C. §2251." [Reply, 7]. Thus there would be sufficient "express authority" under 28 U.S.C. §2251 to provide an exception to the Anti-Injunction Act. See Alexander v. United States, 173 F.2d 865, 866 (9th Cir. 1949); Demosthenes v. Baal, 495 U.S. 731, 737 (1990).

Furthermore, the Supreme Court has recently expanded the power of a single district court judge to issue a stay by holding that a petition for habeas corpus is pending as soon as the prisoner petitions for counsel. The Court also noted that this power was not in conflict with the Anti-Injunction Act (28 U.S.C. §2283). See McFarland v. Scott, 114 S.Ct. 2568, 2573 (1994). It is also worth noting that Local Rule 22 limits single judge stays to specific situations, such as when an application for a certificate of probable cause is presented to a judge not on the panel or when execution is imminent and the en banc panel has not yet been selected. Local Rule 22-4(d)(5), (e)(3). Where broader power is given in 22-4(e)(4), the stay may be vacated by 11-judge en banc court. Given McFarland ruling and the limited nature of these Local Rule 22 provisions, this is not an "inconsistency" with "Federal law" worthy of abrogation under 28 U.S.C.[7]

---

[7] This all assumes that the single-judge stays are not authorized by Fed.R.App.P.8. While this Reporter agrees with the Attorneys General's argument that these stays exceed Rule 8

6. Rule 22 "Eliminates Judicial Discretion Concerning the Issuance of a Stay of the Mandate Contrary to Fed. R. App. P. 41 (b)" [Brief 31-33].

Fed. R. App. P. Rule 41 (b) states, in relevant part:

> "(b) *Stay of mandate pending application for certiorari.* — A stay of the mandate pending application to the Supreme Court for a writ of certiorari may be granted upon motion, reasonable notice of which shall be given to all parties. The stay shall not exceed 30 days unless the period is extended for cause shown. If during the period of the stay there is filed with the clerk of the court of appeals a notice from the clerk of the Supreme Court that the party who has obtained the stay has filed a petition for the writ in that court, the stay shall continue until final disposition by the Supreme Court." (emphasis added)

The Attorneys Generals' argue that because Rule 41(b) uses the word "may," a local rule must not remove that discretion in a particular class of cases. Local Rule 22-3(c) requires that "when the [death penalty] panel affirms a denial or reverses a grant of a first petition, it shall enter an order staying the mandate pursuant to FRAP 41(b.)." (emphasis added). Chief Judge Wallace explains, "[O]ur rule requiring an automatic stay of the mandate in all first petitions ensures that the court will have adequate time to complete its review process and to allow the parties to petition the Supreme Court for review." (Reply, page 7)

The Attorneys Generals' challenge to the automatic stay is similar to their challenge to the automatic issuance of a certificate of probable cause. See Section B(2) supra. But this is not such a clear cut inconsistency. It can be argued that Local Rule 22 simply fills in a gap in Rule 41(b) by specifying how discretion will be exercised in certain cases. We do not have in this case a clear legislative history to the contrary, unlike the legislative history that underlies the 28 U.S.C. §2253 "certificate of probable cause" requirement. Nor is there a direct conflict with Supreme Court language, such as the conflict with Barefoot v. Estelle, supra, as to automatic certificates of probable cause. Indeed, there is some authority for the proposition that stays should be issued in all capital areas subject to direct review by the Supreme Court. See McDonald v. Missouri, 464 U.S. 1306, 1307 (1984). In all events, this is not as clear an inconsistency as

---

(Brief, 34, n.33), here is another "arguable basis" for the relevant provision in Local Rule 22. As for the argument that single judge stays violate the Anti-Injunction Act to the extent that they concern non-habeas "related" civil proceedings, see the discussion at section 4, supra.

those described in Section B, supra.

7. Local Rule 22 "Countenances Ex Parte Communications Contrary to Federal Practice" [Brief, 38-40]

The Attorneys General argue that Local Rule 22-4(d)(5) "countenances ex parte communications . . . when an execution is 'imminent.'" They maintain that "[q]uite simply, if a stay is to be issued, the State should first have an opportunity to be heard on the matter." Brief, 38-39. While they argue that this is "contrary to federal standards," no direct federal statutory or rule conflicts are cited. Brief, 39-40.

Chief Judge Wallace replies by emphasizing that all motions for stays presented to a single judge must be referred to the special death penalty panel except when "execution is imminent" and the panel has not yet made a decision. "Indeed, the rule was drafted to address the concerns that arose in the Harris litigation, by making it clear that such [ex parte] communications should not take place, and that the matter will be referred to the assigned panel if counsel attempts to do so." [Reply, 7-8][8]

Local Rule 22-4(d)(5) provides as follows:

> "(5) If an application for a certificate of probable cause or a motion for a stay of execution is presented to a judge of this court not on the panel rather than the Clerk of Court of Appeals, that judge shall refer the application or the motion to the clerk for determination by the panel, unless the execution is imminent. If an execution is imminent and the panel has not yet determined whether to grant a stay pending final disposition of the appeal, any judge of the court may issue a temporary stay of a scheduled execution. Any judge or judges who issue a temporary stay of execution shall immediately notify the clerk and the panel of such action. By majority vote the panel may vacate such a stay of execution."

---

[8] Chief Judge Wallace further notes:

> "Since revising the rules to incorporate related civil proceedings, our death penalty cases have proceeded smoothly. Review of the histories of all of the capital matters before this court since adoption of the rules indicates the efficacy of the rules. In no instance has a party convinced an off-panel judge to stay an execution. See Clark v. Lewis and Wells v. Arave, supra; see also Brewer v. Lewis, 989 F.2d 1021 (9th Cir. 1993); Mason v. Vasquez, 5 F.3d 1220 (9th Cir. 1993); Campbell v. Wood, No. 94-99004 (unpublished order, May 26, 1994)." Reply, 8.

This provision was developed in the context of the Ninth Circuit's existing Local Rule 27-3, which reads as follows.

**"Rule 27-3. Emergency Motions**

If a movant certifies that to avoid irreparable harm relief is needed in less than 21 days, the motion shall be governed by the following requirements:

(1) before filing the motion, the movant shall make every practicable effort to notify the Clerk and opposing counsel, and to serve the motion, at the earliest possible time.

(2) the motion shall be filed with the Clerk in San Francisco, unless counsel for the movant certifies that relief is required on the day the motion is filed or the next day, and that counsel has not been dilatory in seeking it. In such case, the motion may be filed in a divisional clerk's office or, if there is no office in the district, with an individual circuit judge. Counsel must also transmit a copy of the motion, by overnight mail delivery, to the Clerk in San Francisco.

If it appears that same day or next day relief is not necessary, or if it appears in a case not involving imminent execution of a sentence of death that counsel has been dilatory in requesting relief, the moving party will be directed to file the motion in San Francisco.

(3) Any motion under this Rule shall have a cover page bearing the legend "Emergency Motion Under Circuit Rule 27-3" and the caption of the case. A certificate of counsel for the movant, entitled "Circuit Rule 27-3 Certificate," shall follow the cover page and shall contain:

(i) The telephone numbers and office addresses of the attorneys for the parties;

(ii) Facts showing the existence and nature of the claimed emergency; and

(iii) When and how counsel for the other parties were notified and whether they have been served with the motion; or, of not notified and served, why that was not done.

(4) If the relief sought in the motion was available in the district court, the motion shall state whether all grounds advanced in support thereof in this court were submitted to the district court, and if not, why the motion should not be remanded or denied."

Both Local Rule 22-4(d)(5) and Local Rule 27-3 provide for notification to opposing counsel "at the earliest possible time." Local Rule 27-3(i), is explicitly incorporated by Local rule 22-4(d)(2) ("Counsel shall adhere to Circuit Rule 27-3 regarding

emergency motion, except to the extent it may be inconsistent with these rules.") Handling emergency matters ex parte, with notification to opposing counsel and service of papers filed as soon as possible, is very different from confidential communications between one party and the court. The former is a long standing practice of most courts, and rules like Local Rule 27-3 are quite common. Under local Rule 22, which incorporates Local Rule 27-3 standards of notice and service at Local Rule 22-4(d)(2), ex parte communications are actually disfavored. A judge not on the panel may only stay an execution when it is imminent and when the panel has not decided. Such a judge must notify the panel and clerk immediately, and the stay may be vacated by a majority vote of the panel. Local Rule 22-4(d)(5). There is an obligation to make "every practicable effort to notify the clerk of opposing counsel, and to serve the motion, at the earliest possible time." Local Rule 22-4(d)(2). To the extent that ex parte communications are a by-product of the emergency motion procedure in Local Rule 22, they are unavoidable.

D. JUDICIAL CONFERENCE OPTIONS PURSUANT TO 28 U.S.C. § 331 (AS AMENDED NOV. 19, 1988).

The Attorneys General urge that the Judicial Conference "modify or abrogate" Local Rule 22 pursuant to its statutory powers under 28 U.S.C. §331 as amended by Congress on November 19, 1988. By letter of March 29, 1994, the Chief Justice of the United States referred the issue to this Standing Committee "for appropriate action." This "appropriate action" should be in the form of a recommendation to the Judicial Conference.

There are four possible recommendations:

1. that Local Rule 22 is not "inconsistent with Federal Law" within the meaning of 28 U.S.C. §331,
2. that Local Rule 22 is "inconsistent" and should be "modified,"
3. that Local Rule 22 is "inconsistent" and should be "abrogated";
4. that Local Rule 22 is "inconsistent," but the Judicial Conference should abstain and have the matter resolved by litigation.

As indicated before, it is this Reporter's opinion that Local Rule 22 is "inconsistent" with Federal Law in two specific ways that would justify Conference action under 28 U.S.C. §331: 1) it violates the majority vote requirement to determine whether an appeal should be held en banc as established by 28 U.S.C. §46(c) and Fed. R. App. P. 35(a); and 2) it requires an automatic issuance of a certificate of probable cause contrary to 28 U.S.C. §2253. See the extensive discussion at Section B, supra. The Standing Committee may also find other "inconsistencies." In particular, three members of the Advisory Committee on Appellate Rules

disagreed with this Reporter's analysis above and found that Local Rule 22 also violated 28 U.S.C. §41(c) and Fed.R.App. P. 35 because it permits the possibility of two levels of en banc review. See Section C (3), supra; Minutes, Advisory Committe on Appellate Rules, April 25 & 26, 1994, pp. 14-16. Given the Judicial Conference's mandatory duty to review local rules under 28 U.S.C. §331 and the analogous statutory duties of the judicial councils of the circuits, it would be unfortunate if the words "inconsistent with Federal law" became so weak a standard as to be meaningless. See 28 U.S.C. §2071(c)(1) and (c)(2).

Once an "inconsistency" is found, the Standing Committee may recommend modifying or abrogating the Rule, as requested by the Attorneys General. There is a certain appeal to "modification" if the "inconsistency" found is relatively narrow. For example, Judge Easterbrook has been most helpful in making practical suggestion about how the Ninth Circuit could cure the inconsistencies identified by this Reporter. In his words:

> "There are ways consistent with the statute and rules to accommodate the considerations that led the Ninth Circuit to adopt the questionable devices in Local Rule 22. Without trying to offer a comprehensive catalog of options, I suggest two obvious ones.
>
> First, the Ninth Circuit could assign all applications for CPC's [Certificate of Probable Cause] and stays to a standing panel for immediate review. If, as the court's adoption of Local Rule 22-3(c) implies, all or almost all of the judges are likely to issue CPCs and stays, then this procedure will have the same practical effect as Local Rule 22-(c), in terms of both speed and outcome, without contradicting any statutory or rule.
>
> Similarly, the Ninth Circuit could expedite the decision whether to hear a case en banc by adopting a negative option device. Any judge could call for a vote on a suggestion of rehearing en banc. Unless within 48 hours a majority of the court registered votes against rehearing, the case would be set for a limited en banc. I do not think that the negative-option device is inconsistent with judicial duty. The Supreme Court uses it to decide which cases will be heard (unless a justice puts a case on the discuss list, certiorari is denied automatically); every court of appeals uses it to initiate the en banc process (unless an active judge requests a vote, the petition is denied); many circuits use it to count votes on rehearing (usually with a positive-option presumption: unless a judge votes for rehearing en banc within X days, he is treated as opposed). On receiving a request for rehearing en banc,

a judge must examine the papers and decide. The negative-option device allows that decision to be communicated by silence, but it is a decision nonetheless. The deadline may be made as short as the court of appeals thinks prudent."

Letter to Reporter, October 4, 1994.

But while it may be useful to communicate these suggestions to the Ninth Circuit, neither Judge Easterbrook nor this Reporter would suggest that the Judicial Conference make such modifications unilaterally. At the last meeting of the Advisory Committee on Appellate Rules on October 27-29, 1994, it was emphasized that Local Rule 22 was the result of long and complex discussion within the Ninth Circuit. This has been confirmed by Chief Judge Wallace. Reply, 1-2, 8-9. If only one aspect of this carefully worked out arrangement is set aside, the entire rule should be returned to the Ninth Circuit for redrafting.

The Attorneys General raise three arguments as to why this Standing Committee should recommend that the Judicial Conference exercise its authority to abrogate Local Rule 22, and not abstain. First, they argue the Conference is a "new forum for review of local rules" deliberately created by Congress with this type of case in mind. Brief, 2-3. If the Conference does not exercise the power granted by Congress, it will frustrate Congress' legitimate objectives. Second, "[e]leventh hour litigation has regrettably become too common in capital cases, during which a local rule challenge would likely arise." Brief, 3. Third, "[t]his detached process also avoids the circumstances where a federal court must be required to rule on the legal validity of its own local rules." Brief, 3.

There are also strong arguments the other way. Legally, the Standing Committee could recommend that the Judicial Conference abstain from either modification or abrogation. Federal law 28 U.S.C. §331 requires that the Judicial Conference review local rules prescribed under 28 U.S.C. §2071 for "consistency with Federal Law." The words used are "shall review" (emphasis added). But as to modification or abrogation, the word used is "may". "The Judicial Conference may modify or abrogate any such rule so reviewed found inconsistent in the course of such a review." 28 U.S.C. §2071 (emphasis added).

Abstention was urged by several members of the Advisory Committee on Appellate rules at its latest meeting on October 27-29, 1994, in Washington. It was pointed out that Local Rule 22 was not a "typical local rule," and that the Ninth Circuit's problem with the death sentence was "simply extraordinary." The practical problems are unusual because of the large size of the court, and the political issues involved are particularly inflammatory. Chief Judge Wallace describes these problems in his Reply, 1-2, 8-9. There have been many other accounts. See, for example, Hon. John

T. Noonan, Sr., "Horses of the Night: Harris v. Vasquez," 45 Stanford Law Review 1111 (1993); Hon. William C. Canby, "Conscience and Consistency: Foreword to Breaking the Banc: The Common-Law Process in the Large Appellate Court," ("[T]he Ninth Circuit has become a vast judicial experiment, and it is one that simply must be made to work...") 23 Ariz. St. L. J. 913, 914 (1991) Arthur D. Hellman, "Breaking the Banc: The Common-Law Process in the Large Appellate Court," 23 Ariz. St. L.J. 915 (1991); Evan Caminker & Erwin Chemerinsky, "The Lawless Execution of Robert Alton Harris," 102 Yale L. J. 225 (1992); and Steven G. Calabresi & Gary Lawson, "Equity and Hierarchy: Reflections of the Harris Execution," 102 Yale L. J. 255 (1992).

In addition, several members of the Advisory Committee on Appellate Rules and Judge Patrick E. Higginbotham, Chairman of the Advisory Committee on Civil Rules, are of the strong opinion that resolution by abstention would be preferable. Capital cases under Local Rule 22 are frequent. They point out this is a particularly controversial case better suited to litigation in a regular adjudicatory setting. It has also been argued that the ultimate decision should be made by the Supreme Court itself in light of its holdings in Barefoot v. Estelle, 403 U.S. 880 (1983), Vasquez v. Harris, 503 U.S. ___, 112 S. Ct. 1713 (1992); In re Blodgett 502 U.S. ___, 112 S. Ct. 674 (1992); Gomez v. United States District Court for the Northern District of California 503 U.S. ___, 112 S.Ct. 1652 (1992); and McFarland v. Scott, 114 S.Ct. 2568 (1994). Finally, it is obvious that the interests of petitioners have not yet been represented in this debate.

Nevertheless, the case for abstention remains controversial. At their October 27-29, 1994 meeting in Washington, an equal number of members of the Advisory Committee on Appellate Rules expressed the strong view that abrogation is required for the reasons expressed by the Attorneys General in their Brief. This is a difficult "judgment call" for the Standing Committee and the Judicial Conference.

Item 6A

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

SAM C. POINTER, JR.
CIVIL RULES

WILLIAM TERRELL HODGES
CRIMINAL RULES

EDWARD LEAVY
BANKRUPTCY RULES

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 8, 1994

The Advisory Committee on Appellate Rules is not presenting any items that require Standing Committee action. Part II of this report summarizes current committee projects. More detailed information about committee activity may be found in the draft minutes of the Advisory Committee's October meeting and in the committee's docket, both of which are attached to this report.

## I. ACTION ITEMS

The Advisory Committee on Appellate Rules is not presenting any items that require Standing Committee action. At its October meeting the Advisory Committee approved amendments to four rules. In light of the numerous changes to the appellate rules currently in the pipeline, however, the Advisory Committee decided that it would be undesirable to publish any additional amendments at this time. Rather than submit the proposed changes to the Standing Committee at this meeting, the Advisory Committee decided to submit the rules to the Style Subcommittee for its review. The Advisory Committee will assess the Style Subcommittee's recommendations at the Advisory Committee's spring meeting and submit the rules to the Standing Committee at some later time.

## II. INFORMATION ITEMS

### A. Three day extension following service by mail

Fed. R. App. P. 26(c) says that when a party is required or permitted to act within a prescribed time after service of a paper upon the party, three days are added to the prescribed period if service was by mail. A similar provision is contained in Civil Rule 6(e), Criminal Rule 45(e), and Bankruptcy Rule 9006(f). At the June 1994 Standing Committee meeting a member of the Committee suggested that all these rules be amended to change "three days" to "five days" because there are frequent delays in mail delivery. The Standing Committee asked each of the advisory committees to consider the suggestion and to report its views at the January 1995 Standing Committee meeting.

After a brief discussion the Advisory Committee on Appellate Rules voted to recommend no change. By the time of the FRAP Committee's late October meeting all of the other advisory committees had reached a similar conclusion and, as a consequence, the discussion was very brief. The fact that a court of appeals has the ability to enlarge, for good cause, all time periods effected by Rule 26(c) probably was, however, the determining factor.

### B. Approved Rule Changes

As indicated above, amendments to four rules were approved by the Advisory Committee at its October meeting. The Advisory Committee is not requesting action on any of these proposals. A summary of the changes is included for informational purposes.

#### 1. Rule 26.1

For purposes of assisting a judge in determining whether he or she should recuse himself or herself from a case, Rule 26.1 currently requires a non-governmental corporate party to disclose affiliated corporations. Specifically the rule requires the party to name "all parent companies, subsidiaries (except wholly-owned subsidiaries), and affiliates that have issued shares to the public."

The Committee determined that disclosure of subsidiaries or brother/sister corporations is not necessary. There is only a remote possibility that a judgment for or against a corporate party would affect a shareholder of a subsidiary or a brother/sister corporation in a way that would bias the shareholder. Therefore, a judge's ownership of an interest in a subsidiary or brother/sister corporation should not disqualify the judge

from hearing the case.

The Committee will recommend that Rule 26.1 require disclosure only of a parent corporation and any stockholders that are publicly held companies owning 10% or more of the stock of the party.

2. Rule 29

Rule 29 governs amicus briefs. The Local Rules Project provided the impetus for amendment of this rule. The proposed amendments do the following:

a. require that the brief accompany a motion for leave to file the brief;
b. specify which of the items required by Rule 28 should be included in an amicus brief;
c. establish a page limit for an amicus brief; and
d. prohibit the filing of a reply brief by an amicus.

3. Rule 35

Rule 35 governs in banc proceedings. Several changes have been approved.

a. Rule 35 currently lists two criteria that can lead to the grant of an in banc hearing. They are: 1) consideration by the full court is needed to secure or maintain uniformity of the court's decisions with those of the United States Supreme Court or with the circuit's own decisions; 2) the case involves a "question of exceptional importance." The amendment identifies the existence of an intercircuit conflict as a factor that may lead a court to conclude that the case involves a question of "exceptional importance." Specifically, if the panel decision creates a conflict or maintains a conflict created only by a decision of the same circuit, the case may involve a question of "exceptional importance."
b. Rule 35 currently contains no length limits. The amendments provide that a petition for a hearing or rehearing in banc may not exceed 15 pages.
c. A petition for in banc consideration must begin with a statement concisely demonstrating that the case meets the criteria for in banc consideration.
d. Language is added to make it clear that a senior judge or a judge sitting by designation may not call for a vote on a request for rehearing in banc unless such a judge was a

member of the panel whose decision is sought to be reviewed.

4. Rule 41

Rule 41 governs the issuance of a mandate and the staying of a mandate. Several amendments have been approved.

a. Rule 41 is currently silent about when a mandate is effective. At the request of the Solicitor General the Advisory Committee has approved an amendment stating that a mandate is effective when it is issued.

b. Another amendment provides that the mandate may not issue while a motion for a stay of mandate is pending.

c. Rule 41 currently provides that a stay of mandate pending the filing of a petition for a writ of certiorari cannot exceed 30 days unless the period is extended for cause shown. The amendments would change the presumptive period to 90 days. A court of appeals remains free to specify a shorter period for any reason.

C. Style Revisions

The Style Subcommittee prepared draft revisions of Appellate Rules 1-23. At the Advisory Committee's October meeting the Committee reviewed all 23 rules and in many instances the Advisory Committee suggested further amendment or return to the existing language. A marked copy showing the Advisory Committee's recommendations is attached to the minutes of the October meeting which are attached to this report. It is likely that the Style Subcommittee will want to discuss some of the Advisory Committee's recommendations.

The Advisory Committee compiled a list of substantive questions that arose during its discussions of the revised rules. Some of those substantive questions will need to be resolved prior to publication of the rules. In other instances the Committee Note simply will need to identify an ambiguity in the existing rule and note that the language of the revised rule adopts one of the possible interpretations of the existing language and request comments upon the Committee's decision.

The Style Subcommittee is working on the remaining rules. At its spring meeting the Advisory Committee will consider as many of the revised rules as possible. In view of the need to review the rules currently published and the comments on those rules, it is doubtful that the Advisory Committee will be able to complete even its initial review of Rules 24-48 at the spring meeting. In as

much as the initial review brings to light substantive issues that need resolution, the earliest that the Advisory Committee could be in a position to present the entire packet of Rules to the Standing Committee would be January 1996. Even that may be optimistic.

## III. MINUTES AND COMMITTEE DOCKET

The reporter's draft of the minutes of the Advisory Committee's October meeting are attached to this report. These minutes have not yet been approved by the Advisory Committee. The committee's docket, showing the current status of its projects, is also attached.

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 13, 1994

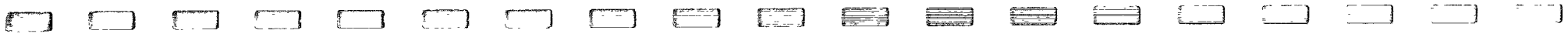
MEMORANDUM TO THE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

SUBJECT: Federal Rules of Appellate Procedure -- Revised For Style

The Advisory Committee on Appellate Rules has reviewed the Style Subcommittees draft of Rules 1-23 of the Federal Rules of Appellate Procedure. The Rules Committee Support Office has on file a marked copy showing the advisory committee's recommendations. If you would like a copy contact Anne Rustin at (202) 273-1820.

John K. Rabiej

John K. Rabiej



Item 6 B

# DRAFT

## MINUTES OF THE MEETING OF THE ADVISORY COMMITTEE ON APPELLATE RULES OCTOBER 25, 26, & 27, 1994

Judge James K. Logan called the meeting to order at 8:30 a.m. in the Conference Center of the Thurgood Marshall Federal Judiciary Building in Washington, D.C. In addition to Judge Logan, the Committee Chair, the following Committee members were present: Judge Danny Boggs, Judge Will L. Garwood, Judge Alex Kozinski, Mr. Michael Meehan, Mr. Luther Munford, Mr. John Charles Thomas, and Judge Stephen Williams. Mr. Robert Kopp attended the entire meeting on behalf of Solicitor General Days who was himself present for a portion of Thursday afternoon. Judge Grady Jolly, whose term on the Committee had just expired, was present. Mr. Robert Hoecker, the former Clerk of the Tenth Circuit and the newly named Circuit Executive for that circuit, attended on behalf of the clerks. Professor Daniel Coquillette, the Reporter for the Standing Committee was present, along with Professor Mooney, the Reporter for the Advisory Committee. Mr. Peter McCabe - the Secretary, Mr. John Rabiej - Chief of the Rules Support Office, and Mr. Robert P. Deyling, all of the Administrative Office, were present along with Ms. Judith McKenna of the Federal Judicial Center and Mr. Joseph Spaniol.

Judge Logan welcomed the new members and announced that items D and E on the agenda would be delayed until the afternoon when the Solicitor General would be able to join the Committee.

Judge Logan made introductory remarks for the benefit of the new members about the Committee's work. He noted that the impetus for much of the Committee's recent work came from the Department of Justice and the national law firms both of which have been urging a return to truly uniform federal practice and the elimination of local rules. The other impetus has been the Local Rules Project that was established by the Standing Committee to study local rules and which has urged, among other measures, uniform numbering of local rules, elimination of any local rule that conflicts with the national rules or that merely repeats provisions in the national rules.

Judge Logan noted that the Advisory Committee has tried to add to the national rules some of the ideas that were developed by the circuits and included in the local circuit rules. The Advisory Committee's aims were twofold: to improve the national rules and to eliminate the need for local rules on those topics. The Advisory Committee has now reached a point where most of the changes proposed as a result of the Local Rules Project have been considered.

Judge Logan stated that the next step will be a systematic simplification of the language used in all of the rules. Significant work has already been done on the civil rules by the Style Subcommittee of the Standing Committee and by the

Advisory Committee on Civil Rules. The Style Subcommittee had completed its first draft revision of Rules 1-23 of the appellate rules and those revisions were on the agenda for consideration by the Advisory Committee at the meeting. Judge Logan stated that the Standing Committee hopes that the restyled version of the Appellate Rules will be the first set of restyled rules to be published for public consideration.

## Minutes

Judge Logan turned to the first item on the agenda, approval of the minutes of the April meeting. The minutes were approved as written. There was, however, a brief return to the discussion initiated at the April meeting about the content of the minutes. The minutes of the April meeting do not attribute comments made during the meeting to any particular member. One member stated that he believes speakers should be identified by name. Another member pointed out that the omission of names may be noticeable simply because this Committee's minutes are more detailed than those of the other advisory committees. The minutes of other advisory committee meetings do not include as detailed a record of committee discussion and, therefore, do not attribute remarks to individual members. There was consensus that detailed minutes are helpful to the committee. It was pointed out that the meetings are open to the public and that anyone who desires to know the position of individual members is free to attend the meetings. A compromise position was proposed: comments would not be attributable to individual members but votes would be attributed to individuals by name. It was agreed, however, that the reporter would prepare the minutes of this meeting without any names attached either to comments or votes. Mr. Rabiej promised to provide the committee members with samples of other committees' minutes and the Committee agreed to put the topic on the agenda for a fuller discussion at a future meeting.

## Standing Committee

The Reporter summarized the action taken by the Standing Committee at its June meeting with regard to proposed amendments to the appellate rules.

The Advisory Committee presented 5 new or amended rules to the Standing Committee with a request that those rules be forwarded to the Judicial Conference for consideration; they were Fed. R. App. P. 4(a)(4), 8, 10, and 47, and proposed new Rule 49. Rules 4(a)(4), 8, and 10 were approved without change. The Standing Committee amended Rule 47, dealing with local rules, by adding a sanctions limitation back into subdivision (b). The Advisory Committee had concluded that in light of other post-publication amendments recommended by the Advisory Committee the sanctions limitation was unnecessary. The Standing Committee decided to reinsert it believing that it would do no harm and

would make the limitation explicit. Rule 47 as amended was approved for submission to the Judicial Conference. The Standing Committee decided not to go forward with Rule 49, dealing with technical amendments, or its corollaries in the other sets of rules.

The Advisory Committee recommended publication of 6 rules, Fed. R. App. P. 21, 25, 26, 27, 28, and 32. Rules 21, 25, and 32 were actually requests for republication because substantial changes had been made following their publication in November 1993. The Standing Committee approved publication of all six rules having first made changes in Rules 25, 26, and 32.

In Rule 25, the proposed amendment published in November 1993 had provided that in order to file a brief or appendix using the mailbox rule, the brief or appendix must be mailed by first-class mail. In light of the public comments, the Advisory Committee proposed further amendment of the rule so that the mailbox rule applies when a brief or appendix is delivered to an "equally reliable commercial carrier." The Standing Committee deleted the word "equally" from "equally reliable commercial carrier." In addition, the Standing Committee made amendments in the subparagraph dealing with electronic filing, so that the language would be consistent with amendments proposed by the bankruptcy committee.

The proposed amendment to Rule 26 makes the three day extension for responding to a document served by mail also applicable when the document is served by an "equally reliable commercial carrier." As with Rule 25, the Standing Committee deleted the word "equally."

When considering the amendment to Rule 25, the Standing Committee discussed the adequacy of the three day extension provided when a party must act within a specified time measured from the date of service and service is accomplished by mail. The Standing Committee asked each of the advisory committees to consider expanding the three days to five days. That issue became Item 94-1 on the Advisory Committee's docket and was on the agenda for the October meeting.

The proposed amendments to Rule 32 deal primarily with typeface issues. The Standing Committee made some minor amendments both in the language of the rule and in the Committee Note and then approved Rule 32 for publication.

Item 91-24, Amicus Briefs

The proposal to amend Rule 29 grew out of the Local Rules Project. In its response to the Local Rules Project Report, the fifth circuit suggested that the

Advisory Committee consider amending Rule 29 to:

1. specify which of the items required by Rule 28 should be included in an amicus brief;
2. establish a page limit; and
3. permit an amicus brief to be filed later than the brief of the party supported.

The fifth circuit believes that permitting later filing of an amicus brief eliminates needless repetition in the amicus brief of the party's arguments.

At the Advisory Committee's September 1993 meeting, the Committee accepted the fifth circuit's first two recommendations, but rejected the third. In addition the Committee decided to include language similar to that in Sup. Ct. R. 37.1, indicating that an amicus brief will be permitted only when the amicus will bring information to the court that has not already been presented by the parties. The Committee also decided to insert language similar to that in Sup. Ct. R. 37.4 in order to provide the court with some standards for granting leave to file an amicus brief and a party with a guide for framing a motion for leave to file. In light of those decisions, the Reporter had prepared a new draft for the Committee's consideration.

One member recommended eliminating the rule altogether or limiting its application to technical matters such as length. He noted that the Supreme Court receives many amicus briefs but they are not as common in the courts of appeals. He further stated that he would not require a motion for leave to file an amicus brief. The brief must accompany the motion and as a practical matter the courts rarely refuse to file an amicus brief.

Two members favored retention of the motion. The privilege of filing an amicus brief can be abused. It can become a way to file a longer brief; a party convinces a friend to file an amicus brief in order to present arguments that the party wants to advance but is unwilling to give space to in the party's own brief. Another member noted that preparation of the motion may help the drafter to crystallize the reasons for the amicus brief.

A member noted that this motion, like any other, requires a response. Until the court responds, the parties do not know whether the amicus brief has been accepted and do not know whether they must respond to the arguments advanced by the amicus.

Another member noted that the language in proposed subdivision 29(a), language modeled on Sup. Ct. R. 37.1, could be read as creating a standard that a clerk's office has responsibility for enforcing. He suggested that if the language is retained it should be more cautionary or advisory in tone. Another member noted that it is difficult for an amicus of a court of appeals to honestly state that

the amicus will not discuss matters discussed by the party. Such a representation is more easily made at the Supreme Court because the party has already briefed and argued the case at the court of appeals and the amicus knows the arguments that will be advanced by the party.

Judge Logan noted that some revision of Rule 29 is desirable in order to eliminate some of the matters covered by local rules and to specify the contents of an amicus brief. Two issues had emerged from the discussion so far:

1. should the rule include precatory language, similar to that in Sup. Ct. R. 37.1, stating that the role of an amicus is to bring matters to the attention of the court that are not presented by the parties; and
2. should the rule require a motion for leave to file an amicus brief.

Judge Logan asked the Committee to focus on the first question, whether proposed subdivision 29(a) should be retained, and if so, whether it should be modified. The draft read as follows:

> (a) *In general.*--An amicus curiae brief should bring relevant matter to the attention of the court which has not already been brought to its attention by the parties.

One member expressed general approval but suggested that the provision should be amended to permit an amicus brief to discuss matters not brought to the court's attention by the parties, or not adequately elaborated upon by the parties. Another member pointed out that in order for an amicus to make that determination, the amicus brief would have to be filed later than the party's brief and such later filing had been rejected by the Committee at its previous meeting. Another member indicated that ordinarily there is a level of coordination between the party and the amicus that would permit an amicus to make the "not adequately elaborated" determination.

Another member stated that if 29(a) were truly precatory it would be acceptable, but if it could be interpreted as imposing a requirement, it would be problematic. When the government files an amicus brief, it cannot coordinate with a party and could not make the representation "required" by 29(a). Another member pointed out, however, that the government has a right to file an amicus brief and could not be precluded from doing so as a result of 29(a).

Judge Logan asked the Committee to vote on retention of a provision similar in nature to 29(a). A motion to eliminate subdivision (a) and to move the language into the note was made and seconded. Five members voted to eliminate any such provision; three voted to retain it.

Judge Logan then asked the Committee to turn its attention to the motion question.

A member moved that the Committee eliminate the motion requirement and substitute an attorney's certificate that the brief is not filed for purposes of delay but to assist the court. He stated that it typically takes one week to get a response to the motion and the opposing party remains uncertain during that time whether there is a need to respond to the arguments raised by the amicus. The motion was seconded.

During discussion other members questioned whether elimination of the motion requirement entitles everyone to file an amicus brief. Several members felt that the motion requirement is important because it provides the court with a measure of control.

The motion failed by a vote of 4 to 3.

Having decided to retain a motion for leave to file, a member suggested eliminating the requirement in draft Rule 29(c)(2), that the motion state "the facts or arguments that have not been, or reasons for believing that they will not be, adequately presented by the parties, and the relevancy of those facts or arguments to the disposition of the case." The member suggested substituting language from an earlier draft that would require the motion to state "the reasons why an amicus brief is desirable."

It was pointed out that it would be helpful to include as specific a statement as possible about what makes an amicus brief desirable. Although it was agreed that a variety of reasons in addition to those mentioned in (c)(2) may make an amicus brief desirable, specificity helps practitioners know what should be in the motion.

A motion was made and seconded to substitute the following language for that in paragraph (c)(2) of the draft:

(c)(2) the reasons why an amicus brief is desirable and the relevance of the matters asserted to the disposition of the case.

The motion passed unanimously.

With regard to subdivision (d), dealing with the contents and form of an amicus brief, a motion was made to add a requirement that the brief include "a concise statement of the identity of the amicus and its interest in the case." The requirement would become (d)(2). It was pointed out that although a statement of its interest is required in an amicus's motion for leave to file, the members of panel in the case will not necessarily have the motion. The motion was seconded and passed unanimously.

A motion was made to delete the word "only" on line 30 of the draft. The

sentence in question stated that "[w]ith respect to Rule 28, an amicus brief must include only the following. . ." The word "only" is ambiguous. It is unclear whether the list establishes the minimum required items, or whether it establishes both the minimum and the maximum items. The motion was seconded and passed by a vote of 7 to 1. The member who opposed the deletion believes that the word established both minimum and maximum contents and that deletion of the word "only" would eliminate uniformity.

Subdivision (d) of the draft, at lines 26-29, included a provision requiring the cover of an amicus brief to "identify the party or parties supported or indicate whether the brief supports affirmance or reversal." A motion was made to change the second "or" to "and." The stated reason for the motion was to promote uniformity. The motion was seconded but defeated with 2 votes in favor and 6 in opposition.

To coordinate the length limitation with Rule 32, and to make frequent amendment of Rule 29 unnecessary, a motion was made to change the length limitation from 20 pages to one-half the length of a principal brief as specified in Rule 32. The motion was seconded and unanimously approved. If Rules 32 and 28, which are currently published for comment, are not approved, subdivision (e) should be reexamined.

Subdivision (f) of the draft, deals with the time for filing an amicus brief; it provides that the brief must be filed within the time allowed the party supported, or if the amicus does not support either party, within the time allowed the appellant. When the previous drafts were discussed by the Committee, it accepted that approach. The Committee had rejected the fifth circuit's practice of allowing later filing because it results in extending the time for filing responsive briefs. For example, if an amicus supporting the appellant files a brief 15 days after the appellant, the time for filing the appellee's brief does not begin to run until the filing of the amicus brief.

A motion to accept subdivision (f) as drafted was made and seconded. The motion passed by a vote of 6 to 2.

Subdivision (h) of the draft provides that "[a] motion of an amicus curiae to participate in the oral argument will be granted only for extraordinary reasons." A member suggested that the Committee Note should indicate that if a party is willing to share its argument time with an amicus, the court may permit the amicus to argue without "extraordinary reasons." An amicus would still need to file a motion seeking court approval, but the motion would not need to show extraordinary circumstances. Another member observed that such a rule makes it possible for an amicus to exert inappropriate pressure on a party to share its time. The Committee consensus was to make no change in either the language of the

rule or the note.

Approval of the rule as amended was moved, seconded, and unanimously approved.

In light of the large number of appellate rules currently in the pipeline at various stages of development, the Committee decided that it would not submit the rule to the Standing Committee at the January 1995 meeting. Rather, the Committee decided to submit the amended draft to the Style Subcommittee for its review and take up the Style Subcommittee's suggestions at the spring meeting. A request for publication will be made some time after the spring meeting.

The meeting recessed from noon until 1:15 p.m.

## Ninth Circuit Local Rule on Death Cases

At the beginning of the afternoon session Professor Coquillette summarized the status of the ninth circuit local rule on death penalty procedures. On March 11, 1994, five attorneys general from capital states in the ninth circuit wrote to Chief Justice Rehnquist claiming that the new ninth circuit procedures for death penalty cases conflict with federal law. The attorneys general requested that the Judicial Conference use its statutory authority to modify or abrogate circuit rules that are inconsistent with federal law.

The Chief Justice referred the matter to the Standing Committee, which in turn referred the matter to the Advisory Committee on Appellate Rules. The Advisory Committee report of its April deliberations on the issues was submitted to the Standing Committee and considered at its June meeting. At that meeting, the Standing Committee made no decision on the merits of the issues. Instead, the Standing Committee decided to invite both the states attorneys general and the ninth circuit to submit briefs elaborating on their positions. The Standing Committee will consider the issues at the January meeting.

Professor Coquillette stated that the Standing Committee would appreciate guidance about the appropriate response to a possible determination that one or more provisions of the ninth circuit rule are inconsistent with federal law. Professor Coquillette stated that there are three possible responses; the Standing Committee may recommend to the Judicial Conference that it: 1) modify the rule to make it consistent with federal law; 2) abrogate the entire rule or the inconsistent provisions; or 3) take no action. Professor Coquillette believes that the third option is available because the statute says that the Judicial Conference "may" modify or abrogate. 28 U.S.C. § 331.

A member of the Advisory Committee indicated that he reads the statutory language as requiring the Judicial Conference to either "modify or abrogate" a circuit rule, once the Conference determines that the rule is inconsistent with federal law. Another member disagreed; that member believes that the statutory language permits the Judicial Conference to abstain from acting. He noted that the Judicial Conference is not a court and that if it abrogates a circuit rule there is no review by the Supreme Court. Because the Judicial Conference is not a court before which parties appear, it is not presented with the sort of in depth research and argument that is typical of the adversary process. He believes that the questions can and should be litigated and in that context the issues can be presented to the Supreme Court.

Professor Coquillette invited the members of the Advisory Committee to write to him with their recommendations for the Standing Committee.

Item 93-5, Rule 26.1

Fed. R. App. P. 26.1 requires a corporate party to file a statement "identifying all parent companies, subsidiaries (except wholly-owned subsidiaries), and affiliates that have issued shares to the public." At the Committee's April meeting, Mr. Spaniol noted that although the language of Rule 26.1 had been patterned after the Supreme Court Rule, the Supreme Court had recently amended its rule to omit references to "affiliates." As a result of Mr. Spaniol's observation, the Committee determined that it would reconsider the propriety of requiring disclosure of "affiliates."

As a preliminary matter, one of the Committee members asked whether the scope of the rule should be broader; it does not require disclosure of all matters that are cause for recusal under the statute. Some of the circuit rules require disclosure of anyone who has a financial interest in the case. The Reporter indicated that during the process of developing Rule 26.1, the Advisory Committee approved a rather broad draft and circulated it to the circuits. Several circuits had strongly negative reactions to the broad rule. As a result, the Advisory Committee promulgated a rule that requires bare-bones disclosure. The Committee Note indicates that the Advisory Committee realizes that some circuits may wish to require more complete disclosure.

Another member spoke in support of the limited disclosure required by Rule 26.1. It would impose a serious burden to require a party to certify that it has identified all persons who may have a financial interest in the outcome of the case. A corporate party, however, is in a position to know who it controls and by whom it is controlled and it is reasonable to require the party to disclose that information.

Another member spoke in support of an even narrower rule than current Rule 26.1; in his opinion the seventh circuit provision dealing with corporate affiliates is narrower but sufficient. The rule need only require disclosure of corporations that may be adversely affected by a decision in the case. The seventh circuit rule requires a corporate party or amicus to disclose its parent corporation and a list of stockholders which are publicly held companies owning 10% or more of the stock of the party or amicus. That disclosure is appropriate; if a judge owns stock in a parent corporation of the litigant, the judge has an interest in the litigant. The other disclosures required by the current federal rule and many of the circuit rules, however, seem unnecessary. For example, disclosure of subsidiaries may be unnecessary. If the litigant is a part parent of a corporation in which the judge may own stock, the possibility is quite remote that the judge might be biased by the fact that the judge and the litigant are co-owners of a corporation. Similarly, that a judge owns stock in a brother or sister corporation of the litigant is unlikely to create any bias. In short, it may be appropriate to eliminate not only the term affiliate but also the term subsidiaries.

Another member posed a hypothetical that illustrated the possibility of an ethical problem arising from participation of a judge in a case if the judge owns stock in a corporation which is under common control with a party to the case. A judge owns 20% of Joe's Barber Shop; the other 80% is owned by Barber Shops Inc.. Barber Shops Inc. also owns 80% of Mary's Barber Shop. If Mary's Barber Shop is the litigant and is awarded judgment, 80% of that will accrue to the benefit of Barber Shops Inc. Although Barber Shops Inc. does not owe Joe's Barber Shop any of that money, does the fact the Barber Shops Inc. is wealthier effect Joe's Barber Shop and its shareholders (one of whom is the judge in the case)? Does the fact that the judge's co-owner could be richer as the result of the litigation mean that the judge should recuse himself or herself? It might because if Joe's Barber Shop needs cash at some point in the future, Barber Shops Inc. may be in a better position to provide the cash if Mary's Barber Shop is awarded a substantial judgment.

Another member pointed out that what is striking about the hypothetical is that the ownership interests are large and in such cases the judge is likely to be aware of the ownership interests and the disclosure statement would not be necessary to make the judge aware of his or her potential interest. In the typical case the ownership interests of shareholders are minuscule and the impact of a judgment for or against a brother or sister corporation would be negligible upon a judge shareholder.

Another member indicated that the purpose of the rule is to address clear-cut interests. The party's certificate cannot address all possible problems such as persons who are contemplating purchases of interests, etc.

A motion was made and seconded to weave the seventh circuit solution into the rule and to eliminate disclosure of subsidiaries and affiliates. It was pointed out that there may be political reaction to what may be perceived as a narrowing of the disclosure. In response, it was suggested that the Committee Note should explain the change, indicating that a person who owns stock in a subsidiary or an affiliate is not affected by judgment for or against the parent. The publication period provides an opportunity to gauge the public reaction to the proposal.

Specifically the motion was to amend Rule 26.1 to read as follows:

> Any non-governmental corporate party in a civil or bankruptcy case, or agency review proceeding and any non-governmental corporate defendant in a criminal case must file a statement identifying its parent corporation, if any, and a list of stockholders which are publicly held companies owning 10% or more of the stock of the party.

The motion passed by a vote of 6 to 2.

Although the seventh circuit rule requires an amicus that is a corporation to file a similar statement, the Committee decided to treat the amicus question in Rule 29. Specifically, a motion was made to amend draft Rule 29(d) to indicate that "an amicus brief must comply with Rule 32 and, if a non-governmental corporation, file a disclosure statement like that required of a party in Rule 26.1." The motion was seconded and passed unanimously.

Item 93-10, Rule 26.1

At one of the Advisory Committee's recent meetings, the question of the applicability of Rule 26.1 to trade associations was raised. The language of Fed. R. App. P. 26.1 does not address the trade association question. The current rule requires only that a "corporate" party disclose its parent, subsidiaries and affiliates. Under the current rule, a trade association would be required to make disclosure only if it is incorporated and even then it typically would not have anything to disclose; a trade association does not have a parent and the association's members are not subsidiaries or affiliates in the ordinary sense of those words.

Given the decisions just approved under item 93-5, that the only disclosures required are those involving financial interest and, more specifically, only disclosure of parent corporations, the consensus was that no change is needed.

Item 94-1, Rule 26(c)

Fed. R. App. P. 26(c) provides that when the time for action is measured from the date of service and service is accomplished by mailing, three days are

added to the time period. At its June 1994 meeting the Standing Committee asked each of the advisory committees to consider whether the three day extension should be changed to a five day extension because of frequent delays in mail delivery.

The Reporter indicated that the bankruptcy, civil, and criminal advisory committees have all recommended retaining the three day rule. A motion was made to recommend no change. The motion was seconded and passed unanimously.

Item 92-8, Sanctions

Mr. Alan Morrison had written to the Committee asking it to reexamine Rule 38 and consider additional amendments. A subcommittee had been appointed to consider Mr. Morrison's suggestion and to monitor the sanctions question generally.

Judge Boggs, the chair of the subcommittee, reported that about a year and a half ago the subcommittee agreed that in light of the uncertain future of Rule 11 and the proposed changes in Rule 38 regarding notice and opportunity to respond before imposition of sanctions, no further amendment of Rule 38 was advisable at the time. In addition there had been an inquiry by then Chief Judge Breyer asking whether the amendment requiring notice and comment would make court chastisement of counsel too difficult. The Committee responded to that inquiry indicating that there are several means of chastisement that would not require notice and comment.

Since that time the subcommittee has continued to monitor the sanctions area and nothing has transpired that has caused the subcommittee members to change their minds about the need for further amendment of Rule 38.

Mr. Morrison wrote to the Committee again in October 1994. Essentially, he argued that because litigation is uncertain and the Supreme Court sometimes rules contrary to virtually all courts that have previously considered an issue, litigation should seldom be classified as frivolous. Judge Boggs indicated that the subcommittee has not been persuaded that Rule 38 should be reinstated as an action item at this time.

Mr. Morrison offered to come to the Committee to speak about the issue. Judge Logan proposed that the subcommittee be continued, that Rule 38 be placed on the agenda for the next meeting, and that Mr. Morrison be invited to attend the meeting and make a presentation. The Committee consensus was that in light of the amendment of Rule 38 scheduled to become effective on December 1, 1994, (an amendment that provides significant new protection for those who

might be sanctioned) the subcommittee should continue to monitor Rule 38 but that it would be premature to provide Mr. Morrison a hearing at the next meeting.

Judge Logan asked the subcommittee to run a computer search of the cases under Rule 38 and determine whether there are any current problems. The Reporter indicated that she would provide the subcommittee with her background research on the question of frivolous appeals. Judge Logan asked the subcommittee to submit its report at the fall 1995 meeting.

Item 93-11, Draft Opinions

Justice Peterson of the Oregon Supreme Court wrote to the Committee suggesting that the appellate rules be amended to permit a party to include, as an appendix to the party's brief, a draft opinion. After a brief discussion of the proposal, there was a motion to take no further action on the proposal. The motion was seconded and unanimously approved.

Item 94-2, Prohibiting Citation to Appellate Decisions that Lack a Clear Recitation of Jurisdiction

William Leighton, Esq. wrote to Mr. McCabe suggesting that the appellate rules be amended to prohibit citation in a brief to an appellate decision that does not clearly recite the applicable basis for federal court jurisdiction. After brief discussion of the proposal, there was a motion to take no further action on the proposal. The motion was seconded and unanimously approved.

Items 91-25 and 92-4, In Banc Proceedings

Solicitor General Drew Days joined the Committee for discussion of these items and Judge Logan invited him to address the Committee.

Solicitor General Days stated that both he and his predecessor had proposed amending Rule 35 so that intercircuit conflict would be made an explicit ground for granting an in banc hearing. Between July 1, 1993 and June 30, 1994, there were 160 cases in which a federal government agency or division recommended that the government file a suggestion for rehearing in banc. (There were in excess of 500 matters in which the preliminary recommendation was not to request a rehearing in banc.) Of the 160 cases in which an agency recommended requesting a rehearing in banc, the Solicitor General approved the filing of a suggestion for rehearing in banc in only 51% of the cases. A rehearing in banc was granted in approximately 25% of the cases in which suggestions were filed. There were five circuits that did not grant any of the petitions. The

Department of Justice realizes that it should not routinely petition for a rehearing in banc but the department is in a better position than perhaps any other litigant in the country to have an overview of the problem of intercircuit conflicts. Solicitor General Days believes that some conflicts can be avoided by granting an in banc rehearing; if a conflict is avoided, later Supreme Court intervention is unnecessary.

Intercircuit conflicts create problems not only for the Department of Justice but also for the judicial system as a whole. Intercircuit conflicts create the impression that a party's rights depend upon the circuit in which he or she litigates. Intercircuit conflicts also create upward pressure to hear cases in the Supreme Court and additional litigation around the country.

Solicitor General Days stated that the proposed amendment simply makes explicit a matter that is typically part of a circuit's current deliberative process. In many instances, the existence of an intercircuit conflict, or the fact that a panel's decision would create an intercircuit conflict, leads a circuit to treat the case as one of "exceptional importance" and to grant a rehearing in banc. Several circuits make it clear in their local rules that intercircuit conflicts are a special concern and may lead to the granting of a rehearing in banc. But, it would be helpful to litigants to make that clear in the national rule. The proposal would not make it mandatory to convene an in banc court.

The Reporter's memorandum prepared for the meeting included two drafts. Draft one treated intercircuit conflict as grounds for finding that a proceeding involves a question of "exceptional importance." Draft two treated intercircuit conflict as a separate category of cases as to which in banc review may be appropriate. A member of the Committee noted that draft two might be read as more mandatory than draft one. When asked which draft he preferred, Solicitor General Days expressed a slight preference for draft two He further stated he had not thought that draft two created an impression that an in banc hearing might be mandatory, and either draft would be satisfactory.

One member noted that some judges in his circuit only vote for an in banc hearing when there is a conflict within the circuit. In such an instance, those judges feel compelled by the language of Rule 35 to vote for a rehearing in banc. If Rule 35 is amended, as suggested in draft two, to make intercircuit conflict a distinct ground for granting an in banc hearing, it is likely to have a similar impact and to increase the number of cases in which an in banc hearing is granted. The member then asked whether the likelihood of a rehearing in banc would create pressure for a panel to simply follow the lead of the other circuits that have already addressed the issue. In other words, might this change raise the stakes when a circuit is confronted by an issue on which another circuit has already ruled, and perhaps impede the development of the law?

Two members expressed a preference for draft one because making intercircuit conflict one subset of cases of "exceptional importance" does not create an impression that the granting of a rehearing in banc is "mandatory" whenever there is such a conflict; whereas, draft two, which makes intercircuit conflict a separate grounds for granting a rehearing in banc, might create such an impression.

Another member stated his opposition to draft one because he thought that it might result in the narrowing of the range of cases that will be considered of exceptional importance.

A motion to work with draft one was made and seconded. The motion passed by a vote of six to one.

The discussion then turned to the fact that the draft states that a case may present a question of exceptional importance if the panel decision conflicts with the decision of another federal court of appeals. But a rehearing in banc is truly useful only when the panel decision creates an intercircuit conflict. In such a case, the in banc court may prevent the creation of a conflict. When a panel decision does not create a conflict but simply joins one side of an already existing conflict, a rehearing in banc cannot avoid the conflict. It was pointed out, however, that when a conflict was created by a pre-existing decision of the same circuit, the second decision in that circuit which persists in the conflict may also be a strong candidate for a rehearing in banc.

> A motion was made to amend lines 31-39 of draft one to read as follows: A proceeding may present a question of exceptional importance if it involves an issue as to which the panel decision conflicts with the authoritative decisions of every other federal court of appeals that has addressed the issue (citation to the conflicting case or cases is required).

The word "authoritative" was used rather than "published" because in some circuits unpublished opinions may be treated as authoritative. It was noted that the language of the rule encompasses both a case in which the panel decision creates the conflict and also a case in which the panel decision maintains a conflict created by an earlier decision of the same circuit. The language does not include those instances in which a circuit joins one side or other in an already existing conflict. The motion was seconded and approved unanimously.

Although there were additional items on the agenda dealing with Rule 35, consideration of them was postponed to allow the Solicitor General to address the Committee on his proposal to amend Rule 41.

Items 93-3 & 93-6, Mandate

Solicitor General Days had previously proposed that Rule 41 be amended to state that a mandate is effective upon issuance. Judge Logan invited him to discuss his proposal.

The Solicitor General noted that the time at which a mandate becomes effective is not specified in Rule 41. A mandate could be considered effective when it issues, when it is received by the district court or agency to which it is sent, when it is docketed, or when the court or agency acts upon it. The effective date of the mandate is especially important when a court of appeals reverses a district court order granting an injunction. The parties need to know when they can rely on the decision of the court of appeal. The fourth circuit has a local rule stating that the mandate is effective when issued. The Department of Justice believes that incorporating such a provision in the national rule would be helpful.

Judge Logan asked the Solicitor General whether the language at lines 22 and 23 of the draft on page 14 of the Reporter's memorandum would be sufficient. That language stated: "The court's mandate is effective on the day the court issues it." The Solicitor General responded affirmatively. Committee discussion resulted in amendment of the sentence to read as follows: "The mandate is effective when issued."

The Solicitor General stated that there is often a delay in issuing the mandate. The Department would prefer that the rule provide that the mandate is effective on the date that the clerk should issue it, in accordance with the rules, even if it is not issued on that date because of clerical delay.

A member expressed opposition to that position. The mandate should be effective when issued, not when it should issue. A judge may delay issuance of the mandate. If a mandate is not issued on the date established by the rules and the approach advocated by the Department of Justice were accepted, one would have to determine whether the delay was the result of clerical delay or judicial intervention. The effective time should be the time of actual issuance. Such an approach provides an easily applied bright line rule.

A motion was made and seconded to amend the rule to state that "the mandate is effective when issued." The motion was approved unanimously.

Following adoption of that language, discussion turned to the practical implications of the amendment. As previously noted, the time at which a mandate is effective is most crucial in cases involving an injunction. If a court of appeals reverses a district court order granting an injunction, the party can cease compliance with the injunction as soon as the mandate issues. If, however, a

court of appeals reverses a district court order denying an injunction, the entry of the mandate does not result in the imposition of an injunction by the district court. If the court of appeals itself issues a stay or injunction, that injunction would be effective upon issuance of the mandate. If the court of appeals does not issue the injunction but simply says that the district court should have, there is no effective injunction until the district court issues it.

Discussion then turned to Item 93-3, a proposal to amend Rule 41 to expand the 7 day period for issuing the mandate. Rule 41 generally requires a court of appeals to issue the mandate 7 days after expiration of the time for filing a petition for rehearing, or if such a petition is filed, 7 days after entry of an order denying the petition.

A recent amendment to Rule 41 requires a petition 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." Because of these new requirements, it may be more difficult than it was previously for a party seeking a stay of mandate to obtain one within the 7 day period. Therefore, the Committee was asked to consider expanding the 7 day period.

One member suggested that the 7 day period after expiration of the time for filing a petition for rehearing is adequate but that the 7 day period after denial of a petition for rehearing is inadequate. A party may not know that the court has denied the petition for rehearing until it arrives in the mail several days after its entry. Therefore, he suggested that the rule should be amended to state that the mandate should be entered 14 days after entry of an order denying a petition for rehearing. Another member suggested that having two different time periods would be confusing.

Rather than expand either of the time periods, a motion was made to adopt draft three. Draft three ensures that the mandate does not issue while a motion for a stay of mandate is pending by providing that the mandate cannot issue while the motion is pending. The motion was seconded and passed unanimously.

It was noted that further amendment of the draft will be needed in light of changes to Rule 35 already approved. Those changes provide that a petition for rehearing in banc will stay the issuance of the mandate just as a petition for panel rehearing does.

Item 93-4, Stay of Mandate

Rule 41 provides that a stay of mandate pending the filing of a petition for writ of certiorari cannot exceed 30 days unless the period is extended for cause

shown. The National Association of Criminal Defense Lawyers pointed out that the 30-day presumptive period for a stay was adopted when the period for filing a petition for a writ of certiorari in a criminal case was only 30 days. Because the period for filing a petition for certiorari is now 90 days in both criminal and civil cases, the association suggested that the presumptive period also should be expanded to 90 days.

The draft prepared for the Committee's consideration provides that the normal period for a stay will be 90 days but that the period cannot, in any event, exceed the time available to the party to file a petition for a writ of certiorari to the Supreme Court. It was pointed out that a court would remain free to specify a shorter period.

Adoption of the draft without amendment was moved and seconded. Some members expressed preference for the current rule because the 30 day period provides an incentive for the party to move with dispatch and it ensures that the mandate is not stayed for an extended period in a case in which the party may never petition for certiorari.

Another member responded that all the rule does is grant the court broader discretion over the period of the stay. The amendment eliminates the need to find good cause for extending the period to 90 days. Given the fact that the motion for stay must show that a petition for certiorari would present a substantial question and that there is good cause for a stay, the 90 day period is appropriate.

The motion passed by a vote of 6 in favor and 3 opposed.

The Committee then returned to Rule 35 and discussion of the items that had been postponed.

Item 91-25, In Banc Proceedings

As a result of suggestions made by the Local Rules Project and the fifth circuit, the Advisory Committee had previously decided to amend Rule 35 to provide:

1. a petition for in banc consideration must demonstrate that in banc consideration is appropriate;
2. a limit on the length of a petition for in banc consideration;
3. a change in the caption for subdivision (a); and
4. a senior judge or a judge sitting by designation may not call for a vote on a request for rehearing in banc unless the judge was a member of the panel whose decision is sought to be reviewed.

With regard to the page limitation the draft under consideration stated that a petition "may not exceed 15 pages unless the court provides otherwise by local rule or by order in a particular case." A member suggested that the local rule option should be eliminated. Another member inquired whether the published version of Rule 32 continued to permit the circuits to shorten the maximum length of briefs and the member suggested that Rule 35 should be consistent with Rule 32. Rule 32 does not permit the circuits to shorten the maximum length other than on a case by case basis. Therefore, the language at lines 40-43 was altered to read as follows: "Except by permission of the court, a petition for in banc hearing or rehearing may not exceed 15 pages."

With regard to using page limits rather than a word count similar to that in proposed Rule 32, the Committee had previously decided to retain page limits in documents such as motions and petitions. The Committee judgment was that there was not a serious enough problem to justify importing the word count and typeface requirements applicable to briefs into other contexts.

The next sentence of the draft, beginning at line 43 of the draft, established a page limit for a combined petition for panel rehearing and petition for rehearing in banc. Because it dealt with a petition for panel rehearing, something generally not addressed in Rule 35, it was suggested that the distinction might be clearer if that sentence constituted a separate numbered paragraph. In that event, however, the next sentence (providing that "[m]aterial excluded by Rule 32(a)(6) does not count" toward the page limits) would have to be dealt with in a manner making it clear that it applies to both of the preceding sentences. The Committee delegated the task of reorganizing the structure of the rule to the Reporter. The Committee approved the substance of those changes.

The meeting recessed at 5:30 p.m.

The meeting resumed at 8:30 a.m. on October 28.

Item 91-25, In Banc Proceedings (continued)

Line 64 of the draft was amended to change the word "filed" to "due." That change having been approved, a motion was made to adopt draft one as amended. The motion passed unanimously.

Style Revisions

The Style Subcommittee's suggested revisions of Rules 1 through 23 were circulated prior to the meeting to the members of the Committee for their consideration. Judge Logan also had appointed two subcommittees and assigned Rules 1 through 12 to the first of the subcommittees and Rules 13 through 23 to

the second and asked the subcommittees to be prepared to lead discussion of those rules at the meeting. Mr. Garner, the consultant to the Style Subcommittee was unable to attend the meeting but he had responded in writing to suggestions submitted to him by Judge Logan and by the Advisory Committee Subcommittee consisting of Judges Garwood and Jolly and Mr. Munford.

Judge Logan asked the first subcommittee to begin the discussion of the first twelve rules.

Attached to this memorandum are copies of the Style Subcommittee's suggested revisions marked to indicate the further changes suggested by the Advisory Committee. The box on the left side of the page contains the current language of the rule; the box in the center contains the Style Subcommittee's suggested language; the editorial marks to the far right indicate the Advisory Committee's changes to the Style Subcommittee's version. These minutes will not discuss each of the Advisory Committee suggested changes. Rather, the minutes will discuss only matters as to which further discussion may be necessary.

**Rule 1**

In paragraph (a)(2) the Committee voted to replace the word "application" with the words "other document." Mr. Munford's subcommittee agreed with Mr. Garner's observation that an application and a motion are the same but noted that the appellate rules require the filing of other documents in the district court, such as a notice of appeal or a transcript order form.

In subdivision (c) the Committee voted to change the sentence from: "These rules are cited as the Federal Rules of Appellate Procedure" to "These rules shall be known as the Federal Rules of Appellate Procedure." The Subcommittee noted that one does not "cite" the full set of rules. The Committee was cognizant of the Style Subcommittee's desire to eliminate all use of the word "shall" but decided that its use is appropriate in this subdivision. Subdivision (c) does not create a rule to be enforced and, therefore, "shall" does not create the troublesome ambiguity in this context that it does when a rule mandates some conduct. Therefore the Committee decided to use the traditional "shall be known as" language.

**Rule 3**

In paragraphs (a)(1) and (3), the Style Subcommittee changed the words "must be taken by" to "is taken by." The Advisory Committee changed the words to "may be taken only by." The Advisory Committee preferred the word "may" to avoid the implication that there is an obligation to take an appeal. The word "only" was added to indicate that there is only one method for taking an appeal,

an implication that formerly arose from the word "must." The Committee believed that these changes did not create any substantive change.

With regard to paragraph (b)(1), the Committee noted that it does not understand what it means to "join" an appeal after filing separate timely notices of appeal. Is this different from "consolidating" appeals as under (b)(2)? The Committee asked the Reporter to note this problem for later substantive discussion.

With regard to paragraph (b)(2), it is unclear under the existing rule whether appeals can be consolidated without court order if the parties stipulate to the consolidation. The Style Subcommittee's version requires a court order even when the parties stipulate to consolidation. The Committee Note should identify the existing ambiguity and indicate that the new version clarifies the procedure consistent with the Committee's view of the proper interpretation of the existing rule.

With regard to paragraph (d)(2) the Committee voted to omit the words "a pro se." The Committee noted that Rule 4(c) does not limit its applicability to an inmate proceeding pro se, but only to an inmate who "files" the notice of appeal. The question is whether Houston v. Lack applies when an attorney prepares a notice of appeal but sends it to the inmate for review and the inmate "files" it by depositing it in the institutional mailing system. The Committee noted that whether Rules 3(d)(2) and 4(c) should be applicable only to an inmate who is proceeding "pro se" is a substantive question that the Committee should discuss at a later time in order to ensure that the restyled rules do not make substantive changes. The Committee also noted that it should explore the meaning of "an inmate confined in an institution" -- language taken from the Supreme Court's rule.

**Rule 4**

The Committee Note accompanying subparagraph (a)(1)(A) should indicate that a cross-reference to subdivision 4(c) has been added to conform the rule to the Houston v. Lack amendments.

Subparagraph (a)(6)(B) permits a district court to reopen the time to file an appeal if a party entitled to notice of the entry of a judgment or order sought to be appealed did not receive notice of its entry "from the clerk or any party" within 21 days after the entry. As a substantive matter, the Committee should consider whether actual notice during the 21 day period from some other source should bar reopening of the time for appeal.

Paragraph (a)(7) states that a judgment or order is entered for purposes of Rule 4(a) "when it is entered in compliance with Rule 58 and 79(a) of the Federal Rules of Civil Procedure." A substantive question was raised: Does Rule 58 require entry of a separate order when a court denies a new trial? It is possible to read (a)(7) as abolishing the collateral order doctrine. Rule 4(a)(7) should be substantively reviewed.

Item (b)(1)(B)(ii) states that the time for the government to file an appeal runs from the later of the entry of the judgment or order or any defendant's filing of a notice of appeal. A substantive question is left unanswered. Does the time begin to run from the filing of the first notice of appeal or from the last if more than one notice of appeal is filed? The statute may be dispositive.

Subparagraph (b)(1)(D) of the Style Subcommittee's draft, subparagraph (b)(3)(A) of the Advisory Committee's redraft, begins with the words "[i]f a defendant timely makes one of the following motions." The criminal rules should be consulted to determine whether the criminal rules require the "filing" of such motions in a manner that would make the use of the verb "files" appropriate in (b)(1)(D).

Paragraph (b)(3) of the Style Subcommittee's draft, paragraph (b)(5) of the Advisory Committee's redraft, permits a district court to extend the time for filing a notice of appeal, either before or after the time has expired, upon a showing of excusable neglect. It was pointed out that if a motion for extension of time is filed before the period has expired, there should be no need to show neglect. It was suggested, therefore, that the rule should permit a district court to extend the time for "good cause" as well as excusable neglect. The Committee approved adding the words "good cause" but decided that the Committee Note should identify that addition as a possible substantive change. The Committee postponed consideration of whether there possibly should be a difference between the grounds available for extension when the application is made before time expires and the grounds available when the application is made after the time has expired.

Paragraph (c)(2) states when an inmate uses the Houston v. Lack filing provisions, the time for filing a notice of cross-appeal runs from the date the district court "receives" the first notice of appeal. Because "receives" is not clear enough, the Committee voted to change the work to "dockets." A court may "receive" a paper when its mail is delivered to it even if the mail is not opened for a day or two. "Docketing" is an easily identified event. The Committee Note must disclose the change.

**Rule 5**

The term "leave to appeal" was changed back to the term used in the existing rule -- "permission to appeal." Use of the term "permission" is consistent with the caption and with the statute which says that a court of appeals may "permit" an interlocutory appeal.

**Rule 5.1**

The caption of Rule 5.1 was changed from appeal by "permission" to appeal by "leave." The term "leave to appeal" is used in subdivision (a) of Rule 5.1 and in the statute, 28 U.S.C. § 636(c)(5).

**Rule 6**

Item (b)(2)(A)(2) of the Style Subcommittee's draft, item (b)(2)(A)(ii) of the Advisory Committee redraft, was amended to conform to Rule 4(a)(4). The amendment provides that a party intending to challenge an altered or amended judgment order or decree must file "a notice or amended notice of appeal." The Committee Note must identify the conforming change.

**Rule 8**

Paragraph (a)(3) of the Style Subcommittee's draft, subparagraph (a)(2)(D) of the Advisory Committee's redraft, says that a motion for a stay pending appeal that is made to a court of appeals is "filed with the clerk" and normally is considered by a panel of the court, but in exceptional circumstances such a motion may be made to and considered by a single judge of the court. Several substantive questions were raised in connection with this provision. First, does a single judge have power either under statute or Rule 25 to "file" a motion presented directly to him or her? Can a party apply to a single judge in other exigent circumstances? Does this rule limit a judge's power? The Committee indicated that it would like to discuss these questions at its next meeting.

Subdivision (b) provides that the grant of a stay may be conditioned upon a party's "filing" a bond. Whether there is a substantive difference between "giving" and "filing" a bond is a question that was noted for future discussion.

**Rule 9**

Paragraph (a)(1) requires a district court to state in writing the reasons for its order regarding release or detention of a defendant in a criminal case. The question was raised whether such an order to a district court would be better placed in the criminal rules. It was noted that Rule 22(b) dealing with habeas

corpus imposes a similar requirement upon a district judge.

**Rule 10**

Paragraph (d) permits the use of an agreed statement as the record on appeal. Given its infrequent use, it was suggested that the Committee consider abrogating the provision.

The Committee recessed for the evening at 6:00 p.m..

The meeting resumed at 8:30 a.m. on October 27.

**Rule 15**

The Committee discussed the use of the terms "petition" for review in subdivision (a) and "application" for enforcement in subdivision (b). The Committee decided that use of the different terms helps to distinguish the two proceedings. As a result the Committee decided to retain the use of the term "application" in subdivision (b) even though the Committee had earlier discussed the general desirability of abandoning the term "application."

Rule 15(c) requires the circuit clerk to serve a copy of a petition for review, or an application to enforce an agency order, on each respondent. Similarly, Rule 3(d) requires the district clerk to serve a copy of a notice of appeal on the other parties. The Committee decided that at a later time it would discuss the possibility of amending subdivision (c), as well as Rule 3, to require that the appellant or petitioner serve the copies rather than imposing that burden on the clerk.

