COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

File Copy

Boston, Massachusetts
June 14-15, 1999

AGENDA
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
JUNE 14-15, 1999

1. Opening Remarks of the Chair

   - Report on actions taken at the Judicial Conference
   - Federal Judicial Center study of courts' practices governing disclosure of parties' financial interests

2. **ACTION** — Approval of Minutes

3. Report of the Administrative Office

   A. Legislative Actions

   B. Administrative Actions

4. Report of the Federal Judicial Center

5. Report of the Advisory Committee on Appellate Rules

6. Report of the Advisory Committee on Civil Rules (Separate Binder)

   A. **ACTION** — Proposed amendments to Rules 4, 5, 12, 14, 26, 30, 34, and 37 and Admiralty Rules B, C, and E for approval and transmission to the Judicial Conference

      i. Report of the chair
      ii. Proposed amendments to Rules 4 and 12
      iii. Proposed amendments to Admiralty Rules and Rule 14
      iv. Discovery package
      v. Summary of public comments

   B. **ACTION** — Proposed amendments to Rules 5(b), 6(e), and 77(d) for consideration to be published for comment

   C. Mass Torts Report Submitted to the Chief Justice (Report mailed separately)

   D. Minutes and other informational items

7. Report of the Advisory Committee on Bankruptcy Rules

   A. **ACTION** — Proposed amendments to Rules 1017(e), 2002(a), 4003(b), 4004(c), and 5003(e) for approval and transmission to the Judicial Conference

   B. Minutes and other informational items

8. Report of the Advisory Committee Criminal Rules

9. Report of the Advisory Committee on Evidence Rules

   A. **ACTION** — Proposed amendments to Rules 103, 404, 701, 702, 703, 803(6), and 902 for approval and transmission to the Judicial Conference

   B. Minutes and other informational items

10. Minutes of Subcommittee on Attorney Conduct Rules Meeting

11. Local Rules Project (Oral Report)

12. Report of Style Subcommittee (Oral Report)

13. Report of Technology Subcommittee

14. Long Range Planning Issues

15. Next Committee Meeting: January 6-7, 2000

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

Chair:

Honorable Anthony J. Scirica
United States Circuit Judge
22614 United States Courthouse
Independence Mall West, 601 Market Street
Philadelphia, Pennsylvania 19106

Members:

Honorable Phyllis A. Kravitch
United States Circuit Judge
Elbert P. Tuttle Court of Appeals Building
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Honorable A. Wallace Tashima
United States Circuit Judge
Richard H. Chambers Court of Appeals Building
125 South Grand Avenue
Pasadena, California 91105-1652

Honorable William R. Wilson, Jr.
United States District Judge
600 West Capitol Avenue, Room 149
Little Rock, Arkansas 72201

Honorable James A. Parker
United States District Judge
United States Courthouse
333 Lomas NW, Chambers 760
Albuquerque, New Mexico 87102

Honorable Frank W. Bullock, Jr.
Chief Judge, United States District Court
Post Office Box 3223
Greensboro, North Carolina 27402

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE (CONTD.)

Honorable Morey L. Sear
Chief Judge, United States District Court
United States Courthouse
500 Camp Street, C-256
New Orleans, Louisiana 70130

Honorable E. Norman Veasey
Chief Justice, Supreme Court of Delaware
Carvel State Office Building
820 North French Street, 11th Floor
Wilmington, Delaware 19801

Professor Geoffrey C. Hazard, Jr.
Director, The American Law Institute
(Trustee Professor of Law
University of Pennsylvania Law School)
4025 Chestnut Street
Philadelphia, Pennsylvania 19104-3099

Sol Schreiber, Esquire
Milberg, Weiss, Bershad, Hynes & Lerach
One Pennsylvania Plaza, 49th Floor
New York, New York 10119-0165

Gene W. Lafitte, Esquire
Liskow & Lewis
50th Floor, One Shell Square
701 Poydras Street
New Orleans, Louisiana 70139

Patrick F. McCartan, Esquire
Jones, Day, Reavis & Pogue
North Point, 901 Lakeside Avenue
Cleveland, Ohio 44114

Charles J. Cooper, Esquire
Cooper, Carvin & Rosenthal
1500 K Street, N.W., Suite 200
Washington, DC 20005

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE (CONTD.)

Deputy Attorney General (ex officio)
Honorable Eric H. Holder, Jr.
4111 U.S. Department of Justice
10th & Constitution Avenue, N.W.
Washington, D.C. 20530
ATTN: Neal K. Katyal, Advisor to the
Deputy Attorney General

Reporter:

Professor Daniel R. Coquillette
Boston College Law School
885 Centre Street
Newton Centre, Massachusetts 02159

Consultants:

Joseph F. Spaniol, Jr., Esquire
5602 Ontario Circle
Bethesda, Maryland 20816-2461

Prof. Mary P. Squiers
Assistant Professor
Boston College Law School
885 Centre Street
Newton , Massachusetts 02159

Bryan A. Garner, Esquire
LawProse, Inc.
Sterling Plaza, 5949 Sherry Lane
Suite 1280, L.B. 115
Dallas, Texas 75225

Secretary:

Peter G. McCabe
Secretary, Committee on Rules of
Practice and Procedure
Washington, D.C. 20544

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

SUBCOMMITTEES

Subcommittee on Style
Judge James A. Parker, Chair
Judge William R. Wilson, Jr.
Professor Geoffrey C. Hazard, Jr.
Bryan A. Garner, Esquire, Consultant
Joseph F. Spaniol, Jr., Esquire, Consultant

Subcommittee on Technology
Gene W. Lafitte, Esquire, Chair
Michael J. Meehan, Esquire (Appellate)
Judge A. Jay Cristol (Bankruptcy)
Richard G. Heltzel, Clerk (Bankruptcy)
Judge John L. Carroll (Civil)
Judge D. Brooks Smith (Criminal)
Judge James T. Turner (Evidence)
Committee Reporters, Consultants

Subcommittee on Attorney Conduct
Professor Daniel R. Coquillette, Chair
Judge Samuel A. Alito, Jr. (Appellate)
Justice John Charles Thomas (Appellate)
Gerald K. Smith, Esquire (Bankruptcy)
R. Neal Batson, Esquire (Bankruptcy)
Judge Lee H. Rosenthal (Civil)
Myles V. Lynk, Esquire (Civil)
Judge John M. Roll (Criminal)
Darryl W. Jackson, Esquire (Criminal)
Judge Jerry E. Smith (Evidence)
Professor Daniel J. Capra (Evidence)

May 18, 1999
Doc. No. 3811

JUDICIAL CONFERENCE RULES COMMITTEES

Chairs

Honorable Anthony J. Scirica
United States Circuit Judge
22614 United States Courthouse
Independence Mall West
601 Market Street
Philadelphia, Pennsylvania 19106

Honorable Will L. Garwood
United States Circuit Judge
903 San Jacinto Boulevard
Suite 300
Austin, Texas 78701

Honorable Adrian G. Duplantier
United States District Judge
United States Courthouse
500 Camp Street
New Orleans, Louisiana 70130

Honorable Paul V. Niemeyer
United States Circuit Judge
United States Courthouse
101 West Lombard Street
Baltimore, Maryland 21201

Honorable W. Eugene Davis
United States Circuit Judge
800 Lafayette Street, Suite 5100
Lafayette, Louisiana 70501

Honorable Fern M. Smith
United States District Judge
United States District Court
P.O. Box 36060
450 Golden Gate Avenue
San Francisco, California 94102

Reporters

Prof. Daniel R. Coquillette
Boston College Law School
885 Centre Street
Newton Centre, MA 02159

Prof. Patrick J. Schiltz
Associate Professor
University of Notre Dame
Law School
Notre Dame, Indiana 46556

Prof. Alan N. Resnick
Hofstra University
School of Law
121 Hofstra University
Hempstead, NY 11549-1210

Prof. Edward H. Cooper
University of Michigan
Law School
312 Hutchins Hall
Ann Arbor, MI 48109-1215

Prof. David A. Schlueter
St. Mary's University
School of Law
One Camino Santa Maria
San Antonio, Texas 78228-8602

Prof. Daniel J. Capra
Fordham University
School of Law
140 West 62nd Street
New York, New York 10023

Item 1

LEONIDAS RALPH MECHAM
Director

CLARENCE A. LEE, JR.
Associate Director

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

WASHINGTON, D.C. 20544

KAREN K. SIEGEL
Assistant Director

WENDY JENNIS
Deputy Assistant Director

Office of
Judicial Conference
Executive Secretariat

May 11, 1999

MEMORANDUM TO PETE LEE, NOEL AUGUSTYN, MIKE BLOMMER, BILL BURCHILL, CHUCK CONNOR, ROSS EISENMAN, PETER MCCABE, AL RESSLER, GEORGE SCHAFER, PAM WHITE, JEFF BARR, TERRY CAIN, DAVE COOK, GREG CUMMINGS, MIKE DOLAN, TOM HNATOWSKI, MARILYN HOLMES, EUNICE JONES, KAREN KREMER, TED LIDZ, ABEL MATTOS, CATHY MCCARTHY, CHARLOTTE PEDDICORD, JOHN RABIEJ, GEORGE REYNOLDS, FRANK SZCZEBAK, AND STEVE TEVLOWITZ

SUBJECT: Comments on the Draft *Report of the Proceedings of the Judicial Conference of the United States*, March 16, 1999 — **ACTION DUE Friday, May 21, 1999**

Attached is the entire draft, or excerpts as appropriate, of the *Report of the Proceedings of the Judicial Conference of the United States* from the March 1999 session. **Please review the document carefully for any errors or omissions.** For your information, we have purposely left out page numbers on internal citations until the document is final.

We very much rely on your responses and would appreciate receiving your comments by telephone, e-mail, or in writing as soon as possible — no later than May 21, 1999. If you have no comments, please let us know.

Thank you.

Wendy

Wendy Jennis

Attachment

COMMITTEE TO REVIEW CIRCUIT COUNCIL CONDUCT AND DISABILITY ORDERS

COMMITTEE ACTIVITIES

The Committee to Review Circuit Council Conduct and Disability Orders reported that the 105th Congress adjourned without enactment of any proposal to amend the Judicial Conduct and Disability Act, 28 U.S.C. § 372(c). A measure passed in the House of Representatives in April 1998 would have amended the Act to provide that any complaint of judicial misconduct or disability filed under the Act that was not dismissed at the outset by the chief judge of the circuit in which the complained-against judge serves would be transferred to another circuit for further complaint proceedings. In April 1997, the Judicial Conference approved a resolution expressing opposition to a similar version of this legislation (JCUS-SEP 97, pp. 81-82). The Committee will continue to monitor legislative developments in this area in the 106th Congress.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

FEDERAL RULES OF CRIMINAL PROCEDURE

Forfeiture Procedures. A proposed new Criminal Rule 32.2 would establish a comprehensive set of forfeiture procedures, consolidating several procedural rules (Rules 7, 31, 32, and 38) currently governing the forfeiture of assets in a criminal case. Under the proposed amendments, the nexus between the property to be forfeited and the offense committed by the defendant would be established during the first stage of the proceedings as part of the sentencing. In the second stage, procedures governing ancillary proceedings are prescribed to determine the claims of any third party asserting an interest in the property. After considering public comments, and making revisions in light of those comments, the Advisory Committee on Criminal Rules recommended, and the Standing Rules Committee concurred, that the Judicial Conference approve proposed new Criminal Rule 32.2 and amendments to Criminal Rules 7, 31, 32, and 38 and transmit them after the Conference's September 1999 session to the Supreme Court for its consideration with the recommendation that they be adopted by the

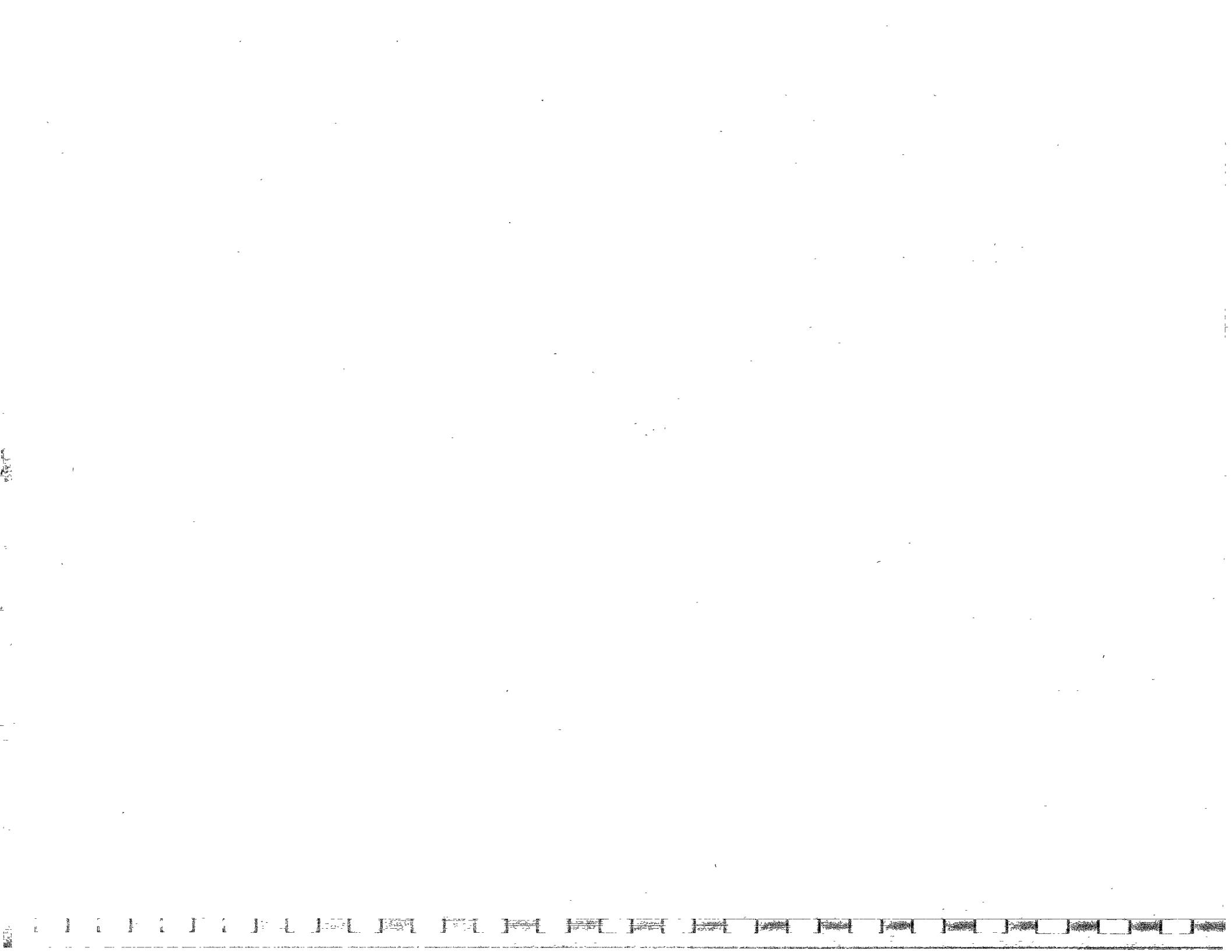
Court and transmitted to Congress in accordance with the law. After failure of a motion to recommit the proposed rule to the Committee for further review, the Judicial Conference approved the Committee's recommendation.

Counsel for Witnesses Appearing Before the Grand Jury. H.R. Conference Report No. 825, 105 Cong. 2d Sess. 1071 (1998), which accompanied the judiciary's fiscal year 1999 appropriations act (Public Law No. 105-277), directs the Judicial Conference to report to the Committees on Appropriations, not later than April 15, 1999, its findings on whether Rule 6(d) of the Federal Rules of Criminal Procedure should be amended to allow a witness appearing before a grand jury to have counsel present. After reviewing extensive historical and current information on this issue, the Advisory Committee on Criminal Rules prepared a report recommending that no action be taken at this time to amend Rule 6(d). The Committee on Rules of Practice and Procedure endorsed the report and recommended its adoption by the Judicial Conference. The Conference adopted and agreed to transmit to Congress the report containing findings and a recommendation that Rule 6(d) of the Federal Rules of Criminal Procedure not be amended at this time to allow a witness appearing before a grand jury to have counsel present.

COMMITTEE ON SECURITY AND FACILITIES

AFTER-HOURS COURTHOUSE SECURITY

Noting that sufficient justification exists to provide any court facility that desires after-hours security coverage with the additional resources, and that the current process for requesting after-hours security is unduly burdensome, the Committee on Security and Facilities recommended that after-hours security be provided as a matter of policy, subject to the availability of funds. The Judicial Conference slightly modified the Committee's recommendation and approved, as a matter of policy, the provision upon request of an after-hours security presence at locations housing full-time judicial officers where judges and employees routinely remain in the building after normal business hours and on weekends or in exigent circumstances, subject to funding availability.



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

ANTHONY J. SCIRICA
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

WILL L. GARWOOD
APPELLATE RULES

ADRIAN G. DUPLANTIER
BANKRUPTCY RULES

PAUL V. NIEMEYER
CIVIL RULES

W. EUGENE DAVIS
CRIMINAL RULES

FERN M. SMITH
EVIDENCE RULES

March 18, 1999

Honorable Rya W. Zobel
Director
Federal Judicial Center
Thurgood Marshall Federal Judiciary Bldg
One Columbus Circle, N.E.
Washington, D.C. 20002-8003

Dear Judge Zobel:

The Committee on Codes of Conduct has asked the rules committees to consider adopting rules similar in nature to Appellate Rule 26.1, which requires parties to disclose certain financial interests to help a judge make a recusal decision.

The rules committees have learned that practices vary widely among the courts on the amount of "financial" information required from parties and on the mechanisms used to obtain this information. Some courts and judges require detailed financial information from the parties, while others require much less information or nothing at all. The courts also use different means to obtain this information. Many judges require parties to complete a financial disclosure form early in the litigation. Other judges have standing orders and a few courts have promulgated local rules of court requiring parties to submit financial disclosure statements.

The Advisory Committees on Appellate, Bankruptcy, Civil, and Criminal Rules are evaluating whether national rules requiring parties to disclose financial interests are necessary, and if so, how detailed the information should be. Accordingly, the rules committees are particularly interested in obtaining data on: (1) the scope of financial information required by courts—including courts of appeals and bankruptcy courts—and judges; and (2) the means used by courts—including courts of appeals and bankruptcy courts—and judges to require parties to submit such information, e.g., local forms, standing orders, local rules, etc. Any other information that the Federal Judicial Center believes would be helpful to the advisory committees on this issue would be welcome. The committees look forward to working with Center staff in developing the survey questionnaires.

We plan to act on this issue at the spring 2000 advisory committee meetings. Under this tentative timetable, the advisory committees would need to review the results of a survey about the first of the year. A status report on the survey's progress would also be helpful at the committees' October-November meetings. At your convenience, please advise me whether the Federal Judicial Center would be interested in undertaking this project. I very much appreciate your consideration of this request.

Sincerely yours,

Anthony J. Scirica

cc: Honorable Carol Bagley Amon
Reporters, Advisory Rules Committees
Professor Daniel R. Coquillette
Peter G. McCabe, Secretary
Marilyn J. Holmes

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

RYA W. ZOBEL
DIRECTOR

TEL 202-273-4160
FAX 202-273-4019

March 25, 1999

Honorable Anthony J. Scirica
Chair
Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
United States Court of Appeals for the Third Circuit
22614 U.S. Courthouse
601 Market Street
Philadelphia, Pennsylvania 19106

Dear Judge Scirica:

In response to yours of March 18th we will be pleased to work with you and the members of the Standing Committee on the study you request. The proposed study of the need for national rules requiring parties to disclose financial interests pertinent to a recusal decision by the judge is consistent with work we have already undertaken for your committee and the Advisory Bankruptcy Rules Committee to determine whether national rules are required to govern attorney conduct in civil and bankruptcy matters.

Your suggested timeframe is also entirely appropriate for the kind of effort we will need to undertake. As you know, it is useful for us to be able to work with a committee liaison and I hope that you will consider so designating a member of your committee. If you will let Jim Eaglin, Director of the Research Division, know who that will be, he will follow-up with your liaison as we design and implement the study. Jim can be reached at (202) 502-4071.

On a more personal note, it was nice to see you again at last week's meeting of the Judicial Conference.

Sincerely,

cc: Honorable Carol Bagley Amon
Reporters, Advisory Rules Committees
Professor Daniel R. Coquillette
Mr. Peter G. McCabe
Mr. John Rabiej
Ms. Marilyn J. Holmes
Mr. James B. Eaglin

Item 2

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

Draft Minutes

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

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

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

Providing support to the committee were: Professor Daniel R. Coquillette, reporter to the committee; Peter G. McCabe, secretary to the committee; John K. Rabiej, chief of the Rules Committee Support Office of the Administrative Office of the United States Courts, Mark D. Shapiro, deputy chief of that office, and Nancy G. Miller, the Administrative Office's judicial fellow.

Representing the advisory committees were:

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

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

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

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

INTRODUCTORY REMARKS

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

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

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

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

APPROVAL OF THE MINUTES OF THE LAST MEETING

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

REPORT OF THE ADMINISTRATIVE OFFICE

Legislative Report

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

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

Administrative Actions

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

REPORT OF THE FEDERAL JUDICIAL CENTER

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

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

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Garwood presented the report of the advisory committee, as set forth in his memorandum and attachments of December 7, 1998. (Agenda Item 5)

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

Committee Notes

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

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

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

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

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

Proposed Effective Date for Local Rules

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

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

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

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

Pending Amendments to the Bankruptcy Rules

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

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

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

Omnibus Bankruptcy Legislation

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

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

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

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

Copyright Rules

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

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

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

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

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

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

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

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

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

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

Discovery Rules

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

Mass Torts

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

Special Masters

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

Local Rules of Court

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

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

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

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

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

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

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Presence of Defense Attorneys in Grand Jury Proceedings

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Restyling of the Criminal Rules

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

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

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

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

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

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

FED. R. EVID. 701-703

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

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

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

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

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

FED. R. EVID. 103

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

FED. R. EVID. 404

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

FED. R. EVID. 803 AND 902

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

DISCLOSURE OF FINANCIAL INTERESTS

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

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

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

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

PROPOSED RULES GOVERNING ATTORNEY CONDUCT

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

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

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

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

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

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

SHORTENING THE RULEMAKING PROCESS

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

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

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

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

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

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

REPORT OF THE STYLE SUBCOMMITTEE

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

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

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

REPORT OF THE TECHNOLOGY SUBCOMMITTEE

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

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

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

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

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

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

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

LOCAL RULES PROJECT

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

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

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

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

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

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

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

NEXT COMMITTEE MEETING

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

Respectfully submitted,

Peter G. McCabe,
Secretary

Item 3A

LEONIDAS RALPH MECHAM
Director

CLARENCE A. LEE, JR.
Associate Director

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
Chief
Rules Committee Support Office

May 13, 1999

MEMORANDUM TO STANDING COMMITTEE

SUBJECT: *Legislative Report*

About 20 bills were introduced in the first five months of the 106th Congress that affect the Federal Rules of Practice and Procedure. A chart showing the status of the rules-related bills is attached.

Representative Howard Coble introduced H.R. 771, an untitled bill, on February 23, 1999, that would undo the 1993 amendments to Civil Rule 30(b) and require that all depositions be recorded by stenographic or stenomask means. A similar bill had been introduced in earlier Congresses. The House Judiciary Subcommittee approved the bill on March 11, 1999. On March 22, Judge Niemeyer sent a letter to Chairman Henry Hyde expressing concern over the bill. (A copy is attached.) Specific information and empirical data on the accuracy and cost of alternative means of recording, including studies by the Federal Judicial Center, were sent to congressional staffers. In addition, the American Bar Association's Litigation Section was alerted to the legislation and is expected to express its concern about the bill. Organizations representing the interests of groups advocating alternative recording means have also weighed in. Nonetheless, it now appears probable that the full House will pass the bill. No parallel bill has been introduced in the Senate. We have advised key congressional staffers in the Senate of our opposition to the bill and will follow-up when the Senate directs its attention to it.

S. 96, S. 461, and H.R. 755 were introduced in the Senate and House, which would establish minimal diversity jurisdiction requirements and special pleading requirements in "Y2K" actions. After consultation with the chairs of the Standing and Civil Rules Committees, Judge Walter Stapleton, chair of the Federal/State Jurisdiction Committee, submitted a statement to the House Judiciary Committee on behalf of the Judicial Conference opposing the pleading requirements on Rules Enabling Act grounds and the class action provision primarily on federalism grounds. At the rules committees' request, Judge Stapleton included a caveat in the statement that the judiciary's position on Y2K legislation should not be construed automatically to bar the extension of minimal diversity to every mass tort.

On May 12, 1999, the House passed its Y2K bill, the "Year 2000 Readiness and Responsibility Act" (H.R. 755). The bill includes the special "fraud" pleading requirements, which were opposed in Judge Stapleton's statement. But instead of a minimal-diversity

provision, the bill directly authorizes class actions to be filed or removed to federal court if the amount in controversy is greater than $1 million. Some categories of predominantly state class actions would be excluded. An offer of judgment provision with no cap was also added. The Senate had earlier devoted three full days on debate of the Y2K legislation. But it could not achieve consensus and further action was deferred indefinitely. The impact of the House's action on the Senate is hard to predict. But it will be difficult, though not impossible, to resurrect the matter in the Senate.

The Senate Judiciary Subcommittee held hearings on the "Class Action Fairness Act of 1999" (S. 353) on May 4, 1999. The bill contains a minimal diversity provision that permits the removal to federal court of any class action filed in state court so long as a single plaintiff resides in a state different from the defendant. The Mass Torts Working Group, which was authorized by the Chief Justice for a one-year period, had been studying potential approaches to handling mass torts, including some limited federalization that could be based on some form of minimal diversity. At the end of the one-year authorization expired, the Working Group recommended in its report to the Chief Justice that an ad hoc committee be appointed to take action on the report, including making recommendations for legislation. In anticipation of the Chief Justice's action regarding the Working Group's recommendations, the judiciary has not taken a position regarding the class action minimal-diversity provision at this time.

S. 353 also contains a provision that would undo the 1993 amendments to Civil Rule 11 and mandate the imposition of sanctions. John Frank, a former member of the Civil Rules Committee, testified before the Senate Judiciary's Subcommittee, and strongly opposed a return to the wasteful satellite litigation generated by the former rule. Several other witnesses concurred in Frank's remarks. We are monitoring the bill closely and will likely submit materials—including a 1995 Federal Judicial Center study on the consequences of revised Rule 11—to the Senate at the appropriate time.

Senator Hatch introduced the "Federal Prosecutor Ethics Act" (S. 250) on January 19, 1999, and Senator Leahy introduced the "Professional Standards for Government Attorneys Act of 1999" (S. 855) on April 21, 1999. Under both bills, the conduct of government attorneys would be subject to state law and rules. But the Attorney General would be authorized under Senator Hatch's bill to prescribe regulations that exempt government attorneys from state coverage to the extent that the state law or rule is inconsistent with federal law or interferes with the effectuation of federal law or policy, including the investigation of violations of federal law. Senator Leahy's bill would require the Judicial Conference to report within one year its recommendations with respect to a federal rule governing communications with represented parties.

On April 28, 1999, Senator Hatch introduced the "21st Century Justice Act of 1999" (S. 899). It is a comprehensive crime bill and consists of more than 1,000 pages. The bill contains multiple provisions that are inconsistent with the Rules Enabling Act. Most of them had been

introduced in earlier Congresses, and written objections are on record. The offending provisions would amend: Criminal Rule 11 to provide victim allocution rights; Evidence Rule 404 to permit consideration of evidence showing the defendant's disposition; Criminal Rule 43 to authorize videoconferencing in sentencing proceedings; Criminal Rule 46 governing forfeiture of a bail bond; Criminal Rule 24 to equalize the number of peremptory challenges between the prosecution and the defense; and Criminal Rule 23 to permit a jury of six. It would also amend the Rules Enabling Act and restructure the composition of the rules committees to include more prosecution-oriented members.

Large comprehensive crime bills have traditionally been dismembered and separately acted upon late in the Congress. At this time, we are monitoring developments. When timely, we will express the Judicial Conference's opposition to these rules-related provisions based on the earlier communications with Congress.

On May 5, 1999, the House passed the "Bankruptcy Reform Act of 1999" (H.R. 833), which is similar to legislation introduced and commented on in the last Congress. A letter from the Director was sent to the House and Senate Judiciary Committees on March 23, 1999, which among other things reiterated the judiciary's opposition to several rules-related provisions. (A copy is attached.) Nonetheless, the House passed the bill retaining these objectionable provisions. At virtually the last minute, however, the reporter to the Bankruptcy Rules Committee persuaded key congressional staffers to revise one of the bills' objectionable provisions dealing with appeal procedures. Under the bill, no time period for the filing of a direct appeal from the bankruptcy court to the court of appeals had been included. The omission was a critical deficiency that would have created terrible problems in bankruptcy. The revision suggested by the reporter in consultation with the chair was adopted in the bill as passed. It generally provides an interim time period subject to change by a future rule amendment. A copy of the appeal provision is attached.

Several other rules-related bills are being monitored. Senator Kohl reintroduced the "Sunshine in Litigation Act of 1999" (S. 957) on May 4, 1999. The bill would require a court to make particularized findings of fact prior to issuing a protective order. Representative Andrews introduced the "Parent-Child Privilege Act of 1999" on February 3, 1999, which would create a new Evidence Rule 502. Senator Grassley introduced an untitled bill (S. 721) that authorizes individual judges to permit the televising of court proceedings. A similar bill was introduced in the House by Representative Chabot (H.R. 1281) on March 25, 1999.

John K. Rabiej

Attachments

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

March 22, 1999

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

Dear Mr. Chairman:

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

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

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

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

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

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

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

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

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

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

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

Sincerely,

Paul V. Niemeyer
United States Circuit Judge

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

JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

March 23, 1999

LEONIDAS RALPH MECHAM
Secretary

Honorable Orrin G. Hatch
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

On behalf of the Judicial Conference, I write to express concern with certain provisions of S. 625 and H.R. 833, the "Bankruptcy Reform Act of 1999." The matters commented upon relate only to the administration of the law, and to the potential effects of the legislation on judicial branch financial and human resources.

- Bankruptcy Statistical Data. Section 602 of S. 625 and section 701 of H.R. 833 would require the clerks of court and the Administrative Office to compile and analyze information concerning the financial affairs of individual consumer debtors. At present, the judiciary compiles and publishes only statistics that reflect information from the clerks' case dockets.

  The Judicial Conference has directed that the judiciary collect and maintain such data as is required for its own operations to fulfill statutory responsibilities, and that collection of financial data on consumer debtors, if desired by Congress, should be assigned to the United States trustee system, which is responsible for supervising trustees and estates and approving distributions to creditors. Pursuant thereto, we have developed a proposal that would assign this responsibility to the U.S. trustees as an adjunct to their responsibility to conduct audits under the bills. This proposal, which we have discussed with staff of your Committee, would have the benefit of improving the accuracy of collected data at a substantially reduced cost of collection.

- Filing of Debtors' Tax Returns. Section 315(b) of S. 625 and section 603(b) of H.R. 833 would require certain petitioners to file copies of tax returns with the clerk of the bankruptcy court. Court files, with the narrow exception of sealed records, are public

records available to anyone upon request. Sealed records are not maintained in a public case file, but, because they are a rarity, typically can be accommodated in the clerk's safe. Recognizing that the tax returns are not to be made available to the public, these provisions require the Director of the Administrative Office to establish procedures to safeguard the confidentiality of tax information and also to establish a system to make the information available to the United States trustee, case trustee, and any party in interest. To carry out this responsibility, it would be necessary to establish a separate filing system in each clerk's office for tax returns, as well as provide personnel to manage it so that unlawful dissemination of this information would not occur. This would be a costly undertaking requiring additional office space and personnel.

In our judgment, this responsibility would be more appropriately assigned to the United States trustees. As the United States trustee's files are not public records, limiting access to trustees and parties in interest would not require segregating tax returns and creating separate procedures governing access to them. While the U.S. trustees may well need some additional resources to meet this responsibility, that cost would be far less than establishing a new separate system in each clerk's office. Also, it can be anticipated that because the tax returns are intended to be used by the trustees, these records would be included in each U.S. trustee's files whether or not the returns were maintained in the office of each bankruptcy clerk.

- Rules Issues. Section 802 of H. R. 833 and section 702 of S. 625 require clerks of court to maintain a register of all governmental units to ensure that the appropriate government office receives adequate notice of bankruptcy filings. The provisions are similar to amendments proposed to Bankruptcy Rule 5003 that the Advisory Committee on Bankruptcy Rules published for comment in August 1998. But there are some important differences. For example, the proposed rule amendments require only annual—and not quarterly—revision, because updating the substantial number of governmental units will be time-consuming and laborious and would impose a significant burden on debtors' attorneys who would be compelled to review the revised lists more often. The proposed rule amendments also provide for "safe harbor" mailing addresses to protect debtors who rely on the address provided by a governmental unit. The failure to use that address, however, does not invalidate any notice that is otherwise effective.

  At its March 18-19, 1999 meeting, the Advisory Committee on Bankruptcy Rules reviewed the comments and statements submitted during the five-month public comment period on the proposed amendments to Rule 5003. The committee decided to approve the proposed amendments, which will now be forwarded in turn to the Judicial Conference Committee on Rules of Practice and Procedure, the Judicial Conference, and the Supreme Court later this year in accordance with the Rules Enabling Act rulemaking process. 28 U.S.C. §§ 2071-77.

The elimination of section 802 and section 702 of the respective pending bills would not frustrate the "Bankruptcy Reform Act." But their deletion would further the policies of the longstanding Rules Enabling Act rulemaking process that has been previously established by agreement of Congress and the courts. I urge you and your colleagues to decline to include section 802 or section 702 in the pending bills.

Sections 102, 403, 607, and 816(e) of H.R. 833, and 102, 319, and 425 of S. 625 would authorize or mandate the initiation of the rulemaking process with respect to separate proposals for rule changes. Some of these sections bypass the initial stages of the Rules Enabling Act process and needlessly undercut in varying degrees the proper role of the Judicial Conference and its committees in that process. Under procedures promulgated pursuant to the Rules Enabling Act, the Judicial Conference's rules advisory committees are responsible for considering every rules change proposed from "any source, new statutes and court decisions affecting the rules, and legal commentary." In accordance with those procedures, a suggestion in any form from Congress, including a letter from an individual member, is promptly referred to the pertinent advisory committee for consideration and initiation of the rulemaking process. Moreover, the provision that requires the Conference to "establish" forms consistent with changes to the Bankruptcy Code (§ 102) is unnecessary because the advisory committee automatically reviews any legislation amending the Code to identify and prescribe any necessary amendments to the rules and forms.

The Judicial Conference strongly supports and promotes the integrity of the rulemaking process as prescribed by the Rules Enabling Act. The Act establishes a partnership between the courts and Congress designed to handle the daily business of the courts, which are matters of concern to all branches of the government. This partnership has worked well, and the judiciary urges Congress to revise these sections by adopting uniform language requesting the Judicial Conference to consider amending the pertinent Bankruptcy Rules or forms.

- Conversion of Chapter 11 Small Business Cases. Section 433 of S. 625 and section 413 of H.R. 833 would authorize the bankruptcy court to convert a Chapter 11 small business case to a Chapter 7 case upon establishment of cause by the moving party. This section further provides that the court shall commence a hearing on any such motion not later than 30 days after it is filed and shall decide the motion within 15 days after commencement of the hearing, absent compelling circumstances or consent of the moving party to a continuance. While the Judicial Conference takes no position with regard to this substantive revision of bankruptcy law, it opposes the time deadlines established by this section and respectfully requests that they be deleted. Prescribing a

national rule to regulate the time for certain judicial decisions interferes with the management of individual court dockets to the potential detriment of other pending matters.