**Rule 18**

Rule 18 permits a party to move for a stay of an agency order pending review of the agency's decision or order. It was pointed out that there is no corollary provision authorizing the agency to move during the pendency of an appeal for enforcement of its order. Rule 8 permits a party to litigation in a district court to move for an order "restoring or granting an injunction during the pendency of an appeal" but that provision is not applicable (see Rule 20) in the agency context. Because this is a matter not addressed by the existing rules, the Committee concluded that it would place the question on the list of substantive questions for later consideration.

**Rule 21**

The Advisory Committee did not consider the Style Subcommittee's draft

of Rule 21 because a significantly altered version of Rule 21 has been published for comment. The Committee decided that it would be better to work with Rule 21 after the close of the comment period.

Judge Logan offered a comment on the published version of the rule. On page 9 of the pamphlet at line 37 the proposed rule uses the word "application." In light of the discussions at this meeting, Judge Logan suggested that the word probably should be changed to "petition." The Committee agreed, however, the use of the word "application" on page 12 at line 94 was appropriate. On page 13 at lines 99-100, the published draft says that a petition must be served on "the parties named as respondents." A member suggested that the words "the parties named as" should be deleted.

**Rule 22**

The use of the word "original" in the caption of subdivision (a) was discussed. One member suggested that it indicates that subdivision (a) deals with a party's first application for the writ. Another member pointed out that subdivision (a) does not apply only when a party applies for a first writ, but also when a party first applies for even for a subsequent writ. Another possible interpretation is that subdivision (a) deals with application for the "original" common law writ, as contrasted with application under the statutory provisions, sections 2054 and 2055. Given the Committee's confusion about its meaning, the Committee decided to change the caption to: "Application for Writ."

The word "application" was retained because that is the word used in the statute.

The Committee changed the word "must" to "shall" in the first sentence of subdivision (a). Because this Rule governs the procedure for the constitutionally preserved writ, it is not appropriate to require -- by use of the word "must" -- application to a district court. The second sentence of subdivision (a) makes it clear that one may apply first to a circuit judge. A circuit judge ordinarily transfers the application to a district court, but a circuit judge may grant the writ in an appropriate circumstance. The Committee considered but decided not to use the word "should" in place of the word "must" (an application for a writ of habeas corpus "should" be made to the appropriate district court) because "should" might imply greater openness to an application to a circuit judge than exists. The Committee voted to return to the word "shall;" the word used in the existing rule. Although "shall" is ambiguous, the Committee was more comfortable with that ambiguity than any of the alternatives. "Shall" might mean either "must" or "should" but the ambiguity preserves the proper tension. In fact, the Committee Note accompanying the rule upon its original promulgation, can be read to say that the ambiguity was deliberate.

The Committee realized that the Style Subcommittee placed a hyphen between the words habeas corpus in the caption and elsewhere in the rule when habeas corpus is used as a compound adjective. The Committee decided, however, to delete the hyphens.

**Rule 23**

Rule 23 was modeled on Supreme Court Rule 36, and the Committee believed that the rule should retain its similarity to the Supreme Court Rule. As a result, the Advisory Committee rejected several of the proposed revisions and returned to the original rule, making slight modifications therein in order to improve comprehension.

Subdivision (a) prohibits a person having custody of a prisoner from transferring custody, pending review of a decision in a habeas corpus proceeding brought by the prisoner. A question was raised concerning how a warden of a state prison is made aware of this provision in the federal rules.

Subdivision (b) deals with review of a decision denying a prisoner's petition for habeas corpus. It provides that, pending review of that decision, the prisoner may be detained in the custody from which release is sought, in other appropriate custody, or released. Subdivision (c) deals with review of a decision to grant the writ. In contrast to subdivision (b), it provides that the prisoner must be released "unless the court or justice or judge rendering the decision or the court of appeals or the Supreme Court, or a judge or justice of either court shall otherwise order." Subdivision (b) permits release of the prisoner to a half-way house ("other appropriate custody"), but no similar authorization is included in subdivision (c). It appears anomalous to permit release to an institution such a half-way house pending review of a decision not to grant the writ, but not to authorize release to "other appropriate custody" pending review of a decision to grant the writ. The anomaly may be more apparent than real. In subdivision (c) the presumption is that the prisoner will be released on personal recognizance, but numerous persons and entities have the ability to "otherwise order." It may well be that the order not to release on personal recognizance can order release to a half-way house. The Committee placed this question on its list of substantive questions to be considered at a later time.

In Subdivision (d) the existing rule says that the initial order respecting custody "shall govern review" in the court of appeals unless it is modified for special reasons. The Style Subcommittee's revision says that the initial order "continues in effect" unless it is modified for special reasons. A member asked whether the change is substantive. The provision that an order "shall govern review" is an unusual one and could be read as establishing the law of the case and that the order is not alterable. The words "continue in effect" implies only

that the order is in effect until something else is done. The use of the phrase "shall govern review" is especially odd when applied to an order regarding release. The order regarding release will not govern review of the case. The restyling may be clarifying an existing ambiguity. The Committee decided that the issue should be flagged in the Committee Note.

Judge Logan thanked the Committee for its hard work.

The next meeting of the Committee was tentatively scheduled for April 27 and 28 in Pasadena.

The meeting adjourned at noon.

Respectfully submitted,

Carol Ann Mooney
Reporter

# Advisory Committee on the Federal Appellate Rules
# Table of Agenda Items -- Revised December 1994

| 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<br>Further research requested 10/90<br>Approved for submission to Standing Committee 12/91<br>Approved by Standing Committee for publication 1/92<br>Approved for resubmission to Standing Committee 4/93<br>Approved for submission to Judicial Conference 6/93<br>Approved by Judicial Conference 9/93<br>Forwarded to Congress by Supreme Court 4/94<br>Effective 12/1/94 |
| 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<br>Subcommittee appointed to monitor; no need for action at this time 4/93<br>C.J. Breyer's suggestion submitted to sub-committee 9/93, see item 93-9<br>Response provided to C.J. Breyer 5/94; no further action deemed appropriate at this time 4/94 |

| FRAP Item | Proposal | Source | Current Status |
|---|---|---|---|
| 89-5 | Amendment of FRAP 35(c). | Mr. Robert St. Vrain (CA-8) | Under study by reporter<br>Discussion with Supreme Court Clerk to precede any further action 10/90<br>Additional drafts requested 12/91<br>Approved for submission to Standing Committee 4/92<br>Standing Committee requested that Advisory Committee reconsider 6/92<br>Draft approved for submission to Standing Committee 4/93. Check all other FRAP for cross-references to "suggestions" for rehearing in banc<br>Approved by Standing Committee for publication to bench and bar 6/93<br>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)<br>Mr. St. Vrain (CA-8) | Under study<br>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<br>Approved by Standing Committee for publication 1/92<br>Approved for resubmission to Standing Committee 4/93<br>Approved by Standing Committee for submission to the Judicial Conference 6/93<br>Approved by Judicial Conference 9/93<br>Forwarded to Congress by Supreme Court 4/94<br>Effective 12/1/94 |

| FRAP Item | Proposal | Source | Current Status |
|---|---|---|---|
| 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<br>Consideration of interlocutory review of rulings on class certification. Referral from Civil Rules Committee 6/93 |
| 91-4 | Typeface, re: rule 32. | Mr. Greacen (CA-5) | Reporter asked to draft language 12/91<br>Approved for submission to Standing Committee 11/92<br>Approved by Standing Committee for publication to bench and bar 12/92<br>Advisory Committee approved new drafts for submission to Standing Committee for re-publication 5/93<br>Standing Committee approved new draft for re-publication 6/93<br>Published 11/93<br>Advisory Committee approved new draft for submission to Standing Committee for republication 4/94<br>Approved by Standing Committee for republication 6/94<br>Published 9/94 |
| 91-5 | Use of special masters in courts of appeals. | Hon. Kenneth Ripple<br>Hon. Gilbert Merritt<br>Hon. Delores Sloviter | Reporter asked to draft language 12/91<br>Approved for submission to Standing Committee 10/92<br>Approved by Standing Committee for publication to bench and bar 12/92<br>Approved for resubmission to Standing Committee 4/93<br>Approved by Standing Committee for submission to the Judicial Conference 6/93<br>Approved by Judicial Conference 9/93<br>Forwarded to Congress by Supreme Court 4/94<br>Effective 12/1/94 |

| FRAP Item | Proposal | Source | Current Status |
|---|---|---|---|
| 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<br>Approved by Standing Committee for publication 1/92<br>Approved for resubmission to Standing Committee 4/93<br>Approved by Standing Committee for submission to Judicial Conference 6/93<br>Approved by Judicial Conference 9/93<br>Forwarded to Congress by Supreme Court 4/94<br>Effective 12/1/94 |
| 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<br>Approved by Standing Committee for publication 1/92<br>Approved for resubmission to Standing Committee 4/93<br>Approved by Standing Committee 6/93 but not forwarded to the Judicial Conference, republished along with other changes to Rule 32 under item 91-4<br>Published 11/93<br>Republished 9/94 |
| 91-11 | Amendment of Rule 25 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<br>Approved for submission to Standing Committee 10/92<br>Approved by Standing Committee for publication to bench and bar 12/92<br>Approved for resubmission to Standing Committee 4/93<br>Approved by Standing Committee for submission to Judicial Conference 6/93<br>Approved by Judicial Conference 9/93<br>Forwarded to Congress by Supreme Court 4/94<br>Effective 12/1/94 |

| FRAP Item | Proposal | Source | Current Status |
|---|---|---|---|
| 91-12 | Amendment of Rule 33. | Local Rules Project | Judge Hall, Judge Logan, Mr. Kopp, & Reporter asked to develop drafts 12/91<br>Approved for submission to Standing Committee 10/92<br>Approved by Standing Committee for publication to bench and bar 12/92<br>Approved for resubmission to Standing Committee 4/93<br>Approved by Standing Committee for submission to Judicial Conference 6/93<br>Approved by Judicial Conference 9/93<br>Forwarded to Congress by Supreme Court 4/94<br>Effective 12/1/94 |
| 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<br>Approved for submission to Standing Committee 10/92<br>Approved by Standing Committee for publication to bench and bar 12/92<br>Approved for resubmission to Standing Committee 4/93<br>Approved by Standing Committee for submission to Judicial Conference 6/93<br>Approved by Judicial Conference 9/93<br>Forwarded to Congress by Supreme Court 4/94<br>Effective 12/1/94 |

| FRAP Item | Proposal | Source | Current Status |
|---|---|---|---|
| 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<br>Approved for submission to Standing Committee 10/92<br>Standing Committee referred the proposal back to to Advisory Committee for further consideration 12/92<br>New draft approved for submission to Standing Committee 4/93<br>Approved by Standing Committee for publication to bench and bar 6/93<br>Published 11/93<br>Advisory Committee approved new draft for submission to Standing Committee for republication 4/94<br>Approved by Standing Committee for republication 6/94<br>Published 9/94 |
| 91-17 | Uniform plan for publication of opinions. | Local Rules Project & Federal Courts Study Committee | Further study recommended 12/91 |
| 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<br>Approved for submission to Standing Committee 10/92<br>Approved by Standing Committee for publication to bench and bar 12/92<br>Approved for resubmission to Standing Committee 4/93<br>Approved by Standing Committee for submission to Judicial Conference 6/93<br>Approved by Judicial Conference 9/93<br>Forwarded to Congress by Supreme Court 4/94<br>Effective 12/1/94 |

| FRAP Item | Proposal | Source | Current Status |
|---|---|---|---|
| 91-24 | Page limits for and contents of amicus briefs. | CA-5 in response to Local Rules Project | For future discussion 12/91<br>Approved in substance; Reporter to prepare new draft 9/93<br>Discussion of new draft postponed until fall meeting 4/94<br>Draft approved 10/94 to be submitted to Style Subcommittee |
| 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<br>Approved in substance; Reporter to prepare new draft 9/93<br>Discussion of new draft postponed until fall meeting 4/94<br>Draft approved 10/94 to be submitted to Style Subcommittee |
| 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<br>Mr. Kopp and Mr. Strubbe asked to assist reporter 12/91<br>Summary of argument -- approved for submission to Standing Committee 10/92<br>Attorney fees -- no further action deemed appropriate 10/92<br>Summary of argument -- approved by Standing Committee for publication 12/92<br>Approved for resubmission to Standing Committee 4/93<br>Summary of argument amendment -- approved by Standing Committee for submission to Judicial Conference 6/93<br>Approved by Judicial Conference 9/93<br>Forwarded to Congress by Supreme Court 4/94<br>Effective 12/1/94 |

| FRAP Item | Proposal | Source | Current Status |
|---|---|---|---|
| 91-27 | Number of copies. | Local Rules Project | Reporter asked to draft language 12/91<br>Mr. Kopp, Mr. Strubbe, & Mr. Spaniol asked to study chart question 12/91<br>Approved for submission to Standing Committee 10/92<br>Approved by Standing Committee for publication to bench and bar 12/92<br>Approved for resubmission to Standing Committee 4/93<br>Approved by Standing Committee for submission to Judicial Conference 6/93<br>Approved by Judicial Conference 9/93<br>Forwarded to Congress by Supreme Court 4/94<br>Effective 12/1/94 |
| 91-28 | Updating Rule 27. | Advisory Committee | Mr. Kopp asked to prepare memo 12/91<br>Held over 10/92<br>Subcommittee appointed 4/93<br>Approved in substance; subcommittee to prepare new draft 9/93<br>Approved for submission to Standing Committee 4/94<br>Approved by Standing Committee for publication 6/94<br>Published 9/94 |

| FRAP Item | Proposal | Source | Current Status |
|---|---|---|---|
| 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<br>Approved for submission to Standing Committee 4/92<br>Standing Committee referred to Committee of Reporters 6/92<br>New draft approved 10/92<br>Uniform language developed by Standing Committee--referred to Advisory Committee for incorporation 12/92<br>Approved by Advisory Committee for submission to Standing Committee 4/93<br>Approved by Standing Committee for publication to bench and bar 6/93<br>Published 11/93<br>Approved for resubmission to Standing Committee 4/94<br>Approved by Standing Committee for submission to Judicial Conference 6/94<br>Approved by Judicial Conference 9/94 |
| 92-2 | Amendment permitting technical amendments without full procedures. | Standing Committee | Draft requested 1/92<br>Draft discussed 4/92; discussion ongoing<br>New draft approved 10/92<br>Uniform language developed by Standing Committee--referred to Advisory Committee for incorporation 12/92<br>Approved by Advisory Committee for submission to Standing Committee 4/93<br>Approved by Standing Committee for publication to bench and bar 4/93<br>Published 11/93<br>Approved for resubmission to Standing Committee 4/94<br>Standing Committee determined that no further action is appropriate 6/94 |

| FRAP Item | Proposal | Source | Current Status |
|---|---|---|---|
| 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<br>Report from FJC pending 1/93<br>On hold pending views of Solicitor General 4/93<br>Approved in substance; subcommittee to prepare new draft 9/93<br>Discussion of new draft postponed until fall meeting 4/94<br>Draft approved 10/94 to be submitted to Style Subcommittee |
| 92-5 | Amendment of Rule 25 re "most expeditious form . . . except special delivery". | Advisory Committee | Approved for submission to Standing Committee 4/93<br>Approved by Standing Committee for publication to bench and bar 6/93<br>Published 11/93<br>Advisory Committee approved new draft for submission to Standing Committee for republication 4/94<br>Approved by Standing Committee for republication 6/94<br>Published 9/94 |
| 92-8 | Amendment of Rule 38 re:<br>1) defining "frivolous";<br>2) whether responsibility falls on the client or the attorney;<br>3) requiring a court to state reasons. | Alan B. Morrison, Esq. | Subcommittee appointed to monitor; no need for action at this time 4/93<br>Subcommittee reported; new chair to be approved 10/94 |

| FRAP Item | Proposal | Source | Current Status |
|---|---|---|---|
| 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<br>Approved by Standing Committee for publication to bench and bar 6/93<br>Published 11/93<br>Approved for resubmission to Standing Committee 4/94<br>Approved by Standing Committee for submission to Judicial Conference 6/94<br>Approved by Judicial Conference 9/94 |
| 92-10 | Reconsideration of some of the language of amended Rule 4(a)(4). | Standing Committee | Approved for submission to Standing Committee 4/93<br>Approved by Standing Committee for publication to bench and bar 6/93<br>Published 11/93<br>Approved for resubmission to Standing Committee 4/94<br>Approved by Standing Committee for submission to Judicial Conference 6/94<br>Approved by Judicial Conference 9/94 |
| 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<br>Referred to Advisory Committee on Civil Rules 4/94 |

| FRAP Item | Proposal | Source | Current Status |
|---|---|---|---|
| 93-2 | Amend Rule 8(c) re: cross-reference to Crim. R. 38. | Department of Justice | Approved for submission to Standing Committee 4/93<br>Approved by Standing Committee for publication 6/93<br>Published 11/93<br>Approved for resubmission to Standing Committee 4/94<br>Approved by Standing Committee for submission to Judicial Conference 6/94<br>Approved by Judicial Conference 9/94 |
| 93-3 | Amend Rule 41 re: 7-day period for issuance of mandate. | Advisory Committee | Draft approved 10/94 to be submitted to Style Subcommittee |
| 93-4 | Amend Rule 41 re: length of time for stay of mandate. | Advisory Committee | Draft approved 10/94 to be submitted to Style Subcommittee |
| 93-5 | Amend Rule 26.1 to delete use of term "affiliate." | Mr. Joseph Spaniol | Draft approved 10/94 to be submitted to Style Subcommittee |
| 93-6 | Amend Rule 41 re: effective date of mandate. | Solicitor General Days | Draft approved 10/94 to be submitted to Style Subcommittee |
| 93-10 | Applicability of Rule 26.1 to trade assoc. | Advisory Committee | No further action deemed appropriate 10/94 |
| 93-11 | Rule permitting party to submit draft opinions as appendix to brief. | Hon. E. Peterson (Sup. Ct. OR) | No further action deemed appropriate 10/94 |
| 94-1 | Amend Rule 26(c) re: length of time for responding when service is by mail. | Standing Committee | No further action deemed appropriate 10/94 |

| FRAP Item | Proposal | Source | Current Status |
|---|---|---|---|
| 94-2 | Amend Rule 28(a) to prohibit citation of appellate decisions without clear recitation of jurisdiction. | Wm. Leighton, Esq. | No further action deemed appropriate 10/94 |

Item 7A

United States Court of Appeals
SECOND CIRCUIT

RECEIVED
11/29/94

(203) 773-2353

CHAMBERS OF
RALPH K. WINTER
U.S. CIRCUIT JUDGE
55 WHITNEY AVENUE
NEW HAVEN, CT 06510

November 22, 1994

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

From: Honorable Ralph K. Winter, Chair
Advisory Committee on Evidence Rules

The Advisory Committee on Evidence Rules submits the following items to the Standing Committee on Rules:

I. Proposals Concerning Amendments to Federal Rules of Evidence 404 and 405 as Alternatives to Rules 413, 414, and 415 as Promulgated by the Congress.

The Advisory Committee adopted recommendations regarding amendments to Federal Rules of Evidence 404 and 405 pursuant to Section 320935 of the Violent Crime Control and Law Enforcement Act of 1994. The Advisory Committee requests that the Standing Committee recommend to the Judicial Conference that these proposals be submitted to the Congress pursuant to Section 320935.

II. A Resolution Concerning Rules 413, 414, and 415.

The Advisory Committee adopted a resolution stating its views on Rules 413, 414, and 415. The Advisory Committee requests that this resolution be submitted to the Judicial Conference with Item I.

III. Proposed Amendments to the Rules of Evidence.

The Advisory Committee has proposed amendments to the Federal Rules of Evidence 103 and 407. The Advisory Committee requests the Standing Committee's approval of these amendments for publication and comment.

IV. Tentative Decision Not To Amend.

The Advisory Committee has tentatively decided not to propose amendments to the following Rules of Evidence and asks the Standing Committee to submit these tentative decisions for publication and comment:

Rule 406. Habit; Routine Practice

Rule 605. Competency of a Judge as Witness.

Rule 606. Competency of a Juror as Witness.

The Advisory Committee requests that the Standing Committee submit for publication and comment these tentative decisions, utilizing the same procedure followed at the last Standing Committee meeting.

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 2, 1994

MEMORANDUM TO STANDING COMMITTEE

SUBJECT: *Materials on Item I Dealing with Evidence Rules 413-415*

Item I contains the following materials:

1. Proposed amendments to Evidence Rules 404 and 405 recommended by the Advisory Committee on Evidence Rules as an alternative to new Evidence Rules 413-415.

2. Correspondence from the committee's chair inviting public comment on new Evidence Rules 413-415, including a copy of the new rules. The invitation was sent to the courts, 900 professors of evidence law, publishers of legal periodicals, 40 women rights organizations, and 1,000 other interested individuals and organizations.

3. A chart summarizing the comments received from the public on Evidence Rules 413-415.

4. Correspondence from the Advisory Committees on Civil and Criminal Rules regarding Evidence Rules 413-415.

John K. Rabiej

Attachments

[Add to Rule 404(a)]

**(4) Character in sexual misconduct cases.** If otherwise admissible under these rules, in a criminal case in which the accused is charged with sexual assault or child molestation, or in a civil case in which a claim is predicated on a party's alleged commission of sexual assault or child molestation, evidence of another act of sexual assault or child molestation, or evidence to rebut such proof or inference therefrom.

(A) In weighing the probative value of such evidence, the court, as part of its rule 403 determination, may consider:

(i) proximity in time to the charged or predicate misconduct;

(ii) similarity to the charged or predicate misconduct;

(iii) frequency of the other acts;

(iv) surrounding circumstances;

(v) relevant intervening events; and

(vi) other relevant similarities or differences.

(B) In a criminal case in which the prosecution intends to offer evidence pursuant to this subdivision, it must disclose the evidence, including statements of witnesses or a summary of the substance of any

testimony, at a reasonable time in advance of trial, or during trial if the court excuses pretrial notice on good cause shown.

(C) For purposes of this subdivision,

(i) "sexual assault" means conduct of the type proscribed by chapter 109A of title 18, United States Code, or conduct that involved deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person irrespective of the age of the victim, or an attempt or conspiracy to engage in either type of conduct, regardless of whether that conduct would have subjected the actor to federal jurisdiction.

(ii) "child molestation" means conduct of the type proscribed by Chapter 110 of Title 18, United States Code, or conduct, committed in relation to a child below the age of 14 years, either of the type proscribed by chapter 109A of title 18, United States Code, or that involved deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person or an attempt or conspiracy to engage in any of these types of conduct, regardless

of whether that conduct would have subjected the actor to federal jurisdiction.

(b) Other crimes, wrongs, or acts. - Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith except as provided in subdivision (a). . .

Note to Rule 404(a)(4)

The Committee has redrafted Rules 413, 414 and 415 which the Violent Crime Control and Law Enforcement Act of 1994 conditionally added to the Federal Rules of Evidence.* These modifications do not change the substance of the congressional enactment. The changes were made in order to integrate the provisions both substantively and stylistically with the existing Rules of Evidence; to illuminate the intent expressed by the principal drafters of the measure; to clarify drafting ambiguities that might necessitate considerable judicial attention if they remained unresolved; and to eliminate possible constitutional infirmities.

The Committee placed the new provisions in Rule 404 because this rule governs the admissibility of character evidence. The congressional enactment constitutes a new exception to the general rule stated in subdivision (a). The Committee also combined the three separate rules proposed by Congress into one subdivision (a)(4) in accordance with the rules' customary practice of treating criminal and civil issues jointly. An amendment to Rule 405 has been added because the authorization of a new form of character evidence in this rule has an impact on methods of proving character that were not explicitly addressed by Congress. The stylistic changes are self-evident. They are particularly noticeable in the definition section in subdivision

---

* Congress provided that the rules would take effect unless within a specified time period the Judicial Conference made recommendations to amend the rules that Congress enacted.

(a)(4)(C) in which the Committee eliminated, without any change in meaning, graphic details of sexual acts.

The Committee added language that explicitly provides that evidence under this subdivision must satisfy other rules of evidence such as the hearsay rules in Article VIII and the expert testimony rules in Article VII. Although principal sponsors of the legislation had stated that they intended other evidentiary rules to apply, the Committee believes that the opening phrase of the new subdivision "if otherwise admissible under these rules" is needed to clarify the relationship between subdivision(a)(4) and other evidentiary provisions.

The Committee also expressly made subdivision (a)(4) subject to Rule 403 balancing in accordance with the repeatedly stated objectives of the legislation's sponsors with which representatives of the Justice Department expressed agreement. Many commentators on Rules 413-415 had objected that Rule 403's applicability was obscured by the actual language employed.

In addition to clarifying the drafters' intent, an explicit reference to Rule 403 may be essential to insulate the rule against constitutional challenge. Constitutional concerns also led the Committee to acknowledge specifically the opposing party's right to offer in rebuttal character evidence that the rules would otherwise bar, including evidence of a third person's prior acts of sexual misconduct offered to prove that the third person rather than the party committed the acts in issue.

In order to minimize the need for extensive and time-

consuming judicial interpretation, the Committee listed factors that a court may consider in discharging Rule 403 balancing. Proximity in time is taken into account in a related rule. See Rule 609(b). Similarity, frequency and surrounding circumstances have long been considered by courts in handling other crimes evidence pursuant to Rule 404(b). Relevant intervening events, such as extensive medical treatment of the accused between the time of the prior proffered act and the charged act, may affect the strength of the propensity inference for which the evidence is offered. The final factor -- "other relevant similarities or differences" -- is added in recognition of the endless variety of circumstances that confront a trial court in rulings on admissibility. Although subdivison (4)(A) explicitly refers to factors that bear on probative value, this enumeration does not eliminate a judge's responsibility to take into account the other factors mentioned in Rule 403 itself -- "the danger of unfair prejudice, confusion of the issues, . . . misleading the jury, . . . undue delay, waste of time, or needless presentation of cumulative evidence." In addition, the Advisory Committee Note to Rule 403 reminds judges that "The availability of other means of proof may also be an appropriate factor."

The Committee altered slightly the notice provision in criminal cases. Providing the trial court with some discretion to excuse pretrial notice was thought preferable to the inflexible 15-day rule provided in Rules 414 and 415. Furthermore, the formulation is identical to that contained in the 1991 amendment

to Rule 404(b) so that no confusion will result from having two somewhat different notice provisions in the same rule. The Committee eliminated the notice provision for civil cases stated in Rule 415 because it did not believe that Congress intended to alter the usual time table for disclosure and discovery provided by the Federal Rules of Civil Procedure.

The definition section was simplified with no change in meaning. The reference to "the law of a State" was eliminated as unnecessarily confusing and restrictive. Conduct committed outside the United States ought equally to be eligible for admission. Evidence offered pursuant to subdivison (a)(4) must relate to a form of conduct proscribed by either chapter 109A or 110 of title 18, United States Code, regardless of whether the actor was subject to federal jurisdiction.

## Rule 405

[Add to first sentence in Rule 405(a)]

except as provided in subdivision (c) of this rule.

[Add]

(c) **Proof in sexual misconduct cases.** In a case in which evidence is offered pursuant to rule 404(a)(4), proof may be made by specific instances of conduct, testimony as to reputation or testimony in the form of an opinion, except that the prosecution or claimant may offer reputation or opinion testimony only after the opposing party has offered such testimony.

## Note to Rule 405(c)

The addition of a new subdivision (a)(4) to Rule 404 necessitates adding a new subdivision (c) to Rule 405 to govern methods of proof. Congress clearly intended no change in the preexisting law that precludes the prosecution or a claimant from offering reputation or opinion testimony in its case in chief to prove that the opposing party acted in conformity with character. When evidence is admissible pursuant to Rule 404(a)(4), the proponents proof must consist of specific instances of conduct. The opposing party, however, is free to respond with reputation or opinion testimony (including expert testimony if otherwise admissible) as well as evidence of specific instances. In a criminal case, the admissibility of reputation or opinion testimony would, in any event, be authorized by Rule 404(a)(1). The extension to civil cases is essential in order to provide the opponent with an adequate opportunity to refute allegations about a character for sexual misconduct. Once the opposing party offers reputation or opinion testimony, however, the prosecution or claimant may counter using such methods of proof.

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

ALICEMARIE H. STOTLER
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

JAMES K. LOGAN
APPELLATE RULES

PAUL MANNES
BANKRUPTCY RULES

PATRICK E. HIGGINBOTHAM
CIVIL RULES

D. LOWELL JENSEN
CRIMINAL RULES

RALPH K. WINTER, JR.
EVIDENCE RULES

September 9, 1994

TO THE BENCH, BAR, AND PUBLIC

The House of Representatives and the Senate have passed H.R.3355, the Violent Crime Control and Law Enforcement Act of 1994. The President is expected to sign the bill soon. Section 320935 of the Act adds three new Evidence Rules 413-415, which would make evidence of a defendant's past similar acts admissible in a civil and a criminal case involving sexual assault or child molestation offense. A copy of the rules is attached.

Under the Act, the three new evidence rules take effect 180 days after the President signs the bill, unless the Judicial Conference makes alternative recommendations to Congress within 150 days. The review procedures under the Rules Enabling Act explicitly do not apply to these rules.

The Judicial Conference's Advisory Committee on Evidence Rules will meet on October 17-18, 1994, in Washington, D.C., and it will consider Rules 413-415. In making its recommendations, the committee will benefit from public comment. To accommodate the deadlines imposed under the Act, the committee requests 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 October 11, 1994**.

All communications on these rules should be addressed to:

Secretary of the Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Washington, D.C. 20544.

Ralph K. Winter, Jr.
Chair, Advisory Committee on
Evidence Rules

*SEC. 320935 ADMISSIBILITY OF EVIDENCE OF SIMILAR CRIMES IN SEX OFFENSE CASES.*

*(a) 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 paragraph (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."*

*(b) IMPLEMENTATION.—The amendments made by subsection (a) shall become effective pursuant to subsection (d).*

*(c) RECOMMENDATIONS BY JUDICIAL CONFERENCE.—Not later than 150 days after the date of enactment of this Act, the Judicial Conference of the United States shall transmit to Congress a report containing recommendations for amending the Federal Rules of Evidence as they affect the admission of evidence of a defendant's prior sexual assault or child molestation crimes in cases involving sexual assault and child molestation. The Rules Enabling Act shall not apply to the recommendations made by the Judicial Conference pursuant to this section.*

*(d) CONGRESSIONAL ACTION.—*

*(1) If the recommendations described in subsection (c) are the same as the amendments made by subsection (a) then the amendments made by subsection (a) shall become effective 30 days after the transmittal of the recommendations.*

*(2) If the recommendations described in subsection (c) are different than the amendments made by subsection (a), the amendments made by subsection (a) shall become effective 150 days after the transmittal of the recommendations unless otherwise provided by law.*

*(3) If the Judicial Conference fails to comply with subsection (c), the amendments made by subsection (a) shall become effective 150 days after the date the recommendations were due under subsection (c) unless otherwise provided by law.*

*(e) APPLICATION.—The amendments made by subsection (a) shall apply to proceedings commenced on or after the effective date of such amendments.*

## SUMMARY OF COMMENTS ON NEW EVIDENCE RULES 413-415

| | OPPOSE | SUPPORT | NEUTRAL/ RECOMMEND MODIFICATIONS |
|---|---|---|---|
| LAWYERS* | - 11 - | - 0 - | - 1 - |
| PROFESSORS OF EVIDENCE LAW* | - 56 - | - 3 - | - 7 - |
| JUDGES* | - 19 - | - 1 - | - 9 - |
| OTHERS | - 2 - | - 3 - | - 0 - |
| *SUBTOTALS* | *- 88 -* | *- 7 -* | *- 17 -* |
| ORGANIZATIONS: | | | |
| NATIONAL | - 7 - | - 1 - | - 0 - |
| LOCAL | - 5 - | - 2 - | - 1 - |
| *SUBTOTALS* | *- 12 -* | *- 3 -* | *- 1 -* |
| **TOTALS** | **- 100 -** | **- 10 -** | **- 18 -** |

*Includes all individual signatories.

**(Prepared by Rules Committee Support Office, Administrative Office of the United States Courts)**

## REASONS FOR OPPOSITION TO EVIDENCE RULES 413-415

| | LAWYERS | PROFESSORS | JUDGES | ORGANIZATIONS | TOTALS |
|---|---|---|---|---|---|
| Circumvents Rules Enabling Act | - 1 - | - 0 - | - 2 - | - 4 - | - 7 - |
| Constitutional Concerns | - 2 - | - 15 - | - 1 - | - 1 - | - 19 - |
| Insufficient Data on Propensity | - 0 - | - 31 - | - 0 - | - 2 - | - 33 - |
| Unfair | - 9 - | - 40 - | - 4 - | - 5 - | - 58 - |
| Unnecessary | - 2 - | - 5 - | - 6 - | - 3 - | - 16 - |
| Impact on Native Americans | - 3 - | - 0 - | - 0 - | - 1 - | - 4 - |
| Drafting Problems | - 2 - | - 35 - | - 7 - | - 3 - | - 47 - |

# ITEM II

# RESOLUTION ON RULES 413-415

Suggested Language for Transmittal Statement for Rule 404
(Broun Draft #2)

The attached suggested rule represents the Committee's attempt to draft a rule that would more effectively carry out the policies embodied in Rules 413-415, as expressed by supporters of those rules, while at the same time providing essential integration with the existing Federal Rules of Evidence.

This Committee had earlier expressed the opinion that the changes now encompassed in these rules were not warranted. Our initial response was reinforced by comments from the overwhelming majority of the large number of lawyers, judges and law professors responding to Rules 413-415. We believe, with these commentators, that the existing Rules of Evidence are adequate to deal with the concerns expressed by members of Congress. Furthermore, we are concerned that the enacted rules may work to diminish significantly the policies established by long standing rules and case law guarding against undue prejudice to persons accused in criminal cases and parties in civil cases.

We do not believe that it is our role to prepare alternative rules that dilute the policies articulated by Congress. Instead, we have attempted to draft a rule that would both correct ambiguities and possible constitutional infirmities identified by the commentators in Rules 413-415 and remain consistent with Congressional intent.

We urge Congress to reconsider its decision on the policy questions. If it does not do so, we recommend that our alternative be adopted.

acceptance of settlement offers, and perhaps to smoke out earlier offers. Results are mixed on the question whether such a rule may moderate demands or, once an offer is made, encourage the offeror to "dig in" and resist further settlement efforts in hopes of winning sanctions based on the offer. And there is a possible "high-ball" effect that encourages defendants to settle for more, just as there may be a "low-ball" effect that encourages plaintiffs to settle for less.

John Frank reminded the Committee of the reactions that met the efforts in 1983 and 1984 to increase Rule 68 sanctions. At the time, he had feared that efforts to pursue those proposals further might meet such protest as to bring down the Enabling Act itself. He also noted that there are other means of encouraging settlement, and imposing sanctions, that involve less gamesmanship and more neutral control. "Michigan mediation," which was recognized as a form of court-annexed arbitration with fee-shifting consequences for a rejecting party who fails to do almost as well as the mediation award, was described. The view was expressed that this and other alternate dispute resolution techniques have made Rule 68 antique in comparison.

Some members of the Committee suggested that the best approach would be to rescind Rule 68. It might work well between litigants of equal sophistication and resources, but it is not fair in other cases, even if it is made two-way. A motion to abrogate Rule 68 was made and seconded twice. Brief discussion suggested that there was support for this view, but also support for an attempt to provide more effective sanctions in a form less complicated than the present draft.

Alfred Cortese noted that Rule 68 has been "studied to death." An ABA committee looked at it but could not reach any consensus. Most lawyers are adamantly opposed to fee-shifting sanctions.

After further discussion, it was concluded that the time has not come for final decisions on Rule 68. It has significant effect in actions brought under attorney fee-shifting statutes that characterize fees as costs. Repeal would have a correspondingly significant effect on such litigation. Even if the present rule seems hurtful, there should be a better idea of the consequences of repeal. It was agreed that the motion to repeal would be carried to the next meeting, or until such time as there is additional information to help appraise the effects of the present rule or the success of various alternative state practices.

*Evidence Rules 413 - 415*

New Evidence Rules 413 to 415 were enacted as part of the Violent Crime Control and Law Enforcement Act of 1994. These Rules

take effect 180 days after the bill was signed unless the Judicial Conference recommends alternative provisions to Congress within 150 days after signing. The deadline is February 10, 1995. The Evidence Rules Committee has recommended alternative provisions; its deliberations were summarized. The Criminal Rules Committee has reviewed the Evidence Rules Committee recommendations and has voted to support them.

It was further noted that the author of the provisions enacted by Congress apparently thought that a Rule 403 balancing test applies to the decision whether to admit evidence apparently admissible under the new rules. There is history to support this view. But the plain language of the Rules shows that they were not drafted to say what they intended to say. The Evidence Rules Committee responded to this information by drafting its alternative recommendations as Evidence Rule 404(a)(4). The approach taken was only to improve the drafting to reflect Congressional intent, not to change the substance of what Congress intended. This approach may be bolstered by the view that the purpose of providing 150 days for alternative Judicial Conference recommendations was to seek drafting suggestions, not comment on the wisdom of the choices made by Congress.

Substantial discomfort was expressed with the substance of the Congressional provisions. It was urged that this Committee should draft an alternative provision that would hew as close as possible to the views that have been expressed repeatedly in recent years by Judicial Conference committees, substantially different from the provisions adopted by Congress. A "mere hortatory response" would be lost without a trace in the echoes of history. An alternative draft would at least give the Standing Committee an alternative to consider if it should decide to take a more aggressive stance than that adopted by the Evidence Rules Committee.

These sentiments were met by concerns that although the substance of the Congressional approach leaves much to be desired, the views of Judicial Conference committees have been made clear to Congress. Vigorous efforts were made to advance these views during the legislative process, without significant success. Rejection of these views was particularly clear with respect to the argument that "other crimes" evidence should be limited to cases of actual convictions. To engage in a process of competing with the Evidence Rules Committee draft might simply vitiate the effectiveness of any response by the Standing Committee.

At the conclusion of this discussion, the sense of the Committee was that the Committee should support the conclusions of the Evidence and Criminal Rules Committees that as narrow an approach as possible should be taken in attempting to improve the drafting of the Rules adopted by Congress. This support should be

conveyed to the Standing Committee.

*Next Meetings*

The next two meetings of the Committee were set. One will be in Philadelphia on Thursday and Friday, February 16 and 17, 1995. The agenda for this meeting will focus solely on Rule 23. Several experienced class-action litigators and a few scholars will be invited to describe their experiences and thoughts for the Committee. The following meeting will be in New York on April 20 to 22, 1995. This meeting will be held in sequence with the mass tort symposium of the Institute for Judicial Administration at New York University. It is hoped that members of the Committee will be able to attend the symposium as another element in the continuing study of Rule 23.

Respectfully submitted,

Edward H. Cooper, Reporter

### I. Rule 10. Arraignment; Proposal to Consider Amendment.

Judge Crigler suggested that the Committee consider an amendment to Rule 10 which would provide that a guilty plea may be entered at an arraignment. The Reporter indicated that he would contact Judge Crigler about possibly placing the issue on the agenda for the Spring 1995 meeting.

## VII. RULES AND PROJECTS PENDING BEFORE THE STANDING COMMITTEE AND JUDICIAL CONFERENCE.

### A. Local Rules Project for Criminal Cases.

Professor Coquillette gave a full report on the background of the local rules project, which had originally focused on civil cases. He noted that with the cooperation of the Committee, he and Mary Squires had continued the project in order to study local rules governing the trial of criminal cases. He noted that the main complaint with regard to local rules was from practitioners that out-of-state lawyers may be able to quickly locate the pertinent rule. To that end, the project would focus on the possibility of uniform number among the districts. The second point, he added, is that the project would assist the district courts in reviewing their own rules and how they related to the national rules. Following a brief discussion about what if any steps could be taken if it appeared that a local rule was in conflict with the national rule, Professor Coquillette indicated that the project would be coordinated with the Committee.

### B. The 1994 Crime Bill

Mr. Rabiej briefly noted several statutory changes which had resulted from the Crime Bill.. First, a typographical error in Rule 46 had been remedied as a part of the bill. Second, Title 18 had been amended to with regard to presentence reports in death penalty cases. And finally, Title 18 was amended to reflect that in capital cases, the government is required to disclose the names of its witnesses to the defense three days before trial unless it can show by a preponderance of the evidence that doing so would endanger the witness.

## VIII. EVIDENCE RULES UNDER CONSIDERATION: RULES 413, 414 & 415

Judge Jensen and the Reporter provided a brief overview of recent Congressional promulgation of Federal Rules of Evidence 413, 414, and 415 which address the admissibility of propensity character evidence. They noted that those evidence rules are being considered by the Evidence Advisory Committee at an upcoming meeting and that the Committee's position or comments on the proposals

might be helpful. Professor Saltzburg was connected through telephone conference call to the Committee and offered additional background discussion on the issue. During the ensuing discussion the Committee considered the rules promulgated by Congress as part of the Crime Bill, and memos from Professors Margaret Berger and Steve Saltzburg concerning possible changes to Congress' version of the rules. The Reporter suggested that rather than endorse any particular language or draft, the Committee might instead address specific policy issues and transmit its views to the Evidence Committee and indicate a willingness to assist that Committee in any way it felt appropriate.

### A. Rules Enabling Act Process.

Before addressing the specifics of the evidence rules, the Committee, at the suggestion of Professor Coquillette, noted its deep concern over the last minute addition of key evidence rules which will in effect drastically change the rules governing the admissibility of other offense, or extrinsic act, evidence -- a controversial and complicated topic in its own right. There was a general consensus that the Congress should be apprised of that concern and the need for initial input from the Judicial Conference before such rules are promulgated. The Committee was convinced that the Rules Enabling Act process is sound and that it insures that a broad cross-section of view points and suggestions will be heard on proposed amendments.

### B. The Need for Rules Governing Propensity Evidence.

Several members of the Committee also expressed the view that Rule of Evidence 404(b) provides an adequate vehicle for introducing other offense evidence against a criminal defendant. Given the sensitive nature of this evidence, and the special dangers attending such information in a criminal trial, several members seriously questioned whether Rules 413-415 are worth the danger of convicting a defendant for his past, as opposed to charged, behavior. The Reporter noted that similar rules were before Congress in 1991 and at that time the Criminal Rules Committee voted by a margin of 8 to 1 to oppose such amendments. Judge Dowd moved that the Committee oppose the adoption of the rules. Judge Davis seconded the motion which carried by a vote of 8 to 1.

### C. The Need for Three Separate Rules; Cross-Over Evidence.

Judge Marovich moved that the three other offense evidence rules adopted by Congress be combined into one rule which would be applicable in both civil and

criminal cases. The motion was seconded by Judge Smith passed by a vote of 8 to 0 with one abstention. The Committee believed that so combining the rules would make it easier for practitioners and courts to locate and apply the applicable provision or rule. The Reporter suggested that because the rules deal with the admissibility of other offenses or extrinsic acts, it might be advisable to include the new provisions in Rule 404, which already deals with that topic, as exceptions to the general rule that extrinsic act evidence is not admissible to prove circumstantially that a person acted in conformity with those previous acts and thus committed the charged offense.

In addressing the question of whether the three rules should be combined, the Committee also noted some ambiguity on whether there could be any cross-over of other offense evidence from sexual assault cases to child molestation cases. That is, could the prosecution in a rape case offer evidence that on prior occasions the defendant had committed acts of child molestation or vice versa? The Committee expressed doubt whether there is justification for any cross-over offense propensity evidence and recommended that that particular issue should be addressed in any proposed alternatives to the Congressional versions of the rules.

### E. Balancing Test.

Upon motion by Judge Marovich (seconded by Judge Crigler), the Committee voted 7 to 2 to recommend that no new balancing test be adopted for other offense evidence regarding sexual propensities. During the discussion, it was suggested that perhaps the evidence should be admissible only if the probative value of the evidence outweighed the prejudicial dangers. Although the Committee was concerned about the special dangers presented by the evidence, in the end it concluded that the balancing test in Rule 403 would suffice. In this regard, the Committee noted that any redraft should make it clear that the admissibility of any proffered evidence under the new rule must be subject to Rule 403 analysis by the court.

### F. Burden of Proof.

The Committee next considered the question of whether any particular or different balancing test should be placed on the admissibility of a defendant's prior acts of sexual misconduct where there has been no conviction. Following a discussion of the current rules applicable to admitting a defendant's prior acts under Rule 404(b), Judge Davis moved that the prosecution be required to prove by clear and convincing evidence in a Rule 104 proceeding that the alleged act occurred before the evidence

could be submitted to the jury. The motion was seconded by Judge Dowd and passed by a vote of 6 to 3.

### G. Notice Provision.

The Congressional version of Rules 413-415 include notice provisions which require the prosecution to inform the defense of its intent to introduce extrinsic act evidence. During the discussion, the Committee considered the issue of whether such notice should be dovetailed with Rule of Criminal Procedure 16 or adopt the more generalized notice provision in Rule 404(b). Judge Crow moved that the 404(b) notice provision be adopted as a recommended notice provision. The motion was seconded by Marovich and failed by a vote of 3 to 5, with one abstention. Judge Dowd then moved that the notice provisions remain as they appear in the Congressional version of the rules. That motion, which was seconded by Judge Davis, passed by a vote of 8 to 0, with one abstention.

### H. Requirement that Sexual Act Resulted in a Conviction.

The suggestion was made during the Committee's discussion that to be admissible under the proposed rules, the defendant's prior sexual conduct must have resulted in a conviction. Several members noted that Rule 404(b) permits non-conviction evidence. Ms. Harkenrider moved that the proposed rules should not be limited to prior convictions. Judge Crow seconded the motion, which carried by a vote of 7 to 2.

### I. Timing Requirement.

Finally, the Committee discussed the question of whether any particular provision should be made for remote sexual conduct, in a manner currently noted in Rule of Evidence 609 for remote convictions. The Committee believed that the balancing test in Rule 403 would adequately cover the court's consideration of prior sexual misconduct. Judge Marovich moved that no specific time limits be established and Judge Crow seconded the motion. It passed by a margin of 7 to 1, with one abstention.

# DRAFT

Honorable Newt Gingrich
Speaker of the House of Representatives
Washington, D.C. 20515

Dear Mr. Speaker:

By direction of the Judicial Conference of the United States, I am honored to transmit to you a report containing recommendations regarding the admission of character evidence in certain cases under the Federal Rules of Evidence.

This report is submitted to Congress in accordance with section 320935 of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322 (September 13, 1994). The section adds new Evidence Rules 413, 414, and 415 to the Federal Rules of Evidence.

The Act defers the effective date of new Evidence Rules 413-415 until February 10, 1995 pending a report from the Judicial Conference. Under the Act the effective date is delayed for an additional 150 days after transmittal of the Conference report, if the Conference makes alternative recommendations to the new rules. The recommendations in the report are different from the Act's new rules. Accordingly, Rules 413-415 will take effect 150 days after the transmittal of this report, unless Congress adopts the alternative recommendations or provides otherwise by law.

Sincerely,

L. Ralph Mecham
Secretary

# REPORT OF THE JUDICIAL CONFERENCE OF THE UNITED STATES ON THE ADMISSION OF CHARACTER EVIDENCE IN CERTAIN SEXUAL MISCONDUCT CASES

**DRAFT**

*February 1995*

Submitted to the Congress in accordance with section 320935
of the
Violent Crime Control and Law Enforcement Act of 1994
(Pub. L. No. 103-322)

# REPORT OF THE JUDICIAL CONFERENCE OF THE UNITED STATES ON THE ADMISSION OF CHARACTER EVIDENCE IN CERTAIN SEXUAL MISCONDUCT CASES

*February 1995*

## I. INTRODUCTION

This report is transmitted to Congress in accordance with the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322 (September 13, 1994). Section 320935 of the Act requires the Judicial Conference of the United States within 150 days (February 10, 1995) to submit "a report containing recommendations for amending the Federal Rules of Evidence as they affect the admission of evidence of a defendant's prior sexual assault or child molestation crimes in cases involving sexual assault or child molestation."

Under the Act, new Rules 413, 414, and 415 would be added to the Federal Rules of Evidence admitting evidence of a defendant's past similar acts in criminal and civil cases involving a sexual assault or child molestation offense for its bearing on any matter to which it is relevant. The effective date of new Rules 413-415 is contingent in part upon the nature of the recommendations submitted by the Judicial Conference.

After careful study, the Judicial Conference urges Congress to reconsider its decision on the policy questions underlying the new rules.

If Congress does not reconsider its decision on the underlying policy questions, the Judicial Conference recommends the adoption of amendments to Rules 404 and 405 of the Federal Rules of Evidence, in lieu of new Rules 413-415. The alternative amendments would not change the substance of the congressional enactment. The changes would clarify drafting ambiguities and eliminate possible constitutional infirmities.

## II. BACKGROUND

Under the Act, the Judicial Conference was provided 150 days within which to make and submit to Congress alternative recommendations to new Evidence Rules 413-415. Consideration of Rules 413-415 by the Judicial Conference was specifically excepted from the exacting review procedures set forth in the Rules Enabling Act (codified at 28 U.S.C. §§ 2071 - 2077). Although the Conference acted on these new rules on an expedited basis to meet the Act's deadlines, the review process was thorough and demanding.

Since the new rules would apply to both civil and criminal cases, the Judicial Conference's Advisory Committee on Civil Rules and the Advisory Committee on Criminal Rules reviewed the rules at separate meetings in September 1994. On earlier occasions, the Advisory Committee on Criminal Rules and the Advisory Committee on Evidence Rules had reviewed and opposed legislative proposals to make similar evidence rule changes, because of the sensitive nature of this type of evidence and the dangers of unfair prejudice.

At the same time, the Advisory Committee on Evidence Rules sent out a notice soliciting comment on new Evidence Rules 413, 414, and 415 to the courts, including all federal judges, about 900 evidence law professors, 40 womens rights organizations, and 1,000 other individuals and interested organizations.

## III. DISCUSSION

On October 17-18, 1994, the Advisory Committee on Evidence Rules met in Washington, D.C. It considered the public responses, which included 84 written comments, representing 112 individuals, 8 local and 8 national legal organizations. The overwhelming majority of judges, lawyers, law professors, and legal organizations who responded opposed new Evidence Rules 413, 414, and 415. The Judicial Conference Advisory Committees on Civil Rules and on Criminal Rules also expressed opposition to the new rules.

The Advisory Committee on Evidence Rules submitted its report to the Judicial Conference Committee on Rules of Practice and Procedure (Standing Committee) for review at its January 11-13, 1995 meeting. The advisory committee believed that the concerns expressed by Congress and embodied in new Evidence Rules 413, 414, and 415 are adequately addressed in the existing Federal Rules of Evidence. In particular, Evidence Rule 404(b) now allows the admission of evidence against a criminal defendant of the commission of prior crimes, wrongs, or acts for specified purposes, including to show intent, plan, motive, preparation, identity, knowledge, or absence of mistake or accident.

Furthermore, the new rules could diminish significantly the protections that have safeguarded persons accused in criminal cases and parties in civil cases against undue prejudice. These protections form a fundamental part of American jurisprudence and have evolved under long-standing rules and case law. A significant concern identified by the committee was the danger of convicting a criminal defendant for past, as opposed to charged, behavior.

For these reasons, the Advisory Committee on Evidence Rules recommended that Congress be urged to reconsider its decision on the policy questions embodied in new Evidence Rules 413, 414, and 415. If Congress does not reconsider its decision on the

policy questions, the committee does not believe that it is their role to prepare alternative rules that diluted the policies articulated by Congress.

Accordingly, the committee drafted proposed amendments to existing Evidence Rules 404 and 405 that would both correct ambiguities and possible constitutional infirmities identified in new Evidence Rules 413, 414, and 415 and remain consistent with Congressional intent. In particular, the proposed amendments were made expressly subject to Evidence Rule 403 balancing in accordance with repeatedly stated objectives of the legislation's sponsors with which representatives of the Department of Justice expressed agreement. In addition to clarifying the drafters' intent, an explicit reference to Rule 403 was determined to be essential to insulate the rule against constitutional challenge.

The committee believed that the alternative amendments would more effectively carry out the policies expressed by supporters of new Evidence Rules 413, 414, and 415, while at the same time providing essential integration with the existing Federal Rules of Evidence.

The Standing Committee reviewed the new rules and the alternative recommendations. It concurred with the views of the Evidence Rules Committee and recommended that the Judicial Conference adopt them.

## IV. RECOMMENDATIONS

The Judicial Conference concurs with the views of its Committee on Rules of Practice and Procedure and urges that Congress reconsider its policy questions underlying Evidence Rules 413-415. In the alternative, the attached amendments to Evidence Rules 404 and 405 are recommended, in lieu of new Evidence Rules 413, 414, and 415. The alternative amendments to Evidence Rules 404 and 405 are accompanied by the Advisory Committee Notes, which explain them in detail.

Item 7B

# ITEM III

# PROPOSED AMENDMENTS TO RULES 103 AND 407

[Add to Rule 103]

(e) Effect of Pretrial Ruling. Any pretrial objection to or proffer of evidence must be renewed in a timely fashion at trial unless the court expressly states on the record, or the context clearly demonstrates, that any ruling thereon is final.

Advisory Committee's Note on Amendment to Rule 103(e):

Since the Federal Rules of Evidence became effective, litigants have increasingly relied on pretrial motions to raise issues about the admissibility of evidence. As enacted, Rule 103 did not specifically address whether a losing party had to renew its objection or offer of proof at trial in order to preserve an issue for appeal.

Subdivison (e) has been added in order to clarify differing approaches that spell uncertainty for litigants and create unnecessary work for the appellate courts. See, e.g., United States v. Vest, 842 F.2d 1319, 1325 (1st Cir.) (absence of objection at trial is "fatal"), cert. denied, 488 U.S. 965 (1988); Allison v. Ticor Title Ins. Co., 979 F.2d 1187, 1200 (7th Cir. 1992) ("the law in this circuit is that an unsuccessful motion in limine does preserve the issue for appeal"); American Home Assurance Co. v. Sunshine Supermarket, Inc., 753 F.2d 321, 324 (3d Cir. 1985) ("test is whether an objection at trial would have been more in the nature of a formal exception or in the nature of a timely objection calling the courts' attention to a matter it need consider."); Palmerin v. City of Riverside, 794 F.2d 1409, 1411 (9th Cir. 1986) (circuit's position is "unclear).

Subdivision (e) states as a default rule that counsel for the losing party must renew any pretrial objection or proffer at trial. Renewal is not required if "the court expressly states on the record, or the context clearly demonstrates," the finality of the pretrial ruling. Counsel bears the responsibility for

obtaining the requisite ruling or renewing the objection and bears the risk of waiving an appealable issue if these procedures are not followed.

Rule 103(e) does not excuse a litigant from having to satisfy the requirements of Luce v. United States, 469 U.S. 28 (1984) to the extent applicable. In Luce, the Supreme Court held that an accused must testify at trial in order to preserve for appeal any Rule 609 objection to a trial court's ruling on the admissibility of the accused's prior convictions for impeachment. Some circuits have extended the Luce rule beyond the Rule 609 context. See United States v. Weichert, 783 F.2d 23, 25 (2d Cir. 1986) (Rule 608(b)), cert. denied, 479 U.S. 831 (1986); United States v. Sanderson, 966 F.2d 184, 189-90 (6th Cir. 1992) (same); United States v. DiMatteo, 759 F.2d 831, 832-33 (11th Cir. 1985) (per curiam) (same), cert. denied, 474 U.S. 860 (1985); United States v. Griffin, 818 F.2d 97, 105 (1st Cir. 1987) (Rule 403), cert. denied, 484 U.S. 844 (1987).

**RULE 407. Subsequent Remedial Measures.**

When, after an injury or harm allegedly caused by an event, measures are taken ~~which~~ that, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, ~~or~~ culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction ~~in connection with the event~~. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

Advisory Committee's Note on Amendment to Rule 407:

The amendment to Rule 407 makes two changes in the rule. First, the words "an injury or harm allegedly caused by" were added to clarify that the rule applies only to changes made after the occurrence that produced the damages giving rise to the action. Evidence of measures taken by the defendant prior to the "event" do not fall within the exclusionary scope of Rule 407 even if they occurred after the manufacture or design of the product. See Chase v. General Motors Corp., 856 F.2d 17, 21-22 (4th Cir. 1988).

Second, Rule 407 has been amended to provide that evidence of subsequent remedial measures may not be used to prove "a defect in a product or its design, or that a warning or instruction should have accompanied a product." This amendment adopts the view of a majority of the circuits that have interpreted Rule 407 to apply to products liability actions. See Raymond v. Raymond Corp., 958 F.2d 1518, 1522 (1st Cir. 1991); In re Joint Eastern District and Southern District Asbestos Litigation v. Armstrong World Industries, Inc., 995 F.2d 343 (2d Cir. 1993); Cann v. Ford Motor Co., 658 F.2d 54, 60 (2d Cir. 1981), cert. denied, 456 U.S. 960 (1982); Kelley v. Crown Equipment Co., 970 F.2d 1273, 1275 (3d Cir. 1992); Werner v. Upjohn,Inc., 628 F.2d 848 (4th Cir. 1980), cert. denied, 449 U.S. 1080 (1981); Grenada Steel Industries, Inc. v. Alabama Oxygen Co., Inc., 695 F.2d 883 (5th Cir. 1983); Bauman v. Volkswagenwerk Aktiengesellschaft, 621 F.2d 230, 232 (6th Cir. 1980); Flaminio

v. Honda Motor Company, Ltd., 733 F.2d 463, 469 (7th Cir. 1984); Gauthier v. AMF, Inc., 788 F.2d 634, 636-37 (9th Cir. 1986).

Although this amendment adopts a uniform federal rule, it should be noted that evidence of subsequent remedial measures may be admissible pursuant to the second sentence of Rule 407. Evidence of subsequent measures that is not barred by Rule 407 may still be subject to exclusion on Rule 403 grounds when the dangers of prejudice or confusion substantially outweigh the probative value of the evidence.

Item 7C-D

# ADVISORY COMMITTEE ON EVIDENCE RULES

## Minutes of the Meeting of October 17-18, 1994
## Washington, D.C.

The Advisory Committee on the Federal Rules of Evidence met on October 17 and 18, 1994 in the Thurgood Marshall Judiciary Building in Washington, D.C. 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
District Judge David S. Doty
Professor Kenneth S. Broun
Gregory P. Joseph, Esq.
James K. Robinson, Esq.
Professor Stephen A. Saltzburg
Roger Pauley, Esq.
Peter G. McCabe, Esq.
Mary F. Harkenrider, Roger Pauley and David Karp, representing the Department of Justice
Professor Margaret A. Berger, Reporter

Also present:

Hon. Annemarie Stotler, Chair, Standing Committee on Rules and Practice
John K. Rabiej, Administrative Office
Peter McCabe, Administrative Office
Joe S. Cecil, Federal Judicial Center
Professor Leon Whinery

Judge Winter called the meeting to order at 8:30 a.m. He reported on the meeting of the Standing Committee on Rules of Practice and Procedure, in June 1994. At that meeting, the Standing Committee responded as follows to actions taken by the Evidence Committee at its May 1994 meeting:

Because of pending action on the Crime Bill, the Standing Committee deferred resubmitting to the Supreme Court the civil portion of Rule 412 that the Supreme Court had declined to promulgate. The issue is now moot because the Violent Crime Control and Law Enforcement Act of 1994 enacted the entire text of Rule 412 that had been forwarded to the Supreme Court, including the civil portions.

The Standing Committee rejected the amendment the Evidence Committee had proposed to Rule 1102(b).

The Standing Committee adopted the Evidence Committee's recommendation that our tentative decision not to amend certain rules be made public, and that comment on these rules should be solicited. An announcement to that effect has been circulated, and a hearing will be held in New York on January 5, 1995 if persons wish to comment.

Judge Winter further reported that the Evidence Committee will meet next in San Diego on January 9 and 10, 1995, and will perhaps meet again on May 4-6, 1995. The Committee approved the minutes of the previous meeting held on May 9 and 10, 1994.

The Committee then turned to the provisions in the Violent Crime Control and Law Enforcement Act of 1994 (Crime Bill) that affect the Rules of Evidence.

Rules 413-415. The Committee first turned to Rules 413-415 which were conditionally passed by Congress with the proviso that if the Judicial Conference makes contrary recommendations within 150 days after the Act's effective date, the Rules will not take effect if both Houses of Congress enact changes within 150 days thereafter. These rules make evidence that a person committed prior acts of sexual assault or child molestation admissible in specified criminal and civil proceedings.

Judge Winter made a number of preliminary comments about the rules. He reminded the Committee that it had evinced no interest in a prior version of these rules at the fall 1993 meeting. With regard to legislative history, he noted that statements about Rules 413-415 in this Congress were made after the Crime Bill had passed. The proponents of the rules now state that Rule 403 and the hearsay rules would continue to apply. Many of the comments the Administrative Office received on the rules point out, however, that the language seems to make other evidentiary rules inapplicable although the defendant's rebuttal evidence would be subject to the existing rules. Numerous comments were received; those from non-politicians were overwhelmingly unfavorable. Proponents of the Crime Bill provisions do not like the propensity rule in general, and reject all time limits that might restrict the admissibility of prior acts. Opponents argue that no empirical evidence supports the proposition that prior sexual offenders are more likely to repeat their acts than other criminals; that the defendant is enormously prejudiced when such evidence is admitted; and that the jury will be diverted and confused by what will be mini-trials about disputed prior acts. In the federal courts, 80-90% of the cases in which these rules would apply involve Native Americans. Judge Winter also advised the Committee that if it decided to rewrite the rules, any accompanying Note would have to be drafted after the meeting and circulated to Committee members via Fax.

Roger Pauley argued that even in the absence of legislative

history, it is clear from looking at the structure of other rules using "is admissible" language that Rule 403 would apply to these rules as well. He mentioned Rules 402, 410, 608(a)(2), 1004, 609(e) and 1003. Judge Winter replied that a reading of these other rules persuaded him that their language did not make a case for Rule 403 applying to the Crime Bill provisions.

The Committee decided by straw vote that it did not wish to leave Rules 413-415 in their present form. Members of the Committee expressed concern about ambiguity, potential constitutional infirmities, style, and inconsistency with existing Federal Rules. The Committee discussed at length whether it should rewrite the rules to make substantive changes or whether it should instead redraft the rules so as to better effectuate the stated aims of its principal sponsors. The Committee adopted the latter view after members stated that they feared that inserting restrictions, such as requiring proof of the prior act by "clear and convincing" evidence, would not pass Congress. The Committee also agreed, however, at the suggestion of Professor Broun, that it would make a short, diplomatic statement to the Standing Committee that the Evidence Committee did not agree with the substance of Rules 413-415.

The Committee agreed that the contents of all three rules belonged in present Rule 404 as an exception to the prohibition against using evidence to show that a person had acted in conformity with his or her character. The Committee thought it essential to clarify the applicability of Rule 403 balancing, and other evidentiary rules such as those governing hearsay. The Committee further decided that the rule should specify the factors that determine probative value in connection with Rule 403 balancing so as to makes the courts' task easier when construing these rules. It was agreed that the Note to the rule should point out that other Rule 403 factors apply as well.

After the Reporter submitted a redraft incorporating these suggestions, other issues arose. The Committee realized that some additional changes would have to be made in Rule 404, as well as in Rule 405, so as to enable a party to respond to propensity evidence about prior acts of sexual assault or child molestation. In a civil case, for instance, a defendant who denies that he ever committed the prior acts ought to be able to introduce evidence opinion or reputation evidence. The Department of Justice had no objection to these changes.

The Committee was also concerned that the reference to state law might open the doors to evidence of conduct such as consensual homosexual activity that is not criminal pursuant to federal law. The formula selected by the Committee does expand the scope of the rules in the Crime Bill slightly in that it would potentially allow evidence of prior acts committed outside the United States to be admitted. The Committee felt, however,

that the availability of Rule 403 balancing would provide the trial court with adequate discretion to exclude evidence in those instances in which a court concluded that the place in which the prior act occurred had a major impact on the evidence's probative value.

The Committee also agreed to make the time limit on notice in criminal proceedings consistent with the notice provision that already exists in Rule 404(b), and to eliminate time limits with regard to civil cases so as not to interfere with discovery and disclosure provisions in the Federal Rules of Civil Procedure.

All voting members of the Committee were in favor of adopting the proposed changes to Rules 404 and 405; the Department of Justice abstained. The amended rules with an accompanying Note will be forwarded to the Standing Committee.

Confidential Communications Between Sexual Assault Victims and Their Counselors. The Crime Bill also contains a provision requiring the Judicial Conference to study whether the Federal Rules of Evidence should be amended to ensure that the confidentiality of communications between sexual victims and their counselors will be adequately protected in federal courts. No time limit for completing this study is in the Crime Bill, but the Attorney General has been directed to report to Congress within one year on measures that the states have taken to protect the confidentiality of these types of communications. Mary Harkenrider suggested that the Committee might wait for the Attorney General's study to be completed. Judge Winter appointed a subcommittee consisting of Judge Fern M. Smith, Mary Harkenrider, Gregory Joseph, Kenneth Broun and the Reporter to consider the Committee's response.

Rule 407. The Committee discussed at length the advisability of amending Rule 407 so as to impose a uniform rule throughout the circuits with regard to the admissibility of evidence of subsequent remedial measures in products liability cases. Ultimately, the Committee agreed to forward to the Standing Committee an amendment that extends Rules 407's ban to products liability cases. The Committee rejected a special provision for recall evidence. The amendment also clarifies when "the event" occurs that triggers application of the rule. The Committee also approved a Note to be forwarded to the Standing Committee.

Rule 103. The Committee spent considerable time debating whether Rule 103 should be amended to clarify whether waiver of appellate review occurs if the losing party fails to renew at trial an issue that had been raised in limine. The Committee with one negative vote agreed that there should be such a rule. It developed a default rule (a new subdivision (e)) that alerts counsel to the need to make clear that unless the record on the in limine motion indicates that the court's determination is

final, counsel must raise the question anew at trial. The amended rule with an accompanying Note will be forwarded to the Standing Committee.

Article VII. The Committee discussed both the Reporter's draft and Professor Broun's draft of possible revisions to Article VII. The Committee decided to defer further action on this Article in light of the recency of the Supreme Court's decision in Daubert v. Merrell Dow Pharmaceuticals, Inc. and the case law that is beginning to develop in response to the opinion.

Other rules. The Committee agreed to add Rules 406, 605, and 606 to the list of rules that it has tentatively decided not to amend.

Item 8A

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

FROM: Honorable Paul Mannes, Chair
Advisory Committee on Bankruptcy Rules

DATE: December 14, 1994

RE: Report of the Advisory Committee on Bankruptcy Rules

**Introduction**

The Advisory Committee on Bankruptcy Rules met on September 22-23, 1994, in New York City. The Advisory Committee considered and approved several proposed amendments to the Bankruptcy Rules at the September meeting, but decided to delay presenting them to the Standing Committee with a request for publication until other proposed amendments are considered at subsequent meetings. It is anticipated that these proposed amendments will be included in a package of proposed amendments to be presented to the Standing Committee with a request for publication in July 1995. These proposed amendments are listed below under "Information Items."

On October 22, 1994, the Bankruptcy Reform Act of 1994 (Pub. L. 103-394, 108 Stat. 4106) was enacted. The Reform Act is lengthy and affects many aspects of bankruptcy law and procedure. With few exceptions, the amendments to the Bankruptcy Code and title 28 of the U.S. Code made by the Reform Act are effective in all bankruptcy cases commenced on or after the date of enactment. Several provisions of the Reform Act have caused certain Bankruptcy Rules and Official Forms to be inconsistent with the Bankruptcy Code and title 28. In addition, there are certain Rules and Forms which -- although not inconsistent with the statutory changes -- should be amended to better implement the new law.

In view of the enactment of the Bankruptcy Reform Act of 1994, the Chairman called a special meeting of the Subcommittee on Forms that was held on December 7, and a special meeting of the full Advisory Committee that was held on December 8-9, 1994, in Washington, D.C., to focus only on proposed amendments to the Rules and Forms designed to conform to, or implement, provisions of the Reform Act.

At the December 1994 meeting, the Advisory Committee approved amendments to the Official Forms designed to conform to the Reform Act. These proposals are listed below ("Action Items") and will be presented to the Standing Committee for approval at the January 1995 meeting. The Advisory Committee also approved three Suggested Interim Bankruptcy Rules, designed to implement certain provisions of the Reform Act, for dissemination to bankruptcy and district courts with a

recommendation for adoption as local rules pending the effective date of similar national Bankruptcy Rule amendments. The Advisory Committee also approved proposed amendments to the Bankruptcy Rules to conform to the Reform Act, but decided to consider these proposals further at its March 1995 meeting and to delay presenting these proposals to the Standing Committee with a request for publication until July 1995 (see "Information Items").

Two provisions of the new legislation directly affect the Bankruptcy Rules, but do not require any action by the Advisory Committee. Section 104(e) of the Reform Act has amended certain provisions of the Rules Enabling Act affecting Bankruptcy Rules, and section 114 has added a new subdivision (h) to Rule 7004 that requires, with certain exceptions, service by certified mail on insured depository institutions. These provisions are discussed in more detail below under "Information Items."

## I. Action Items

A. Proposed Amendments to the Official Forms Submitted for Approval and Transmittal to the Judicial Conference for Its Consideration in March 1995.

1. Synopsis of Proposed Amendments to the Official Forms

a. Official Form No. 1 (Voluntary Petition) is amended to provide a signature line for, and spaces for information relating to, a "bankruptcy petition preparer" (non-attorney who prepares a document for filing in a bankruptcy case for compensation). These amendments are designed to implement § 110 of the Code (added by § 308 of the 1994 Reform Act).

Form 1 also is amended to (1) require that a chapter 11 debtor indicate whether it is a "small business" as defined in § 101 of the Code and to provide a place for such a debtor to elect to be considered a small business under § 1121(e) (added by § 217 of the Reform Act); (2) require the debtor to represent that it is eligible for the relief requested; and (3) to clarify that the person signing a petition on behalf of a corporation or partnership is representing that he or she is authorized to file the petition.

b. Official Form No. 3 (Application and Order to Pay Filing Fee in Installments) is amended to

add a signature line for, and spaces for information relating to, a bankruptcy petition preparer. To correct an oversight, this form is amended further to add a signature line for an attorney who is required by Rule 9011 to sign it.

c. Official Form No. 6 (Schedules), Schedule E (Creditors Holding Unsecured Priority Claims), is amended (1) to list the new priority rights of creditors holding alimony, maintenance and support claims under § 507(a)(7), as amended by § 304(c) of the Reform Act; (2) to increase dollar limits on certain priorities in accordance with § 108 of the Reform Act and to include a note indicating that these limits are subject to future adjustment; and (3) to include in the "wages, salary and commissions" priority category the commissions owed to independent sales representatives in accordance with § 207 of the Reform Act.

In addition, Official Form No. 6 is amended to add a signature line for, and spaces for information relating to, a bankruptcy petition preparer.

d. Official Form No. 7 (Statement of Financial Affairs) is amended to provide a signature line for, and spaces for information relating to, a bankruptcy petition preparer.

e. Official Form No. 8 (Chapter 7 Individual Debtor's Statement of Intention) is amended to provide a signature line for, and spaces for information relating to, a bankruptcy petition preparer.

f. Official Form No. 9 (Notice of Commencement of Case under the Bankruptcy Code, Meeting of Creditors, and Fixing of Dates) includes eleven variations of notices, each one tailored to a certain situation (i.e., type of debtor, chapter of the Code, whether the estate has assets). Where appropriate, these forms are amended to provide notice of the new extended deadline for a governmental unit to file a claim under § 502(b)(9), as amended by §213 of the Reform Act. In addition, these notices are amended where appropriate to state that a proceeding regarding

nondischargeability of a property settlement obligation under § 523(a)(15) (as amended by § 304 of the Reform Act) must be commenced in the bankruptcy case in accordance with § 523(c) of the Code.

g. Official Form No. 10 (Proof of Claim) is amended to (1) add a space for a creditor who is owed alimony, maintenance, or support to claim the new priority under § 507(a)(7) of the Code; (2) to conform to new dollar limits on certain priority claims and to include a note indicating that these limits are subject to future adjustment; and (3) to conform to the amended paragraph numbers in § 507(a) that were changed by the Reform Act.

h. Official Form No. 16 (Captions) consists of three alternatives (Form 16A is the full caption, Form 16 B is the short form, and Form 16C is for adversary proceedings). Section 225 of the Reform Act added § 342(c) to the Code which requires that notices given by the debtor to creditors contain certain information, including the debtor's address and taxpayer identification (Social Security) number. The legislative history to the Reform Act indicates that Congress expects that this information will be included in the caption of notices given in a bankruptcy case. Accordingly, the following amendments are proposed: (1) Form 16A (full caption) is amended to add the debtor's address, (2) Form 16B (short form caption) is amended to include a note indicating that it may be used if § 342(c) of the Code is not applicable; (3) Form 16C is amended to indicate that it is to be used in a complaint in an adversary proceeding commenced by the debtor and to include the information required by § 342(c); and (4) a new Form 16D, which does not include all the information required by § 342(c), is added for use in a complaint in an adversary proceedings other than one filed by a debtor.

i. Official Form No. 17 (Notice of Appeal to a District Court of Bankruptcy Appellate Panel from a Judgment or Other Final Order of a Bankruptcy Court), is amended to recognize the new right to appeal from an interlocutory order extending or reducing the period in

which only the debtor may file a chapter 11 plan under § 1121 of the Code, as amended by § 102 of the Reform Act. The form is also amended to give notice that, if a bankruptcy appellate panel is authorized to hear the appeal, each party has a right to have the appeal heard by the district court and that the appellant may exercise this right only by filing a separate statement of election at the time of the filing of the notice of appeal.

j. Official Form No. 18 (Discharge of Debtor) is amended to include reference to § 523(a)(15) of the Code (property settlement obligations) as one of the types of debts that are discharged unless determined by the bankruptcy court to be nondischargeable.

k. A new Official Form 19 (Certification and Signature of Non-Attorney Bankruptcy Petition Preparer) is added. This form is for use when a document is filed that does not already contain the required signature and information relating to a bankruptcy petition preparer.

2. Text of Proposed Amendments. The amendments to the Official Forms are set forth in Appendix A.

3. Request for Expedited Approval Without Publication for Comment.

In contrast to the Rules, the Official Bankruptcy Forms may be promulgated or amended by the Judicial Conference without approval of the Supreme Court or Congress. See Bankruptcy Rule 9009. Although proposed amendments to the Official Forms have been published for comment in the past -- and the Advisory Committee believes it is appropriate to continue that procedure in most situations -- there is no formal requirement that proposed amendments be published.

The Advisory Committee believes that the proposed amendments to the Official Forms are necessary to conform to the recent legislation, and that it is important that these amendments become effective as soon as possible. With respect to many of the proposed changes, rights of parties may be adversely affected if current forms continue to be used. For example, the Proof of

Claim form lists categories of priorities under section 507(a) of the Code to facilitate the assertion of a priority claim. The current form does not include as an available priority the right of a former spouse or child to the new priority for alimony, maintenance and support obligations afforded under the Bankruptcy Reform Act of 1994. The omission of the new priority right could mislead former spouses into believing that such priority does not exist and could result in the inadvertent waiver of such rights. In addition, the Proof of Claim form and the Schedules contain specific monetary amounts with respect to other priority claims that are no longer applicable because priority limits have been increased.

The Advisory Committee recommends that the proposed amendments to the Official Forms be approved by the Standing Committee without publication for comment, and that they be presented to the Judicial Conference for its approval in March 1995.

4. Request for Judicial Conference Resolution Approving Future Amendments to the Official Forms to Conform to Dollar Adjustments Under Section 104 of the Code.

a. Section 104 of the Bankruptcy Code was amended by the Reform Act to provide that on April 1, 1998, and at each 3-year interval ending on April 1 thereafter, certain dollar amounts in the Code (including monetary limitations on priorities under § 507 of the Code) will be adjusted to the nearest $25 to reflect the change in the Consumer Price Index for All Urban Consumers published by the Department of Labor. Not later than March 1 of the year in which dollar adjustments are made, the Judicial Conference must publish the adjusted amounts in the Federal Register. The dollar amounts relating to priorities under § 507(a) are included in Official Forms No. 6 (Schedules) and No. 10 (Proof of Claim). Any delay in conforming these Official Forms to dollar adjustments will result in inaccurate and misleading forms that could adversely affect the rights of parties. In order to avoid any such delay -- and to avoid the necessity of obtaining Advisory Committee, Standing

Committee, and Judicial Conference approval of future amendments to the Official Forms conforming to adjusted dollar amounts -- the Advisory Committee recommends that the Standing Committee and the Judicial Conference, which prescribes the Official Forms, adopt an appropriate resolution that will result in the automatic amendment of the Official Forms to conform to future dollar adjustments under § 104 of the Code.

B. Proposed Suggested Interim Bankruptcy Rules presented to the Standing Committee with a request for approval and authorization to distribute to district and bankruptcy courts.

1. Background. In 1979, the Advisory Committee on Bankruptcy Rules formulated Suggested Interim Bankruptcy Rules and Forms for adoption as local court rules pending the promulgation of a new body of national Bankruptcy Rules and Official Forms to implement the new Bankruptcy Code (Title I of the Bankruptcy Reform Act of 1978). The interim rules served as model local rules until the new Rules and Forms became effective in 1983.

In 1987, the Advisory Committee again formulated Suggested Interim Bankruptcy Rules and Forms for adoption by local courts. The 1987 interim rules and forms were designed to implement Chapter 12 of the Code (Family Farmers) that was enacted as part of the Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986. These interim rules -- which were sent to district and bankruptcy courts with an explanatory cover letter signed by the chairman of the Advisory Committee -- served as model chapter 12 rules until the national Bankruptcy Rules and Forms were amended in 1991.

At its December 1994 meeting, the Advisory Committee approved three Suggested Interim Bankruptcy Rules and recommended that they be sent to district and bankruptcy courts to serve as model rules designed to implement three aspects of the Bankruptcy Reform Act of 1994 (the election of chapter 11 trustees, small business chapter 11 cases, and jury trials). National rules governing these matters will not become effective until at least December 1997 in accordance with the usual Rules Enabling Act process.

2. Synopsis of Suggested Interim Bankruptcy Rules

a. Suggested Interim Rule 1 provides procedures for the election of a chapter 11 trustee. Before enactment of the Reform Act, creditors did not have the right to elect a trustee in a chapter 11 case. If the court ordered the appointment of a trustee, the United States trustee, in consultation with parties in interest, selected the person to be appointed. The Reform Act continues the same means of selecting a trustee, but also provides that, on request of a party in interest made within 30 days after the court orders the appointment of a trustee, the United States trustee shall convene a meeting of creditors for the purpose of electing a chapter 11 trustee. The Suggested Interim Rule provides procedures for requesting that the United States trustee convene a meeting to elect a trustee, as well as for giving notice of, and conducting, the election. It also governs the procedure for court approval of the appointment of the elected person.

b. Suggested Interim Rule 2 provides procedures to implement some of the Reform Act's provisions relating to small businesses in chapter 11 cases. The Reform Act provides that a "small business" (as defined in a new definition added to the Code) may elect to be considered a small business. If such an election is made, the debtor may solicit votes on a chapter 11 plan with a "conditionally approved" disclosure statement, subject to final approval of the disclosure statement at a hearing that may be combined with the hearing on confirmation. This Suggested Interim Rule provides procedures, including time limits, for making a small business election. It also provides procedures relating to conditional approval of the disclosure statement.

c. Suggested Interim Rule 3 provides procedures relating to jury trials. The Reform Act amended 28 USC § 157 to provide that a bankruptcy judge may conduct a jury trial if a party has a right to trial by jury, the district court designates the bankruptcy judge to conduct a jury trial, and the parties consent. Former Bankruptcy Rule 9015

governing jury trials was abrogated in 1987 because of the existing uncertainty regarding the right to jury trials in bankruptcy cases. Rules are needed governing all aspects of jury trials, including procedures for demanding trial by jury in the district court or the bankruptcy court, and for consenting to have the bankruptcy judge conduct the trial. This Suggested Interim Rule incorporates by reference several Civil Rules relating to jury trials, and also provides procedures relating to consent.

3. Text of Suggested Interim Bankruptcy Rules:

**SUGGESTED INTERIM BANKRUPTCY RULES**

**Rule 1. Election of Trustee in a Chapter 11 Reorganization Case**

(a) REQUEST FOR AN ELECTION. A request to convene a meeting of creditors for the purpose of electing a trustee in a chapter 11 reorganization case shall be filed and transmitted to the United States trustee in accordance with Bankruptcy Rule 5005 within the time prescribed by § 1104(b) of the Code. Pending court approval of the person elected, a person appointed trustee under § 1104(d) shall serve as trustee.

(b) MANNER OF ELECTION AND NOTICE. An election of a trustee under § 1104(b) of the Code shall be conducted in the manner provided in Bankruptcy Rules 2003(b)(3) and 2006. Notice of the meeting of creditors convened under § 1104(b) shall be given in the manner and within the time provided for notices under Bankruptcy Rule 2002(a). A proxy for the purpose of voting in the election may be solicited by a committee appointed under § 1102 of the Code and by any

other party entitled to solicit a proxy under Bankruptcy Rule 2006.

(c) APPLICATION FOR APPROVAL OF APPOINTMENT AND RESOLUTION OF DISPUTES. If it is not necessary to resolve a dispute regarding the election of the trustee or if all disputes have been resolved by the court, the United States trustee shall promptly appoint the person elected to be trustee and file an application for approval of the appointment of the elected person under Bankruptcy Rule 2007.1(b), except that the application does not have to contain names of parties in interest with whom the United States trustee has consulted. If it is necessary to resolve a dispute regarding the election, the United States trustee shall promptly file a report informing the court of the dispute. If no motion for the resolution of the dispute is filed within 10 days after the date of the creditors' meeting called under § 1104(b), a person appointed by the United States trustee in accordance with § 1104(d) of the Code and approved in accordance with Bankruptcy Rule 2007.1(b) shall serve as trustee.

NOTE

This rule implements the amendments to § 1104 of the Code regarding the election of a trustee in a chapter 11 case. The requirement that creditors receive at least 20-days' notice of the meeting may be reduced to a shorter period under Bankruptcy Rule 9006(c)(1).

The procedures for reporting disputes to the court and the time limit for filing a motion to resolve any disputes derive from Bankruptcy Rule 2003(d). Because

the person elected must be "disinterested," the United States trustee must file an application for court approval of the elected person in accordance with Bankruptcy Rule 2007.1(b).

**Rule 2. Small Business Chapter 11 Reorganization Cases**

(a) ELECTION TO BE CONSIDERED A SMALL BUSINESS IN A CHAPTER 11 REORGANIZATION CASE. In a chapter 11 reorganization case, a debtor that is a small business may elect to be considered a small business by filing a written statement of election no later than 60 days after the date of the order for relief or by a later date as the court, for cause, may fix.

(b) APPROVAL OF DISCLOSURE STATEMENT.

(1) Conditional Approval. If the debtor is a small business and has made a timely election to be considered a small business in a chapter 11 case, the court may, on application of the plan proponent, conditionally approve a disclosure statement filed in accordance with Bankruptcy Rule 3016. On or before conditional approval of the disclosure statement, the court shall

(a) fix a time within which the holders of claims and interests may accept or reject the plan;

(b) fix a time for filing objections to the disclosure statement;

(c) fix a date for the hearing on final

approval of the disclosure statement to be held if a timely objection is filed; and (d) fix a date for the hearing on confirmation.

(2) Application of Bankruptcy Rule 3017. If the disclosure statement is conditionally approved, Bankruptcy Rule 3017(a), (b), (c), and (e) do not apply. Conditional approval of the disclosure statement is considered approval of the disclosure statement for the purpose of applying Bankruptcy Rule 3017(d).

(3) Objections and Hearing on Final Approval. Notice of the time fixed for filing objections and the hearing to consider final approval of the disclosure statement shall be given in accordance with Bankruptcy Rule 2002 and may be combined with notice of the hearing on confirmation of the plan. Objections to the disclosure statement shall be filed, transmitted to the United States trustee, and served on the debtor, the trustee, any committee appointed under the Code and any other entity designated by the court at any time before final approval of the disclosure statement or by an earlier date as the court may fix. If a timely objection to the disclosure statement is filed, the court shall hold a hearing to consider final approval before or combined with the hearing on confirmation of

the plan.

NOTE

This rule is designed to implement §§ 1121(e) and 1125(f) that were added to the Code by the Bankruptcy Reform Act of 1994.

If the debtor is a small business and has elected under § 1121(e) to be considered a small business, § 1125(f) permits the court to conditionally approve a disclosure statement subject to final approval after notice and a hearing. If a disclosure statement is conditionally approved, and no timely objection to the disclosure statement is filed, it is not necessary for the court to hold a hearing on final approval.

**Rule 3. Jury Trials**

(a) APPLICABILITY OF CERTAIN FEDERAL RULES OF CIVIL PROCEDURE. Rules 38, 39, and 47-51 F.R.Civ.P., and Rule 81(c) F.R.Civ.P. insofar as it applies to jury trials, apply in cases and proceedings, except that a demand made under Rule 38(b) F.R.Civ.P. shall be filed in accordance with Bankruptcy Rule 5005.

(b) CONSENT TO HAVE TRIAL CONDUCTED BY BANKRUPTCY JUDGE. If the right to a jury trial applies, a timely demand has been filed under Rule 38(b) F.R.Civ.P., and the bankruptcy judge has been specially designated to conduct the jury trial, the parties may consent to have a jury trial conducted by a bankruptcy judge under 28 USC § 157(e) by jointly or separately filing a statement of consent no later than [insert period specified by local rule].

NOTE

This rule provides procedures relating to jury

trials. This rule is not intended to expand or create any right to trial by jury where such right does not otherwise exist.

C. Request for Authorization to Make Recommendations and to Otherwise Communicate with the National Bankruptcy Review Commission on Matters Relating to Bankruptcy Procedures.

1. Title VI of the Bankruptcy Reform Act of 1994 established the National Bankruptcy Review Commission, comprised of 9 members to be appointed within 60 days after enactment of the Act. The duties of the Commission are:

   a. To investigate and study issues and problems relating to the Bankruptcy Code;

   b. To evaluate the advisability of proposals and current arrangements with respect to such issues and problems;

   c. Within 2 years after it first meets, to prepare and submit to Congress, the Chief Justice, and the President a report of its findings and conclusions, together with its recommendations for such legislative or administrative action as it considers appropriate;

   d. To solicit divergent views of all parties concerned with the operation of the bankruptcy system.

2. It is likely that the Commission will study and consider procedural matters, and could make recommendations to amend the Code and Rules to deal with procedural issues. The Advisory Committee believes it would be beneficial to be able to communicate with the Commission -- on behalf of the Advisory Committee and not as a representative of the Standing Committee or the Judicial Conference -- to express views and to make recommendations on procedural matters from time to time during the two-year life of the Commission. The Advisory Committee requests authorization to make such recommendations and to otherwise communicate with the Commission.

## II. Information Items

A. Status of Matters Under Consideration

1. Proposed amendments to Bankruptcy Rules 1006, 1007, 1019, 2002, 2015, 3002, 3016, 4004, 5005, 7004, 8008, and 9006, have been published for comment in September 1994. A public hearing on these proposals is scheduled for February 24, 1995, in Washington, D.C. The Advisory Committee will consider all comments at its March 1995 meeting in Louisiana.

2. Proposed amendments to Bankruptcy Rules 3017, 3018, 3021, and 9011, and a new Rule 8020 on sanctions for frivolous appeals, were approved (subject to further consideration of language) at the September 1994 meeting of the Advisory Committee. Presentation of these proposed amendments to the Standing Committee with a request for publication is expected in July 1995.

3. Proposed amendments to Bankruptcy Rules 2002, 2007.1, 3002, 8001, and 9035, and new Rules 1020 (election to be considered a small business in a chapter 11 case), 3017.1 (procedures relating to approval of a disclosure statement in a small business case), and 9015 (jury trials), were approved (subject to further consideration of language) by the Advisory Committee at its December 8-9, 1994, meeting. These proposed amendments are designed to conform the Rules to the Bankruptcy Reform Act of 1994. The Advisory Committee expects to present these proposed amendments to the Standing Committee with a request for publication in July 1995.

B. Other Matters.

1. The Three-Day Mail Rule. At its September 1994 meeting, the Advisory Committee considered the Standing Committee's request to consider amending the "3-day mail rule" to a "5-day mail rule" in Bankruptcy Rule 9006(f). The Advisory Committee recommends that the suggested change not be made at this time. First, the Advisory Committee is not aware of any problems regarding this rule and has no reason to believe that it is not working well. Second, local rules modeled after the 3-day mail rule -- such as a 3-day mail rule in the Southern District of New York -- would become inconsistent with a new 5-day mail rule in the

national rules, causing unnecessary complexity and confusion for lawyers. Third, changing rules regarding time periods could cause traps for lawyers who are unaware of the change. Finally, the Advisory Committee questions whether the speed of mail delivery at the end of 1997 (when an amendment would become effective) will warrant a 5-day mail rule rather than a 3-day rule.

2. Director's Forms. Bankruptcy Rule 9009 authorizes the Director of the Administrative Office of the United States Courts to issue forms for use under the Code (other than the Official Forms). At the December 1994 meeting, in response to a request by the Administrative Office, the Advisory Committee reviewed and approved suggested amendments to several of these forms for the purpose of conforming to the Bankruptcy Reform Act of 1994.

3. Statutory Amendment to Rule 7004 Relating to Service on Insured Depository Institutions. Section 114 of the Reform Act has amended Bankruptcy Rule 7004. First, it inserted at the beginning of Rule 7004(b) (which permits service by first class mail) the introductory phrase "Except as provided in subdivision (h)". Second, it added the following new subdivision (h):

> "(h) Service of Process on an Insured Depository Institution -- Service on an insured depository institution (as defined in section 3 of the Federal Deposit Insurance Act) in a contested matter or adversary proceeding shall be made by certified mail addressed to an officer of the institution unless --
>
> (1) the institution has appeared by its attorney, in which case the attorney shall be served by first class mail;
>
> (2) the court orders otherwise after service upon the institution by certified mail of notice of an application to permit service on the institution by first class mail sent to an officer of the institution designated by the institution; or
>
> (3) the institution has waived in writing its entitlement to service by certified mail by designating an officer to receive service."

4. Statutory Amendments to the Rules Enabling Act. Section 104(e) of the Reform Act amends 28 USC § 2073(a)(2), (d), and (e), by including reference to 28 USC § 2075 (Bankruptcy Rules). The effect of these amendments is to make the procedural requirements with respect to the Rules Enabling Act applicable to the Bankruptcy Rules. In addition, the Reform Act amends 28 USC § 2075 to conform the effective date of Bankruptcy Rule amendments to the effective date for the other bodies of federal rules (December 1). Prior to this amendment, Bankruptcy Rule amendments became effective on August 1.

Attachments:

1. Appendix A -- Proposed Amendments to the Official Forms.

2. Draft of minutes of Advisory Committee meeting of September 22-23, 1994.

3. Draft of minutes of Advisory Committee meeting of December 8-9, 1994.

Item 8B

## APPENDIX A

## PROPOSED AMENDMENTS TO OFFICIAL BANKRUPTCY FORMS

On some forms, the proposed amendments are handwritten on the existing (unrevised) form.

For other forms, "clean" versions incorporating the proposed amendments were available on 12/14/94. On these, the changes are indicated by hand-drawn circles or brackets, sometimes with the label "new" used for highlighting.

B1
(Rev. 5/92)

# FORM 1. VOLUNTARY PETITION

## United States Bankruptcy Court

_____ District of _____

## VOLUNTARY PETITION

| | |
|---|---|
| IN RE (Name of debtor—If individual, enter: Last, First, Middle) | NAME OF JOINT DEBTOR (Spouse) (Last, First, Middle) |
| ALL OTHER NAMES used by the debtor in the last 6 years (Include married, maiden, and trade names.) | ALL OTHER NAMES used by the joint debtor in the last 6 years (Include married, maiden, and trade names.) |
| SOC. SEC./TAX I.D. NO. (If more than one, state all.) | SOC. SEC./TAX I.D. NO. (If more than one, state all.) |
| STREET ADDRESS OF DEBTOR (No. and street, city, state, and zip code) | STREET ADDRESS OF JOINT DEBTOR (No and street, city, state, and zip code) |
| COUNTY OF RESIDENCE OR PRINCIPAL PLACE OF BUSINESS | COUNTY OF RESIDENCE OR PRINCIPAL PLACE OF BUSINESS |
| MAILING ADDRESS OF DEBTOR (If different from street address) | MAILING ADDRESS OF JOINT DEBTOR (If different from street address) |
| LOCATION OF PRINCIPAL ASSETS OF BUSINESS DEBTOR (If different from addresses listed above) | VENUE (Check one box)<br>☐ Debtor has been domiciled or has had a residence, principal place of business, or principal assets in this District for 180 days immediately preceding the date of this petition or for a longer part of such 180 days than in any other District.<br>☐ There is a bankruptcy case concerning debtor's affiliate, general partner, or partnership pending in this District. |

**INFORMATION REGARDING DEBTOR (Check applicable boxes)**

TYPE OF DEBTOR (Check one box)
- ☐ Individual
- ☐ Joint (Husband & Wife)
- ☐ Partnership
- ☐ Other: _____
- ☐ Corporation Publicly Held
- ☐ Corporation Not Publicly Held
- ☐ Municipality

NATURE OF DEBT (Check one box)
- ☐ Non-Business/Consumer
- ☐ Business—Complete A & B below

A. TYPE OF BUSINESS (Check one box)
- ☐ Farming
- ☐ Professional
- ☐ Retail/Wholesale
- ☐ Railroad
- ☐ Transportation
- ☐ Manufacturing/ Mining
- ☐ Stockbroker
- ☐ Commodity Broker
- ☐ Construction
- ☐ Real Estate
- ☐ Other Business

B. BRIEFLY DESCRIBE NATURE OF BUSINESS

CHAPTER OR SECTION OF BANKRUPTCY CODE UNDER WHICH THE PETITION IS FILED (Check one box)
- ☐ Chapter 7
- ☐ Chapter 9
- ☐ Chapter 11
- ☐ Chapter 12
- ☐ Chapter 13
- ☐ Sec. 304—Case Ancillary to Foreign Proceeding

(Insert - see below)

FILING FEE (Check one box)
- ☐ Filing fee attached
- ☐ Filing fee to be paid in installments. (Applicable to individuals only.) Must attach signed application for the court's consideration certifying that the debtor is unable to pay fee except in installments. Rule 1006(b); see Official Form No. 3.

NAME AND ADDRESS OF LAW FIRM OR ATTORNEY

Telephone No.

NAME(S) OF ATTORNEY(S) DESIGNATED TO REPRESENT THE DEBTOR (Print or Type Names)

☐ Debtor is not represented by an attorney. Telephone No. of Debtor not represented by an attorney: ( )

**STATISTICAL/ADMINISTRATIVE INFORMATION (28 U.S.C. § 604)**
**(Estimates only) (Check applicable boxes)**

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

THIS SPACE FOR COURT USE ONLY

ESTIMATED NUMBER OF CREDITORS

| 1-15 | 16-49 | 50-99 | 100-199 | 200-999 | 1000-over |
|---|---|---|---|---|---|
| ☐ | ☐ | ☐ | ☐ | ☐ | ☐ |

ESTIMATED ASSETS (in thousands of dollars)

| Under 50 | 50-99 | 100-499 | 500-999 | 1000-9999 | 10,000-99,000 | 100,000-over |
|---|---|---|---|---|---|---|
| ☐ | ☐ | ☐ | ☐ | ☐ | ☐ | ☐ |

ESTIMATED LIABILITIES (in thousands of dollars)

| Under 50 | 50-99 | 100-499 | 500-999 | 1000-9999 | 10,000-99,000 | 100,000-over |
|---|---|---|---|---|---|---|
| ☐ | ☐ | ☐ | ☐ | ☐ | ☐ | ☐ |

EST. NO. OF EMPLOYEES—CH. 11 & 12 ONLY

| 0 | 1-19 | 20-99 | 100-999 | 1000-over |
|---|---|---|---|---|
| ☐ | ☐ | ☐ | ☐ | ☐ |

EST. NO. OF EQUITY SECURITY HOLDERS—CH. 11 & 12 ONLY

| 0 | 1-19 | 20-99 | 100-499 | 500-Over |
|---|---|---|---|---|
| ☐ | ☐ | ☐ | ☐ | ☐ |

SMALL BUSINESS (Ch. 11 only)

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

Name of Debtor _____

Case No. _____
(Court use only)

**FILING OF PLAN**

For Chapter 9, 11, 12 and 13 cases only. Check appropriate box.

☐ A copy of debtor's proposed plan dated _____ is attached.

☐ Debtor intends to file a plan within the time allowed by statute, rule, or order of the court.

**PRIOR BANKRUPTCY CASE FILED WITHIN LAST 6 YEARS** (If more than one, attach additional sheet)

| Location Where Filed | Case Number | Date Filed |
|---|---|---|
| | | |

**PENDING BANKRUPTCY CASE FILED BY ANY SPOUSE, PARTNER, OR AFFILIATE OF THIS DEBTOR** (If more than one, attach additional sheet.)

| Name of Debtor | Case Number | Date |
|---|---|---|
| | | |
| **Relationship** | **District** | **Judge** |
| | | |

**REQUEST FOR RELIEF**

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

is eligible for and
A

## SIGNATURES

**ATTORNEY**

X _____
Signature

Date

**INDIVIDUAL/JOINT DEBTOR(S)**

I declare under penalty of perjury that the information provided in this petition is true and correct.

X _____
Signature of Debtor

Date

X _____
Signature of Joint Debtor

Date

**CORPORATE OR PARTNERSHIP DEBTOR**

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

X _____
Signature of Authorized Individual

Print or Type Name of Authorized Individual

Title of Individual Authorized by Debtor to File this Petition

Date

If the debtor is a coeporation filing under chapter 11, Exhibit "A" is attached and made part of this petition.

~~EXHIBIT "A" (To be completed if debtor is a corporation requesting relief under chapter 11.)~~

~~☐ Exhibit "A" is attached and made a part of this petition.~~ (MOVED AND INCORPORATED ABOVE TO MAKE ROOM FOR ADDED BOX, BELOW.)

**TO BE COMPLETED BY INDIVIDUAL CHAPTER 7 DEBTOR WITH PRIMARILY CONSUMER DEBTS (See P.L. 98-353 § 322)**

I am aware that I may proceed under chapter 7, 11, or 12, or 13 of title 11, United States Code, understand the relief available under each such chapter, and choose to proceed under chapter 7 of such title.

If I am represented by an attorney, exhibit 'B' has been completed.

TO BE MOVED LEFT.

X _____
Signature of Debtor

Date

X _____
Signature of Joint Debtor

Date

SIGNATURE BOX FOR BANKRUPTCY PETITION PREPARER TO BE INSERTED.

**EXHIBIT "B" (To be completed by attorney for individual chapter 7 debtor(s) with primarily consumer debts.)**

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

SEE SEPARATE SHEET.

X _____
Signature of Attorney

Date

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

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

_____
Printed or Typed Name of Bankruptcy Petition Preparer

_____
Social Security No.

_____

_____ _____
Address Tel. No.

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

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

X _____ _____
Signature of Bankruptcy Petition Preparer Date

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

## COMMITTEE NOTE

The form is amended to provide space for signing by a "bankruptcy petition preparer," as required under section 110 of the Code, which was added by the Bankruptcy Reform Act of 1994. In addition to signing, a bankruptcy petition preparer is required by section 110 to disclose the information requested. All signatories of Form 1 are requested to provide the clerk's office with a telephone number.

A chapter 11 debtor that qualifies as a "small business" under section 101 of the Code, as amended by the 1994 Act, may elect special, expedited treatment under amendments made to chapter 11 by the 1994 Act. The court may order that a creditors committee not be appointed in a small business case. Accordingly, the first page of the petition is amended to require a small business filing under chapter 11 to identify itself. The petition also is amended to offer a small business chapter 11 debtor an opportunity to exercise its right to elect to be considered a small business at the commencement of the case.

Several clarifying and technical amendments also have been made to indicate that a debtor is to check only one box with respect to "Type of Debtor" and "Nature of Debt," to clarify the intent that the individual signing on behalf of a corporation or partnership is authorized to file the petition, and to require a debtor to represent that it is eligible for relief under the chapter of title 11 specified in the petition.

Form B3
12/94

# Form 3. APPLICATION AND ORDER TO PAY FILING FEE IN INSTALLMENTS

*[Caption as in Form 16B]*

## APPLICATION TO PAY FILING FEES IN INSTALLMENTS

In accordance with Fed. R. Bankr. P. 1006, application is made for permission to pay the filing fee on the following terms:

$ _____ with the filing of the petition, and the balance of

$ _____ in _____ installments, as follows:

$ _____ on or before _____

$ _____ on or before _____

$ _____ on or before _____

$ _____ on or before _____

I certify that I am unable to pay the filing fee except in installments. I further certify that I have not paid any money or transferred any property to an attorney or any other person for services in connection with this case or in connection with any other pending bankruptcy case and that I will not make any payment or transfer any property for services in connection with the case until the filing fee is paid in full.

Date: _____

_____
Applicant

_____
Attorney for Applicant

new

---

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

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

_____ _____
Printed or Typed Name of Bankruptcy Petition Preparer Social Security No.

_____

_____
Address

new

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

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

X _____ _____
Signature of Bankruptcy Petition Preparer Date

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

---

ORDER

IT IS ORDERED that the debtor pay the filing fee in installments on the terms set forth in the foregoing application.

IT IS FURTHER ORDERED that until the filing fee is paid in full the debtor shall not pay, and no person shall accept, any money for services in connection with this case, and the debtor shall not relinquish, and no person shall accept, any property as payment for services in connection with this case.

BY THE COURT

Date: _____

_____
*United States Bankruptcy Judge*

## COMMITTEE NOTE

This form is a "document for filing" that may be prepared by a "bankruptcy petition preparer" as defined in 11 U.S.C. § 110, which was added to the Code by the Bankruptcy Reform Act of 1994; accordingly, a signature line is provided for such preparer. In addition to signing, a bankruptcy petition preparer is required by section 110 to disclose the information requested. A signature line for a debtor's attorney also is added, as required by Rule 9011.

B6E
(Rev. 12/94)

In Re _____, Debtor

Case No. _____ (if known)

# SCHEDULE E - CREDITORS HOLDING UNSECURED PRIORITY CLAIMS

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

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

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

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

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

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

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

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

☐ **Wages, salaries, and commissions**

Wages, salaries, and commissions, including vacation, severance, and sick leave pay owing to employees and commissions owing to qualifying independent sales representatives up to $4000* per person earned within 90 days immediately preceding the filing of the original petition, or the cessation of business, whichever occurred first, to the extent provided in 11 U.S.C. § 507(a)(3).

☐ **Contributions to employee benefit plans**

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

☐ **Certain farmers and fishermen**

Claims of certain farmers and fishermen, up to $4000* per farmer or fisherman, against the debtor, as provided in 11 U.S.C. § 507(a)(5).

☐ **Deposits by individuals**

Claims of individuals up to $1,800* for deposits for the purchase, lease, or rental of property or services for personal, family, or household use, that were not delivered or provided. 11 U.S.C. § 507(a)(6).

In Re _____, Case No._____

Debtor (if known)

☐ **Alimony, Maintenance, or Support**

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

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

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

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

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

* Amounts are subject to adjustment on April 1, 1998, and every three years thereafter with respect to cases commenced on or after the date of adjustment.

___ continuation sheets attached

Form B6-Cont.
(12/94)

In re _____, Debtor

Case No. _____ (If known)

# DECLARATION CONCERNING DEBTOR'S SCHEDULES

## DECLARATION UNDER PENALTY OF PERJURY BY INDIVIDUAL DEBTOR

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

Date _____ Signature: _____ Debtor

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

[If joint case, both spouses must sign.]

---

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

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

_____ Printed or Typed Name of Bankruptcy Petition Preparer

_____ Social Security No.

_____

_____ Address

new

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

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

X _____ Signature of Bankruptcy Petition Preparer

_____ Date

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

---

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

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

Date _____ Signature: _____

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

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

---

## COMMITTEE NOTE

Schedule E - Creditors Holding Unsecured Priority Claims is amended to add the new seventh priority afforded to debts for alimony, maintenance, or support of a spouse, former spouse, or child of the debtor by the Bankruptcy Reform Act of 1994. Statutory references are amended to conform to the paragraph numbers of section 507(a) of the Code as renumbered by the 1994 Act. Schedule E also is amended to add commissions owed to certain independent sales representatives and to raise the maximum dollar amounts for certain priorities in accordance with amendments made by the 1994 Act to section 507(a) of the Code. The 1994 Act also amended section 104 of the Code to provide for future adjustment of the maximum dollar amounts specified in section 507(a) to be made by administrative action at three-year intervals to reflect changes in the consumer price index. Schedule E is amended to give notice that these dollar amounts are subject to change without formal amendment to the official form.

The Schedules are a "document for filing" that may be prepared by a "bankruptcy petition preparer" as defined in 11 U.S.C. § 110, which was added to the Code by the 1994 Act; accordingly, a signature line for such preparer is added. In addition to signing, a bankruptcy petition preparer is required by section 110 to disclose the information requested.

Form 7
(Rev. 12/94)

FORM 7. STATEMENT OF FINANCIAL AFFAIRS

# UNITED STATES BANKRUPTCY COURT

_____ DISTRICT OF _____

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

## STATEMENT OF FINANCIAL AFFAIRS

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

Questions 1 - 15 are to be completed by all debtors. Debtors that are or have been in business, as defined below, also must complete Questions 16 - 21. **If the answer to any question is "None," or the question is not applicable, mark the box labeled "None."** If additional space is needed for the answer to any question, use and attach a separate sheet properly identified with the case name, case number (if known), and the number of the question.

*DEFINITIONS*

**This is a multi-page form. The only amendments are to the final, or signature, page. Accordingly, the body of the form is omitted here.**

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

AMOUNT SOURCE (if more than one)

*[If completed by an individual or individual and spouse]*

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

Date _____ Signature _____
of Debtor

Date _____ Signature _____
of Joint Debtor
(if any)

---

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

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

_____ _____
Printed or Typed Name of Bankruptcy Petition Preparer Social Security No.

_____

_____
Address

new

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

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

X _____ _____
Signature of Bankruptcy Petition Preparer Date

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

---

*[If completed on behalf of a partnership or corporation]*

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

Date _____ Signature _____

_____
Print Name and Title

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

## COMMITTEE NOTE

This form is a "document for filing" that may be prepared by a "bankruptcy petition preparer" as defined in 11 U.S.C. § 110, which was added to the Code by the Bankruptcy Reform Act of 1994; accordingly, a signature line for such preparer is added. In addition to signing, a bankruptcy petition preparer is required by section 110 to disclose the information requested.

Form B8
11/94

# Form 8. INDIVIDUAL DEBTOR'S STATEMENT OF INTENTION

*[Caption as in Form 16B]*

## CHAPTER 7 INDIVIDUAL DEBTOR'S STATEMENT OF INTENTION

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

2. My intention with respect to the property of the estate which secures those consumer debts is as follows:

a. *Property to Be Surrendered.*

| | Description of Property | Creditor's name |
|---|---|---|
| 1. | _____ | _____ |
| 2. | _____ | _____ |
| 3. | _____ | _____ |

*b. Property to Be Retained. [Check applicable statement of debtor's intention concerning reaffirmation, redemption, or lien avoidance.]*

| | Description of property | Creditor's name | Debt will be reaffirmed pursuant to § 524(c) | Property is claimed as exempt and will be redeemed pursuant to § 722 | Lien will be avoided pursuant to § 522(f) and property will be claimed as exempt |
|---|---|---|---|---|---|
| 1. | _____ | _____ | _____ | _____ | _____ |
| 2. | _____ | _____ | _____ | _____ | _____ |
| 3. | _____ | _____ | _____ | _____ | _____ |
| 4. | _____ | _____ | _____ | _____ | _____ |
| 5. | _____ | _____ | _____ | _____ | _____ |

3. I understand that § 521(2)(B) of the Bankruptcy Code requires that I perform the above stated intention within 45 days of the filing of this statement with the court, or within such additional time as the court, for cause, within such 45-day period fixes.

Date: _____

_____
Signature of Debtor

---

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

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

_____ _____
Printed or Typed Name of Bankruptcy Petition Preparer Social Security No.

_____

_____
Address

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

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

X_____ _____
Signature of Bankruptcy Petition Preparer Date

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

new

## COMMITTEE NOTE

This form is a "document for filing" that may be prepared by a "bankruptcy petition preparer" as defined in 11 U.S.C. § 110, which was added to the Code by the Bankruptcy Reform Act of 1994; accordingly, a signature line for such preparer is added. In addition to signing, a bankruptcy petition preparer is required by section 110 to disclose the information requested.

FORM B9A
6/90

# United States Bankruptcy Court

Case Number

District of

NOTICE OF COMMENCEMENT OF CASE UNDER CHAPTER 7 OF THE BANKRUPTCY CODE, MEETING OF CREDITORS, AND FIXING OF DATES
(Individual or Joint Debtor No Asset Case)

| In re (Name of Debtor) | Address of Debtor<br>Date Case Filed (or Converted) | Soc. Sec./Tax Id. Nos. |
|---|---|---|
| Name and Address of Attorney for Debtor<br>Telephone Number | Name and Address of Trustee<br>Telephone Number | |

☐ This is a converted case originally filed under chapter _____ on _____ (date).

## DATE, TIME, AND LOCATION OF MEETING OF CREDITORS

## DISCHARGE OF DEBTS

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

AT THIS TIME THERE APPEAR TO BE NO ASSETS AVAILABLE FROM WHICH PAYMENT MAY BE MADE TO UNSECURED CREDITORS. DO NOT FILE A PROOF OF CLAIM UNTIL YOU RECEIVE NOTICE TO DO SO.

COMMENCEMENT OF CASE. A petition for liquidation under chapter 7 of the Bankruptcy Code has been filed in this court by or against the person or persons named above as the debtor, and an order for relief has been entered. You will not receive notice of all documents filed in this case. All documents filed with the court, including lists of the debtor's property, debts, and property claimed as exempt are available for inspection at the office of the clerk of the bankruptcy court.

CREDITORS MAY NOT TAKE CERTAIN ACTIONS. A creditor is anyone to whom the debtor owes money or property. Under the Bankruptcy Code, the debtor is granted certain protection against creditors. Common examples of prohibited actions by creditors are contacting the debtor to demand repayment, taking action against the debtor to collect money owed to creditors or to take property of the debtor, and starting or continuing foreclosure actions, repossessions, or wage deductions. If unauthorized actions are taken by a creditor against a debtor, the court may penalize that creditor. A creditor who is considering taking action against the debtor or the property of the debtor should review § 362 of the Bankruptcy Code and may wish to seek legal advice. The staff of the clerk of the bankruptcy court is not permitted to give legal advice.

MEETING OF CREDITORS. The debtor (both husband and wife in a joint case) is required to appear at the meeting of creditors on the date and at the place set forth above for the purpose of being examined under oath. Attendance by creditors at the meeting is welcomed, but not required. At the meeting, the creditors may elect a trustee other than the one named above, elect a committee of creditors, examine the debtor, and transact such other business as may properly come before the meeting. The meeting may be continued or adjourned from time to time by notice at the meeting, without further written notice to creditors.

LIQUIDATION OF THE DEBTOR'S PROPERTY. The trustee will collect the debtor's property and turn any that is not exempt into money. At this time, however, it appears from the schedules of the debtor that there are no assets from which any distribution can be paid to creditors. If at a later date it appears that there are assets from which a distribution may be paid, the creditors will be notified and given an opportunity to file claims.

EXEMPT PROPERTY. Under state and federal law, the debtor is permitted to keep certain money or property as exempt. If a creditor believes that an exemption of money or property is not authorized by law, the creditor may file an objection. An objection must be filed not later than 30 days after the conclusion of the meeting of creditors.

DISCHARGE OF DEBTS. The debtor is seeking a discharge of debts. A discharge means that certain debts are made unenforceable against the debtor personally. Creditors whose claims against the debtor are discharged may never take action against the debtor to collect the discharged debts. If a creditor believes that the debtor should not receive any discharge of debts under § 727 of the Bankruptcy Code or that a debt owed to the creditor is not dischargeable under § 523(a)(2), (4), or (6) of the Bankruptcy Code, timely action must be taken in the bankruptcy court by the deadline set forth above in the box labeled "Discharge of Debts." Creditors considering taking such action may wish to seek legal advice.

(6), 15

## DO NOT FILE A PROOF OF CLAIM UNLESS YOU RECEIVE A COURT NOTICE TO DO SO

| Address of the Clerk of the Bankruptcy Court | For the Court:<br>*Clerk of the Bankruptcy Court*<br>*Date* |
|---|---|

FORM B9C
6/90

# United States Bankruptcy Court

Case Number

_____ District of _____

NOTICE OF COMMENCEMENT OF CASE UNDER CHAPTER 7 OF THE BANKRUPTCY CODE, MEETING OF CREDITORS, AND FIXING OF DATES
(Individual or Joint Debtor Asset Case)

| In re (Name of Debtor) | Address of Debtor | Soc. Sec./Tax Id. Nos. |
|---|---|---|
| | Date Case Filed (or Converted) | |

| Name and Address of Attorney for Debtor | Telephone Number | Name and Address of Trustee | Telephone Number |
|---|---|---|---|
| | | | |

☐ This is a converted case originally filed under chapter _____ on _____ (date).

DEADLINE TO FILE ~~FILING CLAIMS~~ A PROOF OF CLAIM

FOR CREDITORS OTHER THAN GOVERNMENTAL UNITS:
~~Deadline to file a proof of claim:~~

FOR GOVERNMENTAL UNITS:

DATE, TIME, AND LOCATION OF MEETING OF CREDITORS

DISCHARGE OF DEBTS

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

COMMENCEMENT OF CASE. A petition for liquidation under chapter 7 of the Bankruptcy Code has been filed in this court by or against the person or persons named above as the debtor, and an order for relief has been entered. You will not receive notice of all documents filed in this case. All documents filed with the court, including lists of the debtor's property, debts, and property claimed as exempt are available for inspection at the office of the clerk of the bankruptcy court.

CREDITORS MAY NOT TAKE CERTAIN ACTIONS. A creditor is anyone to whom the debtor owes money or property. Under the Bankruptcy Code, the debtor is granted certain protection against creditors. Common examples of prohibited actions by creditors are contacting the debtor to demand repayment, taking action against the debtor to collect money owed to creditors or to take property of the debtor, and starting or continuing foreclosure actions, repossessions, or wage deductions. If unauthorized actions are taken by a creditor against a debtor, the court may penalize that creditor. A creditor who is considering taking action against the debtor or the property of the debtor should review § 362 of the Bankruptcy Code and may wish to seek legal advice. The staff of the clerk of the bankruptcy court is not permitted to give legal advice.

MEETING OF CREDITORS. The debtor (both husband and wife in a joint case) is required to appear at the meeting of creditors on the date and at the place set forth above for the purpose of being examined under oath. Attendance by creditors at the meeting is welcomed, but not required. At the meeting, the creditors may elect a trustee other than the one named above, elect a committee of creditors, examine the debtor, and transact such other business as may properly come before the meeting. The meeting may be continued or adjourned from time to time by notice at the meeting, without further written notice to creditors.

LIQUIDATION OF THE DEBTOR'S PROPERTY. The trustee will collect the debtor's property and turn any that is not exempt into money. If the trustee can collect enough money and property from the debtor, creditors may be paid some or all of the debts owed to them.

EXEMPT PROPERTY. Under state and federal law, the debtor is permitted to keep certain money or property as exempt. If a creditor believes that an exemption of money or property is not authorized by law, the creditor may file an objection. An objection must be filed not later than 30 days after the conclusion of the meeting of creditors.

DISCHARGE OF DEBTS. The debtor is seeking a discharge of debts. A discharge means that certain debts are made unenforceable against the debtor personally. Creditors whose claims against the debtor are discharged may never take action against the debtor to collect the discharged debts. If a creditor believes that the debtor should not receive any discharge of debts under § 727 of the Bankruptcy Code or that a debt owed to the creditor is not dischargeable under § 523(a)(2), (4), or (6) of the Bankruptcy Code, timely action must be taken in the bankruptcy court by the deadline set forth above in the box labeled "Discharge of Debts." Creditors considering taking such action may wish to seek legal advice.

PROOF OF CLAIM. Except as otherwise provided by law, in order to share in any payment from the estate, a creditor must file a proof of claim by the date set forth above in the box labeled "Filing Claims." The place to file the proof of claim, either in person or by mail, is the office of the clerk of the bankruptcy court. Proof of claim forms are available in the clerk's office of any bankruptcy court.

| Address of the Clerk of the Bankruptcy Court | For the Court: |
|---|---|
| | *Clerk of the Bankruptcy Court* |
| | *Date* |

FORM B9D
6/92

# United States Bankruptcy Court

Case Number

_____ District of _____

NOTICE OF COMMENCEMENT OF CASE UNDER CHAPTER 7 OF THE BANKRUPTCY CODE, MEETING OF CREDITORS, AND FIXING OF DATES
(Corporation/Partnership Asset Case)

| In re (Name of Debtor) | Address of Debtor | Soc. Sec./Tax Id. Nos. |
|---|---|---|
| | Date Case Filed (or Converted) | |

☐ Corporation ☐ Partnership

| Name and Address of Attorney for Debtor | Telephone Number | Name and Address of Trustee | Telephone Number |
|---|---|---|---|
| | | | |

☐ This is a converted case originally filed under chapter _____ on _____ (date)

DEADLINE TO FILE A ~~FILING CLAIMS~~ PROOF OF CLAIM

FOR creditors other than governmental units: ~~Deadline to File a Proof of Claim:~~

FOR governmental units:

DATE, TIME, AND LOCATION OF MEETING OF CREDITORS

COMMENCEMENT OF CASE. A petition for liquidation under chapter 7 of the Bankruptcy Code has been filed in this court by or against the debtor named above, and an order for relief has been entered. You will not receive notice of all documents filed in this case. All documents filed with the court, including lists of the debtor's property and debts, are available for inspection at the office of the clerk of the bankruptcy court.

CREDITORS MAY NOT TAKE CERTAIN ACTIONS. A creditor is anyone to whom the debtor owes money or property. Under the Bankruptcy Code, the debtor is granted certain protection against creditors. Common examples of prohibited actions by creditors are contacting the debtor to demand repayment, taking action against the debtor to collect money owed to creditors or to take property of the debtor, and starting or continuing foreclosure actions or repossessions. If unauthorized actions are taken by a creditor against a debtor, the court may penalize that creditor. A creditor who is considering taking action against the debtor or the property of the debtor should review § 362 of the Bankruptcy Code and may wish to seek legal advice. If the debtor is a partnership, remedies otherwise available against general partners are not necessarily affected by the commencement of this partnership case. The staff of the clerk of the bankruptcy court is not permitted to give legal advice.

MEETING OF CREDITORS. The debtor's representative, as specified in Bankruptcy Rule 9001(5), is required to appear at the meeting of creditors on the date and at the place set forth above for the purpose of being examined under oath. Attendance by creditors at the meeting is welcomed, but not required. At the meeting, the creditors may elect a trustee other than the one named above, elect a committee of creditors, examine the debtor, and transact such other business as may properly come before the meeting. The meeting may be continued or adjourned from time to time by notice at the meeting, without further written notice to the creditors.

LIQUIDATION OF THE DEBTOR'S PROPERTY. The trustee will collect the debtor's property, if any, and turn it into money. If the trustee can collect enough money and property from the debtor, creditors may be paid some or all of the debts owed to them.

PROOF OF CLAIM. Except as otherwise provided by law, in order to share in any payment from the estate, a creditor must file a proof of claim by the date set forth above in the box labeled "Filing Claims." The place to file the proof of claim, either in person or by mail, is the office of the clerk of the bankruptcy court. Proof of claim forms are available in the clerk's office of any bankruptcy court.

| Address of the Clerk of the Bankruptcy Court | For the Court: |
|---|---|
| | *Clerk of the Bankruptcy Court* |
| | *Date* |

FORM B9E
6/90

# United States Bankruptcy Court

Case Number

_____ District of _____

NOTICE OF COMMENCEMENT OF CASE UNDER CHAPTER 11 OF THE BANKRUPTCY CODE, MEETING OF CREDITORS, AND FIXING OF DATES
(Individual or Joint Debtor Case)

| In re (Name of Debtor) | Address of Debtor<br><br>Date Case Filed (or Converted) | Soc. Sec./Tax Id. Nos. |
|---|---|---|
| Name and Address of Attorney for Debtor<br><br>Telephone Number | Name and Address of Trustee<br><br>Telephone Number | |

☐ This is a converted case originally filed under chapter _____ on _____ (date).

## DATE, TIME, AND LOCATION OF MEETING OF CREDITORS

## DISCHARGE OF DEBTS

Deadline to File a Complaint to Determine Dischargeability of Certain Types of Debts:

COMMENCEMENT OF CASE. A petition for reorganization under chapter 11 of the Bankruptcy Code has been filed in this court by or against the person or persons named above as the debtor, and an order for relief has been entered. You will not receive notice of all documents filed in this case. All documents filed with the court, including lists of the debtor's property, debts, and property claimed as exempt are available for inspection at the office of the clerk of the bankruptcy court.

CREDITORS MAY NOT TAKE CERTAIN ACTIONS. A creditor is anyone to whom the debtor owes money or property. Under the Bankruptcy Code, the debtor is granted certain protection against creditors. Common examples of prohibited actions by creditors are contacting the debtor to demand repayment, taking action against the debtor to collect money owed to creditors or to take property of the debtor, and starting or continuing foreclosure actions, repossessions, or wage deductions. If unauthorized actions are taken by a creditor against a debtor, the court may penalize that creditor. A creditor who is considering taking action against the debtor or the property of the debtor should review § 362 of the Bankruptcy Code and may wish to seek legal advice. The staff of the clerk of the bankruptcy court is not permitted to give legal advice.

MEETING OF CREDITORS. The debtor (both husband and wife in a joint case) is required to appear at the meeting of creditors on the date and at the place set forth above for the purpose of being examined under oath. Attendance by creditors at the meeting is welcomed, but not required. At the meeting, the creditors may examine the debtor and transact such other business as may properly come before the meeting. The meeting may be continued or adjourned from time to time by notice at the meeting, without further written notice to creditors.

EXEMPT PROPERTY. Under state and federal law, the debtor is permitted to keep certain money or property as exempt. If a creditor believes that an exemption of money or property is not authorized by law, the creditor may file an objection. An objection must be filed not later than 30 days after the conclusion of the meeting of creditors.

DISCHARGE OF DEBTS. The debtor may seek a discharge of debts. A discharge means that certain debts are made unenforceable against the debtor personally. Creditors whose claims against the debtor are discharged may never take action against the debtor to collect the discharged debts. If a creditor believes that the debtor should not receive a discharge under § 1141(d)(3)(C) of the Bankruptcy Code, timely action must be taken in the bankruptcy court in accordance with Bankruptcy Rule 4004(a). If a creditor believes that a debt owed to the creditor is not dischargeable under § 523(a)(2), (4), or (6) of the Bankruptcy Code, timely action must be taken in the bankruptcy court by the deadline set forth above in the box labeled "Discharge of Debts." Creditors considering taking such action may wish to seek legal advice.

PROOF OF CLAIM. Schedules of creditors have been or will be filed pursuant to Bankruptcy Rule 1007. Any creditor holding a scheduled claim which is not listed as disputed, contingent, or unliquidated as to amount may, but is not required to, file a proof of claim in this case. Creditors whose claims are not scheduled or whose claims are listed as disputed, contingent, or unliquidated as to amount and who desire to participate in the case or share in any distribution must file their proofs of claim. A creditor who desires to rely on the schedules of creditors has the responsibility for determining that the claim is listed accurately. If the court sets a deadline for filing a proof of claim, you will be notified. The place to file a proof of claim, either in person or by mail, is the office of the clerk of the bankruptcy court. Proof of claim forms are available in the clerk's office of any bankruptcy court.

PURPOSE OF CHAPTER 11 FILING. Chapter 11 of the Bankruptcy Code enables a debtor to reorganize pursuant to a plan. A plan is not effective unless approved by the court at a confirmation hearing. Creditors will be given notice concerning any plan, or in the event the case is dismissed or converted to another chapter of the Bankruptcy Code. The debtor will remain in possession of its property and will continue to operate any business unless a trustee is appointed.

| Address of the Clerk of the Bankruptcy Court | For the Court:<br><br>*Clerk of the Bankruptcy Court*<br><br>*Date* |
|---|---|

FORM B9E (Alt.)
(Rev. 5/92)

# United States Bankruptcy Court

Case Number

_____ District of _____

## NOTICE OF COMMENCEMENT OF CASE UNDER CHAPTER 11 OF THE BANKRUPTCY CODE, MEETING OF CREDITORS, AND FIXING OF DATES
(Individual or Joint Debtor Case)

| In re (Name of Debtor) | Address of Debtor<br>Date Filed (or Converted) | Soc. Sec./Tax Id. Nos |
|---|---|---|
| Addressee: | Address of the Clerk of the Bankruptcy Court | |
| Name and Address of Attorney for Debtor<br>Telephone Number | Name and Address of Trustee<br>Telephone Number | |

This is a converted case originally filed under chapter _____ on _____

DEADLINE TO FILE A ~~FILING CLAIMS~~ PROOF OF CLAIM

FOR CREDITORS other than governmental units: [OR "If the court sets a deadline, creditors will be notified."] FOR governmental units:

DATE, TIME, AND LOCATION OF MEETING OF CREDITORS

DISCHARGE OF DEBTS

_____ is the Deadline to File a Complaint to Determine Dischargeability of Certain Types of Debts.

(6),

15

COMMENCEMENT OF CASE. A petition for reorganization under chapter 11 of the Bankruptcy Code has been filed in this court by or against the person or persons named above as the debtor, and an order for relief has been entered. You will not receive notice of all documents filed in this case. All documents filed with the court, including lists of the debtor's property, debts, and property claimed as exempt are available for inspection at the office of the clerk of the bankruptcy court.

CREDITORS MAY NOT TAKE CERTAIN ACTIONS. A creditor is anyone to whom the debtor owes money or property. Under the Bankruptcy Code, the debtor is granted certain protection against creditors. Common examples of prohibited actions by creditors are contacting the debtor to demand repayment, taking action against the debtor to collect money owed to creditors or to take property of the debtor, and starting or continuing foreclosure actions, repossessions, or wage deductions. If unauthorized actions are taken by a creditor against a debtor, the court may penalize that creditor. A creditor who is considering taking action against the debtor or the property of the debtor should review § 362 of the Bankruptcy Code and may wish to seek legal advice. The staff of the clerk of the bankruptcy court is not permitted to give legal advice.

MEETING OF CREDITORS. The debtor (both husband and wife in a joint case) is required to appear at the meeting of creditors on the date and at the place set forth above for the purpose of being examined under oath. Attendance by creditors at the meeting is welcomed, but not required. At the meeting, the creditors may examine the debtor and transact such other business as may properly come before the meeting. The meeting may be continued or adjourned from time to time by notice at the meeting, without further written notice to creditors.

EXEMPT PROPERTY. Under state and federal law, the debtor is permitted to keep certain money or property as exempt. If a creditor believes that an exemption of money or property is not authorized by law, the creditor may file an objection. An objection must be filed not later than 30 days after the conclusion of the meeting of creditors.

DISCHARGE OF DEBTS. The debtor may seek a discharge of debts. A discharge means that certain debts are made unenforceable against the debtor personally. Creditors whose claims against the debtor are discharged may never take action against the debtor to collect the discharged debts. If a creditor believes that the debtor should not receive a discharge under § 1141(d)(3)(C) of the Bankruptcy Code, timely action must be taken in the bankruptcy court in accordance with Bankruptcy Rule 4004(a). If a creditor believes that a debt owed to the creditor is not dischargeable under § 523(a)(2), (4), or (6) of the Bankruptcy Code, timely action must be taken in the bankruptcy court by the deadline set forth above in the box labeled "Discharge of Debts." Creditors considering taking such action may wish to seek legal advice.

PROOF OF CLAIM. Schedules of creditors have been or will be filed pursuant to Bankruptcy Rule 1007. Any creditor holding a scheduled claim which is not listed as disputed, contingent, or unliquidated as to amount may, but is not required to, file a proof of claim in this case. Creditors whose claims are not scheduled or whose claims are listed as disputed, contingent, or unliquidated as to amount and who desire to participate in the case or share in any distribution must file their proofs of claim. A creditor who desires to rely on the schedules of creditors has the responsibility for determining that the claim is listed accurately. The place to file a proof of claim, either in person or by mail, is the office of the clerk of the bankruptcy court. Proof of claim forms are available in the clerk's office of any bankruptcy court.

PURPOSE OF CHAPTER 11 FILING. Chapter 11 of the Bankruptcy Code enables a debtor to reorganize pursuant to a plan. A plan is not effective unless approved by the court at a confirmation hearing. Creditors will be given notice concerning any plan, or in the event the case is dismissed or converted to another chapter of the Bankruptcy Code. The debtor will remain in possession of its property and will continue to operate any business unless a trustee is appointed.

For the Court: _____ _____
Clerk of the Bankruptcy Court Date

FORM B9F (Alt.)
(Rev. 5/92)

# United States Bankruptcy Court

Case Number

_____ District of _____

## NOTICE OF COMMENCEMENT OF CASE UNDER CHAPTER 11 OF THE BANKRUPTCY CODE, MEETING OF CREDITORS, AND FIXING OF DATES
(Corporation/Partnership Case)

| In re (Name of Debtor) | Address of Debtor | Soc. Sec./Tax Id. Nos. |
|---|---|---|
| | Date Filed or Converted | |

| Addressee: | Address of the Clerk of the Bankruptcy Court |
|---|---|

☐ Corporation ☐ Partnership

| Name and Address of Attorney for Debtor | Telephone Number | Name and Address of Trustee | Telephone Number |
|---|---|---|---|
| | | | |

This is a converted case originally filed under chapter _____ on _____

DEADLINE TO FILE A ~~FILING CLAIMS~~ PROOF OF CLAIM

FOR creditors other than governmental units: [OR "If the court sets a deadline, creditors will be notified."] For governmental units:

DATE, TIME, AND LOCATION OF MEETING OF CREDITORS

COMMENCEMENT OF CASE. A petition for reorganization under chapter 11 of the Bankruptcy Code has been filed in this court by or against the debtor named above, and an order for relief has been entered. You will not receive notice of all documents filed in this case. All documents filed with the court, including lists of the debtor's property and debts, are available for inspection at the office of the clerk of the bankruptcy court.

CREDITORS MAY NOT TAKE CERTAIN ACTIONS. A creditor is anyone to whom the debtor owes money or property. Under the Bankruptcy Code, the debtor is granted certain protection against creditors. Common examples of prohibited actions by creditors are contacting the debtor to demand repayment, taking action against the debtor to collect money owed to creditors or to take property of the debtor, and starting or continuing foreclosure actions, or repossessions. If unauthorized actions are taken by a creditor against a debtor, the court may penalize that creditor. A creditor who is considering taking action against the debtor or the property of the debtor should review § 362 of the Bankruptcy Code and may wish to seek legal advice. If the debtor is a partnership, remedies otherwise available against general partners are not necessarily affected by the filing of this partnership case. The staff of the clerk of the bankruptcy court is not permitted to give legal advice.

MEETING OF CREDITORS. The debtor's representative, as specified in Bankruptcy Rule 9001(5) is required to appear at the meeting of creditors on the date and at the place set forth above for the purpose of being examined under oath. Attendance by creditors at the meeting is welcomed, but not required. At the meeting, the creditors may examine the debtor and transact such other business as may properly come before the meeting. The meeting may be continued or adjourned from time to time by notice at the meeting, without further written notice to creditors.

PROOF OF CLAIM. Schedules of creditors have been or will be filed pursuant to Bankruptcy Rule 1007. Any creditor holding a scheduled claim which is not listed as disputed, contingent, or unliquidated as to amount may, but is not required to, file a proof of claim in this case. Creditors whose claims are not scheduled or whose claims are listed as disputed, contingent, or unliquidated as to amount and who desire to participate in the case or share in any distribution must file their proofs of claim. A creditor who desires to rely on the schedule of creditors has the responsibility for determining that the claim is listed accurately. The place to file a proof of claim, either in person or by mail, is the office of the clerk of the bankruptcy court. Proof of claim forms are available in the clerk's office of any bankruptcy court.

PURPOSE OF CHAPTER 11 FILING. Chapter 11 of the Bankruptcy Code enables a debtor to reorganize pursuant to a plan. A plan is not effective unless approved by the court at a confirmation hearing. Creditors will be given notice concerning any plan, or in the event the case is dismissed or converted to another chapter of the Bankruptcy Code. The debtor will remain in possession of its property and will continue to operate any business unless a trustee is appointed.

For the Court: _____ _____
Clerk of the Bankruptcy Court Date

FORM B9G
6/90

# United States Bankruptcy Court

Case Number

_____ District of _____

NOTICE OF COMMENCEMENT OF CASE UNDER CHAPTER 12 OF THE BANKRUPTCY CODE, MEETING OF CREDITORS, AND FIXING OF DATES
(Individual or Joint Debtor Family Farmer)

| In re (Name of Debtor) | Address of Debtor<br><br>Date Case Filed (or Converted) | Soc. Sec./Tax Id. Nos. |
|---|---|---|
| Name and Address of Attorney for Debtor<br><br>Telephone Number | Name and Address of Trustee<br><br>Telephone Number | |

☐ This is a converted case originally filed under chapter _____ on _____ (date).

~~Deadline to file a proof of claim:~~ DEADLINE TO FILE A ~~FILING CLAIMS~~ PROOF OF CLAIM
FOR creditors other than governmental units: FOR governmental units:

DATE, TIME, AND LOCATION OF MEETING OF CREDITORS

FILING OF PLAN AND DATE, TIME, AND LOCATION OF HEARING ON CONFIRMATION OF PLAN

☐ The debtor has filed a plan. The plan or a summary of the plan is enclosed. Hearing on confirmation will be held:
_____ (Date) _____ (Time) _____ (Location)

☐ The debtor has filed a plan. The plan or a summary of the plan and notice of the confirmation hearing will be sent separately.

☐ A plan has not been filed as of this date. Creditors will be given separate notice of the hearing on confirmation of the plan.

(6), 15

DISCHARGE OF DEBTS

Deadline to File a Complaint to Determine Dischargeability of Certain Types of Debts:

COMMENCEMENT OF CASE. A family farmer's debt adjustment case under chapter 12 of the Bankruptcy Code has been filed in this court by the family farmer named above as the debtor, and an order for relief has been entered. You will not receive notice of all documents filed in this case. All documents filed with the court, including lists of the debtor's property and debts are available for inspection at the office of the clerk of the bankruptcy court.

CREDITORS MAY NOT TAKE CERTAIN ACTIONS. A creditor is anyone to whom the debtor owes money or property. Under the Bankruptcy Code, the debtor is granted certain protection against creditors. Common examples of prohibited actions by creditors are contacting the debtor to demand repayment, taking action against the debtor to collect money owed to creditors or to take property of the debtor, and starting or continuing foreclosure actions, repossessions, or wage deductions. Some protection is also given to certain codebtors of consumer debts. If unauthorized actions are taken by a creditor against a debtor, or a protected codebtor, the court may penalize that creditor. A creditor who is considering taking action against the debtor or the property of the debtor, or any codebtor, should review §§ 362 and 1201 of the Bankruptcy Code and may wish to seek legal advice. The staff of the clerk of the bankruptcy court is not permitted to give legal advice.

MEETING OF CREDITORS. The debtor (both husband and wife in a joint case) is required to appear at the meeting of creditors on the date and at the place set forth above for the purpose of being examined under oath. Attendance by creditors at the meeting is welcomed, but not required. At the meeting, the creditors may examine the debtor and transact such other business as may properly come before the meeting. The meeting may be continued or adjourned from time to time by notice at the meeting, without further written notice to creditors.

EXEMPT PROPERTY. Under state and federal law, the debtor is permitted to keep certain money or property as exempt. If a creditor believes that an exemption of money or property is not authorized by law, the creditor may file an objection. An objection must be filed not later than 30 days after the conclusion of the meeting of creditors.

DISCHARGE OF DEBTS. The debtor may seek a discharge of debts. A discharge means that certain debts are made unenforceable against the debtor personally. Creditors whose claims against the debtor are discharged may never take action against the debtor to collect the discharged debts. If a creditor believes a specific debt owed to the creditor is not dischargeable under § 523(a)(2), (4), or (6) of the Bankruptcy Code, timely action must be taken in the bankruptcy court by the deadline set forth above in the box labeled "Discharge of Debts." Creditors considering taking such action may wish to seek legal advice.

PROOF OF CLAIM. Except as otherwise provided by law, in order to share in any payment from the estate, a creditor must file a proof of claim by the date set forth above in the box labeled "Filing Claims." The place to file the proof of claim, either in person or by mail, is the office of the clerk of the bankruptcy court. Proof of claim forms are available in the clerk's office of any bankruptcy court.

PURPOSE OF A CHAPTER 12 FILING. Chapter 12 of the Bankruptcy Code enables family farmers to reorganize pursuant to a plan. A plan is not effective unless approved by the bankruptcy court at a confirmation hearing. Creditors will be given notice in the event the case is dismissed or converted to another chapter of the Bankruptcy Code.

| Address of the Clerk of the Bankruptcy Court | For the Court:<br><br>*Clerk of the Bankruptcy Court*<br><br>*Date* |
|---|---|

FORM B9H
6/92

# United States Bankruptcy Court

Case Number

District of

## NOTICE OF COMMENCEMENT OF CASE UNDER CHAPTER 12 OF THE BANKRUPTCY CODE, MEETING OF CREDITORS, AND FIXING OF DATES
(Corporation/Partnership Family Farmer)

| In re (Name of Debtor) | Address of Debtor | Soc. Sec./Tax Id. Nos |
|---|---|---|
| | Date Case Filed (or Converted) | |

☐ Corporation ☐ Partnership

| Name and Address of Attorney for Debtor | Telephone Number | Name and Address of Trustee | Telephone Number |
|---|---|---|---|
| | | | |

☐ This a converted case originally filed under chapter _____ on _____ (date)

~~Deadline to file a proof of claim:~~ DEADLINE TO FILE A ~~FILING CLAIMS~~ PROOF OF CLAIM
FOR creditors other than a governmental unit: FOR governmental units:

### DATE, TIME, AND LOCATION OF MEETING OF CREDITORS

### FILING OF PLAN AND DATE, TIME, AND LOCATION OF HEARING ON CONFIRMATION OF PLAN

☐ The debtor has filed a plan. The plan or a summary of the plan is enclosed. Hearing on confirmation will be held:

_____ (Date) _____ (Time) _____ (Location)

☐ The debtor has filed a plan. The plan or a summary of the plan and notice of the confirmation hearing will be sent separately.

☐ The debtor has not filed a plan as of this date. Creditors will be given separate notice of the hearing on confirmation of the plan.

### DISCHARGE OF DEBTS

Deadline to File a Complaint to Determine Dischargeability of Certain Types of Debts:

COMMENCEMENT OF CASE. A family farmer's debt adjustment case under chapter 12 of the Bankruptcy Code has been filed in this court by the family farmer named above as the debtor, and an order for relief has been entered. You will not receive notice of all documents filed in this case. All documents filed with the court, including lists of the debtor's property and debts, are available for inspection at the office of the clerk of the bankruptcy court.