- Appeal Procedures. While neither bill as introduced would revise the current bankruptcy appellate structure, this issue was considered during the recent House Judiciary Subcommittee hearings. Accordingly, we would like to reiterate the position of the Judicial Conference that supports simplification of appellate review of the orders of bankruptcy judges, but respectfully recommends that the current appellate process not be altered until the Conference receives the results of its ongoing study of the bankruptcy appellate structure. Deferring congressional action on this matter would allow the Conference the opportunity to review thoroughly the results of the study and report those results to the Congress.

Thank you for this opportunity to provide the views of the judiciary with regard to this significant legislation. Please feel free to have your staff contact Michael Blommer of the Office of Legislative Affairs at (202) 502-1700 if you have any questions or if we can otherwise be of assistance in this matter.

Sincerely,

Leonidas Ralph Mecham
Secretary

cc: Members of the Judiciary Committee

PROCEDURE GOVERNING AN APPEAL FROM A BANKRUPTCY COURT TO THE COURT OF APPEALS UNDER H.R. 833

THIS SEARCH
Next Hit
Prev Hit
Hit List

THIS DOCUMENT
Forward
Back
Best Sections
Doc Contents

GO TO
New Bills Search
HomePage
Help

H.R.833

Bankruptcy Reform Act of 1999 (Engrossed in House)

SEC. 612. BANKRUPTCY APPEALS.

(a) APPEALS- Title 28, United States Code, is amended by inserting after section 1292 the following:

`Sec. 1293. Bankruptcy appeals

`(a) The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from the following:

`(1) Final orders and judgments entered by bankruptcy courts and district courts in cases under title 11, in proceedings arising under title 11, and in proceedings arising in or related to a case under title 11, including final orders in proceedings regarding the automatic stay of section 362 of title 11, United States Code.

`(2) Interlocutory orders entered by bankruptcy courts and district courts granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions in cases under title 11, in proceedings arising under title 11, and in proceedings arising in or related to a case under title 11, other than interlocutory orders in proceedings regarding the automatic stay of section 362 of title 11, United States Code.

`(3) Interlocutory orders of bankruptcy courts and district courts entered under section 1104(a) or 1121(d) of title 11, or the refusal to enter an order under such section.

`(4) An interlocutory order of a bankruptcy court or district court entered in a case under title 11, in a proceeding arising under title 11, or in a proceeding arising in or related to a case under title 11, if the court of appeals that would have jurisdiction of an appeal of a final order entered in such case or such proceeding permits, in its discretion, appeal to be taken from such interlocutory order.

`(5) Final decisions, judgments, orders, and decrees entered by a bankruptcy appellate panel under subsection (b) of this section.

`(b)(1) The judicial council of a circuit may establish a bankruptcy appellate panel composed of

bankruptcy judges in the circuit who are appointed by the judicial council, which panel shall exercise the jurisdiction to review orders and judgments of bankruptcy courts described in paragraphs (1) through (5) of subsection (a) of this section unless--

`(A) the appellant elects at the time of filing the appeal; or

`(B) any other party elects, not later than 10 days after service of the notice of the appeal,

to have such jurisdiction exercised by the court of appeals.

`(2) An appeal to be heard by a bankruptcy appellate panel under paragraph (1) shall be heard by three members of the bankruptcy appellate panel, provided that a member of such panel may not hear an appeal originating in the district for which such member is appointed or designated under section 152 of this title.

`(3) If authorized by the Judicial Conference of the United States, the judicial councils of two or more circuits may establish a joint bankruptcy appellate panel.'.

(b) PROCEDURAL RULES- Until rules of practice and procedure are promulgated or amended pursuant to the Rules Enabling Act (28 U.S.C. 2071-77) to govern appeals to a bankruptcy appellate panel or to a court of appeals exercising jurisdiction pursuant to section 1293 of title 28, as added by this Act, the following shall apply:

(1) A notice of appeal with respect to an appeal from an order or judgment of a bankruptcy court to a court of appeals or a bankruptcy appellate panel must be filed within the time provided in Rule 8002 of the Federal Rules of Bankruptcy Procedure.

(2) An appeal to a bankruptcy appellate panel shall be taken in the manner provided in Part VIII of the Federal Rules of Bankruptcy Procedure and local court rules.

(3) An appeal from an order or judgment of a bankruptcy court directly to a court of appeals shall be governed by the rules of practice and procedure that apply to a civil appeal from a judgment of a district court exercising original jurisdiction, as if the bankruptcy court were a district court, except as provided in paragraph (1) regarding the time to appeal or by local court rules.

THIS SEARCH	THIS DOCUMENT	GO TO
Next Hit	Forward	New Bills Search
Prev Hit	Back	HomePage
Hit List	Best Sections	Help
	Doc Contents	

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

SENATE BILLS

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

S. 96 Y2K Act (See H.R. 775) 04/29/99 Cloture motion on amendment 267 rejected in Senate
- Introduced by: McCain
- Date Introduced: January 19, 1999
- Status: Referred to Committee on Commerce; Hearings held on February 9, 1999; Committee reported bill favorably on March 3, 1999; Letter from Director opposing class action and special pleading requirements sent on March 24, 1999
- Provisions affecting rules: federalizing class actions and heightened pleading requirements

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

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

S.353 Class Action Fairness Act of 1999

- Introduced by: Grassley (2 co-sponsors)
- Date Introduced: February 3, 1999
- Status: Referred to the Committee on Judiciary 5/4/99 Subcommittee on Oversight and Courts; hearings held on May 4, 1999
- Provisions affecting rules:
  - Sec. 2. Provides for notification of the Attorney General & state attorney generals;
  - Sec. 2. Limits on attorney fees
  - Sec. 3. Minimal diversity requirements;
  - Sec. 4. Allows for removal of class actions to federal court; and
  - Sec. 5. Removes judicial discretion from **Civil Rule 11(c)** in all cases.

S.461 Year 2000 Fairness and Responsibility Act (See S. 96 and H.R. 775)

- Introduced by: Hatch (2 co-sponsors)
- Date Introduced: February 24, 1999
- Status: Referred to Committee on the Judiciary; hearings held on March 3, 1999; Letter from Director opposing class action and special pleading requirements sent on March 24, 1999; Judiciary Committee reported favorably on March 25, 1999
  - Sec. 103 establishes special ("fraud-like") pleading requirements
  - Sec. 404 established minimal diversity for class actions

S. 625 *Bankruptcy Reform Act of 1999*

- Introduced by: Grassley (5 co-sponsors)
- Date Introduced: March 16, 1999
- Status: Referred to the Committee on Judiciary; Letter sent by Director to Hatch 3/23/99; Ordered to be reported with amendments favorably Apr 27, '99;
- Provisions affecting rules:
  - Section 702 requires clerks of court to maintain a register of all governmental units to ensure that the appropriate government office receives adequate notice of bankruptcy filings.
  - Sections 102, 319, and 425 would authorize or mandate the initiation of the rulemaking process with respect to separate proposals for rule changes.

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

- Introduced by: Grassley (6 co-sponsors)
- Date Introduced: March 25, 1999
- Status:
- Provisions affecting rules:
  - Section 1 states that the presiding judge of any appellate court or district court may, in his or her discretion, permit the photographing, electronic recording, broadcasting, or televising to the public of court proceedings over which that

judge presides; safeguards are provided to obscure the identity of nonparty witnesses; the Judicial Conference is authorized to promulgate advisory guidelines
    - Section 3 provides a 3-year sunset of section 1.

S. 755 No title

- Introduced by: Hatch (13 co-sponsors)
- Date Introduced: March 25, 1999
- Status: April 12 read the second time, placed on the calendar
- Provisions affecting rules: Delays effective date of the "McDade" provision on Rule 4.2 contacts with represented parties

S. 758 Fairness in Asbestos Compensation Act of 1999

- Introduced by: Ashcroft (8 co-sponsors)
- Date Introduced: March 25, 1999
- Status: Referred to the Committee on Judiciary.
- Provisions affecting rules:
    - Section 208 gives exclusive jurisdiction, regardless of the amount in controversy or citizenship of parties, to federal courts;
    - Section 301 requires the board of the Asbestos Resolution Corporation to establish procedures for ADR;
    - Section 307(j) creates an penalty for an inadequate offer; and
    - Section 402 bars class actions in asbestos cases without the consent of each defendant, and governs removal.

S. 899 21st Century Justice Act of 1999

- Introduced by: Hatch (7 co-sponsors)
- Date Introduced: April 28, 1999
- Status: Referred to the Committee on Judiciary.
- Provisions affecting rules:
    - Sections 5103-08 provide victims of crime with allocution rights; **Criminal Rule 11** is amended
    - Section 5224 amends **Evidence Rule 404** to permit consideration of evidence showing disposition of defendant
    - Section 6515 amends **Criminal Rule 43(c)** to permit videoconferncing of several types of proceedings n criminal cases, including sentencing
    - Section 6703 amends **Criminal Rule 46** governing criterion for forfeiture of a bail bond
    - Section 7101 amends **Criminal Rule 24** to equalize the number of peremptory challenges
    - Section 7102 amends **Criminal Rule 23** to permit a jury of 6 in a criminal case

- Section 7105 amends the **Rules Enabling Act** and would restructure the composition of the rules committees to include more prosecution-oriented members
- Section 7321 sets up ethical standards governing attorney conduct
- Section 7477 permits disclosure of grand jury information to government attorneys not involved in the original prosecution

S. 934 Crime Victims Assistance Act

- Introduced by: Leahy (5 co-sponsors)
- Date Introduced: April 30, 1999
- Status: Referred to the Committee on Judiciary.
- Provisions affecting rules:
  - Section 121 would amend **Criminal Rule 11** to require the Government to make a reasonable effort to notify the victim of a crime of violence of the time and date of any hearing on entering a plea of guilty or nolo contendere, and the victim's right to attend that hearing. If the victim attends the proceeding, the court shall afford the victim an opportunity to be heard on the plea.
  - Section 122 would amend **Criminal Rule 32** detailing the contents of the Victim Impact Statement; give the victim an opportunity to submit a written or oral statement, or an audio or videotaped statement; require the Government to make a reasonable effort to notify the victim of a crime of violence of the time and date of any sentencing hearing and the victim's right to attend that hearing. If the victim attends the proceeding, the court shall afford the victim an opportunity to be heard.
  - Section 123 would amend **Criminal Rule 32.1** require the Government to make a reasonable effort to notify the victim of a crime of violence of the time and date of any hearing to revoke or modify sentence and the victim's right to attend that hearing. If the victim attends the proceeding, the court shall afford the victim an opportunity to be heard.
  - Section 131 would amend **Evidence Rule 615** to allow the victim of a crime of violence to be present unless the court finds the testimony of that person will be material affected by hearing the testimony of other witnesses or there are too many victims. [Note: It appears the amendments are based on the old version of Evidence Rule 615 (i.e do not account for the 2/98 amendment)]

S. 957 Sunshine in Litigation Act of 1999

- Introduced by: Kohl (No co-sponsors)
- Date Introduced: May 4, 30, 1999
- Status: Referred to the Committee on Judiciary.
- Provisions affecting rules:
  - section 1 would amend chapter 111 of title 28, U.S.C. to require a court to make particularized findings of fact prior to entering a protective order; the proponent of the protective order has the burden of proof; stipulated protective orders would be unenforceable

HOUSE BILLS

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

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

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

- Introduced by: Andrews (No co-sponsors)
- Date Introduced: February 3, 1999
- Status: Referred to the Committee on Judiciary; 2/25/99 Referred to the Subcommittee on Courts and Intellectual Property.
- Provisions affecting rules:
    - Sec. 2 would create new **Evidence Rule 502** providing for a parent/child privilege.

H.R. 771 No title

- Introduced by: Coble (12 co-sponsors)
- Date Introduced: February 23, 1999
- Status: Referred to the Committee on Judiciary; 3/11/99 Forwarded by Subcommittee to Full Committee; Letter from Judge Niemeyer to Hyde 3/22/99
- Provisions affecting rules:
    - Amends **Civil Rule 30** to require that depositions be recorded by stenographic or stenomask means unless the court upon motion orders, or the parties stipulate in writing, to the contrary.

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

- Introduced by: Honorable W. Eugene Davis (62 co-sponsors)
- Date Introduced: February 23, 1999; ordered report 5/4/99
- Status: Referred to the Committee on Judiciary; Letter from Director opposing class action and special pleading requirements sent on March 24, 1999; hearing 4/13; Passed by House of Representatives on May 12, 1999
- Provisions affecting rules:
    - Section 103 establishes special ("fraud-like") pleading requirements
    - Section 404 establishes federal jurisdiction of class actions over $1 million

H.R. 833 Bankruptcy Reform Act of 1999

- Introduced by: Gekas (105 co-sponsors)
- Date Introduced: February 24, 1999

- Status: Referred to the Committee on Judiciary; Forwarded by Subcommittee to Full Committee in the Nature of a Substitute by the Yeas and Nays: 5 - 3; letter sent by Director to Hyde on 3/23/99; Passed(313 - 108) 05/05/99;
- Provisions affecting rules:
  - Section 802 requires clerks of court to maintain a register of all governmental units to ensure that the appropriate government office receives adequate notice of bankruptcy filings.
  - Sections 102, 403, 607, and 816(e) would authorize or mandate the initiation of the rulemaking process with respect to separate proposals for rule changes.

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

- Introduced by: Grassley (38 co-sponsors)
- Date Introduced: March 25, 1999
- Status: 3/25/98 Referred to the House Committee on the Judiciary; referred to the Subcommittee on Courts and Intellectual Property 4/7/99;
- Provisions affecting rules:
  - Section 1 states the presiding judge of any appellate court or district court may, in his or her discretion, permit the photographing, electronic recording, broadcasting, or televising to the public of court proceedings over which that judge presides; safe guards are provided to obscure the identity of nonparty witnesses; the Judicial Conference is authorized to promulgate advisory guidelines
  - Section 3 provides a 3-year sunset of section 1.

H.R. 1658 Civil Asset Forfeiture Reform Act

- Introduced by: Hyde (29 co-sponsors)
- Date Introduced: May 4, 1999
- Status: 5/4/99 Referred to the House Committee on the Judiciary;
-

JOINT RESOLUTIONS

S. J. RES. 3; *A joint resolution proposing an amendment to the Constitution of the United States to protect the rights of crime victims.*

- Introduced by: Kyl (33 Co-sponsors) Date Introduced: 1/19/99
- Status: Referred to the Committee on Judiciary; 3/23/99 Referred to Subcommittee on Constitution, Federalism, Property; 3/24/99 Committee on Judiciary. Hearings held.
- Provisions affecting rules
  - Calls for a Constitutional Amendments enumerating victim's rights.

Item 3B

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

ANTHONY J. SCIRICA
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

WILL L. GARWOOD
APPELLATE RULES

ADRIAN G. DUPLANTIER
BANKRUPTCY RULES

PAUL V. NIEMEYER
CIVIL RULES

W. EUGENE DAVIS
CRIMINAL RULES

FERN M. SMITH
EVIDENCE RULES

May 7, 1999

MEMORANDUM TO THE STANDING RULES COMMITTEE

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

The following report briefly describes administrative actions and some major initiatives undertaken by the office to improve support service to the rules committees.

Update on New Initiatives

The docket sheets of all suggested amendments to Civil, Criminal, and Evidence Rules have been updated to reflect the committees' recent respective actions. Every suggested amendment along with its source and status or disposition is listed. The docket sheets are updated after every committee meeting and are included in each agenda book. We worked with the Civil Rules Agenda Subcommittee to develop a procedure to prioritize consideration of pending items by cataloguing suggested amendments that were ready for consideration, further study, and elimination.

The office continues to research our historical records for information regarding any past relevant committee action on every new proposed amendment submitted to an advisory committee. The microfiche collection of rules-related documents was searched for prior committee action on the rules under consideration by the advisory committees at their respective fall meetings.

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 1992 have been entered on microfiche and indexed. The documents for 1993 have been catalogued and boxed for shipment to the federal Records Center. Congressional Information Services — the publisher of the microfiche collection — should complete the process of placing on microfiche and indexing documents for 1993 by October 1999. The microfiche collection continues to prove useful to us and the public in researching prior committee positions.

October 1999. The microfiche collection continues to prove useful to us and the public in researching prior committee positions.

Automation Project (FRED)

Our automated document management system (FRED) is being enhanced and used as a prototype for an agency-wide system. The process of implementing the enhancements has, in the short term, slowed our progress on full automation. We have encountered significant technical glitches that have caused much inconvenience and delay in our work. We hope that once the project is fully implemented it will provide better overall technical support and perhaps, finally provide direct access to documents on the system to the committee chairs and reporters. Examples of planned enhancements include: reports designed to ensure that data is entered properly and that all comments are acknowledged with appropriate follow-up responses explaining the committee's actions; document routing and workflow; checklists; enhanced indexing and searching capabilities; and possible remote access to the FRED database.

Manual Tracking

Our manual system of tracking comments continues to work well. For the current public comment period, the office received, acknowledged, and forwarded approximately 650 comments and many suggestions to the members of the respective committees. Many of these comments were submitted by organizations and were quite detailed containing many pages. Each comment was numbered consecutively, which enabled committee members to determine instantly whether they had received all of them. We converted each page of the comments into electronic form (PDF) and then sent the comments electronically, rather than mailing by federal express the comments to each member and other interested persons (usually about 40 persons per committee). As a result, the comments were circulated much faster and much more cheaply.

State Bar Points-of-Contact

In August 1994, Judge Stotler sent a letter to the president of each state bar association requesting that a point-of-contact be designated for the rules committee to solicit and coordinate that state bar's comments on the proposed amendments. The Standing Committee outreach to the organized bar has resulted in 43 state bars designating a point-of-contact.

The points-of-contact list was updated last year in time to include the new names in the *Request for Comment* pamphlet on proposed amendments published in August 1998. Several state bars updated their designated point-of-contact. The process will be repeated every year to ensure that we have an accurate and up-to-date list.

Mailing List

The Administrative Office has purchased a new automated mailing list system. It will replace several existing systems. The new system should be fully operational about August 1999 and should substantially reduce the time involved in maintaining and expanding the mailing list.

A contractor will be hired to maintain all mailing lists for the Administrative Office. The new process should enhance our ability to expand the mailing list of attorneys and other interested persons.

Internet

The *Request for Comment* pamphlet will be available each fall on the Judiciary's Home Page (http://www.uscourts.gov). Internet access supplements, rather than replaces, our current system of targeted mailing.

The Judicial Conference has prescribed procedures governing the rulemaking process, which require that virtually all rules-related materials be made available to the public. Moreover, the Judicial Conference's Standing and five Advisory Rules Committees adopted — as part of their self-study plan — a recommendation that the Administrative Office use electronic technologies "to promote rapid dissemination of proposals, receipt of comments, and the work of the rules committees."

For the last few months we have been working with our Office of Public Affairs to develop a "Rules" area on the courts' website. Among the materials that will be on the website in the future are minutes of meetings, membership lists, a schedule of upcoming meetings, summaries of public comments on proposed amendments, and committee responses to comments. We are still working to develop a way to make local rules of court available on the Internet.

Beginning with the *Request for Comment* to be published in August 1998 we are, as a pilot project, receiving comments on the proposed rules amendments directly via the Internet. The Judiciary's website was redesigned to accommodate the submission of comments. We had concern whether this new means of correspondence would result in a crush of e-mail comments. Although we did receive approximately 1,900 visits to the Civil and Evidence proposals and 1,500 visits to the Bankruptcy proposals on the website as of May 7, 1999, we received only 61 comments via the Internet.

Tracking Rule Amendments

The time chart showing the status of all rules changes has been updated. It will be distributed at the meeting.

Committee and Subcommittee Meetings

From January 8, 1999 to May 25, 1999, the office has staffed 5 advisory rules committee meetings, 4 public hearings on proposed rule amendments, and 4 subcommittee meetings. The office has arranged and participated in numerous conference calls involving committee chairs or subcommittees.

Miscellaneous

In February 1999, the *Report on Mass Tort Litigation* was forwarded to the Chief Justice. Copies were provided to members of the Judicial Conference, both the Senate and House Judiciary Committees, select staff of those committees, the Standing Rules Committee, and the five advisory rules committees.

In February 1999, the Subcommittee on Technology hosted a meeting with representatives of federal district and bankruptcy courts that have been testing prototype electronic case files systems and with attorneys who have used those systems.

In March 1999, the Judicial Conference approved the proposed amendments to the Federal Rules of Criminal Procedure recommended by the Standing Committee at its January 1999 meeting. In October the proposals will be forwarded to the Supreme Court.

In April 1999, the Supreme Court approved and forwarded to Congress the proposed amendments to the Federal Rules of Bankruptcy, Civil, and Criminal Procedure approved by the Judicial Conference at its September 1998 session. The office proofread, formatted, and converted the format of the rules package from Wordperfect into Word, which is used by the Supreme Court.

John K. Rabiej

Attachments

AGENDA DOCKETING

ADVISORY COMMITTEE ON CIVIL RULES

Proposal	Source, Date, and Doc #	Status
[Financial disclosure statement]	Request by committee on Codes of Conduct 9/23/98	11/98 — Cmte considered 4/99 — Cmte considered; FJC study initiated **PENDING FURTHER ACTION**
[Copyright Rules of Practice] — Update	Inquiry from West Publishing	4/95 — To be reviewed with additional information at upcoming meetings 11/95 — Considered by cmte 10/96 — Considered by cmte 10/97 — Deferred until spring '98 meeting 3/98 — Deferred until fall '98 meeting 11/98 — Request for publication 1/99 — Stg. Cmte. approves publication for fall **PENDING FURTHER ACTION**
[Admiralty Rule B, C, and E] — Amend to conform to Rule C governing attachment in support of an in personam action	Agenda book for the 11/95 meeting	4/95 — Delayed for further consideration 11/95 — Draft presented to cmte 4/96 — Considered by cmte 10/96 — Considered by cmte, assigned to subc 5/97— Considered by cmte 10/97 — Request for publication and accelerated review by ST Cmte 1/98 — Stg. Com. approves publication at regularly scheduled time 8/98 — Published for comment 4/99 — Cmte approves amendments with revisions **PENDING FURTHER ACTION**
[Admiralty Rule-New]— Authorize immediate posting of preemptive bond to prevent vessel seizure	Mag. Judge Roberts 9/30/96 (96-CV-D) #1450	12/24/96— Referred to Admiralty and Agenda Subc **PENDING FURTHER ACTION**
[Inconsistent Statute] — 46 U.S.C. § 786 inconsistent with admiralty	Michael Cohen 1/14/97 (97-CV-A) #2182	2/97 — Referred to reporter and chair Supreme Court decision moots issue **COMPLETED**
[Non-applicable Statute]— 46 U.S.C. § 767 Death on the High Seas Act not applicable to any navigable waters in the Panama Canal Zone	Michael Marks Cohen 9/17/97 (97-CV-O)	10/97 — Referred to reporter, chair, and Agenda Subc **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[Admiralty Rule C(4) — Amend to satisfy constitutional concerns regarding default in actions *in rem*	Gregory B. Walters, Cir. Exec., for Jud. Council of Ninth Cir. 12/4/97 (97-CV-V)	1/98 — Referred to reporter, chair, and Agenda Subc **PENDING FURTHER ACTION**
[CV4(c)(1)] — Accelerating 120-day service provision	Joseph W. Skupniewitz	4/94 — Deferred as premature **DEFERRED INDEFINITELY**
[CV4(d)] — To clarify the rule	John J. McCarthy 11/21/97 (97-CV-R)	12/97 — Referred to reporter, chair, and Agenda Subc **PENDING FURTHER ACTION**
[CV4(d)(2)] — Waive service of process for actions against the United States	Charles K. Babb 4/22/94	10/94 — Considered and denied 4/95 — Reconsidered but no change in disposition **COMPLETED**
[CV4(e) & (f)] — Foreign defendant may be served pursuant to the laws of the state in which the district court sits	Owen F. Silvions 6/10/94	10/94 — Rules deemed as otherwise provided for and unnecessary 4/95 — Reconsidered and denied **COMPLETED**
[CV4(i)] — Service on government in Bivens suits	DOJ 10/96 (96-CV-B; #1559)	10/96 — Referred to Reporter, Chair, and Agenda Subc 5/97 — Discussed in reporter's memo. 3/98 — Cmte approved draft 6/98 — Stg Cmte approves 8/98 — Published for comment 4/99 — Cmte approves amendments with revisions **PENDING FURTHER ACTION**
[CV4(m)] — Extension of time to serve pleading after initial 120 days expires	Judge Edward Becker	4/95 — Considered by cmte **DEFERRED INDEFINITELY**
[CV4]— Inconsistent service of process provision in admiralty statute	Mark Kasanin	10/93 — Considered by cmte 4/94 — Considered by cmte 10/94 — Recommend statutory change 6/96 — Coast Guard Authorization Act of 1996 repeals the nonconforming statutory provision **COMPLETED**
[CV4] — To provide sanction against the willful evasion of service	Judge Joan Humphrey Lefkow 8/12/97 (97-CV-K)	10/97 — Referred to Reporter, Chair, and Agenda Subc **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CV5] — Electronic filing		10/93 — Considered by cmte 9/94 — Published for comment 10/94 — Considered 4/95 — Cmte approves amendments with revisions 6/95 — Approved by ST Cmte /95 — Approved by Jud Conf 4/96 — Approved by Sup Ct 12/96 — Effective **COMPLETED**
[CV5] — Service by electronic means or by commercial carrier; fax noticing produces substantial cost savings while increasing efficiency and productivity	Michael Kunz, clerk E.D. Pa. and John Frank 7/29/96; 9/10/97 (97-CV-N)	4/95 — Declined to act 10/96 — Reconsidered, submitted to Technology Subcommittee 5/97 — Discussed in reporter's memo. 9/97 — Information sent to reporter, chair, and Agenda Subc 11/98 — Referred to Tech. Subcommittee 4/99 — Cmte requests publication **PENDING FURTHER ACTION**
[CV5(b)] — Facsimile service of notice to counsel	William S. Brownell, District Clerks Advisory Group 10/20/97 (97-CV-Q)	11/97 — Referred to reporter, chair, and Agenda Subc 3/98 — Referred to Technology Subcommittee **PENDING FURTHER ACTION**
[CV5(d)] — Whether local rules against filing of discovery documents should be abrogated or amended to conform to actual practice	Gregory B. Walters, Cir. Exec., for District Local Rules Review Cmte of Jud. Council of Ninth Cir. 12/4/97 (97-CV-V)	1/98 — Referred to reporter, chair, and Agenda Subc 3/98 — Cmte. approved draft 6/98 — Stg Cmte approves with revision 8/98 — Published for comment 4/99 — Cmte approves amendments **PENDING FURTHER ACTION**
[CV6] — Modifying mailbox rule	J. Michael Schaefer, Esq. 12/28/98 (99-CV-A)	3/99 — Referred to reporter, chair, and Agenda Subc **PENDING FURTHER ACTION**
[CV6(b)] — Enlargement of Time; deletion of reference to abrogated rule (technical amendment)	Prof. Edward Cooper 10/27/97	10/97 — Referred to cmte 3/98 — Cmte approved draft with recommendation to forward directly to the Jud Conf w/o publication 6/98 — Stg Cmte approves 9/98 — Jud. Conf. Approves and transmits to Sup. Ct. **PENDING FURTHER ACTION**
[CV6(e)] — Time to act after service	ST Cmte 6/94	10/94 — Cmte declined to act **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CV8, CV12] — Amendment of the general pleading requirements	Elliott B. Spector, Esq. 7/22/94	10/93 — Delayed for further consideration 10/94 — Delayed for further consideration 4/95 — Declined to act **DEFERRED INDEFINITELY**
[CV9(b)] — General Particularized pleading	Elliott B. Spector	5/93 — Considered by cmte 10/93 — Considered by cmte 10/94 — Considered by cmte 4/95 — Declined to act **DEFERRED INDEFINITELY**
[CV9(h)] — Ambiguity regarding terms affecting admiralty and maritime claims	Mark Kasanin 4/94	10/94 — Considered by cmte 4/95 — Approved draft 7/95 — Approved for publication 9/95 — Published 4/96 — Forwarded to the ST Cmte for submission to Jud Conf 6/96 — Approved by ST Cmte 9/96 — Approved by Jud Conf 4/97 — Approved by Supreme Court 12/97 — Effective **COMPLETED**
[CV11] — Mandatory sanction for frivolous filing by a prisoner	H.R. 1492 introduced by Cong Gallegly 4/97	5/97 — Considered by cmte **PENDING FURTHER ACTION**
[CV11] — Sanction for improper advertising	Carl Shipley 4/97 (97-CV-G) #2830	5/97 — Referred to reporter, chair, and Agenda Subc **PENDING FURTHER ACTION**
[CV11] — Should not be used as a discovery device or to test the legal sufficiency or efficiency of allegations in pleadings	Nicholas Kadar, M.D. 3/98 (98-CV-B)	4/98 — Referred to reporter, chair, and Agenda Subc **PENDING FURTHER ACTION**
[CV12] — Dispositive motions to be filed and ruled upon prior to commencement of the trial	Steven D. Jacobs, Esq. 8/23/94	10/94 — Delayed for further consideration 5/97 — Reporter recommends rejection 11/98 — rejected by cmte **COMPLETED**
[CV12] — To conform to *Prison Litigation Act of 1996*	John J. McCarthy 11/21/97 (97-CV-R)	12./97 — Referred to reporter, chair, and Agenda Subc **PENDING FURTHER ACTION**
[CV12(a)(3)] —Conforming amendment to Rule 4(i)		3/98 — Cmte approved draft 6/98 — Stg Cmte approves 8/98 — Published for comment 4/99 — Cmte approves amendments with revisions **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CV12(b)] — Expansion of conversion of motion to dismiss to summary judgment	Daniel Joseph 5/97 (97-CV-H) #2941	5/97 — Referred to reporter, chair, and Agenda Subc **PENDING FURTHER ACTION**
[CV14(a) & (c)] — Conforming amendment to admiralty changes		6/98 — Stg Comt approves 8/98 — Published for comment 4/99 — Cmte approves amendments **PENDING FURTHER ACTION**
[CV15(a)] — Amendment may not add new parties or raise events occurring after responsive pleading	Judge John Martin 10/20/94 & Judge Judith Guthrie 10/27/94	4/95 — Delayed for further consideration 11/95 — Considered by cmte and deferred **DEFERRED INDEFINITELY**
[CV 15(c)(3)(B)] —Clarifying extent of knowledge required in identifying a party	Charles E. Frayer, Law student 9/27/98 (98-CV-E)	9/98 — Referred to chair, reporter, and Agenda Subc **PENDING FURTHER ACTION**
[CV23] — Amend class action rule to accommodate demands of mass tort litigation and other problems	Jud Conf on Ad Hoc Communication for Asbestos Litigation 3/91; William Leighton ltr 7/29/94; H.R. 660 introduced by Canady on CV 23 (f)	5/93 — Considered by cmte 6/93 — Submitted for approval for publication; withdrawn 10/93, 4/94, 10/94, 2/95, 4/95, 11/95; studied at meetings. 4/96 — Forwarded to ST Cmte for submission to Jud Conf 6/96 — Approved for publication by ST Cmte 8/96 — Published for comment 10/96 — Discussed by cmte 5/97 — Approved and forwarded changes to (c)(1), and (f); rejected (b)(3)(A) and (B); and deferred other proposals until next meeting 4/97 — Stotler letter to Congressman Canady 6/97 — Changes to 23(f) were approved by ST Cmte; changes to 23(c)(1) were recommitted to advisory cmte 10/97 — Considered by cmte 3/98 — Considered by cmte deferred pending mass torts working group deliberations **PENDING FURTHER ACTION**
[CV23] — Standards and guidelines for litigating and settling consumer class actions	Patricia Sturdevant, for National Association for Consumer Advocates 12/10/97 (97-CV-T)	12/97 — Referred to reporter, chair, and Agenda Subc **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CV23(e)] — Amend to include specific factors court should consider when approving settlement for monetary damages under 23(b)(3)	Beverly C. Moore, Jr., for Class Action Reports, Inc. 11/25/97 (97-CV-S)	12/ 97 — Referred to reporter, chair, and Agenda Subc **PENDING FURTHER ACTION**
[CV23(f)] — interlocutory appeal	part of class action project	4/98 — Sup Ct approves 12/98 — Effective **COMPLETED**
[CV26] — Interviewing former employees of a party	John Goetz	4/94 — Declined to act **DEFERRED INDEFINITELY**
[CV26] —Initial disclosure and scope of discovery	Thomas F. Harkins, Jr., Esq. 11/30/94 and American College of Trial Lawyers; Allan Parmelee (97-CV-C) #2768; Joanne Faulkner 3/97 (97-CV-D) #2769	4/95 — Delayed for further consideration 11/95 — Considered by cmte 4/96 — Proposal submitted by American College of Trial Lawyers 10/96 — Considered by cmte; subc appointed 1/97 — Subc held mini-conference in San Francisco 4/97 — Doc. #2768 and 2769 referred to Discovery Subc 9/97 — Discovery Reform Symposium held at Boston College Law School 10/97 — Alternatives considered by cmte 3/98 — Cmte approved draft 6/98 — Stg Cmte approves 8/98 — Published for comment 4/99 — Cmte approves amendments with revisions **PENDING FURTHER ACTION**
[CV26(c)] — Factors to be considered regarding a motion to modify or dissolve a protective order	Report of the Federal Courts Study Committee, Professors Marcus and Miller, and Senator Herb Kohl 8/11/94; Judge John Feikens (96-CV-F); S. 225 reintroduced by Sen Kohl	5/93 — Considered by cmte 10/93 — Published for comment 4/94 — Considered by cmte 10/94 — Considered by cmte 1/95— Submitted to Jud Conf 3/95 — Remanded for further consideration by Jud Conf 4/95 — Considered by cmte 9/95 — Republished for public comment 4/96 — Tabled, pending consideration of discovery amendments proposed by the American College of Trial Lawyers 1/97 — S. 225 reintroduced by Sen Kohl 4/97 — Stotler letter to Sen Hatch 10/97 — Considered by subc and left for consideration by full cmte 3/98 — Cmte determined no need has been shown to amend **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CV26] — Depositions to be held in county where witness resides; better distinction between retained and "treating" experts	Don Boswell 12/6/96 (96-CV-G)	12/96 — Referred to reporter, chair, and Agenda Subc. 5/97 — Reporter recommends that it be considered part of discovery project **PENDING FURTHER ACTION**
[CV30] — Allow use by public of audio tapes in the courtroom	Glendora 9/96/96 (96-CV-H)	12/96 — Sent to reporter and chair 11/98 — rejected by cmte **COMPLETED**
[CV30(b)(1)] — That the deponent seek judicial relief from annoying or oppressive questioning during a deposition	Judge Dennis H. Inman 8/6/97 (97-CV-J)	10/97 — Referred to reporter, chair, and Agenda Subc 11/98 — rejected by cmte **COMPLETED**
[CV30(d)(2)] — presumptive one day of seven hours for deposition		3/98 — Cmte approved draft 6/98 — Stg Cmte approves 8/98 — Published for comment 4/99 — Cmte approves amendments with revisions **PENDING FURTHER ACTION**
[CV32] — Use of expert witness testimony at subsequent trials without cross examination in mass torts	Honorable Jack Weinstein 7/31/96	7/31/96 — Submitted for consideration 10/96 — Considered by cmte; FJC to conduct study 5/97 — Reporter recommends that it be considered part of discovery project **PENDING FURTHER ACTION**
[CV34(b)] — requesting party liable for paying reasonable costs of discovery		3/98 — Cmte approved draft 6/98 — Stg Cmte approves 8/98 — Published for comment 4/99 — Cmte approves amendments with revisions (moved to Rule 26) **PENDING FURTHER ACTION**
[CV36(a)] — To not permit false denials, in view of recent Supreme Court decisions	Joanne S. Faulkner, Esq. 3/98 (98-CV-A)	4/98 — Referred to reporter, chair, and Agenda Subc 11/98 — rejected by cmte **COMPLETED**
[CV37(b)(3)] — Sanctions for Rule 26(f) failure	Prof. Roisman	4/94 — Declined to act **DEFERRED INDEFINITELY**
[CV37(c)(1)] — Sanctions for failure to supplement discovery		3/98 — Cmte approved draft 6/98 — Stg Cmte approves 8/98 — Published for comment 4/99 — Cmte approves amendments **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CV39(c) and CV16(e)] — Jury may be treated as advisory if the court states such before the beginning of the trial	Daniel O'Callaghan, Esq.	10/94 — Delayed for further study, no pressing need 4/95 — Declined to act **COMPLETED**
[CV43] — Strike requirement that testimony must be taken orally	Comments at 4/94 meeting	10/93 — Published 10/94 — Amended and forwarded to ST Cmte 1/95 — ST Cmte approves but defers transmission to Jud Conf 9/95 — Jud Conf approves amendment 4/96 — Supreme Court approved 12/96 — Effective **COMPLETED**
[CV43(f)—Interpreters] — Appointment and compensation of interpreters	Karl L. Mulvaney 5/10/94	4/95 — Delayed for further study and consideration 11/95 — Suspended by advisory cmte pending review of Americans with Disabilities Act by CACM 10/96 — Federal Courts Improvement Act of 1996 provides authority to pay interpreters **COMPLETED**
[CV44 — To delete, as it might overlap with Rules of EV dealing with admissibility of public records	Evidence Rules Committee Meeting 10/20-21/97 (97-CV-U)	1/97 — Referred to chair, reporter, and Agenda Subc. 3/98 — Cmte determined no need to amend **COMPLETED**
[CV45] — Nationwide subpoena		5/93 — Declined to act **COMPLETED**
[CV45] — Notice in lieu of attendance subpoenas	J. Michael Schaefer, Esq. 12/28/98 (99-CV-A)	3/99 — Referred to chair, reporter, and Agenda Subc **PENDING FURTHER ACTION**
[CV45] — Clarifying status of subpoena after expiration date	K. Dino Kostopoulos, Esq. 1/27/99 (99-CV-B)	3/99 — Referred to chair, reporter, and Agenda Subc **PENDING FURTHER ACTION**
[CV45] — Discovering party must specify a date for production far enough in advance to allow the opposing party to file objections to production	Prof. Charles Adams 10/1/98 (98-CV-G)	10/98 — Referred to chair, reporter, Agenda Subc, and Discovery Subc **PENDING FURTHER ACTION**
[CV45(d)] — Re-service of subpoena not necessary if continuance is granted and witness is provided adequate notice	William T. Terrell, Esq. 10/9/98 (98-CV-H)	12/98 — Referred to chair, reporter, and Agenda Subc **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CV47(a)] — Mandatory attorney participation in jury voir dire examination	Francis Fox, Esq.	10/94 — Considered by cmte 4/95 — Approved draft 7/95 — Proposed amendment approved for publication by ST Cmte 9/95 — Published for comment 4/96 — Considered by advisory cmte; recommended increased attention by Fed. Jud. Center at judicial training **COMPLETED**
[CV47(b)] — Eliminate peremptory challenges	Judge Willaim Acker 5/97 (97-CV-F) #2828	6/97 — Referred to reporter, chair, and Agenda Subc 11/98 — Cmte declined t take action **COMPLETED**
[CV48] — Implementation of a twelve-person jury	Judge Patrick Higginbotham	10/94 — Considered by cmte 7/95 — Proposed amendment approved for publication by ST Cmte 9/95 — Published for comment 4/96 — Forwarded to ST Cmte for submission to Jud Conf 6/96 — ST Cmte approves 9/96 — Jud Conf rejected 10/96 — Cmte's post-mortem discussion **COMPLETED**
[CV50] — Uniform date for filing post trial motion	BK Rules Committee	5/93 —Approved for publication 6/93 — ST Cmte approves publication 4/94 — Approved by cmte 6/94 — Approved by ST Cmte 9/94 — Approved by Jud Conf 4/95 — Approved by Sup Ct 12/95 — Effective **COMPLETED**
[CV50(b)] — When a motion is timely after a mistrial has been declared	Judge Alicemarie Stotler 8/26/97 (97-CV-M)	8 /97 — Sent to reporter and chair 10/97 — Referred to Agenda Subc **PENDING FURTHER ACTION**
[CV51] — Jury instructions filed before trial	Judge Stotler (96-CV-E) Gregory B. Walters, Cir. Exec., for the Jud. Council of the Ninth Cir. 12/4/97 (97-CV-V)	11/8/96 — Referred to chair 5/97 — Reporter recommends consideration of comprehensive revision 1/98 — Referred to reporter, chair, and Agenda Subc 3/98 — Cmte considered 11/98 — Cmte considered 4/99 — Cmte considered **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CV52] — Uniform date for filing for filing post trial motion	BK Rules Cmte	5/93 —Approved for publication 6/93 — ST Cmte approves publication 4/94 — Approved by cmte 6/94 — Approved by ST Cmte 9/94 — Approved by Jud Conf 4/95 — Approved by Sup Ct 12/95 — Effective **COMPLETED**
[CV53] — Provisions regarding pretrial and post-trial masters	Judge Wayne Brazil	5/93 — Considered by cmte 10/93 — Considered by cmte 4/94 — Draft amendments to CV16.1 regarding "pretrial masters" 10/94 — Draft amendments considered 11/98 — Subcom appointed to study issue **DEFERRED INDEFINITELY**
[CV56] — To clarify cross-motion for summary judgment	John J. McCarthy 11/21/97	12/97 — Referred to reporter, chair, and Agenda Subc **PENDING FURTHER ACTION**
[CV56(a)] — Clarification of timing	Scott Cagan 2/97 (97-CV-B) #2475	3/97 — Referred to reporter, chair, and Agenda Subc 5/97 — Reporter recommends rejection **PENDING FURTHER ACTION**
[CV56(c)] — Time for service and grounds for summary adjudication	Judge Judith N. Keep 11/21/94	4/95 — Considered by cmte; draft presented 11/95 — Draft presented, reviewed, and set for further discussion **PENDING FURTHER ACTION**
[CV59] — Uniform date for filing for filing post trial motion	BK Rules Committee	5/93 —Approved for publication 6/93 — ST Cmteapproves publication 4/94 — Approved by cmte 6/94 — Approved by ST Cmte 9/94 — Approved by Jud Conf 4/95 — Approved by Sup Ct 12/95 — Effective **COMPLETED**
[CV60(b)] — Parties are entitled to challenge judgments provided that the prevailing party cites the judgment as evidence	William Leighton 7/20/94	10/94 — Delayed for further study 4/95 — Declined to act **COMPLETED**
[CV62(a)] — Automatic stays	Dep. Assoc. AG, Tim Murphy	4/94 — No action taken **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CV64] — Federal prejudgment security	ABA proposal	11/92 — Considered by cmte 5/93 — Considered by cmte 4/94 — Declined to act **DEFERRED INDEFINITELY**
[CV65(f)] — rule made applicable to copyright impoundment cases	see request on copyright	11/98 — Request for publication **PENDING FURTHER ACTION**
[CV65.1] — To amend to avoid conflict between 31 U.S.C. § 9396 governing the appointment of agents for sureties and the Code of Conduct for Judicial Employees	Judge H. Russel Holland 8/22/97 (97-CV-L)	10/97 — Referred to reporter, chair, and Agenda Subc 11/98 — Cmte declined to act in light of earlier action taken at March 1998 meeting **COMPLETED**
[CV68] — Party may make a settlement offer that raises the stakes of the offeree who would continue the litigation	Agenda book for 11/92 meeting; Judge Swearingen 10/30/96 (96-CV-C); S. 79 Civil Justice Fairness Act of 1997 and § 3 of H.R. 903	1/21/93 — Unofficial solicitation of public comment 5/93, 10/93, 4/94 — Considered by cmte 4/94 — Federal Judicial Center agrees to study rule 10/94 — Delayed for further consideration 1995 — Federal Judicial Center completes its study **DEFERRED INDEFINITELY** 10/96 — Referred to reporter, chair, and Agenda Subc. (Advised of past comprehensive study of proposal) 1/97 — S. 79 introduced § 303 would amend the rule 4/97 — Stotler letter to Hatch 5/97 — Reporter recommends continued monitoring **PENDING FURTHER ACTION**
[CV73(b)] — Consent of additional parties to magistrate judge jurisdiction	Judge Easterbrook 1/95	4/95 — Initially brought to cmte's attention 11/95 — Delayed for review, no pressing need 10/96 — Considered along with repeal of CV74, 75, and 76 5/97 — Reporter recommends continued monitoring **PENDING FURTHER ACTION**
[CV 74,75, and 76] — Repeal to conform with statute regarding alternative appeal route from magistrate judge decisions	Federal Courts Improvement Act of 1996 (96-CV-A) #1558	10/96 — Recommend repeal rules to conform with statute and transmit to ST Cmte 1/97 — Approved by ST Cmte 3/97 — Approved by Jud Conf 4/97 — Approved by Sup Ct 12/97 — Effective **COMPLETED**
[CV 77(b)] — Permit use of audiotapes in courtroom	Glendora 9/3/96 (96-CV-H) #1975	12/96 — Referred to reporter and chair 5/97 — Reporter recommends that other Conf. Cmte should handle the issue **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CV77(d)] — Fax noticing to produce substantial cost savings while increasing efficiency and productivity	Michael E. Kunz, Clerk of Court 9/10/97 (97-CV-N)	9/97 — Mailed to reporter, chair, and Agenda Subc 4/99 — request publication **PENDING FURTHER ACTION**
[CV77(d)] — Facsimile service of notice to counsel	William S. Brownell, District Clerks Advisory Group 10/20/97 (CV-Q)	11/97 — Referred to reporter, chair, and Agenda Subc **PENDING FURTHER ACTION**
[CV77.1] — Sealing orders		10/93 — Considered 4/94 — No action taken **DEFERRED INDEFINITELY**
[CV81] — To add injunctions to the rule	John J. McCarthy 11/21/97	12/97 — Referred to reporter, chair, and Agenda Subc **PENDING FURTHER ACTION**
[CV 81(a)(2)] — Inconsistent time period vs. Habeas Corpus rule 1(b)	Judge Mary Feinberg 1/28/97 (97-CV-E) #2164	2/97 — Referred to reporter, chair, and Agenda Subc. 5/97 — Considered and referred to Criminal Rules Cmte for coordinated response **PENDING FURTHER ACTION**
[CV81(a)(1)] — Applicability to D.C. mental health proceedings	Joseph Spaniol, 10/96	10/96 — Cmte considered 5/97 — Reporter recommends consideration as part of a technical amendment package 10/98 — Cmte. includes it in package submitted to Stg. Cmte. for publication 1/99 — Stg. Cmte. approves for publication **PENDING FURTHER ACTION**
[CV81(a)(1)] — Applicability to copyright proceedings and substitution of notice of removal for petition for removal	see request on copyright	11/98 — Request for publication 1/99 — Stg. Cmte. approves for publication **PENDING FURTHER ACTION**
[CV81(c)] — Removal of an action from state courts — technical conforming change deleting "petition"	Joseph D. Cohen 8/31/94	4/95 — Accumulate other technical changes and submit eventually to Congress 11/95 — Reiterated April 1995 decision 5/97 — Reporter recommends that it be included in next technical amendment package 4/99 — Cmte considered **PENDING FURTHER ACTION**
[CV83(a)(1)] — Uniform effective date for local rules and transmission to AO		3/98 — Cmte considered 11/98 — Draft language considered **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CV83] — Negligent failure to comply with procedural rules; local rule uniform numbering		5/93 — Recommend for publication 6/93 — Approved for publication 10/93 — Published for comment 4/94 — Revised and approved by cmte 6/94 — Approved by ST Cmte 9/94 — Approved by Jud Conf 4/95 — Approved by Sup Ct 12/95 — Effective **COMPLETED**
[CV84] — Authorize Conference to amend rules		5/93 — Considered by cmte 4/94 — Recommend no change **COMPLETED**
[Recycled Paper and Double-Sided Paper]	Christopher D. Knopf 9/20/95	11/95 — Considered by cmte **DEFERRED INDEFINITELY**
[Pro Se Litigants] — To create a committee to consider the promulgation of a specific set of rules governing cases filed by pro se litigants	Judge Anthony J. Battaglia, on behalf of the Federal Magistrate Judge Assn. Rules Cmte, to support proposal by Judge David Piester 7/17/97 (97-CV-I)	7/97 — Mailed to reporter and chair 10/97 — Referred to Agenda Subc **PENDING FURTHER ACTION**
[CV Form 1] — Standard form AO 440 should be consistent with with summons Form 1	Joseph W. Skupniewitz, Clerk 10/2/98 (98-CV-F)	10/98 — Referred to chair, reporter, and Agenda Subc **PENDING FURTHER ACTION**
[CV Form 17] Complaint form for copyright infringement	Professor Edward Cooper 10/27/97	10/97 — Referred to cmte **PENDING FURTHER ACTION**
[Interrogatories on Disk]	Michelle Ritz 5/13/98 (98-CV-C)	5/98 — Referred to reporter, chair, and Agenda Subc **PENDING FURTHER ACTION**
[To change standard AO forms 241 and 242 to reflect amendments in the law under the Antiterrorism and Effective Death Penalty Act of 1997]	Judge Harvey E. Schlesinger 8/10/98 (98-CV-D)	8/98 — Referred to reporter, chair, and Agenda Subc **PENDING FURTHER ACTION**