CREDITORS MAY NOT TAKE CERTAIN ACTIONS. A creditor is anyone to whom the debtor owes money or property. Under the Bankruptcy Code, the debtor is granted certain protection against creditors. Common examples of prohibited actions by creditors are contacting the debtor to demand repayment, taking action against the debtor to collect money owed to creditors or to take property of the debtor, and starting or continuing foreclosure actions or repossessions. Some protection is also given to certain codebtors of consumer debts. If unauthorized actions are taken by a creditor against a debtor or a protected codebtor, the court may penalize that creditor. A creditor who is considering taking action against the debtor, the property of the debtor, or a codebtor, should review §§ 362 and 1201 of the Bankruptcy Code and may wish to seek legal advice. If the debtor is a partnership, remedies otherwise available against general partners are not necessarily affected by the commencement of this partnership case. The staff of the clerk of the bankruptcy court is not permitted to give legal advice.

MEETING OF CREDITORS. The debtor's representative, as specified in Bankruptcy Rule 9001(5), is required to appear at the meeting of creditors on the date and at the place set forth above for the purpose of being examined under oath. Attendance by creditors at the meeting is welcomed, but not required. At the meeting, the creditors may examine the debtor and transact such other business as may properly come before the meeting. The meeting may be continued or adjourned from time to time by notice at the meeting, without further written notice to the creditors.

DISCHARGE OF DEBTS. The debtor may seek a discharge of debts. A discharge means that certain debts are made unenforceable against the debtor. Creditors whose claims against the debtor are discharged may never take action against the debtor to collect the discharged debts. If a creditor believes a specific debt owed to the creditor is not dischargeable under § 523(a)(2), (4), or (6) of the Bankruptcy Code, timely action must be taken in the bankruptcy court by the deadline set forth above in the box labeled "Discharge of Debts." Creditors considering taking such action may wish to seek legal advice.

PROOF OF CLAIM. Except as otherwise provided by law, in order to share in any payment from the estate, a creditor must file a proof of claim by the date set forth above in the box labeled "Filing Claims." The place to file the proof of claim, either in person or by mail, is the office of the clerk of the bankruptcy court. Proof of Claim forms are available in the clerk's office of any bankruptcy court.

PURPOSE OF A CHAPTER 12 FILING. Chapter 12 of the Bankruptcy Code enables family farmers to reorganize pursuant to a plan. A plan is not effective unless approved by the bankruptcy court at a confirmation hearing. Creditors will be given notice in the event the case is dismissed or converted to another chapter of the Bankruptcy Code.

| Address of the Clerk of the Bankruptcy Court | For the Court: |
|---|---|
| | *Clerk of the Bankruptcy Court* |
| | *Date* |

FORM B9I
6/90

# United States Bankruptcy Court

Case Number

_____ District of _____

## NOTICE OF COMMENCEMENT OF CASE UNDER CHAPTER 13 OF THE BANKRUPTCY CODE, MEETING OF CREDITORS, AND FIXING OF DATES

| In re (Name of Debtor) | Address of Debtor<br>Date Case Filed (or Converted) | Soc. Sec./Tax Id. Nos. |
|---|---|---|
| Name and Address of Attorney for Debtor<br>Telephone Number | Name and Address of Trustee<br>Telephone Number | |

☐ This is a converted case originally filed under chapter _____ on _____ (date).

DEADLINE TO FILE A ~~FILING CLAIMS~~ PROOF OF CLAIM

~~Deadline to file a proof of claim:~~ FOR CREDITORS other than governmental units: FOR governmental units:

DATE, TIME, AND LOCATION OF MEETING OF CREDITORS

FILING OF PLAN AND DATE, TIME, AND LOCATION OF HEARING ON CONFIRMATION OF PLAN

☐ The debtor has filed a plan. The plan or a summary of the plan is enclosed. Hearing on confirmation will be held:

_____ (Date) _____ (Time) _____ (Location)

☐ The debtor has filed a plan. The plan or a summary of the plan and notice of the confirmation hearing will be sent separately.

☐ The debtor has not filed a plan as of this date. Creditors will be given separate notice of the hearing on confirmation of the plan.

COMMENCEMENT OF CASE. An individual's debt adjustment case under chapter 13 of the Bankruptcy Code has been filed in this court by the debtor or debtors named above, and an order for relief has been entered. You will not receive notice of all documents filed in this case. All documents filed with the court, including lists of the debtor's property and debts, are available for inspection at the office of the clerk of the bankruptcy court.

CREDITORS MAY NOT TAKE CERTAIN ACTIONS. A creditor is anyone to whom the debtor owes money. Under the Bankruptcy Code, the debtor is granted certain protection against creditors. Common examples of prohibited actions by creditors are contacting the debtor to demand repayment, taking action against the debtor to collect money owed to creditors or to take property of the debtor, and starting or continuing foreclosure actions, repossessions, or wage deductions. Some protection is also given to certain codebtors of consumer debts. If unauthorized actions are taken by a creditor against a debtor, or a protected codebtor, the court may punish that creditor. A creditor who is considering taking action against the debtor or the property of the debtor, or any codebtor, should review §§ 362 and 1301 of the Bankruptcy Code and may wish to seek legal advice. The staff of the clerk of the bankruptcy court is not permitted to give legal advice.

MEETING OF CREDITORS. The debtor (both husband and wife in a joint case) is required to appear at the meeting of creditors on the date and at the place set forth above in the box labeled "Date, Time, and Location of Meeting of Creditors" for the purpose of being examined under oath. Attendance by creditors at the meeting is welcome, but not required. At the meeting, the creditors may examine the debtor and transact such other business as may properly come before the meeting. The meeting may be continued or adjourned from time to time by notice at the meeting, without further written notice to creditors.

PROOF OF CLAIM. Except as otherwise provided by law, in order to share in any payment from the estate, a creditor must file a proof of claim by the date set forth above in the box labeled "Filing Claims." The place to file the proof of claim, either in person or by mail, is the office of the clerk of the bankruptcy court. Proof of claim forms are available in the clerk's office of any bankruptcy court.

PURPOSE OF A CHAPTER 13 FILING. Chapter 13 of the Bankruptcy Code is designed to enable a debtor to pay debts in full or in part over a period of time pursuant to a plan. A plan is not effective unless approved by the bankruptcy court at a confirmation hearing. Creditors will be given notice in the event the case is dismissed or converted to another chapter of the Bankruptcy Code.

| Address of the Clerk of the Bankruptcy Court | For the Court:<br>*Clerk of the Bankruptcy Court*<br>*Date* |
|---|---|

## COMMITTEE NOTE

The form is amended to provide notice of the claims filing period provided to "a governmental unit" by section 502(b)(9) of the Code as amended by the Bankruptcy Reform Act of 1994. A court that routinely sets a deadline for filing proofs of claim at the outset of chapter 11 cases and, accordingly, uses Form 9E(Alt.) or Form 9F(Alt.) retains the option in any case in which no deadlines actually are set to substitute a message stating that creditors will be notified if the court fixes a deadline.

The form also is amended to add, in the paragraph labeled "Discharge of Debts," a reference to dischargeability actions under section 523(a)(15) of the Code, which was added by the 1994 Act.

B10 (Official Form 10)
(Rev. 12/93)

# United States Bankruptcy Court

_____ District of _____

# PROOF OF CLAIM

In re (Name of Debtor)

Case Number

NOTE: This form should not be used to make a claim for an administrative expense arising after the commencement of the case. A "request" for payment of an administrative expense may be filed pursuant to 11 U.S.C. § 503.

Name of Creditor
*(The person or other entity to whom the debtor owes money or property)*

Name and Address Where Notices Should be Sent

Telephone No.

☐ Check box if you are aware that anyone else has filed a proof of claim relating to your claim. Attach copy of statement giving particulars.

☐ Check box if you have never received any notices from the bankruptcy court in this case.

☐ Check box if the address differs from the address on the envelope sent to you by the court.

THIS SPACE IS FOR COURT USE ONLY

ACCOUNT OR OTHER NUMBER BY WHICH CREDITOR IDENTIFIES DEBTOR:

Check here if this claim ☐ replaces ☐ amends a previously filed claim, dated: _____

1. BASIS FOR CLAIM

- ☐ Goods sold
- ☐ Services performed
- ☐ Money loaned
- ☐ Personal injury/wrongful death
- ☐ Taxes
- ☐ Other (Describe briefly)
- ☐ Retiree benefits as defined in 11 U.S.C. § 1114(a)
- ☐ Wages, salaries, and compensation (Fill out below)

  Your social security number _____

  Unpaid compensation for services performed

  from _____ (date) to _____ (date)

2. DATE DEBT WAS INCURRED

3. IF COURT JUDGMENT, DATE OBTAINED:

4. CLASSIFICATION OF CLAIM. Under the Bankruptcy Code all claims are classified as one or more of the following: (1) Unsecured nonpriority, (2) Unsecured Priority, (3) Secured. It is possible for part of a claim to be in one category and part in another. CHECK THE APPROPRIATE BOX OR BOXES that best describe your claim and STATE THE AMOUNT OF THE CLAIM AT TIME CASE FILED.

☐ SECURED CLAIM $ _____
Attach evidence of perfection of security interest
Brief Description of Collateral:
☐ Real Estate ☐ Motor Vehicle ☐ Other (Describe briefly)

Amount of arrearage and other charges at time case filed included in secured claim above, if any $ _____

☐ UNSECURED NONPRIORITY CLAIM $ _____
A claim is unsecured if there is no collateral or lien on property of the debtor securing the claim or to the extent that the value of such property is less than the amount of the claim.

☐ UNSECURED PRIORITY CLAIM $ _____

Specify the priority of the claim. #4000*

- ☐ Wages, salaries, or commissions (up to ~~$2000~~), earned not more than 90 days before filing of the bankruptcy petition or cessation of the debtor's business, whichever is earlier—11 U.S.C. § 507(a)(3)
- ☐ Contributions to an employee benefit plan—11 U.S.C. § 507(a)(4)
- ☐ Up to #1,600* ~~$900~~ of deposits toward purchase, lease, or rental of property or services for personal, family, or household use—11 U.S.C. § 507(a)(6)
- ☐ Taxes or penalties of governmental units—11 U.S.C. § 507(a)(7)
- ☐ Other—Specify applicable paragraph of 11 U.S.C. § 507(a) _____

* (See below for text)

5. TOTAL AMOUNT OF CLAIM AT TIME CASE FILED: $ _____ (Unsecured) $ _____ (Secured) $ _____ (Priority) $ _____ (Total)

☐ Check this box if claim includes charges in addition to the principal amount of the claim. Attach itemized statement of all additional charges.

6. CREDITS AND SETOFFS: The amount of all payments on this claim has been credited and deducted for the purpose of making this proof of claim. In filing this claim, claimant has deducted all amounts that claimant owes to debtor.

7. SUPPORTING DOCUMENTS: *Attach copies of supporting documents*, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, court judgments, or evidence of security interests. If the documents are not available, explain. If the documents are voluminous, attach a summary.

8 TIME-STAMPED COPY: To receive an acknowledgement of the filing of your claim, enclose a stamped, self-addressed envelope and copy of this proof of claim.

THIS SPACE IS FOR COURT USE ONLY

☐ Alimony, maintenance, or support owed to a spouse, former spouse, or child—11 U.S.C. § 507(a)(7)

| Date | Sign and print the name and title, if any, of the creditor or other person authorized to file this claim (attach copy of power of attorney, if any) |
|---|---|
| Text to follow*: | Amounts are subject to adjustment on 4/1/98 and every 3 years thereaftee with respect to cases commenced on or aftee the date of adjustment. |

*Penalty for presenting fraudulent claim:* Fine of up to $500,000 or imprisonment for up to 5 years, or both. 18 U.S.C. §§ 152 and 3571.

## COMMITTEE NOTE

The form is amended to add the seventh priority granted by the Bankruptcy Reform Act of 1994 to debts for alimony, maintenance, or support of a spouse, former spouse, or child of the debtor. The form also amends the Code reference to the priority afforded to tax debts and the dollar maximums for the priorities granted to wages and customer deposits in conformity with amendments made by the 1994 Act to section 507(a) of the Code. The 1994 Act also amended section 104 of the Code to provide for future adjustment of the dollar amounts specified in section 507(a) to be made by administrative action at three-year intervals to reflect changes in the consumer price index. The form is amended to include notice that these dollar amounts are subject to change without formal amendment to the official form.

Form B16A
11/94

## Form 16A. CAPTION (FULL)

**UNITED STATES BANKRUPTCY COURT**
**_____DISTRICT OF_____**

| | |
|---|---|
| In re _____, *Set forth here all names including married, maiden, and trade names used by debtor within last 6 years.* Debtor | Case No. _____ |
| Address _____ new _____ | Chapter _____ |
| Social Security No(s). _____ and all Employer's Tax Identification No(s). *[if any]*_____ _____ | |

*[Designation of Character of Paper]*

**COMMITTEE NOTE**

The form is amended to provide for the debtor's address to appear in the caption in furtherance of the duty of the debtor to include this information on every notice given by the debtor. The Bankruptcy Reform Act of 1994 amended section 342(c) of the Code to add this requirement.

Form B16B
12/94

## FORM 16B. CAPTION (SHORT TITLE)

*(May be used if 11 U.S.C. § 342(c) is not applicable)* new

UNITED STATES BANKRUPTCY COURT
_____ DISTRICT OF _____

In re _____,
Debtor

Case No. _____

Chapter _____

*[Designation of Character of Paper]*

### COMMITTEE NOTE

The title of this form is amended to specify that it can be used when section 342(c) of the Code, as amended by the Bankruptcy Reform Act of 1994, is not applicable.

Form 16C
12/94

## FORM 16C. CAPTION OF COMPLAINT IN ADVERSARY PROCEEDING FILED BY A DEBTOR

### UNITED STATES BANKRUPTCY COURT
### _____ DISTRICT OF _____

| | |
|---|---|
| In re _____, *Debtor* | Case No. _____ |
| Address _____ | Chapter _____ |
| _____ | |
| Social Security No(s). _____ or Employer's Tax Identification No(s). *[if any]*_____ | |
| _____ | |
| _____, *Plaintiff* | |
| v. | |
| _____, *Defendant* | Adv. Proc. No. _____ |

new

COMPLAINT

Reference to other types of papers deleted.

**COMMITTEE NOTE**

The form is amended to conform to the amendments made to section 342(c) of the Code by the Bankruptcy Reform Act of 1994.

Form B16D
12/94

## Form 16D. CAPTION FOR USE IN ADVERSARY PROCEEDING OTHER THAN FOR A COMPLAINT FILED BY A DEBTOR

**UNITED STATES BANKRUPTCY COURT**
**_____ DISTRICT OF _____**

| | |
|---|---|
| In re _____, *Debtor* | Case No. _____ |
| _____, *Plaintiff* | Chapter _____ |
| v. | |
| _____, *Defendant* | Adv. Proc. No. _____ |

COMPLAINT [*or* other Designation]

new [If used in a Notice of Appeal (see Form 17) or other notice filed and served by a debtor, this caption must be altered to include the debtor's address and Employer's Tax Identification Number(s) or Social Security Number(s) as in Form 16C.]

**COMMITTEE NOTE**

This form of caption may be used in an adversary proceeding when section 342(c) of the Code, as amended by the Bankruptcy Reform Act of 1994, is not applicable.

Form 17
12/94

**FORM 17. NOTICE OF APPEAL UNDER 28 U.S.C. § 158(a) or (b) FROM A JUDGMENT, ORDER, OR DECREE OF A BANKRUPTCY COURT**

In re _____,
Debtor

Case No. _____

Chapter _____

**NOTICE OF APPEAL**

_____, the plaintiff [*or* defendant *or* other party] appeals under 28 U.S.C. § 158(a) or (b) from the judgment, order, or decree of the bankruptcy court (describe) entered in this adversary proceeding [*or other proceeding, describe type*] on the _____ day of _____, 19__.

The parties to the order appealed from and the names of their respective attorneys are as follows:

_____

_____

Dated: _____

Signed: _____
Attorney for Appellant

Address: _____

_____

**If a Bankruptcy Appellate Panel is authorized to hear this appeal, each party has a right to have the appeal heard by the district court. The appellant may exercise this right only by filing a separate statement of election at the time of the filing of this notice of appeal.**

## COMMITTEE NOTE

The form is amended to reflect the amendments to 28 U.S.C. § 158 concerning bankruptcy appellate panels made by the Bankruptcy Reform Act of 1994. Section 158(d) requires an appellant who elects to appeal to a district court rather than a bankruptcy appellate panel to do so "at the time of filing the appeal."

The 1994 Act also amended 28 U.S.C. § 158(a) to permit immediate appeal of interlocutory orders increasing or reducing a chapter 11 debtor's exclusive period to file a plan under section 1121 of the Code. The form is amended to provide appropriate flexibility.

B18
(11/94)

# Form 18. DISCHARGE OF DEBTOR

[*Caption as in Form 16A*]

## DISCHARGE OF DEBTOR

It appears that a petition commencing a case under title 11, United States Code, was filed by or against the person named above on _____, and that an order for relief was entered under chapter 7, and that
(date)
no complaint objecting to the discharge of the debtor was filed within the time fixed by the court [*or* that a complaint objecting to discharge of the debtor was filed and, after due notice and hearing, was not sustained].

**IT IS ORDERED THAT:**

1. The above-named debtor is released from all dischargeable debts.

2. Any judgment heretofore or hereafter obtained in any court other than this court is null and void as a determination of the personal liability of the debtor with respect to any of the following:

   (a) debts dischargeable under 11 U.S.C. § 523;

   (b) unless heretofore or hereafter determined by order of this court to be nondischargeable, debts alleged to be excepted from discharge under clauses (2), (4), (6), and (15) of 11 U.S.C. § 523(a);

   (c) debts determined by this court to be discharged.

3. All creditors whose debts are discharged by this order and all creditors whose judgments are declared null and void by paragraph 2 above are enjoined from instituting or continuing any action or employing any process or engaging in any act to collect such debts as personal liabilities of the above-named debtor.

BY THE COURT

Dated: _____

_____
United States Bankruptcy Judge

*Set forth all names, including trade names, used by the debtor within the last 6 years. (Bankruptcy Rule 1005).*

## COMMITTEE NOTE

The form is amended to include debts described in section 523(a)(15) of the Code, which was added by the Bankruptcy Reform Act of 1994, in the list of debts discharged unless determined by the court to be nondischargeable.

Form B19
12/94

**Form 19. CERTIFICATION AND SIGNATURE OF NON-ATTORNEY BANKRUPTCY PETITION PREPARER (See 11 U.S.C. § 110)**

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

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

_____
Printed or Typed Name of Bankruptcy Petition Preparer

_____
Social Security No.

_____

_____
Address

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

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

X _____ _____
Signature of Bankruptcy Petition Preparer Date

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

## COMMITTEE NOTE

This form is new. The Bankruptcy Reform Act of 1994 requires a "bankruptcy petition preparer," as defined in 11 U.S.C. § 110, to sign any "document for filing" that the bankruptcy petition preparer prepares for compensation on behalf of a debtor, to disclose on the document certain information, and to provide the debtor with a copy of the document. This form or adaptations of this form have been incorporated into the official forms of the voluntary petition, the schedules, the statement of financial affairs, and other official forms that typically would be prepared for a debtor by a bankruptcy petition preparer. This form is to be used in connection with any other document that a bankruptcy petition preparer prepares for filing by a debtor in a bankruptcy case.

Item 8C

# ADVISORY COMMITTEE ON BANKRUPTCY RULES

## Meeting of September 22-23, 1994

DRAFT

## New York City

## Minutes

The Advisory Committee met at the headquarters of the Association of the Bar of the City of New York. The following members were present:

Bankruptcy Judge Paul Mannes, Chairman
Circuit Judge Alice M. Batchelder
District Judge Eduardo C. Robreno
Honorable Jane A. Restani, United States Court of International Trade
Bankruptcy Judge James J. Barta
Bankruptcy Judge James W. Meyers
Professor Charles J. Tabb
Henry J. Sommer, Esquire
Kenneth N. Klee, Esquire
Gerald K. Smith, Esquire
Leonard M. Rosen, Esquire
R. Neal Batson, Esquire
J. Christopher Kohn, Esquire, United States Department of Justice
Professor Alan N. Resnick, Reporter

District Judge Adrian G. Duplantier was unable to attend.

The following representatives of the Committee on Rules of Practice and Procedure also attended:

District Judge Alicemarie H. Stotler, Chair
District Judge Thomas S. Ellis, III, liaison to the Advisory Committee
Professor Daniel R. Coquillette, Reporter
Peter G. McCabe, Assistant Director, Administrative Office of the United States Courts, Secretary

The following additional persons attended all or part of the meeting: District Judge Paul A. Magnuson, Chair, Committee on the Administration of the Bankruptcy System; William F. Baity, Acting Director, Executive Office for United States Trustees; Richard G. Heltzel, Clerk, United States Bankruptcy Court for the Eastern District of California; Patricia S. Channon and James H. Wannamaker, Bankruptcy Judges Division, Administrative Office of the United States Courts; Mark D. Shapiro, Rules Committee Support Office, Administrative Office of the United States Courts; and Elizabeth C. Wiggins and Robert Niemic, 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. Unless otherwise indicated, all memoranda referred to are included in the agenda book for the meeting.

Votes and other action taken by the Advisory Committee and assignments by the Chairman appear in **bold**.

## INTRODUCTORY MATTERS

The Chairman introduced J. Christoper Kohn, Esquire, of the Department of Justice, who had recently been designated by the Attorney General to serve on the Committee. **The Chairman appointed Mr. Kohn to the local rules subcommittee.** The Chairman also welcomed to the meeting Judge Stotler, Judge Magnuson, and Professor Coquillette.

**Minutes of the February 1994 Meeting. The Committee approved the minutes of the February 1994** with a change in wording concerning the Committee's having taken no action on the issue of the status of a late-filed proof of claim and the developing case law on that subject.

**Report on the June 1994 Meeting of the Committee on Rules of Practice and Procedure** (the "Standing Committee"). The Reporter noted that the Committee's recommended substitution of "nonwillful" for the originally proposed "negligent" as the standard for excusing non-compliance with a local rule imposing a requirment of form had been adopted by the Standing Committee. Accordingly, the proposed civil, criminal, appellate, and bankruptcy rules dealing with local rules all prescribe "nonwillful" as the standard. Judge Stotler confirmed that the Judicial Conference had approved these proposed rules earlier in

the week. Professor Resnick reported that the proposed technical amendments rule, however, was not approved by the Standing Committee.

The Standing Committee did approve for publication the package of amendments requested by the Committee. In addition, the advisory committees on the appellate, civil, and criminal rules had adopted conforming amendments to permit electronic filing, which will be published for comment. Most importantly, all of the advisory committees had adopted the Committee's recommendation that any Judicial Conference standards on the subject be limited to "technical standards."

The Reporter said that the Standing Committee's consultant on style, Bryan Garner, had circulated among the reporters an interim draft of "Guidelines for Drafting Court Rules. Professor Resnick noted that the Advisory Committee on Bankruptcy Rules has a style subcommittee and that it is the only advisory committee which does. He also said that Mr. Garner had provided some style suggestions on the amendments that are being published for comment. These suggestions reached the Reporter too late for incorporation into the submission to the Standing Committee. Accordingly, they will be treated as public comments and considered with the other comments on the amendments package.

The Reporter thanked Judge Stotler for her letter to the chairman of the House Judiciary Committee opposing the provision in the pending bankruptcy bill that would amend Rule 7004 to require service of process on an insured depository institution to be made by certified mail in certain circumstances.

Judge Stotler called the Committee's attention to the new brochure summarizing the proposed amendments to the rules and to the new format of the pamphlet in which the full texts are published. Judge Stotler said the Standing Committee hopes to

receive feedback on both the brochure and the new format of the pamphlet, which shows on the cover those rules subject to proposed amendments. Mr. McCabe said that he and the Standing Committee think they need more comment on proposed rules and from a broader spectrum of persons. To help achieve that, he said, the Standing Committee contacted all of the state bars and asked that these organizations name coordinators to read all proposed amendments, publicize them, and then assemble, digest, and transmit comments to the Standing Committee.

**Report on Publication of Minutes via "Online" Computer Services.** Mr. Shapiro stated that to date only Lexis and Westlaw have requested copies of minutes for such publication. The question was raised whether, in light of this wider availability of the minutes, the speakers at meetings should continue to be identified. The consensus was to continue the current practice.

## RULES

Rule 9014. The Reporter's memorandum discussed Rule 9014 governing contested matters in light of the 1993 amendments to Federal Rule of Civil Procedure 26 and the applicability of certain other time periods in the civil rules. The Reporter had drafted a proposed amendment to Rule 9014 to make parts of Rule 26 (Rule 26(a)(1)-(4) and (f)) inapplicable to contested matters unless otherwise ordered by the court. The Reporter stated that he would add to the draft a clause expressly permitting discovery to proceed under the first sentence of Fed. R. Civ. P. 26(d). An alternative draft would make these amendments and, in addition, would shorten time periods prescribed in other civil rules relating to discovery and summary judgment motions.

The representatives of the Federal Judicial Center distributed copies of the Center's most recent compilation concerning districts that have locally opted-out of all or part of Rule

26(a) in contested matters. This report shows that 42 districts have clearly opted-out of Rule 26(a) entirely. An additional 21 districts have opted-out of at least Rule 26(a)(1) and most have opted-out of a little more than that. Another group, 11 districts, have opted-out at least temporarily. Six more districts are studying the matter, which means that, while the rule is officially in effect there, it is not clear how thoroughly it is being enforced. In summary, approximately two-thirds of the districts have exercised their option to opt out of all or part of Rule 26(a) in contested matters. With respect to Rule 26(f), the Federal Judicial Center's compilation showed that 58 districts had clearly opted-out and 11 had temporarily opted-out, approximately the same two-thirds proportion as had opted-out of all or part of Rule 26(a).

The Reporter noted that any national rule amendment would not take effect until 1997. By then, courts may be settled with their local rules and a national rule may not be necessary. Yet, he said, it seems important for the national rules to lead the way, to establish what should be the "default mode" on discovery in contested matters. He said it is his view, as a general proposition, that the discovery provisions in question should not apply in contested matters. On the other hand, he noted, Mr. Smith had taken the opposing view in a memorandum circulated to Advisory Committee members.

Mr. Smith said he thinks the issue should not be left so much to local rule. Without a national rule, there will be proliferation of rules with no consistency. He also said he thinks the opt-out statistics indicate that districts simply do not know how to make the new discovery rules work. Professor Coquillette said that the Standing Committee and the Advisory Committee on Civil Rules both are concerned about how the Civil Justice Reform Act (CJRA) and the amendments to Rule 26 (with its opt-out provision) have led to a "balkanizing" of federal procedure. He noted that in

the district courts some of the opt-outs are attributable to the fact that the district has a CJRA plan which contains an almost identical rule.

Several participants favored giving longer thought to the question of whether there should be a distinction between adversary proceedings and contested matters with respect to discovery. Judge Magnuson reported that under the new Rule 26 he has only had one Fed. R. Civ. P. 12 motion (on whether the statute of limitations had run) and cautioned against discarding the new provisions just over the time issue in contested matters. A consensus began to emerge that the Advisory Committee should take the time to consider what really would make sense in contested matters and perhaps draft a provision tailored to this special motion practice. A motion to table the matter carried by a vote of 9-4.

Rule 8002(c). The Advisory Committee previously had voted to amend this rule to clarify that a motion for an extension of time to file an appeal must be "filed" rather than "made" within the 10-day period prescribed. Before the amendment was presented to the Standing Committee, however, the Ninth Circuit issued a decision that the Reporter believed justified bringing the rule back for consideration of further proposals for amendments. That case is In re Mouradick, 13 F.3d 326 (9th Cir. 1994), in which the court ruled a notice of appeal untimely because it was not filed with the time allowed by the rule, even though the court had not ruled within that prescribed period on the party's timely motion for an extension of time to file the notice. The Reporter's memorandum noted that Federal Rule of Appellate Procedure 4, in the wake of a similar decision, had been amended to allow a notice of appeal to be filed within the time prescribed in the rule or ten days from the entry of the order granting the motion for extension, whichever occurs later.

The Reporter presented three options: 1) provide for early finality by requiring that the order granting an extension be entered within the additional 20-day period already provided in the rule, 2) protect a party that files a timely motion by permitting the notice to be filed within a specified period after entry of the order granting the motion, or 3) permit filing of the notice of appeal within a specified time after entry of the order granting the motion but also require the court to rule on the motion within a specified time. Although one member expressed concern about encouraging "games designed to prevent finality," discussion of a motion to adopt alternative #3 indicated substantial resistance to the tying of a party's rights to action by a judge within a specified time period. **A substitute motion to adopt the Reporter's Draft No. 2 - giving the party that has filed a timely motion 10 days from entry of the order granting the extension, regardless of when the court acts - carried by a vote of 10-3.** After this vote, however, further discussion raised the idea of excluding certain matters from any extension of time for filing a notice of appeal. If approved, some members said, these exclusions or "carve outs" should be listed at the beginning of the rule. **A motion to defer action on this rule to the next (3/95) meeting carried by a vote of 7 - 1.**

Rule 4003(b). Recent court decisions have raised questions about the interpretation of this rule and whether the time to object to a debtor's claim of exemption can properly be extended by the granting of a timely filed motion if the court does not act until after the period provided in the rule has expired. The Reporter presented three alternatives: 1) rewriting the rule to more clearly prohibit the court from acting after the deadline, 2) allowing an extension if the motion was timely filed, and 3) allowing the court up to ten days after the end of the period provided in the rule to act on a timely filed motion. One member questioned the wisdom of responding to every conflict in the

**cases with an amendment to resolve the issue. Mr. Smith observed that there always will be tension between a perceived institutional distaste for too many "little" amendments and a desire to reduce the number of "litigation points." A motion to adopt alternative #2 failed by a vote of 5 - 8. A motion to amend both Rules 4003(b) and 9006(b) to forbid extensions altogether failed by a vote of 3 - 9. A motion to adopt alternative #3 failed for want of a second.**

Rule 3021. The Committee had approved for publication an amendment to this rule to permit the plan or order confirming the plan to fix a record date for equity security holders purposes of distribution. In working on the rule after the meeting, however, the Reporter had noted some problems with the terminology used in the rule with respect to holders of bonds and debentures. Accordingly, he suggested correcting these also before submitting any amendment to the Standing Committee. **A motion to adopt the Reporter's revised draft, with the substitution of "that" for "who" on line 6, carried by a vote of 12 - 0.**

Rules 3017(d) and 3018(a). At the February 1994 meeting, the Reporter presesnted proposed drafts to amend these rules to provide for flexibility in fixing a record date for determing the creditors and equity security holders who will receive a copy of the plan, the disclosure statement, and a ballot, and who have the right to vote on the plan. Alternative drafts were proposed, but consideration was postponed until the September 1994 meeting. **A motion to adopt in principle Alternative B, which would allow the court to set the record date, passed by a vote of 8 - 2. The vote included a directive to add to the rule that any fixing of a date by the court should be "after notice and a hearing." The Reporter will present a revised draft at the February 1995 meeting.**

Rule 9011. The Committee discussed conforming the rule to Fed.

R. Civ. P. 11 as amended December 1, 1993. The Reporter presented a draft for discussion. He noted that he inadvertently had omitted the petition from the list of documents to which a signatory certifies. A motion to add the word "petition" on line 35 of the draft passed unanimously. The Reporter also inquired whether the petition should be protected by the 21-day "safe harbor" provision of Rule 11 under which a challenged pleading can be withdrawn without penalty. There appeared to be a consensus that because a petition acts as a self-executing, ex parte injunction, it should not be protected. Additionally, in chapters 7 and 11 the debtor cannot dismiss a case, and the court can do so only for "cause" and after notice and a hearing. One member wanted to carve out a notice of appeal as well. Another, however, said there appears to be a fundamental difference between a matter of business judgment, such as a notice of appeal, and the injunctive effect of a petition. A motion to adopt the Reporter's draft, as amended above and with the petition carved out of the "safe harbor," carried by a vote of 8-1. A further motion not to tinker further with the rule also carried with one opposed. The Reporter is to re-draft the rule. [See below.]

[New] Rule 8020. The proposed new rule would authorize the district court or bankruptcy appellate panel to impose sanctions for filing a frivolous appeal. It is similar to Rule 38 of the Federal Rules of Appellate Procedure. A motion to adopt the Reporter's draft carried unanimously.

Rule 9006(f). The Standing Committee had requested that the Advisory Committees study whether the additional three days provided when service is made by mail should be enlarged to five days because of slower mail deliveries. The Reporter stated that the Postal Service standard for first class mail delivery is a maximum of three days within the contiguous United States and that the Postal Service's studies indicate that this standard

actually is met for 80 percent of the mail, on average. Judge Robreno said the problem really is with attorneys who do not mail documents until the last day. Professor Coquillette stated that there will be an overall study undertaken of time periods in the rules, probably in 1996, and that mail service conditions then can not be predicted now. There was a consensus that the Committee should recommend no action at this time.

Rule 3002. The Committee discussed the developing case law on the deadline for filing proofs of claim. The published cases still are unsettled on whether the deadline prescribed in Rule 3002 is effective in chapter 13 cases. None of the cases so far is inconsistent with the amendments to Rule 3002 approved by the Committee for publication. The Reporter will continue to monitor new cases.

## SUBCOMMITTEES

Subcommittee on Technology. Judge Barta said the written report on technology and the rules will be presented at the March 1995 meeting. He said the draft guidelines for routine filing of papers with the court by facsimile that were proposed by another committee had been withdrawn, and the Judicial Conference, accordingly, had taken no action to expand the availability of "fax" filing. (An existing Judicial Conference guideline permits a court to accept a facsimile filing in an emergency.)

Subcommittee on Forms. Mr. Sommer reported that the subcommittee is working on rewriting several forms and on creating one or more new forms for giving notice of a motion. The subcommittee's goal is to maximize the use of "plain English" in notices that are sent to the public in large numbers. He said that, before any formal presentation of revised forms to the Committee, the subcommittee plans to circulate its final drafts for preliminary comment from the members.

Subcommittee on Alternative Dispute Resolution. Professor Tabb said the subcommittee presently is gathering information on how the various local programs are working. If the subcommittee believes a national rule is needed to cover such matters as controls, ethics, and confidentiality, it will return to the Committee with a recommendation and draft. Mr. Niemic said the Federal Judicial Study is conducting a study of ADR that includes both mandatory programs and voluntary ones, but the results are not yet available.

Subcommittee on Local Rules. Ms. Channon reported that preliminary comment on the uniform numbering system for local rules that the Committee had approved at the February 1994 meeting indicated that it might not be as workable or "user friendly" as the Committee had hoped. Accordingly, the subcommittee brought the matter back to the committee along with several alternative numbering systems that it had developed in response to the preliminary comments. Under any of the alternatives, the citation would be "(District name) L.B.R._____-____." One of these systems would simply use the existing related national rule number (where there is one) followed by a dash and another numeral. Local rules topics unrelated to any national rule would have a four-digit number created for them, which also would be followed by a dash and another numeral. After discussion, the Committee voted unanimously to adopt this alternative, provided the use of the dash would not slow down the ability to conduct a topical search in a computer data base. If the dash would slow a search, the dash is to be replaced with a decimal point. The proposed numbering system is to be published and comment sought from the bankruptcy community, as directed at the February 1994 meeting.

Subcommittee on Long Range Planning. Mr. Klee led the discussion. The first issue to be decided, he said, is whether the rules need only a "cosmetic fix" or a fundamental overhaul

and restructuring. Judge Robreno said it would be best to obtain empirical data through an FJC study on how the current rules are working and whether the users perceive a need for change. Others suggested that the subcommittee give the Committee an outline of an ideal organization or a framework for a proposed organizational revision, so the Committee would have something specific to discuss. It was suggested that the subcommittee should also identify areas for change and areas where the rules seem not to work well with the statute. Several members recommended that work on two well known troublespots --- motions and discovery --- receive prompt attention. The consensus was that a survey should be conducted, that the subcommittee should present specific ideas for areas the Committee should work on, and that once these have been done, the Committee can make an informed decision concerning the direction of its work. With respect to the philosophical question of whether the rules are mandatory or simply guidelines, Judge Stotler suggested that the Committee might could cull any rules that seem to be more hortatory and retain only what is essential.

There was further consensus that the Advisory Committee would want to be heard by any bankruptcy commission that might be formed if the pending bankruptcy legislation --- which provides for such a commission --- is enacted. At Judge Stotler's suggestion, the Advisory Committee will present to the Standing Committee a request that the Judicial Conference authorize the Advisory Committee to communicate directly with a bankruptcy commission, if one is created.

LIAISON WITH ADVISORY COMMITTEE ON CIVIL RULES

Judge Restani reported that she expects to attend a special symposium on Fed. R. Civ. P. 23 to be held in Philadelphia under the auspices of the Advisory Committee on Civil Rules. Mr. McCabe said another "hot" issue emerging for the civil rules is

the granting of protective orders under Fed. R. Civ. P. 26(c) and when such orders can or should be lifted.

Respectfully submitted,

Patricia S. Channon

# ADVISORY COMMITTEE ON BANKRUPTCY RULES

## Meeting of December 8-9, 1994

## Washington, D.C.

## Minutes

The Advisory Committee on Bankruptcy Rules met in the Thurgood Marshall Federal Judiciary Building in Washington, D.C., December 8-9, 1994. The following members were present:

Bankruptcy Judge Paul Mannes, Chairman
District Judge Adrian G. Duplantier
District Judge Eduardo C. Robreno
Honorable Jane A. Restani, United States Court of International Trade
Bankruptcy Judge Donald E. Cordova
Bankruptcy Judge Robert J. Kressel
Bankruptcy Judge James W. Meyers
R. Neal Batson, Esquire
Kenneth N. Klee, Esquire
J. Christopher Kohn, Esquire, United States Department of Justice
Leonard M. Rosen, Esquire
Gerald K. Smith, Esquire
Henry J. Sommer, Esquire
Professor Charles J. Tabb
Professor Alan N. Resnick, Reporter

Circuit Judge Alice M. Batchelder was unable to attend. Joseph Patchan, Director Designee, represented the Executive Office for United States Trustees.

The following representatives of the Committee on Rules of Practice and Procedure also attended:

District Judge Alicemarie H. Stotler, Chair
District Judge Thomas S. Ellis, III, liaison to the Advisory Committee
Peter G. McCabe, Assistant Director, Administrative Office of the United States Courts, Secretary

The following additional persons attended all or part of the meeting: Perry Apelbaum, counsel, House Subcommittee on Economic and Commercial Law; James G. Whiddon, counsel, Senate Subcommittee on Courts and Administrative Practice; Richard G. Heltzel, Clerk, United States Bankruptcy Court for the Eastern District of California; Mark Van Allsburg, Clerk, United States Bankruptcy Court for the Western District of Michigan; Francis F. Szczebak, Patricia S. Channon, James H. Wannamaker, and John D. Howard, Bankruptcy Judges Division, Administrative Office of the United States Courts; Mary Louise Mitterhoff, Bankruptcy Court

Administration Division, Administrative Office of the United States Courts; John K. Rabiej, Joseph F. Spaniol, Jr., Mark D. Shapiro, and Judith W. Krivit, Rules Committee Support Office, Administrative Office of the United States Courts; Elizabeth C. Wiggins, Federal Judicial Center; and several members of the public.

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. Unless otherwise indicated, all memoranda referred to were included in the agenda book for the meeting.

Votes and other action taken by the Advisory Committee and assignments by the Chairman appear in **bold**.

## INTRODUCTORY MATTERS

The Chairman introduced Bankruptcy Judges Cordova and Kressel, new members of the Committee, and Mr. Patchan, who has been designated to head the Executive Office for United States Trustees. (Mr. Patchan is a former bankruptcy judge and a former member of the Committee.) The Chairman also welcomed to the meeting Judge Stotler, Judge Ellis, Mr. Apelbaum, and Mr. Whiddon.

The Chairman said he called the special meeting to consider changes that may be required in the Federal Rules of Bankruptcy Procedure and the Official Bankruptcy Forms as a result of the enactment of the Bankruptcy Reform Act of 1994.

The Reporter stated that two provisions in the Reform Act affect the Bankruptcy Rules but do not require action by the committee. First, 28 U.S.C. § 2075 has been amended to make amendments to the Bankruptcy Rules effective on December 1 of the year in which they are promulgated by the Supreme Court. Second,

Rule 7004 was amended to require, with certain exceptions, service by certified mail on insured depository institutions.

The Reporter suggested that, in view of the time required for completing the rules amendment process, the Committee consider proposing "suggested interim rules" for adoption as local court rules pending the promulgation of amendments to the Bankruptcy Rules. The same process was used when chapter 12 was added to the Bankruptcy Code in 1986. **A motion to request that the Standing Committee on Rules of Practice and Procedure expedite the consideration and approval of the amendments required by the Reform Act failed for lack of a second.** Mr. Rosen said the experience gained from using interim rules might assist in the formation of permanent rules. **The consensus of the Committee was to propose interim rules and to complete the full rules amendment process for permanent rules.**

## RULES AMENDMENTS

**Notices to Creditors.** The Reporter stated that section 225 of the Reform Act amended section 342 of the Bankruptcy Code to provide that notices required to be given by a debtor to creditors must contain the name, address, and taxpayer identification number of the debtor, although failure to do so does not invalidate the notice. The Reporter discussed three alternative responses to the statutory change: 1) do nothing and let the statute speak for itself; 2) amend rule 2002(n) only to the extent required by section 342(c); or 3) amend Rule 1005 to require the information specified in section 342(c) in the caption of every notice, regardless of who gives the notice.

Mr. Klee outlined the history of the provision, which he said was prompted by creditors' desire to more easily identify debtors in their databases. Because it was argued that requiring the use of account numbers would be too burdensome, creditors

agreed to the use of the debtor's name, address, and taxpayer identification number. Mr. Klee said the reference to invalidity of the notice was included in response to a court decision that a debt was not discharged because two digits in the debtor's Social Security were transposed in a notice. The amendment was restricted to notices by debtors because, he said, they have the necessary information. Mr. Klee said notices given by bankruptcy clerks were not considered.

Professor Tabb moved to accept the Reporter's draft amendment for the second alternative as set out in his memorandum of November 7, 1994. Several committee members questioned the need for putting the debtor's address in every caption. Professor Tabb agreed to a request to delete the phrase "The caption of" from the Reporter's draft. Mr. Sommer said the easiest place to put section 342(c) information is in the caption. The Reporter said including the information in the caption would recognize the legislative history, which stated that Congress intended for the caption of every bankruptcy notice to include the information. Professor Tabb returned to his original motion, without the deletion. **The motion to approve the original text of the Reporter's draft amendment carried by a vote of 13-0.**

**Election of Chapter 11 Trustee.** The Reporter stated that section 211 of the Reform Act amended section 1104 of the Bankruptcy Code to permit creditors to elect a disinterested person to serve as trustee in a chapter 11 case if a timely request is made for an election. The Reporter said he assumed that the person elected must be approved by the court as "disinterested" and that the U.S. trustee should apply for the approval with full disclosure of the person's connections. Further, the Reporter said he believed the U.S. trustee should appoint a trustee under section 1104(d) (after consultation) as soon as practicable after the court orders the appointment of a

chapter 11 trustee and that this trustee will serve unless and until another person is elected under new section 1104(b). Accordingly, the Reporter offered draft amendments to Rules 2007.1 and 2002(a).

The Committee discussed whether an elected trustee is subject to appointment by the U.S. trustee and court approval under section 1104(d). Several members said the U.S. trustee should not be required to appoint an elected trustee which the U.S. trustee believes is unqualified. Other members said the appointment is automatic but the U.S. trustee should inform the court of any factors (positive or negative) relative to the appointment. Mr. Klee noted that the debtor's exclusive right to file a plan and several other chapter 11 provisions are tied to the appointment of a trustee, not to the election of a trustee. Mr. Rosen said a court order approving the trustee is particularly important because millions of dollars may be turned over to a chapter 11 trustee. The Committee agreed by a straw vote that the person elected should be appointed by the U.S. trustee and approved by the court.

Judge Restani moved to approve the draft revision of Rule 2007.1 in the Reporter's memorandum of November 7, 1994, with the addition of the words "approval of" after the word "for" in lines 24 and 28. **The motion carried on a vote of 9-2.** Mr. Sommer moved to require notice of the request for election. The Reporter said this is unnecessary because creditors will get notice of the meeting of creditors (called for the election) within a few days. **The motion failed. The Committee agreed by consensus to delete the brackets and retain the bracketed language in section (b)(1) of the Reporter's draft.** Mr. Klee moved to insert the phrase "appoint the person elected to be trustee" after the word promptly in line 28. Mr. Smith said that if the Committee believes the U.S. trustee must appoint the person elected, then the rule should say so. **The motion carried**

**with one dissenting vote.**

Mr. Klee moved to amend line 27 by inserting the phrase "or, for cause shown, any party in interest," after the word "trustee". The Reporter stated that, under the current rule, only the U.S. trustee can apply for court approval of an appointment of a chapter 11 trustee, but, if the U.S. trustee fails to act, a party could seek redress under Rule 2020. **The Committee agreed that the U.S. trustee should make the application.** Judge Restani said the word "only" in line 43 was too strong. **After a discussion of whether the word created a inference that Rule 2020 was inapplicable, the Committee voted unanimously to delete "only." A motion to insert the phrase "approved in accordance with" after the word "and" in line 37 was approved unanimously.**

**The Committee approved the draft amendment to Rule 2002(a) in the Reporter's memorandum of November 7, 1994, by consensus.**

**Filing Proofs of Claim.** Section 213(a) of the Reform Act amended section 502(b)(9) of the Bankruptcy Code to specify that claims filed by governmental units are timely if they are filed within 180 days after the order for relief. The Reporter stated that the statutory change made the proposed amendment to Rule 3002(d), which has been published for comment by the bench, bar, and public, unnecessary.

The Committee discussed whether the 180-day limit was intended to apply to just chapter 7 cases or to cases in all chapters. Mr. Klee said the understanding in the proponents' negotiations with Congress was that the amendment would apply to all chapters. The Reporter stated that he prepared the draft amendment to Rule 3002 set out in his memorandum of November 7, 1994, on that assumption although the time for filing by governmental units could be fixed by the rule as long as it did

not conflict with the statute.

Mr. Klee stated that all governmental units should be treated the same way in order to avoid discriminating against foreign governments. **A motion to delete the phrase "of the United States, a state, or a subdivision thereof" from lines 17-18 of the Reporter's draft and to substitute "of a governmental unit made" carried unanimously.**

Mr. Sommer moved to add the following language: "If the claim is tardily filed, the party filing the claim shall serve copies on the trustee and the debtor." He said chapter 13 trustees should be served so that they don't have to constantly check the claims dockets in thousands of cases which may remain pending for several years. Several Committee members questioned whether checking the dockets is an unreasonable burden. The Committee discussed whether the amendment should include sanctions for not serving the trustee and whether it is proper for the rules to impose such sanctions. **Professor Tabb's motion to table the matter until the next Committee meeting carried without dissent. Professor Tabb's motion to approve the remaining changes in Rule 3002 was passed unanimously.**

**Small Business Cases.** Section 217 of the Reform Act amended the Bankruptcy Code by adding a new definition of "small business" and making special provisions for chapter 11 cases in which the debtor is a small business. The Reporter presented drafts of a new Rule 1020, Election to be Considered a Small Business in a Chapter 11 Reorganization Case, and amendments to Rule 3017.

Judge Kressel suggested that all parties should receive notice if the court orders that no creditors' committee be appointed under section 1102(a)(3) in a small business case. Mr. Batson stated that the statute didn't require notice and that new

Rule 1020 should not do so, either. **His motion to not require the notice carried without dissent.**

The Committee discussed the form and timing of the debtor's election to be considered as a small business and the potential for abuse if the debtor made the election shortly before the 160-day deadline for any party to file a plan. The Reporter said he used a 100-day deadline for the election in his draft because that coincides with the end of a small business debtor's exclusivity period.

The Reporter stated that his draft would permit, but not require, the debtor to make the election on the petition. Mr. Kohn stated that making the election on the petition would allow the parties to proceed in a more informed manner and would avoid any mischief in the timing of the election. The Reporter said the debtor and its counsel might be unaware of the possibility of making the election at the time of filing but that the judge could raise it at a status conference. Mr. Klee asked why the Reporter had not drafted a rule for chapter 11 status conferences. The Reporter stated that the statute was detailed and that no rule appeared to be needed.

Judge Restani moved to approve the Reporter's draft Rule 1020 after substituting "60 days" for "100 days" in line 4, substituting "a later" for "another" in line 5, and adding "for good cause shown" to the end of line 6. **The motion carried with one dissenting vote.** Mr. Klee proposed adding the following: "For cause shown, the court may allow the debtor to withdraw the election." **His motion failed by a vote of 4-8.**

Judge Kressel said the amendment to Rule 3017 should preserve the court's right to disapprove a conditionally-approved disclosure statement, even if no party objects. The Reporter agreed. **A motion to delete the last sentence of the draft**

**carried with one dissenting vote.** Judge Duplantier suggested a separate Rule 3017.1 for small business cases. **The Committee agreed in a straw vote.**

Mr. Klee suggested deleting the word "unimpaired" on line 45 of the Reporter's draft or adding a reference to a convenience class of claims under section 1122(b) of the Bankruptcy Code. The Reporter said deleting the requirement for sending copies of the plan and disclosure statement to unimpaired classes was very controversial and indicated that not sending the documents to some impaired creditors would be more controversial. The Committee discussed whether a plan proponent can go directly to cramdown for a class when the debtor is insolvent. **Professor Tabb's motion to table the matter until the March meeting passed with one dissenting vote.**

Mr. Smith asked whether the Reporter referred to the debtor's "application" for conditional approval of the disclosure statement in line 109 in order to avoid the requirement of notice. The Reporter stated that he used "application" in an effort to be consistent with Rule 9013 and the streamlined process used for matters such as "first day" orders. Judge Duplantier asked why he didn't refer to "ex parte motions" as in civil practice before the district court.

In response to a question about the use of "application" in the bankruptcy rules, Mr. Patchan said the drafters of the 1983 rules tried to restrict use of the word to administrative matters in an effort to be as consistent as possible with civil practice. He said the drafters avoided use of the phrase "ex parte" whenever possible because of its bad connotation in past bankruptcy practice and the policy against ex parte meetings.

The Reporter said he could substitute "ex parte motion" for the word "application" in the draft but that the change could

lead to confusion until the Committee considers the use of "application" throughout the bankruptcy rules. **A motion to make the substitution in the draft and require notice pursuant to Rule 9013 failed for lack of a second.** Mr. Batson said requiring notice would defeat the goal of "fast tracking" small business cases. Judge Robreno said the rule should acknowledge that Congress permitted an ex parte process.

Judge Kressel moved to delete the phrase ", on application of the plan proponent," from line 109. **The Chairman ruled the motion out of order.** In response to a question about a deadline for a secured creditor's section 1111(b) election in a small business case, the Reporter agreed to add a reference to Rule 3014 to the Committee Note. He said the creditor couldn't make the election by the time of the conditional approval of the disclosure statement because the creditor wouldn't get a copy of the plan until later. **The Committee agreed that the Reporter would include the substance of his draft Rule 3017(f) in a separate small business rule.**

**Appeals.** The Reporter recommended that the Committee consider amending subsections (a), (b), and (e) of Rule 8001 to conform to the Reform Act's provisions for appeals as a matter of right from exclusivity orders and for the creation of Bankruptcy Appellate Panel (BAP) Services. The Reform Act reversed the statutory presumption that bankruptcy appeals will go to the district court and provided that, if a BAP is available in the district, bankruptcy appeals will go to it unless one of the parties elects to go to the district court.

The Reporter said it seems logical for the appellant to make the election in the Notice of Appeal. Judge Meyers stated, however, that the Notice of Appeals printed by some publishers contain references to the district court which could be viewed as an election -- albeit inadvertent -- to take the appeal to the

district court. He said requiring that the election be made in a separate writing would avoid the potential problem. Judge Restani moved to approve the Reporter's draft revision to Rule 8001 after deleting the bracketed language on lines 38-40. **The motion carried on a vote of 12-0.**

**After discussing whether Rule 8007 should be amended to provide in more detail for the transmittal of the record on appeal, the Committee agreed that the circuits could handle the matter or leave it to the bankruptcy clerks to resolve.**

**Jury Trials.** The Reporter stated that former Rule 9015 was abrogated in 1987 to avoid any inference that the rule conferred a right to a jury trial in a bankruptcy case. Since then, the Supreme Court held in Granfinanciera, S.A. v. Norberg that a person who has not filed a proof of claim in the bankruptcy case is entitled to a jury trial under the Seventh Amendment in certain proceedings, such as fraudulent conveyances or preference actions. Further, the Reform Act provides that a bankruptcy judge may conduct a jury trial if specially designated by the district court to do so and if the parties expressly consent.

The Reporter presented a draft of a new Rule 9015 and an alternative which included issues arising in involuntary petitions and specified that the bankruptcy judge may determine whether there is a right to a jury trial when one is demanded. The Committee discussed whether the district court should give the bankruptcy judges a blanket designation to conduct jury trials or do so on a case-by-case basis and whether the bankruptcy judge may determine whether there is a right to a jury trial.

Judge Duplantier said there was no need for a separate, detailed bankruptcy rule on jury trials. He said the bankruptcy rule could state that when a right to a jury trial exists, the

following civil rules apply: Civil Rule 38, part of Rule 39, and Rules 47-51. Consent to the bankruptcy judge's conducting the jury trial could be patterned on the procedure in Civil Rule 73(b) for the parties' filing a joint consent to a jury trial before a magistrate judge. Mr. Sommer said incorporating the civil rules to the maximum extent possible would permit use of the extensive body of case law developed under those rules.

Judge Meyers said a bankruptcy rule is needed on the form and timing of the demand for a jury trial. The Chairman stated that a bankruptcy rule is needed because the Civil Rule 81(a) provides that the Civil Rules do not apply to proceedings in bankruptcy unless specifically incorporated. **The Reporter agreed to present another draft of a rule on jury trials.**

**Applicability of Rules in Alabama and North Carolina.** Rule 9035 provides that the bankruptcy rules apply to cases in Alabama and North Carolina only to the extent that the rules are not inconsistent with the provisions of title 11 and title 28 effective in the case. The Reporter stated that the Reform Act contained provisions relating to bankruptcy administrators in those two states which will not be codified in either title 11 or title 28. For that reason he recommended amending Rule 9035 to apply the rules to the extent that they are not inconsistent with any federal statute effective in the case.

Mr. Klee questioned whether the amendment would constitute a substantive position on the constitutionality of the bankruptcy administrator program. The Reporter said the amendment made a change required by statute. **The proposed amendment was approved by an unanimous vote.**

## LONG RANGE PLANNING COMMITTEE

Mr. Klee presented the report from the Long Range Planning

Subcommittee. He distributed draft copies of two surveys developed with the help of Elizabeth Wiggins of the Federal Judicial Center to ascertain the views of the bankruptcy community on the scope, format, and organization of the Bankruptcy Rules. One version is to be mailed to a sample of bankruptcy attorneys and the other is to be sent to bankruptcy judges, bankruptcy clerks, U.S. trustees and their assistants, chapter 7 trustees, and chapter 13 trustees.

At Judge Ellis' request, Mr. Klee agreed to send the survey to chief district judges. At Mr. Kohn's suggestion, he agreed to include references to the bankruptcy rules and forms. At Judge Meyers' suggestion, Ms. Wiggins agreed to include questions on the scope, format, and organization of local bankruptcy rules. The two authors also agreed to send the survey to bankruptcy law professors and to delete the phrase "In your opinion" from the questions. **The Committee voted to continue the project.**

## CHANGES TO OFFICIAL FORMS

Mr. Sommer presented the amendments to the Official Bankruptcy Forms approved by the Forms Subcommittee on December 7, 1994, and set out in the subcommittee's memorandum of December 8, 1994.

**Official Form 1. Voluntary Petition.** The Committee discussed the difference between being a small business and electing to be considered one, and whether there should be a check box for the election on the petition. **A motion was approved unanimously to have two "check box" lines on the petition worded as follows:**

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

At Mr. Klee's request, the Committee agreed to substitute the phrase "I have been authorized to file this petition on behalf of the debtor" for the phrase "the filing of this petition on behalf of the debtor has been authorized" in the first sentence of the corporate or partnership debtor declaration on page two. In order to make space for the Certification and Signature by Non-Attorney Bankruptcy Petition Preparer, the Committee agreed to move the reference to Exhibit "A" to the corporate or partnership debtor declaration by adding the following sentence: "If debtor is a corporation filing under chapter 11, Exhibit "A" is attached and made part of this petition."

In order to clarify a chapter 9 debtor's eligibility for relief, the Committee agreed, at Mr. Klee's request, to revise the Request for Relief on page two by inserting the phrase "is eligible for and" after the word "Debtor". The Committee also agreed to the following changes on page one of the Petition:

-- Move the Small Business section to the right-hand column on page one.

-- Insert the phrase "check one" after the phrases "TYPE OF DEBTOR" and "NATURE OF DEBT" in the left-hand column on page one.

**Official Form 19. Certification and Signature of Non-Attorney Bankruptcy Petition Preparer.** The Committee discussed at some length the Certification and Signature and its completion by preparers. The Committee agreed to move the signature line and date to the bottom of the form. The Committee agreed to add the following warning below the signature: "A bankruptcy petition preparer's failure to comply with the provisions of title 11 and the Federal Rules of Bankruptcy Procedure may result in fines or imprisonment or both. 11 U.S.C. § 110; 18 U.S.C. § 156".

Although the statute requires the disclosure of only the

**Social Security numbers of other individuals who prepared or assisted in preparing the document, the Committee agreed to require the disclosure of their names as well. The Committee agreed to add the phrase "of Bankruptcy Petition Preparer" under the line for the preparer's printed or typed name and to move the line above the preparer's Social Security number.**

**By acclamation, the Committee approved the Certification and Signature, as revised, as a new Official Form 19 and as a block on the second page of the Petition. The Committee also approved the Petition as revised.**

**Official Form 3. Application and Order to Pay Filing Fee in Installment. The Committee approved the addition of the Certification and Signature of Non-Attorney Bankruptcy Petition Preparer to the Application and Order.**

**Official Form 6. Schedules.** The Subcommittee proposed a number of amendments to Schedule E - Creditors Holding Unsecured Priority Claims. In order to reduce the need for future changes in the form, the Subcommittee recommended deleting the dollar amount of priorities because the amounts are subject to adjustment every three years under section 104 of the Bankruptcy Code, as amended by the Reform Act. The Subcommittee suggested deleting the references to subsections of section 507(a) of the Bankruptcy Code because the subsections are renumbered frequently by Congress.

**In order to make it easier for debtors to complete the form accurately, the Committee decided to retain the dollar amounts, as amended by the Reform Act, in Schedule E but to include a footnote as follows: "Amounts are subject to adjustment on April 1, 1998, and every three years thereafter with respect to cases commenced on or after the date of adjustment." The Committee deleted the reference to omitting dollar amounts from the**

**Committee Note. The Committee also decided to retain the references to subsections of section 507(a).** Including the references will make it easier to complete the form and the subsections usually are renumbered only when Congress adds a new priority, which requires revising the form anyway. **The Committee agreed to add a reference to commissions owing to qualifying independent sales representatives to Schedule E and a Certification and Signature of Non-Attorney Bankruptcy Petition Preparer at the end of Form 6. The Committee approved the Schedules, as amended.**

**Official Form 7. Statement of Financial Affairs.** Mr. Sommer said the Subcommittee considered adding a question concerning single asset real estate but decided not to do so because secured creditors have other ways to determine the information. The only change recommended by the Subcommittee was the addition of a Certification and Signature of Non-Attorney Bankruptcy Petition Preparer. Mr. Klee suggested that the cover sheet state that municipalities need not complete the form. Ms. Channon said Rule 1007(b) clearly provides that chapter 9 debtors are not required to prepare and file the statement. **The Committee approved the revised Statement of Financial Affairs as proposed by the Subcommittee.**

**Official Form 8. Individual Debtor's Statement of Intention.** The only change recommended by the Subcommittee was the addition of a Certification and Signature of Non-Attorney Bankruptcy Petition Preparer. **The Committee approved the revision.**

**Official Form 9. Notice of Commencement of Case under the Bankruptcy Code, Meeting of Creditors, and Fixing of Dates. The Committee approved the Subcommittee's recommendation to add references to dischargeability actions under section 523(a)(15) to Forms 9(A), 9(C), 9(E), 9(E)(Alt.), 9(G), and 9(H).** The Subcommittee recommended including separate deadlines for filing

claims for governmental units and all other creditors on Forms 9(C), 9(D), 9(E)(Alt.), 9(F)(Alt.), 9(G), 9(H), and 9(I). **The Committee agreed that the claims deadline box would read as follows:**

**DEADLINE TO FILE A PROOF OF CLAIM**

**For all creditors (other than governmental units):** **For governmental units:**

**The Committee approved Official Form 9, as revised.**

**Official Form 10. Proof of Claim.** The Committee agreed to add the following footnote to the dollar amounts in the priority section: **"Amounts are subject to adjustment on 4/1/98 and every three years thereafter with respect to cases commenced on or after the date of adjustment." The Committee agreed to the conforming changes recommended by the Subcommittee.**

**Official Form 16. Captions.** The Subcommittee recommended:

-- Revising Form 16A to include the debtor's address in furtherance of the debtor's duty under section 342(c) of the Code to include this information in every notice given by the debtor;

-- Noting on Form 16B that it may be used if section 342(c) is not applicable;

-- Revising Form 16C for use as the caption of a complaint in an adversary proceeding filed by the debtor; and

-- Redesignating former Form 16C as Form 16D for use as a caption in an adversary proceeding other than for a complaint filed by the debtor. **The Committee approved the four forms as recommended.**

**Form 17. Notice of Appeal.** Mr. Sommer said the draft Notice of Appeal approved by the Forms Subcommittee is consistent with the Committee's vote to require a separate Statement of Election. The Committee discussed whether the warning concerning the appellant's election to proceed in the district court should

be included in the Notice of Appeal; if so, in what form; and whether a similar warning should be included for the appellee. **The Committee agreed to move the warning below the appellant's signature and revise it to read as follows: "If a Bankruptcy Appellate Panel is authorized to hear this appeal, each party has a right to have the appeal heard by the district court. The appellant may exercise this right only by filing a separate statement at the time of the filing of this notice of appeal." The Committee approved the Notice of Appeal as revised.**

**Form 18. Discharge of Debtor. The Committee approved the addition of a reference to dischargeability actions under section 523(a)(15).**

## CHANGES TO DIRECTOR'S FORMS

**The Committee approved conforming changes to the following forms issued by the Director of the Administrative Office under Rule 9009:**

| | |
|---|---|
| 18J | Discharge of Joint Debtors |
| 18JO | Discharge of Joint Debtor |
| 242A | Order Discharging Debtor After Completion of Chapter 13 Plan |
| 200 | Required Lists, Schedules, Statements and Fees |
| 201 | Notice to Individual Consumer Debtor |

**The Committee approved the following new Director's Forms:**

| | |
|---|---|
| 280 | Disclosure of Compensation of Bankruptcy Petition Preparer |
| 13S | Order and Notice with Respect to Conditionally Approving Disclosure Statement and Plan in a Small Business Case |
| 15S | Order Finally Approving Disclosure Statement and Confirming Plan |
| 281 | Appearance of Child Support Creditor or Representative |

**After discussing the new Form 281, the Committee directed the Chairman to write the chairman of the Committee on the Administration of the Bankruptcy System to request that the Bankruptcy Committee consider whether section 304(g) of the Reform Act exempted child support creditors from payment of fees for filing motions for relief from the automatic stay and adversary proceedings.**

## INTERIM RULES

The Committee considered the interim rules drafted by the Reporter as both suggested interim local rules and, with appropriate stylistic changes, as proposed amendments to the national Bankruptcy Rules. (These drafts were not contained in the agenda materials.) The final draft of the proposed amendments covered by the interim rules will not be submitted until after the March 1995 meeting.

**Interim Rule 1. Election of Trustee in Chapter 11 Reorganization Case. The Committee approved the interim rule as presented by the Reporter.**

**Interim Rule 2. Small Business Chapter 11 Reorganization Case. The Committee approved the interim rule as presented and deleted the second paragraph of the draft Committee Note.**

**Interim Rule 3. Appeals to the District Court [or Bankruptcy Appellate Panel]. The Committee concluded that, to the extent a rule is needed, the districts and circuits can develop their own. The Chairman will write the Ninth Circuit to suggest that it adopt an interim rule.**

**Interim Rule 3. Jury Trials.** The Reporter presented a draft containing the alternative language he prepared that morning in response to the Committee's request on the previous

day. Judge Kressel questioned the need for an interim rule on jury trials. The Chairman said he has received requests for such a rule from a number of bankruptcy judges.

The Reporter stated that, as requested by the Committee, he attempted to incorporate by reference the Civil Rules as much as possible. He also informed the Committee that Judge Stotler was unable to attend the meeting on that day, but had given him comments concerning his prior draft. The Reporter stated Judge Stotler's concerns that his prior draft, which combined the form and timing of the parties' consent into one provision, (and which required filing a written statement of consent before a deadline fixed by the court as the "only" method of giving consent), possibly should be changed so that: (1) parties would not be barred from making an oral stipulation on the record consenting to have the bankruptcy judge conduct the jury trial, (the statute does not require written consent), provided consent is given before the time deadline, and (2) the court would have flexibility to set the consent deadline by local rule (rather than by court order in the particular case). This flexibility is needed to enable the court to deal with logistics problems related to jury trials.

**In response to Judge Stotler's comments, the Committee agreed to delete the word "only" from the consent subsection of the Reporter's draft. The Committee also agreed to leave the time period to local rule.** The Reporter stated that leaving the period to local rule would enable the local courts, if they so desire, to provide by local rule that a judge may fix a different date in a particular case.

**After a discussion focusing on the Reporter's draft, the Committee agreed to delete the separate paragraph on removed actions, to delete a separate sentence on removed actions, and to make several other stylistic changes. The Committee approved the**

**following text by unanimous vote:**

**Interim Rule 3. Jury Trials**

(a) APPLICABILITY OF CERTAIN FEDERAL RULES OF CIVIL PROCEDURE. Rules 38, 39, and 47-51 F.R.Civ.P., and Rule 81(c) F.R.Civ.P. as it applies to jury trials, apply in cases and proceedings, except that a demand made under Rule 38(b) F.R.Civ.P. shall be filed in accordance with Bankruptcy Rule 5005.

(b) CONSENT TO HAVE TRIAL CONDUCTED BY BANKRUPTCY JUDGE. If the right to a jury trial applies, a timely demand has been filed under Rule 38(b) F.R.Civ.P., and the bankruptcy judge has been specially designated to conduct the jury trial, the parties may consent to have a jury trial conducted by a bankruptcy judge under 28 U.S.C. § 157(e) by jointly or separately filing a statement of consent no later than [insert period specified by local rule].

NOTE

This rule provides procedures relating to jury trials. The rule is not intended to expand or create any right to trial by jury where such right does not otherwise exist.

Judge Ellis asked whether the Advisory Committee would issue the suggested interim rules immediately. The Reporter stated that the original plan was to do so but that, since the standing committee is meeting in four weeks, Judge Mannes and Judge Stotler had agreed that the interim rules would be referred to the Standing Committee with a request for that committee's concurrence. He said the interim rules would be accompanied by a cover letter from Judge Mannes which states that the interim rules are provided for consideration for use as local rules pending the adoption of national bankruptcy rules.

Respectfully submitted,

James H. Wannamaker, III

Item 9A

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

December 13, 1994

CHAIRS OF ADVISORY COMMITTEES

JAMES K. LOGAN
APPELLATE RULES

PAUL MANNES
BANKRUPTCY RULES

PATRICK E. HIGGINBOTHAM
CIVIL RULES

D. LOWELL JENSEN
CRIMINAL RULES

RALPH K. WINTER, JR.
EVIDENCE RULES

TO: Committee on Rules of Practice and Procedure
Standing Committee

Re: Report of Advisory Committee on Civil Rules

Dear Colleagues:

The Advisory Committee on Civil Rules met on October 20-21, 1994. Professor Ed Cooper, Reporter to the committee, has prepared draft Minutes of the meeting, a copy of which is attached. I will refer to these Minutes in this report.

This was the first meeting for two new members. Justice Christine Durham of the Utah Supreme Court replaces Chief Justice Holmes. Judge David Levi, United States District Court in Sacramento replaces Magistrate Judge Wayne Brazil. The American College of Trial Lawyers was represented by Robert Campbell, and the Litigation Section of the American Bar Association by Barry McNeil. This was the first meeting attended by a representative of the Litigation Section.

I.

Five items require action by the Standing Committee:

1. Rule 4(m) - Suits in Admiralty Act (Minutes pp. 1-2). The Advisory Committee recommends that the Standing Committee urge Judicial Conference approval of a recommendation that Congress delete the service provisions from 42 U.S.C. § 742.

2. Rule 26(c) (Minutes p. 6). The Minutes set out the history of the proposed changes to Rule 26(c). Following extensive discussion at the meeting in Tucson, the committee voted by ballot as follows:

**BALLOT NO. 1**

*Expanded Version of (c)(3), Without "Intervention"*

(3) On motion, the court may dissolve or modify a protective order. In ruling, the court must consider, among other matters, the following:
- (A) the extent of reliance on the order;
- (B) the public and private interests affected by the order, including any risk to public health or safety;
- (C) the movant's consent to submit to the terms of the order;
- (D) the reasons for entering the order, and any new information that bears on the order; and
- (E) the burden that the order imposes on persons seeking information relevant to other litigation.