AGENDA DOCKETING

ADVISORY COMMITTEE ON CRIMINAL RULES

Proposal	Source, Date, and Doc #	Status
[CR 4] — Require arresting officer to notify pretrial services officer, U.S. Marshal, and U.S. Attorney of arrest	Local Rules Project	10/95 — Subc appointed 4/96 — Rejected by subc **COMPLETED**
[CR 5] — Video Teleconferencing of Initial Appearances and Arraignments	Judge Fred Biery 5/98	5/98 — Referred to chair and reporter for consideration 10/98 — Referred to subcmte **PENDING FURTHER ACTION**
[CR 5] — To allow initial appearances, arraignments, attorney status hearings, and possibly petty pleas to be taken by video conferencing.	Judge Durwood Edwards 6/98	6/98 — Referred to chair and reporter for consideration 10/98 — Referred to subcmte **PENDING FURTHER ACTION**
[CR 5(a)] — Time limit for hearings involving unlawful flight to avoid prosecution arrests	DOJ 8/91; 8/92	10/92 — Subc appointed 4/93 — Considered 6/93 — Approved for publication 9/93 — Published for public comment 4/94 — Revised and forwarded to ST Cmte 6/94 — Approved by ST Cmte 9/94 — Approved by Jud Conf 4/95 — Approved by Sup Ct 12/95 — Effective **COMPLETED**
[CR 5(c)] — Misdemeanor defendant in custody is not entitled to preliminary examination. Cf CR58(b)(2)(G)	Magistrate Judge Robert B. Collings 3/94	10/94 — Deferred pending possible restylizing efforts **PENDING FURTHER ACTION**
[CR 5(c)] — Eliminate consent requirement for magistrate judge consideration	Judge Swearingen 10/28/96 (96-CR-E)	1/97 — Sent to reporter 4/97 — Recommends legislation to ST Cmte 6/97 — Recommitted by ST Cmte 10/97—Adv. Cmte declines to amend provision. 3/98 — Jud Conf instructs rules cmtes to propose amendment 4/98 — Approves amendment, but defers until style project completed 6/98 — Stg Cmte concurs with deferral **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CR 5.1] — Extend production of witness statements in CR26.2 to 5.1.	Michael R. Levine, Asst. Fed. Defender 3/95	10/95 — Considered 4/96 — Draft presented and approved 6/96 — Approved by ST Cmte 8/96— Published for public comment 4/97— Forwarded to ST Cmte 6/97 — Approved by ST Cmte 9/97—Approved by Jud Conf 4/98 — Approved by Supreme Court 12/98 — Effective **COMPLETED**
[CR 6] — Statistical reporting of indictments	David L. Cook AO 3/93	10/93 — Cmte declined to act on the issue **COMPLETED**
[CR6(a)] — Reduce number of grand jurors	H.R. 1536 introduced by Cong Goodlatte	5/97 — Introduced by Congressman Goodlatte, referred to CACM with input from Rules Cmte 10/97—Adv Cmte unanimously voted to oppose any reduction in grand jury size. 1/98—ST Cmte voted to recommend that the Judicial Conference oppose the legislation. 3/98 — Jud Conf concurs **COMPLETED**
[CR 6(d)] — Allow witness to be accompanied into grand jury by counsel	Omnibus Approp. Act (P.L.105-277)	10/98 — Considered; Subcomm. Appointed 1/99 — Stg Cmte approved subcomm rec. not to allow representation 3/99 — Jud Conf approves report for submission to Congress **COMPLETED**
[CR 6(d)] — Interpreters allowed during grand jury	DOJ 1/22/97 (97-CR-B)	1/97 — Sent directly to chair 4/97 — Draft presented and approved for request to publish 6/97 — Approved by ST Cmte for publication 8/97— Published for public comment 4/98— Approved and forwarded to St Cmte 6/98 — Approved by Stg Cmte 9/98 — Approved by Jud Conf 4/99 — Approved by Sup. Ct. **COMPLETED**
[CR 6(e)] — Intra-Department of Justice use of Grand Jury materials	DOJ	4/92 — Rejected motion to send to ST Cmte for public comment 10/94 — Discussed and no action taken **COMPLETED**
[CR 6(e)(3)(C)(iv)] — Disclosure of Grand Jury materials to State Officials	DOJ	4/96 — Cmte decided that current practice should be reaffirmed **COMPLETED**
[CR 6(e)(3)(C)(iv)] — Disclosure of Grand Jury materials to State attorney discipline agencies	Barry A. Miller, Esq. 12/93	10/94 — Considered, no action taken **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CR6 (f)] — Return by foreperson rather than entire grand jury	DOJ 1/22/97 (97-CR-A)	1/97 — Sent directly to chair 4/97— Draft presented and approved for publication 6/97 — Approved by ST Cmte for publication 8/97— Published for public comment 4/98— Approved and forwarded to St Cmte 6/98 — Approved by Stg Cmte 9/98 — Approved by Judicial Conference 4/99 — Approved by Sup. Ct. **COMPLETED**
[CR7(c)(2)] — Reflect proposed new Rule 32.2 governing criminal forfeitures		4/97— Draft presented and approved for publication 6/97 — Approved by ST Cmte for publication 8/97— Published for public comment 4/98— Approved and forwarded to St Cmte 6/98 — Withdrawn in light of R. 32.2 rejection by Stg. Cmte 10/98 — revised and resubmitted to stg cmte for transmission to conference — 1/99— Approved by Stg Cmte 3/99— Approved by Jud Conf **COMPLETED**
[CR 10] — Arraignment of detainees through video teleconferencing; Defendant's presence not required	DOJ 4/92	4/92 — Deferred for further action 10/92 — Subc appointed 4/93 — Considered 6/93 — Approved for publication by ST Cmte 9/93 — Published for public comment 4/94 — Action deferred, pending outcome of FJC pilot programs 10/94 — Considered 4/98 —Draft amendments considered, but subcmte appointed to further study 10/98 — Considered by cmte; reporter to redraft and submit at next meeting 4/99 — Considered **PENDING FURTHER ACTION**
[CR 10] — Guilty plea at an arraignment	Judge B. Waugh Crigler 10/94	10/94 — Suggested and briefly considered **DEFERRED INDEFINITELY**
[CR 11] — Magistrate judges authorized to hear guilty pleas, and inform accused of possible deportation	James Craven, Esq. 1991	4/92 — Disapproved **COMPLETED**
[CR 11] — Advise defendant of impact of negotiated factual stipulation	David Adair & Toby Slawsky, AO 4/92	10/92 — Motion to amend withdrawn **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CR 11(c)] — Advise defendant of any appeal waiver provision which may be contained in plea agreement	Judge Maryanne Trump Barry 7/19/96 (96-CR-A)	10/96 — Considered, draft presented 4/97 — Draft presented and approved for request to publish 6/97 — Approved for publication by ST Cmte 8/97— Published for public comment 4/98 — Approved and forwarded to Stg Cmte 6/98 — Approved by Stg Cmte 9/98 — Approved by Jud Conf 4/99 — Approved by Sup. Ct. **COMPLETED**
[CR 11(d)] — Examine defendant's prior discussions with an government attorney	Judge Sidney Fitzwater 11/94	4/95 — Discussed and no motion to amend **COMPLETED**
[CR 11(e)] — Judge, other than the judge assigned to hear case, may take part in plea discussions	Judge Jensen 4/95	10/95 — Considered 4/96 —Tabled as moot, but continued study by subcmte on other Rule 11 issues **DEFERRED INDEFINITELY**
[CR 11(e)(4) — Binding Plea Agreement (Hyde decision)	Judge George P. Kazen 2/96	4/96 — Considered 10/96 — Considered 4/97 — Deferred until Sup Ct decision **COMPLETED**
[CR 11(e)(1) (A)(B) and (C)] — Sentencing Guidelines effect on particular plea agreements	CR Rules Committee 4/96	4/96 — To be studied by reporter 10/96 — Draft presented and considered 4/97 — Draft presented and approved for request to publish 6/97 — Approved for publication by ST Cmte 8/97— Published for public comment 4/98 — Approved and forwarded to Stg Cmte 6/98 — Approved by Stg Cmte 9/98 — Approved by Jud Conf 4/99 — Approved by Sup. Ct. **COMPLETED**
[CR 11]—Pending legislation regarding victim allocution	Pending legislation 97-98	10/97—Adv Cmte expressed view that it was not opposed to addressing the legislation and decided to keep the subcmte in place to monitor/respond to the legislation.
[CR 11(e)(6) — Court required to inquire whether the defendant is entitled to an adjustment for acceptance of responsibility	Judge John W. Sedwick 10/98 (98-CR-C)	**PENDING FURTHER ACTION**
[CR 12] — Inconsistent with Constitution	Paul Sauers 8/95	10/95 — Considered and no action taken **COMPLETED**
[CR 12(b)] — Entrapment defense raised as pretrial motion	Judge Manuel L. Real 12/92 & Local Rules Project	4/93 — Denied 10/95 — Subcmte appointed 4/96 — No action taken **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CR 12(i)] — Production of statements		7/91 — Approved by ST Cmte for publication 4/92 — Considered 6/92 — Approved by ST Cmte 9/92 — Approved by Jud Conf 4/93 — Approved by Sup Ct 12/93 — Effective **COMPLETED**
[CR12.2]—authority of trial judge to order mental examination.	Presented by Mr. Pauley on behalf of DOJ at 10/97 meeting.	10/97—Adv Cmte voted to consider draft amendment at next meeting. 4/98 — Deferred for further study of constitutional issues 10/98 — Considered draft amendments, continued for further study 4/99 — Considered **PENDING FURTHER ACTION**
[CR 16] — Disclosure to defense of information relevant to sentencing	John Rabiej 8/93	10/93 — Cmte took no action **COMPLETED**
[CR 16] — Prado Report and allocation of discovery costs	'94 Report of Jud Conf	4/94 — Voted that no amendment be made to the CR rules **COMPLETED**
[CR 16] — Prosecution to inform defense of intent to introduce extrinsic act evidence	CR Rules Committee '94	10/94 — Discussed and declined **COMPLETED**
[CR 16(a)(1)] — Disclosure of experts		7/91 — Approved by for publication by St Cmte 4/92 — Considered 6/92 — Approved by ST Cmte 9/92 — Approved by Jud Conf 4/93 — Approved by Sup Ct 12/93 — Effective **COMPLETED**
[CR 16(a)(1)(A)] — Disclosure of statements made by organizational defendants	ABA	11/91 — Considered 4/92 — Considered 6/92 — Approved by ST Cmte for publication, but deferred 12/92 — Published 4/93 — Discussed 6/93 — Approved by ST Cmte 9/93 — Approved by Jud Conf 4/94 — Approved by Sup Ct 12/94 — Effective **COMPLETED**
[CR 16(a)(1)(C)] — Government disclosure of materials implicating defendant	Prof. Charles W. Ehrhardt 6/92 & Judge O'Brien	10/92 — Rejected 4/93 — Considered 4/94 — Discussed and no motion to amend **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CR 16(a)(1)(E)] — Require defense to disclose information concerning defense expert testimony	Jo Ann Harris, Asst. Atty. Gen., CR Div., DOJ 2/94; clarification of the word "complies" Judge Propst (97-CR-C)	4/94 — Considered 6/94 — Approved for publication by ST Cmte 9/94 — Published for public comment 7/95 — Approved by ST Cmte 9/95 — Rejected by Jud Conf 1/96 — Discussed at ST meeting 4/96 — Reconsidered and voted to resubmit to ST Cmte 6/96 — Approved by ST Cmte 9/96 — Approved by Jud Conf 4/97 — Approved by Sup Ct 12/97 — Effective **COMPLETED** 3/97 — Referred to reporter and chair 10/98 — Incorporated in proposed amendments to Rule 12.2 **PENDING FURTHER ACTION**
[CR 16(a) and (b)] — Disclosure of witness names and statements before trial	William R. Wilson, Jr., Esq. 2/92	2/92 — No action 10/92 — Considered and decided to draft amendment 4/93 — Deferred until 10/93 10/93 — Considered 4/94 — Considered 6/94 — Approved for publication by ST Cmte 9/94 — Published for public comment 4/95 — Considered and approved 7/95 — Approved by ST Cmte 9/95 — Rejected by Jud Conf **COMPLETED**
[CR 16(d)] — Require parties to confer on discovery matters before filing a motion	Local Rules Project & Mag Judge Robert Collings 3/94	10/94 — Deferred 10/95 — Subcmte appointed 4/96 — Rejected by subcmte **COMPLETED**
[CR23(b)] — Permits six-person juries in felony cases	S. 3 introduced by Sen Hatch 1/97	1/97 — Introduced as § 502 of the Omnibus Crime Prevention Act of 1997 10/97—Adv. Cmte voted to oppose the legislation 1/98— ST Cmte expressed grave concern about any such legislation. **COMPLETED**
[CR 24(a)] — Attorney conducted voir dire of prospective jurors	Judge William R. Wilson, Jr. 5/94	10/94 — Considered 4/95 — Considered 6/95 — Approved for publication by ST Cmte 9/95 — Published for public comment 4/96 — Rejected by advisory cmte, but should be subject to continued study and education; FJC to pursue educational programs **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CR 24(b)] — Reduce or equalize peremptory challenges in an effort to reduce court costs	Renewed suggestions from judiciary; Judge Acker (97-CR-E); pending legislation S-3.	2/91 — ST Cmte, after publication and comment, rejected CR Cmte 1990 proposal 4/93 — No motion to amend 1/97 — Omnibus Crime Control Act of 1997 (S.3) introduced [Section 501] 6/97 — Stotler letter to Chairman Hatch **COMPLETED** 10/97—Adv. Cmte decided to take no action on proposal to randomly select petit and venire juries and abolish peremptory challenges. 10/97—Adv. Cmte directed reporter to prepare draft amendment equalizing peremptory challenges at 10 per side. 4/98 — Approved by 6 to 5 vote and will be included In style package **PENDING FURTHER ACTION**
[CR 24(c)] — Alternate jurors to be retained in deliberations	Judge Bruce M. Selya 8/96 (96-CR-C)	10/96 — Considered and agreed to in concept; reporter to draft appropriate implementing language 4/97 — Draft presented and approved for request to publish 6/97 — Approved for publication by ST Cmte 8/97— Published for public comment 4/98 — Approved and forwarded to Stg Cmte 6/98 — Approved by Stg Cmte 9/98 — Approved by Jud Conf 4/99 — Approved by Sup. Ct. **COMPLETED**
[CR 26] — Questioning by jurors	Prof. Stephen Saltzburg	4/93 — Considered and tabled until 4/94 4/94 — Discussed and no action taken **COMPLETED**
[CR 26] — Expanding oral testimony, including video transmission	Judge Stotler 10/96	10/96 — Discussed 4/97 — Subcmte will be appointed 10/97—Subcmte recommended amendment. Adv Cmte voted to consider a draft amendment at next meeting. 4/98 — Deferred for further study 10/98 — Cmte approved, but deferred request to publish until spring meeting or included in style package 4/99 — Considered **PENDING FURTHER ACTION**
[CR 26] — Court advise defendant of right to testify	Robert Potter	4/95 — Discussed and no motion to amend **COMPLETED**
[CR 26.2] — Production of statements for proceedings under CR 32(e), 32.1(c), 46(i), and Rule 8 of § 2255		7/91 — Approved for publication by ST Cmte 4/92 — Considered 6/92 — Approved by ST Cmte 9/92 — Approved by Jud Conf 4/93 — Approved by Sup Ct 12/93 — Effective **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CR 26.2] — Production of a witness' statement regarding preliminary examinations conducted under CR 5.1	Michael R. Levine, Asst. Fed. Defender 3/95	10/95 — Considered by cmte 4/96 — Draft presented and approved 6/96 — Approved by ST Cmte 8/96 — Published for public comment 4/97— Forwarded to ST Cmte 6/97 — Approved by ST Cmte 9/97—Jud Conf approves 4/98 — Approved by Supreme Court 12/98 — Effective **COMPLETED**
[CR26.2(f)] — Definition of Statement	CR Rules Cmte 4/95	4/95 — Considered 10/95 — Considered and no action to be taken **COMPLETED**
[CR 26.3] — Proceedings for a mistrial		7/91 — Approved for publication by ST Cmte 4/92 — Considered 6/92 — Approved by ST Cmte 9/92 — Approved by Jud Conf 4/93 — Approved by Sup Ct 12/93 — Effective **COMPLETED**
[CR 29(b)] — Defer ruling on motion for judgment of acquittal until after verdict	DOJ 6/91	11/91 — Considered 4/92 — Forwarded to ST Cmte for public comment 6/92 — Approved for publication, but delayed pending move of RCSO 12/92 — Published for public comment on expedited basis 4/93 — Discussed 6/93 — Approved by ST Cmte 9/93 — Approved by Jud Conf 4/94 — Approved by Sup Ct 12/94 — Effective **COMPLETED**
[CR 30] — Permit or require parties to submit proposed jury instructions before trial	Local Rules Project	10/95 — Subcmte appointed 4/96 — Rejected by subcmte **COMPLETED**
[CR 30] — discretion in timing submission of jury instructions	Judge Stotler 1/15/97 (97-CR-A)	1/97 — Sent directly to chair and reporter 4/97 — Draft presented and approved for request to publish 6/97 — Approved for publication by ST Cmte 8/97— Published for public comment 4/98 — Deferred for further study 10/98 — Considered by cmte, but deferred pending Civil Rules Cmte action on CV 51 **PENDING FURTHER ACTION**
[CR 31] — Provide for a 5/6 vote on a verdict	Sen. Thurmond, S.1426, 11/95	4/96 — Discussed, rulemaking should handle it **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CR 31(d)] — Individual polling of jurors	Judge Brooks Smith	10/95 — Considered 4/96 — Draft presented and approved 6/96 — Approved by ST Cmte 8/96 — Published for public comment 4/97 — Forwarded to ST Cmte 6/97 — Approved by ST Cmte 9/97—Approved by Jud Conf 4/98 — Approved by Supreme Court 12/98 — Effective **COMPLETED**
[31(e)] — Reflect proposed new Rule 32.2 governing criminal forfeitures		4/97— Draft presented and approved for publication 6/97 — Approved for publication by ST Cmte 8/97— Published for public comment 4/98— Approved and forwarded to St Cmte 6/98 — Withdrawn in light of rejection of R. 32.2 by Stg Cmte 10/98 — revised and resubmitted to stg cmte for transmission to conference 1/99— Approved by Stg Cmte 3/99 — Approved by Jud Conf **COMPLETED**
[CR 32] — Amendments to entire rule; victims' allocution during sentencing	Judge Hodges, before 4/92; pending legislation reactivated issue in 1997/98.	10/92 — Forwarded to ST Cmte for public comment 12/92 — Published 4/93 — Discussed 6/93 — Approved by ST Cmte 9/93 — Approved by Jud Conf 4/94 — Approved by Sup Ct 12/94 — Effective **COMPLETED** 10/97—Adv Cmte expressed view that it was not opposed to addressing the legislation and decided to keep the subcmte in place to monitor/respond to the legislation. **PENDING FURTHER ACTION**
[CR 32]—mental examination of defendant in capital cases	Extension of amendment to CR 12.2(DOJ) at 10/97 meeting.	10/97— Adv Cmte voted to proceed with the drafting of an amendment. 10/98 — Incorporated in proposed amendments to Rule 12.2 **PENDING FURTHER ACTION**
[CR 32]—release of presentence and related reports	Request of Criminal Law Committee	10/98 — Reviewed recommendation of subcomm and agreed that no rules necessary **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CR 32(d)(2) — Forfeiture proceedings and procedures reflect proposed new Rule 32.2 governing criminal forfeitures	Roger Pauley, DOJ, 10/93	4/94 — Considered 6/94 — Approved by ST Cmte for public comment 9/94 — Published for public comment 4/95 — Revised and approved 6/95 — Approved by ST Cmte 9/95 — Approved by Jud Conf 4/96 — Approved by Sup Ct 12/96 — Effective **COMPLETED** 4/97— Draft presented and approved for publication 6/97 — Approved for publication by ST Cmte 8/97— Published for public comment 4/98— Approved and forwarded to St Cmte 6/98 — Withdrawn in light of rejection of R. 32.2 by Stg Cmte 10/98 — revised and resubmitted to stg cmte for transmission to conference 1/99— Approved by Stg Cmte 3/99 — Approved by Jud Conf **COMPLETED**
[CR 32(e)] — Delete provision addressing probation and production of statements (later renumbered to CR32(c)(2))	DOJ	7/91 — Approved by ST Cmte for publication 4/92 — Considered 6/92 — Approved by ST Cmte 9/92 — Approved by Judicial Conference 4/93 — Approved by Supreme Court 12/93 — Effective **COMPLETED**
[CR 32.1] — Production of statements		7/91 — Approved for publication by ST Cmte 4/92 — Considered 6/92 — Approved by ST Cmte 9/92 — Approved by Jud Conf 4/93 — Approved by Sup Ct 12/93 — Effective **COMPLETED**
[CR 32.1]— Technical correction of "magistrate" to "magistrate judge."	Rabiej (2/6/98)	2/98—Letter sent advising chair & reporter 4/98 — Approved, but deferred until style project completed **PENDING FURTHER ACTION**
[CR 32.1]—pending victims rights/allocution litigation	Pending litigation 1997/98.	10/97—Adv Cmte expressed view that it was not opposed to addressing the legislation and decided to keep the subcmte in place to monitor/respond to the legislation. **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CR 32.2] — Create forfeiture procedures	John C. Keeney, DOJ, 3/96 (96-CR-D)	10/96 — Draft presented and considered 4/97 — Draft presented and approved for request to publish 6/97 — Approved for publication by ST Cmte 8/97— Published for public comment 4/98— Approved and forwarded to St Cmte 6/98 — Rejected by Stg Cmte 10/98 — revised and resubmitted to stg cmte for transmission to conference 1/99 — Approved by Stg Cmte 3/99 — Approved by Jud Conf **COMPLETED**
[CR 33] — Time for filing motion for new trial on ground of newly discovered evidence	John C. Keeney, DOJ 9/95	10/95 — Considered 4/96 — Draft presented and approved 6/96 — Approved for publication by ST Cmte 8/96 — Published for public comment 4/97 — Forwarded to ST Cmte 6/97 — Approved by ST Cmte 9/97—Approved by Jud Conf 4/98 — Approved by Supreme Court 12/98 — Effective **COMPLETED**
[CR 35(b)] — Recognize combined pre-sentencing and post-sentencing assistance	Judge T. S. Ellis, III 7/95	10/95 — Draft presented and considered 4/96 — Forwarded to ST Cmte 6/96 — Approved for publication by ST Cmte 8/96 — Published for public comment 4/97 — Forwarded to ST Cmte 6/97 — Approved by ST Cmte 9/97—Approved by Jud Conf 4/98 — Approved by Supreme Court 12/98 — Effective **COMPLETED**
[CR 35(b)] — Recognize assistance in any offense	S.3, Sen Hatch 1/97	1/97 — Introduced as § 602 and 821 of the Omnibus Crime Prevention Act of 1997 6/97 — Stotler letter to Chairman Hatch **COMPLETED**
[CR 35(c)] — Correction of sentence, timing	Jensen, 1994 9th Cir. decision	10/94 — Considered 4/95 — No action pending restylization of CR Rules 4/99 — Considered **PENDING FURTHER ACTION**
[CR35(b)] — Substantial asssistance provided after one year	Judge Edward E. Carnes 3/99 (99-CR-A)	**PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CR 38(e)] — Conforming amendment to CR 32.2		4/97— Draft presented and approved for publication 6/97 — Approved by ST Cmte for publication 8/97— Published for public comment 4/98— Approved and forwarded to St Cmte 6/98 — Withdrawn in light of rejection of R. 32.2 by Stg Cmte 10/98 — revised and resubmitted to stg cmte for transmission to conference 1/99— Approved by Stg Cmte 3/99 — Approved by Jud Conf **COMPLETED**
[CR 40] — Commitment to another district (warrant may be produced by facsimile)		7/91 — Approved for publication by ST Cmte 4/92 — Considered 6/92 — Approved by ST Cmte 9/92 — Approved by Jud Conf 4/93 — Approved by Sup Ct 12/93 — Effective **COMPLETED**
[CR 40] —Treat FAX copies of documents as certified	Mag Judge Wade Hampton 2/93	10/93 — Rejected **COMPLETED**
[CR 40(a)] — Technical amendment conforming with change to CR5	Criminal Rules Cmte 4/94	4/94 — Considered, conforming change no publication necessary 6/94 — Approved by ST Cmte 9/94 — Approved by Jud Conf 4/95 — Approved by Sup Ct 12/95 — Effective **COMPLETED**
[CR 40(a)] —Proximity of nearest judge for removal proceedings	Mag Judge Robert B. Collings 3/94	10/94 — Considered and deferred further discussion until 4/95 10/96 — Considered and rejected **COMPLETED**
[CR 40(d)] — Conditional release of probationer; magistrate judge sets terms of release of probationer or supervised release	Magistrate Judge Robert B. Collings 11/92	10/92 — Forwarded to ST Cmte for publication 4/93 — Discussed 6/93 — Approved by ST Cmte 9/93 — Approved by Jud Conf 4/94 — Approved by Sup Ct 12/94 — Effective **COMPLETED**
[CR 41] — Search and seizure warrant issued on information sent by facsimile		7/91 — Approved for publication by ST Cmte 4/92 — Considered 6/92 — Approved by ST Cmte 9/92 — Approved by Jud Conf 4/93 — Approved by Sup Ct 12/93 — Effective **COMPLETED**
[CR 41] — Warrant issued by authority within the district	J.C. Whitaker 3/93	10/93 — Failed for lack of a motion **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CR 41(c)(2)(D)] — recording of oral search warrant	J. Dowd 2/98	4/98 — Tabled until study reveals need for change **DEFERRED INDEFINITELY**
[CR 41(c)(1) and (d) — enlarge time period	Judge B. Waugh Crigler 11/98 (98-CR-D)	**PENDING FURTHER ACTION**
[CR 43(b)] —Sentence absent defendant	DOJ 4/92	10/92 — Subcmte appointed 4/93 — Considered 6/93 — Approved for publication by ST Cmte 9/93 — Published for public comment 4/94 — Deleted video teleconferencing provision & forwarded to ST Cmte 6/94 — Approved by ST Cmte 9/94 — Approved by Jud Conf 4/95 — Approved by Sup Ct 12/95 — Effective **COMPLETED**
[CR 43(b)] — Arraignment of detainees by video teleconferencing		10/98 — Subcmte appointed 4/99 — Considered **PENDING FURTHER ACTION**
[CR 43(c)(4)] — Defendant need not be present to reduce or change a sentence	John Keeney, DOJ 1/96	4/96 — Considered 6/96 — Approved for publication by ST Cmte 8/96 — Published for public comment 4/97 — Forwarded to ST Cmte 6/97 — Approved by ST Cmte 9/97—Approved by Jud Conf 4/98 — Approved by Supreme Court 12/98 — Effective **COMPLETED**
[CR 43(c)(5) — Defendant to waive personal arraignment on subsequent, superseding indictments and enter plea of not guilty in writing	Judge Joseph G. Scoville, 10/16/97 (97-CR-I) and Mario Cano 97---	10/97 — Referred to reporter and chair 4/98 —Draft amendments considered, subcmte appointed 10/98 — Cmte considered; reporter to submit draft at next meeting **PENDING FURTHER ACTION**
[CR 46] — Production of statements in release from custody proceedings		6/92 — Approved by ST Cmte 9/92 — Approved by Jud Conf 4/93 — Approved by Sup Ct 12/93 — Effective **COMPLETED**
[CR 46] — Release of persons after arrest for violation of probation or supervised release	Magistrate Judge Robert Collings 3/94	10/94 — Defer consideration of amendment until rule might be amended or restylized **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CR 46] — Requirements in AP 9(a) that court state reasons for releasing or detaining defendant in a CR case	11/95 Stotler letter	4/96 — Discussed and no action taken **COMPLETED**
[CR 46 (e)] — Forfeiture of bond	H.R. 2134	4/98 — Opposed amendment **COMPLETED**
[CR 46(i)] — Typographical error in rule in cross-citation	Jensen	7/91 — Approved for publication by ST Cmte 4/94 — Considered 9/94 — No action taken by Jud Conf because Congress corrected error **COMPLETED**
[CR 47] — Require parties to confer or attempt to confer before any motion is filed	Local Rules Project	10/95 — Subcmte appointed 4/96 — Rejected by subcmte **COMPLETED**
[CR 49] — Double-sided paper	Environmental Defense Fund 12/91	4/92 — Chair informed EDF that matter was being considered by other cmtes in Jud Conf **COMPLETED**
[CR 49(c)] — Fax noticing to produce substantial cost savings while increasing efficiency and productivity	Michael E. Kunz, Clerk of Court 9/10/97 (97-CR-G)	9/97 — Mailed to reporter and chair 4/98 — Referred to Technology Subcmte 4/99 — Considered **PENDING FURTHER ACTION**
[CR49(c)] — Facsimile service of notice to counsel	William S. Brownell, 10/20/97 (CR-J)	11/97 — Referred to reporter and chair, pending Technology Subcmte study 4/99 — Considered **PENDING FURTHER ACTION**
[CR 49(e)] —Delete provision re filing notice of dangerous offender status — conforming amendment	Prof. David Schlueter 4/94	4/94 — Considered 6/94 — ST Cmte approved without publication 9/94 — Jud Conf approved 4/95 — Sup Ct approved 12/95 — Effective **COMPLETED**
[CR53] — Cameras in the courtroom		7/93 — Approved by ST Cmte 10/93 — Published 4/94 — Considered and approved 6/94 — Approved by ST Cmte 9/94 — Rejected by Jud Conf 10/94 — Guidelines discussed by cmte **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CR54] — Delete Canal Zone	Roger Pauley, minutes 4/97 mtg	4/97 — Draft presented and approved for request to publish 6/97 — Approved for publication by ST Cmte 8/97— Published for public comment 4/98 — Approved and forwarded to Stg Cmte 6/98 —Approved by Stg Cmte 9/98 — Approved by Jud Conf 4/99 — Approved by Sup. Ct. **COMPLETED**
[CR 57] — Local rules technical and conforming amendments & local rule renumbering	ST meeting 1/92	4/92 — Forwarded to ST Cmte for public comment 6/93 — Approved for publication by ST Cmte 9/93 — Published for public comment 4/94 — Forwarded to ST Cmte 12/95 — Effective **COMPLETED**
[CR 57] — Uniform effective date for local rules	Stg Cmte meeting 12/97	4/98 — Considered an deferred for further study **PENDING FURTHER ACTION**
[CR 58] — Clarify whether forfeiture of collateral amounts to a conviction	Magistrate Judge David G. Lowe 1/95	4/95 — No action **COMPLETED**
[CR 58 (b)(2)] — Consent in magistrate judge trials	Judge Philip Pro 10/24/96 (96- CR-B)	1/97 — Reported out by CR Rules Cmte and approved by ST Cmte for transmission to Jud Conf without publication; consistent with Federal Courts Improvement Act 4/97 — Approved by Sup Ct 12/97 — Effective **COMPLETED**
[CR 59] — Authorize Judicial Conference to correct technical errors with no need for Supreme Court & Congressional action	Report from ST Subcommittee on Style	4/92 — Considered and sent to ST Cmte 6/93 — Approved for publication by ST Cmte 10/93 — Published for public comment 4/94 — Approved as published and forwarded to ST Cmte 6/94 — Rejected by ST Cmte **COMPLETED**
[Megatrials] — Address issue	ABA	11/91 — Agenda 1/92 — ST Cmte, no action taken **COMPLETED**
[Rule 8. Rules Governing §2255] — Production of statements at evidentiary hearing		7/91 — Approved for publication by ST Cmte 4/92 — Considered 6/92 — Approved by ST Cmte 9/92 — Approved by Jud Conf 4/93 — Approved by Sup Ct 12/93 — Effective **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[Rules Governing Habeas Corpus Proceedings]— miscellaneous changes to Rule 8 & Rule 4 for §2255 & §2254 proceedings	CV Cmte	10/97 — Subcmte appointed 4/98 — Considered; further study 10/98 — Cmte approved some proposals and deferred others for further consideration **PENDING FURTHER ACTION**
[CR8(c)] — Apparent mistakes in Federal Rules Governing § 2255 and § 2254	Judge Peter Dorsey 7/9/97 (97-CR-F)	8/97 — Referred to reporter 10/97 — Referred to subcmte 4/98 — Cmte considered 10/98 — Cmte considered **PENDING FURTHER ACTION**
[U.S. Attorneys admitted to practice in Federal courts]	DOJ 11/92	4/93 — Considered **COMPLETED**
[Restyling CR Rules]		10/95 — Considered 4/96 — On hold pending consideration of restyled AP Rules published for public comment 4/98 — Advised that Style Subc intends to complete first draft by the end of the year 12/98 — Style subcmte completes its draft **PENDING FURTHER ACTION**
Style: Rules 1-9	SubCmte A	4/99 — Considered