Votes for the published version: 3
Votes for the expanded version: 10

**BALLOT NO. 2**

*Expanded Version, With "Intervention" Provision*

(3) (A) The court may modify or dissolve a protective order on motion made by a party, a person bound by the order, or a person who has been allowed to intervene to seek modification or dissolution.

(B) In ruling on a motion to dissolve or modify a protective order, the court must consider, among other matters, the following: (The same list as above, cast as (i), etc., rather than A through E.)

Votes to add the intervention language to whichever version of (c)(3) wins: 8

Votes against adding the intervention language to the winning (c)(3) version: 5

It is the judgment of the committee that these changes will not require a second publication. We recommend that Rule 26(c) be transmitted to the Judicial Conference for approval. The full text of Rule 26(c) with changes shown is attached as Exhibit 1, with a summary of public comments on the published version.

3. Rule 43(a) (Minutes pp. 13-14). The history of the proposed revision of Rule 43(a) is set out at pp. 13-14 of the Minutes. The only recommended change from the published version is to require "good cause shown in compelling circumstances." It was the judgment of the committee that since the only change from the published version narrows the availability of transmission, no additional period of comment is required. Conforming changes to the Committee Note are also made. The full text of Rule 43(a), as recommended with changes shown, is attached as Exhibit 2, with a summary of public comments on the published version.

4. Rule 47(a) (Minutes pp. 14-17). The history of the proposed change to 47(a) is set out in the Minutes at pp. 14-17. The Advisory Committee unanimously recommends that the following change (full text and note are attached as Exhibit 3) to Rule 47(a) be published for comment:

> The court must conduct the examination of prospective jurors. The parties are entitled to examine the prospective jurors to supplement the court's examination within reasonable limits of time, manner, and subject matter set by the court in its discretion.

The Federal Judicial Center, at the committee's request, conducted a survey of the district court concerning voir dire. The study reflects that somewhere between 51% and 67% of all district judges allow counsel questioning. It further found that the average time devoted to voir dire was virtually the same for all levels of attorney participation. The averages for civil cases ranged from 65 minutes to 75 minutes. The Center study also reported:

> Among judges who reported any time expended by counsel, the average was 31 minutes in civil cases and 40 in

> criminal cases. Perhaps most intriguing, however, is the absence of much relationship between total voir dire time and the judge's indication of his or her standard practice regarding attorney participation in voir dire.

The Litigation Section of the American Bar Association and the American College of Trial Lawyers strongly endorse this change. The lawyers are critical of voir dire now being conducted by judges in many courts. Under Batson and J.E.B., lawyers must now articulate nondiscriminatory reasons for their preemptory challenges. Lawyers complain of unfairness in requiring their articulation of reasons derivable by a process by which they are not allowed to directly participate; that requesting the judge to ask follow-on questions is often inadequate.

On the other hand, the committee is persuaded that most trial judges conduct a thorough and probing voir dire. Indeed, over half of the judges reporting in the Federal Judicial Center study now conduct voir dire in essentially the same manner contemplated by the proposed rule. Many of these judges informally report that lawyers seldom exercise the opportunity to examine the panel directly.

A number of district judges in Virginia and one from North Carolina have written letters opposing any participation by lawyers in voir dire. These letters express concern over losing control of the examination of the venire and express fear of transporting various "state court practices" into federal court. The committee also opposes granting uncontrolled examination by lawyers of the jury panel and also opposes any licensing of the feared "state court" voir dire. It is the strong sense of the Advisory Committee that the trial judge should shoulder primary responsibility for examining the venire; that a thorough voir dire by the trial judge in the first instance asking questions, including questions the trial lawyers have asked the judge to ask, will ordinarily leave little necessary supplementation by counsel. The committee expects that the judge will conduct a probing examination. Indeed, questions that step on the privacy of venirepersons are best asked by the court, not counsel.

The Advisory Committee was also of the view that the trial judge ought to be able to properly confine trial counsel to questions that go directly to jury qualification, and that the court has not already asked. That is, a trial judge should be well within her discretion to cut off questions that move from jury qualification to jury persuasion or are repetitive. The text and comment of the proposed rule is intended to reflect these views. We have also heard the views of trial judges who have selected thousands of panels by the procedure contemplated by the rule, with no difficulty in maintaining control, and without experiencing abusive or repetitive examination.

The committee concludes the proposed rule by casting control by the trial judge into the area of trial court discretion. We anticipate that this will likely produce an abuse of discretion standard of review.

In short, the committee sees the proposed rule as a small, but necessary, change. We understand the sincere concerns expressed by some district judges. We are not persuaded, however, that the rule will pose the difficulties they fear. War stories are legion in this field and they can be arrayed on both sides of this debate. We emphasize that the committee disagrees in only one material respect with the judges who have written to the committee in opposing any participation by counsel in voir dire. The committee is not persuaded that the proposed rule transports into federal practice the fear of abuses now occurring in many state court systems. We think many of those same judges would agree that properly modulated attorney voir dire can be particularly helpful. United States v. Hawkins, 658 F.2d 279 (5th Cir., Unit A, 1981), is instructive. In Hawkins, the district judge allowed counsel to follow its questioning regarding publicity. During the court's questioning, no member of the venire acknowledged hearing or seeing media reports regarding defendants and the pending charges. During counsel's voir dire, 48 of 56 members of the venire acknowledged hearing media reports.

Finally, we think it important to send this rule out for comment to ensure that lawyers and judges are fairly heard. At the least, we must put the matter on the table for discussion. Few of the judges writing to the committee have had an opportunity to see the proposed

rule and note. We need the benefit of discussion disciplined by the actual proposal.

5. Rule 48 (Minutes pp. 17-19). The committee unanimously recommends a return to 12-person juries by amending Rule 48. The full text and note are attached as Exhibit 4. The amendment would not alter the requirement of unanimity, nor require the sitting of alternates. A civil jury would be required to commence with 12 persons, in the absence of a stipulation by counsel of a lesser number, but could lose down to 6 as excused by the trial judge for illness, etc.

The Minutes at pp. 17-19 describe the committee's discussion regarding 12-person juries. We have surveyed the literature and gathered much of it in a binder called "Background Materials on Jury Size." The literature is remarkably consistent in its criticism of 6-person juries. These studies largely validate intuitive judgments that 12-person juries deliver a more stable deliberative body than 6. Whatever the origins of the number 12, it is a number that works well.

As strong as it is, the relative instability of 6-person juries is not the most powerful argument for returning to the 12-person jury. It is, rather, that increasing the civil jury to 12 persons works an exponential increase in its ability to reflect the interests of minorities. There is irony in the circumstance that the reduction of the civil jury from 12 to 6 persons came during the same time period that the court began to heavily question their failure to adequately represent the community. Reducing the size from 12 to 6 plainly deals a heavier blow to the representativeness of the civil jury than any bigoted exercise of preemptory challenges.

The argument for 6-person juries revolves largely around cost and efficiency. We are persuaded that dollar cost is quite small. In any event, any savings will not compensate for its instability and frustration of minority participation. Nor have the studies shown a substantial increase in the time required to seat a 12-person jury over a 6-person jury. Throughout the United States today the district courts are seating 8 and 10 person juries for any other than the most routine civil matters. Indeed, the rules themselves encourage district judges to do precisely that, as a companion to the abolition of alternates. So, the rule change brings a

step up from 8 or 10 to 12 and not from 6 to 12, at least in most cases of length.

II.

There are seven information items. They are each described in the Minutes.

1. Rule 5(e) (Minutes pp. 2-3).

2. Rule 6(c) (Minutes p. 4).

3. Rule 23 (Minutes p. 6).

4. Rule 53 (Minutes pp. 19-22).

5. Rule 68 (Minutes pp. 22-23).

6. Evidence Rules 413-415 (Minutes pp. 23-24).

7. Rule 9(h) (Minutes pp. 4-5). Rule 9(h) provides:

> The reference in Title 28, U.S.C. § 1292(a)(3), to admiralty cases shall be construed to mean admiralty and maritime claims within the meaning of the subdivision (h).

This language is ambiguous when applied to a case that includes both an admiralty claim and a nonadmiralty claim. The committee is considering a revision that, with current style conventions, would read:

> A case that includes an admiralty or maritime claim within this subdivision is an admiralty case within 28 U.S.C. § 1292(a)(3).

Sincerely yours,

Patrick E. Higginbotham

Item 9B

RULE 26(c)

(c) (1) **Protective Orders.** ~~Upon~~ On motion by a party or by the person from whom discovery is sought, accompanied by a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action, ~~and for good cause shown,~~ the court ~~in which~~ where the action is pending ~~or~~ – and ~~alternatively~~, on matters relating to a deposition, also the court in the district where the deposition ~~is to~~ will be taken – may, for good cause shown or on stipulation of the parties, make any order ~~which~~ that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(~~1~~A) ~~that~~ precluding the disclosure or discovery ~~not be had~~;

(~~2~~B) ~~that~~ specifying conditions, including time and place, for the disclosure or discovery ~~may be had only on specified terms and conditions, including a designation of time or place~~;

(~~3~~C) ~~that the discovery may be had only by~~ prescribing a discovery method ~~of discovery~~ other than that selected by the party seeking discovery;

(~~4~~D) ~~that~~ excluding certain matters ~~not be inquired into~~, or ~~that~~ limiting the scope of ~~the~~ disclosure or discovery ~~be limited~~ to certain matters;

(~~5~~E) designating the persons who may be present while ~~that~~ the discovery is ~~be~~ conducted ~~with no one present except persons designated by the court~~;

(~~6~~F) ~~that a deposition, after being sealed,~~ directing that a sealed deposition be opened

only ~~by order of the~~ upon court order;

~~(7~~(G) ordering that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way; or

~~(8~~(H) directing that the parties simultaneously file specified documents or information enclosed in sealed envelopes, to be opened as ~~directed by~~ the court directs.

(2) If ~~the~~ a motion for a protective order is wholly or partly denied ~~in whole or in part~~, the court may, on ~~such~~ just terms ~~and conditions as are just~~, order that any party or ~~other~~ person provide or permit discovery or disclosure. ~~The provisions of~~ Rule 37(a)(4) apply~~ies~~ to the award of expenses incurred in relation to the motion.

(3) (A) The court may modify or dissolve a protective order on motion made by a party, a person bound by the order, or a person who has been allowed to intervene to seek modification or dissolution.

(B) In ruling on a motion to dissolve or modify a protective order, the court must consider, among other matters, the following:

(i) the extent of reliance on the order;

(ii) the public and private interests affected by the order, including any risk to public health or safety;

(iii )the movant's consent to submit to the terms of the order;

(iv) the reasons for entering the order, and any new information that bears on the order; and

(v) the burden that the order imposes on

persons seeking information relevant to other litigation.

**Committee Note**

Subdivisions (1) and (2) are revised to conform to the style conventions adopted for simplifying the present rules. No change in meaning is intended by these style changes.

Subdivision (1) also is amended to confirm the common practice of entering a protective order on stipulation of the parties. Stipulated orders can provide a valuable means of facilitating discovery without frequent requests for action by the court, particularly in actions that involve intensive discovery. If a stipulated protective order thwarts important interests, relief may be sought by a motion to modify or dissolve the order under subdivision (3).

Subdivision (3) is added to the rule to dispel any doubt whether the power to enter a protective order includes power to modify or vacate the order. The power is made explicit, and includes orders entered by stipulation of the parties as well as orders entered after adversary contest. The power to modify or dissolve should be exercised after careful consideration of the conflicting policies that shape protective orders. Protective orders serve vitally important interests by ensuring that privacy is invaded by discovery only to the extent required by the needs of litigation. Protective orders entered by agreement of the parties also can serve the important need to facilitate discovery without requiring repeated court rulings. A blanket protective order may encourage the exchange of information that a court would not order produced, or would order produced only under a protective order. Parties who rely on protective orders in these circumstances should not risk automatic disclosure simply because the material was once produced in discovery and someone else might want it.

Modification of a protective order may be sought to increase the level of protection afforded as well as to reduce it. Among the grounds for increasing protection might be violation of the order, enhanced appreciation of the extent to which discovery threatens important interests in privacy, or the need of a nonparty to protect interests that the parties have not adequately protected.

Modification or dissolution of a protective order does not, without more, ensure access to the once-protected information. If discovery responses have been

filed with the court, access follows from a change of the protective order that permits access. If discovery responses remain in the possession of the parties, however, the absence of a protective order does not without more require that any party share the information with others.

Despite the important interests served by protective orders, concern has been expressed that protective orders can thwart other interests that also are important. Two interests have drawn special attention. One is the interest in public access to information that involves matters of public concern. Information about the conduct of government officials is frequently used to illustrate an area of public concern. The most commonly offered example focuses on information about dangerous products or situations that have caused injury and may continue to cause injury until the information is widely disseminated. The other interest involves the efficient conduct of related litigation, protecting adversaries of a common party from the need to engage in costly duplication of discovery efforts.

The first sentence of subparagraph (A) recognizes that a motion to modify or dissolve a protective order may be made by a party, a person bound by the order, or a person allowed to intervene for this purpose. A motion to intervene for this purpose is made for the limited purpose of establishing standing to pursue the request for modification or dissolution. Intervention should be granted if the applicant asserts an interest that justifies full argument and consideration of the motion to modify or dissolve. Because intervention is for this limited purpose, there is no need to invoke the Rule 24 standards that would apply to a request to intervene as a party. Several courts have relied on limited intervention in this setting, and the procedure has worked well.

Subparagraph (B) lists some of the matters that must be considered on a motion to dissolve or modify a protective order. The list is not all-inclusive; the factors that may enter the decision are too varied even to be foreseen.

The most important form of reliance on a protective order is the production of information that the court would not have ordered produced without the protective order. Often this reliance will take the form of producing information under a blanket protective order without raising the objection that the information is not

subject to disclosure or discovery. The information may be protected by privilege or work-product doctrine, the outer limits of Rule 26(b)(1), or other rules. Reliance also may take other forms, including the court's own reliance on a protective order less sweeping than an order that flatly prohibits discovery. If the court would not have ordered discovery over proper objection, it should not later defeat protection of information that need not have been produced at all. Reliance also deserves consideration in other settings, but a finding that information is properly discoverable directs attention to the question of the terms – if any – on which protection should continue.

The public and private interests affected by a protective order include all of the myriad interests that weigh both for and against discovery. The question whether to modify or dissolve a protective order is, apart from the question of reliance, much the same as the initial determination whether there is good cause to enter the order. An almost infinite variety of interests must be weighed. The public and private interests in defeating protection may be great or small, as may be the interests in preserving protection. Special attention must be paid to a claim that protection creates a risk to public health or safety. If a protective order actually thwarts publication of information that might help protect against injury to person or property, only the most compelling reasons, if any, could justify protection. Claims of commercial disadvantage should be examined with particular care. On the other hand, it is proper to demand a realistic showing that there is a need for disclosure of protected information. Often there is full opportunity to publicize a risk without access to protected discovery information. Paradoxically, the cases that pose the most realistic public risk also may be the cases that involve the greatest interests in privacy, such as a yet-to-be-proved claim that a party is infected with a communicable disease.

Consent to submit to the terms of a protective order may provide strong reason to modify the order. Submission to the terms of the order should include submission to the jurisdiction of the court to enforce the order. Submission, however, does not establish an automatic right to modification. The court still must balance the need for access to information against the interests of privacy. If the need for access arises from pending or impending litigation of parallel claims, it may prove better to defer to the protective order discretion of the court responsible for the other

litigation, or even to work out a cooperative approach that allows each court to consider the factors most familiar to it.

The role of the court in considering the reasons for entering the protective order is affected by the distinction between contested and stipulated orders. If the order was entered on stipulation of the parties, the motion to modify or dissolve requires the court to consider the reasons for protection for the first time. All of the information that bears on the order is new to the court and must be considered. If the order was entered after argument, however, the court may justifiably focus attention on information that was not considered in entering the order initially.

Rule 26(c)(3) applies only to the dissolution or modification of protective orders entered by the court under subdivision (c)(1). It does not address private agreements entered into by litigants that are not submitted to the court for its approval. Nor does Rule 26(c)(3) apply to motions seeking to vacate or modify final judgments that occasionally contain restrictions on the disclosure of specified information. Rules 59 and 60 govern such motions.

**(a) Form.** In ~~all~~ every trials, the testimony of witnesses ~~shall~~ must be taken ~~orally~~ in open court, unless ~~otherwise provided by an Act of Congress or by~~ a federal law, these rules, the Federal Rules of Evidence, or other rules adopted by the Supreme Court provide otherwise. The court may, for good cause shown in compelling circumstances and upon appropriate safeguards, permit presentation of testimony in open court by contemporaneous transmission from a different location.

**Committee Note**

Rule 43(a) is revised to conform to the style conventions adopted for simplifying the present Civil Rules. The only intended changes of meaning are described below.

The requirement that testimony be taken "orally" is deleted. The deletion makes it clear that testimony of a witness may be given in open court by other means if the witness is not able to communicate orally. Writing or sign language are common examples. The development of advanced technology may enable testimony to be given by other means. A witness unable to sign or write by hand may be able to communicate through a computer or similar device.

Contemporaneous transmission of testimony from a different location is permitted only on showing good cause in compelling circumstances. The importance of presenting live testimony in court cannot be forgotten. The very ceremony of trial and the presence of the factfinder may exert a powerful force for truthtelling. The opportunity to judge the demeanor of a witness face-to-face is accorded great value in our tradition. Transmission cannot be justified merely by showing that it is inconvenient for the witness to attend the trial.

The most persuasive showings of good cause and compelling circumstances are likely to arise when a witness is unable to attend trial for unexpected reasons, such as accident or illness, but remains able to testify from a different place. Contemporaneous transmission may be better than an attempt to reschedule the trial, particularly if there is a risk that other — and perhaps

more important — witnesses might not be available at a later time.

Other possible justifications for remote transmission must be approached cautiously. Ordinarily depositions, including video depositions, provide a superior means of securing the testimony of a witness who is beyond the reach of a trial subpoena, or of resolving difficulties in scheduling a trial that can be attended by all witnesses. Deposition procedures ensure the opportunity of all parties to be represented while the witness is testifying. An unforeseen need for the testimony of a remote witness that arises during trial, however, may establish good cause and compelling circumstances. Justification is particularly likely if the need arises from the interjection of new issues during trial or from the unexpected inability to present testimony as planned from a different witness.

Good cause and compelling circumstances may be established with relative ease if all parties agree that testimony should be presented by transmission. The court is not bound by a stipulation, however, and can insist on live testimony. Rejection of the parties' agreement will be influenced, among other factors, by the apparent importance of the testimony in the full context of the trial.

A party who could reasonably foresee the circumstances offered to justify transmission of testimony will have special difficulty in showing good cause and the compelling nature of the circumstances. Notice of a desire to transmit testimony from a different location should be given as soon as the reasons are known, to enable other parties to arrange a deposition, or to secure an advance ruling on transmission so as to know whether to prepare to be present with the witness while testifying.

No attempt is made to specify the means of transmission that may be used. Audio transmission without video images may be sufficient in some circumstances, particularly as to less important testimony. Video transmission ordinarily should be preferred when the cost is reasonable in relation to the matters in dispute, the means of the parties, and the circumstances that justify transmission. Transmission that merely produces the equivalent of a written statement ordinarily should not be used.

Safeguards must be adopted that ensure accurate identification of the witness and that protect against

influence by persons present with the witness. Accurate transmission likewise must be assured.

Other safeguards should be employed to ensure that advance notice is given to all parties of foreseeable circumstances that may lead the proponent to offer testimony by transmission. Advance notice is important to protect the opportunity to argue for attendance of the witness at trial. Advance notice also ensures an opportunity to depose the witness, perhaps by video record, as a means of supplementing transmitted testimony.

**Rule 47. Selecting ~~Selection of~~ Jurors**

(a) ~~Examination of~~Examining Jurors. The court ~~may~~ must ~~permit the parties or their attorneys to~~ conduct the examination of prospective jurors ~~or may itself conduct the examination~~. The parties are entitled to examine the prospective jurors to supplement the court's examination within reasonable limits of time, manner, and subject matter set by the court in its discretion. ~~In the latter event, the court shall permit the parties or their attorneys to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions of the parties or their attorneys as it deems proper.~~

**Committee Note**

Rule 47(a) in its original and present form permits the court to exclude the parties from direct examination of prospective jurors. Although a recent survey shows that a majority of district judges permit party participation, the power to exclude is often exercised. See Shapard & Johnson, Survey Concerning Voir Dire (Federal Judicial Center 1994). Courts that exclude the parties from direct examination express two concerns. One is that direct participation by the parties extends the time required to select a jury. The second is that counsel frequently seek to use voir dire not as a means of securing an impartial jury but as the first stage of adversary strategy, attempting to establish rapport with prospective jurors and influence their views of the case.

The concerns that led many courts to undertake all direct examination of prospective jurors have earned deference by long tradition and widespread adherence. At the same time, the number of federal judges that permit party participation has grown considerably in recent years. The Federal Judicial Center survey shows that the total time devoted to jury selection is virtually the same across all variations between no party participation and party conduct of most or all of the voir dire. It also shows that judges who permit party participation have found little difficulty in controlling potential misuses of voir dire. This experience demonstrates that the problems that have been perceived in some state-court systems of party participation can be avoided by making clear the discretionary power of the district court to control the behavior of the party or counsel. The ability to enable party participation at low cost is of itself strong reason to permit party participation. The parties are thoroughly familiar with the case by the start of trial. They are in the best position to know the juror information that bears on challenges for cause and

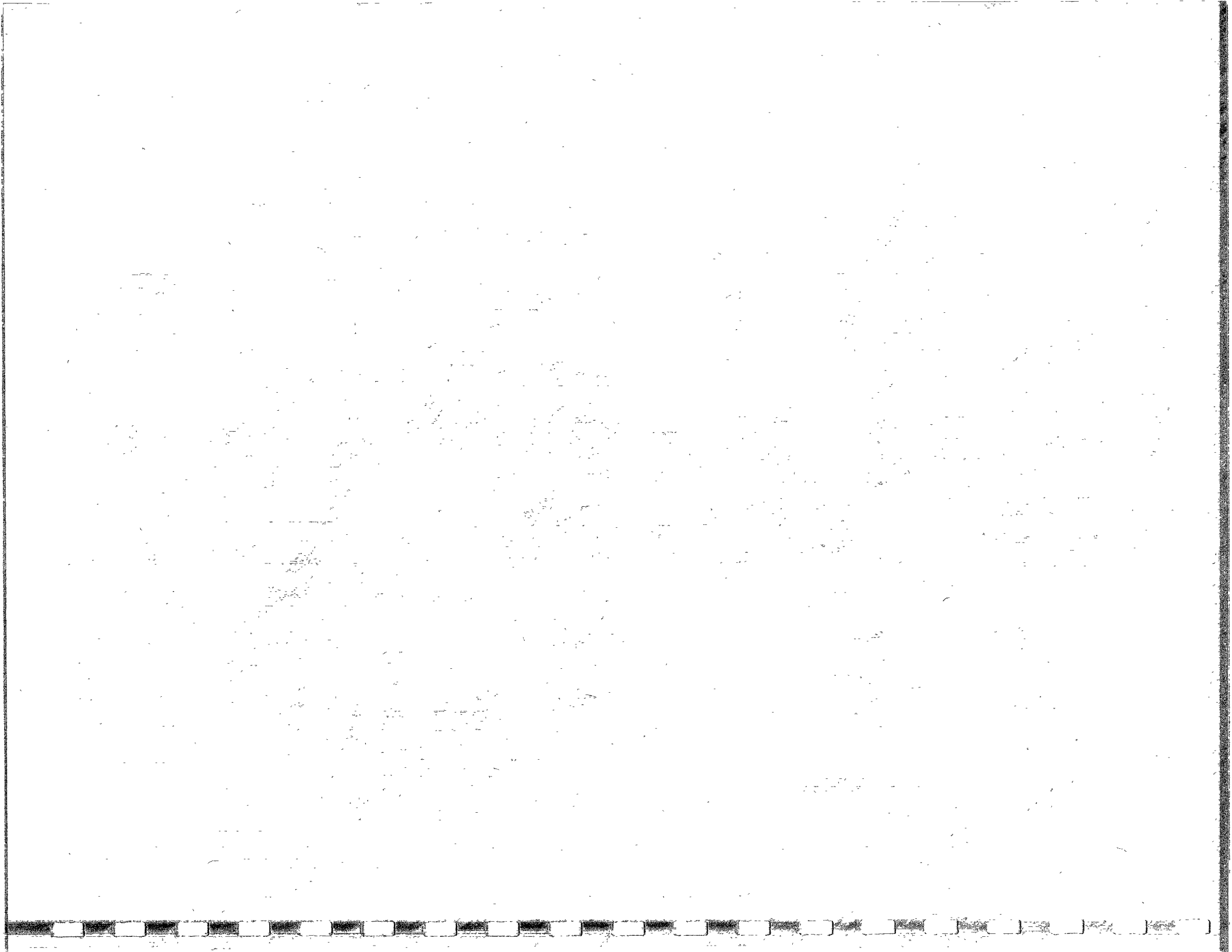
peremptory challenges, and to elicit it by jury questioning. In addition, the opportunity to participate provides an appearance and reassurance of fairness that has value in itself.

The strong direct case for permitting party participation is further supported by the emergence of constitutional limits that circumscribe the use of peremptory challenges in both civil and criminal cases. The controlling decisions begin with Batson v. Kentucky, 476 U.S. 79 (1986) and continue through J.E.B. v. Alabama ex rel. T.B., 114 S.Ct. 1419 (1994). Prospective jurors "have the right not to be excluded summarily because of discriminatory and stereotypical presumptions that reflect and reinforce patterns of historical discrimination." J.E.B., 114 S.Ct. at 1428. These limits enhance the importance of searching voir dire examination to preserve the value of peremptory challenges and buttress the role of challenges for cause. When a peremptory challenge against a member of a protected group is attacked, it can be difficult to distinguish between group stereotypes and intuitive reactions to individual members of the group as individuals. A stereotype-free explanation can be advanced with more force as the level of direct information provided by voir dire increases. As peremptory challenges become less peremptory, moreover, it is increasingly important to ensure that voir dire examination be as effective as possible in supporting challenges for cause.

Fair opportunities to exercise peremptory and for-cause challenges in this new setting require the assurance that the parties can supplement the court's examination of prospective jurors by direct questioning. The importance of party participation in voir dire has been stressed by trial lawyers for many years. They believe that just as discovery and other aspects of pretrial preparation and trial, voir dire is better accomplished through the adversary process. The lawyers know the case better than the judge can, and are better able to frame questions that will support challenges for cause or informed use of peremptory challenges. Many also believe that prospective jurors are intimidated by judges, and are more likely to admit potential bias or prejudgment under questioning by the parties.

Party examination need not mean prolonged voir dire, nor subtle or brazen efforts to argue the case before trial. The court can undertake the initial examination of prospective jurors, restricting the parties to supplemental questioning controlled by direct time limits. Effective control can be exercised by the court in setting reasonable limits on the manner and subject-matter of the examination. Lawyers will not be allowed to advance arguments in the guise of questions, to seek committed responses to hypothetical descriptions of the case, to assert propositions of law, to intimidate or ingratiate, or otherwise turn the opportunity to seek information about prospective jurors into improper adversary strategies. The district court has broad discretion to control the time, manner, and subject matter of party examination. Only a clear abuse of this discretion – usually in conjunction with a clearly inadequate examination by the court – could justify reversal of an otherwise proper jury verdict.

The voir dire process can be further enhanced by use of jury questionnaires to elicit routine information before voir dire begins. Questionnaires can save much time, and may avoid the embarrassment of public examination or the failure to confess publicly to information that a juror would provide in response to a questionnaire. Written answers to a questionnaire also may avoid the risk that answers given in the presence of other prospective jurors may contaminate a large group. Questionnaires are not required by Rule 47(a), but should be seriously considered.



**Rule 48. Number of Jurors — Participation in Verdict**

The court ~~shall~~ must seat a jury of ~~not fewer than six and not more than~~ twelve members. ~~and a~~All jurors ~~shall~~ must participate in the verdict unless excused from service ~~by the court pursuant to~~ under Rule 47(c). Unless the parties ~~otherwise~~ stipulate otherwise, (1) the verdict ~~shall~~ must be unanimous, and (2) no verdict ~~shall~~ may be taken from a jury ~~reduced in size to~~ of fewer than six members.

**Committee Note**

Rule 48 was amended in 1991 to reflect the conclusion that it had been "rendered obsolete by the adoption in many districts of local rules establishing six as the standard size for a civil jury." Six-person jury local rules were upheld by the Supreme Court in Colgrove v. Battin, 413 U.S. 149 (1973). The Court concluded that the Seventh Amendment permits six-person juries, and that the local rules were not inconsistent with Rule 48 as it then stood.

Rule 48 is now amended to restore the core of the twelve-member body that has constituted the definition of a civil jury for centuries. Local rules setting smaller jury sizes are invalid because inconsistent with Rule 48.

The rulings that the Seventh Amendment permits six-member juries, and that former Rule 48 permitted local rules establishing six-member juries, do not speak to the question whether six-member juries are desirable. Much has been learned since 1973 about the advantages of twelve-member juries. Twelve-member juries substantially increase the representative quality of most juries, greatly improving the probability that most juries will include members of minority groups. The sociological and psychological dynamics of jury deliberation also are strongly influenced by jury size. Members of a twelve-person jury are less easily dominated by an aggressive juror, better able to recall the evidence, more likely to rise above the biases and prejudices of individual members, and enriched by a broader base of community experience. The wisdom enshrined in the twelve-member tradition is increasingly demonstrated by contemporary social science.

Although the core of the twelve-member jury is restored, the other effects of the 1991 amendments remain unchanged. Alternate jurors are not provided. The jury includes twelve members at the beginning of trial, but may be reduced to fewer members if some are excused under Rule 47(c). A jury may be reduced to fewer than six members, however, only if the parties stipulate to a lower number before the verdict is returned.

Careful management of jury arrays can help reduce the incremental costs associated with the return to twelve-member juries.

Sylistic changes have been made.

Item 9D

*MINUTES*

*ADVISORY COMMITTEE ON CIVIL RULES*

*OCTOBER 20 and 21, 1994*

The Advisory Committee on Civil Rules met on October 20 and 21, 1994, at the Westin La Paloma in Tucson, Arizona. The meeting was attended by Judge Patrick E. Higginbotham, Chair, and Committee Members Judge David S. Doty, Justice Christine M. Durham, Carol J. Hansen Fines, Esq., Francis H. Fox, Esq., Assistant Attorney General Frank W. Hunger, Mark O. Kasanin, Esq., Judge David F. Levi, Judge Paul V. Niemeyer, Professor Thomas D. Rowe, Jr., Judge Anthony J. Scirica, Judge C. Roger Vinson, and Phillip A. Wittmann, Esq.. Edward H. Cooper was present as Reporter. Judge William O. Bertelsman attended as Liaison Member from the Standing Committee on Rules of Practice and Procedure, and Professor Daniel R. Coquillette attended as Reporter of that Committee. Judge Jane A. Restani, a member of the Bankruptcy Rules Advisory Committee, attended. Thomas E. Willging of the Federal Judicial Center was present. Peter G. McCabe, John K. Rabiej, and Mark Shapiro represented the Administrative Office. Observers included Robert S. Campbell, Jr., Esq., Alfred W. Cortese, Jr., Esq., John P. Frank, Esq., Barry McNeil, Esq., and Fred S. Souk, Esq.

The Chairman introduced the new members of the Committee, Justice Durham and Judge Levi.

The Minutes for the April 28 and 29, 1994 meeting were approved, subject to correction of typographical errors.

*Rule 4(m): Suits in Admiralty Act*

The Suits in Admiralty Act, 46 U.S.C. § 742, requires that the libelant "forthwith serve" the libel on the United States Attorney and the Attorney General of the United States. "Forthwith" has been read to require service within a period much shorter than the 120-day period provided for effecting service under Rule 4(m). Several courts, moreover, have ruled that Rule 4(m) does not supersede the statute because the service requirement is a condition on the United States's waiver of sovereign immunity. Concerns have been expressed that Rule 4(m), in conjunction with Rule 4(i), has become a trap for the unwary.

The Committee considered this problem at the meeting in April, 1994, and concluded that rather than amend Rule 4 to provide warning of an exception for cases governed by § 742, § 742 should be amended to delete the service requirement. Section 742 was enacted before the Civil Rules were adopted, and there is no reason that justifies a distinctive service procedure for actions brought under the Suits in Admiralty Act. Further discussion reinforced this conclusion. The Maritime Law Association has recommended amendment of § 742 for years. There has not been any indication that the Department of Justice believes there are special reasons

that require special rules for these cases.

A motion was adopted by consensus to recommend to the Standing Committee that it recommend Judicial Conference approval of a recommendation that Congress delete the service provisions from 46 U.S.C. § 742.

*Rule 5(e)*

A proposed amendment of Rule 5(e) was published for comment on September 1, 1994. Discussion of the proposal began with a reminder of the process that led to publication. Publication of electronic filing rules was proposed at the June, 1994 meeting of the Standing Committee by the Appellate and Bankruptcy Rules Advisory Committees. Because the proposals ran parallel to the present provisions of Rule 5(e), it seemed desirable to publish an amended version of Rule 5(e) for comment at the same time. A draft was circulated to the members of this Committee, and was approved for publication by mail vote. The October meeting afforded the first opportunity for Committee discussion of the proposal.

The amended version of Rule 5(e) deletes the present express reference to facsimile filing, but it is intended that facsimile transmission be one of the means of electronic filing that may be authorized by local rule. (A suggestion that the reference to facsimile filing be restored was rejected, on the grounds that it is better to adhere to the phrasing used in other sets of rules and that this point is made clear in the Committee Note.) The amendment would effect two significant changes in the role assigned to the Judicial Conference of the United States. Under the present rule, a district court can authorize filing by facsimile or other electronic means only if the Judicial Conference has authorized filing by such means. This requirement is deleted from the amended rule. The present rule also requires that a local rule be consistent with standards established by the Judicial Conference. The amended rule limits the role of Judicial Conference standards by referring to them as "technical" standards.

There was lengthy discussion of the burdens that may be imposed by facsimile filing. At the same time, the practicing members of the Committee noted that the opportunity to file by means that avoid physical delivery will be welcome. There is no reason to wait until every court can be set up to permit electronic filing. The present situation seems to be that many courts do not have the equipment or staffing required to support filing by electronic means. Other courts, however, may be able to accommodate such filing. These courts should be allowed to proceed.

The question whether the Enabling Act permits delegation to

the Judicial Conference of power to establish technical standards was explored. It might be feared that the Enabling Act process cannot be used to delegate the power to proceed without following the complete Enabling Act process in each instance. The fact that the present rule delegates more extensive powers to the Judicial Conference does not of itself answer the question whether this delegation is proper. It was concluded that the power to adopt technical standards can properly be lodged in the Judicial Conference. Great benefits would flow from adhrence by all federal courts to common technical standards, facilitating ready compliance by all who wish to accomplish electronic filing. Absent common technical standards, it seems inevitable that different courts will adopt different standards, unless there is common acquiescence in the standards first adopted by a belwether court. As compared to adoption and regular revision of standards by the Judicial Conference, adherence by acquiescence is not likely to achieve as desirable results. Alternatively, common standards might be established by the bureaucratic processes through which the Administrative Office undertakes to support acquisition of electronic filing equipment by district courts. These processes are less open than the processes of the Judicial Conference, and are entirely outside the Enabling Act system. These considerations persuaded the Committee that the various advisory Committees and the Standing Committee have been right all along — the Enabling Act does authorize adoption of rules that delegate the standards-setting function to the Judicial Conference.

There followed substantial discussion of two elements of the published draft. The first was the substitution of "documents" for "papers" in the provision that a court may "permit ~~papers~~ documents to be filed * * *." A motion to restore "papers" passed by vote of 12 to 0, restoring the word used throughout the rest of Rule 5(e). The second was the sentence stating: "An electronic filing under this rule has the same effect as a written filing." It was urged that this sentence, which parallels similar provisions in the other rules published for comment at the same time, is unnecessary. The full effect of this sentence is accomplished by the initial permission to adopt rules that permit a paper to be "filed, signed, or verified." A motion to delete this sentence passed by vote of 10 to 0.

Possible changes in the Committee Note were discussed without final resolution. One would add a suggestion that local rules address the steps required to have the effect of filing a physical paper — one requirement, for example, might be that a physical paper be delivered to the court by some means such as ordinary mail. Another would add a statement that local rules or Judicial Conference technical standards should ensure that a reliable physical record is made of what was done, and how. Yet another would delete the final two sentences of the Committee Note, which

suggest that few courts should want to authorize filing by facsimile transmission. It was concluded that these matters could be addressed when the period for public comment has closed and the time comes for final Committee action on recommendations to the Standing Committee.

*Rule 6(e)*

At the June, 1994, meeting of the Standing Committee, it was suggested that the several Advisory Committees study the question whether the additional time provided for acting after service by mail should be extended from 3 days to 5 days. Rule 6(e) now provides that whenever an act is required within a prescribed period after service of a notice or other paper, the period is extended by 3 days if service is made by mail. Similar provisions appear in other sets of court rules, all setting the extension at 3 days. See Appellate Rule 26(c), Bankruptcy Rule 9006(f), and Criminal Rule 45(e).

The Bankruptcy Rules Advisory Committee considered amendment of Bankruptcy Rule 9006(f) shortly before this Committee met. The Bankruptcy Rules Committee concluded that the 3-day period should not be extended to 5 days. Some of the considerations that weighed in that decision seem to be peculiar to bankruptcy practice. Others, however, are common to all the sets of rules. The effect of all time periods is affected by the extension of time that occurs when the last day of a specified period is a Saturday, Sunday, legal holiday, or day when the clerk's office is inaccessible. The effect of time periods less than 11 days is affected by the extension that results from exclusion of intermediate Saturdays, Sundays, and legal holidays, a question that was last studied with the 1985 amendment of Rule 6(e). Any change in the rule, even an extension of time, will result in confusion and resentment. A change in one set of rules but not others will result in worse confusion, and occasional losses of rights as parties mistakenly rely on the longer provision in one set of rules when operating under the shorter provision of a different set of rules. All rules should continue to adhere to the same period. And there is no sufficient reason to believe that postal service has deteriorated so markedly, or will have deteriorated so markedly by the time an amended rule would take effect, as to justify amendment now.

These considerations led the Committee to conclude that there is no present need to amend Rule 6(e).

*Rule 9(h)*

Section 1292(a)(3) of the Judicial Code provides for appeal from "Interlocutory decrees of * * * district courts * * *

determining the rights and liabilities of the parties to admiralty *cases* in which appeals from final decrees are allowed." The final sentence of Rule 9(h) provides: "The reference in Title 28, U.S.C. § 1292(a)(3), to admiralty *cases* shall be construed to mean admiralty and maritime *claims* within the meaning of this subdivision (h)." The meaning of this provision is unclear when a single case includes both an admiralty claim and a nonadmiralty claim. There is some authority that an appeal can be taken from an order that determines the rights and liabilities of the parties with respect to a nonadmiralty claim so long as the case also includes an admiralty claim. If this position is desirable, it can be made secure by revising Rule 9(h). Adhering to current style conventions, the final sentence could read: "A case that includes an admiralty or maritime claim within this subdivision is an admiralty case within 28 U.S.C. § 1292(a)(3)."

The Appellate Rules Committee considered this question and concluded that it should be addressed by this Committee.

It was urged that the proposed amendment should be recommended. The values of interlocutory appeal are as great for nonadmiralty claims in an admiralty case as they are for the admiralty claims. The chair of the Practice and Procedure Committee of the Maritime Law Association has expressed the same view. Such scant authority as there is interpreting the present rule reaches the result that would be expressed more clearly by the amended version. Action would simply clarify, not extend or change present appeal doctrine.

This view was met with expressions of hesitation. Section 1292(a)(3) has been construed narrowly, limiting the opportunities for interlocutory appeal in light of final judgment appeal values. Appeal of nonadmiralty claims under § 1292(a)(3) could be seen as a matter of pendent appellate jurisdiction, although it also could be seen as simple interpretation of the statute in light of the consolidation of admiralty procedure with civil procedure. The question can be seen in at least two perspectives: one is that the interlocutory appeal device is a good thing in admiralty cases, and should be made as useful as possible; the other is that there is no apparent justification for treating admiralty cases differently than other cases, and the unique but somewhat antique interlocutory appeal statute should be circumscribed as narrowly as possible.

A motion to adopt the draft amendment was carried forward without immediate decision. It was left to the discretion of the chair to determine whether to submit the issue to vote by mail ballot after submitting additional materials on practice under § 1292(a)(3). The advice of the Maritime Law Association will be sought if the question is not submitted to mail ballot in time for making recommendations to the January, 1995 meeting of the Standing

Committee.

*Rule 23*

Rule 23 was discussed briefly at the beginning of the meeting, noting that there is nothing on the agenda for action at this meeting. The Federal Judicial Center is just ready to begin the fieldwork in its Rule 23 study. The topic will be the focus of the agenda for the February, 1995 meeting and an important part of the work to be done in conjunction with the ensuing meeting in April. It was recalled that the current draft was sent to the Standing Committee in June, 1993, but pulled back because of the press of other business. If further information shows that the present rule is working reasonably well, perhaps it would be better to avoid modest amendments that might cause more disruption than improvement. In addition, it has become clear that we need to reexamine Rule 23 in terms more fundamental than those underlying the current draft. The focus of concern is on mass torts.

Mass settlement classes are perhaps the most important unknown factor. Recent developments have brought new practices to our experience, particularly in asbestos and silicone gel breast implant litigations. In both, defendants have initiated class actions in an effort to settle and buy peace. In exploring these problems, it would be a mistake to focus attention on approaches that fall within the reach of the Rules Enabling Act. If a careful view of the whole problem suggests that it is better addressed by other means, it could easily be a mistake to attempt a less satisfactory solution by changing the rules.

*Rule 26(c)*

Proposed amendments to Rule 26(c) were published in October, 1993. The proposal, and public comments on the proposal, were discussed at the April, 1994 meeting of the Committee. The proposal was not acted on at the April meeting. New materials were provided for consideration at this meeting, including two alternative drafts of Rule 26(c) and a proposed amendment of Rule 5(d).

The draft Rule 5(d) amendment would add a new sentence: "A party may agree to destroy unfiled discovery materials, or return them to the person who produced them, only if the person who produced them undertakes to retain the materials and the corresponding discovery requests for five years after the conclusion of all discovery in the action." The Committee did not consider this amendment, and did not consider whether it should remain on the agenda for consideration at a future meeting.

One of the alternative Rule 26(c) drafts was included with the

agenda materials for the meeting. This version was intended to incorporate all of the comments on the published draft that urged various proposals for narrowing the scope of protection afforded by a protective order. The other alternative draft incorporated additional provisions capturing concerns reflected in ongoing legislative proposals, and was presented to Committee members for the first time at the meeting in an effort to focus discussion on the differences between the 1993 proposal and the legislative proposals.

Discussion began with review of the history of attempts to consider legislative proposals to amend Rule 26(c). As at the April meeting, it was agreed that careful attention should be paid to the concerns reflected in these legislative proposals. Although the Committee cannot urge adoption of undesirable rules changes for purposes of political expediency, it must be sensitive to the concerns of Congress. Just as public comment on proposed rules provides much valuable information for consideration by the Committee, so legislative proposals reflect information gathered by the legislative process that can prove invaluable in framing the best possible rules proposals. Thoughtful consideration of the concerns that trouble Congress can have a real impact on Congressional deliberations.

It is clear that there is much concern that materials in the federal judicial system "ought to be public." The ongoing political debate is not limited to the particulars of discovery practice, but focuses on larger issues of public information. There is a natural and sharp focus on discovery protective orders, however, and legislation has been proposed that would alter the framework for dealing with protective orders. Judge Higginbotham testified before a Senate Committee, where attention focused on protective orders in products liability and other mass tort settings. It is clear that there is continuing concern in Congress that protective orders may have the effect of preventing access to information that is important to protect the public health and safety, and of making it more costly to litigate parallel claims. There is a risk that this concern, whether or not well-founded in light of actual present practice, will lead to remedies that interfere with the vital lubricating function of discovery protective orders. Over-eager remedies could greatly increase the number of litigated discovery disputes, and ultimately restrict the actual flow of discovery information. It is most important to attempt to achieve a rule that addresses all legitimate needs for limiting protective orders without imposing undue burdens on the courts or causing positive harm to the discovery process.

The proposal published in 1993 dealt with modification or dissolution of protective orders, not with the standards for initial consideration of protective orders. A deliberate decision

was made not to address the questions whether modification or dissolution can be sought by nonparties, or whether action is proper after judgment as well as before judgment. In his Senate committee testimony, however, Judge Higginbotham noted that courts frequently have permitted nonparties to seek modification or dissolution and that the 1993 proposal would permit continuation of this practice.

Preliminary results of the Federal Judicial Center study of protective orders were presented in a paper by Elizabeth C. Wiggins and Melissa J. Pecherski. Several aspects of the study were noted during the discussion. Studying three different districts for three years each, there was protective order activity in a range of 4.7% to 10.0% of all cases. Of course the figure would be higher as a percentage only of cases in which there was some discovery. It seems likely that the figure would be higher still as a percentage of cases in which there was a substantial amount of discovery activity, but the preliminary data do not provide this information. Most protective order activity is initiated by motion, not by stipulation of the parties; the highest figure for initiation by party stipulation was 26%. It was noted, however, that the data do not permit differentiation between types of cases; it would be consistent with these data to find that stipulated protective orders are commonplace in "complex" litigation. Approximately half the motions are met by a response in opposition; almost none were met by a "response in concurrence." The rate of hearings on motions was highly variable: in the District of Columbia, it was 12%, in Eastern Michigan 59%, and in Eastern Pennsylvania, 2%. Of the motions that were ruled upon by a judge, approximately equal numbers were denied, or granted in whole or in part. (By some chance, in all three districts 41% of the motions were granted in whole or in part.) Protective orders included a wide variety of provisions, but many included restrictions on disclosure or established procedures for handling confidential material. Of the suits in which an order was entered to restrict access to discovery materials, contract, civil rights, and "other statutes" actions accounted for large portions of the total. Personal injuries accounted for 8% or 9% of the total, depending on the district. Protective orders were modified or dissolved, whether by court order or agreement, in very few of the cases; there is no indication yet as to the types of cases involved or the reasons for modification or dissolution.

The first change in the 1993 draft would incorporate in (c)(1) an express provision recognizing and confirming the common practice of entering protective orders on stipulation by the parties. This change was accepted, on the express understanding that the court may refuse to enter an order notwithstanding stipulation of all parties. Rule 26(c)(1), as redrafted, simply provides that the court "may" enter the order; in keeping with the Committee's style

conventions, "may" is a word of permission, not mandate.

Throughout the discussion of other proposed changes, several members voiced concern with the substantive effects of protective orders. Information produced in discovery often is not public information. It can be reached, if at all, only by specified procedures limited to specified purposes. There is a substantive right of privacy that should not be violated by rules of procedure. The determination that privacy can be compromised by discovery appropriate to the needs of particular litigation does not justify allowing access to private information for other purposes. Public access to personnel files produced for employment discrimination litigation, for example, cannot be justified by vague invocations of the "public interest." Private information may be property protected against taking by the Fifth Amendment.

The distinction between limiting the scope of protective orders and establishing a positive right of access also ran throughout the discussion. The mere absence of a protective order does not establish a right of public access to discovery information that has not been filed with the court, nor to discovery proceedings. Care must be taken in drafting lest inadvertent references to "access" create a freedom-of-information act in the guise of protective order limits.

Discussion of the alternative draft began with paragraph (2). The draft provided that the court might protect materials only to the extent that the interest in confidentiality substantially outweighs the interest in access to the materials. It was suggested that the burden should lie in the opposite direction — that the rule should provide that discovery material should be protected unless the public interest substantially outweighs the interest in privacy. It also was suggested that the unrestricted reference to denying protection "when a nonparty has an interest in access" was too broad. Concern was expressed that as with other proposals, this approach might require extensive satellite litigation of the questions of public interest and the balance between the interests in access and in privacy. Such attempts to add to the open-ended "good cause" approach of paragraph (1) were feared as adding another layer of litigation. Concern also was expressed that there is a tension with the provision that expressly permits entry of a protective order on stipulation of the parties: that the draft might be read to limit the court's power to enter a stipulated protective order by requiring that it independently determine the balance between the interests in confidentiality and openness. It was suggested that in most litigation there is no public interest, but the draft might require explicit consideration and rejection of this possibility in all cases. Even imposing the burden on the person asserting that the public interest overcomes the interest in confidentiality does not clearly avoid this

problem. All of these shortcomings could be addressed by limiting these issues to consideration on a motion to modify or dissolve. Present practice could continue. There has been no showing that protective orders are entered improvidently, or that they conceal the very nature or existence of the litigation. Allowing unimpeded entry of protective orders, perhaps with greater guidance as to the circumstances that justify modification or dissolution, would be better.

A motion to delete paragraph (2) of the alternative draft, leaving its provisions for incorporation in the provision on modification or dissolution, carried by vote of 9 to 3.

Paragraph (5) of the alternative draft provided that the court must allow a nonparty access to protected materials if the nonparty agreed to submit to the terms of the protective order and either had a claim or defense factually related to the protected materials or was a state or federal agency with jurisdiction over matters related to the protected materials. Discussion of this paragraph included reference again to the concern that there is a difference between denying protection and ordering access. It also was asked why this provision should be separate from the more general modification or dissolution provisions of the following paragraph (6). As with paragraph (2), it was suggested that this provision should be combined with the more general provisions on modification or dissolution. As a more specific matter, it was urged that a public agency should not be allowed access to materials without regard to whether it would have authority to compel production by its own independent proceedings. In the same vein, it was suggested that submission to the protective order might not be enough to protect against forced disclosure under a freedom-of-information act, not only with respect to federal agencies but also with respect to state agencies governed by a wide variety of state acts. Discussion of the aspect of the draft that would require the court to defeat protection produced general agreement that the verb should be changed to provide that the court "may," not must, defeat protection. No formal action was taken on paragraph (5).

Subparagraph (6) of the alternate draft provided detailed guidance for modification or dissolution of a protective order. One feature was discarded by consensus. The draft would have allocated the burden of justification according to the nature of the protective order. If the order had been entered on stipulation of the parties, the burden of establishing the need for continued protection would be on the party asserting the need. If the order was contested, the burden of establishing the need for modification or dissolution would be on the person seeking access to protected material. This distinction had been vigorously urged by a committee of the Association of the Bar of the City of New York in commenting on the October, 1993 published draft. Concern was

expressed that it might be difficult to determine whether an order had been contested, and that the distinction almost certainly would discourage stipulated orders because of the desire to secure the greater protection of a contested order. Half-hearted contests could lead to further confusion through arguments that an order was not genuinely contested. The values of stipulated protective orders should not be defeated by this provision.

The procedures for nonparty motions to modify or dissolve were discussed at length. It was recognized from the outset that the question of procedures is bound up with the importance of permitting extensive nonparty applications. Although it was noted that one possible means of raising the issue would be a subpoena issued in separate proceedings, commanding production of material subject to a protective order, there was no suggestion that such procedures should be encouraged. A protective order in one action ordinarily does not protect against production in independent proceedings by the party who initially controlled information that has been produced under a protective order. An effort to get the material from a party who received the information subject to a protective order, however, is better made by application to the court that entered the protective order. The alternative draft provided for motions in the court that entered the order by nonparties as well as parties. The motive for this approach was the belief that it should be as easy to deny an ill-founded motion directly as to deny intervention. Intervention, on the other hand, avoids the awkwardness of recognizing a nonparty's standing to make a motion.

Discussion of intervention by nonparty applicants began with recognition that intervention has been the procedure regularly used as the foundation for a motion to modify or dissolve. The rule could provide for use of an intervention procedure without invoking the intervention standards of Rule 24, and without directly addressing the question of "standing" to seek intervention. Intervention, moreover, makes it clear that the nonparty has submitted to the jurisdiction of the court to make binding orders that limit the use of any information released from the full reach of the original protective order.

Robert Campbell observed that the Federal Rules Committee of the American College of Trial Lawyers had spent several hours discussing the Rule 26(c) proposal, but had not anticipated this particular turn of the discussion to intervention. He asked, however, how Rule 24 intervention tests would apply to an applicant urging a public interest, particularly a generalized public interest in health or safety. It was responded that Rule 24 intervention tests are elastic, as shown by regular invocation of Rule 24 in present practice dealing with motions to modify or dissolve. It was further suggested that an open invitation for

nonparty motions might lead to unnecessary work for everyone involved – that an intervention procedure would permit an initial narrow focus on the question whether a plausible claim for modification or dissolution had been stated, sorting out claims that do not justify the burdens of full-scale argument and consideration.

A motion was made to adopt the first sentence of the alternative draft paragraph (6) as modified to refer to intervention. As a working model, it might begin: "A party – or a nonparty who has been granted intervention for this purpose – may move at any time before or after judgment to dissolve or modify * * *." This motion was not acted on. Discussion of the motion, however, further explored the usefulness of intervention along lines similar to the earlier discussion. Although Rule 24 intervention standards may seem to fit poorly the situation of a person who is not interested in the merits of an action, the intervention device allows a court to focus on the nature of the interest asserted as a matter separate from actual application of the standards for modifying or dissolving a protective order. If an applicant obviously cannot justify full-scale consideration of the issue, intervention can be denied. One approach would be to refer to intervention in the text of Rule 26(c) and to explain in the Note that Rule 24 does not identify the standards for intervention.

Another motion was made to strike paragraphs (2), (5), and (6) of the alternative draft. In their place, paragraph (3) of the October 1993 draft would be restored with additional discussion of public interest factors. The problems of nonparty motions, motions after judgment, and other matters would be left to continuing decisional development. This motion rested on doubts about the capacity of the Committee to discharge well the responsibility of drafting in greater detail. It was suggested that this motion was premature because the Committee had not yet finished discussion of all possibilities. The motion was not brought to a vote.

Further discussion noted that relief from a protective order might be sought by a nonparty bound by the order, as well as by a nonparty who simply wished to free someone else from the order.

Discussion of these issues led the Committee to conclude by consent that it would be better to avoid immediate decisions. One or two revised drafts will be prepared, reflecting the discussion, and circulated to the Committee. One draft might hew rather close to the 1993 proposal, while the other might venture into greater detail. If agreement can be reached, either to adhere to the proposal published in October, 1993, or to adopt a revised draft, the topic will be reported to the Standing Committee in time for its January, 1995 meeting. It was agreed that if the

recommendation should be adoption of a draft with significant additions to the published draft, the recommendation would include publication for comment before reaching a final recommendation to the Standing Committee.

*Rule 43(a)*

A revision of Rule 43(a) was published for comment in October, 1993. The revision was considered in light of the comments at the April, 1994 meeting of the Committee. No difficulty was caused by the first revision, which strikes the requirement that testimony be taken "orally." This revision makes it clear that testimony can be taken in open court from a witness who is unable to communicate orally but is able to communicate by other means.

The other revision added a new provision that the court may, for good cause, permit testimony "by contemporaneous transmission from a different location." This provision provoked substantial discussion and uncertainty. Doubts were expressed about moving toward "the courtroom of the future" in which everyone participates by remote electronic means from many scattered locations. A motion to send the revised rule forward to the Standing Committee for recommendation to the Judicial Conference failed by even division of the Committee.

Reconsideration of the Rule 43(a) proposals again produced no disagreement as to deletion of the requirement that testimony be given orally.

Discussion of the provision for transmitting testimony from a different location began with a protest that this device can appeal only to those anxious to be "trendy," "with it," and adept with "all the new toys." A lawyer confronted with a proposal to transmit testimony must face the choice of trusting to unseen arrangements made by others or of arranging to be present with the witness in person or by representative. Only physical presence with the witness can ensure that there is no improper coaching. If testimony is needed from a witness who cannot be present, the party desiring the testimony should arrange a video deposition after notice that ensures the opportunity to be present.

These concerns were met with various reassurances. Transmission of testimony could be useful in prisoner cases. State courts have substantial experience with conducting arraignments in this way. Transmission of testimony works well in admiralty proceedings. The lawyers for other parties can choose between participating through the system used to transmit the tesimony or participating by arranging for someone to be present with the witness.

Facing these concerns, it was moved that the draft be amended for purposes of further discussion by retaining the requirement of good cause and adding a requirement that compelling circumstances justify transmission of testimony. This amendment was adopted without dissent.

Further discussion of the amended proposal provoked new expressions of doubt whether available technology is yet sufficiently reliable to support transmission of testimony. It was observed again that it works in admiralty. Another illustration offered was the need to take formal authenticating testimony from the custodian of records in a remote location; this illustration was met by the response that ready resort to deposition or other means should show that there is no compelling need in such circumstances.

The next illustration was the witness who has an accident, a death in the family, or like calamity. Transmission is better than a "deposition" during trial. It is not a response that an earlier deposition should have been taken — the party calling a witness often will not seek to frame a deposition, no matter by whom taken, in the shape of expected trial testimony.

It was moved to delete the entire sentence providing for contemporaneous transmission of testimony from a remote location. The motion failed by vote of 5 in favor, 7 against.

The proposal, as amended to require "good cause shown in compelling circumstances," was then adopted with a recommendation that the Standing Committee recommend its adoption to the Judicial Conference. It was concluded that since the only change from the published version is to narrow the availability of transmission, there is no need to republish the proposal for an additional period of comment. It also was concluded that the Committee Note should be revised to make clear that remote transmission should be permitted only for truly compelling reasons.

*Rule 47(a)*

Several draft variations of Rule 47(a) were considered. Each variation would establish a right of party participation in the examination of prospective jurors. The variation most extensively discussed framed the right as one to supplement examination by the court, subject to reasonable limits set by the court.

Discussion was introduced with the observation that for many years, the Judicial Conference has opposed legislation that would establish a right for attorneys to participate in voir dire examination. Bills continue to be introduced. The most recent form of proposed legislation would set a minimum period that must

be allowed for party participation, expanded according to the number of parties but subject to a ceiling beyond which the number of parties makes no difference.

A major reason for examining the question again arises from the limits that have been placed on peremptory challenges. It has become increasingly important to establish information that supports a peremptory challenge that might be attacked on the ground that it seems based on stereotyped views of race, ethnicity, gender, or perhaps some other protected characteristic. If lawyers must explain peremptory challenges, the voir dire process must be sufficient to support them. The Supreme Court, moreover, has recognized that adequate voir is essential to get a fair jury. It is particularly important to have lawyer participation in capital punishment cases. The Criminal Rules Committee has decided to go forward with a proposal to establish a right of party participation, but has not worked out precise language. An effort should be made to draft common language for both the Civil and Criminal Rules.

It also was observed that federal judges fear lawyer participation because of the results that have occurred in some state courts, where lawyers drag voir dire out to undue length. Lawyers sometimes manage to make long argumentative statements about the case, concluding with a question mark. Attempts may be made to ingratiate the lawyer with the jury, to secure commitments to hypothetical positions, or worse. Any right of lawyer participation must be subject to judicial control that eliminates these dangers. A specific time limit, however, probably does not make sense.

Additional information was provided by a survey of current federal practice conducted by John Shapard and Molly Johnson of the Federal Judicial Center at the request of the Committee. The survey was mailed to 150 active district judges; 124 responded. The responses showed that 59% of the responding judges allow some form of attorney participation in voir dire. The average time spent in voir dire was essentially the same across all forms of lawyer participation, ranging from allowing counsel to conduct most or all of the voir dire to limiting counsel to suggesting additional questions to be asked by the court. Judges who allow questioning by counsel listed a number of means used to prevent improper or unduly extended use of voir dire. Forty-four percent responded that it was rarely necessary to do anything, perhaps in part because 79% responded that they make it clear at the outset that inappropriate behavior is not permitted. Fifty percent generally limit the time for voir dire. Among specific limits listed were rules that prohibit addressing a question to an individual juror if it can be addressed to the panel as a whole, prohibit attempts to "instruct" jurors, and prohibit any effort to

seek a juror's commitment to support a position based on a hypothetical fact statement.

Turning to the question of drafting, it was urged that it is important to define the right as one to supplement the court's voir dire. This perspective makes it clear that the court is in control, and establishes the foundation for the court's power to establish reasonable limits that respond to many case-specific factors, including the extent of examination by the court. The Committee was informed that the Criminal Rules Advisory Committee concluded that there must be an "escape clause" to ensure authority to control abuse by pro se defendants. It was agreed that this power of control must be included in the power of the court to limit the time, manner, and subject matter of the examination.

District judge members noted that each of them now allows attorney participation in voir dire. But caution was expressed about incorporating this practice in the rule as a "right." Although the rule would establish the authority to limit lawyer participation, creation of even a limited right expands the possibility of appellate reversal on finding one limit or another unreasonable. One judge, for example, is "very tough" on argumentative questions. A rule requiring that limits be reasonable would exert some pressure to lighten up on this stance. It would not be enough simply to allow exceptions "in the interest of justice." Another judge noted that he had seated perhaps 1,000 juries. Lawyers, when given the chance to participate in voir dire, have done it properly. In addition, he and many others have found that it is helpful to use questionnaires to get information that is difficult to elicit in open court. Many judges conduct the first stage of juror examination, and then allow lawyers to participate.

Lawyer members of the Committee stated that often they do not get enough information to make intelligent challenges. This problem is particularly acute with judges that do not use questionnaires and who conduct ineffective voir dire examinations. Judges who do not allow lawyers to participate often do a poor job. State courts in such states as Louisiana and California do a good job of controlling lawyer participation.

Robert Campbell noted that the American College of Trial Lawyers generally supports the proposal to establish a right of lawyer participation, but recognizes that this is a tricky question. Lawyers are concerned about judges who believe that expedition is the key to justice, racing through a meaningless voir dire — perhaps in the belief that it makes no difference — to select a jury quickly. But there also is a risk created by lawyers who continually push as close as possible to the mistrial line in seeking to misuse voir dire to persuade or intimidate jurors.

Barry McNeil urged that there is no issue more important to trial lawyers than participation in voir dire. Often it does not take long. Often the questions go to knowledge, not to bias. Mandatory language is highly desirable.

These concerns were translated into a motion to revise the final draft variation to read as follows: "The court must conduct the examination of prospective jurors. The parties are entitled to examine the prospective jurors to supplement the court's examination within reasonable limits of time, manner, and subject matter set by the court in its discretion." The motion passed by vote of 12 to 0.

Two suggestions were made for additions to the draft Committee Note to reflect the changes in the text of the rule and the discussion. The Note should describe the virtues of juror questionnaires as a means of eliciting useful information and providing the foundation for effective but efficient voir dire examination. And it should stress the importance of appellate deference to trial court discretion in setting limits on the time, manner, and subject matter of attorney questions.

*Rule 48*

The proposal to amend Rule 48 to require 12-member juries was supported by a separate volume of readings on jury size. These readings underscore many of the issues discussed in brief compass, or simply assumed, in the Committee discussion.

The introductory comments began by observing that the path by which 6-person juries became the norm, replacing 12-person juries, has been a source of uneasiness from the beginning. Reduction of jury size by local court rules was urged in the interests of efficiency and cost. The decisions that due process allows state courts to try criminal cases to juries with as few as 6 members paved the way for the decision that the Seventh Amendment also permits 6-person juries. The rulemaking process of course does not provide the occasion for reconsidering Supreme Court interpretations of the Seventh Amendment. Sound procedure, however, may justify means that are not constitutionally required.

The recent elimination of alternate jurors has been welcomed, because it avoids the need to excuse alternates at the end of trial without an opportunity to participate in the process of deliberation and decision. The Committee Note to the 1991 Rule 48 amendments observed that ordinarily it is "prudent and necessary" to seat more than 6 jurors in order to guard against sickness or disability. It further observed that use of more than 6 jurors is desirable because it increases the representativeness of the jury, and that smaller juries "are more erratic and less effective in

serving to distribute responsibility for the exercise of judicial power." These concerns underlie the common practice of seating 8 or even 10 jurors in trials that seem likely to go more than 3 days. The more apt comparison is between 8- and 12-person juries, not 6- and 12-person juries.

Many scholars agree that 12-member juries are better. The vast weight of history and tradition creates a strong presumption in favor of 12. A 12-person jury, moreover, makes it much more probable that any single jury will include representatives of significant minority groups. The importance of representativeness has been underscored by recent decisions that limit the use of peremptory challenges for the purpose of striking minority members from a jury; it is ironic that one of the surest safeguards of representativeness should be sacrificed in the name of expediency. Smaller jury verdicts, moreover, are more erratic, less stable, for a variety of reasons. In many ways, the capacities and behavior of a group of 6 are different from those of a group of 12. It is more difficult for a single aggressive juror to dominate a larger group. Larger juries bring broader ranges of experience and values to the deliberation, and are better able to recall trial evidence.

The argument for smaller juries is that they perform as well and cost less. It is difficult to generate useful estimates of the added costs. Much depends on efficient management of the jury pool. Use of "staggered starts," for example, with different judges of the same court setting different times for beginning the jury selection process, can achieve significant efficiencies. Without attempting to assume any new efficiencies on this score, however, initial rough estimates suggest that the additional annual cost of returning to 12-person juries would range from a low estimate of about $4,000,000 to higher estimates of three or four times that much. These sums are not insignificant. All estimates, however, are a fraction of one percent of the judiciary budget, an infinitesimal fraction of one percent of the national budget, and only a few cents per person each year.

Turning to detailed drafting issues, it was agreed that the present rule means that the parties can stipulate to a nonunanimous verdict, or to a jury of fewer than 6 members, at any time through verdict.

Robert Campbell told the Committee that the American College of Trial Lawyers feels strongly about returning to 12-person juries. They also believe that there should be alternates. The 12-person jury has been used for a long time. It is much easier for one juror to manipulate a 6-person jury than a 12-person jury.

A motion was made to adopt "Variation 1" of the alternative drafts submitted for consideration. This version requires that the

court seat a jury of 12 members. The balance of Rule 48 is retained with only stylistic changes. The motion was adopted by a vote of 12 to 0.

It was moved that the rule be amended to require a jury of "no fewer than" 12 members, so that a larger number could be seated for a long trial. A parallel suggestion was that the use of alternates should be restored. If more than 12 are seated, either some must be treated as alternates or all must be allowed to deliberate. It was suggested that it would be unwise to have more than 12 deliberate. Designation as alternates could be left to the end of trial, however, even by some device such as drawing lots. If the parties were concerned about a larger jury, they could stipulate to a smaller one. This approach, however, would leave the parties subject to persuasion by the trial judge. Another problem seen with a jury of more than 12 members was that the number of peremptory challenges is set by statute. It would be necessary to determine whether an increase beyond 12 jurors would warrant an increase in the number of peremptory challenges, and if so how to accomplish the change. The motion to amend failed by vote of 0 to 12.

A motion was then made to begin the rule with a power to stipulate to a jury of fewer than 12 members: "Unless the parties stipulate to a smaller jury, the court must seat a jury of twelve members." This motion failed by vote of 2 to 11.

The draft variations that tied jury size to various nonunanimous verdict formulas were discussed briefly. It was agreed that the unanimity requirement has profound effects on the dynamics of deliberation. These variations were dismissed without further discussion.

*Rule 53*

Discussion of the Rule 53 draft began with the statement of the chair that Judge Wayne Brazil had been deeply involved in the back-and-forth process of generating the draft. Great appreciation was expressed by the Committee both for this assistance and for Judge Brazil's great services to the Committee during his period as a member.

The Rule 53 draft was submitted in two forms. The earlier form set out three related rules. Draft Rule 53 rewrote present Rule 53. Draft Rule 53.1 invoked Rule 53 but added separate provisions for pretrial masters. Draft Rule 53.2 likewise invoked Rule 53 but added separate provisions for post-trial masters. This form reflected the history of the project. An initial suggestion for a modest amendment to reflect the growing role of pretrial masters led to a Committee recommendation that a rule be prepared

governing pretrial masters in some detail. Consideration of that draft persuaded the Committee that if the subject were to be approached, it might be better to undertake a more thorough revision of Rule 53. One of the major reasons for this conclusion was the level of detail with which the pretrial master draft regulated topics also involved with trial or post-trial masters. The first response to this conclusion was the set of three related rules. A later response was to fold all three into a single revised Rule 53.

Several distinguished academics had provided reactions to these drafts. One of the common reactions was surprise that masters are used for trial purposes — these observers have become so accustomed to the pretrial and post-trial functions of masters that they were uncomfortable with the traditional trial role of masters. These reactions were supplemented with the observation that there has been concern about the dissonance between Rule 53 as a trial master rule and the flourishing use of pretrial masters. One question is whether Rule 53 should continue to provide for trial masters at all. The role of the trial master's report is uncertain, particularly in a jury trial. The tracks for presenting pretrial-gathered evidence now include the 700 series Evidence Rules, and Evidence Rule 1006. These did not exist as such when special masters were taking root. If a master is to be a witness at trial, should it be by other means? And if the traditional trial function of masters were to be abolished, should the remaining roles be covered by a rule outside the Rule 53 framework?

John Frank observed that with masters, we are dealing with the "fourth tier" in relation to Article III. This issue was faced in the 1980s with the question whether a new court should be created as an intermediary between the circuit courts of appeals and the Supreme Court. Bankruptcy courts and magistrate judges both function as fourth tiers. Masters are another fourth tier. We should not "create" this practice. To the extent that trial master practice is dwindling, it is a good process. We should not encourage a separate fourth-tier process that competes with magistrate judges.

It was asked whether there are any abuses that might demonstrate the need for a rule amendment. The response was that the question is not so much one of abuses as one of a large practice that does not appear to be supported by present Rule 53. A revised rule could validate this practice and regulate it. There are, however, no rigorous data detailing the developing use of pretrial or post-trial masters. Professor Margaret Farrell has done a recent study for the Federal Judicial Center, but it proceeds by systematic review of specific experiences rather than a generalized survey.