AGENDA DOCKETING

ADVISORY COMMITTEE ON EVIDENCE RULES

Proposal	Source, Date, and Doc #	Status
[EV 101] — Scope		6/92 — Approved by ST Cmte. 9/92 — Approved by Jud. Conf. 4/93 — Approved by Sup. Ct. 12/93 — Effective 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 102 — Purpose and Construction		5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 103] — Ruling on EV		9/93 — Considered 5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 103(a)] — When an *in limine* motion must be renewed at trial (earlier proposed amendment would have added a new Rule 103(e))		9/93 — Considered 5/94 — Considered 10/94 — Considered 1/95 — Approved for publication by ST Cmte. 5/95 — Considered. Note revised. 9/95 — Published for public comment 4/96 — Considered 11/96 — Considered. Subcommittee appointed to draft alternative. 4/97 — Draft requested for publication 6/97 — ST Cmte. recommitted to advisory cmte for further study 10/97 — Request to publish revised version 1/98 — Approved for publication by ST Cmte. 8/98 — Published for comment 10/98 — Cmte considered comments and statements from witnesses 4/99 — Cmte approved with revisions **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[EV104] — Preliminary Questions		9/93 — Considered 1/95 — Considered 5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 105] — Limited Admissibility		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 106] — Remainder of or Related Writings or Recorded Statements		5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 106] — Admissibility of "hearsay" statement to correct a misimpression arising from admission of part of a record	Prof. Daniel Capra (4/97)	4/97 — Reporter to determine whether any amendment is appropriate 10/97 — No action necessary **COMPLETED**
[EV 201] — Judicial Notice of Adjudicative Facts		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment 11/96 — Decided not to amend **COMPLETED**
[EV 201(g)] — Judicial Notice of Adjudicative Facts		5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment 11/96 — Decided to take no action **DEFERRED INDEFINITELY**
[EV 301] — Presumptions in General Civil Actions and Proceedings. (Applies to evidentiary presumptions but not substantive presumptions.)		5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment 11/96 — Deferred until completion of project by Uniform Rules Committee **PENDING FURTHER ACTION**
[EV 302] — Applicability of State Law in Civil Actions and Proceedings		5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[EV 401] — Definition of "Relevant Evidence"		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 402] — Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 403] — Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 404] — Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes	Sen. Hatch S.3, § 503 (1/97)(dealing with 404(a)	9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment 10/94 — Considered with EV 405 as alternative to EV 413-415 4/97 — Considered 6/97 — Stotler letter to Hatch on S.3 10/97 — Recommend publication 1/98 — Approved for publication by the ST Cmte. 8/98 — Published for comment 10/98 — Cmte considered comments and statements from witnesses 4/99 — Cmte approved with revisions **PENDING FURTHER ACTION**
[EV 404(b)] — Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes: Other crimes, wrongs, or acts. (Uncharged misconduct could only be admitted if the probative value of the evidence substantially outweighs the prejudicial effect.)	Sen. Hatch S.3, § 713 (1/97)	9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment 10/94 — Discussed 11/96 — Considered and rejected any amendment 4/97 — Considered 6/97 — Stotler letter to Hatch on S.3 10/97 — Proposed amendment in the Omnibus Crime Bill rejected **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[EV 405] — Methods of Proving Character. (Proof in sexual misconduct cases.)		9/93 — Considered 5/94 — Considered 10/94 — Considered with EV 404 as alternative to EV 413-415 **COMPLETED**
[EV 406] — Habit; Routine Practice		10/94 — Decided not to amend (Comprehensive Review) 1/95 — Approved for publication by ST Cmte. **COMPLETED**
[EV 407] — Subsequent Remedial Measures. (Extend exclusionary principle to product liability actions, and clarify that the rule applies only to measures taken after injury or harm caused by a routine event.)	Subcmte. reviewed possibility of amending (Fall 1991)	4/92 — Considered and rejected by CR Rules Cmte. 9/93 — Considered 5/94 — Considered 10/94 — Considered 5/95 — Considered 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment 4/96 — Approved & submitted to ST Cmte. for transmittal to Jud. Conf. 6/96 — Approved by ST Cmte. 9/96 — Approved by Jud. Conf. 4/97 — Approved by Sup. Ct. 12/97 — Enacted **COMPLETED**
[EV 408] — Compromise and Offers to Compromise		9/93 — Considered 5/94 — Considered 1/95 — Considered 5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 409] — Payment of Medical and Similar Expenses		5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
EV 410] — Inadmissibility of Pleas, Plea Discussions, and Related Statements		9/93 — Considered and recommended for CR Rules Cmte. **COMPLETED**
[EV 411] — Liability Insurance		5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[EV 412] — Sex Offense Cases; Relevance of Alleged Victim's Past Sexual Behavior or Alleged Sexual Predisposition	Prof. David Schlueter (4/92); Prof. Stephen Saltzburg (4/92)	4/92 — Considered by CR Rules Cmte. 10/92 — Considered by CR Rules Cmte. 10/92 — Considered by CV Rules Cmte. 12/92 — Published 5/93 — Public Hearing, Considered by EV Cmte. 7/93 — Approved by ST Cmte. 9/93 — Approved by Jud. Conf. 4/94 — Recommitted by Sup. Ct. with a change 9/94 — Sec. 40140 of the Violent Crime Control and Law Enforcement Act of 1994 (superseding Sup. Ct. action) 12/94 — Effective **COMPLETED**
[EV 413] — Evidence of Similar Crimes in Sexual Assault Cases		5/94 — Considered 7/94 — Considered by ST Cmte. 9/94 — Added by legislation 1/95 — Considered 1/95 — Reported to but disregarded by Congress 7/95 — Effective **COMPLETED**
[EV 414] — Evidence of Similar Crimes in Child Molestation Cases		5/94 — Considered 7/94 — Considered by ST Cmte. 9/94 — Added by legislation 1/95 — Considered 1/95 — Reported to but disregarded by Congress 7/95 — Effective **COMPLETED**
[EV 415] — Evidence of Similar Acts in Civil Cases Concerning Sexual Assault or Child Molestation		5/94 — Considered 7/94 — Considered by ST Cmte. 9/94 — Added by legislation 1/95 — Considered 1/95 — Reported to but disregarded by Congress 7/95 — Effective **COMPLETED**
[EV 501] — General Rule. (Guarantee that the confidentiality of communications between sexual assault victims and their therapists or trained counselors be adequately protected in Federal court proceedings.)	42 U.S.C., § 13942(c) (1996)	10/94 — Considered 1/95 — Considered 11/96 — Considered 1/97 — Considered by ST Cmte. 3/97 — Considered by Jud. Conf. 4/97 — Reported to Congress **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[EV 501] — Privileges, extending the same attorney-client privilege to in-house counsel as to outside counsel		11/96 — Decided not to take action 10/97 — Rejected proposed amendment to extend the same privilege to in-house counsel as to outside counsel 10/98 — Subcmte appointed to study the issue **COMPLETED**
[Privileges] — To codify the federal law of privileges	EV Rules Committee (11/96)	11/96 — Denied 10/98 — Cmte. reconsidered and appointed a subcmte to further study the issue 4/99 — Considered pending further study **COMPLETED**
[EV 501] Parent/Child Privilege	Proposed Legislation	4/98 — Considered; draft statement in opposition prepared
[EV 601] — General Rule of Competency		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 602] — Lack of Personal Knowledge		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 603] — Oath or Affirmation		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 604] — Interpreters		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 605] — Competency of Judge as Witness		9/93 — Considered 10/94 — Decided not to amend (Comprehensive Review) 1/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 606] — Competency of Juror as Witness		9/93 — Considered 10/94 — Decided not to amend (Comprehensive Review) 1/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[EV 607] —Who May Impeach		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 608] — Evidence of Character and Conduct of Witness		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 609] — Impeachment by EV of Conviction of Crime. See 404(b)		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment 11/96 — Considered 4/97 — Declined to act **COMPLETED**
[EV 609(a) — Amend to include the conjunction "or" in place of "and" to avoid confusion.	Victor Mroczka 4/98 (98-EV-A)	5/98 — Referred to chair and reporter for consideration 10/98 — Cmte declined to act **COMPLETED**
[EV 610] — Religious Beliefs or Opinions		5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 611] — Mode and Order of Interrogation and Presentation		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 611(b)] — Provide scope of cross-examination not be limited by subject matter of the direct		4/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment 11/96 — Decided not to proceed **COMPLETED**
[EV 612] — Writing Used to Refresh Memory		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[EV 613] — Prior Statements of Witnesses		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 614] — Calling and Interrogation of Witnesses by Court		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 615] — Exclusion of Witnesses. (Statute guarantees victims the right to be present at trial under certain circumstances and places some limits on rule, which requires sequestration of witnesses. Explore relationship between rule and the Victim's Rights and Restitution Act of 1990 and the Victim Rights Clarification Act of 1997 passed in 1996.)	42 U.S.C., § 10606 (1990)	9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment 11/96 — Considered 4/97 — Submitted for approval without publication 6/97 — Approved by ST Cmte. 9/97 — Approved by Jud. Conf. 4/98 — Sup Ct approved **COMPLETED**
[EV 615] — Exclusion of Witnesses	Kennedy-Leahy Bill (S. 1081)	10/97 — Response to legislative proposal considered; members asked for any additional comments **COMPLETED**
[EV 701] — Opinion testimony by lay witnesses		10/97 — Subcmte. formed to study need for amendment 4/98 — Recommend publication 6/98 — Stg. Cmte approves request to publish 8/98 — Published for comment 10/98 — Cmte considered comments and statements from witnesses 4/99 — Cmte approved with revisions **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[EV 702] — Testimony by Experts	H.R. 903 and S. 79 (1997)	2/91 — Considered by CV Rules Cmte. 5/91 — Considered by CV Rules Cmte. 6/91 — Approved for publication by ST Cmte. 8/91 — Published for public comment by CV Rules Cmte. 4/92 — Considered and revised by CV and CR Rules Cmtes. 6/92 — Considered by ST Cmte. 4/93 — Considered 5/94 — Considered 10/94 — Considered 1/95 — Considered (Contract with America) 4/97 — Considered. Reporter tasked with drafting proposal. 4/97 — Stotler letters to Hatch and Hyde 10/97 — Subcmte. formed to study issue further 4/98 — Recommend publication 6/98 — Stg. Cmte approves request to publish 8/98 — Published for comment 10/98 — Cmte considered comments and statements from witnesses 4/99 — Cmte approved with revisions **PENDING FURTHER ACTION**
[EV 703] — Bases of Opinion Testimony by Experts. (Whether rule, which permits an expert to rely on inadmissible evidence, is being used as means of improperly evading hearsay rule.)		4/92 — Considered by CR Rules Cmte. 6/92 — Considered by ST Cmte. 5/94 — Considered 10/94 — Considered 11/96 — Considered 4/97 — Draft proposal considered. 10/97 — Subcmte. formed to study issue further 4/98 — Recommend publication 6/98 — Stg. Cmte approves request to publish 8/98 — Published for comment 10/98 — Cmte considered comments and statements from witnesses 4/99 — Cmte approved with revisions **PENDING FURTHER ACTION**
[EV 705] — Disclosure of Facts or Data Underlying Expert Opinion		5/91 — Considered by CV Rules Cmte. 6/91 — Approved for publication by ST Cmte. 8/91 — Published for public comment by CV Rules Cmte. 4/92 — Considered by CV and CR Rules Cmtes 6/92 — Approved by ST Cmte. 9/92 — Approved by Jud. Conf. 4/93 — Approved by Sup. Ct. 12/93 — Effective **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[EV 706] — Court Appointed Experts. (To accommodate some of the concerns expressed by the judges involved in the breast implant litigation, and to determine whether the rule should be amended to permit funding by the government in civil cases.)	Carnegie (2/91)	2/91 — Tabled by CV Rules Cmte. 11/96 — Considered 4/97 — Considered. Deferred until CACM completes their study. **PENDING FURTHER ACTION**
[EV 801(a-c)] — Definitions: Statement; Declarant; Hearsay		5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 801(d)(1)] — Definitions: Statements which are not hearsay. Prior statement by witness.		1/95 — Considered and approved for publication 5/95 — Decided not to amend (Comprehensive Review) 9/95 — Published for public comment **COMPLETED**
[EV 801(d)(1)] Hearsay exception for prior consistent statements that would otherwise be admissible to rehabilitate a witness's credibility	Judge Bullock	4/98 — Considered; tabled **PENDING FURTHER ACTION**
[EV 801(d)(2)] — Definitions: Statements which are not hearsay. Admission by party-opponent. (*Bourjaily*)	Drafted by Prof. David Schlueter, Reporter, 4/92	4/92 — Considered and tabled by CR Rules Cmte 1/95 — Considered by ST Cmte. 5/95 — Considered draft proposed 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment 4/96 — Considered and submitted to ST Cmte. for transmittal to Jud. Conf. 6/96 — Approved by St. Cmte. 9/96 — Approved by Jud. Conf. 4/97 — Approved by Sup. Ct. 12/97 — Effective **COMPLETED**
[EV 802] — Hearsay Rule		5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 803(1)-(5)] — Hearsay Exceptions; Availability of Declarant Immaterial		1/95 — Considered 5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[EV 803(6)] — Hearsay Exceptions; Authentication by Certification (See Rule 902 for parallel change)	Roger Pauley, DOJ 6/93	9/93 — Considered 5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment 11/96 — Considered 4/97 — Draft prepared and considered. Subcommittee appointed for further drafting. 10/97 — Draft approved for publication 1/98 — Approved for publication by the ST Cmte. 8/98 — Published for comment 10/98 — Cmte considered comments and statements from witnesses 4/99 — Cmte approved **PENDING FURTHER ACTION**
[EV 803(7)-(23)] — Hearsay Exceptions; Availability of Declarant Immaterial		1/95 — Considered 5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 803(8)] — Hearsay Exceptions; Availability of Declarant Immaterial: Public records and reports.		9/93 — Considered 5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment 4/96 — Considered regarding trustworthiness of record 11/96 — Declined to take action regarding admission on behalf of defendant **COMPLETED**
[EV 803(24)] — Hearsay Exceptions; Residual Exception	EV Rules Committee (5/95)	5/95 — Combined with EV804(b)(5) and transferred to a new Rule 807. 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment 4/96 — Considered and submitted to ST Cmte. for transmittal to Jud. Conf. 6/96 — Approved by St. Cmte. 9/96 — Approved by Jud. Conf. 4/97 — Approved by Sup. Ct. 10/97 — Effective **COMPLETED**
[EV 803(24)] — Hearsay Exceptions; Residual Exception (Clarify notice requirements and determine whether it is used too broadly to admit dubious evidence)		10/96 — Considered and referred to reporter for study 10/97 — Declined to act **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[EV 804(a)] — Hearsay Exceptions; Declarant Unavailable: Definition of unavailability	Prof. David Schlueter (4/92); Prof. Stephen Saltzburg (4/92)	4/92 — Considered by CR Rules Cmte. 6/92 — Considered by ST Cmte. for publication 1/95 — Considered and approved for publication 5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 804(b)(1)-(4)] — Hearsay Exceptions		10/94 — Considered 1/95 — Considered and approved for publication by ST Cmte. 5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 804(b)(5)] — Hearsay Exceptions; Other exceptions		5/95 — Combined with EV804(b)(5) and transferred to a new Rule 807. 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment 4/96 — Considered and submitted to ST Cmte. for transmittal to Jud. Conf. 6/96 — Approved by St. Cmte. 9/96 — Approved by Jud. Conf. 4/97 — Approved by Sup. Ct. 10/97 — Effective **COMPLETED**
[EV 804(b)(6)] — Hearsay Exceptions; Declarant Unavailable. (To provide that a party forfeits the right to object on hearsay grounds to the admission of a statement made by a declarant whose unavailability as a witness was procured by the party's wrongdoing or acquiescence.)	Prof. David Schlueter (4/92); Prof. Stephen Saltzburg (4/92)	4/92 — Considered by CR Rules Cmte. 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment 4/96 — Considered and submitted to ST Cmte. for transmittal to Jud. Conf. 6/96 — Approved by ST Cmte. 9/96 — Approved by Jud. Conf. 4/97 — Approved by Sup. Ct. **COMPLETED**
[EV 805] — Hearsay Within Hearsay		1/95 — Considered 5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[EV 806] — Attacking and Supporting Credibility of Declarant. (To eliminate a comma that mistakenly appears in the current rule. Technical amendment.)	EV Rules Committee 5/95	5/95 — Decided not to amend 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment 4/96 — Considered and submitted to ST Cmte. for transmittal to Jud. Conf. 6/96 — Approved by St. Cmte. 9/96 — Approved by Jud. Conf. 4/97 — Approved by Sup. Ct. 12/97 — Effective **COMPLETED**
[EV 806] — To admit extrinsic evidence to impeach the character for veracity of a hearsay declarant		11/96 — Declined to act **COMPLETED**
[EV 807] — Other Exceptions. Residual exception. The contents of Rule 803(24) and Rule 804(b)(5) have been combined to form this new rule.	EV Rules Committee 5/95	5/95 — This new rule is a combination of Rules 803(24) and 804(b)(5). 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment 4/96 — Considered and submitted to ST Cmte. for transmittal to Jud. Conf. 6/96 — Approved by St. Cmte. 9/96 — Approved by Jud. Conf. 10/96 — Expansion considered and rejected 4/97 — Approved by Sup. Ct. 12/97 — Effective **COMPLETED**
[EV 807] — Notice of using the provisions	Judge Edward Becker	4/96 — Considered 11/96 — Reported. Declined to act. **COMPLETED**
[EV 901] — Requirement of Authentication or Identification		5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 902] — Self-Authentication		5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment 10/98 — Cmte considered comments and statements from witnesses 4/99 — Cmte approved with revisions **COMPLETED**
[EV 902(6)] — Extending applicability to news wire reports	Committee member (10/98)	10/98 — to be considered when and if other changes to the rule are being considered **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[EV 902 (11) and (12)] — Self-Authentication of domestic and foreign records (See Rule 803(6) for consistent change)		4/96 — Considered 10/97 — Approved for publication 1/98 — Approved for publication by the ST Cmte. 8/98 — Published for comment 10/98 — Cmte considered comments and statements from witnesses 4/99 — Cmte approved with revisions **PENDING FURTHER ACTION**
[EV 903] — Subscribing Witness' Testimony Unnecessary		5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 1001] — Definitions		9/93 — Considered 5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 1001] — Definitions (Cross references to automation changes)		10/97 — Considered **PENDING FURTHER ACTION**
[EV 1002] — Requirement of Original. Technical and conforming amendments.		9/93 — Considered 10/93 — Published for public comment 4/94 — Recommends Jud. Conf. make technical or conforming amendments 5/95 — Decided not to amend 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 1003] — Admissibility of Duplicates		5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 1004] — Admissibility of Other Evidence of Contents		5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 1005] — Public Records		5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[EV 1006] — Summaries		5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 1007] — Testimony or Written Admission of Party		5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 1008] — Functions of Court and Jury		5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 1101] — Applicability of Rules		6/92 — Approved by ST Cmte. 9/92 — Approved by Jud. Conf. 4/93 — Approved by Sup. Ct. 12/93 — Effective 5/95 — Decided not to amend 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment 4/98 — Considered 10/98 — Reporter submits report; cmte declined to act **COMPLETED**
[EV 1102] — Amendments to permit Jud. Conf. to make technical changes	CR Rules Committee (4/92)	4/92 — Considered by CR Rules Cmte. 6/92 — Considered by ST Cmte. 9/93 — Considered 6/94 — ST Cmte. did not approve 5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 1103] — Title		5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[Admissibility of Videotaped Expert Testimony]	EV Rules Committee (11/96)	11/96 — Denied but will continue to monitor 1/97 — Considered by ST Cmte. **PENDING FURTHER ACTION**
[Attorney-client privilege for in-house counsel]	ABA resolution (8/97)	10/97 — Referred to chair 10/97 — Denied **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[Automation] — To investigate whether the EV Rules should be amended to accommodate changes in automation and technology	EV Rules Committee (11/96)	11/96 — Considered 4/97 — Considered 4/98 — Considered **PENDING FURTHER ACTION**
[Circuit Splits] — To determine whether the circuit splits warrant amending the EV Rules		11/96 — Considered 4/97 — Considered **COMPLETED**
[Obsolete or Inaccurate Rules and Notes] — To identify where the Rules and/or notes are obsolete or inaccurate.	EV Rules Committee (11/96)	5/93 — Considered 9/93 — Considered. Cmte. did not favor updating absent rule change 11/96 — Considered 1/97 — Considered by the ST Cmte. 4/97 — Considered and forwarded to ST Cmte. 10/97 — Referred to FJC 1/98 — ST Cmte. Informed of reference to FJC 6/98 — Reporter's Notes published **COMPLETED**
[Statutes Bearing on Admissibility of EV] — To amend the EV Rules to incorporate by reference all of the statutes identified, outside the EV Rules, which regulate the admissibility of EV proffered in federal court		11/96 — Considered 4/97 — Considered and denied **COMPLETED**
[Sentencing Guidelines] — Applicability of EV Rules		9/93 — Considered 11/96 — Decided to take no action **COMPLETED**

Agenda Item IV
Committee on Rules of
Practice & Procedure
June 1999
Information

FEDERAL JUDICIAL CENTER UPDATE

This is a brief update of Judicial Center projects and activities that may be of interest to the Committee on . The research projects described below are but a few of the many projects undertaken by the Center, many of them in support of this and other Judicial Conference committees. The educational programs noted here represent a small number of the seminars, workshops, and in-court programs offered in person or electronically by the Center.

I. Selected Research Projects

Disclosure of Financial Interests of Parties in Federal Cases. In response to a recent request from the Chair of the Standing Committee on the Rules of Practice and Procedure, we are designing a study of bankruptcy, district, and appellate courts' practices and procedures requiring the disclosure of financial information by parties for purposes of judge recusal. A member of the research team will be available to report on the status of this project

Assistance to the Mass Torts Working Group. The Center was asked to help the Working Group on Mass Torts, then chaired by Judge Anthony Scirica (3rd Cir.). Much of the Center's work was incorporated into the February 5, 1999 report presented by the working group and the Advisory Committee on Civil Rules to the Chief Justice and the Judicial Conference. The report includes a study of mass torts limited fund and bankruptcy reorganization settlements commissioned by the Center and conducted by Professor S. Elizabeth Gibson of the University of North Carolina at Chapel Hill School of Law.

State Court Practices in Capital Cases with Court-Ordered Mental Examinations. The Advisory Committee on Criminal Rules is considering an amendment to Fed. R. Crim. P. 12.2 (Notice of Insanity Defense or Expert Testimony of Defendant's Mental Condition). The amendment would require a defendant to give notice of intent to introduce expert testimony in any capital case sentencing proceeding and would authorize the court to order a defendant who provided such notice to undergo a compelled mental examination. Our report has been forwarded to the Committee to inform its deliberations about whether changes should be proposed to Rule 12.2 concerning government access to defendants' mental health reports.

Resource Guide for Managing Capital Cases. We have completed a draft of the first part of a two-volume manual to provide guidance to judges and others on managing capital cases. The completed draft covers federal death penalty prosecutions and is currently being reviewed by outside experts. Part 2 will discuss state and federal capital habeas cases.

Bankruptcy Appeals. The Chair of the Bankruptcy Committee asked the Center to study the existing bankruptcy appellate structure and to propose possible alternative structures. We are working closely with a Bankruptcy Committee subcommittee, which includes liaisons from the Court Administration and Case Management Committee.

Survey of Attorney Conduct in Bankruptcy Courts. As noted in our last report, the Advisory Committee on Bankruptcy Rules asked the Center to conduct a survey of attorney conduct rules in the bankruptcy courts. We surveyed all bankruptcy judges and reported our findings to the Bankruptcy Rules Committee in March of this year.

Template for Appellate Chief Judges' Deskbook. In response to a request from the chief circuit judges, we have developed a template that will help each circuit chief judge develop, in effect, his or her own equivalent of the *Deskbook for Chief District Judges* and the *Deskbook for Chief Judges of United States Bankruptcy Courts.* The administrative procedures in the thirteen circuits are sufficiently diverse to make impractical a common desk reference for the circuit chief judges. The template will enable each circuit to compile their own information about the chief judge's responsibilities and how they are carried out.

Commission on Structural Alternatives for the Federal Courts of Appeals. As a final task for the Commission, earlier this year we prepared the Commission's working papers for publication. To permit independent analysis and replication, we included in the papers summaries of responses made to three surveys the Center conducted for the Commission.

Analysis of Document Production Burdens in Employment and Civil Rights Cases. The chair and reporter of the Discovery Subcommittee of the Advisory Committee on Civil Rules asked the Center to analyze data from an earlier Center study to determine whether plaintiffs' requests for documents in employment and civil rights cases might be so excessive that Rule 34 cost-bearing requests could be expected in such cases more frequently than in other cases. For the most part, we found few meaningful differences between civil rights cases and non-civil rights cases.

Special Masters. This project, undertaken at the request of the Advisory Committee on Civil Rules, will assess the functions of special masters appointed under Fed. R. Civ. P. 53, with particular attention to their role in the resolution of disputed issues of scientific and technical evidence.

Rule 56 Summary Judgment. At the request of a member of our Board, we extended an earlier study of summary judgment practices. Both studies sought to identify changes that may have occurred in federal summary judgment practice following the Supreme Court's 1986 trilogy of summary judgement decisions.