Experience with trial masters was described from a practitioner's perspective. The device can be useful as a means of addressing part of a complicated case that requires detailed evidence, leaving the rest of the trial for the court. Usefulnes, however, depends on the agreement of the parties to accept the master's report as final. Trial masters should be used only if the parties agree to treat the report as final. In one jury trial, with the consent of the parties, the master's report was submitted to the judge, objections were made to the judge, and the report as thus finalized was read to the jury as dispositive on the issues involved. In another case, the report was offered as a piece of evidence, to be supported or rebutted by other evidence. That experience was "a zoo."

It was noted that maritime damages cases often are tried to a master. Another experience involved use of a master in a massive foreclosure to rule on the priority of liens and to distribute a $25,000,000 fund among 260 applicants. Superfund and like litigation frequently involves resort to masters. In California, experts often are used as masters in leaking underground storage tank litigation. Other experiences involved use of a master in a three-judge court redistricting case, in a class action with 20,000 claims; in an action parcelling out a complex real estate division; and in attorney fee disputes.

A master also may have the advantage of expert experience. John Frank noted a case in which this advantage was in fact realized.

Returning to pretrial masters, it was asked whether Rule 53 authorizes developing practices. Inherent power was noted as an alternative source of authority. A rule that — as Rule 53 — approaches a procedure without authorizing it does not always, by negative implication, preempt the field and oust reliance on inherent power. Consensual use should not be troubling. The structural components of Article III and the Seventh Amendment are satisfied by consent of the parties; the master becomes essentially an arbitrator operating within the framework of an Article III tribunal.

Greater difficulties are presented by nonconsensual use. Unique and complicated subject matters often present courts with a need for assistance. Reliance on private individuals who serve as masters can, however, present problems of competence. Lawyer-masters, moreover, also present problems of conflicting interests.

Thomas Willging noted that when he and Joe Cecil studied court-appointed expert witnesses, they found judges using the witnesses as expert advisers. Evidence Rule 706 experts are used not just as witnesses. Their sense was that there is little

authority, apart from inherent power.

It was suggested that discussion should focus on the contested use of a master. Parties may agree even on the use of an expert as adviser to the court; agreement means there is little problem. If there is a large not-consented use of masters, there are serious questions of authority, proper practice, and the like.

At the end, it was concluded that there is no apparent need for imminent action. The Rule 53 drafts will be treated as an information-study item for the time being. Should reason appear for further work, they may provide a useful starting point.

*Rule 68*

Rule 68 has been before the Committee for some time. At the April, 1994 meeting, it was concluded that further action should await completion of the Federal Judicial Center study of Rule 68. John Shapard, who is in charge of the study, put it aside over the summer for the purpose of completing the survey of practices surrounding attorney participation in voir dire examination of prospective jurors. See the discussion of Rule 47(a) above.

An informal survey of California practice was described. California "section 998" uses costs as an offer-of-judgment sanction, but costs commonly include expert witness fees in addition to the more routine items of costs taxed in federal courts. Generally this sanction is seen as desirable, although respondents generally would like more significant sanctions. Most thought the state practice was more satisfactory than Rule 68. There was no strong feeling against the state practice. One lawyer thought the state practice restricts his freedom in negotiating for plaintiffs. This state practice seems preferable to the complicated "capped benefit-of-the-judgment" approach embodied in the current Rule 68 draft.

Another comment was that Rule 68 becomes an element of gamesmanship in fee-shifting cases. It is like a chess game – an extra shield and tool in civil-rights litigation. It is working close to a casino mentality. But Rule 68 has meaning only in cases where attorney fees are thus at stake. It would be better to abandon it.

Professor Rowe described his ongoing empirical work with Rule 68, investigating the consequences of adding attorney-fee sanctions. The work does not answer all possible questions. An offer-of-judgment rule may have the effect of encouraging strong small claims that otherwise would not support the costs of suit; this hypothesis has not yet been subjected to effective testing. There does seem to be an effect on willingness to recommend

acceptance of settlement offers, and perhaps to smoke out earlier offers. Results are mixed on the question whether such a rule may moderate demands or, once an offer is made, encourage the offeror to "dig in" and resist further settlement efforts in hopes of winning sanctions based on the offer. And there is a possible "high-ball" effect that encourages defendants to settle for more, just as there may be a "low-ball" effect that encourages plaintiffs to settle for less.

John Frank reminded the Committee of the reactions that met the efforts in 1983 and 1984 to increase Rule 68 sanctions. At the time, he had feared that efforts to pursue those proposals further might meet such protest as to bring down the Enabling Act itself. He also noted that there are other means of encouraging settlement, and imposing sanctions, that involve less gamesmanship and more neutral control. "Michigan mediation," which was recognized as a form of court-annexed arbitration with fee-shifting consequences for a rejecting party who fails to do almost as well as the mediation award, was described. The view was expressed that this and other alternate dispute resolution techniques have made Rule 68 antique in comparison.

Some members of the Committee suggested that the best approach would be to rescind Rule 68. It might work well between litigants of equal sophistication and resources, but it is not fair in other cases, even if it is made two-way. A motion to abrogate Rule 68 was made and seconded twice. Brief discussion suggested that there was support for this view, but also support for an attempt to provide more effective sanctions in a form less complicated than the present draft.

Alfred Cortese noted that Rule 68 has been "studied to death." An ABA committee looked at it but could not reach any consensus. Most lawyers are adamantly opposed to fee-shifting sanctions.

After further discussion, it was concluded that the time has not come for final decisions on Rule 68. It has significant effect in actions brought under attorney fee-shifting statutes that characterize fees as costs. Repeal would have a correspondingly significant effect on such litigation. Even if the present rule seems hurtful, there should be a better idea of the consequences of repeal. It was agreed that the motion to repeal would be carried to the next meeting, or until such time as there is additional information to help appraise the effects of the present rule or the success of various alternative state practices.

*Evidence Rules 413 - 415*

New Evidence Rules 413 to 415 were enacted as part of the Violent Crime Control and Law Enforcement Act of 1994. These Rules

take effect 180 days after the bill was signed unless the Judicial Conference recommends alternative provisions to Congress within 150 days after signing. The deadline is February 10, 1995. The Evidence Rules Committee has recommended alternative provisions; its deliberations were summarized. The Criminal Rules Committee has reviewed the Evidence Rules Committee recommendations and has voted to support them.

It was further noted that the author of the provisions enacted by Congress apparently thought that a Rule 403 balancing test applies to the decision whether to admit evidence apparently admissible under the new rules. There is history to support this view. But the plain language of the Rules shows that they were not drafted to say what they intended to say. The Evidence Rules Committee responded to this information by drafting its alternative recommendations as Evidence Rule 404(a)(4). The approach taken was only to improve the drafting to reflect Congressional intent, not to change the substance of what Congress intended. This approach may be bolstered by the view that the purpose of providing 150 days for alternative Judicial Conference recommendations was to seek drafting suggestions, not comment on the wisdom of the choices made by Congress.

Substantial discomfort was expressed with the substance of the Congressional provisions. It was urged that this Committee should draft an alternative provision that would hew as close as possible to the views that have been expressed repeatedly in recent years by Judicial Conference committees, substantially different from the provisions adopted by Congress. A "mere hortatory response" would be lost without a trace in the echoes of history. An alternative draft would at least give the Standing Committee an alternative to consider if it should decide to take a more aggressive stance than that adopted by the Evidence Rules Committee.

These sentiments were met by concerns that although the substance of the Congressional approach leaves much to be desired, the views of Judicial Conference committees have been made clear to Congress. Vigorous efforts were made to advance these views during the legislative process, without significant success. Rejection of these views was particularly clear with respect to the argument that "other crimes" evidence should be limited to cases of actual convictions. To engage in a process of competing with the Evidence Rules Committee draft might simply vitiate the effectiveness of any response by the Standing Committee.

At the conclusion of this discussion, the sense of the Committee was that the Committee should support the conclusions of the Evidence and Criminal Rules Committees that as narrow an approach as possible should be taken in attempting to improve the drafting of the Rules adopted by Congress. This support should be

conveyed to the Standing Committee.

*Next Meetings*

The next two meetings of the Committee were set. One will be in Philadelphia on Thursday and Friday, February 16 and 17, 1995. The agenda for this meeting will focus solely on Rule 23. Several experienced class-action litigators and a few scholars will be invited to describe their experiences and thoughts for the Committee. The following meeting will be in New York on April 20 to 22, 1995. This meeting will be held in sequence with the mass tort symposium of the Institute for Judicial Administration at New York University. It is hoped that members of the Committee will be able to attend the symposium as another element in the continuing study of Rule 23.

Respectfully submitted,

Edward H. Cooper, Reporter

Item 10

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

ALICEMARIE H. STOTLER
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

JAMES K. LOGAN
APPELLATE RULES

PAUL MANNES
BANKRUPTCY RULES

PATRICK E. HIGGINBOTHAM
CIVIL RULES

D. LOWELL JENSEN
CRIMINAL RULES

RALPH K. WINTER, JR.
EVIDENCE RULES

**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:** **November 29, 1994**

## I. INTRODUCTION.

At its meeting October 6-7, 1994, the Advisory Committee on the Rules of Criminal Procedure considered proposed or pending amendments to several Rules of Criminal Procedure. This report addresses those proposals. The minutes of that meeting are attached.

There are no items affecting the Rules of Criminal Procedure which require action by the Standing Committee at its January 1995 meeting.

## II. RULES OF CRIMINAL PROCEDURE PUBLISHED FOR PUBLIC COMMENT.

There are currently two proposed amendments to the Rules of Criminal Procedure which are pending public comment. The first, is an amendment to Rule 16 which would affect pretrial discovery of expert testimony and the names and addresses of government witnesses. Originally two dates were set aside for hearings on the proposals. Due to a lack of interest, the hearing scheduled for New York city on December 12, 1994 has been canceled. It appears that several witnesses will appear at the scheduled hearing in Los

Angeles on January 27, 1995. To date, five written comments have been received on the proposed amendments.

## III. RULES PENDING BEFORE THE ADVISORY COMMITTEE

The Committee has considered proposed amendments to Rule 5 (disposition of defendants not in custody), Rule 10 (entry of guilty plea at arraignment), Rule 16 (which would require the parties to confer on discovery), Rule 24( attorney conducted voir dire), Rule 35(c) (correction of sentence), Rule 40(a)(commitment to another district) and Rule 46 (release from custody).

Although the Criminal Rules Committee has no proposed amendments to present to the Standing Committee at this time, the Committee decided to consider amendments to Rules 10, 24, and 35(c) at its April 1995 meeting.

## IV. EVIDENCE RULES CONSIDERED BY THE ADVISORY COMMITTEE.

At its meeting in Santa Fe, New Mexico, the Committee carefully studied the rules of evidence adopted by Congress as part of the Crime Control Act. Rather than offer specific objections or language to the Evidence Advisory Committee, the Committee focused on a number of general policy considerations and passed it views along to the Evidence Committee. The attached minutes reflect the positions suggested by the Criminal Rules Committee.

Attachment: Minutes of Committee Meeting

# MINUTES
# of
# THE ADVISORY COMMITTEE
# on
# FEDERAL RULES OF CRIMINAL PROCEDURE

**October 6 & 7, 1994**
**Santa Fe, New Mexico**

The Advisory Committee on the Federal Rules of Criminal Procedure met at the New Mexico State Supreme Court in Santa Fe, New Mexico on October 6 and 7, 1994. These minutes reflect the actions taken at that meeting.

## I. CALL TO ORDER & ANNOUNCEMENTS

Judge Jensen, Chair of the Committee, called the meeting to order at 8:30 a.m. on Thursday, October 6, 1994. The following persons were present for all or a part of the Committee's meeting:

Hon. D. Lowell Jensen, Chair
Hon. W. Eugene Davis
Hon. Sam A. Crow
Hon. George M. Marovich
Hon. David D. Dowd, Jr.
Hon. D. Brooks Smith
Hon. B. Waugh Crigler
Mr. Darryl W. Jackson, Esq.
Mr. Henry A. Martin, Esq.
Mr. Roger Pauley, Jr., designate of Ms. Jo Ann Harris, Asst. Attorney General
Professor David A. Schlueter, Reporter

Also present at the meeting were: Judge William R. Wilson, Jr., a member respectively of the Standing Committee on Rules of Practice and Procedure; Professor Daniel Coquillette, Reporter to the Standing Committee; Ms. Mary Harkenrider, from the Department of Justice: Mr. John Rabiej and Mr. Paul Zingg from the Administrative Office of the United States Courts; and Mr. James Eaglin from the Federal Judicial Center.

Professor Stephen A. Saltzburg and Mr. Robert C. Josefsberg, Esq. were not able to attend the meeting although Professor Saltzburg did participate in a portion of the meeting by conference call.

The attendees were welcomed by the chair, Judge Jensen who introduced a new member of the Committee, Mr. Jackson. Judge Jensen noted that two outgoing members of the Committee, Mr. Tom Karas and Ms. Rikki Klieman were not able to attend; Mr. Karas' term had expired and Ms. Klieman had resigned from the Committee in conjunction with acceptance of full-time employment by Court TV, as a commentator. On behalf of the Committee Judge Jensen expressed the Committee's profound thanks for their excellent and tireless efforts over the last years.

## II. APPROVAL OF MINUTES OF APRIL 1994 MEETING

Judge Marovich moved that the minutes of the Committee's April 1994 meeting in Washington, D.C. be approved. Mr.Martin seconded the motion which carried by a unanimous vote.

## III. CRIMINAL RULES APPROVED BY THE SUPREME COURT AND FORWARDED TO CONGRESS

The Reporter informed the Committee that the Supreme Court had approved and forwarded to Congress proposed amendments to four rules: Rule 16(a)(1)(A)(statements of organization defendants); Rule 29(b)(Delayed ruling on judgment of acquittal); Rule 32 (Sentence and Judgment); and Rule 40(d) (Conditional release of probationer). He noted that although the Committee had rejected any proposed amendments to Rule 32 regarding victim allocution, Congress had included the provision. Mr. Pauley indicated that he believed that United States Attorneys would coordinate implementation of the amendment through existing victim assistance programs. All of these amendments, including the Congressional addition to Rule 32, will become effective on December 1, 1994.

## IV. RULES APPROVED BY JUDICIAL CONFERENCE AND FORWARDED TO THE SUPREME COURT

The Reporter also informed the Committee that the Judicial Conference had approved several proposed amendments and forwarded them to the Supreme Court for its review: Rule 5(a)(Initial Appearance Before the Magistrate); Rule 43 (Presence of Defendant); Rule 49(e) (Repeal of Provision re Filing of Dangerous Offender Notice); and Rule 57 (Rules by District Courts). The Conference declined to approve a proposed amendment to Rule 53 which would have authorized cameras in federal criminal trials under guidelines promulgated by the Judicial Conference. And because of a Congressional correction of a typographical error in Rule 46, no further action was taken by the Judicial Conference to correct the error through the Rules Enabling Act process.

## V. RULES APPROVED BY STANDING COMMITTEE FOR PUBLICATION AND COMMENT

The Committee was informed by the Reporter that the Standing Committee had approved three amendments for publication and comment: Rule 16(a)(1)(E), (b)(1)(C) (Discovery of Experts); Rule 16(a)(1)(F), (b)(1)(D) (Disclosure of Witness' Names and Statements); and Rule 32(d) (Sentence and Judgment; Forfeiture Proceedings Before Sentencing). The deadline for submitting written comments on the proposed amendments

is February 28, 1995. Public hearings on the proposed amendments have been scheduled for December 12, 1994 in New York and January 27, 1995 in Los Angeles.

## VI. CRIMINAL RULES CURRENTLY UNDER CONSIDERATION BY ADVISORY COMMITTEE

### A. Rule 5(c). Offenses Not Triable by the United States Magistrate: Proposal to Amend Rule to Address Issue of Defendant Not in Custody.

The Reporter informed the Committee that Magistrate Judge Robert B. Collings from Boston had recommended that Rule 5(c) be amended. He had pointed out what he believed was a conflict between Rules 5 and 58. Read together, he asserted that it is not clear whether a defendant who is charged with a misdemeanor, but is not in custody, is entitled to a preliminary examination. Rule 5(c), he maintained, seems to indicate that the defendant is entitled to a hearing while Rule 58(b)(2)(G) indicates to the contrary.

The sense of the Committee discussion was that there are very few cases where the conflict, if it exists, would arise. Magistrate Judge Crigler noted that this issue might be viewed as largely academic and noted that in his experience he rarely encounters a defendant held in custody on a misdemeanor charge. Agreeing with that point, Professor Coquillette observed that the public should not be deluged with minor amendments; Mr. Pauley suggested that the amendment be deferred and considered in conjunction with possible restylizing efforts of the Rules.

### B. Rule 6. Grand Jury Disclosure.

The Committee was informed that a provision in the Administration's Health Care Act (S. 1757 and H.R. 3600) would amend Title 18 to permit the Department of Justice to share grand jury information with other attorneys in the Department who are charged with civil enforcement purposes. Following a very brief discussion on the issue, no action was taken by the Committee.

### C. Rule 16. Discovery and Inspection; Proposal to Include Provision Requiring Parties to Confer on Discovery.

In a letter to the Committee, Magistrate Judge Robert Collings of Boston recommended that Rule 16 be amended to require that the parties confer on discovery before asking the court to compel discovery. He noted that such a provision now exists in the civil rules and that it would make sense to require counsel in both civil and criminal trials to confer on the issue of discovery before submitting it to the court. Judge Crow noted that normally counsel may be required to confer on a wide range of issues and that

the record may be protected by including a statement on the record as to that conference. Mr. Pauley indicated that substantively the Department of Justice had not objections to the proposal but indicated that it would be helpful to have more information about the current practices. He believed that in a majority of the districts local rules already covered the issue. Professor Coquillette indicated that Professor May Squires was currently compiling the local rules governing criminal cases and several members of the Committee volunteered to submit sample local rules or forms for the Committee's consideration. Mr. Pauley noted that the proposed amendment would presumably include sanctions for failure to confer and Judge Dowd raised the question of whether the amendment would affect reciprocal discovery provisions.

Judge Crow observed that a procedure of requiring a conference before filing pretrial motions need not include a penalty; it still has a positive effect. The defense counsel is protected from allegations of ineffectiveness by showing on the record that a particular motion was not necessary because the parties had conferred on the matter. Judge Wilson concurred that conferences seem to work but Judge Davis noted that there may be a problem with practitioners who practice in different districts.

Judge Jensen indicated that the proposed amendment would be deferred until a future meeting when the Committee would have before it the compiled local rules governing criminal cases.

### D. Rule 24(a). Trial Jurors; Proposal Re Voir Dire by Counsel.

The Reporter pointed out Judge Bill Wilson, of the Standing Committee, had encouraged the Committee to consider amendments to Rule 24 which would increase counsel's role in voir dire and that the issue was being considered by the Civil Rules Committee at its Fall meeting. The Reporter also informed the Committee that the possibility of permitting greater participation by counsel in voir dire had not been directly considered by the Committee in many years; the topic had only been tangentially considered in connection with proposed amendments to equalize peremptory challenges. Since 1943 the Judicial Conference has opposed legislative attempts to increase the role of greater participation by counsel.

Judge Jensen observed that conditions and practices may have changed to the point where it might be appropriate to consider a change to Rule 24(a). Mr. Pauley noted that the Department of Justice considered the present rule and practices to be adequate and that any discussion should distinguish between permitting and requiring counsel participation in voir dire. Mr. Jackson indicated that there seems to be connection between the time permitted to counsel to conduct voir dire and the likelihood of being upheld on appeal. He agreed with Judge Wilson that counsel's role should be expanded but that counsel have abused the opportunity to do so; the trial judge should have the discretion to limit voir dire.

Judge Wilson stated that the courts have uniformly upheld limits placed on counsel's role at trial and Ms. Harkenrider indicated that the Department of Justice takes the position that the trial judge may permit counsel voir dire on a case by case basis. Noting that he favored an amendment to Rule 24, Judge Davis observed that the "school" advice is to keep the lawyers out of the voir dire process. Judge Dowd expressed deep concern over the need for speed records; the real issue is whether counsel will be permitted to talk to individual jurors. He added that an unlimited opening up of voir dire may not be the best solution. Ms. Harkenrider indicated that experienced counsel are able to build rapport with the jurors and that it is important that judges be able to do the same thing.

Professor Coquillette indicated that any possible amendments to the Criminal Rules should be coordinated with the other committees and Judge Jensen indicated that there appears to be diversity in actual practice and that there has been a change in legal culture. He noted for example that in past practice in California state courts, voir dire was conducted primarily by counsel. Judge Crigler noted that he had come to the meeting opposed to counsel voir dire but that he was willing to consider a middle ground. Judge Marovich questioned whether attitudes have been changed by the trial of O.J. Simpson. He noted that the attorneys who are used to conducting voir dire are now on the stand, running the process.

Mr. Jackson observed that there seems to be fear of the adversarial process and Judge Jensen questioned whether there is a chance that Congress will act to amend the rules. He also indicated that the Supreme Court seems to assume that counsel are conducting voir dire. Judge Smith observed that the process is intended to determine the qualifications of a juror and it is possible that counsel will be able to get answers that the judge cannot get. Several other members expressed the view that judges are encouraged to keep the docket moving and conduct case management. Mr. Wilson noted that the Department of Justice is normally opposed to counsel voir dire and Judge Dowd questioned whether a rule could be drafted which would give the right to counsel to conduct voir dire unless the trial judge puts reasons on the record for denying the opportunity. Mr. Pauley indicated that the fact that Congress might consider the issue should not be sufficient reason for amending the rule.

Following a straw poll of the members (5 to 4) in favor of continued consideration of an amendment to Rule 24, the Reporter indicated that the matter could be considered at the Spring 1995 meeting and that several proposals could be considered, including an amendment which would provide counsel with the right to conduct voir dire unless specifically limited by the trial judge.

### E. Rule 35(c); Correction of Sentence.

Judge Jensen informed the Committee that a recent case from the Ninth Circuit, *United States v. Navarro-Espinosa*, 30 F.3d 1169 (9th Cir. 1994) had addressed the applicability of Rule 35(c). In dicta the court addressed the question of whether the time for correcting a sentence runs from the oral announcement of the sentence or from the date the formal entry of judgment is entered. Noting that the language in the rule itself refers to imposition of the sentence, i.e. oral announcement, but the Advisory Committee Note seems to indicate that the time runs from formal entry of the judgment. The court expressed the hope that the Advisory Committee would clarify the point.

Following brief discussion by the Committee it was determined that the Reporter would look into the matter and place the item on the agenda for the Committee's Spring 1995 meeting.

### F. Rule 40(a). Commitment to Another District; Exception for Transporting UFAP Defendants Across State Lines.

Magistrate Judge Robert Collings recommended in a letter to the Committee that Rule 40(a) be amended. As written, the rule requires that a defendant who is arrested in a district other than the district where the offense was committed is to be taken to the nearest available magistrate in the district of the arrest. Judge Collings suggested that an exception to that rule should be permitted where the nearest available magistrate happens to be in the district where the offense took place. Magistrate Judge Crigler indicated that the legislative history of Rule 40 indicates that in the 1960's the rule was amended specifically to require an appearance in the district of arrest.. Mr. Pauley added that there is little caselaw on the issue and that if the rule is properly applied there should not be any real problems. Noting that the Department of Justice has no current position on the proposed amendment he added that even if the defendant is taken to the wrong district, there appears to be no sanction.

Judge Jensen deferred any further discussion on the proposal until the next meeting, pending input from the Department of Justice.

### G. Rule 46. Release From Custody; Proposal to Add Provision for Release of Persons After Arrest for Violation of Probation or Supervised Release.

The Committee considered the written proposal from Magistrate Robert Collings of Boston who suggested that Rule 46 be amended to make the rule explicitly applicable to those cases where a person has been arrested for a violation of probation or supervised release. Following a very brief discussion, the Committee decided to defer consideration of the amendment until such time as the rule might be otherwise amended or restylized.

### H. Rule 53. Regulation of Conduct in Courtroom; Report of Subcommittee on Guidelines.

Judge Jensen provided a brief overview of the proposed amendments to Rule 53 which would have permitted broadcasting from federal criminal trials to the same extent provided for in civil trials. He noted that the Judicial Conference had completed a pilot program of cameras in civil court rooms and that the Criminal Rules Committee had forwarded an amendment to Rule 53 to parallel whatever guidelines might have been adopted by the Judicial Conference. To that end, a subcommittee, chaired by Ms. Rikki Klieman, had drafted suggested guidelines which were to have been considered by the full Committee. In the meantime, however, the Judicial Conference at its Fall 1994 meeting had decided not to permit any further testing of cameras in federal courtrooms, thus negating any need for an amendment to Rule 53. He raised the question of whether the Committee should take any formal action on the subcommittee's report and recommendations.

Ms. Harkenrider indicated that the Department of Justice had not taken a formal position on cameras in the courtroom but that it would be important to proceed with great caution. Judge Jensen questioned whether some action should be taken in light of the fact that some groups had expressed an intent to seek legislative changes in Congress. Judge Crigler noted that he was still opposed to cameras in the courtroom but that he had consented to the proposed amendment because it would not be inconsistent to adopt guidelines to insure that the Judicial Conference would have some say in permitting cameras. Professor Coquillette questioned how the guidelines should be drafted and whether they might be considered as "rules." Judge Marovich indicated that the issue of cameras in the courtroom was a dead issue at this point and that no further consideration of the issue would be fruitful. Following additional brief discussion, the Committee accepted the subcommittee's report as presented.

### I. Rule 10. Arraignment; Proposal to Consider Amendment.

Judge Crigler suggested that the Committee consider an amendment to Rule 10 which would provide that a guilty plea may be entered at an arraignment. The Reporter indicated that he would contact Judge Crigler about possibly placing the issue on the agenda for the Spring 1995 meeting.

## VII. RULES AND PROJECTS PENDING BEFORE THE STANDING COMMITTEE AND JUDICIAL CONFERENCE.

### A. Local Rules Project for Criminal Cases.

Professor Coquillette gave a full report on the background of the local rules project, which had originally focused on civil cases. He noted that with the cooperation of the Committee, he and Mary Squires had continued the project in order to study local rules governing the trial of criminal cases. He noted that the main complaint with regard to local rules was from practitioners that out-of-state lawyers may be able to quickly locate the pertinent rule. To that end, the project would focus on the possibility of uniform number among the districts. The second point, he added, is that the project would assist the district courts in reviewing their own rules and how they related to the national rules. Following a brief discussion about what if any steps could be taken if it appeared that a local rule was in conflict with the national rule, Professor Coquillette indicated that the project would be coordinated with the Committee.

### B. The 1994 Crime Bill

Mr. Rabiej briefly noted several statutory changes which had resulted from the Crime Bill.. First, a typographical error in Rule 46 had been remedied as a part of the bill. Second, Title 18 had been amended to with regard to presentence reports in death penalty cases. And finally, Title 18 was amended to reflect that in capital cases, the government is required to disclose the names of its witnesses to the defense three days before trial unless it can show by a preponderance of the evidence that doing so would endanger the witness.

## VIII. EVIDENCE RULES UNDER CONSIDERATION: RULES 413, 414 & 415

Judge Jensen and the Reporter provided a brief overview of recent Congressional promulgation of Federal Rules of Evidence 413, 414, and 415 which address the admissibility of propensity character evidence. They noted that those evidence rules are being considered by the Evidence Advisory Committee at an upcoming meeting and that the Committee's position or comments on the proposals

might be helpful. Professor Saltzburg was connected through telephone conference call to the Committee and offered additional background discussion on the issue. During the ensuing discussion the Committee considered the rules promulgated by Congress as part of the Crime Bill, and memos from Professors Margaret Berger and Steve Saltzburg concerning possible changes to Congress' version of the rules. The Reporter suggested that rather than endorse any particular language or draft, the Committee might instead address specific policy issues and transmit its views to the Evidence Committee and indicate a willingness to assist that Committee in any way it felt appropriate.

**A. Rules Enabling Act Process.**

Before addressing the specifics of the evidence rules, the Committee, at the suggestion of Professor Coquillette, noted its deep concern over the last minute addition of key evidence rules which will in effect drastically change the rules governing the admissibility of other offense, or extrinsic act, evidence -- a controversial and complicated topic in its own right. There was a general consensus that the Congress should be apprised of that concern and the need for initial input from the Judicial Conference before such rules are promulgated. The Committee was convinced that the Rules Enabling Act process is sound and that it insures that a broad cross-section of view points and suggestions will be heard on proposed amendments.

**B. The Need for Rules Governing Propensity Evidence.**

Several members of the Committee also expressed the view that Rule of Evidence 404(b) provides an adequate vehicle for introducing other offense evidence against a criminal defendant. Given the sensitive nature of this evidence, and the special dangers attending such information in a criminal trial, several members seriously questioned whether Rules 413-415 are worth the danger of convicting a defendant for his past, as opposed to charged, behavior. The Reporter noted that similar rules were before Congress in 1991 and at that time the Criminal Rules Committee voted by a margin of 8 to 1 to oppose such amendments. Judge Dowd moved that the Committee oppose the adoption of the rules. Judge Davis seconded the motion which carried by a vote of 8 to 1.

**C. The Need for Three Separate Rules; Cross-Over Evidence.**

Judge Marovich moved that the three other offense evidence rules adopted by Congress be combined into one rule which would be applicable in both civil and

criminal cases. The motion was seconded by Judge Smith passed by a vote of 8 to 0 with one abstention. The Committee believed that so combining the rules would make it easier for practitioners and courts to locate and apply the applicable provision or rule. The Reporter suggested that because the rules deal with the admissibility of other offenses or extrinsic acts, it might be advisable to include the new provisions in Rule 404, which already deals with that topic, as exceptions to the general rule that extrinsic act evidence is not admissible to prove circumstantially that a person acted in conformity with those previous acts and thus committed the charged offense.

In addressing the question of whether the three rules should be combined, the Committee also noted some ambiguity on whether there could be any cross-over of other offense evidence from sexual assault cases to child molestation cases. That is, could the prosecution in a rape case offer evidence that on prior occasions the defendant had committed acts of child molestation or vice versa? The Committee expressed doubt whether there is justification for any cross-over offense propensity evidence and recommended that that particular issue should be addressed in any proposed alternatives to the Congressional versions of the rules.

### E. Balancing Test.

Upon motion by Judge Marovich (seconded by Judge Crigler), the Committee voted 7 to 2 to recommend that no new balancing test be adopted for other offense evidence regarding sexual propensities. During the discussion, it was suggested that perhaps the evidence should be admissible only if the probative value of the evidence outweighed the prejudicial dangers. Although the Committee was concerned about the special dangers presented by the evidence, in the end it concluded that the balancing test in Rule 403 would suffice. In this regard, the Committee noted that any redraft should make it clear that the admissibility of any proffered evidence under the new rule must be subject to Rule 403 analysis by the court.

### F. Burden of Proof.

The Committee next considered the question of whether any particular or different balancing test should be placed on the admissibility of a defendant's prior acts of sexual misconduct where there has been no conviction. Following a discussion of the current rules applicable to admitting a defendant's prior acts under Rule 404(b), Judge Davis moved that the prosecution be required to prove by clear and convincing evidence in a Rule 104 proceeding that the alleged act occurred before the evidence

could be submitted to the jury. The motion was seconded by Judge Dowd and passed by a vote of 6 to 3.

### G. Notice Provision.

The Congressional version of Rules 413-415 include notice provisions which require the prosecution to inform the defense of its intent to introduce extrinsic act evidence. During the discussion, the Committee considered the issue of whether such notice should be dovetailed with Rule of Criminal Procedure 16 or adopt the more generalized notice provision in Rule 404(b). Judge Crow moved that the 404(b) notice provision be adopted as a recommended notice provision. The motion was seconded by Marovich and failed by a vote of 3 to 5, with one abstention. Judge Dowd then moved that the notice provisions remain as they appear in the Congressional version of the rules. That motion, which was seconded by Judge Davis, passed by a vote of 8 to 0, with one abstention.

### H. Requirement that Sexual Act Resulted in a Conviction.

The suggestion was made during the Committee's discussion that to be admissible under the proposed rules, the defendant's prior sexual conduct must have resulted in a conviction. Several members noted that Rule 404(b) permits non-conviction evidence. Ms. Harkenrider moved that the proposed rules should not be limited to prior convictions. Judge Crow seconded the motion, which carried by a vote of 7 to 2.

### I. Timing Requirement.

Finally, the Committee discussed the question of whether any particular provision should be made for remote sexual conduct, in a manner currently noted in Rule of Evidence 609 for remote convictions. The Committee believed that the balancing test in Rule 403 would adequately cover the court's consideration of prior sexual misconduct. Judge Marovich moved that no specific time limits be established and Judge Crow seconded the motion. It passed by a margin of 7 to 1, with one abstention.

## IX. CONCLUDING REMARKS; DESIGNATION OF TIME AND PLACE OF NEXT MEETING

Judge Jensen expressed the Committee's gratitude to the New Mexico Supreme Court for permitting the Committee to use its facilities. He also thanked John Rabiej and his staff for their excellent support for the meeting.

It was determined that the Committee's next meeting will be held in Washington, D.C. on April 10th and 11th.

Respectfully submitted,

David A. Schlueter
Professor of Law
Reporter

Item 1)

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 2, 1994

MEMORANDUM TO JUDGE STOTLER, CHAIRS, AND REPORTERS, ADVISORY RULES COMMITTEES

SUBJECT: *Legislation Proposed in the "Contract With America" that Affects the Federal Rules*

I am sending to you rules-related sections from three of the ten bills that form the House Republicans' "Contract With America." For your information, I am also sending to you a memorandum from our Office of Legislative and Public Affairs that identifies key issues in all ten bills. In the margins of that memorandum various committees of the Judicial Conference have been designated to address specific issues. It is recognized that other committees may have an interest in and should also comment on these matters.

The incoming speaker has pledged to bring to the House floor all ten bills within the first 100 days of the session. Director L. Ralph Mecham has requested that the affected Judicial Conference committees consider those parts of the bills that bear on their work, so that a coordinated response can be presented by the judiciary.

We have reviewed all ten bills and identified provisions that directly or indirectly affect the rules. We have also indicated which Advisory Committee would most probably have the primary interest in responding to individual rules-related provisions contained in the bills. Below is a brief synopsis of those provisions. The Standing Committee will also be provided with copies of this memorandum and the rules-related provisions.

*Taking Back Our Streets*

Sections 101 and 105 of Title I of *Taking Back Our Streets* impose time deadlines for filing a writ of habeas corpus. The changes would affect Rule 9 in both the Rules Governing Section 2254 Cases and the Rules Governing Section 2255 Proceedings. The **Advisory Committee on Criminal Rules** probably should address this item, although the **Advisory Committee on Civil Rules** may also have an interest in them.

Section 103 would directly amend Appellate Rule 22, regarding the issuance of a certificate of probable cause in habeas corpus proceedings. The **Advisory Committee on Appellate Rules** should address this item.

*Job Creation and Wage Enhancement Act*

Sections 3401 and 7008 establish for private causes of action in cases attacking an agency's assessment of health and safety risks and cases challenging an agency's regulatory impact analysis. Both sections provide a statutory right to attorney fees for the prevailing party. In certain whistleblower cases, section 8207 would allow damages, including attorney, expert witness, and consultant fees.

*Common Sense Legal Reform Act*

Section 101 adds subsection (e) to § 1332 of title 28, United States Code, and would provide that a prevailing party in a diversity action is entitled to attorney's fees. The fees awarded can not exceed the attorney's fees paid by the nonprevailing party or the reasonable value of services rendered to the nonprevailing party when the nonprevailing party has a contingent fee arrangement. Under the proposed section the court in its discretion could reduce the amount awarded to avoid injustice.

The amendment to § 1332 proposed by the *Common Sense Legal Reform Act* is substantially similar to § 102 of the *Access to Justice Act*, which was introduced by Senator Grassley in 1992. In May 1992, the Executive Committee of the Judicial Conference declined to take a position on § 102 and referred the issue to the Judicial Conference Committee on Court Administration and Case Management (CACM) with directions to study the availability of fee-shifting as an incentive to filing in the federal courts. CACM did not undertake the study at that time, because the *Access to Justice Act* became a non-issue.

Senator Grassley resubmitted the proposal in 1993 as section 2 of S. 585, the *Civil Justice Reform Act of 1993*. On a related issue, section 3 of S. 585 proposed changes to offers of judgment. It was studied at length by the Advisory Committee on Civil Rules as part of the committee's evaluation of Rule 68. The offer of judgment proposal under section 3 of S. 585, however, was not included in any of the bills in the "Contract With America."

Section 102 of the *Common Sense Legal Reform Act* would directly amend Evidence Rule 702 in two ways. First, opinion evidence based on scientific knowledge would be inadmissible unless the court determines that such opinion is based on scientifically valid reasoning and is sufficiently reliable so that its probative value outweighs the dangers specified in rule 403. Second, testimony of experts who have

contingent fee arrangements would be inadmissible. The **Advisory Committee on Evidence Rules** should address this matter.

Section 104(b) of the *Common Sense Legal Reform Act* would directly amend Civil Rule 11(c) by requiring a judge to impose sanctions for violation of Rule 11. It also provides that sanctions must be sufficient to deter such proscribed conduct and to compensate the parties that are injured. Section 104(b) would permit the court to award attorney's fees under Rule 11 on the court's own initiative. The **Advisory Committee on Civil Rules** should address this matter.

Section 105 of the *Common Sense Legal Reform Act* would require a claimant to give written notice of specific claims and the amount of damages prior to bringing a suit in the United States District Court. Section 104 of the *Access to Justice Act* contained a similar provision. The Executive Committee opposed this provision in the *Access to Justice Act*, because it lacked empirical data assessing the effectiveness of the prior notice requirement as well as its effectiveness. A similar provision was included in S. 585 introduced by Senator Grassley in 1993. The **Advisory Committee on Civil Rules** may want to consider taking a position on this matter.

Title II of the *Common Sense Legal Reform Act* is similar to S. 1976, *Private Securities Litigation Reform Act of 1994* introduced by Senator Dodd. The title would require courts to appoint a plaintiff steering committee or a guardian to direct lawyers in class actions involving securities. Their powers would include the authority to retain or dismiss counsel and reject or accept settlement. The title seeks to ensure that investors, not lawyers, decide whether to bring a suit, whether to settle, and appropriate lawyers' compensation. Under the title, a plaintiff in whose name the case is brought must hold either 1% of the securities that are the subject of the litigation or $10,000 of such securities. The title also contains provisions awarding attorney fees to the prevailing parties in adjudicated cases, prohibiting attorney's fees, and establishing an ADR framework for private securities litigation.

The **Advisory Committee on Civil Rules** may wish to consider this item in light of their long-term and ongoing effort studying Civil Rule 23.

Other provisions in the bill that may have an indirect impact on the rules are:

- Section 106 - Special Procedures for Collateral Proceedings in Capital Cases (**Advisory Committees on Civil and Criminal Rules**).
- Section 601 - Admissibility of Evidence Obtained by Search or Seizure (Exclusionary Rule Reform)(**Advisory Committee on Evidence Rules**).

- Section 701 - Stopping Abusive Prisoner Lawsuits (**Advisory Committee on Civil Rules**).

John K. Rabiej

Attachments

cc: Standing Committee

I M P O R T A N T  A N D  U R G E N T

RECEIVED 11/25/94

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

L. RALPH MECHAM
DIRECTOR

CLARENCE A. LEE, JR.
ASSOCIATE DIRECTOR

November 22, 1994

MEMORANDUM TO THE FOLLOWING JUDICIAL CONFERENCE COMMITTEE CHAIRMEN:

HONORABLE RICHARD S. ARNOLD
HONORABLE MARYANNE TRUMP BARRY
HONORABLE ROBERT C. BROOMFIELD
HONORABLE GUSTAVE DIAMOND
HONORABLE JULIA S. GIBBONS
HONORABLE STANLEY MARCUS
HONORABLE PHILIP M. PRO
HONORABLE ALICEMARIE H. STOTLER
HONORABLE ANN C. WILLIAMS

SUBJECT: "Contract with America" (ACTION REQUESTED)

Attached is a copy of the House Republicans' "Contract with America", as well as ten implementing bills identified on pages two through four of the contract. As indicated in the attached article from The Washington Post of November 20, 1994, incoming Speaker Newt Gingrich has pledged to implement the eight administrative reforms (on pages one and two of the contract) immediately after the 104th Congress convenes. He has also pledged to bring to the House floor all ten of the draft bills within the first 100 days of the session. In addition, House GOP leaders hope to codify subsequently the administrative reforms in statute. The purpose of this memorandum is to request that you consider relevant portions of the "Contract" at the winter meetings of the committees you chair.

The first administrative principle, to "require all laws that apply to the rest of the country also apply equally to the Congress," includes the substance of the Congressional Accountability Act, H.R. 4822, which passed the House in the 103rd Congress. Were H.R. 4822 applied to the federal judiciary, it would impose upon the courts numerous laws such as Title VII of the Civil Rights Act, the Fair Labor Standards Act, the Occupational Safety and Health Act, the Freedom of Information Act, and the Privacy Act.

In order for the judiciary to be prepared to respond in the event that Congress were to consider including the Third Branch

within the scope of these laws, the Judicial Resources Committee will be considering the proposed Congressional Accountability Act at its December meeting. Since the Freedom of Information Act and the Privacy Act fall within the jurisdiction of the Court Administration and Case Management Committee, the Resources Committee would no doubt appreciate receiving the Court Administration and Case Management Committee's suggestions with regard to those two statutes. Likewise, the Security, Space and Facilities Committee may have views on the Americans with Disabilities Act, the Rehabilitation Act and OSHA. The eighth administrative principle, to implement "zero base-line budgeting" will, of course, be of interest to the Budget Committee.

With regard to the ten legislative proposals, I have attached a memorandum prepared by our Legislative and Public Affairs Office which lists the issues of potential interest to the federal judiciary. Committees with principle jurisdiction over the sections are identified. However, particularly with regard to the "Taking Back Our Streets Act" and the "Common Sense Legal Reform Act", jurisdiction among committees is overlapping. For example, the Defender Services Committee will likely have comments on a number of the issues presented in the "Taking Back Our Streets Act". I ask Judge Barry to take the lead on the "Taking Back Our Streets Act", and Judge Marcus to take the lead on the "Common Sense Legal Reform Act", in coordinating a comprehensive response for the judiciary.

I recognize that this is short notice for consideration at your winter meetings; nevertheless, the election results have escalated the "Contract with America" to the top of the legislative agenda, at least in the House. If the judiciary's views are to be heard, they will need to be advanced soon or events may render them moot.

L. Ralph Mecham

Attachments

cc: Mr. Joseph Bobek
Mr. Gerald Thacker
Mr. Ted Lidz
Ms. Myra Howze Shiplett
Ms. Charlotte Peddicord
Ms. Karen Kremer
Mr. Thomas Hnatowski
Mr. Peter McCabe
Mr. John Rabiej
Mr. Abel Mattos
Ms. Eunice Jones
Mr. David Adair

# Contract With America

*As Republican Members of the House of Representatives and as citizens seeking to join that body we propose not just to change its policies, but even more important, to restore the bonds of trust between the people and their elected representatives.*

*That is why, in this era of official evasion and posturing, we offer instead a detailed agenda for national renewal, a written commitment with no fine print.*

*This year's election offers the chance, after four decades of one-party control, to bring to the House a new majority that will transform the way Congress works. That historic change would be the end of government that is too big, too intrusive, and too easy with the public's money. It can be the beginning of a Congress that respects the values and shares the faith of the American family.*

*Like Lincoln, our first Republican president, we intend to act "with firmness in the right, as God gives us to see the right." To restore accountability to Congress. To end its cycle of scandal and disgrace. To make us all proud again of the way free people govern themselves.*

On the first day of the 104th Congress, the new Republican majority will immediately pass the following major reforms, aimed at restoring the faith and trust of the American people in their government:

FIRST, require all laws that apply to the rest of the country also apply equally to the Congress;

SECOND, select a major, independent auditing firm to conduct a comprehensive audit of Congress for waste, fraud or abuse;

THIRD, cut the number of House committees, and cut committee staff by one-third;

FOURTH, limit the terms of all committee chairs;

FIFTH, ban the casting of proxy votes in committee;

SIXTH, require committee meetings to be open to the public;

SEVENTH, require a three-fifths majority vote to pass a tax increase;

EIGHTH, guarantee an honest accounting of our Federal Budget by implementing zero base-line budgeting.

Thereafter, within the first 100 days of the 104th Congress, we shall bring to the House Floor the following bills, each to be given full and open debate, each to be given a clear and fair vote and each to be immediately available this day for public inspection and scrutiny.

1. **THE FISCAL RESPONSIBILITY ACT**

   A balanced budget/tax limitation amendment and a legislative line-item veto to restore fiscal responsibility to an out-of-control Congress, requiring them to live under the same budget constraints as families and businesses.

2. **THE TAKING BACK OUR STREETS ACT**

   An anti-crime package including stronger truth-in-sentencing, "good faith" exclusionary rule exemptions, effective death penalty provisions, and cuts in social spending from this summer's "crime" bill to fund prison construction and additional law enforcement to keep people secure in their neighborhoods and kids safe in their schools.

3. **THE PERSONAL RESPONSIBILITY ACT**

   Discourage illegitimacy and teen pregnancy by prohibiting welfare to minor mothers and denying increased AFDC for additional children while on welfare, cut spending for welfare programs, and enact a tough two-years-and-out provision with work requirements to promote individual responsibility.

4. **THE FAMILY REINFORCEMENT ACT**

   Child support enforcement, tax incentives for adoption, strengthening rights of parents in their children's education, stronger child pornography laws, and an elderly dependent care tax credit to reinforce the central role of families in American society.

# *Contract with America*

## 5. THE AMERICAN DREAM RESTORATION ACT

A $500 per child tax credit, begin repeal of the marriage tax penalty, and creation of American Dream Savings Accounts to provide middle class tax relief.

## 6. THE NATIONAL SECURITY RESTORATION ACT

No U.S. troops under U.N. command and restoration of the essential parts of our national security funding to strengthen our national defense and maintain our credibility around the world.

## 7. THE SENIOR CITIZENS FAIRNESS ACT

Raise the Social Security earnings limit which currently forces seniors out of the work force, repeal the 1993 tax hikes on Social Security benefits and provide tax incentives for private long-term care insurance to let Older Americans keep more of what they have earned over the years.

## 8. THE JOB CREATION AND WAGE ENHANCEMENT ACT

Small business incentives, capital gains cut and indexation, neutral cost recovery, risk assessment/cost-benefit analysis, strengthening the Regulatory Flexibility Act and unfunded mandate reform to create jobs and raise worker wages.

## 9. THE COMMON SENSE LEGAL REFORM ACT

"Loser pays" laws, reasonable limits on punitive damages and reform of product liability laws to stem the endless tide of litigation.

## 10. THE CITIZEN LEGISLATURE ACT

A first-ever vote on term limits to replace career politicians with citizen legislators.

# *Contract with America*

Further, we will instruct the House Budget Committee to report to the floor and we will work to enact additional budget savings, beyond the budget cuts specifically included in the legislation described above, to ensure that the Federal budget deficit will be ***less*** than it would have been without the enactment of these bills.

*Respecting the judgment of our fellow citizens as we seek their mandate for reform, we hereby pledge our names to this Contract with America.*

_____ _____

Name State/District

# ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

## Memorandum

**DATE:** November 17, 1994

**FROM:** Mark W. Braswell, Counsel, Office of Legislative and Public Affairs

**SUBJECT:** Issues of Interest in the "Contract with America"

**TO:** Karen K. Siegel, Assistant Director, Judicial Conference Executive Secretariat

**THRU:** Arthur E. White, Acting Assistant Director, Office of Legislative and Public Affairs

Below is a listing of issues of potential interest to the federal judiciary in the House Republicans' "Contract with America," which was announced on September 27, 1994. I hope that this preliminary information will assist you in committee assignments.

The contract indicates that within the first 100 days, the Republicans intend to bring to the House floor ten bills for "full and open debate, each to be given a clear and fair vote. . . ." Following are the issues identified from these bills:

1. The Fiscal Responsibility Act
   - Implicates the federal budget. (Balanced budget amendment to the Constitution and line item veto.)

2. The Taking Back Our Streets Act
   - Reforms habeas corpus, including the following changes:
     - limits the period for filing writ of habeas corpus following final judgment of a state court;
     - revises the authority of appellate judges to issue certificates of probable cause for appeal in habeas corpus and federal collateral relief proceedings;
     - provides federal courts with additional discretion to deny habeas corpus applications despite a prisoner's failure to exhaust state remedies;
     - limits the period in which a federal prisoner may file for collateral remedy; and
     - prescribes special procedures for collateral proceedings in capital cases.

     (Pages 3-11.)
   - Revises federal death penalty procedures. (Pages 11-12.)

Crim. Law • Imposes mandatory minimums for use, possession, or carrying of a firearm or destructive device during a state crime of violence or state drug trafficking crime. (Tracks the "D'Amato amendment.") (Pages 12-14.)

Crim. Law/ Magis. Judges • Establishes mandatory restitution for all federal crimes and includes a provision specifically providing that restitution issues may be referred to a "magistrate or special master for proposed findings of fact and recommendations." Dramatically expands what may be included in an order of restitution and revises the procedures for the issuance of such orders and their enforcement. (Pages 14-17.)

Crim. Law • Requires each state to enact "truth in sentencing" laws (providing that each prisoner must serve at least 85 percent of his or her sentence) in order for that state to be eligible for extensive prison construction grants. (Pages 25-28.)

Crim. Law • Expands and codifies the "good faith" exception to the fourth amendment exclusionary rule. (Page 28-29.)

Fed/State • Imposes additional limitations on the rights of prisoners to bring civil rights actions in federal courts by amending exhaustion, frivolous actions, modification of required minimum standards, and proceedings in forma pauperis. (Pages 29-30.)

Crim. Law • Expands the power of federal courts to order deportation of criminal aliens as part of sentencing for aggravated felony convictions and dramatically expands the number of offenses constituting aggravated felonies for such purposes. (Pages 30-38.)

3. The Personal Responsibility Act

Fed/State • Establishes judicial review of the disqualification of food businesses from participation in a food coupon program and also provides for judicial review of the imposition of related civil money penalties. (Pages 37-40.)

Crim. Law • Creates new crimes related to misuse of food coupons. (Pages 40-41.)

4. The Family Reinforcement Act

Crim. Law • Increases penalties for use of a computer in sexual crimes against children. (Page 5.)

Crim. Law • Establishes a mandatory minimum sentence for prostitution of children. (Page 5.)

Crim. Law • Amends the sentencing guidelines relating to prostitution of children. (Page 5.)

Crim. Law • Increases the penalty for sexual abuse of a minor. (Page 5.)

Crim. Law • Increases the penalty for sexual abuse of a ward. (Page 5.)

Fed/State • Amends provisions governing the civil enforcement of child support orders. (Pages 6-7.)

5. The American Dream Restoration Act
   - No apparent judiciary-related issues.

6. The National Security Restoration Act
   - No apparent judiciary-related issues.

7. The Senior Citizens Fairness Act
   - No apparent judiciary-related issues.

8. The Job Creation and Wage Enhancement Act

Fed/State
- Creates a civil cause of action for violations of Title III, the "Risk Communication Act of 1995," which, in general, requires risk assessments by executive branch agencies to explain scientific findings affecting regulatory strategies. (The court may award a prevailing plaintiff reasonable attorney's fees as part of the costs.) (Page 24).

Fed/State
- Repeals the bar to judicial review of chapter 6 ("The Analysis of Regulatory Functions") of title 5, United States Code. (Page 43.)

Fed/State
- Creates a civil cause of action for a violation of Title VII, the "Administrative Procedure Reform act of 1995." (The court may award a prevailing plaintiff reasonable attorney's fees as part of the costs.) (Page 48.)

Fed/State
- Creates a civil cause of action for any person injured or threatened by a prohibited regulatory practice. Establishes federal question jurisdiction for these "citizen suits" in district court. (Page 51.)

Fed/State
- Allows any person who has reason to believe that any employee of any agency has engaged in a prohibited regulatory practice to request the Special Counsel to investigate. (Page 52.)

Fed/State
- Bars judicial review of Title X, the "Federal Mandate Accountability and Reform Act of 1995." (Page 68.)

9. The Common Sense Legal Reform Act
[actual bill title: "Common Sense Legal Reforms Act of 1995"]

CACM
- Requires a district court in diversity cases to award an attorney's fee to a prevailing party. (Page 2.)

Rules
- Amends Rule 702 of the Federal Rules of Evidence (opinion testimony). (Page 2.)

Fed/State
- Reforms product liability law, including limitations on punitive damages and providing for several liability only for noneconomic damages. (Pages 3-6.)

CACM
- Notes that it is the "sense of the Congress" that each state should require attorneys to disclose to clients who are subject to a contingency fee agreement the actual services performed and the number of hours expended. (Page 6.)

Rules
- Amends Rule 11(c) of the Federal Rules of Civil Procedure (attorney sanctions). (Page 6.)

CACM
- Establishes notice requirements before commencement of a civil action. (Pages 6-8.)

Fed/State
- Amends the Rules of the House of Representatives to require that each committee report include: whether the bill preempts state law; whether the bill has retroactive applicability; whether the bill creates any private cause of action and, if so, a description of that relief and the terms and conditions for awarding attorneys fees, if any; and whether the bill is applicable to the federal government or any of its agencies. (Page 8.)

Fed/State
- Reforms private securities litigation and includes provisions that relate to:
  - guardian ad litem and class action steering committees;
  - additional amendments to class actions (e.g., awards of attorneys' fees, settlement discharge);
  - barring the receipt of referral fees;
  - new requirements for securities fraud actions;
  - establishment of "safe harbor" for predictive statements;
  - alternative dispute resolution procedures; and
  - an amendment to RICO.

  (Pages 9-18.)

10. The Citizen Legislature Act
    - No apparent judiciary-related issues.

In addition to proposing the above ten bills, the "Contract with America" states that the Republicans will pass eight "major reform" measures on the first day of the next Congress. Although no detailed language was released along with the contract relating to these internal reforms, they touch upon the following additional topics of potential interest to the judiciary:

- Application of labor (workplace) laws to Congress. (Relates to the Congressional Accountability Act.)
- Implementation of zero base-line budgeting.

cc: L. Ralph Mecham

H.L.C.

# The Taking Back Our Streets Act

104TH CONGRESS
1ST SESSION

# H. R. _____

IN THE HOUSE OF REPRESENTATIVES

**House Republicans** will introduce the following bill

# A BILL

To control crime.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) SHORT TITLE.—This Act may be cited as the "Taking Back Our Streets Act of 1995".

(b) TABLE OF CONTENTS.—The table of contents is as follows:

# TITLE I—EFFECTIVE DEATH PENALTY

## Subtitle A—Habeas Corpus Reform

### CHAPTER 1—POST CONVICTION PETITIONS: GENERAL HABEAS CORPUS REFORM

**SEC. 101. PERIOD OF LIMITATION FOR FILING WRIT OF HABEAS CORPUS FOLLOWING FINAL JUDGMENT OF A STATE COURT.**

Section 2244 of title 28, United States Code, is amended by adding at the end the following:

"(d) A one-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of the following times:

"(1) The time at which State remedies are exhausted.

"(2) The time at which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, where the applicant was prevented from filing by such State action.

"(3) The time at which the Federal right asserted was initially recognized by the Supreme Court, where the right has been newly recognized by the Court and is retroactively applicable.

"(4) The time at which the factual predicate of the claim or claims presented could have been discovered through the exercise of reasonable diligence.".

**SEC. 102. AUTHORITY OF APPELLATE JUDGES TO ISSUE CERTIFICATES OF PROBABLE CAUSE FOR APPEAL IN HABEAS CORPUS AND FEDERAL COLLATERAL RELIEF PROCEEDINGS.**

Section 2253 of title 28, United States Code, is amended to read as follows:

**"§ 2253. Appeal**

"(a) In a habeas corpus proceeding or a proceeding under section 2255 of this title before a circuit or district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit where the proceeding is had.

"(b) There shall be no right of appeal from such an order in a proceeding to test the validity of a warrant to remove, to another district or place for commitment or trial, a person charged with a criminal offense against the United States, or to test the validity of his detention pending removal proceedings.

"(c) An appeal may not be taken to the court of appeals from the final order in a habeas corpus proceeding where the detention complained of

arises out of process issued by a State court, or from the final order in a proceeding under section 2255 of this title, unless a circuit justice or judge issues a certificate of probable cause.".

SEC. 103. CONFORMING AMENDMENT TO THE RULES OF APPELLATE PROCEDURE.

Federal Rule of Appellate Procedure 22 is amended to read as follows:

"RULE 22

"HABEAS CORPUS AND SECTION 2255 PROCEEDINGS

"(a) APPLICATION FOR AN ORIGINAL WRIT OF HABEAS CORPUS.—An application for a writ of habeas corpus shall be made to the appropriate district court. If application is made to a circuit judge, the application will ordinarily be transferred to the appropriate district court. If an application is made to or transferred to the district court and denied, renewal of the application before a circuit judge is not favored; the proper remedy is by appeal to the court of appeals from the order of the district court denying the writ.

"(b) NECESSITY OF CERTIFICATE OF PROBABLE CAUSE FOR APPEAL.—In a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court, and in a motion proceeding pursuant to section 2255 of title 28, United States Code, an appeal by the applicant or movant may not proceed unless a circuit judge issues a certificate of probable cause. If a request for a certificate of probable cause is addressed to the court of appeals, it shall be deemed addressed to the judges thereof and shall be considered by a circuit judge or judges as the court deems appropriate. If no express request for a certificate is filed, the notice of appeal shall be deemed to constitute a request addressed to the judges of the court of appeals. If an appeal is taken by a State or the Government or its representative, a certificate of probable cause is not required.".

SEC. 104. DISCRETION TO DENY HABEAS CORPUS APPLICATION DESPITE FAILURE TO EXHAUST STATE REMEDIES.

Section 2254(b) of title 28, United State Code, is amended to read as follows:

"(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the applicant. An application may be denied on the merits notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.".

SEC. 105. PERIOD OF LIMITATION FOR FEDERAL PRISONERS FILING FOR COLLATERAL REMEDY.

Section 2255 of title 28, United States Code, is amended by striking the second paragraph and the penultimate paragraph thereof, and by adding at the end the following new paragraphs:

"A two-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of the following times:

"(1) The time at which the judgment of conviction becomes final.

"(2) The time at which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, where the movant was prevented from making a motion by such governmental action.

"(3) The time at which the right asserted was initially recognized by the Supreme Court, where the right has been newly recognized by the Court and is retroactively applicable.

"(4) The time at which the factual predicate of the claim or claims presented could have been discovered through the exercise of reasonable diligence.".

## CHAPTER 2—SPECIAL PROCEDURES FOR COLLATERAL PROCEEDINGS IN CAPITAL CASES

SEC. 106. DEATH PENALTY LITIGATION PROCEDURES.

(a) IN GENERAL.—Title 28, United States Code, is amended by inserting the following new chapter after chapter 153:

## "CHAPTER 154—SPECIAL HABEAS CORPUS PROCEDURES IN CAPITAL CASES



### "§ 2256. Prisoners in State custody subject to capital sentence; appointment of counsel; requirement of rule of court or statute; procedures for appointment

"(a) This chapter shall apply to cases arising under section 2254 brought by prisoners in State custody who are subject to a capital sentence. It shall apply only if the provisions of subsections (b) and (c) are satisfied.

"(b) This chapter is applicable if a State establishes by rule of its court of last resort or by statute a mechanism for the appointment, compensation and payment of reasonable litigation expenses of competent counsel in State

posteonviction proceedings brought by indigent prisoners whose capital convictions and sentences have been upheld on direct appeal to the court of last resort in the State or have otherwise become final for State law purposes. The rule of court or statute must provide standards of competency for the appointment of such counsel.

"(c) Any mechanism for the appointment, compensation and reimbursement of counsel as provided in subsection (b) must offer counsel to all State prisoners under capital sentence and must provide for the entry of an order by a court of record: (1) appointing one or more counsel to represent the prisoner upon a finding that the prisoner is indigent and accepted the offer or is unable competently to decide whether to accept or reject the offer; (2) finding, after a hearing if necessary, that the prisoner rejected the offer of counsel and made the decision with an understanding of its legal consequences; or (3) denying the appointment of counsel upon a finding that the prisoner is not indigent.

"(d) No counsel appointed pursuant to subsections (b) and (c) to represent a State prisoner under capital sentence shall have previously represented the prisoner at trial or on direct appeal in the case for which the appointment is made unless the prisoner and counsel expressly request continued representation.

"(e) The ineffectiveness or incompetence of counsel during State or Federal collateral postconviction proceedings in a capital case shall not be a ground for relief in a proceeding arising under section 2254 of this chapter. This limitation shall not preclude the appointment of different counsel, on the court's own motion or at the request of the prisoner, at any phase of State or Federal postconviction proceedings on the basis of the ineffectiveness or incompetence of counsel in such proceedings.

**"§ 2257. Mandatory stay of execution; duration; limits on stays of execution; successive petitions**

"(a) Upon the entry in the appropriate State court of record of an order under section 2256(c), a warrant or order setting an execution date for a State prisoner shall be stayed upon application to any court that would have jurisdiction over any proceedings filed under section 2254. The application must recite that the State has invoked the postconviction review procedures of this chapter and that the scheduled execution is subject to stay.

"(b) A stay of execution granted pursuant to subsection (a) shall expire if—

"(1) a State prisoner fails to file a habeas corpus petition under section 2254 within the time required in section 2258, or fails to make

a timely application for court of appeals review following the denial of such a petition by a district court;

"(2) upon completion of district court and court of appeals review under section 2254 the petition for relief is denied and (A) the time for filing a petition for certiorari has expired and no petition has been filed; (B) a timely petition for certiorari was filed and the Supreme Court denied the petition; or (C) a timely petition for certiorari was filed and upon consideration of the case, the Supreme Court disposed of it in a manner that left the capital sentence undisturbed; or

"(3) before a court of competent jurisdiction, in the presence of counsel and after having been advised of the consequences of his decision, a State prisoner under capital sentence waives the right to pursue habeas corpus review under section 2254.

"(c) If one of the conditions in subsection (b) has occurred, no Federal court thereafter shall have the authority to enter a stay of execution or grant relief in a capital case unless—

"(1) the basis for the stay and request for relief is a claim not previously presented in the State or Federal courts;

"(2) the failure to raise the claim is (A) the result of State action in violation of the Constitution or laws of the United States; (B) the result of the Supreme Court recognition of a new Federal right that is retroactively applicable; or (C) based on a factual predicate that could not have been discovered through the exercise of reasonable diligence in time to present the claim for State or Federal postconviction review; and

"(3) The facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact finder would have found the petitioner guilty of the underlying offense or eligible for the death penalty under State law.

"(d) Notwithstanding any other provision of law, no Federal district court or appellate judge shall have the authority to enter a stay of execution, issue injunctive relief, or grant any equitable or other relief in a capital case on any successive habeas petition (or other action which follows the final determination of a first habeas corpus petition) unless the court first determines the petition or other action does not constitute an abuse of the writ. This determination shall be made only by the district judge or appellate panel who adjudicated the merits of the original habeas petition (or to the district judge or appellate panel to which the case may have been subsequently assigned as a result of the unavailability of the original court or judges). In the Federal courts of appeal, a stay may issue pursuant to the terms of this provision only when a majority of the original panel or major-

ity of the active judges determines the petition does not constitute an abuse of the writ.

**"§ 2258. Filing of habeas corpus petition; time requirements; tolling rules**

"Any petition for habeas corpus relief under section 2254 must be filed in the appropriate district court within one hundred and eighty days from the filing in the appropriate State court of record of an order under section 2256(c). The time requirements established by this section shall be tolled—

"(1) from the date that a petition for certiorari is filed in the Supreme Court until the date of final disposition of the petition if a State prisoner files the petition to secure review by the Supreme Court of the affirmance of a capital sentence on direct review by the court of last resort of the State or other final State court decision on direct review;

"(2) during any period in which a State prisoner under capital sentence has a properly filed request for postconviction review pending before a State court of competent jurisdiction; if all State filing rules are met in a timely manner, this period shall run continuously from the date that the State prisoner initially files for postconviction review until final disposition of the case by the highest court of the State, but the time requirements established by this section are not tolled during the pendency of a petition for certiorari before the Supreme Court except as provided in paragraph (1); and

"(3) during an additional period not to exceed sixty days, if (A) a motion for an extension of time is filed in the Federal district court that would have proper jurisdiction over the case upon the filing of a habeas corpus petition under section 2254; and (B) a showing of good cause is made for the failure to file the habeas corpus petition within the time period established by this section.

**"§ 2259. Evidentiary hearings; scope of Federal review; district court adjudication**

"(a) Whenever a State prisoner under a capital sentence files a petition for habeas corpus relief to which this chapter applies, the district court shall—

"(1) determine the sufficiency of the record for habeas corpus review based on the claims actually presented and litigated in the State courts except when the prisoner can show that the failure to raise or develop a claim in the State courts is (A) the result of State action in violation of the Constitution or laws of the United States; (B) the result of the Supreme Court recognition of a new Federal right that is retroactively applicable; or (C) based on a factual predicate that

could not have been discovered through the exercise of reasonable diligence in time to present the claim for State postconviction review; and

"(2) conduct any requested evidentiary hearing necessary to complete the record for habeas corpus review.

"(b) Upon the development of a complete evidentiary record, the district court shall rule on the claims that are properly before it.

**"§ 2260. Certificate of probable cause inapplicable**

"The requirement of a certificate of probable cause in order to appeal from the district court to the court of appeals does not apply to habeas corpus cases subject to the provisions of this chapter except when a second or successive petition is filed.

**"§ 2261. Application to State unitary review procedure**

"(a) For purposes of this section, a 'unitary review' procedure means a State procedure that authorizes a person under sentence of death to raise, in the course of direct review of the judgment, such claims as could be raised on collateral attack. The provisions of this chapter shall apply, as provided in this section, in relation to a State unitary review procedure if the State establishes by rule of its court of last resort or by statute a mechanism for the appointment, compensation and payment of reasonable litigation expenses of competent counsel in the unitary review proceedings, including expenses relating to the litigation of collateral claims in the proceedings. The rule of court or statute must provide standards of competency for the appointment of such counsel.

"(b) A unitary review procedure, to qualify under this section, must include an offer of counsel following trial for the purpose of representation on unitary review, and entry of an order, as provided in section 2256(c), concerning appointment of counsel or waiver or denial of appointment of counsel for that purpose. No counsel appointed to represent the prisoner in the unitary review proceedings shall have previously represented the prisoner at trial in the case for which the appointment is made unless the prisoner and counsel expressly request continued representation.

"(c) Sections 2257, 2258, 2259, 2260, and 2262 shall apply in relation to cases involving a sentence of death from any State having a unitary review procedure that qualifies under this section. References to State 'postconviction review' and 'direct review' in those sections shall be understood as referring to unitary review under the State procedure. The references in sections 2257(a) and 2258 to 'an order under section 2256(c)' shall be understood as referring to the post-trial order under subsection (b) concerning representation in the unitary review proceedings, but if a transcript of the trial proceedings is unavailable at the time of the filing of such an order in the appropriate State court, then the start of the one hundred and eighty

day limitation period under section 2258 shall be deferred until a transcript is made available to the prisoner or his counsel.

"§ 2262. Limitation periods for determining petitions

"(a)(1) A Federal district court shall determine such a petition or motion within 60 days of any argument heard on an evidentiary hearing, or where no evidentiary hearing is held, within 60 days of any final argument heard in the case.

"(2)(A) The court of appeals shall determine any appeal relating to such a petition or motion within 90 days after the filing of any reply brief or within 90 days after such reply brief would be due. For purposes of this provision, any reply brief shall be due within 14 days of the opposition brief.

"(B) The court of appeals shall decide any petition for rehearing and or request by an appropriate judge for rehearing en banc within 20 days of the filing of such a petition or request unless a responsive pleading is required in which case the court of appeals shall decide the application within 20 days of the filing of the responsive pleading. If en banc consideration is granted, the en banc court shall determine the appeal within 90 days of the decision to grant such consideration.

"(3) The time limitations contained in paragraphs (1) and (2) may be extended only once for 20 days, upon an express good cause finding by the court that the interests of justice warrant such a one-time extension. The specific grounds for the good cause finding shall be set forth in writing in any extension order of the court.

"(4) Since the matters under paragraphs (1) and (2)(A) are to be handled on a priority basis, the time from filing of the petition or motion to final argument (under paragraph (1)) or of the notice of appeal to the hearing of the appeal (under paragraph (2)(A)) shall not exceed 4 months, unless exceptional circumstances require a longer period. Where such time period exceeds 4 months in any petition or motion (under paragraph (2)(A)), the court shall set forth in writing the exceptional circumstances causing the delay.

"(b) The time limitations under subsection (a) shall apply to an initial petition or motion, and to any second or successive petition or motion. The same limitations shall also apply to the re-determination of a petition or motion or related appeal following a remand by the court of appeals or the Supreme Court for further proceedings, and in such a case the limitation period shall run from the date of the remand.

"(c) The time limitations under this section shall not be construed to entitle a petitioner or movant to a stay of execution, to which the petitioner or movant would otherwise not be entitled, for the purpose of litigating any petition, motion, or appeal.

"(d) The failure of a court to meet or comply with the time limitations under this section shall not be a ground for granting relief from a judgment of conviction or sentence. The State or Government may enforce the time limitations under this section by applying to the court of appeals or the Supreme Court for a writ of mandamus.

"(e) The Administrative Office of United States Courts shall report annually to Congress on the compliance by the courts with the time limits established in this section.