Visiting Judges. The Judicial Officers Resources Working Group, which was appointed late last year by the Chief Justice, has asked the Center to study how districts request and use visiting judges. Our work, which builds on an earlier Center study of visiting judges, is examining how districts identify the need for assistance; how a visitor is identified and appointed; and what practices on the part of the borrowing court and visiting judge produce a successful visit. We reported our findings to the working group in May 1999 and have been asked to provide additional analysis for an upcoming July meeting of the working group.

II. Selected Federal Judicial History Research Projects

The following are examples of projects undertaken in response to the Center's statutory mission to "conduct, coordinate, and encourage programs relating to the history of the judicial branch." As with the rest of this report, not listed are technical assistance activities and numerous responses to information requests.

Landmark Statutes in the History of the Organization and Administration of the Federal Judiciary. The Center's Federal Judicial History Office completed the selection and editing of twenty-five landmark statutes in the history of the organization and administration of the federal judiciary. The texts of these acts will be presented on the Center's Web page with an introductory note explaining the historical importance of each.

Biographical Database Reference Reports. The History Office has prepared a series of reference reports drawn from the federal judges' biographical database. Samples of the reports, which demonstrate the research potential of the database, will be published in the next edition of the newsletter, *The Court Historian*.

Internet Judicial Biographical Database. Working with the Center's Office of Systems Innovation and Development, the History Office has begun the transfer of the judges' biographical database to an internet application. This database of the service record of judges since 1789 will be available on line as part of an expanded history section of the Center's Web page.

Special Exhibit on the Federal Judiciary. The history office has initiated research for an exhibit on the federal judiciary in the age of John Marshall. The exhibit, developed in cooperation with the curator's office of the Supreme Court, will mark the two-hundredth anniversary of Marshall's swearing in as Chief Justice.

III. Selected Educational Programs for Judges

Case Budgeting in Federal Capital Habeas Cases. At its three national workshops for district judges this year, the Center will conduct sessions that give an overview of case budgeting practices and procedures in federal capital habeas corpus cases. The Center offered similar sessions last year at its two national workshops for magistrate judges.

Case and Chambers Management. The three National Workshops for District Court Judges, scheduled for May, August, and September of this year, will include small group discussions of case management and chambers management issues and innovations.

ADR Act of 1998. On February 4, 1999, the Center broadcast a live one-hour program on the Alternative Dispute Resolution Act of 1998. This FJTN program addressed the basic requirements of the Act and issues it raises for the courts. The program will be rebroadcast several times.

Seminar for Court of Appeals Judges. In April 1999, the Center presented a three-day seminar for Court of Appeals judges. The focus of the workshop was on jurisdiction, but several other topics were also discussed, including screening procedures, motions practice, and implementation of the PLRA and AEDPA in local rules and internal operating procedures.

Mediation Workshops for Bankruptcy and Magistrate Judges. On March 2-4, 1999, the Center conducted a second mediation workshop for twenty-five magistrate judges. The program emphasized development of core mediation skills through intensive, hands-on training. A third program will be held later this year.

IV. Selected Educational Programs for Court Staff

In addition to training offered through the Federal Judicial Television Network as noted below, the Center uses seminars, workshops, local court programs and computer- and audio-based conferences to provide educational programs for court staff.

Training for Electronic Case Filing. Center staff provide consultation services to individual courts on request. Recently, the Northern District of Ohio, one of the prototype courts for electronic case filing, requested Center assistance with Electronic Case Filing training for external and internal customers. The Center was asked to review materials developed to train the bar to use ECF and to help the district prepare staff to handle the influx of electronic case filings. These materials will serve as a template for other districts that request assistance when they adopt electronic case filing.

Training for Court Interpreters. In response to this committee's interest in helping court interpreters understand the trial process and their role in it, the Center is working with the AO to develop a twenty-minute video to introduce new interpreters to the court environment. The video will address such topics as the ethical and legal guidelines on interpreting, the location and role of the interpreter in court, the locations and roles of other participants in the courtroom, the various types of court proceedings, and common legal terminology.

Highlights of educational offerings, some of which have already been conducted and others are scheduled for the remainder of the fiscal year, include:

- in-court training to give employees in operational support positions an understanding of the knowledge, skills, and attitudes needed to do their jobs effectively;

- in-court training to teach supervisors and managers how to hire the right person by using effective interviewing skills;
- workshops held in May for new chief district judges and clerks and in June for teams from bankruptcy courts to identify the critical elements of executive teamwork;
- sessions for teams of appellate clerks, chief deputies, and bankruptcy appellate panel clerks to analyze capital case and pro se issues and technology and information management strategies;
- collaborative training (with the AO) to enable clerks and systems managers to build effective partnerships to manage technology—district teams will attend a July workshop and appellate teams will participate in an August program;
- an April institute for court unit executives to explore new methods for strategic planning, maximizing human resources, and leading change efforts in the courts;
- a training program on caseflow management for AO systems analysts who will develop caseflow software for court staff;
- a new class of mid-level managers in the three-year Federal Court Manager Leadership Program and a final workshop for the 65 members of the first class;
- a workshop to help new and experienced court managers use modern techniques for maximizing productivity, such as process improvement;
- national orientation seminars for probation and pretrial services officers;
- on-line conferences to provide advanced training for operations managers and district chief deputies, enhance mid-level managers' project management skills, and give courtroom deputies opportunities to discuss caseflow, operational, and technology issues.

VI. Selected Programs on The Federal Judicial Television Network

The Center continues to manage the Federal Judicial Television Network (FJTN) and the teletraining studio in the Thurgood Marshall Building. To aid viewers, the Center produces the *FJTN Bulletin*, which lists and describes broadcasts from the Center, AO, and the USSC.

Programs for Judges. Currently scheduled Center educational programs primarily for judges include the annual review of the Supreme Court's decisions in the 1998-99 term, an overview of the Alternative Dispute Resolution Act of 1998, and an update on bankruptcy law. In September, shortly after new law clerks begin their appointments, the Center will air a revised two-day Orientation Program for Law Clerks. The Center encourages judges to build in-court orientation programs for law clerks around this broadcast.

Programs for Court Staff. Among the broadcasts scheduled for court staff are a substance abuse series (for probation and pretrial services officers); management training programs; and video magazines that demonstrate how individual courts adapt to new procedures, such as electronic case filing. A recent edition of *Perspectives*, the video- magazine for probation and pretrial services personnel, featured excerpts from the Center's March 1999 Sentencing Policy Institute.

Item 5

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

DATE: May 13, 1999

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

FROM: Judge Will Garwood, Chair
Advisory Committee on Appellate Rules

Detailed information about the recent activities of the Advisory Committee on Appellate Rules can be found in the minutes of the Committee's April 1999 meeting and in the Committee's docket, both of which are attached to this report. At this time, the Committee is not seeking Standing Committee action on any proposals.

I wish to report on three matters:

1. Amendments Approved for Later Submission to the Standing Committee. As you may recall, the Advisory Committee has determined that, barring an emergency, no proposed amendments to FRAP will be forwarded to the Standing Committee until the bench and bar have had an opportunity to become accustomed to the restylized rules, which took effect on December 1, 1998. However, the Advisory Committee is continuing to consider and approve proposed amendments. All amendments approved by the Advisory Committee will be held until they are presented as a group to the Standing Committee, most likely at its January 2000 meeting.

At the Advisory Committee's April 1999 meeting, several amendments were approved:

a. Last year the Committee approved an amendment to FRAP 26(a)(2) that would provide that intermediate Saturdays, Sundays, and legal holidays will be excluded when computing deadlines under 11 days but will be counted when computing deadlines of 11 days and over. At present, the demarcating line in FRAP is 7 days, while the demarcating line in the FRCP and FRCrP is 11 days. The amendment would ensure that deadlines are computed in the same way under all three sets of rules.

At the Advisory Committee's April 1999 meeting, we approved amendments that would shorten a couple of the deadlines in FRAP to take into account the new method of calculation. Specifically, we approved:

i. an amendment to FRAP 27(a)(3)(A) to shorten the time within which a party must file a response to a motion from 10 days to 7 days after the motion is served;

ii. an amendment to FRAP 27(a)(4) to shorten the time within which a party must file a reply to a response to a motion from 7 days to 5 days after the response is served; and

iii. an amendment to FRAP 41(b) to provide that a court's mandate must issue "7 *calendar* days" (instead of "7 days") after the time to file a petition for rehearing expires (or after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate).

b. We also approved an amendment to FRAP 32 that would require every brief, motion, or other paper filed with a court to be signed by the attorney or unrepresented party who files it. Surprisingly, no provision of FRAP now requires that briefs or other papers be signed.

The full text of these amendments, as well as the accompanying Committee Notes, can be found in the appendix to the minutes of the Committee's April meeting.

2. Reconsideration of Amendments to FRAP 4(a). In my last report to the Standing Committee, I mentioned that the Advisory Committee had approved the following three amendments to FRAP 4(a):

a. an amendment to FRAP 4(a)(4) that would clarify that the time to appeal an order that amends a judgment runs from the later of the entry of the amended judgment or the entry of the order directing that the judgment be amended;

b. an amendment to FRAP 4(a)(7) that would eliminate the requirement that an order *denying* one of the post-judgment motions listed in FRAP 4(a)(4)(A) be entered on a separate document in compliance with FRCP 58 before the time to appeal the order begins to run; and

c. an amendment to FRAP 4(a)(7) that would permit (but not require) a party to appeal a judgment or order that is required to be entered on a separate document in compliance with FRCP 58 but that has not yet been so entered.

At our April 1999 meeting, the Committee reconsidered the second and third of these changes. For reasons that are described in the minutes of our meeting, the Committee agreed in principle that orders that *grant*, as well as orders that *deny*, one of the post-judgment motions listed in FRAP 4(a)(4)(A) should be deemed entered for purposes of calculating the time to appeal when the order is entered on the docket in compliance with FRCP 79(a). Entry on a separate document in compliance with FRCP 58 would no longer be required. At its October 1999 meeting, the Committee will consider whether FRAP 4(a)(7) should be further amended to provide that the time to appeal *all* orders — whether or not the order disposes of a post-judgment motion listed in FRAP 4(a)(4)(A) — should begin to run when the order is entered on the docket, leaving the separate document requirement applicable only to judgments.

The Committee also decided to put a "cap" on the length of time that a party can wait to appeal a judgment or order that is required to be entered on a separate document in compliance with FRCP 58 but that is not. At present, a party literally can wait forever to appeal such a judgment or order, as, under FRAP 4(a)(7), the time to appeal such a judgment or order does not begin to run until it is entered in compliance with FRCP 58. The Committee approved in principle an amendment to FRAP 4(a)(7) that would provide that the time to appeal a judgment or order that is required to be entered in compliance with FRCP 58 would begin to run upon the earlier of (a) entry of the judgment or order in compliance with FRCP 58 or (b) 150 days after entry of the judgment or order on the docket in compliance with FRCP 79(a).

3. Comments on Electronic Service Rules. The Advisory Committee reviewed the electronic service amendments to the civil rules drafted by Prof. Cooper.

a. The Committee agrees that electronic service should not be imposed upon unwilling parties and that courts should not be able to forbid parties who have consented to electronic service from using it. The Committee prefers the "Capra" formulation of the proposed amendment to FRCP 5(b)(2)(D).

The Committee does not understand why FRCP 5(b)(2)(D) has been drafted to require the consent of parties to "other means" of service — such as Federal Express or third party carriers. The appellate rules have authorized such service without the consent of the parties since 1996 (see FRAP 25(c)). The Committee suggests that FRCP 5(b)(2) be redrafted so that "electronic" service (to which parties must consent) is mentioned in one subsection and "any other means" of service (to which parties need not consent) is mentioned in another.

b. The Committee agrees that, although courts should not be able to *forbid* the use of electronic service when the parties consent, they should have considerable discretion to use local rules to *regulate* that service. At present, the draft amendments say nothing about such discretion, and the Committee Note mentions it only with respect to the "means of consent." The Committee thinks it important that the ability of courts to use local rules to regulate electronic service be expressly mentioned in the text of a rule (just as the ability of courts to use local rules to regulate electronic filing is expressly mentioned in FRCP 5(e)).

c. The Committee agrees that only "FRCP 5 service" (as well as "FRCP 77(d) service"), and not "FRCP 4 service," should be made electronically. Like the Advisory Committee on Bankruptcy Rules, the Committee does not believe that requests for waiver of service under FRCP 4(d) should be made electronically.

d. The Committee understands the decision to use "transmission" as the effective date of electronic service. However, it is concerned about the not uncommon situation in which the sender of an electronic message is informed that the message was not delivered to its intended recipient. In this situation, is service still effective upon transmission? The Committee believes that either the text of the rule or the Committee Note should address this situation.

e. The Committee expressed a concern about extending the "three day rule" of FRCP 6(e) to electronic service or to any means of service other than mail service. The practitioners on the Committee pointed out that, in choosing a means of service, lawyers often seek to give their opponents as little time to respond as possible. Extending the three day rule to electronic service will discourage its use, as attorneys will not want their opponents to have three extra days to respond to something that they are likely to receive instantaneously. Instead, attorneys will use the mail.

The Committee generally prefers Prof. Cooper's "Alternative 1," which would leave FRCP 6(e) unchanged. Mail is distinguishable from electronic service, in that mail is completely out of the control of attorneys for several days, while attorneys can, if they wish, check their e-mail daily.

f. The Committee supports giving courts the discretion to use local rules to authorize clerks to make consented-to electronic service on behalf of parties.

DRAFT

Minutes of Spring 1999 Meeting of
Advisory Committee on Appellate Rules
April 15 & 16, 1999
Washington, D.C.

I. Introductions

Judge Will Garwood called the meeting of the Advisory Committee on Appellate Rules to order on Thursday, April 15, 1999, at 8:35 a.m. at the Thurgood Marshall Federal Judiciary Building in Washington, D.C. The following Advisory Committee members were present: Judge Samuel A. Alito, Jr., Judge Diana Gribbon Motz, Judge Stanwood R. Duval, Jr., Hon. John Charles Thomas, Prof. Carol Ann Mooney, Mr. W. Thomas McGough, Jr., and Mr. Michael J. Meehan. Mr. Douglas Letter, Appellate Litigation Counsel, Civil Division, U.S. Department of Justice was present representing the Solicitor General. Also present were Mr. Peter G. McCabe and Mr. John K. Rabiej from the Administrative Office, Ms. Laural L. Hooper from the Federal Judicial Center, and Mr. Joseph F. Spaniol, Jr., from the Standing Committee's Subcommittee on Style.

Judge Garwood welcomed Mr. McGough to the Committee. Mr. McGough replaced Mr. Luther T. Munford on October 1, 1998, but was unable to attend the Committee's October 1998 meeting.

II. Approval of Minutes of October 1998 Meeting

The minutes of the October 1998 meeting were approved with the following changes:

1. In the seventh line of the third paragraph on page 5, insert "of" after "couple."

2. In the third line of the second paragraph following the draft amendment on page 11, change "misleading" to "misleadingly."

III. Report on January 1999 Meeting of Standing Committee

Judge Garwood reported on the Standing Committee's most recent meeting. Judge Garwood said that this Advisory Committee had no action items on the Standing Committee's agenda. Judge Garwood told the Standing Committee that this Advisory Committee intended to present a package of proposed amendments to the Standing Committee at its January 2000 meeting.

Judge Garwood communicated the sentiments of this Advisory Committee that the term "Advisory Committee Note" should continue to be used instead of "Committee Note," but the Standing Committee was not receptive to his comments. Judge Garwood also raised the question of whether prescribing a universal December 1 effective date for changes to local rules — as this Committee and other advisory committees are considering — would violate 28 U.S.C. § 2071(b). (That section provides that a local rule "shall take effect upon the date specified by the prescribing court.") Judge Garwood was not given any guidance in response to his question.

At Judge Garwood's request, Mr. Rabiej gave an update on the Standing Committee's consideration of possible Federal Rules of Attorney Conduct. Mr. Rabiej said that the ad hoc committee studying the issue would be meeting this spring and would meet again in September. The ad hoc committee hopes to have a proposal ready for the advisory committees to consider at their fall meetings. Mr. Rabiej pointed out that the McDade Amendment will take effect in a few days and that, under the Amendment, federal attorneys will be required to comply with state ethical rules. Mr. Letter described some of the ambiguities of the McDade Amendment that the Department of Justice is now studying.

At Judge Garwood's request, Mr. Rabiej also gave an update on the Standing Committee's consideration of financial disclosure statements by parties and the recusal of judges for financial interest. Mr. Rabiej said that, following a conference call involving Judge Anthony J. Scirica (Chair of the Standing Committee), the reporters to the advisory committees, and others, the Federal Judicial Center was asked to collect information about local rules and practices on this topic. No action is expected until next year.

IV. Action Items

A. Item No. 97-22 (FRAP 34(a)(1) — require statements regarding oral argument)

The Reporter introduced the following proposed amendments and Committee Notes:

Rule 28. Briefs

(a) Appellant's Brief. The appellant's brief must contain, under appropriate headings and in the order indicated:

(1) a corporate disclosure statement if required by Rule 26.1;

(2) a table of contents, with page references;

(3) a table of authorities — cases (alphabetically arranged), statutes, and other authorities — with references to the pages of the brief where they are cited;

(4) a statement with respect to oral argument (see Rule 34(a)(1));

(~~4~~5) a jurisdictional statement, including:

(A) the basis for the district court's or agency's subject-matter jurisdiction, with citations to applicable statutory provisions and stating relevant facts establishing jurisdiction;

(B) the basis for the court of appeals' jurisdiction, with citations to applicable statutory provisions and stating relevant facts establishing jurisdiction;

(C) the filing dates establishing the timeliness of the appeal or petition for review; and

(D) an assertion that the appeal is from a final order or judgment that disposes of all parties' claims, or information establishing the court of appeals' jurisdiction on some other basis;

(5~~6~~) a statement of the issues presented for review;

(6~~7~~) a statement of the case briefly indicating the nature of the case, the course of proceedings, and the disposition below;

(7~~8~~) a statement of facts relevant to the issues submitted for review with appropriate references to the record (see Rule 28(e));

(8~~9~~) a summary of the argument, which must contain a succinct, clear, and accurate statement of the arguments made in the body of the brief, and which must not merely repeat the argument headings;

(9~~10~~) the argument, which must contain:

(A) appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies; and

(B) for each issue, a concise statement of the applicable standard of review (which may appear in the discussion of the issue or under a separate heading placed before the discussion of the issues);

(~~10~~11) a short conclusion stating the precise relief sought; and

(~~11~~12) the certificate of compliance, if required by Rule 32(a)(7).

(b) Appellee's Brief. The appellee's brief must conform to the requirements of Rule 28(a)(1)-(~~9~~10) and (~~11~~12), except that none of the following need appear unless the appellee is dissatisfied with the appellant's statement:

(1) the jurisdictional statement;

(2) the statement of the issues;

(3) the statement of the case;

(4) the statement of the facts; and

(5) the statement of the standard of review.

* * *

(h) Briefs in a Case Involving a Cross-Appeal. If a cross-appeal is filed, the party who files a notice of appeal first is the appellant for the purposes of this rule and Rules 30, 31, and 34. If notices are filed on the same day, the plaintiff in the proceeding below is the appellant. These designations may be modified by agreement of the parties or by court order. With respect to appellee's cross-appeal and response to appellant's brief, appellee's brief must conform to the requirements of Rule 28(a)(1)-(~~11~~12). But an appellee who is satisfied with appellant's statement need not include a statement of the case or of the facts.

Committee Note

Subdivisions (a), (b), and (h). Rule 34(a)(1), which previously permitted parties to file statements regarding oral argument (and authorized courts to require such statements by local rule), has been amended to require that such statements be included in the principal brief of every party. By way of implementing this change, subdivision (a) has been amended to direct that the statement with respect to oral argument appear after the table of authorities and before the jurisdictional statement. In addition, subdivision (a)'s subparts have been renumbered to reflect

the addition of this requirement, and the references in subdivision (b) and subdivision (h) to subdivision (a)'s subparts have been changed accordingly.

Rule 34. Oral Argument

(a) In General.

(1) **Party's Statement.** ~~Any~~ Every party ~~may file, or a court may require by local rule,~~ must include in the party's principal brief a statement of 125 words or less explaining why oral argument should, or need not, be permitted.

Committee Note

Subdivision (a)(1). Rule 34(a)(1) has been amended to require that every party include a statement with respect to oral argument in the party's principal brief and to impose a 125 word limit on such statements. The present version of Rule 34(a)(1) — which permits, but does not require, the filing of such statements (unless the filing of such statements is mandated by local rule) — has resulted in conflicting local rules. Some circuits permit a party — after being informed that the court has decided to dispense with oral argument — to file a statement asking the panel to change its mind. *See* D.C. Cir. R. 34(j)(3); 1st Cir. R. 34.1(a); 2d Cir. R. 34(d)(1) (all parties except incarcerated pro se appellants); 9th Cir. R. 34-4(c). By implication, these circuits seem to forbid parties from making statements about the desirability of oral argument in their principal briefs or elsewhere. Other circuits *permit*, but do not require, parties to make statements about the desirability of oral argument in their principal briefs or in papers filed with or shortly after their principal briefs. *See* 3d Cir. R. 34.1(b); 4th Cir. R. 34(a); 7th Cir. R. 34(f). Still other circuits *require* parties to make statements about the desirability of oral argument in their principal briefs or in papers filed with or shortly after their principal briefs. *See* 2d Cir. R. 34(d)(2) (incarcerated pro se appellants); 5th Cir. R. 28.2.4; 6th Cir. R. 9(d); 8th Cir. R. 28A(i)(1); 10th Cir. R. 28.2(e); 11th Cir. R. 28-2(c). Rule 34(a)(1) has been amended to preempt these conflicting local rules and thereby to promote uniformity in federal appellate practice.

The Committee debated the proposed amendments at length. Those supporting the amendments argued that it was important to bring about uniformity in appellate practice, and that the current hodgepodge of conflicting local rules regarding requests for oral argument creates a hardship for attorneys with national practices. They also argued that statements regarding oral argument can be helpful to courts, particularly when attorneys do not believe that oral argument is necessary. One member who supported the amendments said that he would also support an amendment *forbidding* parties to request or waive oral argument in their briefs; his main concern was bringing about uniformity, one way or the other.

Those opposing the amendments argued that statements regarding oral argument are generally not helpful to courts, and that directing parties to include such statements in their briefs may force some attorneys who would otherwise remain silent on the question of oral argument to ask for oral argument — particularly if the attorneys feared that a waiver of oral argument would be interpreted as an implicit admission that their case was weak. Also, requiring statements regarding oral argument might exacerbate tensions between courts and litigants. As a general matter, attorneys resent not being given oral argument. Forcing an attorney to make a formal request for oral argument, only to have the request denied, might increase that resentment. Finally, although there is a lack of uniformity, that lack of uniformity is appropriate, given that individual circuit courts maintain very different cultures regarding oral argument.

A member moved that Item No. 97-22 be removed from the study agenda. The motion was seconded. The motion carried (6-2).

B. Item No. 98-12 (FRAP 4(a)(4)(A)(vi), 27(a)(3)(A), 27(a)(4) & 41(b) — shorten deadlines to account for new method of calculating time)

Rule 26(a)(2) directs that, in computing periods of time under the Federal Rules of Appellate Procedure ("FRAP"), intermediate Saturdays, Sundays, and legal holidays should not be counted when a deadline is less than 7 days, unless the deadline is stated in calendar days. At its October 1998 meeting, the Committee approved a proposed amendment to Rule 26(a)(2) that would extend the threshold to 11 days. If that amendment becomes law, the calculation of deadlines under FRAP will be consistent with the calculation of deadlines under the Federal Rules of Civil Procedure ("FRCP") and the Federal Rules of Criminal Procedure ("FRCrP"). *See* FRCP 6(a) and FRCrP 45(a).

Many of the deadlines in FRAP will be extended as a *practical* matter if Rule 26(a)(2) is amended as proposed. Specifically:

1. All of the 7-day deadlines in FRAP will become *at least* 9-day deadlines. In other words, no attorney with a 7-day deadline will ever have less than 9 actual days to comply. Often, attorneys will have 11 days. Legal holidays could extend that period to 12 or 13 days.

2. All of the 10-day deadlines in FRAP will become *at least* 14-day deadlines.[1] In other words, no attorney with a 10-day deadline will ever have less than 14 actual days to comply. Legal holidays could extend that period to 17 or 18 days.

At its October 1998 meeting, the Committee discussed whether any of the existing 7-day deadlines should be shortened to 5 days (which would, as a practical matter, ensure that every

[1]There are no 8- or 9-day deadlines in FRAP.

attorney will have 7 actual days to act, in the absence of a legal holiday) and whether any of the 10-day deadlines should be shortened to 7 days (which would, as a practical matter, ensure that every attorney will have at least 9 actual days, and, in the absence of a legal holiday, no more than 11 actual days to act). After considerable discussion, the Committee determined that all deadlines should remain the same, with the following exceptions:

1. Rule 27(a)(3)(A) should be amended by substituting "7" for "10."

2. Rule 27(a)(4) should be amended by substituting "5" for "7." And

3. Rule 41(b) should be amended by substituting "7 calendar days" for "7 days."

The Reporter introduced the following proposed amendments and Committee Notes, which are designed to implement the changes approved by the Committee at its October 1998 meeting:

Rule 4. Appeal as of Right — When Taken

(a) Appeal in a Civil Case.

(4) **Effect of a Motion on a Notice of Appeal.**

(A) If a party timely files in the district court any of the following motions under the Federal Rules of Civil Procedure, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

(vi) for relief under Rule 60 if the motion is filed no later than 10 days ~~(computed using Federal Rule of Civil Procedure 6(a))~~ after the judgment is entered.

Committee Note

Subdivision (a)(4)(A)(vi). Rule 4(a)(4)(A)(vi) has been amended to remove a parenthetical that directed that the 10-day deadline be "computed using Federal Rule of Civil Procedure 6(a)." That parenthetical has become superfluous because Rule 26(a)(2) has been amended to require that all deadlines under 11 days be calculated as they are under FRCP 6(a).

Rule 27. Motions

(a) In General.

(3) **Response.**

(A) **Time to file.** Any party may file a response to a motion; Rule 27(a)(2) governs its contents. The response must be filed within ~~10~~ 7 days after service of the motion unless the court shortens or extends the time. A motion authorized by Rules 8, 9, 18, or 41 may be granted before the ~~10~~7-day period runs only if the court gives reasonable notice to the parties that it intends to act sooner.

Committee Note

Subdivision (a)(3)(A). Subdivision (a)(3)(A) presently requires that a response to a motion be filed within 10 days after service of the motion. Intermediate Saturdays, Sundays, and legal holidays are counted in computing that 10-day deadline, which means that, except when the 10-day deadline ends on a weekend or legal holiday, parties generally must respond to motions within 10 actual days.

Fed. R. App. P. 26(a)(2) has been amended to provide that, in computing any period of time, a litigant should "[e]xclude intermediate Saturdays, Sundays, and legal holidays when the period is less than 11 days, unless stated in calendar days." This change in the method of computing deadlines means that 10-day deadlines (such as that in subdivision (a)(3)(A)) have been lengthened as a practical matter. Under the new computation method, parties would never have less than 14 actual days to respond to motions, and legal holidays could extend that period to as much as 18 days.

Permitting parties to take two weeks or more to respond to motions would introduce significant and unwarranted delay into appellate proceedings. For that reason, the 10-day deadline in subdivision (a)(3)(A) has been reduced to 7 days. This change will, as a practical matter, ensure that every attorney will have at least 9 actual days — but, in the absence of a legal holiday, no more than 11 actual days — to respond to motions. The court continues to have discretion to shorten or extend that time in appropriate cases.

Rule 27. Motions

(a) In General.

(4) **Reply to Response.** Any reply to a response must be filed within ~~7~~ 5 days after service of the response. A reply must not present matters that do not relate to the response.

Committee Note

Subdivision (a)(4). Subdivision (a)(4) presently requires that a reply to a response to a motion be filed within 7 days after service of the response. Intermediate Saturdays, Sundays, and legal holidays are counted in computing that 7-day deadline, which means that, except when the 7-day deadline ends on a weekend or legal holiday, parties generally must respond to motions within one week.

Fed. R. App. P. 26(a)(2) has been amended to provide that, in computing any period of time, a litigant should "[e]xclude intermediate Saturdays, Sundays, and legal holidays when the period is less than 11 days, unless stated in calendar days." This change in the method of computing deadlines means that 7-day deadlines (such as that in subdivision (a)(4)) have been lengthened as a practical matter. Under the new computation method, parties would never have less than 9 actual days to respond to motions, and legal holidays could extend that period to as much as 13 days.

Permitting parties to take 9 or more days to reply to a response to a motion would introduce significant and unwarranted delay into appellate proceedings. For that reason, the 7-day deadline in subdivision (a)(4) has been reduced to 5 days. This change will, as a practical matter, ensure that every attorney will have 7 actual days to file replies to responses to motions (in the absence of a legal holiday).

Rule 41. Mandate: Contents; Issuance and Effective Date; Stay

(b) When Issued. The court's mandate must issue 7 calendar days after the time to file a petition for rehearing expires, or 7 calendar days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later. The court may shorten or extend the time.

Committee Note

Subdivision (b). Subdivision (b) directs that the mandate of a court must issue 7 days after the time to file a petition for rehearing expires or 7 days after the court denies a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later. Intermediate Saturdays, Sundays, and legal holidays are counted in computing that 7-day deadline, which means that, except when the 7-day deadline ends on a weekend or legal holiday, the mandate issues exactly one week after the triggering event.

Fed. R. App. P. 26(a)(2) has been amended to provide that, in computing any period of time, one should "[e]xclude intermediate Saturdays, Sundays, and legal holidays when the period is less than 11 days, unless stated in calendar days." This change in the method of computing deadlines means that 7-day deadlines (such as that in subdivision (b)) have been lengthened as a practical matter. Under the new computation method, a mandate would never issue sooner than 9 actual days after a triggering event, and legal holidays could extend that period to as much as 13 days.

Delaying mandates for 9 or more days would introduce significant and unwarranted delay into appellate proceedings. For that reason, subdivision (b) has been amended to require that mandates issue 7 *calendar* days after a triggering event.

The Committee briefly discussed the merits of the proposed amendment to Rule 26(a)(2) that was approved at the October 1998 meeting, and all members of the Committee who spoke, save one, reaffirmed their support for that amendment.

A member moved that the implementing amendments be approved. The motion was seconded. The motion carried (unanimously).

The Reporter told the Committee that the Style Subcommittee had suggested changes to *unamended* parts of the rules under consideration. Several members expressed strong objections to "re-restylizing" unamended portions of rules. First, such a practice can create confusion about the scope of substantive amendments; in this instance, for example, it would camouflage the simplicity of changing a deadline from "x" days to "y" days. Second, such a practice creates a hardship for members of the bench and bar, who must pay close attention to any changes in the rules. Finally, such a practice risks unintended substantive consequences.

The Committee reached a consensus that it would not consider "re-restylizing" rules that were already restylized as part of the lengthy restylization project that culminated in last year's amendments to FRAP. By consensus, the suggestions of the Style Subcommittee were rejected.

V. Discussion Items

A. Item No. 98-02 (FRAP 4 — clarify application of FRAP 4(a)(7) to orders granting or denying post-judgment relief/apply one way waiver doctrine to requirement of compliance with FRCP 58)

Judge Garwood introduced the following proposed amendments and Committee Notes:

Rule 4. Appeal as of Right — When Taken

(a) Appeal in a Civil Case.

(4) **Effect of a Motion on a Notice of Appeal.**

(A) If a party timely files in the district court any of the following motions under the Federal Rules of Civil Procedure, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion or the entry of the judgment altered or amended in response to such a motion, whichever comes later:

(i) for judgment under Rule 50(b);

(ii) to amend or make additional factual findings under Rule 52(b), whether or not granting the motion would alter the judgment;

(iii) for attorney's fees under Rule 54 if the district court extends the time to appeal under Rule 58;

(iv) to alter or amend the judgment under Rule 59;

(v) for a new trial under Rule 59; or

(vi) for relief under Rule 60 if the motion is filed no later than 10 days (computed using Federal Rule of Civil Procedure 6(a)) after the judgment is entered.

(B) (i) If a party files a notice of appeal after the court announces or enters a judgment — but before it disposes of any motion listed in Rule 4(a)(4)(A) — the notice becomes effective to appeal a judgment or order, in whole or in part, when the order disposing of the last such

remaining motion is entered or when the judgment altered or amended in response to such a motion is entered, whichever comes later.

(ii) A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or a judgment altered or amended upon such a motion, must file a notice of appeal, or an amended notice of appeal — in compliance with Rule 3(c) — within the time prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion or the entry of the judgment altered or amended in response to such a motion, whichever comes later.

(iii) No additional fee is required to file an amended notice.

* * *

(7) **Entry Defined.** An order disposing of any motion listed in Rule 4(a)(4)(A) is entered for purposes of this Rule 4(a) when it is entered in compliance with Rule 79(a) of the Federal Rules of Civil Procedure. A judgment or any other order is entered for purposes of this Rule 4(a) when it is entered in compliance with both Rules 58 and 79(a) of the Federal Rules of Civil Procedure, or 180 days after it is entered in compliance with Rule 79(a) of the Federal Rules of Civil Procedure, whichever comes first. The failure to enter a judgment or order under Rule 58 when required does not invalidate an otherwise timely appeal from that judgment or order.

Committee Note

Subdivisions (a)(4)(A), (a)(4)(B)(i), and (a)(4)(B)(ii). The Committee intends that when a district court, in ruling upon one of the post-judgment motions listed in Rule 4(a)(4)(A), orders that a judgment be altered or amended, the time to appeal that order and the altered or amended judgment runs from the date on which the order is entered or from the date on which the altered or amended judgment is entered, whichever date is later. (Almost always, the judgment will be entered after the order.) At present, Rule 4(a)(4)(B)(ii) leaves that matter in some doubt by providing that an appeal from an order disposing of one of the post-judgment motions listed in Rule 4(a)(4)(A) should be brought "within the time prescribed by this Rule measured from the *entry of the order*," rather than from the later of the entry of the order or of the altered or amended judgment. Subdivisions (a)(4)(A), (a)(4)(B)(i), and (a)(4)(B)(ii) have been amended to eliminate that ambiguity.

Subdivision (a)(7). The courts of appeals are divided on the question of whether an order disposing of one of the post-judgment motions listed in Rule 4(a)(4)(A) must be entered on a separate document in compliance with FRCP 58 before that order can be appealed and before the time to appeal the original judgment begins to run. *See* 16A CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE & PROCEDURE § 3950.2, at 113 (1996) ("The caselaw is in disarray on how the requirement of entry on a separate document is to be applied in the context of postjudgment motions."). The First and Second Circuits (as well as at least one decision of the Ninth Circuit) hold that FRCP 58 applies to all orders disposing of post-judgment motions. *See Fiore v. Washington County Community Mental Health Ctr.*, 960 F.2d 229, 234 (1st Cir. 1992) (en banc); *Hard v. Burlington N. R.R. Co.*, 870 F.2d 1454, 1458 (9th Cir. 1989); *RR Village Ass'n v. Denver Sewer Corp.*, 826 F.2d 1197, 1201 (2d Cir. 1987). The Fifth and Seventh Circuits (as well as at least one decision of the Ninth Circuit) hold that FRCP 58 applies when post-judgment relief is granted, but not when such relief is denied. *See Marré v. United States*, 38 F.3d 823, 825 (5th Cir. 1994); *Chambers v. American Trans Air, Inc.*, 990 F.2d 317, 318 (7th Cir. 1993); *Hollywood v. City of Santa Maria*, 886 F.2d 1228, 1231 (9th Cir. 1989). The Eleventh Circuit holds that FRCP 58 never applies to orders granting or denying post-judgment relief. *See Wright v. Preferred Research, Inc.*, 937 F.2d 1556, 1560-61 (11th Cir. 1991).

Subdivision (a)(7) has been amended to adopt the position of the Eleventh Circuit. An order that grants, denies, or otherwise disposes of one of the motions for post-judgment relief listed in Rule 4(a)(4)(A) is entered for all purposes of Rule 4(a) when the order is entered in the civil docket in compliance with FRCP 79(a), whether or not the order is also entered on a separate document in compliance with FRCP 58. An order that *denies* one of the motions for post-judgment relief listed in Rule 4(a)(4)(A) does not disturb the original judgment, and thus compliance with the separate document requirement of FRCP 58 should be unnecessary. An order that *grants* one of the motions for post-judgment relief listed in Rule 4(a)(4)(A) usually does alter or amend the original judgment, but, given that the altered or amended judgment must itself be entered in compliance with FRCP 58, it should be unnecessary to require that the order also be entered in compliance with that rule. Admittedly, an order granting one of the post-judgment motions listed in Rule 4(a)(4)(A) sometimes does not result in an altered or amended judgment, but such orders are unlikely to create the type of uncertainty that prompted the separate document requirement of FRCP 58, and thus compliance with the requirement should be unnecessary. *See* FRCP 58, advisory committee's note to 1963 amendment.

The time to appeal all judgments and all other orders — that is, all orders other than those disposing of the post-judgment motions listed in Rule 4(a)(4)(A) — does not begin to run until the judgment or order is entered in compliance with both FRCP 58 and FRCP 79(a), with one exception: If such a judgment or order is not entered in compliance with FRCP 58, the time to appeal begins to run 180 days after the judgment or order is entered in the civil docket in compliance with FRCP 79(a). Without such a provision, a party could wait forever to appeal a judgment or order that was not entered in compliance with FRCP 58, "open[ing] up the possibility

that long dormant cases could be revived years after the parties had considered them to be over." *Fiore*, 960 F.2d at 236.

Subdivision (a)(7) has been further amended to apply the "one-way waiver" doctrine in cases in which a party has "prematurely" appealed a judgment or order that is required to be (but has not been) entered in compliance with FRCP 58. If a party chooses to appeal such a judgment or order before it is entered in compliance with FRCP 58, the appeal should be heard, even if the appellee objects to the lack of a FRCP 58 judgment or order. The separate document requirement of FRCP 58 is imposed for the benefit of the appellant. If the appellant wishes to waive that requirement by bringing a "premature" appeal, it seems pointless to dismiss the appeal, require the district court to enter the judgment or order on a separate document, and force the appellant to appeal a second time. "Wheels would spin for no practical purpose." *Bankers Trust Co. v. Mallis*, 435 U.S. 381, 385 (1978).

Judge Garwood apologized for asking the Committee to reconsider this issue, after the Committee had discussed this issue and approved amendments to Rule 4(a) at its October 1998 meeting. However, for the reasons described in his March 12, 1999 memorandum to the Committee, Judge Garwood concluded that the amendments approved in October should be reconsidered in two primary respects:

First, under the amendments approved in October, the time to appeal an order disposing of one of the post-trial motions listed in Rule 4(a)(4)(A) would begin to run as soon as the order was entered on the docket pursuant to FRCP 79(a) if the order *denied* the motion, but would not begin to run until the order was both entered on the docket pursuant to FRCP 79(a) *and* entered on a separate document pursuant to FRCP 58 if the order *granted* the motion. Judge Garwood now proposes that Rule 4(a)(7) be amended so that an order disposing of one of the post-trial motions listed in Rule 4(a)(4)(A) would begin to run as soon as the order was entered on the docket pursuant to FRCP 79(a), *regardless* of whether the order granted or denied the motion. There is one exception: If the order directs that the original judgment be amended, the time to appeal would begin to run on the date on which the amended judgment is entered in compliance with both FRCP 58 and 79(a).

Second, under the amendments approved in October, a party could wait forever to bring an appeal from a judgment or order that *is* required to be entered on a separate document pursuant to FRCP 58 but is not. Judge Garwood now proposes that Rule 4(a)(7) be amended to incorporate an approach similar to the approach adopted by the First Circuit in *Fiore v. Washington County Community Mental Health Ctr.*, 960 F.2d 229 (1st Cir. 1992): The time to appeal a judgment or order that is required to be entered in compliance with FRCP 58 would begin to run *either* when the judgment or order is entered in compliance with FRCP 58 (as well as FRCP 79(a)) *or* 180 days after the judgment or order is entered in compliance with FRCP 79(a), whichever comes first.

Judge Garwood summarized his reasons for suggesting these two changes, which reasons were described at length in his March 12 memorandum to the Committee.

A member said that it seemed to him that the problem was with the failure of district court judges to enter orders in compliance with FRCP 58, and thus that this problem should be addressed by the Advisory Committee on Civil Rules. Other members disagreed: FRCP 58, on its face, applies only to *judgments*. It is the rules of appellate procedure, not the rules of civil procedure, which provide that the time to appeal an *order* does not begin to run until the order is entered on a separate document in compliance with FRCP 58. In other words, it is the appellate rules, not the civil rules, which give parties forever to appeal an order (or, for that matter, a judgment) that is not entered in compliance with FRCP 58. Thus it is this Committee, and not the Civil Rules Committee, that has responsibility for addressing this problem.

A member expressed support for Judge Garwood's proposal. He said that it is extremely common for district court judges to *deny* Rule 4(a)(4)(A) motions in orders that are not entered in compliance with FRCP 58. He said that it is even more common for those motions to be *granted* in orders that do not comply with FRCP 58, because almost all such orders direct that a judgment be amended, and judges know that the amended judgment will itself be entered in compliance with FRCP 58. He is afraid that there are thousands of "time bombs" waiting to explode — that is, old orders that were not entered in compliance with FRCP 58 and thus could be appealed any time in the future.

Mr. Letter said that the Department of Justice also supports Judge Garwood's proposal. He pointed out that the proposal differs from the *Fiore* approach in an important respect: *Fiore* gives parties a certain amount of time within which to request that a judgment or order be entered in compliance with FRCP 58, and then runs the time to appeal from the date on which the judgment or order is so entered. By contrast, Judge Garwood's proposal would provide that the time to appeal a judgment or order that was not entered in compliance with FRCP 58 would begin to run a certain amount of time after the judgment or order was entered on the docket in compliance with FRCP 79(a). Judge Garwood responded that the difference between his proposal and *Fiore* was intentional; his approach is designed to be simpler and self-executing.

A member suggested that the first sentence of proposed Rule 4(a)(7) be deleted altogether. If it were, the time to appeal any judgment or order would begin to run either when it was entered in compliance with both FRCP 58 and 79(a) or 180 days after it was entered on the docket in compliance with FRCP 79(a), whichever comes first. Other members opposed this proposal. They pointed out that post-trial motions are often brought and usually denied in orders that do not comply with FRCP 58. If the first sentence of Rule 4(a)(7) were deleted, the time to appeal in *most* civil trials would not begin to run until 180 days after the case was concluded.

Judge Scirica joined the meeting at this point.

The remainder of the Committee's lengthy discussion of Judge Garwood's proposal focused on two issues:

First, several members argued that Rule 4(a)(7) should be amended so that the time to appeal *any* order — not just orders that grant or deny the motions listed in Rule 4(a)(4)(A) — would begin to run upon entry of the order on the docket in compliance with FRCP 79(a). In

other words, no order would have to be entered on a separate document before the time to appeal the order began to run. The "separate document" requirement of FRCP 58 would apply only to judgments.

Those favoring this proposal made several points: First, the proposal would be much cleaner and simpler. Rather than distinguishing among orders, some of which would have to be entered in compliance with FRCP 58 before the time to appeal began to run and some of which would not, all orders would be treated the same. Second, this proposal would harmonize the rules of appellate procedure with the rules of civil procedure; FRCP 58, by its terms, applies only to judgments, not to orders. Third, this proposal would harmonize the rules of appellate procedure with the practice of district courts; as noted, it is extremely common for district courts to enter orders in a manner that does not comply with FRCP 58, and it is extremely common for parties to appeal those orders (usually without anyone even noticing that the orders were supposed to be entered in compliance with FRCP 58).

Those opposing the proposal responded in several ways: First, there might be some types of orders — such as orders granting preliminary injunctions and contempt citations — that should be entered in compliance with FRCP 58 before the time to appeal those orders begins to run. Second, if Rule 4(a) were amended as proposed, the difference between "judgments" and "orders" would become important — and distinguishing between the two is sometimes quite difficult. Third, it is only orders granting or denying the motions listed in Rule 4(a)(4)(A) that have caused a problem for federal courts and created conflicting case law; the application of FRCP 58 to other types of orders simply has not been a problem. Finally, further research should be done before Rule 4 is amended to eliminate *all* orders from the requirement of compliance with FRCP 58. Such an amendment might have unanticipated consequences.

The second issue discussed by the Committee was the length of the cut-off for appealing orders or judgments that are required to be entered in compliance with FRCP 58 but are not. Under Judge Garwood's proposal, the time to appeal such an order or judgment would begin to run 180 days after the order or judgment was entered on the docket in compliance with FRCP 79(a) (unless, in the meantime, the court corrected its omission by entering the order or judgment in compliance with FRCP 58, in which case the time to appeal would begin to run on the date of the entry). Judge Garwood stressed that he is not wedded to 180 days as the length of the cut-off; he chose 180 days because it echoes the 180-day grace period in Rule 4(a)(6)(A).

Several members argued that 180 days was too long. They pointed out that, in fact, this would give most parties 210 days to appeal typical orders — 180 days before the time to appeal began to run, plus 30 days to bring the appeal once the time begins to run. Some Committee members suggested that the cut-off should be 60 or 90 days.

In the course of this discussion, the Committee voted on three motions:

First, a member moved that Rule 4(a)(7) be amended to provide that the time to appeal all orders that dispose of the motions listed in Rule 4(a)(4)(A) — that is, both orders that grant those motions and orders that deny those motions — would begin to run when the order is entered on the docket in compliance with FRCP 79(a). Entry on a separate document in compliance with FRCP 58 would not be required. The motion was seconded. The motion carried (unanimously).

Second, a member moved that Rule 4(a)(7) be amended so that it includes *a* cut-off on the time within which a party could wait to appeal a judgment or order that was required to be entered in compliance with FRCP 58 but that was not. The motion was seconded. The motion carried (unanimously).

Third, a member moved that the length of the cut-off be 150 days. The motion was seconded. The motion carried (5-4).

The Committee also agreed to consider further at its October 1999 meeting the question of whether Rule 4(a)(7) should be amended so that the time to appeal *any* order — that is, not merely orders disposing of the motions listed in Rule 4(a)(4)(A), but any other order as well — would begin to run when the order is entered on the docket in compliance with FRCP 79(a). Under this proposal, entry on a separate document in compliance with FRCP 58 would be required only for *judgments*. Committee members will give this matter some thought over the summer, and the Reporter will try to determine whether such an amendment would create any unforeseen consequences.

B. Item No. 98-03 (FRAP 29(e) & 31(a)(1) — timing of amicus briefs)

Mr. Letter introduced this item. Mr. Letter said that when the appellate rules were restylized, Rule 29 was amended so that, instead of an amicus brief being due at the same time as the principal brief of the party being supported, an amicus brief is now due 7 days after the filing of the principal brief of the party being supported. This change created two problems:

First, an appellant might have to file a reply brief before being able to read the brief of an amicus supporting the appellee. Suppose that, on June 1, an appellee located in Washington, D.C., mails its briefs to the Ninth Circuit for filing and hand delivers a copy of its brief to the appellant. Suppose further that the Ninth Circuit receives and files the appellee's brief on June 4. Under these circumstances, the brief of the amicus in support of the respondent would be due on June 11 (7 days after *filing*), and the reply brief of the appellant would be due on June 15 (14 days after *service*) — meaning that the appellant would have only 4 days to review and respond to the arguments raised by the amicus *if it received the amicus brief on the day it was filed.* If the amicus served its brief by mail, the appellant might not see it at all before its reply brief was due.

Second, an amicus supporting an appellee might not be able to see the appellee's brief until just before the amicus's brief is due, and thus the amicus might not be able to take account of the arguments made by the appellee in its brief. Suppose that the appellee does not permit the amicus to review drafts of its brief. If the appellee files its brief on June 1 and mails a copy of the

brief to the amicus, the amicus might not receive a copy of the brief until June 4 or 5, just a couple of days before the amicus's brief is due.

Mr. Letter said that he had written to 18 organizations that frequently file amicus briefs in the courts of appeals to solicit their suggestions about how Rule 29 might be amended to fix these problems. To date, only 3 organizations have responded. Mr. Letter hopes that further responses will be forthcoming and that the Department of Justice will be able to make a formal proposal for amending Rule 29 at the October 1999 meeting of the Committee.

A couple of members commented that they were sympathetic only to the first of the two problems described by Mr. Letter. After all, for many years amicus briefs were due on the same day as the principal brief of the party being supported, and amici seemed to manage successfully. It is hard to believe that amici cannot manage just as successfully now that their briefs are due 7 days after the filing of the principal brief.

C. Item No. 98-06 (FRAP 4(b)(3)(A)) — effect of filing of FRCrP 35(c) on time to appeal)

FRCrP 35(c) states that a district court, "acting within 7 days after the imposition of sentence, may correct a sentence that was imposed as a result of arithmetical, technical, or other clear error." Suppose that a defendant is sentenced on June 1. Suppose further that the defendant files a FRCrP 35(c) motion on June 2. Finally, suppose that the district court does not act upon the motion until June 30 — long after the "7 days" referred to in FRCrP 35(c) have come and gone. This scenario raises at least two questions:

First, did the filing of the FRCrP 35(c) motion toll the time for the defendant to file a notice of appeal under Rule 4(b)(1)? Rule 4(b)(3)(A) lists certain post-judgment motions, the filing of which explicitly tolls the time to appeal under Rule 4(b)(1). FRCrP 35(c) motions are *not* among them. However, some of the courts of appeals have held that the list of tolling motions in Rule 4(b)(3)(A) is not exclusive, and that under the "*Healy* doctrine" of the common law, any "motion for reconsideration" is sufficient to toll the time to appeal under Rule 4(b)(1). Is a FRCrP 35(c) motion such a "motion for reconsideration"?

The second question is this: Given that a district court has authority to correct a sentence under FRCrP 35(c) only when "acting within 7 days after the imposition of sentence," what happens when a timely FRCrP 35(c) motion is filed but the district court does not rule upon the motion until, say, 30 days after imposition of sentence? Should the time to appeal be tolled until the district court issues an order denying the motion, even though the district court loses the authority to grant the motion after 7 days? Or should a FRCrP 35(c) motion be deemed denied — and the time to appeal under Rule 4(b)(1) be deemed to begin to run — once the 7-day period expires?

At the October 1998 meeting, Mr. Letter agreed to look into these issues for the Committee. Mr. Letter presented three proposals on behalf of the Department of Justice. Under

the first proposal, Rule 4(b)(5) would be amended to provide that the filing of a FRCrP 35(c) motion would not toll the time for filing a notice of appeal *at all*. Under the second proposal, Rule 4(b)(5) would be amended to provide that the filing of a FRCrP 35(c) motion would toll the time for filing a notice of appeal, but only for 7 days after entry of judgment or until the district court rules on the motion, whichever comes first. Under the third proposal, Rule 4(b)(3) would be amended to achieve, in substance, the same result as the second proposal.

Mr. Letter said that the Department strongly preferred the first proposal. It would result in the clearest rule and the one most consistent with the rest of the appellate rules — which, as noted, do not include FRCrP 35(c) motions among the "tolling" motions listed in Rule 4(b)(3)(A), and which, in fact, specifically provide that the filing of a FRCrP 35(c) motion does not render the underlying judgment non-final (*see* Rule 4(b)(5)). Mr. Letter said that the Department could foresee only one problem with the first proposal: In a case in which a defendant wanted to appeal only his sentence — and then only if his sentence was not corrected in response to his FRCrP 35(c) motion — he might feel compelled to protect his appellate rights by filing a notice of appeal before the court rules on his FRCrP 35(c) motion, rather than simply waiting until the FRCrP 35(c) motion is granted or denied. Of course, even in that circumstance, the defendant could withdraw his notice of appeal if his FRCrP 35(c) motion is granted.

Most members of the Committee supported the Department's preferred approach, although a couple of members raised the following problem: Suppose that the *government* brings a FRCrP 35(c) motion and, on the seventh day after imposing sentence and entering a judgment, the district court grants the motion. Suppose further that the defendant, who did not plan to appeal the original judgment, now wants to appeal because, in his view, the government's FRCrP 35(c) motion was erroneously granted. Even if the defendant learns of the granting of the government's FRCrP 35(c) motion on the day the order is entered, he will have only 3 days to file a notice of appeal. If, as is likely, the defendant does not learn of the granting of the government's motion until a couple of days after the order is entered, he may find that the time to appeal the original judgment has run.

Mr. Letter said that his understanding is that, when a FRCrP 35(c) motion is *granted*, a new judgment is entered, and either party has 10 days to appeal that new judgment. Judge Garwood asked Mr. Letter to look into the issue so that the Committee can be sure. It may be that Rule 4(b) will have to be amended to explicitly provide that, when a FRCrP 35(c) motion is granted, a new judgment must be entered, and the time to appeal for both the government and the defendant begins to run upon the entry of that new judgment.

A member described another advantage of the Department's preferred approach: At present, there is a split in the circuits over when the 7-day period in FRCrP 35(c) begins to run. FRCrP 35(c) provides that the 7 days begins to run upon "imposition of sentence." Some courts hold that a sentence is "imposed" when it is orally pronounced in open court, while others hold that a sentence is "imposed" only when the formal judgment of sentence is entered. Under the Department's first proposal, the issue of when the 7-day period begins to run would be irrelevant, as FRCrP 35(c) motions would not toll the time to appeal *at all*.

A member moved that the Committee, in principle, adopt the first proposal of the Department. The motion was seconded. The motion carried (unanimously).

Mr. Letter agreed that the Department would draft an amendment and Committee Note in time for the Committee's October 1999 meeting and report to the Committee on whether the granting of a FRCrP 35(c) motion always results in the entry of a new judgment.

D. Item No. 98-07 (FRAP 22(a) — permit circuit judges to deny habeas applications)

Rule 22(a) requires that a habeas petition be filed in the district court and that, if it is erroneously presented to a circuit judge, it be transferred to the district court. Judge Kenneth F. Ripple has suggested that Rule 22(a) be amended to permit circuit judges to deny habeas petitions. He argues that it is a waste of time for a circuit judge to review a frivolous habeas petition and then, instead of denying it, transfer it to a district judge, who will have to take the time to review it before denying it. He also points out that circuit judges have *statutory* authority to deny habeas petitions under 28 U.S.C. § 2241(a), but Rule 22(a) precludes them from using that authority. At the Committee's October 1998 meeting, Mr. Letter offered to have the Department of Justice study and report back on this issue.

Mr. Letter said that this issue had turned out to be far more complicated than he anticipated, and that the Department would not be prepared to present a formal proposal until at least the October 1999 meeting. The Department was not sympathetic to the notion that circuit judges should be permitted to rule on habeas petitions in criminal cases. In criminal cases, habeas petitions are generally not coupled with other motions that require circuit judges to review the merits of the case, so circuit judges can refer those petitions to district courts without even reading them. The immigration context is different. A person who has been ordered deported is authorized to move in a court of appeals for a stay of deportation. In ruling upon such a motion, a circuit judge must review the merits of the case, and thus it might make sense to permit the circuit judge to also rule upon an accompanying habeas petition. All of this is under discussion within the Department.

Mr. Letter said that one additional complicating issue was a circuit split that has developed over the question of whether district courts have authority to rule on habeas petitions filed by aliens who have been ordered deported. Mr. Letter said that it would not make sense for Rule 22(a) to require circuit judges to transfer habeas petitions to district courts if district courts do not have authority to rule on those petitions. A member disagreed. He said that the Department should not focus on the question of whether district courts have jurisdiction to rule on habeas petitions in immigration cases, but instead on the question of who should first make that determination. It might make sense to require circuit judges to transfer habeas petitions to district courts, district courts to decide in the first instance whether they have jurisdiction, and then circuit courts to review those decisions on appeal.

The Committee very briefly discussed the merits of Judge Ripple's suggestion. Some members opposed the suggestion, arguing that it was wise policy to require all habeas petitions to be reviewed by district courts before being presented to courts of appeals. Other members expressed some sympathy for the suggestion, stressing the inconsistency between Rule 22(a) and § 2241(a). In response, one member said that, although she was not certain, she thought that Rule 22(a)'s requirement that habeas petitions be transferred to district courts was inserted into Rule 22(a) by act of Congress.

Judge Garwood told Mr. Letter that the Committee would be grateful if the Department would continue to discuss this issue and be prepared to take a position on Judge Ripple's suggestion at the October 1999 meeting.

E. Item No. 98-08 (permit "54(b)" appeals from Tax Court)

It is not clear whether the courts of appeals have jurisdiction to review orders of the Tax Court that finally resolve some but not all of the disputes between the Internal Revenue Service and a taxpayer. The rules of the Tax Court do not contain the equivalent of FRCP 54(b). Chief Judge Richard A. Posner has suggested that either the rules of the Tax Court or FRAP be amended to permit "54(b)-type" appeals from the Tax Court. *See Shepherd v. Commissioner of Internal Revenue*, 147 F.3d 633 (7th Cir. 1998).

At its October 1998 meeting, the Committee reached a consensus that any such "54(b)-type" provision should appear in the rules of the Tax Court rather than in FRAP. But Mr. Letter asked the Committee not to remove this item from its study agenda until he had an opportunity to solicit the views of the Internal Revenue Service and the Tax Court.

Mr. Letter reported that he had consulted with the Chief Counsel of the Internal Revenue Service and the Chief Judge of the Tax Court, and both had agreed that this issue should not be addressed by this Committee. A member moved that Item No. 98-08 be removed from the study agenda. The motion was seconded. The motion carried (unanimously).

The Committee recessed for lunch and reconvened at 1:20 p.m.

F. Item No. 99-03 (electronic filing and service)

Judge Garwood asked the Reporter to lead the discussion on this item.

The Reporter said that all of the rules of practice and procedure — appellate, bankruptcy, civil, and criminal — include almost identically worded provisions authorizing the promulgation of local rules that permit electronic case filing ("ECF"). *See, e.g.*, Rule 25(a)(2)(D). Following enactment of the ECF rules in 1996, the Judicial Conference Committee on Automation and Technology developed the "ECF Initiative," under which several district and bankruptcy courts that had been experimenting with electronic filing agreed to serve as ECF "prototypes." The

Committee on Automation and Technology hoped that the experiences of the prototype courts would help the Judicial Conference to identify the legal, policy, and technical issues that would need to be addressed before ECF could be implemented on a nationwide basis.

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

In February 1999, the Standing Committee's Subcommittee on Technology met, and Prof. Cooper presented various proposals for amending the civil rules. After considerable discussion, the Subcommittee made a few tentative decisions, and Prof. Cooper agreed to draft amendments implementing those decisions. The Reporter described Prof. Cooper's draft amendments and the decisions that they reflected:

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

One member expressed disagreement with the Subcommittee's approach. He said that courts should be authorized to use their local rules to permit or not to permit electronic service, as those courts see fit. The Reporter responded that the Subcommittee had discussed and rejected that option. The Subcommittee wants to use the rules of practice and procedure to push courts to accept electronic service, and thus the Subcommittee intentionally drafted the rules so that courts could not forbid consenting parties from using electronic service.

A member said that nothing presently in the rules forbids parties from agreeing among themselves to serve electronically. Why are amendments to the rules of practice and procedure necessary? The Reporter responded that the Subcommittee wants to encourage the use of electronic service and, toward that end, it wants to establish a "substructure" of rules on such issues as when electronic service will be deemed complete and whether the 3-day rule of FRCP 6(e) should apply to electronic service. Without such a substructure, parties would have to discuss and try to reach agreement on each of these ground rules in every case, and that would discourage parties from using electronic service.

A member moved that the Committee agrees in principle that electronic service should not be imposed upon unwilling parties and that courts should not be able to forbid parties who have consented to electronic service from using it. The motion was seconded. The motion carried (7-1).

The Committee was asked by Prof. Cooper to consider two alternative formulations of an amendment to FRCP 5(b)(2)(D) — the "Capra" formulation and the "Lafitte" formulation. By consensus, the Committee decided that it preferred the "Capra" formulation. However, several members noted that under both formulations, FRCP 5(b)(2)(D) would require the consent of parties to "other means" of service — such as Federal Express or third party carriers. The members argued that such consent should not be necessary and pointed out that the appellate rules authorize such service without the consent of the parties. *See* Rule 25(c). By consensus, the Committee decided to recommend to Prof. Cooper that he redraft FRCP 5(b)(2) so that "electronic" service (to which parties must consent) is mentioned in one subsection and "any other means" of service (to which parties need not consent) is mentioned in another.

2. Although the Subcommittee did not want to permit district courts to *block* the use of electronic service by consenting parties, the Subcommittee recognized that the district courts must be free to use local rules to *regulate* such service. A number of difficult questions are likely to arise after parties begin serving each other electronically, and it is important that district courts have the flexibility to address those problems in their local rules.

Several members said that, while they agreed with the Subcommittee's approach, they were concerned that the amendments drafted by Prof. Cooper did not make explicit the authority of courts to use local rules to regulate electronic service. The amendments themselves say nothing about local rules (with the exception of local rules permitting service by the clerk instead of by the parties, discussed below). Similarly, the Committee Note mentions local rulemaking only in connection with regulating the "means of consent" to electronic service; it says nothing about using local rules to regulate other aspects of electronic service.

A member moved that the Committee agrees that, although courts should not be able to forbid the use of electronic service when the parties consent, they must have considerable discretion to use local rules to regulate that service. The member further moved that the Committee recommends that the ability of courts to use local rules to regulate electronic service be explicitly mentioned in the text of a rule. The motion was seconded. The motion carried (unanimously).

3. The Subcommittee determined that only "FRCP 5" service may be made electronically, while "FRCP 4" service must continue to be made manually. Roughly speaking, FRCP 4 (and FRCP 4.1) service is the service of process that commences a lawsuit, while FRCP 5 service is essentially all of the service that occurs thereafter (e.g., service of answers, discovery requests, and motions). The Subcommittee was nervous about permitting electronic service of the summons and complaint. The Subcommittee also determined that requests to waive formal service made under FRCP 4(d) should continue to be in writing.

After a brief discussion, the Committee agreed by consensus with the proposals of the Subcommittee.

4. The Subcommittee struggled with the question of when electronic service will be deemed complete. The Subcommittee rejected a proposal that electronic service be deemed

complete upon "receipt" because it is too vague and manipulable. The Subcommittee also rejected a proposal that electronic service be deemed complete when the sender receives "confirmation" that her message has been received. Some e-mail programs do not confirm the receipt of messages, while others do, and any confirmation rule would be subject to manipulation. The Subcommittee eventually decided that electronic service should be deemed complete upon "transmission" — roughly speaking, when the sender hits the "send" button on her computer and launches the message on its way through cyberspace. The transmission rule closely parallels the mailbox rule of FRCP 5(b), under which service by mail is deemed complete "upon mailing."

A member expressed two concerns about the transmission rule: First, what happens when an attorney is away from the office for a couple of weeks and not able to receive e-mail? Second, what happens when the sender of the e-mail gets back a message informing the sender that the message was not received? Several members responded that they were not sympathetic to the first concern; just as an attorney can arrange to have someone open her mail, she can arrange to have someone open her e-mail. At the same time, several members expressed agreement with the second concern.

A member moved that, although the Committee was not opposed in principle to using transmission as the effective date of electronic service, it believes that the text of a rule or a Committee Note should explicitly address the situation in which the sender of an electronic message is informed that the message was not delivered to its intended recipient. The motion was seconded. The motion carried (unanimously).

5. The Subcommittee considered the question of whether the 3-day rule of FRCP 6(e) should apply to electronic service. FRCP 6(e) currently provides that, "[w]henever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon the party and the notice or paper is served upon the party by mail, 3 days shall be added to the prescribed period." After much discussion, the Subcommittee decided that FRCP 6(e) should be redrafted so that 3 days are added to the prescribed period whenever service is made by *any* means — including electronic — other than personal service. Although it may seem strange to apply the 3-day rule to electronic service, which is instantaneous, electronic service might be made at 8:00 p.m. on a Friday night and the recipient might not turn on her computer until 9:00 a.m. Monday morning.

Several members expressed concern about extending the 3-day rule to electronic service. The practitioners on the Committee pointed out that, in choosing a means of service, lawyers often seek to give their opponents as little time to respond as possible. Extending the 3-day rule to electronic service will discourage its use, as attorneys will not want their opponents to have 3 extra days to respond to something that they are likely to receive instantaneously. Instead, attorneys will use the mail. These members argued that the 3-day rule should be restricted to service by U.S. Mail. Mail is distinguishable from electronic service, in that mail is completely out of the control of attorneys for several days, whereas attorneys can, if they wish, check their e-mail daily.

A member moved that the Committee does not agree with the Subcommittee's proposal to extend the 3-day rule to electronic service, but instead prefers to leave FRCP 6(e) unchanged — that is, to continue to limit the 3-day rule only to mail. The motion was seconded. The motion carried (6-2).

6. Finally, the Subcommittee discussed the fact that, before long, it may make sense to require the clerk, rather than the parties, to serve all papers filed with the court. Software is apparently being developed that would permit the clerk, with a touch of a button, to serve an electronically filed paper on all parties. Under the draft amendment, a district court could, by local rule, authorize service by the clerk instead of by the parties.

The Committee quickly reached a consensus that it agreed with the Subcommittee's proposal.

Judge Scirica asked whether it would be possible for the Reporter to work overnight to draft electronic service amendments to FRAP, so that the Committee could consider those amendments tomorrow, and the Standing Committee could consider them in June. After a lengthy discussion, Judge Scirica and the Committee agreed that drafting and approving electronic service rules and Committee Notes in such a short period of time would be impracticable. Instead, this Committee will, as originally planned, await action on the proposed amendments to the civil rules at the Standing Committee's June meeting, and then consider similar amendments to FRAP at this Committee's October meeting.

G. Item No. 97-32 (FRAP 12(a) — require caption to identify only the parties to the appeal)

The circuit clerks have proposed an amendment to Rule 12(a), which currently requires that appeals be docketed under the caption used in the district court. Occasionally the district court caption includes hundreds of parties, many of whom are not parties to the appeal. This creates needless work for the clerks' offices. The clerks have proposed that Rule 12(a) be amended so that captions would identify only the parties to the appeal.

Two members expressed opposition to the clerks' proposal. They argued that there are advantages to using the same caption in both the trial court and the appellate court. Using the same caption sometimes gives judges helpful information about the case and aids judges in meeting their recusal obligations. One member wondered whether Rule 12(a) could be amended so appeals would continue to be docketed under the caption used in the district court, unless the number of parties identified in the district court caption exceeded a specific number, in which case some other method would be used. After further discussion, the Committee agreed by consensus to postpone action on this matter until the October 1999 meeting, when Mr. Charles R. "Fritz" Fulbruge, III, the liaison from the appellate clerks, could be present to answer questions.

H. Item No. 97-33 (FRAP 3(c) or 12(b) — require filing of statement identifying all parties and counsel)

Rule 12(b) presently requires only the attorney who files a notice of appeal to submit a representation statement and requires that attorney to identify only himself and his clients. The appellant's attorney is not asked to identify the appellees or their attorneys, and no other party is required to file a representation statement. This lack of information sometimes makes it difficult for the clerks to identify all of the parties and attorneys. To remedy this problem, the clerks have proposed amending Rule 3(c)(1)(A) to require a party filing a notice of appeal to simultaneously submit "a separate statement listing all parties to the appeal, the last known counsel, and the last known addresses for counsel and unrepresented parties."

The Reporter suggested that, rather than amend Rule 3's provisions on the filing of a notice of appeal, it might be better to amend Rule 12(b)'s provisions on the representation statement. A member agreed and said further that, if Rule 3 were to be amended along the lines suggested by the clerks, the Committee should add the provision as a new Rule 3(f) rather than adding it to Rule 3(c)(1)(A).

A member moved that the Committee amend Rule 12(b) to require that the representation statement filed by the appellant name not just the parties represented by the attorney who files the statement, but *all* parties and *all* attorneys. The motion was seconded.

The Committee discussed the motion at length. Members were not clear on whether amending Rule 12(b) in this manner would solve the problem identified by the clerks. The primary concern of the clerks appears to be the information available to them when they docket an appeal, but the representation statement does not have to be filed until 10 days after the notice of appeal is filed. Other members said that, in many cases, the attorney for the appellant cannot be expected to identify the appellees until he files his principle brief.

The Committee agreed, by consensus, to postpone further discussion of Item No. 97-33 until October, when Mr. Fulbruge would be present to answer questions.

I. Items Awaiting Initial Discussion

1. Item No. 99-02 (FRAP 32 — add signature requirement)

Judge Garwood introduced the following proposed amendment and Committee Note:

Rule 32. Form of Briefs, Appendices, and Other Papers

(d) **Signature.** All notices of appeal, requests for permission to appeal, petitions for review or applications for enforcement of agency orders, motions, responses to motions, replies to responses to motions, briefs, petitions for panel rehearing, answers to petitions for

panel rehearing, petitions for hearing or rehearing en banc, responses to petitions for hearing or rehearing en banc, and similar papers filed with the court must be signed by the party filing the paper or, if the party is represented, by one of the party's attorneys. The party or attorney who signs the paper must also state the signer's address and telephone number (if any).

(de) Local Variation. Every court of appeals must accept documents that comply with the form requirements of this rule. By local rule or order in a particular case a court of appeals may accept documents that do not meet all of the form requirements of this rule.

Committee Note

Subdivisions (d) and (e). Former subdivision (d) has been redesignated as subdivision (e), and a new subdivision (d) has been added. The new subdivision (d) requires that every brief, motion, rehearing petition, and similar paper be signed by the attorney or unrepresented party who files it, much as FRCP 11(a) imposes a signature requirement on papers filed in district court. By requiring a signature, subdivision (d) ensures that a readily identifiable attorney or party takes responsibility for every paper. The courts of appeals already have authority to sanction attorneys and parties who file papers that contain misleading or frivolous assertions, *see, e.g.*, 28 U.S.C. § 1912, Fed. R. App. P. 38 & 46(b)(1)(B), and thus subdivision (d) has not been amended to incorporate provisions similar to those found in FRCP 11(b) and 11(c).

A member said that he agreed with Judge Garwood that a signature requirement should be added to the rules, but he thought that the first sentence of proposed Rule 32(d) could provide simply that "every brief, motion, or other paper filed with the court must be signed by the party filing the paper or, if the party is represented, by one of the party's attorneys." Rule 32(d) might also clarify either in its text or in its Committee Note that the signature requirement does not extend to appendices. Such a provision would match up well with the terminology of Rule 32: Rule 32(a) refers to the form of "a Brief," Rule 32(b) refers to the form of "an Appendix," Rule 32(c)(1) refers to the form of a "Motion," and Rule 32(c)(2) refers to the form of "Other Papers." Several members agreed with this suggestion.

A member moved that Rule 32 be amended as proposed, except that the first sentence of proposed Rule 32(d) be shortened as suggested. The motion was seconded. The motion carried (unanimously).

A member expressed fear that by incorporating the signature requirement of FRCP 11(a), but not the "good faith" requirements of FRCP 11(b) and 11(c), the appellate rules might be understood to imply that signing a paper submitted to a circuit court means less than signing a paper submitted to a trial court. He wondered whether FRAP should be amended to incorporate the "good faith" requirements of FRCP 11(b) and 11(c). Several members opposed this notion, pointing out that the district courts have had great difficulty interpreting and applying FRCP 11, and arguing that this Committee should not inflict similar problems on the appellate courts.

The Committee adjourned for the day at 4:30 p.m.

The Committee reconvened on Friday, April 16, 1999, at 8:29 a.m.