**"§ 2263. Rule of construction**

"This chapter shall be construed to promote the expeditious conduct and conclusion of State and Federal court review in capital cases.".

(b) CLERICAL AMENDMENT.—The table of chapters at the beginning of part VI of title 28, United States Code, is amended by inserting after the item relating to chapter 153 the following new item:

**"154. Special habeas corpus procedures in capital cases ..... 2256".**

## CHAPTER 3—FUNDING FOR LITIGATION OF FEDERAL HABEAS CORPUS PETITIONS IN CAPITAL CASES

**SEC. 107. FUNDING FOR DEATH PENALTY PROSECUTIONS.**

Part E of title I of the Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. 3711 et seq.) is amended by adding at the end the following new section:

"SEC. 515. Notwithstanding any other provision of this subpart, the Director shall provide grants to the States, from the funding allocated pursuant to section 511, for the purpose of supporting litigation pertaining to Federal habeas corpus petitions in capital cases. The total funding available for such grants within any fiscal year shall be equal to the funding provided to capital resource centers, pursuant to Federal appropriation, in the same fiscal year.".

# Subtitle B—Federal Death Penalty Procedures Reform

**SEC. 111. FEDERAL DEATH PENALTY PROCEDURES REFORM.**

(a) IN GENERAL.—Subsection (e) of section 3593 of title 18, United States Code, is amended by striking "Based upon this consideration" and all that follows through the end of such subsection and inserting the following:

"The jury, or if there is no jury, the court, shall then consider whether the aggravating factor or factors found to exist outweigh any mitigating factors. The jury, or if there is no jury, the court shall recommend a sentence of death if it unanimously finds at least one aggravating factor and no mitigating factor or if it finds one or more aggravating factors which outweigh

any mitigating factors. In any other case, it shall not recommend a sentence of death. The jury shall be instructed that it must avoid any influence of sympathy, sentiment, passion, prejudice, or other arbitrary factors in its decision, and should make such a recommendation as the information warrants. The jury shall be instructed that its recommendation concerning a sentence of death is to be based on the aggravating factor or factors and any mitigating factors which have been found, but that the final decision concerning the balance of aggravating and mitigating factors is a matter for the jury's judgment.".

(b) CONFORMING AMENDMENT.—Section 3594 of title 18, United States Code, is amended by striking "or life imprisonment without possibility of release".

# TITLE II—DETERRING GUN CRIMES

## SEC. 201. MANDATORY PRISON TERMS FOR USE, POSSESSION, OR CARRYING OF A FIREARM OR DESTRUCTIVE DEVICE DURING A STATE CRIME OF VIOLENCE OR STATE DRUG TRAFFICKING CRIME.

Section 924(c) of title 18, United States Code, is amended by adding at the end the following new paragraph:

"(4)(A) A person who, during and in relation to a crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of any State—

"(i) in the case of a first conviction of such a crime, in addition to the sentence imposed for the crime of violence or drug trafficking crime—

"(I) knowingly possesses a firearm shall be imprisoned not less than 10 years;

"(II) discharges a firearm with intent to injure another person shall be imprisoned not less than 20 years; or

"(III) knowingly possesses a firearm that is a machinegun or destructive device or is equipped with a firearm silencer or firearm muffler shall be imprisoned not less than 30 years;

"(ii) in the case of a second conviction of such a crime, in addition to the sentence imposed for the crime of violence or drug trafficking crime—

"(I) shall be imprisoned not less than 20 years if the person possessed a firearm during and in relation to the crime of violence or drug trafficking crime;

"(II) shall be imprisoned not less than 30 years if the person discharged a firearm during and in relation to the crime of violence or drug trafficking crime; or

"(III) if the person possessed or discharged a firearm that is a machinegun or a destructive device or is equipped with a firearm silencer or firearm muffler during and in relation to the crime of violence or drug trafficking crime, shall be imprisoned for life; and

"(iii) in the case of a third or subsequent conviction of such a crime, shall be imprisoned for life.

"(B)(i) Notwithstanding any other provision of law, the court shall not impose a probationary sentence on any person convicted of a violation of this subsection, nor shall a term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the crime of violence or drug trafficking crime in which the firearm was used.

"(ii) No person sentenced under this subsection shall be released for any reason whatsoever during a term of imprisonment imposed under this paragraph.

"(C) For purposes of subparagraph (A), a person shall be considered to be in possession of a firearm if—

"(i) in the case of a crime of violence, the person touches a firearm at the scene of the crime at any time during the commission of the crime; and

"(ii) in the case of a drug trafficking crime, the person has a firearm readily available at the scene of the crime.

"(D) Subparagraph (A) shall not apply to a person who may be found to have committed a criminal act while acting in defense of person or property during the course of a crime being committed by another person (including the arrest or attempted arrest of the offender during or immediately after the commission of the crime), unless the person engaged in or participated in criminal conduct that gave rise to the occasion for the person's use of a firearm.

"(E) As used in this paragraph:

"(i) The term 'crime of violence' means an offense that is punishable by imprisonment for more than 1 year and—

"(I) has as an element the use, attempted use, or threatened use of physical force against the person or property of another; or

"(II) by its nature involves a substantial risk that physical force against the person or property of another may be used during the course of the offense.

"(ii) The term 'drug trafficking crime' means a crime punishable by imprisonment for more than 1 year involving the manufacture, distribution, possession, cultivation, sale, or transfer of a controlled substance, controlled substance analogue, immediate precursor, or listed chemical (as those terms are defined in section 102 of the Controlled Substance Act (21 U.S.C. 802)), or an attempt or conspiracy to commit such a crime.

"(F) It is the intent of the Congress that—

"(i) this paragraph shall be used to supplement but not supplant the efforts of State and local prosecutors in prosecuting crimes of violence and drug trafficking crimes that could be prosecuted under State law; and

"(ii) the Attorney General shall give due deference to the interest that a State or local prosecutor has in prosecuting a person under State law.".

# TITLE III—MANDATORY VICTIM RESTITUTION

## SEC. 301. MANDATORY RESTITUTION AND OTHER PROVISIONS.

(a) ORDER OF RESTITUTION.—Section 3663 of title 18, United States Code, is amended—

(1) in subsection (a)—

(A) by striking "may order" and inserting "shall order"; and

(B) by adding at the end the following new paragraph:

"(4) In addition to ordering restitution of the victim of the offense of which a defendant is convicted, a court may order restitution of any person who, as shown by a preponderance of evidence, was harmed physically, emotionally, or pecuniarily, by unlawful conduct of the defendant during—

"(A) the criminal episode during which the offense occurred; or

"(B) the course of a scheme, conspiracy, or pattern of unlawful activity related to the offense.";

(2) in subsection (b)(1)(A) by striking "impractical" and inserting "impracticable";

(3) in subsection (b)(2) by inserting "emotional or" after "resulting in";

(4) in subsection (b)—

(A) by striking "and" at the end of paragraph (3);

(B) by redesignating paragraph (4) as paragraph (5); and

(C) by inserting after paragraph (4) the following new paragraph:

"(4) in any case, reimburse the victim for necessary child care, transportation, and other expenses related to participation in the inves-

tigation or prosecution of the offense or attendance at proceedings related to the offense; and".

(5) in subsection (c) by striking "If the Court decides to order restitution under this section, the" and inserting "The";

(6) by striking subsections (d), (e), (f), (g), and (h); and

(7) by adding at the end the following new subsections:

"(d)(1) The court shall order restitution to a victim in the full amount of the victim's losses as determined by the court and without consideration of—

"(A) the economic circumstances of the offender; or

"(B) the fact that a victim has received or is entitled to receive compensation with respect to a loss from insurance or any other source.

"(2) Upon determination of the amount of restitution owed to each victim, the court shall specify in the restitution order the manner in which and the schedule according to which the restitution is to be paid, in consideration of—

"(A) the financial resources and other assets of the offender;

"(B) projected earnings and other income of the offender; and

"(C) any financial obligations of the offender, including obligations to dependents.

"(3) A restoration order may direct the offender to make a single, lump-sum payment, partial payment at specified intervals, or such in-kind payments as may be agreeable to the victim and the offender.

"(4) An in-kind payment described in paragraph (3) may be in the form of—

"(A) return of property;

"(B) replacement of property; or

"(C) services rendered to the victim or to a person or organization other than the victim.

"(e) When the court finds that more than 1 offender has contributed to the loss of a victim, the court may make each offender liable for payment of the full amount of restitution or may apportion liability among the offenders to reflect the level of contribution and economic circumstances of each offender.

"(f) When the court finds that more than 1 victim has sustained a loss requiring restitution by an offender, the court shall order full restitution of each victim but may provide for different payment schedules to reflect the economic circumstances of each victim.

"(g)(1) If the victim has received or is entitled to receive compensation with respect to a loss from insurance or any other source, the court shall order that restitution be paid to the person who provided or is obligated to

provide the compensation, but the restitution order shall provide that all restitution of victims required by the order be paid to the victims before any restitution is paid to such a provider of compensation.

"(2) The issuance of a restitution order shall not affect the entitlement of a victim to receive compensation with respect to a loss from insurance or any other source until the payments actually received by the victim under the restitution order fully compensate the victim for the loss, at which time a person that has provided compensation to the victim shall be entitled to receive any payments remaining to be paid under the restitution order.

"(3) Any amount paid to a victim under an order of restitution shall be set off against any amount later recovered as compensatory damages by the victim in—

"(A) any Federal civil proceeding; and

"(B) any State civil proceeding, to the extent provided by the law of the State.

"(h) A restitution order shall provide that—

"(1) all fines, penalties, costs, restitution payments and other forms of transfers of money or property made pursuant to the sentence of the court shall be made by the offender to an entity designated by the Director of the Administrative Office of the United States Courts for accounting and payment by the entity in accordance with this subsection;

"(2) the entity designated by the Director of the Administrative Office of the United States Courts shall—

"(A) log all transfers in a manner that tracks the offender's obligations and the current status in meeting those obligations, unless, after efforts have been made to enforce the restitution order and it appears that compliance cannot be obtained, the court determines that continued recordkeeping under this subparagraph would not be useful;

"(B) notify the court and the interested parties when an offender is 90 days in arrears in meeting those obligations; and

"(3) the offender shall advise the entity designated by the Director of the Administrative Office of the United States Courts of any change in the offender's address during the term of the restitution order.

"(i) A restitution order shall constitute a lien against all property of the offender and may be recorded in any Federal or State office for the recording of liens against real or personal property.

"(j) Compliance with the schedule of payment and other terms of a restitution order shall be a condition of any probation, parole, or other form of release of an offender. If a defendant fails to comply with a restitution

order, the court may revoke probation or a term of supervised release, modify the term or conditions of probation or a term of supervised release, hold the defendant in contempt of court, enter a restraining order or injunction, order the sale of property of the defendant, accept a performance bond, or take any other action necessary to obtain compliance with the restitution order. In determining what action to take, the court shall consider the defendant's employment status, earning ability, financial resources, the willfulness in failing to comply with the restitution order, and any other circumstances that may have a bearing on the defendant's ability to comply with the restitution order.

"(k) An order of restitution may be enforced—

"(1) by the United States—

"(A) in the manner provided for the collection and payment of fines in subchapter (B) of chapter 229 of this title; or

"(B) in the same manner as a judgment in a civil action; and

"(2) by a victim named in the order to receive the restitution, in the same manner as a judgment in a civil action.

"(l) A victim or the offender may petition the court at any time to modify a restitution order as appropriate in view of a change in the economic circumstances of the offender.".

(b) PROCEDURE FOR ISSUING ORDER OF RESTITUTION.—Section 3664 of title 18, United States Code, is amended—

(1) by striking subsection (a);

(2) by redesignating subsections (b), (c), (d), and (e) as subsections (a), (b), (c), and (d);

(3) by amending subsection (a), as redesignated by paragraph (2), to read as follows:

"(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.".

# TITLE IV—LAW ENFORCEMENT BLOCK GRANTS

SEC. 401. BLOCK GRANT PROGRAM.

Title I of the Violent Crime Control and Law Enforcement Act of 1994 is amended to read as follows:

# "TITLE I—LAW ENFORCEMENT BLOCK GRANTS

SEC. "101. PAYMENTS TO LOCAL GOVERNMENTS.

"(a) PAYMENT AND USE.—

"(1) PAYMENT.—The Director of the Bureau of Justice Assistance, shall pay to each unit of general local government which qualifies for a payment under this title an amount equal to the sum of any amounts allocated to such unit under this title for each payment period. The Director of the Bureau of Justice Assistance shall pay such amount from amounts appropriated under section 102.

"(2) USE.—Amounts paid to a unit of general local government under this section shall be used by that unit for carrying out one or more of the following purposes:

"(A) Grants to local law enforcement organizations to—

"(i) hire, train, and employ on a continuing basis new, additional law enforcement officers and necessary support personnel;

"(ii) pay overtime to presently employed law enforcement officers and necessary support personnel for the purpose of increasing the number of hours worked by such personnel; and

"(iii) procure equipment, technology, and other material that is directly related to the basic law enforcement functions of the law enforcement agency that is the intended beneficiary of the expenditure of such funds by the unit of local government.

"(B) Grants to local educational agencies or to a local law enforcement agency with jurisdiction over a school district, as appropriate, to pay for enhanced school security measures including—

"(i) providing increased police patrols in and around schools, whether through the hiring of additional police officers or paying overtime to presently employed officers;

"(ii) purchasing police equipment necessary to carry out normal police functions in and around schools;

"(iii) equipping schools with metal detectors, fences, closed circuit cameras, and other physical safety measures; and

"(iv) gun hotlines designed to facilitate the reporting of weapons possession by students and other persons in and around schools.

"(C) Grants to local nonprofit organizations which have or intend to establish citizen neighborhood watch programs, provided that the program operated or to be operated by the organization—

"(i) is presently operating or will become operational within six months from the date of any grant application submitted pursuant to section 404 for this purpose;

"(ii) is established pursuant to guidelines issued by a local law enforcement agency; and

"(iii) provides for the active, on-going involvement of a local law enforcement agency to provide advice to the organization with respect to the community-watch operation.

"(D) Grants for programs that have as their principal purpose the teaching of citizenship and moral standards, including programs using law enforcement officials as role models, provided that such programs are supervised, organized, or participated in by law enforcement officials.

"(b) TIMING OF PAYMENTS.—The Director of the Bureau of Justice Assistance shall pay each amount allocated under this title to a unit of general local government for a payment period by—

"(1) 90 days after the date the amount is available; or

"(2) the first day of the payment period if the unit of general local government has provided the Director of the Bureau of Justice Assistance with the assurances required by section 403(d),

whichever is later.

"(c) ADJUSTMENTS.—

"(1) IN GENERAL.—Subject to paragraph (2), the Director of the Bureau of Justice Assistance shall adjust a payment under this title to a unit of general local government to the extent that a prior payment to the government was more or less than the amount required to be paid.

"(2) CONSIDERATIONS.—The Director of the Bureau of Justice Assistance may increase or decrease under this subsection a payment to a unit of general local government only if the Director of the Bureau of Justice Assistance determines the need for the increase or decrease,

or the unit requests the increase or decrease, within one year after the end of the payment period for which the payment was made.

"(d) RESERVATION FOR ADJUSTMENT.—The Director of the Bureau of Justice Assistance may reserve a percentage of not more than two percent of the amount under this section for a payment period for all units of general local government in a State if the Director of the Bureau of Justice Assistance considers the reserve is necessary to ensure the availability of sufficient amounts to pay adjustments after the final allocation of amounts among the units of general local government in the State.

"(e) REPAYMENT OF UNEXPENDED AMOUNTS.—

"(1) REPAYMENT REQUIRED.—A unit of general local government shall repay to the Director of the Bureau of Justice Assistance, by not later than 27 months after receipt from the Director of the Bureau of Justice Assistance, any amount that is—

"(A) paid to the unit from amounts appropriated under the authority of this section; and

"(B) not expended by the unit within two years after receipt of such funds from the Director of the Bureau of Justice Assistance.

"(2) PENALTY FOR FAILURE TO REPAY.—If the amount required to be repaid is not repaid, the Director of the Bureau of Justice Assistance shall reduce payment in future payment periods accordingly.

"(3) DEPOSIT OF AMOUNTS REPAID.—Amounts received by the Director of the Bureau of Justice Assistance as repayments under this subsection shall be deposited in a designated fund for future payments to units of general local government.

"(f) NONSUPPLANTING REQUIREMENT.—Funds made available under this title to units of local government shall not be used to supplant State or local funds, but will be used to increase the amount of funds that would, in the absence of funds under this title, be made available from State or local sources.

"SEC. 102. AUTHORIZATION OF APPROPRIATIONS.

"(a) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated to carry out this title—

"(1) 2,000,000,000 for fiscal year 1996;

"(2) 2,000,000,000 for fiscal year 1997;

"(3) 2,000,000,000 for fiscal year 1998;

"(4) 2,000,000,000 for fiscal year 1999; and

"(5) 2,000,000,000 for fiscal year 2000.

"Such sums are to remain available until expended.

"(b) ADMINISTRATIVE COSTS.—Not more than 2.5 percent of the amount authorized to be appropriated under subsection (b) is authorized to be appropriated period beginning on the first day of fiscal year 1995 and ending on the last day of fiscal year 2000 to be available for administrative costs by the Director of the Bureau of Justice Assistance in furtherance of the purposes of the program. Such sums are to remain available until expended.

"SEC. 103. QUALIFICATION FOR PAYMENT.

"(a) IN GENERAL.—The Director of the Bureau of Justice Assistance shall issue regulations establishing procedures under which eligible units of general local government are required to provide notice to the Director of the Bureau of Justice Assistance of the units' proposed use of assistance under this title.

"(b) GENERAL REQUIREMENTS FOR QUALIFICATION.—A unit of general local government qualifies for a payment under this title for a payment period only if the unit establishes, to the satisfaction of the Director, of the Bureau of Justice Assistance that—

"(1) the government will establish a trust fund in which the government will deposit all payments received under this title;

"(2) the government will use amounts in the trust fund "(including interest) during a period not to exceed two years from the date the first grant payment is made to the government;

"(3) the government will expend the payments so received in accordance with the laws and procedures that are applicable to the expenditure of revenues of the government;

"(4) the government will use accounting, audit, and fiscal procedures that conform to guidelines which shall be prescribed by the Director of the Bureau of Justice Assistance after consultation with the Comptroller General of the United States and as applicable, amounts received under this title shall be audited in compliance with the Single Audit Act of 1984;

"(5) after reasonable notice to the government, the government will make available to the Director of the Bureau of Justice Assistance and the Comptroller General of the United States, with the right to inspect, records that the Director of the Bureau of Justice Assistance reasonably requires to review compliance with this title or that the Comptroller General of the United States reasonably requires to review compliance and operation;

"(6) the government will make reports the Director of the Bureau of Justice Assistance reasonably requires, in addition to the annual reports required under this title; and

"(7) the government will spend the funds only for the purposes set forth in section 101(a)(2).

"(c) REVIEW BY GOVERNORS.—A unit of general local government shall give the chief executive officer of the State in which the government is located an opportunity for review and comment before establishing compliance with subsection (d).

"(d) SANCTIONS FOR NONCOMPLIANCE.—

"(1) IN GENERAL.—If the Director of the Bureau of Justice Assistance decides that a unit of general local government has not complied substantially with subsection (b) or regulations prescribed under subsection (b), the Director of the Bureau of Justice Assistance shall notify the government. The notice shall state that if the government does not take corrective action by the 60th day after the date the government receives the notice, the Director of the Bureau of Justice Assistance will withhold additional payments to the government for the current payment period and later payment periods until the Director of the Bureau of Justice Assistance is satisfied that the government—

"(A) has taken the appropriate corrective action; and

"(B) will comply with subsection (b) and regulations prescribed under subsection (b).

"(2) NOTICE.—Before giving notice under paragraph (1), the Director of the Bureau of Justice Assistance shall give the chief executive officer of the unit of general local government reasonable notice and an opportunity for comment.

"(3) PAYMENT CONDITIONS.—The Director of the Bureau of Justice Assistance may make a payment to a unit of general local government notified under paragraph (1) only if the Director of the Bureau of Justice Assistance is satisfied that the government—

"(A) has taken the appropriate corrective action; and

"(B) will comply with subsection (b) and regulations prescribed under subsection (b).

"SEC. 104. ALLOCATION AND DISTRIBUTION OF FUNDS.

"(a) STATE DISTRIBUTION.—For each payment period, the Director of the Bureau of Justice Assistance shall allocate out of the amount appropriated for the period under the authority of section 102—

"(1) 0.25 percent to each State; and

"(2) of the total amount of funds remaining after allocation under paragraph (1), an amount that is equal to the ratio that the number of part 1 violent crimes reported by such State to the Federal Bureau of Investigation for 1993, bears to the number of part 1 violent crimes reported by all States to the Federal Bureau of Investigation for 1993.

"(b) LOCAL DISTRIBUTION.—

"(1) The Director of the Bureau of Justice Assistance shall allocate among the units of general local government in a State the amount allocated to the State under paragraphs (1) and (2) of subsection (a).

"(2) The Director of the Bureau of Justice Assistance shall allocate to each unit of general local government an amount which—

"(A) bears the ratio that the number of part 1 violent crimes reported by such unit to the Federal Bureau of Investigation for 1993 bears to the number of part 1 violent crimes reported by all units in the State in which the unit is located to the Federal Bureau of Investigation for 1993 multiplied by the ratio of the population living in all units in the State in which the unit is located that reported part 1 violent crimes to the Federal Bureau of Investigation for 1993 bears to the population of the State; or

"(B) if such data are not available for a unit, the ratio that the population of such unit bears to the population of all units in the State in which the unit is located for which data are not available multiplied by the ratio of the population living in units in the State in which the unit is located for which data are not available bears to the population of the State.

"(3) If under paragraph (2) a unit is allotted less than $5,000 for the payment period, the amount allotted shall be transferred to the Governor of the State who shall equitably distribute the allocation to all such units or consortia thereof.

"(4)(A) If there is in a State a unit of general local government that has been incorporated since the date of the collection of the data used by the Director of the Bureau of Justice Assistance in making allocations pursuant to this section, the Director of the Bureau of Justice Assistance shall allocate to this newly incorporated local government, out of the amount allocated to the State under this section, an amount bearing the same ratio to the amount allocated to the State as the population of the newly incorporated local government bears to the population of the State.

"(B) If there is in the State a unit of general local government that has been annexed since the date of the collection of the data used by the Director of the Bureau of Justice Assistance in making allocations pursuant to this section, the Director of the Bureau of Justice Assistance shall pay the amount that would have been allocated to this local government to the unit of general local government that annexed it.

"(c) UNAVAILABILITY OF INFORMATION.—For purposes of this section, if data regarding part 1 violent crimes in any State for 1993 is unavailable or substantially inaccurate, the Director of the Bureau of Justice Assistance shall utilize the best available comparable data regarding the number of violent crimes for 1993 for such State for the purposes of allocation of any funds under this title.

"SEC. 105. UTILIZATION OF PRIVATE SECTOR.

"Funds or a portion of funds allocated under this subsection may be utilized to contract with private, nonprofit entities or community-based organizations to carry out the uses specified under section 401(a)(2).

"SEC. 106. PUBLIC PARTICIPATION.

"A unit of general local government expending payments under this title shall hold at least one public hearing on the proposed use of the payment in relation to its entire budget. At the hearing, persons shall be given an opportunity to provide written and oral views to the governmental authority responsible for enacting the budget and to ask questions about the entire budget and the relation of the payment to the entire budget. The government shall hold the hearing at a time and a place that allows and encourages public attendance and participation.

"SEC. 107. ADMINISTRATIVE PROVISIONS.

"The administrative provisions of part H of the Omnibus Crime Control and Safe Streets Act of 1968, shall apply to this title.

"SEC. 108. DEFINITIONS.

"For the purposes of this title:

"(1) The term "unit of general local government" means—

"(A) a county, township, city, or political subdivision of a county, township, or city, that is a unit of general local government as determined by the Secretary of Commerce for general statistical purposes; and

"(B) the District of Columbia and the recognized governing body of an Indian tribe or Alaskan Native village that carries out substantial governmental duties and powers.

"(2) The term "payment period" means each one -year period beginning on October 1 of any year in which a grant under this title is awarded.

"(3) The term "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, Guam, and the Northern Mariana Islands, except that American Samoa, Guam, and the Northern Mariana Islands shall be considered as one State and that, for purposes of section 404(a), 33 per centum of the amounts allocated shall be allocated to

American Samoa, 50 per centum to Guam, and 17 per centum to the Northern Mariana Islands.

"(4) 'Juvenile' means an individual who is 17 years of age or younger.

"(5) 'Part 1 violent crimes' means murder and non-negligent manslaughter, forcible rape, robbery, and aggravated assault as reported to the Federal Bureau of Investigation for purposes of the Uniform Crime Reports.".

# TITLE V—TRUTH IN SENTENCING GRANTS

SEC. 501. TRUTH IN SENTENCING GRANT PROGRAM.

Subtitle A of title II of the Violent Crime Control and Law Enforcement Act of 1994 is amended to read as follows:

# "TITLE V—TRUTH IN SENTENCING GRANTS

"SEC. 501. AUTHORIZATION OF GRANTS.

"(a) IN GENERAL.—The Attorney General is authorized to provide grants to eligible States and to eligible States organized as regional compacts to build, expand, and operate space in correctional facilities in order to increase the prison bed capacity in such facilities for the confinement of persons convicted of a serious violent felony and to build, expand, and operate temporary or permanent correctional facilities, including facilities on military bases, for the confinement of convicted nonviolent offenders and criminal aliens for the purpose of freeing suitable existing prison space for the confinement of persons convicted of a serious violent felony.

"(b) LIMITATION.—An eligible State or eligible States organized as regional compacts may receive either a general grant under section 502 or a truth-in-sentencing incentive grant under section 503.

"SEC. 502. GENERAL GRANTS.

"(a) DISTRIBUTION OF GENERAL GRANTS.—50 percent of the total amount of funds made available under this title for each of the fiscal years 1995 through 2000 shall be made available for general eligibility grants for each State or States organized as regional compacts that meet the requirements under subsection (b).

"(b) GENERAL GRANTS.—In order to be eligible to receive funds under subsection (a), a State or States organized as regional compacts shall submit an application to the Attorney General that provides assurances that such State since 1993 has—

"(1) increased the percentage of convicted violent offenders sentenced to prison;

"(2) increased the average prison time actually to be served in prison by convicted violent offenders sentenced to prison; and

"(3) increased the percentage of sentence to be actually served in prison by violent offenders sentenced to prison.

"SEC. 503. TRUTH IN SENTENCING GRANTS.

"(a) TRUTH IN SENTENCING INCENTIVE GRANTS.—50 percent of the total amount of funds made available under this title for each of the fiscal years 1995 through 2000 shall be made available for truth-in-sentencing incentive grants to each State or States organized as regional compacts that meet the requirements of subsection (c).

"(b) ELIGIBILITY FOR TRUTH IN SENTENCING INCENTIVE GRANTS.—In order to be eligible to receive funds under subsection (a), a State or States organized as regional compacts shall submit an application to the Attorney General that provides assurances that each State applying has enacted laws and regulations which include—

"(1)(A) truth-in-sentencing laws which require persons convicted of a serious violent felony serve not less than 85 percent of the sentence imposed or 85 percent of the court-ordered maximum sentence for States that practice indeterminate sentencing; or

"(B) truth-in-sentencing laws which have been enacted, but not yet implemented, that require such State, not later than three years after such State submits an application to the Attorney General, to provide that persons convicted of a serious violent felony serve not less than 85 percent of the sentence imposed or 85 percent of the court-ordered maximum sentence for States that practice indeterminate sentencing, and

"(2) laws requiring that the sentencing or releasing authorities notify and allow the defendant's victims or the family of victims the opportunity to be heard regarding the issue of sentencing and any post-conviction release.

"SEC. 504. SPECIAL RULES.

"(a) INDETERMINANT SENTENCING EXCEPTION.—Notwithstanding the provisions of paragraphs (1) through (3) of section 502(b), any State in which on the date of enactment of this section practices indeterminant sentencing and the average times served for the offenses of murder, rape, robbery, and assault exceed, by 10 percent or greater, the national average of times served for such offenses in State systems shall be eligible for grants under subsection (a)(1).

"(b) EXCEPTION.—The requirements under section 502(b) shall apply, except that a State may provide that the Governor of the State may allow for the release of a prisoner over the age of 70 after a public hearing in

which representatives of the public and the prisoner's victims have an opportunity to be heard regarding a proposed release.

"SEC. 505. FORMULA FOR GRANTS.

"To determine the amount of funds that each eligible State or eligible States organized as regional compacts may receive to carry out programs under section 502 or 503, the Attorney General shall apply the following formula:

"(1) $500,000 or 0.40 percent, whichever is greater shall be allocated to each participating State; and

"(2) of the total amount of funds remaining after the allocation under paragraph (1), there shall be allocated to each State an amount which bears the same ratio to the amount of remaining funds described in this paragraph as the population of such State bears to the population of all the States.

"SEC. 506. ACCOUNTABILITY.

"(a) FISCAL REQUIREMENTS.—A State or States organized as regional compacts that receives funds under this title shall use accounting, audit, and fiscal procedures that conform to guidelines which shall be prescribed by the Attorney General.

"(b) REPORTING.—Each State that receives funds under this title shall submit an annual report, beginning on January 1, 1996, and each January 1 thereafter, to the Congress regarding compliance with the requirements of this title.

"(c) ADMINISTRATIVE PROVISIONS.—The administrative provisions of section 801 and 802 of the Omnibus Crime Control and Safe Streets Act of 1968 shall apply to this title, except that the requirements under such section shall also apply to the Attorney General.

"SEC. 507. AUTHORIZATION OF APPROPRIATIONS.

"(a) IN GENERAL.—For purposes of this title, there are authorized to be appropriated $232,000,000 for fiscal year 1995, $997,500,000 for fiscal year 1996, $1,330,000,000 for fiscal year 1997, $2,527,000,000 for fiscal year 1998, $2,660,000,000 for fiscal year 1999, and $2,753,100,000 for fiscal year 2000, to carry out this title and no funds for other purposes authorized by this Act shall be appropriated in fiscal years 1995 through 1999 until the programs under this title are fully funded in such years.

"(b) LIMITATIONS ON FUNDS.—

"(1) USES OF FUNDS.—Funds made available under this title may be used to carry out the purposes described in section 501(a).

"(2) 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.

"(3) ADMINISTRATIVE COSTS.—Not more than three percent of the funds available under this section may be used for administrative costs.

"(4) MATCHING FUNDS.—The Federal share of a grant received under this title may not exceed 75 percent of the costs of a proposal as described in an application approved under this title.

"(5) CARRY OVER OF APPROPRIATIONS.—Any funds appropriated but not expended as provided by this section during any fiscal year shall be carried over and will be made available until expended.

"SEC. 508. DEFINITIONS.

"As used in this title—

"(1) the term 'indeterminate sentencing' means a system by which the court has discretion on imposing the actual length of the sentence, up to the statutory maximum and an administrative agency, generally the parole board, controls release between court-ordered minimum and maximum sentence;

"(2) the term 'serious violent felony' means—

(A) an offense that is a felony and has as an element the use, attempted use, or threatened use of physical force against the person or property of another and has a maximum term of imprisonment of 10 years or more,

"(B) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense and has a maximum term of imprisonment of 10 years or more,

"(C) such crimes include murder, assault with intent to commit murder, arson, armed burglary, rape, assault with intent to commit rape, kidnapping, and armed robbery; and

"(3) the term 'State' means a State of the United States, the District of Columbia, or any commonwealth, territory, or possession of the United States.".

# TITLE VI—EXCLUSIONARY RULE REFORM

SEC. 601. ADMISSIBILITY OF CERTAIN EVIDENCE.

(a) IN GENERAL.—Chapter 223 of title 18, United States Code, is amended by adding at the end the following:

"§ 3510. Admissibility of evidence obtained by search or seizure

"(a) EVIDENCE OBTAINED BY OBJECTIVELY REASONABLE SEARCH OR SEIZURE.—Evidence which is obtained as a result of a search or seizure shall not be excluded in a proceeding in a court of the United States on the ground that the search or seizure was in violation of the fourth amendment to the Constitution of the United States, if the search or seizure was carried out in circumstances justifying an objectively reasonable belief that it was in conformity with the fourth amendment. The fact that evidence was obtained pursuant to and within the scope of a warrant constitutes prima facie evidence of the existence of such circumstances.

"(b) EVIDENCE NOT EXCLUDABLE BY STATUTE OR RULE.—Evidence shall not be excluded in a proceeding in a court of the United States on the ground that it was obtained in violation of a statute, an administrative rule or regulation, or a rule of procedure unless exclusion is expressly authorized by statute or by a rule prescribed by the Supreme Court pursuant to statutory authority.

"(c) RULE OF CONSTRUCTION.—This section shall not be construed to require or authorize the exclusion of evidence in any proceeding.".

(b) CLERICAL AMENDMENT.—The table of sections at the beginning of chapter 223 of title 18, United States Code, is amended by adding at the end the following:

"3510. Admissibility of evidence obtained by search or seizure.".

# TITLE VII—STOPPING ABUSIVE PRISONER LAWSUITS

SEC. 701. EXHAUSTION REQUIREMENT.

Section 8(a)(1) of the Civil Rights of Institutionalized Persons Act (42 U.S.C. 1997e) is amended—

(1) by striking "in any action brought" and inserting "no action shall be brought";

(2) by striking "the court shall" and all that follows through "require exhaustion of" and insert "until"; and

(3) by inserting "are exhausted" after "available".

SEC. 702. FRIVOLOUS ACTIONS.

Section 8(a) of the Civil Rights of Institutionalized Persons Act (42 U.S.C. 1997e(a) is amended by adding at the end the following:

"(3) The court shall on its own motion or on motion of a party dismiss any action brought pursuant to section 1979 of the Revised Statutes of the United States by an adult convicted of a crime and confined in any jail, prison, or other correctional facility if the court is sat-

isfied that the action fails to state a claim upon which relief can be granted or is frivolous or malicious.

SEC. 703. MODIFICATION OF REQUIRED MINIMUM STANDARDS.

Section 8(b)(2) of the Civil Rights of Institutionalized Persons Act (42 U.S.C. 1997e(b)(2)) is amended by striking subparagraph (A) and redesignating subparagraphs (B) through (E) as subparagraphs (A) through (D), respectively.

SEC. 704. PROCEEDINGS IN FORMA PAUPERIS.

(a) DISMISSAL.—Section 1915(d) of title 28, United States Code, is amended—

(1) by inserting "at any time" after "counsel and may"; and

(2) by striking "and may" and inserting "and shall";

(3) by inserting "fails to state a claim upon which relief may be granted or" after "that the action"; and

(4) by inserting "even if partial filing fees have been imposed by the court" before the period.

(b) PRISONER'S STATEMENT OF ASSETS.—Section 1915 of title 28, United States Code, is amended by adding at the end the following:

"(f) If a prisoner in a correctional institution files an affidavit in accordance with subsection (a) of this section, such prisoner shall include in that affidavit a statement of all assets such prisoner possesses. The court shall make inquiry of the correctional institution in which the prisoner is incarcerated for information available to that institution relating to the extent of the prisoner's assets. The court shall require full or partial payment of filing fees according to the prisoner's ability to pay.".

# TITLE VIII—STREAMLINING DEPORTATION OF CRIMINAL ALIENS

SEC. 801. EXPANSION OF DEFINITION OF AGGRAVATED FELONY.

(a) EXPANSION OF DEFINITION.—Section 101(a)(43) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(43)) is amended to read as follows:

"(43) The term 'aggravated felony' means—

"(A) murder;

"(B) illicit trafficking in a controlled substance (as defined in section 102 of the Controlled Substances Act), including a drug trafficking crime (as defined in section 924(c) of title 18, United States Code);

"(C) illicit trafficking in firearms or destructive devices (as defined in section 921 of title 18, United States Code) or in explosive materials (as defined in section 841(c) of that title);

"(D) an offense described in section 1956 of title 18, United States Code (relating to laundering of monetary instruments) or section 1957 of that title (relating to engaging in monetary transactions in property derived from specific unlawful activity) if the amount of the funds exceeded $100,000;

"(E) an offense described in—

"(i) section 842 (h) or (i) of title 18, United States Code, or section 844 (d), (e), (f), (g), (h), or (i) of that title (relating to explosive materials offenses);

"(ii) section 922(g) (1), (2), (3), (4), or (5), (j), (n), (o), (p), or (r) or 924 (b) or (h) of title 18, United States Code (relating to firearms offenses); or

"(iii) section 5861 of the Internal Revenue Code of 1986 (relating to firearms offenses);

"(F) a crime of violence (as defined in section 16 of title 18, United States Code, but not including a purely political offense) for which the term of imprisonment imposed (regardless of any suspension of imprisonment) is at least 5 years;

"(G) a theft offense (including receipt of stolen property) or budgetary offense for which a sentence of 5 years' imprisonment or more may be imposed;

"(H) an offense described in section 875, 876, 877, or 1202 of title 18, United States Code (relating to the demand for or receipt of ransom);

"(I) an offense described in section 2251, 2251A, or 2252 of title 18, United States Code (relating to child pornography);

"(J) an offense described in—

"(i) section 1962 of title 18, United States Code (relating to racketeer influenced corrupt organizations); or

"(ii) section 1084 (if it is a second or subsequent offense) or 1955 of that title (relating to gambling offenses), for which a sentence of 5 years' imprisonment or more may be imposed;

"(K) an offense relating to commercial bribery, counterfeiting, forgery, or trafficking in vehicles the identification numbers of which have been altered for which a sentence of 5 years' imprisonment or more may be imposed;

"(L) an offense that—

"(i) relates to the owning, controlling, managing or supervising of a prostitution business;

"(ii) is described in section 2421, 2422, or 2423 of title 18, United States Code (relating to transportation for the purpose of prostitution) for commercial advantage; or

"(iii) is described in section 1581, 1582, 1583, 1584, 1585, or 1588, of title 18, United States Code (relating to peonage, slavery, and involuntary servitude);

"(M) an offense relating to perjury or subornation of perjury for which a sentence of 5 years' imprisonment or more may be imposed;

"(N) an offense described in—

"(i) section 793 (relating to gathering or transmitting national defense information), 798 (relating to disclosure of classified information), 2153 (relating to sabotage) or 2381 or 2382 (relating to treason) of title 18, United States Code; or

"(ii) section 601 of the National Security Act of 1947 (50 U.S.C. 421) (relating to protecting the identity of undercover intelligence agents);

"(O) an offense that—

"(i) involves fraud or deceit in which the loss to the victim or victims exceeds $200,000; or

"(ii) is described in section 7201 of the Internal Revenue Code of 1986 (relating to tax evasion) in which the revenue loss to the Government exceeds $200,000;

"(P) an offense described in section 274(a)(1) of title 18, United States Code (relating to alien smuggling) for the purpose of commercial advantage;

"(Q) an offense described in section 1546(a) of title 18, United States Code (relating to document fraud), for the purpose of commercial advantage;

"(R) an offense relating to a failure to appear before a court pursuant to a court order to answer to or dispose of a charge of a felony for which a sentence of 2 years' imprisonment or more may be imposed; and

"(S) an attempt or conspiracy to commit an offense described in this paragraph.

The term applies to an offense described in this paragraph whether in violation of Federal or State law and applies to such an offense in violation of the law of a foreign country for which the term of imprisonment was completed within the previous 15 years.".

(b) EFFECTIVE DATE.—The amendments made by this section shall apply to convictions entered on or after the date of enactment of this Act.

SEC. 802. DEPORTATION PROCEDURES FOR CERTAIN CRIMINAL ALIENS WHO ARE NOT PERMANENT RESIDENTS.

(a) ELIMINATION OF ADMINISTRATIVE HEARING FOR CERTAIN CRIMINAL ALIENS.—Section 242A of the Immigration and Nationality Act (8 U.S.C. 1252a) is amended by adding at the end the following new subsection:

"(c) DEPORTATION OF ALIENS WHO ARE NOT PERMANENT RESIDENTS.—

"(1) Notwithstanding section 242, and subject to paragraph (5), the Attorney General may issue a final order of deportation against any alien described in paragraph (2) whom the Attorney General determines to be deportable under section 241(a)(2)(A)(iii) (relating to conviction of an aggravated felony).

"(2) An alien is described in this paragraph if the alien—

"(A) was not lawfully admitted for permanent residence at the time that proceedings under this section commenced, or

"(B) had permanent resident status on a conditional basis (as described in section 216) at the time that proceedings under this section commenced.

"(3) No alien described in this section shall be eligible for any relief from deportation that the Attorney General may grant in his discretion.

"(4) The Attorney General may not execute any order described in paragraph (1) until 14 calendar days have passed from the date that such order was issued, unless waived by the alien, in order that the alien has an opportunity to apply for judicial review under section 106.".

(b) LIMITED JUDICIAL REVIEW.—Section 106 of the Immigration and Nationality Act (8 U.S.C. 1105a) is amended—

(1) in the first sentence of subsection (a), by inserting "or pursuant to section 242A" after "under section 242(b)";

(2) in subsection (a)(1) and subsection (a)(3), by inserting "(including an alien described in section 242A)" after "aggravated felony"; and

(3) by adding at the end the following new subsection:

"(d) Notwithstanding subsection (c), a petition for review or for habeas corpus on behalf of an alien described in section 242A(c) may only challenge whether the alien is in fact an alien described in such section, and no court shall have jurisdiction to review any other issue.".

(c) TECHNICAL AMENDMENTS.—Section 242A of the Immigration and Nationality Act (8 U.S.C. 1252a) is amended—

(1) in subsection (a)—

(A) by striking "(a) IN GENERAL.—" and inserting the following:

"(b) DEPORTATION OF PERMANENT RESIDENT ALIENS.—

"(1) IN GENERAL.—"; and

(B) by inserting in the first sentence "permanent resident" after "correctional facilities for";

(2) in subsection (b)—

(A) by striking "(b) IMPLEMENTATION.—" and inserting "(2) IMPLEMENTATION.—"; and

(B) by striking "respect to an" and inserting "respect to a permanent resident";

(3) by striking subsection (c);

(4) in subsection (d)—

(A) by striking "(d) EXPEDITED PROCEEDINGS.—(1)" and inserting "(3) EXPEDITED PROCEEDINGS.—(A)";

(B) by inserting "permanent resident" after "in the case of any"; and

(C) by striking "(2)" and inserting "(B)";

(5) in subsection (e)—

(A) by striking "(e) REVIEW.—(1)" and inserting "(4) REVIEW.—(A)";

(B) by striking the second sentence; and

(C) by striking "(2)" and inserting "(B)";

(6) by inserting after the section heading the following new subsection:

"(a) PRESUMPTION OF DEPORTABILITY.—An alien convicted of an aggravated felony shall be conclusively presumed to be deportable from the United States."; and

(7) by amending the heading to read as follows:

"EXPEDITED DEPORTATION OF ALIENS CONVICTED OF COMMITTING AGGRAVATED FELONIES".

(d) EFFECTIVE DATE.—The amendments made by this section shall apply to all aliens against whom deportation proceedings are initiated after the date of enactment of this Act.

SEC. 803. JUDICIAL DEPORTATION.

(a) JUDICIAL DEPORTATION.—Section 242A of the Immigration and Nationality Act (8 U.S.C. 1252a) is amended by adding at the end the following new subsection:

"(d) JUDICIAL DEPORTATION.—

"(1) AUTHORITY.—Notwithstanding any other provision of this Act, a United States district court shall have jurisdiction to enter a judicial order of deportation at the time of sentencing against an alien whose criminal conviction causes such alien to be deportable under section 241(a)(2)(A)(iii) (relating to conviction of an aggravated felony), if such an order has been requested prior to sentencing by the United States Attorney with the concurrence of the Commissioner.

"(2) PROCEDURE.—

"(A) The United States Attorney shall provide notice of intent to request judicial deportation promptly after the entry in the record of an adjudication of guilt or guilty plea. Such notice shall be provided to the court, to the alien, and to the alien's counsel of record.

"(B) Notwithstanding section 242B, the United States Attorney, with the concurrence of the Commissioner, shall file at least 20 days prior to the date set for sentencing a charge containing factual allegations regarding the alienage of the defendant and satisfaction by the defendant of the definition of aggravated felony.

"(C) If the court determines that the defendant has presented substantial evidence to establish prima facie eligibility for relief from deportation under section 212(c), the Commissioner shall provide the court with a recommendation and report regarding the alien's eligibility for relief under such section. The court shall either grant or deny the relief sought.

"(D)(i) The alien shall have a reasonable opportunity to examine the evidence against him or her, to present evidence on his or her own behalf, and to cross-examine witnesses presented by the Government.

"(ii) The court, for the purposes of determining whether to enter an order described in paragraph (1), shall only consider evidence that would be admissible in proceedings conducted pursuant to section 242(b).

"(iii) Nothing in this subsection shall limit the information a court of the United States may receive or consider for the purposes of imposing an appropriate sentence.

"(iv) The court may order the alien deported if the Attorney General demonstrates by clear and convincing evidence that the alien is deportable under this Act.

"(3) NOTICE, APPEAL, AND EXECUTION OF JUDICIAL ORDER OF DEPORTATION.—

"(A)(i) A judicial order of deportation or denial of such order may be appealed by either party to the court of appeals for the circuit in which the district court is located.

"(ii) Except as provided in clause (iii), such appeal shall be considered consistent with the requirements described in section 106.

"(iii) Upon execution by the defendant of a valid waiver of the right to appeal the conviction on which the order of deportation is based, the expiration of the period described in section 106(a)(1), or the final dismissal of an appeal from such conviction, the order of deportation shall become final and shall be executed at the end of the prison term in accordance with the terms of the order.

"(B) As soon as is practicable after entry of a judicial order of deportation, the Commissioner shall provide the defendant with written notice of the order or deportation, which shall designate the defendant's country of choice for deportation and any alternate country pursuant to section 243(a).

"(4) DENIAL OF JUDICIAL ORDER.—Denial of a request for a judicial order of deportation shall not preclude the Attorney General from initiating deportation proceedings pursuant to section 242 upon the same ground of deportability or upon any other ground of deportability provided under section 241(a).".

(b) TECHNICAL AMENDMENT.—The ninth sentence of section 242(b) of the Immigration and Nationality Act (8 U.S.C. 1252(b)) is amended by striking "The" and inserting "Except as provided in section 242A(d), the".

(c) EFFECTIVE DATE.—The amendments made by this section shall apply to all aliens whose adjudication of guilt or guilty plea is entered in the record after the date of enactment of this Act.

SEC. 804. RESTRICTING DEFENSES TO DEPORTATION FOR CERTAIN CRIMINAL ALIENS.

(a) DEFENSES BASED ON SEVEN YEARS OF PERMANENT RESIDENCE.—The last sentence of section 212(c) of the Immigration and Nationality Act (8 U.S.C. 1182(c)) is amended by striking "has served for such felony or felonies" and all that follows through the period and inserting "has been sentenced for such felony or felonies to a term of imprisonment of at least 5 years, if the time for appealing such conviction or sentence has expired and the sentence has become final.".

(b) DEFENSES BASED ON WITHHOLDING OF DEPORTATION.—Section 243(h)(2) of the Immigration and Nationality Act (8 U.S.C. 1253(h)(2)) is amended—

(1) by striking the final sentence and inserting the following new subparagraph:

"(E) the alien has been convicted of an aggravated felony."; and

(2) by striking "or" at the end of subparagraph (C) and inserting "or" at the end of subparagraph (D).

SEC. 805. ENHANCING PENALTIES FOR FAILING TO DEPART, OR REENTERING, AFTER FINAL ORDER OF DEPORTATION.

(a) FAILURE TO DEPART.—Section 242(e) of the Immigration and Nationality Act (8 U.S.C. 1252(e)) is amended—

(1) by striking "paragraph (2), (3), or 4 of" the first time it appears; and

(2) by striking "shall be imprisoned not more than ten years" and inserting "shall be imprisoned not more than four years, or shall be imprisoned not more than ten years if the alien is a member of any of the classes described in paragraph (1)(E), (2), (3), or (4) of section 241(a).".

(b) REENTRY.—Section 276(b) of the Immigration and Nationality Act (8 U.S.C. 1326(b)) is amended—

(1) in paragraph (1)—

(A) by inserting after "commission of" the following: "three or more misdemeanors invoving drugs, crimes against the person, or both, or"; and

(B) by striking "5" and inserting "10";

(2) in paragraph (2), by striking "15" and inserting "20"; and

(3) by adding at the end the following sentence:

"For the purposes of this subsection, the term 'deportation' includes any agreement in which an alien stipulates to deportation during a criminal trial under either Federal or State law.".

(c) COLLATERAL ATTACKS ON UNDERLYING DEPORTATION ORDER.—Section 276 of the Immigration and Nationality Act (8 U.S.C. 1326) is amended by adding after subsection (b) the following new subsection:

"(c) In a criminal proceeding under this section, an alien may not challenge the validity of the deportation order described in subsection (a)(1) or subsection (b) unless the alien demonstrates that—

"(1) the alien exhausted any administrative remedies that may have been available to seek relief against the order;

"(2) the deportation proceedings at which the order was issued improperly deprived the alien of the opportunity for judicial review; and

"(3) the entry of the order was fundamentally unfair.".

SEC. 806. MISCELLANEOUS AND TECHNICAL CHANGES.

(a) FORM OF DEPORTATION HEARINGS.—The second sentence of section 242(b) of the Immigration and Nationality Act (8 U.S.C. 1252(b)) is amended by inserting before the period the following: "; except that nothing in this subsection shall preclude the Attorney General from authorizing proceedings by electronic or telephonic media (with the consent of the alien) or, where waived or agreed to by the parties, in the absence of the alien.".

(b) CONSTRUCTION OF EXPEDITED DEPORTATION REQUIREMENTS.—No amendment made by this Act and nothing in section 242(i) of the Immigration and Nationality Act (8 U.S.C. 1252(i)) shall be construed to create any substantive or procedural right or benefit that is legally enforceable by any party against the United States or its agencies or officers or any other person.

SEC. 807. CRIMINAL ALIEN TRACKING CENTER.

(a) OPERATION.—The Commissioner of Immigration and Naturalization, with the cooperation of the Director of the Federal Bureau of Investigation and the heads of other agencies, shall, under the authority of section 242(a)(3)(A) of the Immigration and Nationality Act (8 U.S.C. 1252(a)(3)(A)), operate a criminal alien tracking center.

(b) PURPOSE.—The criminal alien tracking center shall be used to assist Federal, State, and local law enforcement agencies in identifying and locating aliens who may be subject to deportation by reason of their conviction of aggravated felonies.

(c) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated to carry out this section $5,000,000 for fiscal year 1994 and $2,000,000 for each of fiscal years 1995, 1996, 1997, and 1998.

# TITLE IX—AMENDMENTS TO VIOLENT CRIME CONTROL AND LAW ENFORCEMENT ACT

SEC. 901. DELETION OR REPLACEMENT OF PROGRAMS.

The Violent Crime Control and Law Enforcement Act of 1994 is amended—

(1) by striking title V; and

(2) by striking subtitles A through S and subtitle X of title III.

# The Common Sense Legal Reform Act

104TH CONGRESS
1ST SESSION

# H. R. _____

---

IN THE HOUSE OF REPRESENTATIVES

**House Republicans will introduce the following bill**

# A BILL

To reform the Federal civil justice system; to reform product liability law; and to amend the Securities Exchange Act of 1934 to promote equity in private securities litigation.

*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 "Common Sense Legal Reforms Act of 1995".

# TITLE I—CIVIL JUSTICE REFORM

SEC. 101. AWARD OF ATTORNEY'S FEE TO PREVAILING PARTY IN FEDERAL CIVIL DIVERSITY LITIGATION.

(a) AWARD OF ATTORNEY'S FEE.—Section 1332 of title 28, United States Code, is amended by adding at the end the following:

"(e)(1) The district court that exercises jurisdiction in a civil action commenced under this section shall award to the party that prevails with respect to a claim in such action an attorney's fee determined in accordance with paragraph (2).

"(2) An attorney's fee awarded under paragraph (1) shall be a reasonable attorney's fee attributable to such claim, except that the fee awarded under such paragraph may not exceed—

"(A) the actual cost incurred by the nonprevailing party for an attorney's fee payable to an attorney for services in connection with such claim; or

"(B) if no such cost was incurred by the nonprevailing party due to a contingency fee agreement, a reasonable cost that would have been incurred by the nonprevailing party for an attorney's noncontingent fee payable to an attorney for services in connection with such claim.

"(3) Notwithstanding paragraphs (1) and (2), the court in its discretion may refuse to award, or may reduce the amount awarded as, an attorney's fee under paragraph (1) to the extent that the court finds special circumstances that make an award of an attorney's fee determined in accordance with such subparagraph unjust.".

SEC. 102. HONESTY IN EVIDENCE.

(a) OPINION TESTIMONY BY EXPERTS.—Rule 702 of the Federal Rules of Evidence is amended—

(1) by inserting "(a) **In general.**" before "If", and

(2) by adding at the end the following:

"(b) **Adequate basis for opinion.** Testimony in the form of an opinion by a witness that is based on scientific knowledge shall be inadmissible in evidence unless the court determines that such opinion is—

"(1) based on scientifically valid reasoning; and

"(2) sufficiently reliable so that the probative value of such evidence outweighs the dangers specified in rule 403.

"(c) **Disqualification.** Testimony by a witness who is qualified as described in subsection (a) is inadmissible in evidence if such witness is entitled to receive any compensation contingent on the legal disposition of any claim with respect to which such testimony is offered.".

SEC. 103. PRODUCT LIABILITY REFORM.

(a) APPLICABILITY AND PREEMPTION.—This section governs any product liability action brought in any State or Federal Court against any manufacturer or seller of a product on any theory for harm caused by the product. This section supersedes State law only to the extent that State law applies to an issue covered by this section. Any issue that is not covered by this section shall be governed by otherwise applicable State or Federal law.

(b) LIABILITY RULES APPLICABLE TO PRODUCT SELLERS.—

(1) GENERAL RULE.—Except as provided in paragraph 2, in a product liability action, a product seller shall be liable to a claimant for harm only if the claimant establishes that—

(A)(i) the product which allegedly caused the harm complained of was sold by the product seller,

(ii) the product seller failed to exercise reasonable care with respect to the product, and

(iii) such failure to exercise reasonable care was a proximate cause of the claimant's harm,

(B)(i) the product seller made an express warranty applicable to the product which allegedly caused the harm complained of, independent of any express warranty made by the manufacturer as to the same product,

(ii) the product failed to conform to the warranty, and

(iii) the failure of the product to conform to the warranty caused the claimant's harm, or

(C) the product seller engaged in intentional wrongdoing as determined under applicable State law and such intentional wrongdoing was a proximate cause of the harm complained of by the claimant.

For purposes of subparagraph (A)(ii), a product seller shall not be considered to have failed to exercise reasonable care with respect to a product based upon an alleged failure to inspect a product where there was no reasonable opportunity to inspect the product in a manner which would, in the exercise of reasonable care, have revealed the aspect of the product which allegedly caused the claimant's harm.

(2) SPECIAL RULE.—In a product liability action, a product seller shall be liable for harm to the claimant caused by such product as if the product seller were the manufacturer of such product if—

(A) the manufacturer is not subject to service of process under the laws of the State in which the claimant brings the action, or

(B) the court determines that the claimant would be unable to enforce a judgment against the manufacturer.

(c) LIMITATIONS ON PUNITIVE DAMAGES.—

(1) GENERAL LIMITATION.—Punitive damages may to the extent permitted by applicable State law, be awarded against a manufacturer or product seller in a product liability action if the claimant establishes by clear and convincing evidence that the harm suffered was the result of conduct manifesting actual malice.

(2) LIMITATION ON AMOUNT.—The amount of punitive damages that may be awarded for a claim in any civil action subject to this section shall not exceed 3 times the amount awarded to the claimant for the economic injury on which such claim is based, or $250,000, whichever is greater.

(d) SEVERAL LIABILITY FOR NONECONOMIC DAMAGES.—In any product liability action, the liability of each manufacturer or seller of the product involved in such action shall be several only and shall not be joint for noneconomic damages. Such manufacturer or seller shall be liable only for the amount of noneconomic damages allocated to such manufacturer or seller in direct proportion to such manufacturer's or such seller's percentage of responsibility as determined by the trier of fact.

(e) DEFINITIONS.—For purposes of this section—

(1) the term "claimant" means any person who brings a product liability action and any person on whose behalf such an action is brought, including such person's decedent if such an action is brought through or on behalf of an estate or such person's legal representative if it is brought through or on behalf of a minor or incompetent,

(2) the term 'malice' means conduct that is either—

(A) specifically intended to cause serious personal injury, or

(B) carried out with both a flagrant indifference to the rights of the claimant and an awareness that such conduct is likely to result in serious personal injury,

(3) with respect to a product, the term "manufacturer" means—

(A) any person who is engaged in a business to produce, create, make, or construct the product and who designs or formulates the product or has engaged another person to design or formulate the product,

(B) a product seller of the product who, before placing the product in the stream of commerce—

(i) designs or formulates or has engaged another person to design or formulate an aspect of the product after the product was initially made by another, and

(ii) produces, creates, makes, or constructs such aspect of the product, or

(C) any product seller not described in subparagraph (B) which holds itself out as a manufacturer to the user of the product,

(4) the term "product"—

(A) means any object, substance, mixture, or raw material in a gaseous, liquid, or solid state—

(i) which is capable of delivery itself, in a mixed or combined state, or as a component part or ingredient,

(ii) which is produced for introduction into trade or commerce,

(iii) which has intrinsic economic value, and

(iv) which is intended for sale or lease to persons for commercial or personal use, and

(B) does not include—

(i) human tissue, human organs, human blood, and human blood products, or

(ii) electricity, water delivered by a utility, natural gas, or steam,

(5) the term "product seller"—

(A) means a person—

(i) who sells, distributes, leases, prepares, blends, packages, or labels a product or is otherwise involved in placing a product in the stream of commerce, or

(ii) who installs, repairs, or maintains the harm-causing aspect of a product, and

(B) does not include—

(i) a manufacturer,

(ii) a seller or lessor of real property,

(iii) a provider of professional services in any case in which the sale or use of a product is incidental to the transaction and the essence of the transaction is the furnishing of judgment, skill, or services,

(iv) any person who acts only in a financial capacity with respect to the sale of a product, or

(v) any person who leases a product under a lease arrangement in which the selection, possession, maintenance, and operation of the product are controlled by a person other than the lessor,

(6) the term 'punitive damages' means damages in addition to compensation for actual injury suffered, for purposes of imposing punishment for conduct engaged in with malice and to deter similar future conduct, but such term does not include compensation for actual injury, and

(7) the term "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Northern Mariana Islands, the Trust Territory of the Pacific Islands, and any other territory or possession of the United States, or any political subdivision thereof.

SEC. 104. ATTORNEY ACCOUNTABILITY.

(a) TRUTH IN ATTORNEYS' FEES.—It is the sense of the Congress that each State should require, under penalty of law, each attorney admitted to practice law in such State to disclose in writing, to any client with whom such attorney has entered into a contingency fee agreement—

(1) the actual services performed for such client in connection with such agreement, and

(2) the precise number of hours actually expended by such attorney in the performance of such services.

(b) AMENDMENT TO THE FEDERAL RULES OF CIVIL PROCEDURE.—Rule 11(c) of the Federal Rules of Civil Procedure (28 U.S.C. App.) is amended—

(1) in the matter preceding subdivision (1) by striking "may" and inserting "shall";

(2) in the penultimate sentence of subdivision (1)(A) by striking "may" and inserting "shall"; and

(3) in subdivision (2)—

(A) by amending the first sentence to read as follows: "A sanction imposed for a violation of this rule shall be sufficient to deter repetition of such conduct or comparable conduct by others similarly situated, and to compensate the parties that were injured by such conduct."; and

(B) in the second sentence by striking ", if imposed on motion and warranted for effective deterrence,".

SEC. 105. NOTICE REQUIRED BEFORE COMMENCEMENT OF CIVIL ACTION.

Chapter 99 of title 28, United States Code is amended by adding at the end the following:

**§ 1632. Notice required before commencement of civil action**

"(a) DISMISSAL OF CIVIL ACTION.—Except as provided in subsection (c), the district court in which a civil action is commenced shall dismiss such action with respect to a defendant, without prejudice, if—

"(1) not later than 60 days after such action is commenced, the defendant files a motion to dismiss such action on the basis that the plaintiff failed to comply with the requirement specified in subsection (b); and

"(2) the plaintiff fails to establish that before commencing such action the plaintiff complied with such requirement.

"(b) Requirement.—Not less than 30 days before commencing a civil action in a district court of the United States, the plaintiff shall transmit (by 1st class mail, postage prepaid, or contract for delivery by any company that in its regular course of business physically delivers correspondence as a commercial service to the public) to the defendant (at an address reasonably calculated to provide actual notice to such defendant) a written statement specifying the particular claims alleged in such action and the amount of damages claimed in such action.

"(c) EXCEPTIONS.—Subsection (a) shall not apply with respect to any civil action—

"(1) to seize or forfeit assets subject to forfeiture;

"(2) commenced under title 11 of the United States Code;

"(3) commenced to establish a receivership or conservatorship;

"(4) based on the insolvency of the defendant, or the need to liquidate assets of the defendant to satisfy any requirement under Federal law;

"(5) if assets that are subject to such action or that would satisfy a judgment in such action are likely to be removed, dissipated, or destroyed by the defendant;

"(6) if the defendant is likely to flee;

"(7) if prior written notice of the filing of such action is required by any other law:

"(8) to enforce a civil investigative demand or an administrative summons;

"(9) if such action is—

"(A) to foreclose a lien;

"(B) to obtain a temporary restraining order or preliminary injunction; or

"(C) to prevent the fraudulent conveyance of property; or

"(10) if such action involves exigent circumstances that compel immediate resort to the court.

"(d) STATUTE OF LIMITATIONS.—

"(1) SUSPENSION BEFORE COMMENCEMENT OF ACTION.—If the statute of limitations applicable to a claim would expire in the 30-day period beginning on the date the plaintiff transmits the notice required by subsection (b), such statute shall be suspended—

"(A) during such 30-day period; or

"(B) during the 90-day period beginning on the date the plaintiff so transmits such notice if, in such 30-day period, the parties to such action so agree in writing.

"(2) FILING CIVIL ACTION AFTER DISMISSAL.—If—

"(A) a civil action is timely commenced in a district court with respect to a claim;

"(B) such action is dismissed under subsection (a); and

"(C) the statute of limitations applicable to such claim expires before the expiration of the 60-day period beginning on the date such action is dismissed;

then the plaintiff in such action may commence a civil action based on such claim in such 60-day period notwithstanding such statute.".

(b) CONFORMING AMENDMENT.—Chapter 99 of title 28, United States Code, is amended in the table of sections by adding at the end the following:

"1632. Notice required before commencement of civil action.".

SEC. 106. HOUSE COMMITTEE REPORTS.

Clause 2(l) of rule XI of the Rules of the House of Representatives is amended by adding at the end the following new subparagraph:

"(8) Each report of a committee on each bill or joint resolution of a public character reported by that committee shall include the following information regarding that bill or joint resolution:

"(A) Whether that bill or joint resolution preempts the law of any State.

"(B) The retroactive applicability, if any, of that bill or joint resolution.

"(C) Whether that bill or joint resolution creates any private cause of action and, if so, a description of that relief and the terms and conditions for awarding attorneys fees, if any.

"(D) The applicability, if any, of that bill or joint resolution to the Federal Government or any of its agencies or instrumentalities.".

SEC. 107. EFFECTIVE DATE; APPLICATION OF AMENDMENTS.

(a) EFFECTIVE DATE.—Except as provided in subsection (b), this title and the amendments made by this title shall take effect on the first day

of the first month beginning more than 180 days after the date of the enactment of this Act.

(b) APPLICATION OF AMENDMENTS.—(1) The amendments made by sections 101 and 105 shall apply only with respect to civil actions commenced after the effective date of this title.

(2) The amendments made by section 102 shall apply only with respect to cases in which a trial has commenced after the effective date of this title.

(3) The amendments made by section 103 shall apply only with respect to claims arising after the effective date of this title.

(4) The amendment made by section 106 shall apply to bills and joint resolutions reported by any committee at least 30 calendar days after the date of enactment of this Act.

# TITLE II—REFORM OF PRIVATE SECURITIES LITIGATION

## SEC.201. SHORT TITLE; TABLE OF CONTENTS.

(a) SHORT TITLE.—This title may be cited as the "Private Securities Litigation Reform Act of 1995".

(b) TABLE OF CONTENTS.—The table of contents for this title is as follows:



## SEC. 202. PREVENTION OF LAWYER-DRIVEN LITIGATION.

(a) PLAINTIFF STEERING COMMITTEES.—The Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.) is amended by adding at the end the following new section:

### "SEC. 36. GUARDIAN AD LITEM AND CLASS ACTION STEERING COMMITTEES.

"(a) GUARDIAN AD LITEM.—Except as provided in subsection (b), not later than 10 days after certifying a plaintiff class in any private action brought under this title, the court shall appoint a guardian ad litem for the plaintiff class from a list or lists provided by the parties or their counsel. The guardian ad litem shall direct counsel for the class as set forth in this section and perform such other functions as the court may specify. The court shall apportion the reasonable fees and expenses of the guardian ad litem among the parties. Court appointment of a guardian ad litem shall not be subject to interlocutory review.

"(b) CLASS ACTION STEERING COMMITTEE.—Subsection (a) shall not apply if, not later than 10 days after certifying a plaintiff class, on its own

motion or on motion of a member of the class, the court appoints a committee of class members to direct counsel for the class (hereafter in this section referred to as the 'plaintiff steering committee') and to perform such other functions as the court may specify. Court appointment of a plaintiff steering committee shall not be subject to interlocutory review.

"(c) MEMBERSHIP OF PLAINTIFF STEERING COMMITTEE.—

"(1) QUALIFICATIONS.—

"(A) NUMBER.—A plaintiff steering committee shall consist of not fewer than 5 class members, willing to serve, who the court believes will fairly represent the class.

"(B) OWNERSHIP INTERESTS.—Members of the plaintiff steering committee shall have cumulatively held during the class period not less than—

"(i) the lesser of 5 percent of the securities which are the subject matter of the litigation or securities which are the subject matter of the litigation with a market value of $10,000,000; or

"(ii) such smaller percentage or dollar amount as the court finds appropriate under the circumstances.

"(2) NAMED PLAINTIFFS.—Class members who are named plaintiffs in the litigation may serve on the plaintiff steering committee, but shall not comprise a majority of the committee.

"(3) NONCOMPENSATION OF MEMBERS.—Members of the plaintiff steering committee shall serve without compensation, except that any member may apply to the court for reimbursement of reasonable out-of-pocket expenses from any common fund established for the class.

"(4) MEETINGS.—The plaintiff steering committee shall conduct its business at one or more previously scheduled meetings of the committee at which a majority of its members are present in person or by electronic communication. The plaintiff steering committee shall decide all matters within its authority by a majority vote of all members, except that the committee may determine that decisions other than to accept or reject a settlement offer or to employ or dismiss counsel for the class may be delegated to one or more members of the committee, or may be voted upon by committee members seriatim, without a meeting.

"(5) RIGHT OF NONMEMBERS TO BE HEARD.—A class member who is not a member of the plaintiff steering committee may appear and be heard by the court on any issue in the action, to the same extent as any other party.

"(d) FUNCTIONS OF GUARDIAN AD LITEM AND PLAINTIFF STEERING COMMITTEE.—

"(1) DIRECT COUNSEL.—The authority of the guardian ad litem or the plaintiff steering committee to direct counsel for the class shall include all powers normally permitted to an attorney's client in litigation, including the authority to retain or dismiss counsel and to reject offers of settlement, and the preliminary authority to accept an offer of settlement, subject to the restrictions specified in paragraph (2). Dismissal of counsel other than for cause shall not limit the ability of counsel to enforce any contractual fee agreement or to apply to the court for a fee award from any common fund established for the class.

"(2) SETTLEMENT OFFERS.—If a guardian ad litem or a plaintiff steering committee gives preliminary approval to an offer of settlement, the guardian ad litem or the plaintiff steering committee may seek approval of the offer by a majority of class members if the committee determines that the benefit of seeking such approval outweighs the cost of soliciting the approval of class members.

"(e) IMMUNITY FROM LIABILITY; REMOVAL.—Any person serving as a guardian ad litem or as a member of a plaintiff steering committee shall be immune from any liability arising from such service. The court may remove a guardian ad litem or a member of a plaintiff steering committee for good cause shown.

"(f) EFFECT ON OTHER LAW.—This section does not affect any other provision of law concerning class actions or the authority of the court to give final approval to any offer of settlement.".

(b) ADDITIONAL PROVISIONS APPLICABLE TO CLASS ACTIONS.—Section 21 of the Securities Exchange Act of 1934 (15 U.S.C. 78u) is amended by adding at the end the following new subsection:

"(i) DISCLOSURE OF SETTLEMENT TERMS TO CLASS MEMBERS.—In any private action under this title that is certified as a class action pursuant to the Federal Rules of Civil Procedure, a proposed settlement agreement that is published or otherwise disseminated to the class shall include the following statements:

"(1) STATEMENT OF POTENTIAL OUTCOME OF CASE.—

"(A) AGREEMENT ON AMOUNT OF DAMAGES AND LIKELIHOOD OF PREVAILING.—If the settling parties agree on the amount of damages per share that would be recoverable if the plaintiff prevailed on each claim alleged under this title and the likelihood that the plaintiff would prevail—

"(i) a statement concerning the amount of such potential damages; and

"(ii) a statement concerning the probability that the plaintiff would prevail on the claims alleged under this title and a brief explanation of the reasons for that conclusion.