2. Item No. 99-01 (FRAP 24(a)(3) & 24(a)(5) — potential conflicts with PLRA)

Last year the Committee proposed an amendment to Rule 24(a)(2) to resolve a conflict between that rule and the Prison Litigation Reform Act of 1995 ("PLRA"). Judge Garwood asked the Reporter to do some follow-up research to determine whether there might be further conflicts between Rule 24(a) and the PLRA. In a memorandum dated March 15, 1999, the Reporter described five potential conflicts between Rule 24(a) and the PLRA. At Judge Garwood's request, the Reporter briefly summarized the five potential conflicts:

Conflict No. 1: The PLRA requires prisoners who bring civil actions or appeals from civil actions to "pay the full amount of [the] filing fee," 28 U.S.C. § 1915(b)(1), albeit sometimes in installments, § 1915(b). By contrast, Rule 24(a)(2) provides that, after any litigant (including a prisoner) receives permission to proceed on appeal IFP, the litigant may proceed "without prepaying or giving security for fees and costs." There is undoubtedly a conflict between Rule 24(a)(2) and the PLRA, but this Committee already addressed this conflict at its April 1998 meeting, when it approved a proposed amendment to Rule 24(a)(2). Under that proposal, the phrase "unless the law requires otherwise" would be inserted after the phrase "fees and costs."

Conflict No. 2: Under Rule 24(a)(1), a party who moves the district court for permission to proceed on appeal IFP need file only the Form 4 affidavit. Under the PLRA, a *prisoner* must also file a trust fund statement. § 1915(a)(2). One could argue that, because Rule 24(a)(1) is silent on the question of submitting a trust fund statement, it implies that nothing besides the Form 4 affidavit need be filed, and thus implicitly conflicts with the PLRA.

A member reminded the Committee that Form 4, as amended on December 1, 1998, specifically directs: "If you are a prisoner . . . you must attach a statement certified by the appropriate institutional officer showing all receipts, expenditures, and balances during the last six months in your institutional accounts." That being the case, there is no conflict between Rule 24(a)(1) and the PLRA. Other members agreed.

Conflict No. 3: Under Rule 24(a)(3), a party who proceeds IFP in the district court is automatically entitled to proceed IFP on appeal "without further authorization," unless the district court finds that the appeal is taken in bad faith or that the party is no longer indigent. By contrast, nothing in the PLRA authorizes a party who was permitted to proceed IFP in the district court to *automatically* be given the same status in the appellate court. The PLRA is silent on this issue with respect to *non-prisoners*, and thus one could argue that Rule 24(a)(3) and the PLRA are not in conflict. But the PLRA fairly clearly provides that, before a *prisoner* can be given permission to proceed on appeal IFP, he must move for that permission and submit with his motion a copy of his trust fund statement.

The Committee has several options for addressing the potential conflict between Rule 24(a)(3) and the PLRA. The conflict arises only in cases involving prisoners, so one easy way of addressing the problem would be to insert a couple of words into Rule 24(a)(3) to limit its application to non-prisoners; Rule 24(a)(3) would then be silent on the question of prisoner litigation. Another option would be to renumber what is now Rule 24(a)(3) as Rule 24(a)(3)(A), limit it to non-prisoners as just suggested, and add a subsection (B) that explicitly provides that prisoners are *not* entitled to "carryover" IFP status. A third option would be simply to insert the words, "Unless the law requires otherwise," at the beginning of Rule 24(a)(3).

A member said that he had a philosophical objection to treating prisoners and non-prisoners differently in the text of FRAP. He would prefer the third option. A member disagreed. He pointed out that it was Congress's decision to treat prisoners differently from non-prisoners; all the Committee is doing is implementing a Congressional directive. In addition, the phrase "[u]nless the law requires otherwise" is not particularly helpful. It leaves parties wondering to which of the thousands of statutes, regulations, and rules the phrase is referring.

Several other members agreed with the first member. They, too, wanted to avoid distinguishing between prisoners and non-prisoners in the rules, and they did not want Rule 24(a) to specifically incorporate the provisions of the PLRA, given that the PLRA is likely to be amended in the future. The Committee reached a consensus that Rule 24(a)(3) should be amended by inserting at the beginning the phrase, "Unless the law requires otherwise." Judge Garwood asked the Reporter to draft an amendment and Committee Note for the Committee's October meeting.

Conflict No. 4: Rule 24(a)(5) permits a party to move in the court of appeals for permission to proceed on appeal IFP after the district court has denied him that permission or found that his appeal is not taken in good faith. Such a motion need be accompanied by only the Form 4 affidavit (and a copy of the district court's statement of reasons for its action). The PLRA does not preclude a party from moving the court of appeals for permission to proceed on appeal IFP, either before or after such permission has been denied by the district court. However, the PLRA clearly requires that a *prisoner* filing such a motion with a court of appeals must submit a trust fund statement, as well as a Form 4 affidavit. This potential conflict is identical to "Conflict No. 2," and the consensus of the Committee was that, just as Conflict No. 2 is adequately addressed by the language in the newly revised Form 4, so, too, is this conflict.

Conflict No. 5: Rule 24(a)(5) requires that a party seeking to proceed on appeal IFP first seek the permission of the district court and then, if that permission is denied for any reason (including a finding of bad faith), move the court of appeals within 30 days for permission to proceed on appeal IFP. However, the PLRA provides that "[a]n appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith." § 1915(a)(3). There is a potential conflict between the fact that Rule 24(a)(5) permits a party who has been found by the district court to be appealing in bad faith to file a *motion* in the court of appeals for permission to proceed on appeal IFP and the fact that the PLRA precludes a party who has been found by the district court to be appealing in bad faith from *appealing* that finding in the court of appeals.

Most of the courts of appeals do not see a conflict. All of the courts of appeals that have addressed the issue (save the Sixth Circuit) have held that, after the district court makes a finding of bad faith, the party may, consistently with the PLRA, move in the court of appeals for permission to proceed IFP (even though, as a practical matter, this permits the party to get appellate review of the district court's finding). After a brief discussion, the Committee reached a consensus that the majority interpretation of the PLRA is correct, and thus that there is no conflict between Rule 24(a)(5) and the PLRA.

Judge Garwood asked the Reporter to draft an amendment and Committee Note implementing the one additional change to Rule 24(a) agreed upon by the Committee.

3. Item No. 98-11 (FRAP 5(c) — clarify application of FRAP 32(a) to petitions for permission to appeal)

The Reporter introduced this item.

Rule 5(c) requires that a petition for permission to appeal "must conform to Rule 32(a)(1)." Rule 32(c) requires that "other papers" — which includes petitions for permission to appeal — must conform to "Rule 32(a)," with two exceptions. It is thus not clear whether petitions for permission to appeal must conform only with the requirements of Rule 32(a)(1) (as Rule 5(c) seems to say) or with all of the requirements of Rule 32(a), save two (as Rule 32(c) seems to say).

A member said that the use of "Rule 32(a)(1)" in the restylized Rule 5(c) was an obvious mistake, and that the mistake could be correct by replacing "Rule 32(a)(1)" with "Rule 32(a)." Another member suggested that it would be better to replace "Rule 32(a)(1)" with "Rule 32(c)(2)," which would make it clear that petitions for permission to appeal are "other papers" for purposes of the rule. Also, amending Rule 5(c) in this manner would make it clear that the two exceptions to the Rule 32(a) requirements made for "other papers" apply to petitions for permission to appeal.

A member moved that Rule 5(c) be amended by replacing the reference to "Rule 32(a)(1)" with a reference to "Rule 32(c)(2)." The motion was seconded. The motion carried (unanimously). Judge Garwood asked the Reporter to draft an amendment and Committee Note for consideration by the Committee in October.

4. Item No. 98-10 (FRAP 46(b)(3) — delete requirement of hearing in reciprocal discipline cases)

Under Rule 46(b), an attorney who has been suspended or disbarred by a state supreme court may request a hearing before being suspended or disbarred by a court of appeals. The

Fourth Circuit Rules Advisory Committee has recommended that Rule 46(b) be amended so that a hearing would be necessary only if material facts were in dispute.

A member asked how often attorneys request hearings in these "reciprocal discipline" cases. A member responded that such hearings were rare in the Fifth Circuit. Another member said that he could recall only one such hearing in the Third Circuit.

A member said that, in light of the extremely small number of hearings requested, he favored leaving Rule 46(b) alone. A member agreed and said that he also favored retaining the hearing requirement as a policy matter, as it served as a check on state supreme courts.

A member proposed restricting the ability to request a hearing to cases in which there was a dispute of fact or law. Several other members objected, saying that they saw no reason to amend Rule 46(b).

A member moved that Item No. 98-10 be removed from the study agenda. The motion was seconded. The motion carried (6-1), with 1 abstention.

VI. Additional Old Business and New Business (If Any)

No additional old business or new business was raised.

Judge Garwood noted that Mr. Meehan's term as a member of the Committee would expire on October 1. Judge Garwood expressed appreciation for Mr. Meehan's dedicated service to the Committee and said that he hoped Mr. Meehan would join the Committee at its October 1999 meeting.

VII. Scheduling of Dates and Location of Fall 1999 Meeting

The Committee agreed that it will meet in Tucson, Arizona, on October 21 and 22, 1999.

VIII. Adjournment

By unanimous consent, the Advisory Committee adjourned at 9:30 a.m.

Respectfully submitted,

Patrick J. Schiltz
Reporter

Reporter's Note: Attached as an appendix to these minutes are copies of all amendments and Committee Notes approved by the Committee at this meeting.

APPENDIX

To the Minutes of the Spring 1999 Meeting of the Advisory Committee on Appellate Rules

Reporter's Note: This appendix contains copies of all amendments to the Federal Rules of Appellate Procedure and Committee Notes approved by the Advisory Committee on Appellate Rules at its April 1999 meeting.

Rule 4. Appeal as of Right — When Taken

(a) Appeal in a Civil Case.

(4) **Effect of a Motion on a Notice of Appeal.**

(A) If a party timely files in the district court any of the following motions under the Federal Rules of Civil Procedure, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

(vi) for relief under Rule 60 if the motion is filed no later than 10 days ~~(computed using Federal Rule of Civil Procedure 6(a))~~ after the judgment is entered.

Committee Note

Subdivision (a)(4)(A)(vi). Rule 4(a)(4)(A)(vi) has been amended to remove a parenthetical that directed that the 10 day deadline be "computed using Federal Rule of Civil Procedure 6(a)." That parenthetical has become superfluous because Rule 26(a)(2) has been amended to require that all deadlines under 11 days be calculated as they are under Fed. R. Civ. P. 6(a).

Rule 27. Motions

(a) In General.

(3) **Response.**

(A) **Time to file.** Any party may file a response to a motion; Rule 27(a)(2) governs its contents. The response must be filed within ~~10~~ 7 days after service of the motion unless the court shortens or extends the time. A motion authorized by Rules 8, 9, 18, or 41 may be granted before the ~~10~~7-day period runs only if the court gives reasonable notice to the parties that it intends to act sooner.

Committee Note

Subdivision (a)(3)(A). Subdivision (a)(3)(A) presently requires that a response to a motion be filed within 10 days after service of the motion. Intermediate Saturdays, Sundays, and legal holidays are counted in computing that 10 day deadline, which means that, except when the 10 day deadline ends on a weekend or legal holiday, parties generally must respond to motions within 10 actual days.

Fed. R. App. P. 26(a)(2) has been amended to provide that, in computing any period of time, a litigant should "[e]xclude intermediate Saturdays, Sundays, and legal holidays when the period is less than 11 days, unless stated in calendar days." This change in the method of computing deadlines means that 10 day deadlines (such as that in subdivision (a)(3)(A)) have been lengthened as a practical matter. Under the new computation method, parties would never have less than 14 actual days to respond to motions, and legal holidays could extend that period to as much as 18 days.

Permitting parties to take two weeks or more to respond to motions would introduce significant and unwarranted delay into appellate proceedings. For that reason, the 10 day deadline in subdivision (a)(3)(A) has been reduced to 7 days. This change will, as a practical matter, ensure that every attorney will have at least 9 actual days — but, in the absence of a legal holiday, no more than 11 actual days — to respond to motions. The court continues to have discretion to shorten or extend that time in appropriate cases.

Rule 27. Motions

(a) In General.

(4) **Reply to Response.** Any reply to a response must be filed within ~~7~~ 5 days after service of the response. A reply must not present matters that do not relate to the response.

Committee Note

Subdivision (a)(4). Subdivision (a)(4) presently requires that a reply to a response to a motion be filed within 7 days after service of the response. Intermediate Saturdays, Sundays, and legal holidays are counted in computing that 7 day deadline, which means that, except when the 7 day deadline ends on a weekend or legal holiday, parties generally must respond to motions within one week.

Fed. R. App. P. 26(a)(2) has been amended to provide that, in computing any period of time, a litigant should "[e]xclude intermediate Saturdays, Sundays, and legal holidays when the period is less than 11 days, unless stated in calendar days." This change in the method of computing deadlines means that 7 day deadlines (such as that in subdivision (a)(4)) have been lengthened as a practical matter. Under the new computation method, parties would never have less than 9 actual days to respond to motions, and legal holidays could extend that period to as much as 13 days.

Permitting parties to take 9 or more days to reply to a response to a motion would introduce significant and unwarranted delay into appellate proceedings. For that reason, the 7 day deadline in subdivision (a)(4) has been reduced to 5 days. This change will, as a practical matter, ensure that every attorney will have 7 actual days to file replies to responses to motions (in the absence of a legal holiday).

Rule 32. Form of Briefs, Appendices, and Other Papers

(d) **Signature.** Every brief, motion, or other paper filed with the court must be signed by the party filing the paper or, if the party is represented, by one of the party's attorneys. The party or attorney who signs the paper must also state the signer's address and telephone number (if any).

(de) **Local Variation.** Every court of appeals must accept documents that comply with the form requirements of this rule. By local rule or order in a particular case a court of appeals may accept documents that do not meet all of the form requirements of this rule.

Committee Note

Subdivisions (d) and (e). Former subdivision (d) has been redesignated as subdivision (e), and a new subdivision (d) has been added. The new subdivision (d) requires that every brief, motion, or other paper filed with the court be signed by the attorney or unrepresented party who files it, much as Fed. R. Civ. P. 11(a) imposes a signature requirement on papers filed in district court. (An appendix filed with the court does not have to be signed.) By requiring a signature, subdivision (d) ensures that a readily identifiable attorney or party takes responsibility for every paper. The courts of appeals already have authority to sanction attorneys and parties who file papers that contain misleading or frivolous assertions, *see, e.g.*, 28 U.S.C. § 1912, Fed. R. App. P. 38 & 46(b)(1)(B), and thus subdivision (d) has not been amended to incorporate provisions similar to those found in Fed. R. Civ. P. 11(b) and 11(c).

Rule 41. Mandate: Contents; Issuance and Effective Date; Stay

(b) When Issued. The court's mandate must issue 7 calendar days after the time to file a petition for rehearing expires, or 7 calendar days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later. The court may shorten or extend the time.

Committee Note

Subdivision (b). Subdivision (b) directs that the mandate of a court must issue 7 days after the time to file a petition for rehearing expires or 7 days after the court denies a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later. Intermediate Saturdays, Sundays, and legal holidays are counted in computing that 7 day deadline, which means that, except when the 7 day deadline ends on a weekend or legal holiday, the mandate issues exactly one week after the triggering event.

Fed. R. App. P. 26(a)(2) has been amended to provide that, in computing any period of time, one should "[e]xclude intermediate Saturdays, Sundays, and legal holidays when the period is less than 11 days, unless stated in calendar days." This change in the method of computing deadlines means that 7 day deadlines (such as that in subdivision (b)) have been lengthened as a practical matter. Under the new computation method, a mandate would never issue sooner than 9 actual days after a triggering event, and legal holidays could extend that period to as much as 13 days.

Delaying mandates for 9 or more days would introduce significant and unwarranted delay into appellate proceedings. For that reason, subdivision (b) has been amended to require that mandates issue 7 *calendar* days after a triggering event.

Advisory Committee on Appellate Rules
Table of Agenda Items — Revised May 1999

FRAP Item	Proposal	Source	Current Status
95-03	Amend FRAP 15(f) to conform to new FRAP 4(a)(4)(B)(i).	Hon. Stephen F. Williams (CADC)	Awaiting initial discussion Retained in part on agenda with medium priority 9/97 Draft approved 10/98 for submission to Standing Committee in 01/00
95-04	Amend computation of time to conform to Civil Rules method. (Related to Nos. 97-01 and 98-12.)	James B. Doyle, Esq.	Awaiting initial discussion Retained on agenda with medium priority 9/97 Discussed and retained on agenda 4/98 Draft approved 10/98 for submission to Standing Committee in 01/00
95-07	Amend FRAP 4(a)(5) to make it clear that a "good cause" extension is available after expiration of original period.	Luther T. Munford, Esq.	Awaiting initial discussion Retained on agenda with low priority 9/97 Draft approved 10/98 for submission to Standing Committee in 01/00
97-01	Amend FRAP 26(a) so that time computation is consistent with FRCP 6(a). (Related to Nos. 95-04 and 98-12.)	Advisory Committee & Los Angeles County Bar Assn.	Awaiting initial discussion Retained on agenda with medium priority 9/97 Discussed and retained on agenda 4/98 Draft approved 10/98 for submission to Standing Committee in 01/00
97-05	Amend FRAP 24(a)(2) in light of Prisoner Litigation Reform Act.	Advisory Committee	Awaiting initial discussion Retained on agenda with high priority 9/97 Draft approved 4/98 for submission to Standing Committee in 01/00
97-07	Amend FRAP 28(j) to allow brief explanation.	Jack Goodman, Esq.	Awaiting initial discussion Retained on agenda with low priority 9/97 Draft approved 4/98 for submission to Standing Committee in 01/00
97-09	Amend FRAP 32 — cover color for petition for rehearing/rehearing en banc, response to either, and supplemental brief.	Paul Alan Levy, Esq. Public Citizen Litigation Group	Awaiting initial discussion Retained on agenda with low priority 9/97 Draft approved 4/98 for submission to Standing Committee in 01/00
97-12	Amend FRAP 44 to apply to constitutional challenges to state laws.	Advisory Committee	Awaiting initial discussion Retained on agenda with low priority 9/97 Draft approved 4/98 for submission to Standing Committee in 01/00

FRAP Item	Proposal	Source	Current Status
97-14	Amend FRAP 46(b)(1)(B) to replace the general "conduct unbecoming" standard with a more specific standard or, alternatively, supplement FRAP 46(b)(1)(B) by recommending a model local rule governing attorney conduct.	Standing Committee	Awaiting initial discussion Retained on agenda with low priority 9/97 Discussed and retained on agenda 4/98
97-18	Amend or delete FRAP 1(b)'s assertion that the "rules do not extend or limit the jurisdiction of the courts of appeals."	Hon. Frank H. Easterbrook (CA7)	Awaiting initial discussion Retained on agenda with high priority 9/97 Draft approved 10/98 for submission to Standing Committee in 01/00
97-21	Amend FRAP 31(b) to clarify that briefs must be served on unrepresented parties, as well as on "counsel for each separately represented party."	Advisory Committee	Awaiting initial discussion Draft approved 9/97 for submission to Standing Committee in 01/00
97-30	Amend FRAP 32(a)(7)(C) to require use of a standard certificate of compliance with type-volume limitation.	Luther T. Munford, Esq.	Awaiting initial discussion Retained on agenda with high priority 9/97 Draft approved 4/98 for submission to Standing Committee in 01/00
97-31	Amend FRAP 47(a)(1) to require that all new and amended local rules take effect on December 1.	Luther T. Munford, Esq.	Awaiting initial discussion Retained on agenda with medium priority 9/97 Draft approved 4/98 for submission to Standing Committee in 01/00
97-32	Amend FRAP 12(a) to require the appellate caption to identify only the parties to the appeal.	Methods Analysis Program	Awaiting initial discussion Discussed and retained on agenda 10/98; awaiting specific proposal from appellate clerks Discussed and retained on agenda 04/99
97-33	Amend FRAP 3(c) to require that an appellant file with the notice of appeal a statement identifying all appellants, all appellees, and counsel for all represented parties.	Methods Analysis Program	Awaiting initial discussion Discussed and retained on agenda 10/98; awaiting specific proposal from appellate clerks Discussed and retained on agenda 04/99
97-41	Amend FRAP 4 to specify time for appeal of order granting or denying writ of coram nobis.	Solicitor General Waxman	Awaiting initial discussion Draft approved 4/98 for submission to Standing Committee in 01/00

FRAP Item	Proposal	Source	Current Status
98-01	Amend FRAP 47(a) to provide that local rules do not become effective until filed with the Administrative Office.	Standing Committee	Awaiting initial discussion Draft approved 4/98 for submission to Standing Committee in 01/00
98-02	Amend FRAP 4 to clarify the application of FRAP 4(a)(7) to orders granting or denying the motions for post-judgment relief listed in FRAP 4(a)(4)(A).	Hon. Will Garwood (CA5) Luther T. Munford, Esq.	Awaiting initial discussion Discussed and retained on agenda 4/98 Draft approved 10/98 for submission to Standing Committee in 01/00 10/98 draft withdrawn; discussed further and retained on agenda 04/99
98-03	Amend FRAP 29(e) to increase the time for amici to file their briefs and to clarify the status of local rules on amicus briefs, and amend FRAP 31(a)(1) so that the time to file a reply brief runs from the filing of the amicus brief rather than the service of the appellee's brief.	Paul Alan Levy, Esq. Public Citizen Litigation Group	Awaiting initial discussion Discussed and retained on agenda 10/98; awaiting specific proposal from Department of Justice, et al. Discussed and retained on agenda 04/99; continue to await specific proposal from Department, et al.
98-06	Amend FRAP 4(b)(3)(A) to clarify whether and to extent the filing of a FRCrP 35(c) motion for correction of sentence tolls the time to file appeal.	Hon. Will Garwood (CA5)	Awaiting initial discussion Discussed and retained on agenda 10/98; awaiting specific proposal from Department of Justice Discussed and retained on agenda 04/99; awaiting draft amendment and Committee Note
98-07	Amend FRAP 22(a) to permit circuit judges to deny applications for writs of habeas corpus.	Hon. Kenneth F. Ripple (CA7)	Awaiting initial discussion Discussed and retained on agenda 10/98; awaiting specific proposal from Department of Justice Discussed and retained on agenda 04/99; continue to await specific proposal from Department
98-11	Amend FRAP 5(c) to clarify application of FRAP 32(a) to petitions for permission to appeal.	Christopher A. Goelz (CA9 Circuit Mediator)	Awaiting initial discussion Discussed and retained on agenda 04/99
98-12	Amend FRAP 4(a)(4)(A)(vi), 27(a)(3)(A), 27(a)(4) & 41(b) to account for amendment to FRAP 26(a) regarding calculating time. (Related to Nos. 95-04 and 97-01.)	Advisory Committee	Awaiting initial discussion Discussed and retained on agenda 10/98 Draft approved 04/99 for submission to Standing Committee in 01/00
99-01	Amend FRAP 24(a)(3) & 24(a)(5) to address potential conflicts with Prisoner Litigation Reform Act.	Hon. Will Garwood (CA5)	Awaiting initial discussion Discussed and retained on agenda 04/99

FRAP Item	Proposal	Source	Current Status
99-02	Amend FRAP 32 to require that briefs, written motions, rehearing petitions, etc. be signed.	Hon. Will Garwood (CA5)	Awaiting initial discussion Draft approved 04/99 for submission to Standing Committee in 01/00
99-03	Amend unspecified rules to permit electronic filing and service.	Subcommittee on Technology	Awaiting initial discussion Discussed and retained on agenda 04/99

Item 7A

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

FROM: Honorable Adrian G. Duplantier, Chair
Advisory Committee on Bankruptcy Rules

DATE: May 7, 1999

RE: Report of the Advisory Committee on Bankruptcy Rules

I. Introduction

The Advisory Committee on Bankruptcy Rules met on March 18-19, 1999, at the Airlie Center in Warrenton, Virginia. The Advisory Committee considered public comments regarding two packages of proposed amendments to the Bankruptcy Rules that were published in August, 1998.

The first package, titled the "Litigation Package," includes proposed amendments to 27 Bankruptcy Rules that would substantially revise procedures relating to litigation (other than adversary proceedings) in bankruptcy courts. Complete revisions of Rules 9013(motions) and 9014 (contested matters) are the primary focus of the Litigation Package. The Committee received 176 letters or E-mail messages, and heard 14 witnesses testify at a public hearing in Washington, D.C., on January 28, 1999, commenting on the Litigation Package. Most of the commentators opposed the proposed amendments or suggested substantial revisions. In view of the numerous comments, the Advisory Committee decided to study further the Litigation Package. The Committee will not be presenting to the Standing Committee at its June 1999 meeting any of the proposed amendments included in the Litigation Package.

The second package of proposed amendments published in August, 1998, includes miscellaneous revisions to six Bankruptcy Rules (Rules 1007, 1017, 2002(a), 2002(j), 4003, 4004, and 5003) and two Official Bankruptcy Forms (Form 1 -- Voluntary Petition, and Form 7 -- Statement of Financial Affairs). The Advisory Committee received 17 letters or E-mail messages commenting on these proposed amendments (no witnesses testified on these amendments at the public hearing). At its meeting at the Airlie Center, the Advisory Committee considered these comments and decided to study further the proposed amendments to Rules 1007 and 2002(j) and Official Bankruptcy Forms 1 and 7. The Committee approved the proposed amendments to Rules 1017, 2002(a), 4003, 4004, and 5003, and will present them to the Standing Committee at its June 1999 meeting for final approval and transmission to the Judicial Conference.

The Advisory Committee also approved a preliminary draft of proposed amendments to Bankruptcy Rules 1007, 2002(c) and (g), 3016, 3017, 3020, and 9020, and will present them to the Standing Committee at its June 1999 meeting with a request that they be published for

comment.

The Advisory Committee discussed the recommendations of the Standing Committee's Subcommittee on Technology regarding electronic service under Civil Rule 5 and the expansion of the 3-day mail rule under Civil Rule 6(e) to include electronic service. The Advisory Committee also discussed alternative drafts of amendments to Civil Rules 5, 6(e), 77(d), and 4(d) prepared by Professor Edward H. Cooper at the request of the Subcommittee on Technology. The Advisory Committee supports the suggested amendments to Civil Rule 5 that would permit electronic service on consent of the parties, the expansion of the 3-day rule to include any method of service other than personal delivery, and amendments to Civil Rule 77(d) to permit the clerk to use electronic service when giving notice of entry of a judgment. Since Bankruptcy Rule 7005 makes Civil Rule 5 applicable to adversary proceedings, any amendments to Civil Rule 5 to permit electronic service will apply in adversary proceedings without the need to amend the Bankruptcy Rules. But if the Standing Committee approves for publication proposed amendments to Civil Rule 5(b) regarding electronic service, the Advisory Committee will request that proposed amendments to Bankruptcy Rule 9006(f) (expanding the 3-day rule) and 9022(a) (authorizing the clerk to send notice of entry of a judgment or order by electronic means) be published at the same time.

The proposed amendments that will be presented to the Standing Committee for final approval and transmission to the Judicial Conference, the preliminary draft of proposed amendments that will be presented with a request for publication, and the preliminary draft of proposed amendments ready for publication if the proposed amendments to Civil Rule 5 on electronic service are approved for publication, are set forth below under "Action Items."

II. Action Items

A. Proposed Amendments to Bankruptcy Rules 1017, 2002(a), 4003, 4004, and 5003 Submitted for Final Approval by the Standing Committee and Transmittal to the Judicial Conference.

1. *Public Comment.*

The Preliminary Draft of the Proposed Amendments to the Federal Rules of Bankruptcy Procedure and related committee notes were published for comment by the bench and bar in August 1999. A public hearing on the preliminary draft was held on January 28, 1999, in Washington, D.C.

Sixteen letters or E-mail messages were received and no witnesses testified regarding the proposed amendments to Bankruptcy Rules 1017, 2002(a), 4003, 4004, or 5003. The comments contained in these letters and E-mail messages are summarized on a rule-by-rule basis following the text

of each rule in the GAP Report (see pages 4 - 15 below). These comments were reviewed at the Advisory Committee meeting and, as a result, several revisions were made to the published draft. The post-publication revisions are identified in the GAP Report.

2. *Synopsis of Proposed Amendments:*

(a) Rule 1017(e) is amended to permit the court to grant a timely request for an extension of time to file a motion to dismiss a chapter 7 case under §707(b), whether the court rules on the request before or after the expiration of the 60-day time limit for filing the extension request.

(b) Rule 2002(a) is amended to avoid the expense of sending to all creditors notice of a hearing on a request for compensation or reimbursement of expenses if the request does not exceed $1,000. The current rule provides that notice is not necessary if the amount of the request does not exceed $500. The amendment also eliminates certain ambiguities in the current rule.

(d) Rule 4003(b) is amended to permit the court to grant a timely request for an extension of time to object to a list of claimed exemptions, whether the court rules on the request before or after the expiration of the 30-day time limit for filing an objection. The amendments also extend the rule to apply to an objection filed by any party in interest, instead of limiting it to objections filed by a trustee or creditor.

(e) Rule 4004(c)(1) is amended to delay the granting of a discharge in a chapter 7 case while a motion for an extension of time to file a motion to dismiss the case under § 707(b) is pending.

(f) Rule 5003 is amended to permit the United States and the state in which the court is located to file statements designating safe harbor mailing addresses for notice purposes. The amendment requires the clerk to maintain a register of these addresses. Failure to use a mailing address in the register does not invalidate any notice that is otherwise effective under applicable law.

2. *Text of Proposed Amendments to Rules 1017, 2002, 4003, 4004, and 5003.*

Rule 1017. Dismissal or Conversion of Case; Suspension

****

(e) DISMISSAL OF AN INDIVIDUAL DEBTOR'S CHAPTER 7 CASE FOR SUBSTANTIAL ABUSE. The court may dismiss an individual debtor's case for substantial abuse under § 707(b) only on motion by the United States trustee or on the court's own motion and after a hearing on notice to the debtor, the trustee, the United States trustee, and any other entities as the court directs.

(1) A motion to dismiss a case for substantial abuse may be filed by the United States trustee only within 60 days after the first date set for the meeting of creditors under § 341(a), unless, on request filed by the United States trustee before the time has expired, the court for cause extends the time for filing the motion to dismiss. The United States trustee shall set forth in the motion all matters to be submitted to the court for its consideration at the hearing.

****

COMMITTEE NOTE

This rule is amended to permit the court to grant a timely request filed by the United States trustee for an extension of time to file a motion to dismiss a chapter 7 case under § 707(b), whether the court rules on the request before or after the expiration of the 60-day period.

Reporter's Note on Text of Rule 1017(e). The above text of Rule 1017(e) is not based on the text of the rule in effect on this date. The above text embodies amendments that have been promulgated by the Supreme Court in April 1999 and, unless Congress acts with respect to the amendments, will become effective on December 1, 1999.

Public Comment on Proposed Amendments to Rule 1017(e):

(1) Hon. Christopher M. Klein (Bankr. E.D. Cal.) asked whether Rule 1017(e)(1) permits the court to extend the time for the court to dismiss the case for substantial abuse *sua sponte*.

(2) Peter C. Fessenden, Esq. (Brunswick, Maine) supports all the proposed amendments.

GAP Report on Rule 1017(e). No changes since publication.

Rule 2002. Notices to Creditors, Equity Security Holders, United States, and United States Trustee

****

(a) TWENTY-DAY NOTICES TO PARTIES IN INTEREST. Except as provided in subdivisions (h), (i), and (l) of this rule, the clerk, or some other person as the court may direct, shall give the debtor, the trustee, all creditors and indenture trustees at least 20 days' notice by mail of:

****

(6) ~~hearings on all applications for compensation or reimbursement of expenses totaling in excess of $500~~ a hearing on any entity's request for compensation or reimbursement of expenses if the request exceeds $1,000;

COMMITTEE NOTE

Paragraph(a)(6) is amended to increase the dollar amount from $500 to $1,000. The amount was last amended in 1987, when it was changed from $100 to $500. The amendment also clarifies that the notice is required only if a particular entity is requesting more than $1,000 as compensation or reimbursement of expenses. If several professionals are requesting compensation or reimbursement, and only one hearing will be held on all applications, notice under paragraph (a)(6) is required only with respect to the entities that have requested more than $1,000. If each applicant requests $1,000 or less, notice under paragraph (a)(6) is not required even though the aggregate amount of all applications to be considered at the hearing is more than $1,000.

If a particular entity had filed prior applications or had received compensation or reimbursement of expenses at an earlier time in the case, the amounts previously requested or awarded are not considered when determining whether the present application exceeds $1,000 for the purpose of applying this rule.

Public Comment on Proposed Amendments to Rule 2002(a):

(1) Hon. Arthur J. Spector (on behalf of the four bankruptcy judges in the E.D. Mich.) supports the proposed amendments.

(2) Terrence H. Dunn, Clerk (D. Ore.) Supports the proposed amendments.

(3) Peter C. Fessenden, Esq. (Brunswick, Maine) suggests that the $500 dollar amount be maintained. Also, "the rule should be amended to clarify that notice and opportunity for hearing on a fee application is required if the *aggregate total* fee application exceeds the threshold amount." Based on his experience as a chapter 13 trustee for over 18 years, even $500 can be a significant burden on debtors. The bankruptcy judges in Maine take seriously their responsibility to review fee applications; "inefficiency and padding are ferreted out and disallowed. Raising the level of unscrutinized fees to $1,000 may impose an unfair burden on those least able to afford it." Regardless of the dollar amount used, he comments that the existing and proposed rule is ambiguous. Are notice and hearing escaped if

the *particular request* is less than $500/$1,000, or if the *total aggregate* fees to date are less than that amount? Especially in chapter 13, counsel could "fly below radar" simply by spreading out fee requests to receive court approval without any meaningful review. Rule 2002(a)(6) should clarify that notice and opportunity for hearing are waived only if the application indicates that the total aggregate fees do not exceed the dollar limit in the rule.

GAP Report on Rule 2002(a). No changes since publication.

Rule 4003. Exemptions

****

(b) ~~OBJECTIONS~~ OBJECTING TO A CLAIM OF EXEMPTIONS. ~~The trustee or any creditor may file objections~~ A party in interest may file an objection to the list of property claimed as exempt only within 30 days after ~~the conclusion of~~ the meeting of creditors held ~~pursuant to Rule 2003(a)~~ under §341(a) is concluded or within 30 days after ~~the filing of~~ any amendment to the list or supplemental schedules is filed, whichever is later. ~~unless, within such period, further time is granted by the court.~~ The court may, for cause, extend the time for filing objections if, before the time to object expires, a party in interest files a request for an extension. Copies of the objections shall be delivered or mailed to the trustee, ~~and to~~ the person filing the list, and the attorney for ~~such~~ that person.

COMMITTEE NOTE

This rule is amended to permit the court to grant a timely request for an extension of time to file objections to the list of claimed exemptions, whether the court rules on the request before or after the expiration of the 30-day period. The purpose of this amendment is to avoid the harshness of the present rule which has been construed to deprive a bankruptcy court of jurisdiction to grant a timely

request for an extension if it has failed to rule on the request within the 30-day period. See In re Laurain, 113 F.3d 595 (6th Cir. 1997); Matter of Stoulig, 45 F.3d 957 (5th Cir. 1995); In re Brayshaw, 912 F.2d 1255 (10th Cir. 1990). The amendments clarify that the extension may be granted only for cause. The amendments also conform the rule to § 522(l) of the Code by recognizing that any party in interest may file an objection or request for an extension of time under this rule. Other amendments are stylistic.

Public Comment on Proposed Amendments to Rule 4003:

(1) Hon. Arthur J. Spector (on behalf of the four bankruptcy judges in the E.D. Mich.) supports the proposed amendments that will obviate the possibility of harsh results such as those created in *In re Laurain*, 113 F.3d 595 (6th Cir. 1997).