"(B) DISAGREEMENT ON AMOUNT OF DAMAGES OR LIKELIHOOD OF PREVAILING.—If the parties do not agree on the amount of damages per share that would be recoverable if the plaintiff prevailed on each claim alleged under this title or on the likelihood that the plaintiff would prevail on those claims, or both, a statement from each settling party concerning the issue or issues on which the parties disagree.

"(C) INADMISSIBILITY FOR CERTAIN PURPOSES.—Statements made in accordance with subparagraphs (A) and (B) shall not be admissible for purposes of any Federal or State judicial or administrative proceeding.

"(2) STATEMENT OF ATTORNEYS' FEES OR COSTS SOUGHT.—If any of the settling parties or their counsel intend to apply to the court for an award of attorneys' fees or costs from any fund established as part of the settlement, a statement indicating which parties or counsel intend to make such an application, the amount of fees and costs that will be sought (including the amount of such fees and costs determined on a per-share basis, together with the amount of the settlement proposed to be distributed to the parties to suit, determined on a per-share basis), and a brief explanation of the basis for the application. Such information shall be clearly summarized on the cover page of any notice to a party of a proposed or final settlement.

"(3) IDENTIFICATION OF REPRESENTATIVES.—The name and address of one or more representatives of counsel for the plaintiff class who will be reasonably available to answer written questions from class members concerning any matter contained in any notice of settlement published or otherwise disseminated to class members.

"(4) OTHER INFORMATION.—Such other information as may be required by the court, or by any guardian ad litem or plaintiff steering committee appointed by the court pursuant to this section.".

(c) PROHIBITION ON ATTORNEYS' FEES PAID FROM COMMISSION DISGORGEMENT FUNDS.—Section 21(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78u(d)) is amended by adding at the end the following new paragraph:

"(4) PROHIBITION ON ATTORNEYS' FEES PAID FROM COMMISSION DISGORGEMENT FUNDS.—Except as otherwise ordered by the court, funds disgorged as the result of an action brought by the Commission in Federal court, or of any Commission administrative action, shall not

be distributed as payment for attorneys' fees or expenses incurred by private parties seeking distribution of the disgorged funds.".

SEC. 203. PREVENTION OF ABUSIVE PRACTICES THAT FOMENT LITIGATION.

(a) ADDITIONAL PROVISIONS APPLICABLE TO CLASS ACTIONS.—Section 21 of the Securities Exchange Act of 1934 (15 U.S.C. 78u) is further amended by adding at the end the following new subsections:

"(j) RECOVERY BY NAMED PLAINTIFFS IN CLASS ACTIONS.—In any private action under this title that is certified as a class action pursuant to the Federal Rules of Civil Procedure, the share of any final judgment or of any settlement that is awarded to class plaintiffs serving as the representative parties shall be calculated in the same manner as the shares of the final judgment or settlement awarded to all other members of the class. Nothing in this subsection shall be construed to limit the award to any representative parties of actual expenses (including lost wages) relating to the representation of the class.

"(k) NAMED PLAINTIFF THRESHOLD.—In any private action under this title, in order for a plaintiff or plaintiffs to obtain certification as representatives of a class of investors pursuant to the Federal Rules of Civil Procedure, the plaintiff or plaintiffs must show that they owned, in the aggregate, during the time period in which violations of this title are alleged to have occurred, not less than the lesser of—

"(1) 1 percent of the securities which are the subject of the litigation; or

"(2) $10,000 (in market value) of such securities.

A person may be a named plaintiff in no more than 5 class actions filed during any 3-year period.

"(l) AWARDS OF ATTORNEYS' FEES.—

"(1) PAYMENT BY LOSING PARTY.—If the court in any private action under this title enters a final judgment against a party litigant on the basis of a motion to dismiss, motion for summary judgment, or a trial on the merits, the court shall, upon motion by the prevailing party, order the losing party to pay the prevailing party reasonable attorneys' fees and other expenses incurred by the prevailing party.

"(2) TIME FOR APPLICATION.—A party seeking an award of fees and other expenses shall, within 30 days of a final, nonappealable judgment in the action, submit to the court an application for fees and other expenses.

"(3) COURT DISCRETION.—The court, in its discretion, may reduce the amount to be awarded pursuant to this section, or deny an award, to the extent that the prevailing party during the course of the

proceedings engaged in conduct that unduly and unreasonably protracted the final resolution of the matter in controversy.

"(m) CONFLICTS OF INTEREST.—In any private action under this title that is certified as a class action pursuant to the Federal Rules of Civil Procedure, if a party is represented by an attorney who directly owns or otherwise has a beneficial interest in the securities that are the subject of the litigation, the court shall make a determination of whether such interest constitutes a conflict of interest sufficient to disqualify the attorney from representing the party.

"(n) SETTLEMENT DISCHARGE.—

"(1) IN GENERAL.—A defendant who settles any private action brought under this title at any time before verdict or judgment shall be discharged from all claims for contribution brought by other persons. Upon entry of the settlement by the court, the court shall enter a bar order constituting the final discharge of all obligations to the plaintiff of the settling defendant arising out of the action. The order shall bar all future claims for contribution or indemnity arising out of the action—

"(A) by nonsettling persons against the settling defendant; and

"(B) by the settling defendant against any nonsettling defendants.

"(2) REDUCTION.—If a person enters into a settlement with the plaintiff prior to verdict or judgment, the verdict or judgment shall be reduced by the amount paid to the plaintiff by that person.

"(o) CONTRIBUTION.—A person who becomes liable for damages in any private action under this title may recover contribution from any other person who, if joined in the original suit, would have been liable for the same damages.

"(p) STATUTE OF LIMITATIONS FOR CONTRIBUTION.—Once judgment has been entered in any private action under this title determining liability, an action for contribution must be brought not later than 6 months after the entry of a final, nonappealable judgment in the action.

"(q) SPECIAL VERDICTS.—In any private action under this title in which the plaintiff may recover money damages, the court shall, when requested by a defendant, submit to the jury a written interrogatory on the issue of each such defendant's state of mind at the time the alleged violation occurred.".

(b) RECEIPT FOR REFERRAL FEES.—Section 15(c) of the Securities Exchange Act of 1934 (15 U.S.C. 78*o*(c)) is amended by adding at the end the following new paragraph:

"(7) RECEIPT OF REFERRAL FEES.—No broker or dealer, or person associated with a broker or dealer, may solicit or accept remuneration for assisting an attorney in obtaining the representation of any customer in any private action under this title.".

SEC. 204. PREVENTION OF "FISHING EXPEDITION" LAWSUITS.

The Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.) is amended by inserting after section 10 the following new section:

"SEC. 10A. REQUIREMENTS FOR SECURITIES FRAUD ACTIONS.

"(a) INTENT.—In any private action under section 10(b)—

"(1) the plaintiff may recover money damages from a defendant only on proof that the defendant made a material misstatement or omission concerning a security;

"(2) the plaintiff must prove that the defendant had actual knowledge that the statement was false at the time it was made or knowingly and intentionally omitted to state a fact with actual knowledge that such statement would at the time it was made be rendered false by such omission and with the purpose of rendering the statement false; and

"(3) the plaintiff's complaint shall allege specific facts demonstrating the state of mind of each defendant at the time the alleged violation occurred.

"(b) MISLEADING STATEMENTS AND OMISSIONS.—In any private action under section 10(b) in which the plaintiff alleges that the defendant—

"(1) made an untrue statement of a material fact; or

"(2) omitted to state a material fact necessary in order to make the statements made, in the light of the circumstances in which they were made, not misleading;

the plaintiff shall specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is made on information and belief, the plaintiff shall set forth all information on which that belief is formed.

"(c) BURDEN OF PROOF.—In any private action arising under section 10(b) based upon a material misstatement or omission concerning a security, the plaintiff must prove that he or she had actual knowledge of and actually relied on such statement in connection with the purchase or sale of a security and that the misstatement or omission proximately caused (through both transaction causation and loss causation) any loss incurred by the plaintiff.

"(d) DAMAGES.—In any private action arising under section 10(b) based on a material misstatement or omission concerning a security, the plaintiff's damages shall not exceed the lesser of—

"(1) the difference between the price paid by the plaintiff for the security and the market value of the security immediately after dissemination to the market of information which corrects the misstatement or omission; and

"(2) the difference between the price paid by the plaintiff for the security and the price at which the plaintiff sold the security after dissemination of information correcting the misstatement or omission.".

**SEC. 205. ESTABLISHMENT OF "SAFE HARBOR" FOR PREDICTIVE STATEMENTS.**

(a) CONSIDERATION OF REGULATORY OR LEGISLATIVE CHANGES.—In consultation with investors and issuers of securities, the Securities and Exchange Commission shall adopt or amend its rules and regulations to create—

(1) clear and objective criteria that the Commission finds sufficient for the protection of investors, compliance with which shall be readily ascertainable by issuers prior to issuance of securities, by which forward-looking statements concerning the future economic performance of an issuer of securities registered under section 12 of the Securities Exchange Act of 1934 will be deemed not to be in violation of section 10(b) of that Act; and

(2) procedures by which courts shall timely dismiss claims against such issuers of securities based on such forward-looking statements if such statements are in accordance with any criteria under paragraph (1).

(b) COMMISSION CONSIDERATIONS.—In developing rules in accordance with subsection (a), the Commission shall adopt—

(1) appropriate limits to liability for forward-looking statements;

(2) procedures for making a summary determination of the applicability of any Commission rule for forward-looking statements early in a judicial proceeding to limit protracted litigation and expansive discovery;

(3) rules incorporating and reflecting the scienter requirements applicable to any private actions under section 10(b) of the Securities Exchange Act of 1934; and

(4) rules providing clear guidance to issuers of securities and the judiciary.

(c) SECURITIES ACT AMENDMENT.—The Securities and Exchange Act of 1934 (15 U.S.C. 78a et seq.), is amended by adding at the end the following new section:

"SEC. 38. APPLICATION OF SAFE HARBOR FOR FORWARD-LOOKING STATEMENTS.

"(a) IN GENERAL.—In any private action under this title that alleges that a forward-looking statement concerning the future economic performance of an issuer registered under section 12 was materially false or misleading, if a party making a motion in accordance with subsection (b) requests a stay of discovery concerning the claims or defenses of that party, the court shall grant such a stay until it has ruled on any such motion.

"(b) SUMMARY JUDGMENT MOTIONS.—Subsection (a) shall apply to any motion for summary judgment made by a defendant asserting that the forward-looking statement was within the coverage of any rule which the Commission may have adopted concerning such predictive statements, if such motion is made not less than 60 days after the plaintiff commences discovery in the action.

"(c) DILATORY CONDUCT; DUPLICATIVE DISCOVERY.—Notwithstanding subsection (a) or (b), the time permitted for a plaintiff to conduct discovery under subsection (b) may be extended, or a stay of the proceedings may be denied, if the court finds that—

"(1) the defendant making a motion described in subsection (b) engaged in dilatory or obstructive conduct in taking or opposing any discovery; or

"(2) a stay of discovery pending a ruling on a motion under subsection (b) would be substantially unfair to the plaintiff or other parties to the action.".

SEC. 206. ALTERNATIVE DISPUTE RESOLUTION PROCEDURE.

The Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.) is amended by adding at the end the following new section:

"SEC. 39. ALTERNATIVE DISPUTE RESOLUTION PROCEDURE.

"(a) IN GENERAL.—

"(1) OFFER TO PROCEED.—Except as provided in paragraph (2), in any private action arising under this title, any party may, before the expiration of the period permitted for answering the complaint, deliver to all other parties an offer to proceed pursuant to any voluntary, nonbinding alternative dispute resolution procedure established or recognized under the rules of the court in which the action is maintained.

"(2) PLAINTIFF CLASS ACTIONS.—In any private action under this title which is brought as a plaintiff class action, an offer under paragraph (1) shall be made not later than 30 days after a guardian ad litem or plaintiff steering committee is appointed by the court in accordance with section 38.

"(3) RESPONSE.—The recipient of an offer under paragraph (1) or (2) shall file a written notice of acceptance or rejection of the offer with the court not later than 10 days after receipt of the offer. The court may, upon motion by any party made prior to the expiration of such period, extend the period for not more than 90 additional days, during which time discovery may be permitted by the court.

"(4) SELECTION OF TYPE OF ALTERNATIVE DISPUTE RESOLUTION.—For purposes of paragraphs (1) and (2), if the rules of the court establish or recognize more than 1 type of alternative dispute resolution, the parties may stipulate as to the type of alternative dispute resolution to be applied. If the parties are unable to so stipulate, the court shall issue an order not later than 20 days after the date on which the parties agree to the use of alternative dispute resolution, specifying the type of alternative dispute resolution to be applied.

"(5) SANCTIONS FOR DILATORY OR OBSTRUCTIVE CONDUCT.—If the court finds that a party has engaged in dilatory or obstructive conduct in taking or opposing any discovery allowed during the response period described in paragraph (3), the court may—

"(A) extend the period to permit further discovery from that party for a suitable period; and

"(B) deny that party the opportunity to conduct further discovery prior to the expiration of the period.".

**SEC. 207. AMENDMENT TO RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT.**

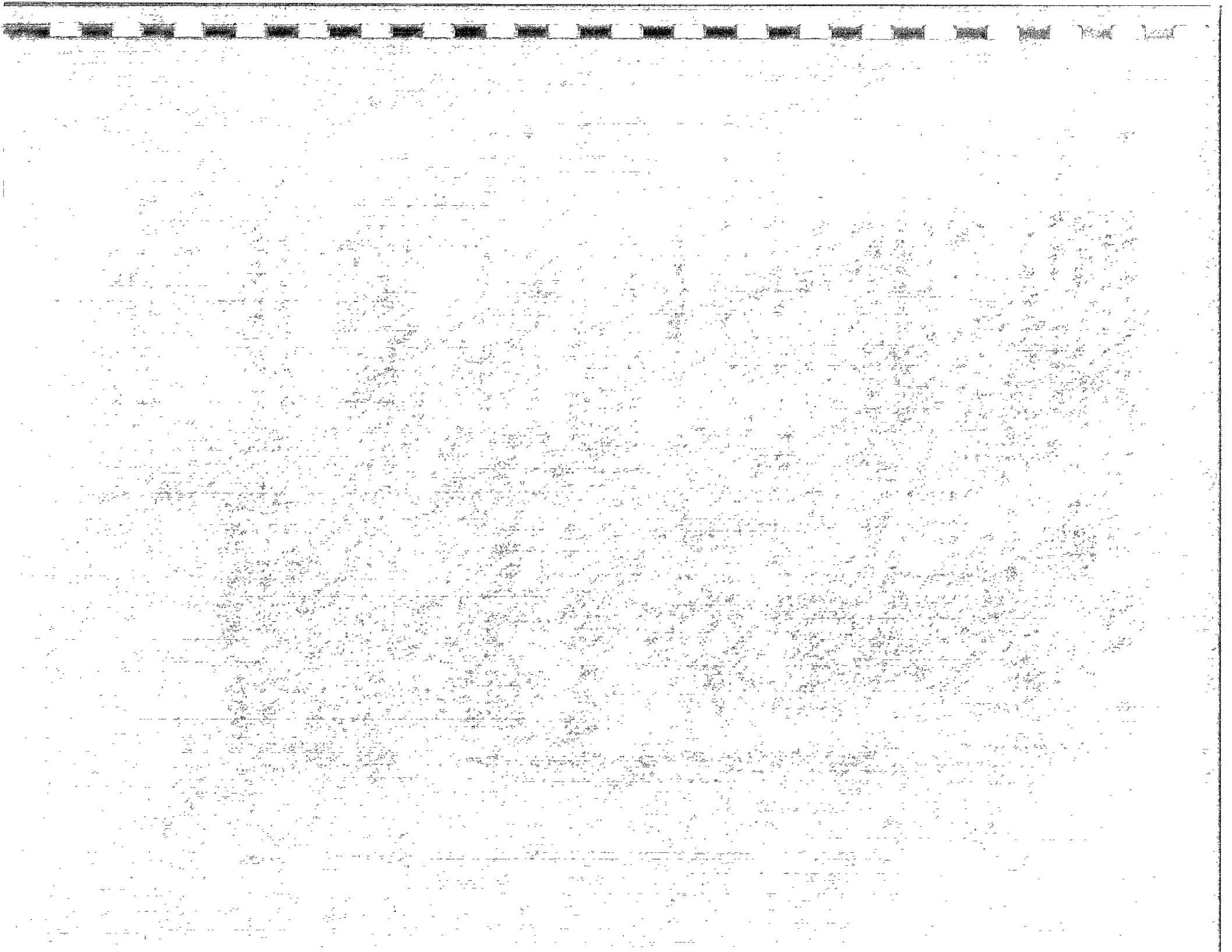
Section 1964(c) of title 18, United States Code, is amended by inserting ", except that no person may bring an action under this provision if the racketeering activity, as defined in section 1961(1)(D), involves conduct actionable as fraud in the sale of securities" before the period.

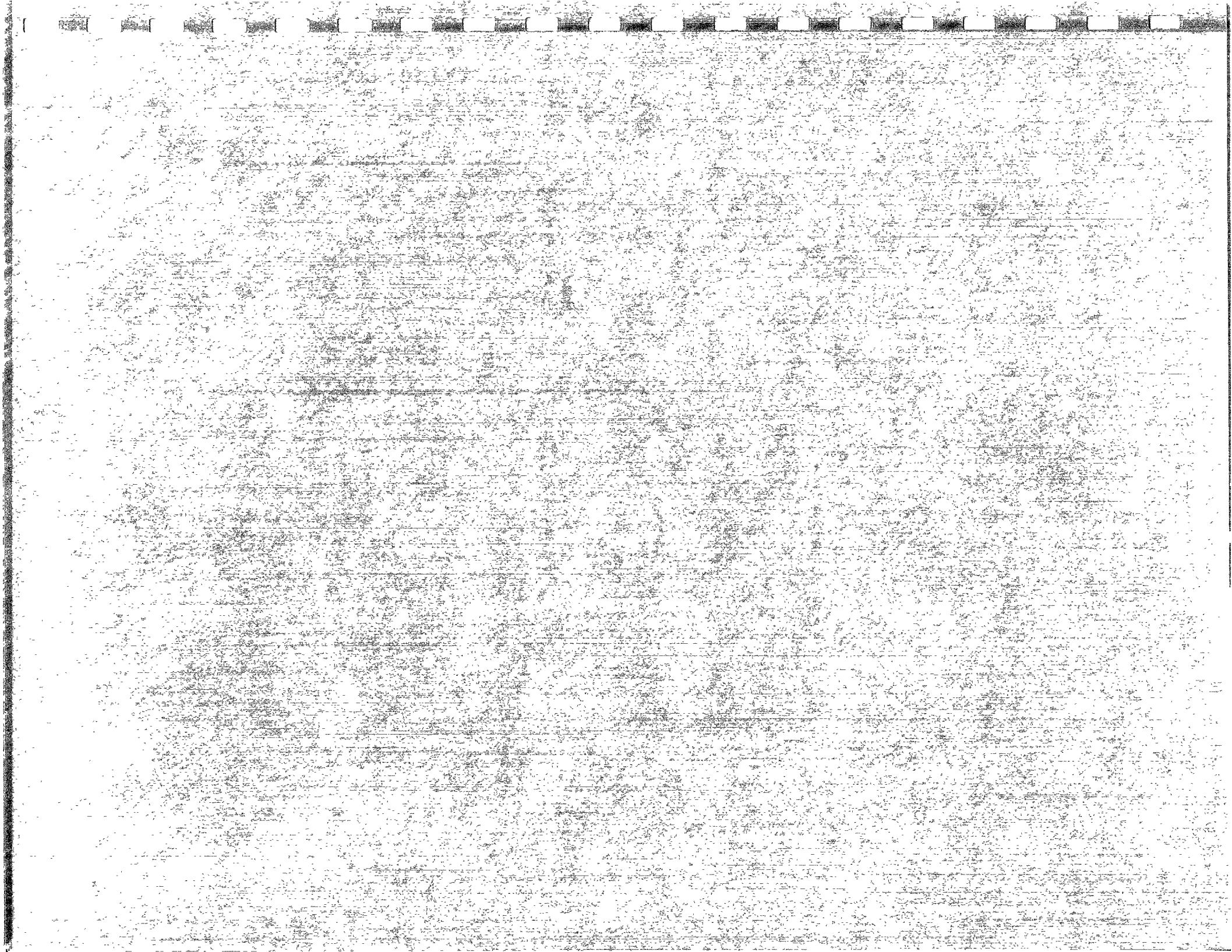
**SEC. 208. RULE OF CONSTRUCTION.**

Nothing in this title or in the amendments made by this title shall be deemed to create or ratify any implied right of action, or to prevent the Commission from restricting or otherwise regulating private actions brought under the Securities Exchange Act of 1934.

**SEC. 209. EFFECTIVE DATE.**

This title and the amendments made by this title are effective on the date of enactment of this Act and shall apply to cases pending on or commenced after such date of enactment.





# The Job Creation and Wage Enhancement Act

104TH CONGRESS
1ST SESSION

# H. R. _____

IN THE HOUSE OF REPRESENTATIVES

**House Republicans** will introduce the following bill

# A BILL

To create jobs, enhance wages, strengthen property rights, maintain certain economic liberties, decentralize and reduce the power of the Federal Government with respect to the States, localities, and citizens of the United States, and to increase the accountability of Federal officials.

*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 "Job Creation and Wage Enhancement Act of 1995".

SEC. 2. TABLE OF CONTENTS.

The table of contents for this Act is as follows:

be issued in final form unless the head of the agency which proposed the major rule—

(1) prepares a new risk assessment or cost/benefit analysis, as applicable, for the proposed major rule in accordance with this title; and

(2) submits the new assessment and analysis for peer review in accordance with this subtitle.

## Subtitle D—Citizen Suits

SEC. 3401. CIVIL ACTION.

Whoever is adversely affected by any conduct in violation of this title may in a civil action obtain appropriate relief. The court may award a prevailing plaintiff in an action under this section a reasonable attorney's fees as a part of the costs.

# TITLE IV—ESTABLISHMENT OF FEDERAL REGULATORY BUDGET COST CONTROL

SEC. 4001. AMENDMENTS TO THE CONGRESSIONAL BUDGET ACT OF 1974.

(a) FEDERAL REGULATORY BUDGET COST CONTROL SYSTEM.—Title III of the Congressional Budget Act of 1974 is amended by inserting before section 300 the following new center heading "PART A—GENERAL PROVISIONS" and by adding at the end the following new part:

## "PART B—FEDERAL REGULATORY BUDGET COST CONTROL

"SEC. 321. OMB-CBO REPORTS.

"(a) OMB-CBO INITIAL REPORT.—Within 1 year after the date of enactment of this section, OMB and CBO shall jointly issue a report to the President and each House of Congress that contains the following:

"(1) For the first budget year beginning after the issuance of this report, a projection of the aggregate direct cost to the private sector of complying with all Federal regulations and rules in effect immediately before issuance of the report containing the projection for that budget year of the effect of current-year Federal regulations and rules into the budget year and the outyears based on those regulations and rules.

"(2) A calculation of the estimated aggregate direct cost to the private sector of compliance with all Federal regulations and rules as a percentage of the gross domestic product (GDP).

"(3) The estimated marginal cost (measured as a reduction in estimated gross domestic product) to the private sector of compliance with all Federal regulations and rules in excess of 5 percent of the gross domestic product.

(1) is written in a reasonably simple and understandable manner and is easily readable;

(2) is written to provide adequate notice of the content of the rule, summary, or Analysis to affected persons and interested persons that have some subject matter expertise;

(3) conforms to commonly accepted principles of grammar;

(4) contains only sentences that are as short as practical and organized in a sensible manner; and

(5) to the extent practicable, does not contain any double negatives, confusing cross references, convoluted phrasing, unreasonably complex language, or term of art or word with multiple meanings that may be misinterpreted and is not defined in the rule, summary, or analysis, respectively.

SEC. 7007. REPORT BY OIRA.

The Administrator of the Office of Information and Regulatory Affairs shall submit a report to the Congress no later than 12 months after the date of the enactment of this Act containing an analysis of rule making procedures of Federal agencies and an analysis of the impact of those rule making procedures on the regulated public and regulatory process.

SEC. 7008. CIVIL ACTION.

Whoever is adversely affected by any conduct in violation of this title may in a civil action obtain appropriate relief. The court may award a prevailing plaintiff in an action under this section a reasonable attorney's fees as a part of the costs.

SEC. 7009. DEFINITIONS.

For purposes of this title—

(1) except as provided in section 7004(d)(2), each of the terms "agency", "rule", and "rule making" has the meaning given that term in section 551 of title 5, United States Code; and

(2) the term "major rule" has the meaning given that term in section 7004(b).

# TITLE VIII—PROTECTION AGAINST FEDERAL REGULATORY ABUSE

## Subtitle A—Citizens' Regulatory Bill of Rights

SEC. 8101. CITIZENS' REGULATORY BILL OF RIGHTS.

(a) IN GENERAL.—Except as provided in subsection (c), each person that is the target of a Federal investigative or enforcement action shall, upon the initiation of an inspection, investigation, or other official proceeding directed against that person, have the right—

(1) to remain silent;

SEC. 8205. PROHIBITED REGULATORY PRACTICE AS A DEFENSE TO AGENCY ACTION.

(a) IN GENERAL.—In any administrative or judicial action or proceeding, formal or informal, by an agency to create, apply or enforce any obligation, duty or liability under any law, rule or regulation against any person, the person may assert as a defense that the agency or one or more employees of the agency have engaged in a prohibited regulatory practice with respect to the person or to a related entity in connection with the action or proceeding.

(b) COMPLIANCE.—If the existence of a prohibited regulatory practice is established, the person may be required to comply with the obligation, duty or liability to the extent compliance is required of and enforced against other persons similarly situated, but no penalty, fine, damages, costs or other obligation except compliance shall be imposed on the person.

SEC. 8206. ENFORCEMENT.

(a) CIVIL PENALTY.—Any agency, and any employee of an agency, engaging in a prohibited regulatory practice may be assessed a civil penalty of not more than $25,000 for each such practice. In the case of a continuing prohibited regulatory practice, each day that the practice continues shall be deemed a separate practice.

(b) PROCEDURES.—The President shall, by regulation, establish procedures providing for the administrative enforcement of the requirements of subsection (a) of this section.

SEC. 8207. CITIZEN SUITS.

(a) COMMENCEMENT.—Any person injured or threatened by a prohibited regulatory practice may commence a civil action on his own behalf against any person or agency alleged to have engaged in or threatened to engage in such practice.

(b) JURISDICTION AND VENUE.—Any action under subsection (a) of this section shall be brought in the district court for any district in which the alleged prohibited regulatory practice occurred or in which the alleged injury occurred. The district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to—

(1) restrain any agency or person who has engaged or is engaging in any prohibited regulatory practice;

(2) order the cancellation or remission of any penalty, fine, damages, or other monetary assessment that resulted from a prohibited regulatory practice;

(3) order the rescission of any settlement that resulted from a prohibited regulatory practice;

(4) order the issuance of any permit or license that has been denied or delayed as a result of a prohibited regulatory practice;

(5) order the agency and/or the employee engaging in a prohibited regulatory practice to pay to the injured person such damages as may be necessary to compensate the person for any harm resulting from the practice, including damages for—

(A) injury to, deterioration of, or destruction of real or personal property;

(B) loss of profits from idle or underutilized resources, and from business forgone;

(C) costs incurred, including costs of compliance where appropriate;

(D) loss in value of a business;

(E) reasonable legal, consulting and expert witness fees; or

(F) payments to third parties;

(6) order the payment of punitive damages, in an amount not to exceed $25,000 for each such prohibited regulatory practice, provided that, in the case of a continuing prohibited regulatory practice, each day that the practice continues shall be deemed a separate practice.

**SEC. 8208. OFFICE OF THE SPECIAL COUNSEL.**

(a) REQUEST FOR INVESTIGATION.—Any person who has reason to believe that any employee of any agency has engaged in a prohibited regulatory practice may request the Special Counsel established by section 1211 of title 5, United States Code, to investigate.

(b) POWERS.—The Special Counsel shall have the same power to investigate prohibited regulatory practices that it has to investigate prohibited personnel practices pursuant to section 1212 of title 5, United States Code.

# TITLE IX—PRIVATE PROPERTY RIGHTS PROTECTIONS AND COMPENSATION

**SEC. 9001. COMPENSATION FOR TAKING OF PRIVATE PROPERTY.**

(a) ELIGIBILITY.—

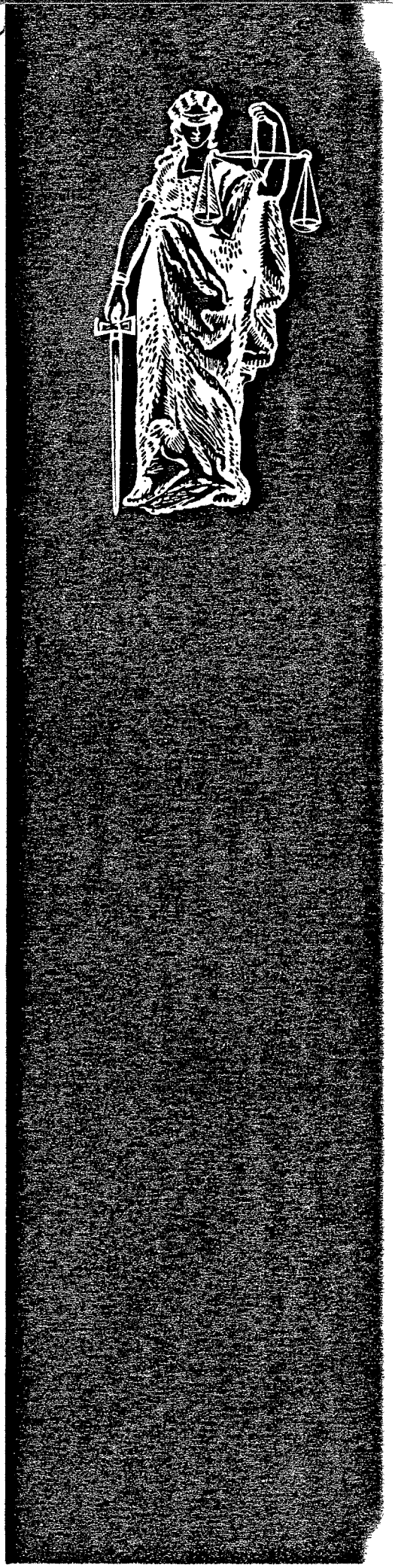
(1) IN GENERAL.—A private property owner is entitled to receive compensation in accordance with this section for any reduction in the value of property owned by the private property owner, that—

(A) is a consequence of a limitation on an otherwise lawful use of the property imposed by a final agency action; and

(B) is measurable and not negligible.

(2) REDUCTIONS DEEMED NOT NEGLIGIBLE.—For purposes of paragraph (1)(B), a reduction in the value of property of 10 percent or more is deemed not negligible.

Jem12A-C

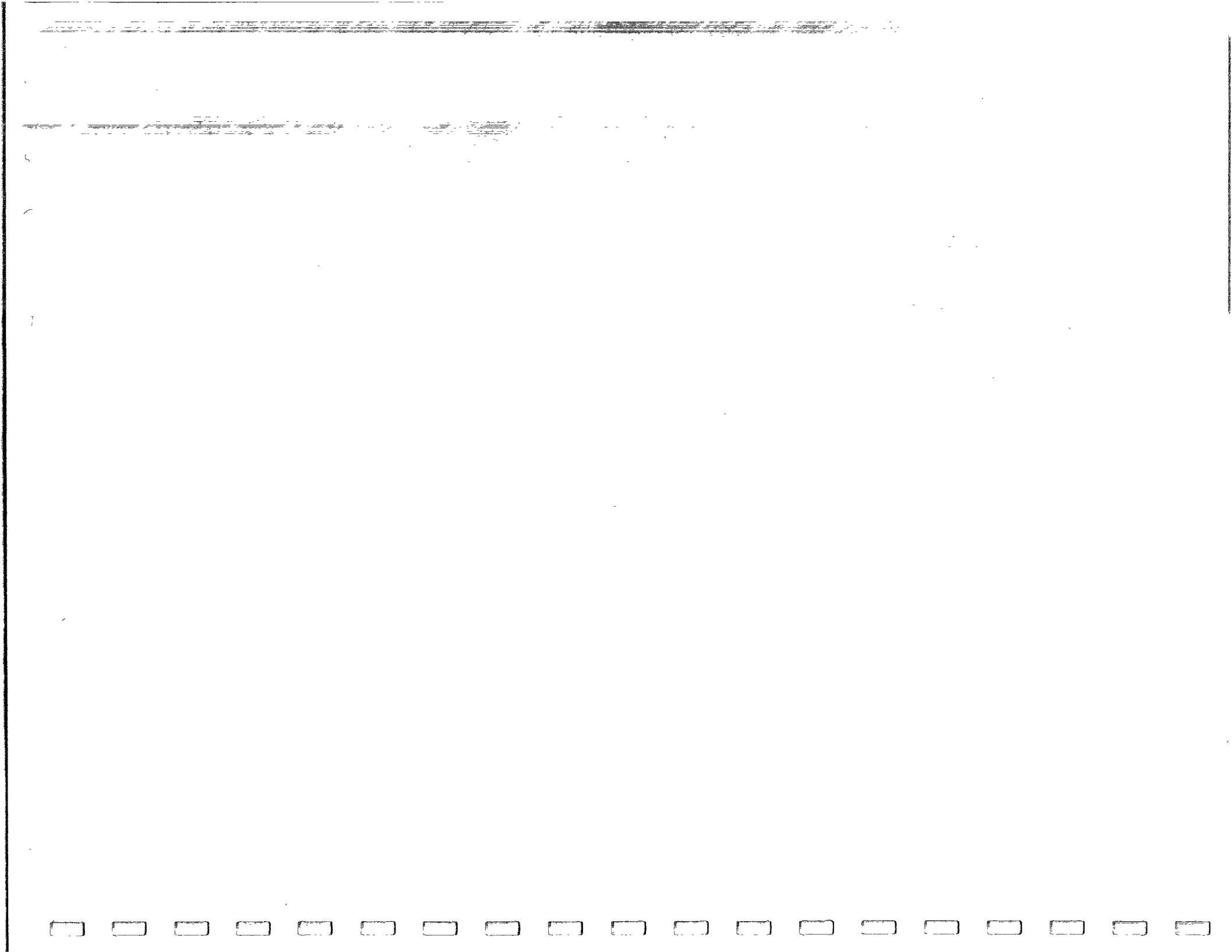


# Proposed Long Range Plan for the Federal Courts

Draft for Public Comment

Committee on Long Range Planning
Judicial Conference of the United States

November 1994



(Cite as: 59 Brook. L. Rev. 841)

Brooklyn Law Review
Fall, 1993

Symposium: Reinventing Civil Litigation: Evaluating Proposals For Change

# *841 IGNORANCE AND PROCEDURAL LAW REFORM: A CALL FOR A MORATORIUM

Stephen B. Burbank [FNa1]

Copyright (c) 1993 by the Brooklyn Law Review; Stephen B. Burbank

In 1881, Oliver Wendell Holmes, Jr. observed that "[i]gnorance is the best of law reformers. People are glad to discuss a question on general principles, when they have forgotten the special knowledge necessary for technical reasoning." [FN1] In 1982, I concluded a study of the Rules Enabling Act of 1934 [FN2] with a question for federal rulemakers, namely, whether "ignorance can continue to be 'the best of law reformers.' " [FN3] My question was prompted by the studied indifference of those responsible for the Federal Rules of Civil Procedure to questions of rulemaking power. In the intervening decade, I also have had occasion to lament their studied indifference to empirical questions. [FN4] The two phenomena are related. The papers for this session provide a welcome occasion to explore that relationship, however briefly.

I want to suggest that by failing to take seriously the task of defining limitations on the rulemaking power, the Supreme Court and those who assist it have encouraged Congress also to ignore the question of appropriate allocation rules. Similarly, by failing to seek empirical evidence on the operation of the Rules or proposed amendments, the rulemakers have both put their workproduct at risk of *842 legislative override and encouraged Congress to initiate its own half-baked reforms. We need a moratorium on procedural law reform, whether by court rule or by statute, until such time as we know what we are doing. The knowledge needed concerns alternative reform strategies and their likely impacts, but we also need to know who is responsible for what.

If this sounds like crisis rhetoric, which Professor Marcus correctly suggests can be overblown, self-serving or both, [FN5] so be it. It is difficult, however, not to sense a crisis in federal procedural reform when the Chief Justice's letter transmitting the 1993 amendments to the Federal Rules disclaimed any implication "that the Court itself would have proposed these amendments in the form submitted," [FN6] and when four other Justices indicated their agnosticism about, [FN7] lack of competence to evaluate [FN8] or disagreement with, [FN9] one or more of the amendments. When a majority of the Supreme Court has washed its hands of proposed Federal Rules, and when some of the Justices have aired the dirty linen, what is it that should restrain

Congress from responding to those who wish to do the same?

It cannot be Congress' confidence that those who draft the Rules are alert to the limitations on the rulemaking power contained in the Enabling Act. Ignorance on that score has persisted despite a serious effort to invigorate and clarify the desired scheme of allocation in the legislative history of the 1988 overhaul of the Enabling Act. [FN10] To be sure, there has *843 been progress, including one Reporter's acknowledgement that separation of powers is an Enabling Act concern, [FN11] the Supreme Court's willingness, for the first time since Sibbach v. Wilson & Co., [FN12] to take at least somewhat seriously an Enabling Act challenge to a Federal Rule (Rule 11), [FN13] the Court's refusal to transmit proposed amendments because of foreign relations concerns [FN14] and the acknowledgement by the Advisory Committee that one of its proposals may transgress the Enabling Act's limitations. [FN15] There is still no consensus among the rulemakers, however, about the nature and scope of the limitations on their power. In the absence of consensus, the Advisory Committee is apt to equate controversy with politics, which is for Congress, [FN16] and the statement of controversial issues that the Supreme Court now expects to receive with rulemaking proposals [FN17] is apt to tempt Justices to "discuss a *844 question on general principles [even] when they [acknowledge that they] have forgotten the knowledge necessary for technical reasoning." [FN18]

Perhaps, however, Congress should stay its hand because, although the rulemakers have no shared sense of the limitations on their power, in Professor Marcus' words, they approach innovations with "neutrality and care." [FN19] Is that how anyone else would describe the process that yielded the two most notorious Rules in the last decade, Rule 11 as amended in 1983 and Rule 26 as amended in 1993?

First, as to care, amended Rule 11 was promulgated in a virtual empirical vacuum, [FN20] but with numerous warnings from the bar about its potential costs. [FN21] I applaud the rulemakers' willingness to consider and propose additional amendments and to seek empirical evidence in the process, but they did not exactly volunteer. [FN22] Moreover, this irresponsible experiment with court access [FN23] was in place for ten years.

*845 And what of the provisions for "required disclosures" in the 1993 amendments to Rule 26? [FN24] Do they demonstrate the Advisory Committee's "care?" Again, there was little relevant empirical evidence [FN25] and, indeed, the Committee repeatedly rejected pleas to stay its hand pending the evaluation of experience under local rules. [FN26] Having once abandoned ship, [FN27] the Committee was apparently persuaded to reboard by the view that it "had a duty to provide leadership in light of its study and hearings," [FN28] by expressed doubt that ongoing experimentation would yield any useful empirical data [FN29] and by the argument that a national rule would be necessary to effect "the cultural change the Committee sought." [FN30] What the *846 Committee's "study" involved, other than

thought experiments by judges and law professors and consideration of some anecdotal experiences, [FN31] and what light the hearings shed to dispel the massive opposition of the practicing bar [FN32] are not clear. Moreover, one would have thought both that care in drafting should produce an easily comprehensible rule and that a vehicle of cultural change should not be riddled with escape hatches. [FN33]

Second, as to neutrality, Professor Marcus and I are in substantial agreement, which is to say that from my perspective he is dealing with a number of straw men (and women). We both know the difference between the inevitable non-neutrality of procedure and the notion that the rulemakers are or might as well be animated by an overtly political agenda. [FN34] We also know that no responsible scholar who has seriously considered the issue of non-transubstantive procedure proposes a revolutionary reform. The impact of the critique is, indeed, "relatively modest." [FN35] I agree with Professor Marcus--indeed, I have been at pains to point out [FN36]--that "[i]t does not reject the general idea of a common model of procedures for most or all cases, but only asks that special circumstances be noted." [FN37]

*847 Here, I think, is the rub. For although Professor Marcus appears to agree that it makes sense to consider "the likely effects of a change, including possible gains and losses for identifiable groups," [FN38] and for a judgment to be made "whether some adjustment in the general procedural regime should be undertaken to ameliorate the impact on a particular area," [FN39] he does not tell us who should make that judgment and, if it is the rulemakers, how they can possibly retain their neutrality. Indeed, Professor Marcus' discussion of the "risks and costs" [FN40] of substance-specific procedure demonstrates one reason why the rulemakers so rarely seek facts bearing on the impact of their proposals and why Professor Carrington advocated a "veil of ignorance" [FN41] in rulemaking. [FN42]

If neutrality is not to be a prescription for ignorance, the rulemakers must have other sources of information about the likely impact of proposed Federal Rules or amendments that will serve as a surrogate for empirical work. Three possibilities come to mind: the collective experience and wisdom of the rulemakers, information provided through written comments and public hearings and the fruits of scholarly inquiry. It seems to me that the rulemakers' own knowledge base has been shrinking, or should I say narrowing, that their professed distaste for politics and unwillingness to share power have consequentially diminished the utility of public comment and that the nature of scholarship in the aid of legal reform has changed depressingly little since the days when Charles Clark was rewriting the Enabling Act as a scholar to suit his purposes as a rulemaker. [FN43]

Professor Marcus is correct that the original Federal Rules were drafted "by a group of elite lawyers and law professors who acted with little empirical evidence." [FN44] They were, however, people of substantial practical experience [FN45] concerned *848 about rules that would work for lawyers and their clients while serving

what Professor Garth calls "the universal principles of the profession." [FN46] That seems to be the view Justice White takes of the current rulemaking group or at least so one might infer from his professed reluctance, as one long away from trial practice "to second-guess the careful work of the active professionals manning the rulemaking committees." [FN47] Active at what profession and serving whose interests? [FN48] Does neutrality include the willingness to subordinate the interests of the judiciary narrowly viewed when they are in conflict with other interests traditionally valued, including by the organized bar? [FN49] Is that the lesson of Rule 11, of sanctions in general, of court-annexed arbitration or of managerial judging? [FN50]

Although drafts of the original Federal Rules were distributed for comment, [FN51] in recent years the rulemaking *849 process has come to resemble the legislative process. [FN52] Professor Stempel believes that greater assimilation is called for. [FN53] I am not so sure.

The legislative process is, after all, an overtly political process, and a visible participant in a political process may, as Professor Chayes suggested of judges involved in public law litigation, find it difficult to sustain her disinterestedness. [FN54] The rulemakers' current strategies of burying their heads, dismissing arguments with which they disagree as special pleading or leaving it for Congress to second-guess them if it chooses to do so on "political" grounds [FN55] are hardly satisfactory. Yet, just as empirical data have been an effective antidote to crisis rhetoric in recent years--as Professor Marcus points out [FN56]--so could they provide a neutral counter to special pleading in the future. Moreover, perhaps we should not give up on the profession's ability to reassert the primacy of "universal principles" [FN57] over narrow practice interests. In any event, the more we fashion the rulemaking process in Congress' image, the more Congress will be tempted to second- *850 guess the product of that process or to preempt it. [FN58] In other words, I agree with Professor Marcus that "neutrality is at least a pursuable goal in designing procedures for civil litigation." [FN59] The trick is to be candid in identifying policy choices and clear about the allocation of power to make them. [FN60]

As one whose work is cited twice in uncomfortably close proximity to Professor Marcus' characterizations of criticisms or commentary as "heated," [FN61] I should probably have better sense than to dilate on the impoverishment of current procedural scholarship. It is not a new story, [FN62] which may be answer enough to Professor Stempel's attempt to use civil procedure textbooks as evidence of the vibrancy of the old paradigm. [FN63] Another look at those textbooks, however, should suffice to drive from his mind the curious notion, at least as applied to procedure, that "constitutional rights of federalism, historically ... have not been given the same force as separation of powers principles." [FN64] If that were true, Sibbach v. Wilson & Co. [FN65] and Hanna v. Plumer [FN66] might have come out the other way and we might not be here today. [FN67]

From this perspective, the teeth gnashing and general hysteria that have greeted the Civil Justice Reform Act of 1990 ("CJRA") [FN68] in some quarters are mystifying if not downright funny. What is a member of Congress who hears that "[t]he reigning sensibility for fifty years of federal rulemaking has been an ethos of elitism and secrecy" [FN69] to make of the charge that the CJRA was "stealth legislation"? [FN70] If that same *851 legislator knows something about the present composition of the rules committees, [FN71] how should she react to criticisms of the Brookings Task Force, [FN72] and why in any event should she care since it did not enact anything? [FN73] Should she be moved by criticisms that the legislation is founded on a questionable empirical base [FN74] if she knows the history of the 1993 amendments to Rule 26? [FN75] Should she be moved by criticisms that it will "transform the reigning procedural aesthetic of simplicity and uniformity" [FN76] if she knows that, as a result of a vast underbrush of local rules and standing orders, the supposed aesthetic has nothing to do with reality? [FN77] And what about the claim that the statute violates the separation of powers? [FN78] Is it Sibbach or Hanna that so exalts the allocation of lawmaking power between the branches? [FN79]

*852 Please do not misapprehend. I am no fan of the CJRA or of the process by which it was passed. In fact, I have found it very difficult to read, let alone to take seriously. Professor Robel's paper suggests that I have been on the right track, [FN80] although some of the questionable local rules promulgated under the CJRA's supposed authority, which she analyzes in another paper, should be taken very seriously. [FN81]

Senator Biden is not a captive of the insurance industry [FN82] any more than he is the son of a Welsh coal miner. [FN83] He is a politician who wanted a statute on civil justice reform. After some nervous moments, the end product was quite innocuous. Against a background of the rulemaker's inattention to the allocation of lawmaking power and to empirical evidence, many criticisms of the CJRA from that quarter have the odor of sour grapes. [FN84] Moreover, to the extent that the Act as finally passed is seen as an attempt to fill an empirical vacuum or an *853 expression of distrust in the rulemaking process, [FN85] Justice Scalia's dissent can only flag the 1993 amendments to Rule 26 as salt in Senator Biden's wounds. [FN86]

I am not sure that I agree with Professor Stempel's prediction that "the judicial branch and the legal profession at large will regain some of the ground lost." [FN87] I am doubtful because practicing lawyers play such a small role in decisionmaking about the Federal Rules, [FN88] and also because, as Professor Garth suggests, it may no longer make sense to talk about the legal profession in connection with procedural reform. [FN89] Indeed, it may be that the winners in the reforms of the last decade have been the judiciary and some lawyers (and their clients). If so, however, the lesson is not that neutrality and generality are progressive or at least benignly unpredictable, as Professor Marcus, taking a cue from Professor Hazard, [FN90] would have it. [FN91]

Whatever the motivations of the original Advisory Committee, [FN92] the procedural system that group produced was a bonanza for lawyers--lawyers, it is important to note, of all types. A system of open access to the courts is a lawyer-friendly system, [FN93] one that permits lawyers, or at least those who subordinate their clients' interests, not to worry about what Professor Garth calls "the tension--or even contradiction--between the legal profession and legal practice." [FN94] And whatever accounts for the pressure to shrink the litigation pie in recent years, the prospect has meant both that it was more difficult for lawyers to subordinate their clients' interests and that some lawyers (and their clients) would lose. The choices about who wins and who loses typically are not made in Federal Rules; they are made by judges *854 exercising the vast discretion that a system of general rules of procedure reposes in them. [FN95] Remember that Charles Clark and William Howard Taft were dancing cheek-to-cheek. [FN96]

Divisions among lawyer entrepreneurs on questions relating to open access bode ill for the ability of the "organized bar" [FN97] to have consequential impact on civil justice reform, wherever the focus of the reform effort. Worse, experience under the CJRA suggests that, unless local experimentation is tightly controlled, "various sections of the organized bar" may collaborate with the federal judges who appoint them in what Professor Robel calls the "destructi[on] of important procedural values." [FN98]

These phenomena--the growing impotence of the organized bar, the increase in the number of difficult choices federal judges must make in the exercise of their discretion under the national rules and the temptation to make such choices in local rules--are hardly a firm basis on which to predict that Congress will, let alone to believe that it should, leave the field.

Some years ago I half-facetiously asked whether, given the assimilation of the rulemaking process to the legislative process and the pace of proposed amendments, there is "reason to fear that the Federal Rules of Civil Procedure will become a latter day Throop Code." [FN99] There would be nothing facetious about such a question today, particularly with Justice Scalia parting his veil of ignorance to assert that "[c]onstant reform of the federal rules to correct emerging problems is essential." [FN100] The "continuous study of the operation and effect" [FN101] of Federal Rules required by statute need not be, and it should not be, construed as an invitation to "[c]onstant reform." It is *855 time for a breather, for a group that includes rulemakers, members of Congress and members of the bar carefully to review where we have been, where we are going and where we should be going. [FN102] It is time for a moratorium on ignorance and procedural law reform.

FNa1. Robert G. Fuller, Jr., Professor of Law, University of Pennsylvania Law School. This article is a revised version of remarks made at the Symposium. I have profited from discussions with Leo Levin and Richard Marcus.

FN1 OLIVER WENDELL HOLMES, JR., THE COMMON LAW 64 (Mark DeWolfe Howe ed., 1963).

FN2 Act of June 19, 1934, Pub.L. No. 73-415, 48 Stat. 1064. The current version of the Enabling Act is contained in 28 U.S.C. ss 2072-74 (1988 & Supp. III 1991). See also 28 U.S.C. s 2075 (1988) (bankruptcy rules).

FN3 Stephen B. Burbank, The Rules Enabling Act of 1934, 130 U.PA.L.REV. 1015, 1197 (1982) (footnote omitted).

FN4 See, e.g., Stephen B. Burbank, The Transformation of American Civil Procedure: The Example of Rule 11, 137 U.PA.L.REV. 1925, 1927-28, 1934-41, 1957-59 (1989).

FN5 See Richard L. Marcus, Of Babies and Bathwater: The Prospects for Procedural Progress, 59 BROOK.L.REV. 761 (1993).

FN6 H.R.DOC. NO. 74, 103d Cong., 1st Sess. 1 (1993) (letter from William H. Rehnquist to Thomas S. Foley (April 22, 1993)), reprinted in 113 S.Ct. (Preface) 477 (1993).

FN7 See H.R.DOC. NO. 74, supra note 6, at 102 (statement of Justice White), reprinted in 113 S.Ct. (Preface) at 575.

FN8 See H.R.DOC. NO. 74, supra note 6, at 101-02, reprinted in 113 S.Ct. (Preface) at 581.

FN9 See H.R.DOC. NO. 74, supra note 6, at 104 (dissenting statement of Justice Scalia), reprinted in 113 S.Ct. (Preface) at 581. Justice Scalia dissented from the Court's adoption of amendments to Rule 11 (sanctions) and to Rules 26, 30, 31, 33 and 37 (discovery). Justice Thomas joined in full, while Justice Souter joined in the dissent with respect to the discovery rules.

FN10 See H.R.REP. NO. 422, 99th Cong., 1st Sess. 1 (1985); 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, 1029-36; Karen Nelson Moore, The Supreme Court's Role in Interpreting the Federal Rules of Civil Procedure,
FN11 See Burbank, supra note 10, at 1015, 1017 n. 31, 1018-19; Paul D. Carrington, "Substance" and "Procedure" in the Rules Enabling Act, 1989 DUKE L.J. 281, 298.

FN12 312 U.S. 1 (1941).

FN13 See Business Guides, Inc. v. Chromatic Comm'n Enter., Inc., 498 U.S. 533 (1993). But see Ralph U. Whitten, Developments in the Erie Doctrine: 1991, 40 AM.J.COMP.L. 967, 967-70 (1992). "It remains true that the Court has never

invalidated a rule promulgated under the Act." Id. at 970.

FN14 See H.R.DOC. NO. 77, 102d Cong., 1st Sess. 3 (1991) (letter from William H. Rehnquist to Thomas S. Foley (April 30, 1991)); Letter from William K. Suter, Clerk of the Supreme Court, to L. Ralph Mecham, Secretary of the Judicial Conference of the United States (Dec. 11, 1991) (returning proposed amendments to Rules 4, 4.1, 12, 26, 28, 30, and 71A and enclosing documents presenting foreign relations concerns).

FN15 The Advisory Committee Note to the 1993 amendments to Rule 4 is prefaced by a "Special Note" as follows: "Mindful of the constraints of the Rules Enabling Act, the Committee calls the attention of the Supreme Court and Congress to the new subdivision (k)(2). Should this limited extension of service be disapproved, the Committee nevertheless recommends adoption of the balance of the rule...." H.R.DOC. NO. 74, supra note 6, at 154-55, reprinted in 113 S.Ct. (Preface) at 631.

FN16 See Advisory Committee on the Federal Rules of Civil Procedure, Minutes of Committee Meeting 4-5 (April 13-15, 1992) [hereinafter April 1992 Minutes]. "Unless there is consensus about the limits of the rulemaking function, however, it is doubtful that all the procedural safeguards in the world will prevent controversy where it counts--in Congress--because the rulemakers' reaction to controversy in the lawmaking process will necessarily continue to be ad hoc." Burbank, supra note 3, at 1195.

FN17 The Advisory Committee was informed in February 1992 "that the Court would in the future like a memorandum explaining the contentious issues resolved." Advisory Committee on the Civil Rules, Minutes of Committee Meeting 1 (February 21, 1992) [hereinafter February 1992 Minutes]. Appendix H to the Judicial Conference Rules materials for September 1992 is a document entitled Proposed Rules Amendments Generating Substantial Controversy.

FN18 See HOLMES, supra note 1, at 64. Never having specialized in trial practice, I began at the level of expertise (and of acquiescence in others' proposals) with which Justice Douglas ended. Both categories of revision on which I remark today, however, seem to me not matters of expert detail, but rise to the level of principle and purpose that even Justice Douglas in his later years continued to address. H.R.DOC. NO. 74, supra note 6, at 110, reprinted in 113 S.Ct. (Preface) at 587.

FN19 Marcus, supra note 5, at 805.

FN20 See Burbank, supra note 4, at 1927-28.

FN21 See id. at 1955.

FN22 Rule 11 was discussed again. It was noted that the anger level in the bar is high. It was again noted that the criticism is impressionistic. It was also observed that

the furor is different than that bearing on Rule 23 in 1966 with respect to the number and identity of persons involved. It was also urged that the Committee should strive to be sufficiently receptive to the concerns of others that people will not generally think it necessary or desirable to go to Congress for help. Advisory Committee on the Civil Rules, Committee Minutes 53-54 (April 27-29, 1989).

FN23 "Theory is an irresponsible basis for lawmaking about something as important as access to court, and it is especially irresponsible when the lawmaking involves judicial amendment of a Rule that, in part because of access concerns, only barely escaped the bright light of the democratic process." Burbank, supra note 4, at 1947-48; see also id. at 1962.

FN24 See H.R.DOC. NO. 74, supra note 6, at 28, reprinted in 113 S.Ct. (Preface) at 680.

FN25 The Advisory Committee Note states: The rule is based upon the experience of district courts that have required disclosure of some of this information through local rules, court-approved standard interrogatories, and standing orders.... While far more limited, the experience of the few state and federal courts that have required pre-discovery exchange of core information ... indicates that savings in time and expense can be achieved.... H.R.DOC. NO. 74, supra note 6, at 94, reprinted in 113 S.Ct. (Preface) at 702.

Yet, the information considered by the Committee was essentially anecdotal, and it was not extensive. See, e.g., Advisory Committee on the Civil Rules, Minutes of the Committee Meeting 5, 8 (November 17-18, 1989); Advisory Committee on the Civil Rules, Minutes of the Committee Meeting 2 (Nov. 29-Dec. 1, 1990); Linda S. Mullenix, Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking, 69 N.C.L.REV. 795, 810-20, 821 (1991).

FN26 See Advisory Committee on the Civil Rules, Minutes of the Committee Meeting 1 (May 22-24, 1991); April 1992 Minutes, supra note 16, at 7; Mullenix, supra note 25, at 816-17 n. 114; Laurens Walker, A Comprehensive Reform for Federal Civil Rulemaking, 61 GEO.WASH.L.REV. 455, 458-59 (1993); see also infra note 30.

FN27 See February 1992 Minutes, supra note 17, at 4.

FN28 April 1992 Minutes, supra note 16, at 7.

FN29 See id.

FN30 Id. The Committee agreed, however, that "the national plan [should] be subject to local variation." Id. Thus, amended Rule 26(a)(1) begins: "Except to the extent otherwise stipulated or directed by order or local rule, a party shall, without awaiting a discovery request, provide to other parties...." H.R.DOC. NO. 74, supra note 6, at

203, reprinted in 113 S.Ct. (Preface) at 680. Professor Stempel asserts that this feature of Rule 26(a)(1) "reduc[es] the force of th[e] objection," made by Justice Scalia, that "[a]ny major reform of the discovery rules should await completion of the pilot programs authorized by Congress." H.R.DOC. NO. 74, supra note 6, at 109, reprinted in 113 S.Ct. (Preface) at 586. Yet, local variation under the Rule requires that "a court act[ ] affirmatively to impose other requirements or indeed to reject all such requirements for the present," H.R.DOC. NO. 74, supra note 6, at 226, reprinted in 113 S.Ct. (Preface) at 702, and the Committee has provided little guidance for the exercise of the discretion conferred. Neither that aspect nor the ability of the parties to stipulate out of Rule 26(a)(1) bodes well for controlled experimentation. See Rhonda McMillon, ABA Seeks Delay in Amending Federal Discovery Rules, A.B.A.J., Sept. 1993, at 119.

FN31 See supra note 25 and accompanying text. "Lawyers, including judges and law professors, have been lazy about subjecting their hunches--which in honesty we should admit are often little better than prejudices--to systematic empirical testing." Richard A. Posner, The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations, 53 U.CHI.L.REV. 366, 367 (1986).

FN32 See Marcus, supra note 5, at 810.

FN33 See A. Leo Levin, Beyond Techniques of Case Management: The Challenge of the Civil Justice Reform Act of 1990, 68 ST. JOHN'S L.REV. (forthcoming 1993); see also McMillon, supra note 30, at 119 (quoting report recommending ABA policy that predicts adverse impact on CJRA experimentation process "as litigants and courts struggle with the meaning and impact of the new national rules").

FN34 See, e.g., Stephen B. Burbank, The Costs of Complexity, 85 MICH.L.REV. 1463, 1472-73 (1987) (book review).

FN35 Marcus, supra note 5, at 778.

FN36 See, e.g., Burbank, supra note 4, at 1940; Stephen B. Burbank, Of Rules and Discretion: The Supreme Court, Federal Rules and Common Law, 63 NOTRE DAME L.REV. 693, 716-17 & n. 172 (1988).

FN37 Marcus, supra note 5, at 778.

FN38 Id. at 775.

FN39 Id.

FN40 Id. at 779.

FN41 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, 2079 (1989).

FN42 See Burbank, supra note 4, at 1934-41.

FN43 See Burbank, supra note 3, at 1136-37, 1186.

FN44 Marcus, supra note 5, at 782.

FN45 See Stephen N. Subrin, How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective, 135 U.PA.L.REV. 909, 971-72 (1987).

FN46 Bryant G. Garth, From Civil Litigation to Private Justice: Legal Practice at War with the Profession and its Values, 59 BROOK.L.REV. 931, 959 (1993) (identifying "the traditional legal values asserted by the organizations of the legal profession--access, judicial independence, official public courts").

FN47 H.R.DOC NO. 74, supra note 6, at 101, reprinted in 113 S.Ct. (Preface) at 575.

FN48 See Laura Kaster & Kenneth Wittenberg, Rulemakers Should Be Litigators, NAT'L L.J., Aug. 17, 1992, at 15 (noting small number of practicing lawyers on Advisory Committee).

FN49 See Burbank, supra note 34, at 1476-83; cf. Burbank, supra note 3, at 1191 ("But there is reason to fear that if the rulemakers are left to make choices in such areas [between procedure and substance], and whatever the purpose of the dichotomy, they will choose to advance those policies that are their special province and to subordinate those that are not."). Of course, I agree with Professor Walker that "federal courts are operated for the benefit of the parties and society as a whole, not for the benefit of attorneys." Walker, supra note 26, at 478.

FN50 See Burbank, supra note 34, at 1476-87. On managerial judging, see also Marcus, supra note 5, at 790-94.

FN51 The original Advisory Committee produced two preliminary drafts, one in 1936 and one in 1937. Thousands of copies were printed. Everybody in the country had an opportunity to examine them. At the suggestion of the Attorney General, the Federal judges throughout the country appointed local committees of the bar, which have worked on this problem. Thousands of suggestions came to the advisory committee as a result of these two drafts. Hearing on S.J.Res. 281 Before a Subcomm. of the Senate Comm. on the Judiciary, 75th Cong., 3d Sess. 3-4 (1938). But see Jeffrey W. Stempel, New Paradigm, Normal Science, or Crumbling Construct? Trends in Adjudicatory

Procedure and Litigation Reform, 59 BROOK.L.REV. 659, 667 (1993) (asserting that committee "deliberated in relative anonymity before producing a fully developed code of civil procedure").

FN52 See 28 U.S.C. s 2073 (1988); Stephen B. Burbank, Sanctions in the Proposed Amendments to the Federal Rules of Civil Procedure: Some Questions About Power, 11 HOFSTRA L.REV. 997, 998-99 n. 3 (1983); Mullenix, supra note 25, at 830-34.

FN53 See Stempel supra note 51, at 762. He also advocates more involvement by the Supreme Court. Id. at That is hardly the Court's present inclination. See supra text accompanying notes 6-9. Moreover, I am doubtful that the Justices have either the time or expertise to make a useful contribution, and I fear that, except when they are agnostic about a proposal, see supra text accompanying note 7, a congressional veto entails some cost to the institution.

FN54 "Can the disinterestedness of the judge be sustained, for example, when he is more visibly a part of the political process? Will the consciously negotiated character of the relief ultimately erode the sense that what is being applied is law?" Abram Chayes, The Role of the Judge in Public Law Litigation, 89 HARV.L.REV. 1281, 1309 (1976).

FN55 See Stephen B. Burbank, The Reluctant Partner: Making Procedural Law for International Civil Litigation, 57 LAW & CONTEMP.PROBS. (forthcoming 1994). For a recent example of some of these techniques from a member of the Advisory Committee, see Ralph K. Winter, Foreword: In Defense of Discovery Reform, 58 BROOK.L.REV. 263 (1992).

FN56 See Marcus, supra note 5, at 762. Civil justice issues involve value choices--and that means political choices. But an enhanced knowledge base can rescue us from a debate dominated by bogus questions and fictional facts." Marc Galanter, News From Nowhere: The Debased Debate on Civil Justice, 71 DENV.U.L.REV. 77, 102 (1993).

FN57 See supra text accompanying note 46.

FN58 Accord Walker, supra note 26, at 463.

FN59 Marcus, supra note 5, at 773.

FN60 See, e.g., Burbank, supra note 34, at 1473.

FN61 See Marcus, supra note 5, at 776.

FN62 See, e.g., GEOFFREY C. HAZARD, JR., RESEARCH IN CIVIL PROCEDURE (1963).

FN63 See Stempel, supra note 51, at 688.

FN64 Id. at 415.

FN65 312 U.S. 1 (1941).

FN66 380 U.S. 460 (1965).

FN67 See, e.g., Burbank, supra note 3, at 1028-35, 1187.

FN68 28 U.S.C. ss 471-82 (Supp. III 1991).

FN69 Mullenix, supra note 25, at 837. But see supra note 51 and accompanying text (noting wide distribution of drafts of original Federal Rules).

FN70 Linda S. Mullenix, The Counter-Reformation in Procedural Justice, 77 MINN.L.REV. 375, 397 (1992). The charge is, in any event, silly. See Jeffrey J. Peck, "Users United:" The Civil Justice Reform Act of 1990, 54 LAW & CONTEMP.PROBS. 105, 109, 116-17 (1991).

FN71 See supra note 48 and accompanying text.

FN72 See Mullenix, supra note 70, at 406-07.

FN73 The same question might be asked about the advisory groups created under the Act. See Levin, supra note 33; Stempel, supra note 51, at 733 ("A frequent complaint voiced by practitioners serving on Advisory Groups is the unreceptiveness of the bench to their ideas."). But see Linda S. Mullenix, Unconstitutional Rulemaking: The Civil Justice Reform Act and Separation of Powers, 77 MINN.L.REV. 1283, 1298 (1993) ("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 engaged in procedural rulemaking."). More astonishing than this assertion is Professor Mullenix's conclusion that Congress "violate[d] separation-of-power doctrine by impermissibly infringing on the power, prerogatives, and independence of the federal courts to promulgate procedural rules." Id. For a more sober judgment, see LAUREN K. ROBEL, FRACTURED PROCEDURE: THE CIVIL JUSTICE REFORM ACT OF 1990 (forthcoming). See also infra text accompanying note 79.

FN74 See Mullenix, supra note 70, at 396-97 & n. 90; Avern Cohn, A Judge's View of Congressional Action Affecting the Courts, 54 LAW & CONTEMP.PROBS. 99, 101 (1991). Again, the same question might be asked about the work of advisory groups under the Act. But see Mullenix, supra note 73, at 1287 ("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.").

FN75 See supra text accompanying notes 24-33.

FN76 Mullenix, supra note 73, at 1287.

FN77 See Burbank, supra note 4, at 1929, 1941. Professor Mullenix admits that "[t]oday, federal practice and procedure is impossibly arcane." Mullenix, supra note 70, at 380.

FN78 See generally Mullenix, supra note 73.

FN79 "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." Sibbach v. Wilson & Co., 312 U.S. 9 (1941) (footnote omitted). "For the 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 pleading in those courts." Hanna v. Plumer, 380 U.S. 460, 472 (1965). Professor Mullenix's attempt to deal with these cases is based on a fundamentally flawed view of the Rules Enabling Act and its antecedent history. See Mullenix, supra note 73, at 1327-29. Indeed, the most astonishing aspect of her assault on the Civil Justice Reform Act is the attempt to enlist the Rules Enabling Act in aid of her constitutional thesis. See, e.g., Mullenix, supra note 73, at 1321-37. Senator Walsh, who prevented passage of the legislation from 1915 until 1934, must be spinning in his grave. See Burbank, supra note 3, at 1063-98. More important, the main sponsor of the legislation, Senator Cummins, would be shocked. "It is probably true that, in the absence of any legislation, courts have the inherent right to make rules for the government of the matters mentioned in the bill: but this is purely an academic question because the Congress has legislated upon the subject, withdrawing that power, insofar as the district courts are concerned." S.REP. NO. 1174, 69th Cong., 1st Sess. 2 (1926); see also id. at 7- 9. On Cummins and the importance of the 1926 Senate Report to the interpretation of the Enabling Act, see Burbank, supra note 3, at 1071-92, 1098-1101; Peck, supra note 70, at 115. Finally, all of us (including Professor Mullenix) should remember that the Enabling Act was revised in 1988. See supra text accompanying note 10.

FN80 See Lauren K. Robel, Grass Roots Procedure: Local Advisory Groups and the Civil Justice Reform Act of 1990, 59 BROOK.L.REV. 879 (1993).

FN81 See, e.g., ROBEL, supra note 73.

FN82 See Marcus, supra note 5, at 804. But see Cohn, supra note 74, at 103 ("it

appears that, given the financing of Justice for All, the precursor of the Biden Bill, the bill is being driven by special interests.").

FN83 See William Safire, On Language: No Heavy Lifting, N.Y. TIMES, Sept. 27, 1987, s 6, at 12.

FN84 Cf. Robel, supra note 80, at 883 n. 22 (quoting federal judge's remark, "Being told you're inefficient by Congress is like being told you're ugly by a toad.").

FN85 See, e.g., Marcus, supra note 5, at 852-53; Peck, supra note 70, at 113- 16.

FN86 See H.R.DOC. NO. 74, supra note 6, at 108-09, reprinted in 113 S.Ct. (Preface) at 584-86; see also supra note 26 and accompanying text.

FN87 Stempel, supra note 51, at 735.

FN88 See supra text accompanying notes 44-50.

FN89 See generally Garth, supra note 46.

FN90 See Geoffrey C. Hazard, Jr., Discovery Vices and Trans-Substantive Virtues in the Federal Rules of Civil Procedure, 137 U.PA.L.REV. 2237, 2247 (1989).

FN91 See Marcus, supra note 5, at 773, 775, 785.

FN92 See id. at 765.

FN93 See generally Garth, supra note 46.

FN94 Id. at 931.

FN95 See, e.g., Burbank, supra note 34, at 1473-76.

FN96 See Stephen B. Burbank, The Chancellor's Boot, 54 BROOK.L.REV. 31, 33- 34 (1988).

FN97 Garth, supra, note 46, at 932.

FN98 ROBEL, supra note 73.

FN99 Burbank, supra note 52, at 999 n. 3. "This Code ... was attacked by bar committees for intermingling substantive and procedural provisions, and for being too long, too complicated, 'too minute and technical, and lack[ing] elasticity and adaptability.' " Subrin, supra note 45, at 940 (footnote omitted).

FN100 H.R.DOC. NO. 74, supra note 6, at 109-110, reprinted in 113 S.Ct. (Preface) at 586-87.

FN101 28 U.S.C. s 331 (1988).

FN102 The study group I have in mind, which might take the form of a national commission, should consider the interesting proposal recently made by Professor Walker, among others. See generally Walker, supra note 26.

Item 13-14

# ORAL PRESENTATIONS