(2) Hon. Leslie Tchaikovsky (on behalf of nine Bankr. Judges of N.D. Cal.) suggests that Rule 4003(b) be further revised to clarify that an objection to an exemption is governed by Rule 9014. Also, further amend the rule to provide that the time limit for objecting to exemptions does not apply to chapter 11 cases and, in such cases, to permit the court to set a deadline.

(3) Shirley C. Arcuri, Esq., on behalf of the Local Rules Advisory Committee (Bankr. M.D. Fla.), expressed support for the proposed amendments to Rule 4003(b) that will allow trustees additional time, if warranted, to file objections to claims of exemption. Trustees are sometimes forced to file objections even if they are unsure of the merits in order to meet the 30-day time limit. Some of these are subsequently withdrawn. The amendment will allow trustees more time to determine the merits of an objection before filing it.

(4) Martha L. Davis, General Counsel, Executive Office for United States Trustees, commented that the reference to an objection to claimed exemptions filed by the "trustee or a creditor" is incomplete. Section 552(l) refers to a "party." They suggest similar language in Rule 4003(b) because the United States trustee sometimes finds it necessary to object to a debtor's claim of exemptions, particularly in chapter 11.

(5) Judy B. Calton. Esq., on behalf of the Advisory Committee of the

Bankruptcy Court for the Eastern District of Michigan, expressed support for the proposed amendments to Rule 4003(b), but is concerned that the inclusion of this provision might, by negative implication, be deemed to preclude the court from granting extensions of exclusivity or the time to assume or reject nonresidential leases if the statutory time period expires where a timely filed request for extension is pending. She suggests that similar provisions be placed in other rules with respect to such requests and/or the language permitting enlargement of time in Rule 9006(b) be strengthened.

(6) Peter C. Fessenden, Esq. (Brunswick, Maine) supports the proposed amendments.

GAP Report on Rule 4003. The words "trustee or creditor" were replaced by "party in interest" to conform to § 522(l) of the Bankruptcy Code which permits any party in interest to object to claimed exemptions. Style revisions also were made to the published draft.

Rule 4004. Grant or Denial of Discharge

****

(c) GRANT OF DISCHARGE.

(1) In a chapter 7 case, on expiration of the time fixed for filing a complaint objecting to discharge and the time fixed for filing a motion to dismiss the case ~~pursuant to~~ under Rule 1017(e), the court shall forthwith grant the discharge unless:

~~(a)~~(A) the debtor is not an individual,

~~(b)~~(B) a complaint objecting to the discharge has been filed,

~~(e)~~(C) the debtor has filed a waiver under § 727(a)(10),

~~(d)~~(D) a motion to dismiss the case under ~~pursuant to~~ Rule 1017(e) is pending,

~~(e)~~(E) a motion to extend the time for filing a complaint objecting to discharge is pending, ~~or~~

(F) a motion to extend the time for filing a motion to dismiss the case under Rule 1017(e)(1) is pending, or

~~(f)~~(G) the debtor has not paid in full the filing fee prescribed by 28 U.S.C. §1930(a) and any other fee prescribed by the Judicial Conference of the United States under 28 U.S.C. §1930(b) that is payable to the clerk upon the commencement of a case under the Code.

****

COMMITTEE NOTE

Subdivision (c) is amended so that a discharge will not be granted while a motion requesting an extension of time to file a motion to dismiss the case under § 707(b)is pending. Other amendments are stylistic.

Public Comment on Proposed Amendments to Rule 4003:

(1) Hon. Christopher M. Klein (E.D. Cal.) asks whether the court may extend the time *sua sponte*? Consider revising the rule to take into

account undeserved discharges in cases that should be dismissed. There has been a problem when the debtor does not attend the meeting of creditors, which the trustee keeps continuing, and ultimately the case gets dismissed for failure to prosecute, but the discharge has been automatically entered under Rule 4004(c). Since section 349 does not provide that dismissal vacates the discharge, there is an opportunity for manipulation in which a debtor gets the benefit of a discharge without giving up nonexempt property to creditors.

(2) Peter C. Fessendon, Esq. (Brunswick, Maine) supports the proposed amendments.

GAP Report on Rule 4004. No changes since publication except for style revisions.

Rule 5003. Records Kept By the Clerk

****

(e) *Register of Mailing Addresses of Federal and State Governmental Units*. The United States or the state or territory in which the court is located may file a statement designating its mailing address. The clerk shall keep, in the form and manner as the Director of the Administrative Office of the United States Courts may prescribe, a register that includes these mailing addresses, but the clerk is not required to include in the register more than one mailing address for each department, agency, or instrumentality of the United States or the state or territory. If more than one address for a department, agency, or instrumentality is included in the register, the clerk shall also include information that would enable a user of the register to determine the circumstances when each address is applicable, and mailing notice to only one applicable address is sufficient to provide effective notice. The clerk shall update the register

annually, effective January 2 of each year. The mailing address in the register is conclusively presumed to be a proper address for the governmental unit, but the failure to use that mailing address does not invalidate any notice that is otherwise effective under applicable law.

~~(e)~~ (f) *Other Books and Records of the Clerk.* The clerk shall ~~also~~ keep ~~such~~ any other books and records ~~as may be~~ required by the Director of the Administrative Office of the United States Courts.

COMMITTEE NOTE

Subdivision (e) is added to provide a source where debtors, their attorneys, and other parties may go to determine whether the United States or the state or territory in which the court is located has filed a statement designating a mailing address for notice purposes. By using the address in the register -- which must be available to the public -- the sender is assured that the mailing address is proper. But the use of an address that differs from the address included in the register does not invalidate the notice if it is otherwise effective under applicable law.

The register may include a separate mailing address for each department, agency, or instrumentality of the United States or the state or territory. This rule does not require that addresses of municipalities or other local governmental units be included in the register, but the clerk may include them.

Although it is important for the register to be kept current, debtors, their attorneys, and other parties should be able to rely on mailing addresses listed in the register without the need to continuously inquire as to new or amended addresses. Therefore, the clerk must update the register, but only once each year.

To avoid unnecessary cost and burden on the clerk and to keep the register a reasonable length, the clerk is not required to include more than one mailing address for a particular agency, department, or instrumentality of the United States or the state or territory. But if more than one address is included, the clerk is required to include information so that a person using the register could determine when each address should be used. In any event, the inclusion of more than one address for a particular department, agency, or instrumentality, does not

impose on a person sending a notice the duty to send it to more than one address.

Public Comment on Proposed Amendments to Rule 5003:

(1) The Bankruptcy Judges and Clerk of the District of South Carolina commented that the amendments will require significant administrative time and effort in the clerk's office for a product that is optional. It would be better to permit the court to solicit from all creditors, including credit card companies and governmental units, one address for noticing purposes.

(2) Terrence H. Dunn, Clerk (D. Ore.) opposes this change, which would require extensive administrative effort in the clerks' office while stating that a failure to use the address in the register does not invalidate the notice. Expansion of the electronic noticing contract for bankruptcy courts will help eliminate the need for this proposal. The increasing number of pro se debtors will negate the effect of this rule since many are not sophisticated enough to check the register. If this rule is kept, the court should maintain these records only on its PACER system rather than wasting time and money printing paper copies and mailing.

(3) Arthur J. Fried, General Counsel, Social Security Administration, opposes the proposed amendments to this rule because they provide that a debtor's failure to comply will not affect the validity of the notice if the governmental unit has notice or actual knowledge in time to participate. While this may appear to protect the debtor, in practice it may result in adverse consequences, i.e., failure to give timely notice to the appropriate component of SSA may result in the continued collection of overpayments that normally would be suspended as a result of the automatic stay. Monthly Social Security benefits may be inadvertently withheld. Notice failures also will result in added time and expense to the courts because of contempt proceedings when the stay is violated due to poor notice of the case.

(4) Shirley C. Arcuri, Esq., Local Rules Advisory Committee (Bankr. M.D. Fla.) supports the amendments to this rule because they provide certainty as to where to send notices to governmental agencies.

(5) Hon. Christopher M. Klein (Bankr. E.D. Cal.) commented that the concept of a clearinghouse for addresses is appealing, but the details raise questions. Since updated only once each year, some addresses will be obsolete. The

conclusive presumption of an obsolete address raises concerns especially in an era when the Postal Service seems to be getting less efficient at forwarding mail. If the address contains an error, is the conclusive presumption operative? The burdens on clerks may be greater than anticipated. Given the opportunity for misunderstanding when something does not happen when and as anticipated, this proposal should not be adopted in its present form.

(6) The Executive Office for United States Attorneys commented that the register is a good idea, but multiple addresses for agencies are needed so that an agency can have different addresses for offices handling different types of loans. Suggests eliminating the information requirement enabling the user to determine which address is applicable. The failure to use the provided mailing address does not invalidate notice, so the purpose of this provision is unclear and its effectiveness is uncertain.

(7) Barry K. Lander, Clerk, on behalf of the Bankruptcy Clerks' Advisory Group, wrote that this rule would require extensive administrative effort by clerks' offices without a clear purpose because failure to use the specified address would not invalidate an otherwise valid notice.

(8) Peter H. Arkison, Esq. (Bellingham, WA) suggested that the register should be expanded to include local governmental units such as cities and counties.

(9) Stephen J. Csontos, Sr. Legislative Counsel, Tax Division, U.S. Dept. of Justice, expressed concern about the limitation that the clerk is not obligated to list more than one address for an agency. The IRS might want to use more than one address in the future (depending on the type of proceeding) as a result of the pending reorganization of the IRS along functional lines. While most clerks will cooperate, the proposed rule would give clerks the right to deny such a request arbitrarily. Proposes language stating that "the clerk may include more than one mailing address ..." (rather than "the clerk is not required to include more than one ...").

(10) Karen Cordry, Esq., on behalf of Bankruptcy and Taxation Working Group, National Association of Attorneys General, suggests that action on this amendment be delayed until it is possible to assess the likelihood of new legislation, which may deal with these issues. The register is a useful concept, but the restrictions on it make it less helpful (even harmful).

Opposes excluding other states and municipalities, and limiting it to one address for each agency. Updating only once each year is not sufficient (forwarding addresses are limited in time, certainly less than one year). Since the address is conclusively presumed to be the correct one, if an agency moves and notifies the debtor, the debtor may still send notices to the old address (i.e., room for abuse). It is important that it be accurate (updated) and mandatory (not optional), or it will be of little value. A properly constructed, updated, mandatory register that is on the Internet would be very useful.

(11) Peter C. Fessenden, Esq. (Brunswick, Maine) supports the proposed amendments.

GAP Report on Rule 5003. No changes since publication.

B. Preliminary Draft of Proposed Amendments to Bankruptcy Rules 1007, 2002(c) and (g), 3016, 3017, 3020, and 9020 Submitted for Approval to Publish for Comment.

1. *Synopsis of Proposed Amendments:*

(a) Rule 1007 is amended so that, if the debtor knows that a creditor is an infant or incompetent person, the debtor will be required to include in the list of creditors and schedules the name, address, and legal relationship of any representative upon whom process would be served in an adversary proceeding against the infant or incompetent person. This information will enable the clerk to mail notices required under Rule 2002 to the appropriate representative.

(b) Rule 2002(c) is amended to assure that parties entitled to notice of a hearing on confirmation of a plan are given adequate notice of any injunction included in the plan that would enjoin conduct not otherwise enjoined by operation of the Bankruptcy Code.

(c) Rule 2002(g) is amended to clarify that where a creditor or indenture trustee files both a proof of claim which includes a mailing address and a separate request designating a different mailing address, the last paper filed determines the proper address, and that a request designating a mailing address is effective only with respect to a particular case. The amendments also clarify that a filed proof of claim is considered a request designating a mailing address if a notice of no dividend has been given under Rule 2002(e), but has been superseded by a subsequent notice of possible dividend under Rule 3002(c)(5). A new paragraph has been added to assure that notices to an infant or incompetent person are mailed to the person's legal representative identified in the debtor's schedules or list of creditors.

(d) Rule 3016 is amended to assure that entities whose conduct would be enjoined under a plan, rather than by operation of the Bankruptcy Code, are given adequate notice of the proposed injunction. The amendment would require that the plan and disclosure statement describe in specific and conspicuous language all acts to be enjoined and to identify the entities that would be subject to the injunction.

(e) Rule 3017 is amended to assure that entities whose conduct would be enjoined under a plan, but who would not ordinarily receive copies of the plan and disclosure statement or information regarding the confirmation hearing because they are neither creditors nor equity security holders, are provided with adequate notice of the proposed injunction, the confirmation hearing, and the deadline for

objecting to confirmation of the plan.

(f) Rule 3020 is amended so that, if a plan contains an injunction against conduct not otherwise enjoined under the Code, the order confirming the plan must describe in detail all acts enjoined and identify the entities subject to the injunction. The amendment also requires that notice of entry of the order of confirmation be mailed to all known entities subject to the injunction.

(g) Rule 9020 is amended to delete provisions that delay for 10 days the effectiveness of an order of civil contempt issued by a bankruptcy judge and that render the order subject to *de novo* review by the district court. Other procedural provisions in the rule are replaced with a statement that a motion for an order of contempt made by the United States trustee or a party in interest is governed by Rule 9014 (contested matters).

2. *Text of Preliminary Draft of Proposed Amendments Submitted for Approval to Publish*:

Rule 1007. Lists, Schedules and Statements; Time Limits

****

(m) *Infants and Incompetent Persons.* If the debtor knows that a person on the list of creditors or schedules is an infant or incompetent person, the debtor also shall include the name, address, and legal relationship of any person upon whom process would be served in an adversary proceeding against the infant or incompetent person in accordance with Rule 7004(b)(2).

COMMITTEE NOTE

Subdivision (n) is added to enable the person required to mail notices under Rule 2002 to mail them to the appropriate guardian or other representative when the debtor knows that a creditor or other person listed is an infant or incompetent person.

The proper mailing address of the representative is determined in accordance with Rule 7004(b)(2), which requires mailing to the person's dwelling

house or usual place of abode or at the place where the person regularly conducts a business or profession.

Rule 2002. Notices to Creditors, Equity Security Holders, United States, and United States Trustee

****

(c) *Content of Notice.*

****

(3) *Notice of Hearing on Confirmation When Plan Provides for an Injunction.* If a plan provides for an injunction against conduct not otherwise enjoined under the Code, the notice required under Rule 2002(b)(2) shall:

(A) include in conspicuous language (bold, italic, or highlighted text) a statement that the plan proposes an injunction;

(B) describe briefly the nature of the injunction; and

(C) identify the entities that would be subject to the injunction.

****

~~(g) ADDRESSES OF NOTICES. All notices required to be mailed under this rule to a creditor, equity security holder, or indenture trustee shall be addressed as such entity or an authorized agent may direct in a filed request; otherwise, to the address shown in the list of creditors or the schedule, whichever is filed later. If a different address is stated in a proof of claim duly filed, that address shall be used unless a notice of no dividend has been given.~~

(g) *Addressing Notices.*

(1) Notices required to be mailed under Rule 2002 to a creditor, indenture trustee, or equity security holder shall be addressed as such entity or an authorized agent has directed in its last request filed in the particular case. For the purposes of this subdivision --

(A) a proof of claim filed by a creditor or indenture trustee that designates a mailing address constitutes a filed request to mail notices to that address, unless a notice of no dividend has been given under Rule 2002(e) and a later notice of possible dividend under Rule 3002(c)(5) has not been given; and

(B) a proof of interest filed by an equity security holder that designates a mailing address constitutes a filed request to mail notices to that address.

(2) If a creditor or indenture trustee has not filed a request designating a mailing address under Rule 2002(g)(1), the notices shall be mailed to the address shown on the list of creditors or schedule of liabilities, whichever is filed later. If an equity security holder has not filed a request designating a mailing address under Rule 2002(g)(1), the notices shall be mailed to the address shown on the list of equity security holders.

(3) If a list or schedule filed under Rule 1007 includes the name and address of a legal representative of an infant or incompetent person, and a person other than that representative files a request or proof of claim designating a

name and mailing address that differs from the name and address of the representative included in the list or schedule, unless the court orders otherwise, notices under Rule 2002 shall be mailed to the representative included in the list or schedules and to the name and address designated in the request or proof of claim.

COMMITTEE NOTE

Subdivision (c)(3) is added to assure that parties given notice of a hearing to consider confirmation of a plan under subdivision (b) are given adequate notice of an injunction provided for in the plan if it would enjoin conduct that is not otherwise enjoined by operation of the Code.

This new requirement is not applicable to an injunction contained in a plan if it is substantially the same as an injunction provided under the Code. For example, if a plan contains an injunction against acts to collect a discharged debt from the debtor, Rule 2002(c)(3) would not apply because that conduct would be enjoined under § 524(a)(2) upon the debtor's discharge. But if a plan provides that creditors will be enjoined from asserting claims against persons who are not debtors in the case, the notice of the confirmation hearing must include the information required under Rule 2002(c)(3) because that conduct would not be enjoined by operation of the Code. See § 524(e).

The requirement that the notice identify the entities that would be subject to the injunction requires only reasonable identification under the circumstances. If the entities that would be subject to the injunction cannot be identified by name, the notice may describe them by class or category if reasonable under the circumstances. For example, it may be sufficient for the notice to identify the entities as "all creditors of the debtor" and for the notice to be published in a manner that satisfies due process requirements.

This rule is not intended to affect any determination of whether, or to what extent, a plan may provide for injunctive relief. The validity and effect of any injunction provided for in a plan are substantive law matters that are beyond the scope of these rules.

Subdivision (g) has been revised to clarify that where a creditor or indenture trustee files both a proof of claim which includes a mailing address and a separate request designating a mailing address, the last paper filed determines the proper address. The amendments also clarify that a request designating a mailing address is effective only

with respect to a particular case.

Under Rule 2002(g), a duly filed proof of claim is considered a request designating a mailing address if a notice of no dividend has been given under Rule 2002(e), but has been superseded by a subsequent notice of possible dividend under Rule 3002(c)(5). A duly filed proof of interest is considered a request designating a mailing address of an equity security holder.

Rule 2002(g)(3) is added to assure that notices to an infant or incompetent person under this rule are mailed to the appropriate guardian or other legal representative. Under Rule 1007(m), if the debtor knows that a creditor is an infant or incompetent person, the debtor is required to include in the list and schedule of creditors the name and address of the person upon whom process would be served in an adversary proceeding in accordance with Rule 7004(b)(2). If the infant or incompetent person, or another person, files a request or proof of claim designating a different name and mailing address, the notices would have to be mailed to both names and addresses until the court resolved the issue as to the proper mailing address.

The other amendments to Rule 2002(g) are stylistic.

Rule 3016. Filing of Plan and Disclosure Statement in a Chapter 9 Municipality ~~and~~ or Chapter 11 Reorganization ~~Cases~~ Case

****

(c) *Injunction Under a Plan.* If a plan provides for an injunction against conduct not otherwise enjoined under the Code, the plan and disclosure statement shall describe in specific and conspicuous language (bold, italic, or highlighted text) all acts to be enjoined and identify the entities that would be subject to the injunction.

COMMITTEE NOTE

Subdivision (c) is added to assure that entities whose conduct would be enjoined under a plan, rather than by operation of the Code, are given adequate notice of the proposed injunction.

This requirement is not applicable to an injunction contained in a plan if it is substantially the same as an injunction provided under the Code. For example, if a plan

contains an injunction against acts to collect a discharged debt from the debtor, Rule 3016(c) would not apply because that conduct would be enjoined nonetheless under § 524(a)(2). But if a plan provides that creditors will be permanently enjoined from asserting claims against persons who are not debtors in the case, the plan and disclosure statement must highlight the injunctive language and comply with the requirements of Rule 3016(c). See § 524(e).

The requirement that the plan and disclosure statement identify the entities that would be subject to the injunction requires reasonable identification under the circumstances. If the entities that would be subject to the injunction cannot be identified by name, the plan and disclosure statement may describe them by class or category. For example, it may be sufficient for the subjects of the injunction to be identified as "all creditors of the debtor."

This rule is not intended to affect any determination of whether, or to what extent, a plan may provide for injunctive relief. The validity and effect of any injunction provided for in a plan are substantive law matters that are beyond the scope of these rules.

Rule 3017. Court Consideration of Disclosure Statement in a Chapter 9 Municipality ~~and~~ or Chapter 11 Reorganization Case

****

(f) *Notice and Transmission of Documents to Entities Subject to an Injunction Under a Plan.* If a plan provides for an injunction against conduct not otherwise enjoined under the Code and an entity that would be subject to the injunction is not a creditor or equity security holder, at the hearing held under Rule 3017(a), the court shall consider procedures for providing the entity with:

(1) at least 25 days' notice of the time fixed for filing objections and the hearing on confirmation of the plan containing the information described in Rule 2002(c)(3); and

(2) to the extent feasible, a copy of the plan and disclosure statement.

COMMITTEE NOTE

Subdivision (f) is added to assure that entities whose conduct would be enjoined under a plan, rather than by operation of the Code, and who will not receive the documents listed in subdivision (d) because they are neither creditors nor equity security holders, are provided with adequate notice of the proposed injunction.

This rule recognizes the need for adequate notice to subjects of an injunction, but that reasonable flexibility under the circumstances may be required. If a known and identifiable entity would be subject to the injunction, and the notice, plan, and disclosure statement could be mailed to that entity, the court should require that they be mailed at the same time that the plan, disclosure statement and related documents are mailed to creditors under Rule 3017(d). If mailing notices and other documents is not feasible because the entities subject to the injunction are described in the plan and disclosure statement by class or category and they cannot be identified individually by name and address, the court may require that notice under Rule 3017(f)(1) be published.

This rule does not address any substantive law issues relating to the validity or effect of any injunction provided under a plan, or any due process or other constitutional issues relating to notice. These issues are beyond the scope of these rules and are left for judicial determination.

Rule 3020. Deposit; Confirmation of Plan in a Chapter 9 Municipality or a Chapter 11 Reorganization Case

****

(c) *Order of Confirmation.*

(1) The order of confirmation shall conform to the appropriate Official Form ~~and~~ . If the plan provides for an injunction against conduct not otherwise enjoined under the Code, the order of confirmation shall (1) describe in reasonable detail all acts enjoined; (2) be specific in its terms regarding the injunction; and (3) identify the entities subject to the injunction.

(2) Notice of entry of the order of confirmation ~~notice of entry thereof~~ shall be mailed promptly ~~as provided in Rule 2002(f)~~ to the debtor, the trustee, creditors, equity security holders, ~~and~~ other parties in interest, and, if known, to any identified entity subject to an injunction provided for in the plan against conduct not otherwise enjoined under the Code.

(3) Except in a chapter 9 municipality case, notice of entry of the order of confirmation shall be transmitted to the United States trustee as provided in Rule 2002(k).

COMMITTEE NOTE

Subdivision (c) is amended to provide notice to an entity subject to an injunction provided for in a plan against conduct not otherwise enjoined by operation of the Code. This requirement is not applicable to an injunction contained in a plan if it is substantially the same as an injunction provided under the Code.

The requirement that the order of confirmation identify the entities subject to the injunction requires only reasonable identification under the circumstances. If the entities that would be subject to the injunction cannot be identified by name, the order may describe them by class or category if reasonable under the circumstances. For example, it may be sufficient for the order to identify the entities as "all creditors of the debtor."

This rule is not intended to affect any determination of whether, or to what extent, a plan may provide for injunctive relief. The validity and effect of any injunction provided for in a plan are substantive law matters that are beyond the scope of these rules.

Rule 9020 Contempt Proceedings

Rule 9014 governs a motion for an order of contempt made by the United States trustee or a party in interest.

~~(a) CONTEMPT COMMITTED IN PRESENCE OF BANKRUPTCY JUDGE. Contempt committed in the presence of a bankruptcy judge may be determined summarily by a bankruptcy judge. The order of contempt shall recite the facts and shall be signed by the bankruptcy judge and entered of record.~~

~~(b) OTHER CONTEMPT. Contempt committed in a case or proceeding pending before a bankruptcy judge, except when determined as provided in subdivision (a) of this rule, may be determined by the bankruptcy judge only after a hearing on notice. The notice shall be in writing, shall state the essential facts constituting the contempt charged and describe the contempt as criminal or civil and shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense. The notice may be given on the court's own initiative or on application of the United States attorney or by an attorney appointed by the court for that purpose. If the contempt charged involves disrespect to or criticism of a bankruptcy judge, that judge is disqualified from presiding at the hearing except with the consent of the person charged.~~

~~(c) SERVICE AND EFFECTIVE DATE OF ORDER; REVIEW. The clerk shall serve forthwith a copy of the order of contempt on the entity named therein. The order shall be effective 10 days after service of the order and shall have the same force and effect as an order of contempt entered by the district court unless, within the 10-day period, the entity named therein serves and files objections prepared in the manner provided in Rule 9033(b). If timely objections are filed, the order shall be reviewed as provided in Rule 9033.~~

~~(d) RIGHT TO JURY TRIAL. Nothing in this rule shall be construed to~~

~~impair the right to jury trial whenever it otherwise exists.~~

COMMITTEE NOTE

The amendments to this rule cover a motion for an order of contempt filed by the United States trustee or a party in interest. This rule, as amended, does not address a contempt proceeding initiated by the court sua sponte. Neither the Bankruptcy Rules nor the Federal Rules of Civil Procedure provide procedures for sua sponte contempt orders.

Whether the court is acting on motion under this rule or is acting sua sponte, these amendments are not intended to extend, limit, or otherwise affect either the contempt power of a bankruptcy judge or the role of the district judge regarding contempt orders. Issues relating to the contempt power of bankruptcy judges are substantive and are left to statutory and judicial development, rather than procedural rules.

This rule, as amended in 1987, delayed for ten days from service the effectiveness of a bankruptcy judge's order of contempt and rendered the order subject to de novo review by the district court. These limitations on contempt orders were added to the rule in response to the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333, which provides that bankruptcy judges are judicial officers of the district court, but does not specifically mention contempt power. See 28 U.S.C. § 151. As explained in the committee note to the 1987 amendments to this rule, no decisions of the courts of appeals existed concerning the authority of a bankruptcy judge to punish for either civil or criminal contempt under the 1984 Act and, therefore, the rule as amended in 1987 "recognizes that bankruptcy judges may not have the power to punish for contempt." Committee Note to 1987 Amendments to Rule 9020.

Since 1987, several courts of appeals have held that bankruptcy judges have the power to issue civil contempt orders. See, e.g., Matter of Terrebonne Fuel and Lube, Inc., 108 F.3d 609 (5th Cir. 1997); In re Rainbow Magazine, Inc., 77 F.3d 278 (9th Cir. 1996). Several courts have distinguished between a bankruptcy judge's civil contempt power and criminal contempt power. See, e.g., Matter of Terrebonne Fuel and Lube, Inc., 108 F.3d at 613, n. 3 ("[a]lthough we find that bankruptcy judge's [sic] can find a party in civil contempt, we must point out that bankruptcy courts lack the power to hold persons in criminal contempt."). For other decisions regarding criminal contempt power, see, e.g., In re Ragar, 3 F.3d 1174 (8th Cir. 1993); Matter of Hipp, Inc., 895 F.2d 1503 (5th Cir. 1990). To the extent that Rule 9020, as amended in 1987, delayed the effectiveness of civil contempt orders and required de novo review by the district court, the rule may have been unnecessarily restrictive in view of judicial decisions recognizing that bankruptcy judges have the power to hold parties in civil contempt.

Subdivision (d), which provides that the rule shall not be construed to impair the right to trial by jury, is deleted as unnecessary and is not intended to deprive any party of

the right to a jury trial when it otherwise exists.

C. Preliminary Draft of Proposed Amendments to Bankruptcy Rules 9006(f) and 9022(a) Submitted for Approval to Publish for Comment if Proposed Amendments to Civil Rule 5(b) to Permit Electronic Service are Published.

1. *Introduction.*

The following preliminary draft of proposed amendments to Bankruptcy Rules 9006(f) and 9022(a) should be published only if proposed amendments to Civil Rule 5(b) permitting electronic service of papers are published at the same time. Minor conforming revisions to these drafts may be necessary before publication if the draft of proposed amendments to Civil Rule 5(b) approved by the Advisory Committee on Civil Rules at its April 19-20, 1999, meeting is revised before its publication.

1. *Synopsis of Proposed Amendments:*

(a) Rule 9006(e) is amended to expand the 3-day rule so that it will apply to any method of service, including service by electronic means, authorized under proposed amendments to Civil Rule 5(b), other than service by personal delivery.

(b) Rule 9022(a) is amended to authorize the clerk to serve notice of entry of a judgment or order of a bankruptcy judge by any method of service, including service by electronic means, permitted under the proposed amendments to Civil Rule 5(b).

3. *Text of Preliminary Draft of Proposed Amendments to Rules 9006(f) and 9022(a) Submitted for Approval to Publish if Proposed Amendments to Civil Rule 5(b) Authorizing Service by Electronic Means are Published*:

Rule 9006. Time

****

(f) *Additional Time after Service by Mail* or Under Rule 5(b)(2)(C) or (D) F. R. Civ. P. When there is a right or requirement to do some act or undertake some proceedings within a prescribed period after service of a notice or other paper and the notice or paper other than process is served by mail or under Rule 5(b)(2)(C) or (D) F. R. Civ. P., three days shall be added to the prescribed period.

COMMITTEE NOTE

Rule 5(b) F. R. Civ. P., which is made applicable in adversary proceedings by Rule 7005, is being restyled and amended to authorize service by electronic means -- or any other means not otherwise authorized under Rule 5(b) -- if consent is obtained from the person served. The amendment to Rule 9006(f) is intended to extend the three-day "mail rule" to service under Rule 5(b)(2)(D), including service by electronic means. The three-day rule also will apply to service under Rule 5(b)(2)(C) F. R. Civ. P. when the person served has no known address and the paper is served by leaving a copy with the clerk of the court.

Rule 9022. Notice of Judgment or Order

(a) *Judgment or Order of Bankruptcy Judge.* Immediately on the entry of a judgment or order the clerk shall serve a notice of entry ~~by mail~~ in the manner provided ~~by Rule 7005~~ in Rule 5(b) F. R. Civ. P. on the contesting parties and on other entities as the court directs. Unless the case is a chapter 9 municipality case, the clerk shall forthwith transmit to the United States trustee a copy of the judgment or order. Service of the notice shall be noted in the docket. Lack of notice of the entry does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in Rule 8002.

****

COMMITTEE NOTE

Rule 5(b) F. R. Civ. P., which is made applicable in adversary proceedings by Rule 7005, is being restyled and amended to authorize service by electronic means -- or any other means not otherwise authorized under Rule 5(b) -- if consent is obtained from the person served. The amendment to Rule 9022(a) authorizes the clerk to serve notice of entry of a judgment or order by electronic means if the person served consents, or to use any other means of service authorized under Rule 5(b), including service by mail. This amendment conforms to the amendments made to Rule 77(d) F. R. Civ. P.

III. Information Items

A. *Proposed Bankruptcy Legislation.*

Last year, the Advisory Committee reported that Congress was considering comprehensive legislation that would significantly change the Bankruptcy Code and related statutes. Among other provisions, the bills would have expressly required the Advisory Committee or the Judicial Conference to amend or add new Bankruptcy Rules and Official Bankruptcy Forms. Any of these bills, if enacted, would have required substantial revisions to the Rules and Forms. Although both the Senate and the House of Representatives passed bankruptcy bills in 1998, a conference was necessary to resolve differences. The House of Representatives passed the conference report, but the Senate did not before the 105th Congress adjourned in October.

Comprehensive bankruptcy reform legislation similar to those considered last year has been introduced in the 106th Congress in 1999. As of the date of this report, the House of Representatives passed H.R. 833 and the Senate Judiciary Committee approved S.625. The Advisory Committee is monitoring these legislative developments closely.

B. *Attorney Conduct.*

At its meeting in March 1999, the Advisory Committee heard a report on a recent survey conducted by the Federal Judicial Center on attorney conduct in bankruptcy cases. The report has been furnished to Professor Coquillette for consideration by the committee on attorney conduct.

Attachment:

Draft minutes of the meeting of the Advisory Committee on Bankruptcy Rules, March 18-19, 1999.

Item 7B

ADVISORY COMMITTEE ON BANKRUPTCY RULES
Meeting of March 18 - 19, 1999
Airlie Conference Center, Warrenton, Virginia

Draft Minutes

The following members attended the meeting:
District Judge Adrian G. Duplantier, Chairman
District Judge Eduardo C. Robreno
District Judge Robert W. Gettleman
District Judge Norman C. Roettger, Jr.
Bankruptcy Judge Robert J. Kressel
Bankruptcy Judge Donald E. Cordova
Bankruptcy Judge A. Jay Cristol
Bankruptcy Judge A. Thomas Small
Professor Kenneth N. Klee
Gerald K. Smith, Esquire
Leonard M. Rosen, Esquire
R. Neal Batson, Esquire
Eric L. Frank, Esquire
J. Christopher Kohn Esquire, United States Department of Justice
Professor Alan N. Resnick, Reporter

District Judge Bernice B. Donald and Professor Mary Jo Wiggins were unable to attend the meeting. Circuit Judge A. Wallace Tashima, liaison to this Committee from the Committee on Rules of Practice and Procedure ("Standing Committee"), and Peter G. McCabe, Secretary to the Standing Committee and Assistant Director of the Administrative Office of the United States Courts ("Administrative Office"), also attended the meeting. Bankruptcy Judge George R. Hodges, a member of the Committee on the Administration of the Bankruptcy System ("Bankruptcy Committee"), and Professor Charles J. Tabb, a former member of this Committee, also attended all or part of the meeting.

The following additional persons attended the meeting: Joseph G. Patchan, Esquire, Director of the Executive Office for United States Trustees; Richard G. Heltzel, Clerk, United States Bankruptcy Court for the Eastern District of California; Professor Jeffrey W. Morris, University of Dayton Law School, Consultant to the Committee; Patricia S. Channon, Bankruptcy Judges Division, Administrative Office; Mark D. Shapiro, Rules Committee Support Office, Administrative Office; and Robert Niemic, Research Division, Federal Judicial Center ("FJC"). In addition, Marie Leary, Research Division, FJC, and Alan S. Tenenbaum, Environment and Natural Resources Division, United States Department of Justice, attended part of the meeting.

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 Standing Committee. Votes and other action taken by the Committee and assignments by the Chairman appear in **bold.**

Introductory Items

The Committee approved the minutes of the October 1998 meeting.

Judge Duplantier reported that he and Professor Resnick had attended the January 1999 meeting of the Standing Committee. The Chairman had reported on the status of the comment process on the proposed amendments which had been published in August 1998. He noted that the Advisory Committee had not had any action items before the Standing Committee.

Judge Duplantier also reported that the Committee on the Administration of the Bankruptcy System ("Bankruptcy Committee") had met simultaneously a few blocks from the location of the Standing Committee meeting. Accordingly, he and Professor Resnick also had attended part of the Bankruptcy Committee meeting. Judge Hodges noted that there was much interest on the part of the Bankruptcy Committee in the "Litigation Package."

Judge Cristol reported on a meeting of the technology subcommittee of the Standing Committee held in Washington in February 1999. The purpose of the meeting was to learn from the prototype courts in the electronic filing effort about their experiences with introducing electronic filing and any amendments to the federal rules that might be needed as the courts move from a paper environment to an electronic one. On the first day of the meeting, the subcommittee heard reports from each of the courts that currently is accepting filings electronically. On the second day, practitioners who are filing documents electronically with the courts also participated. The subcommittee had invited Judge Cristol, Professor Resnick, and the reporters for the other advisory committees to join the meeting. After hearing from the courts and the bar, the subcommittee met with the reporters to consider drafting amendments to the various bodies of federal rules that would employ common language to the extent possible.

Action Items

Published Amendments to "Other Rules." The Reporter introduced the discussion by briefly summarizing the comments received on the proposed amendments to rules that were not part of the "Litigation Package" but were published at the same time. He noted that the proposed amendments concerning notice to governmental units may be pre-empted by statute if some of the bankruptcy reform legislation pending in Congress were to be enacted.

Rule 1007(m). The Committee considered this proposed amendment in light of both the comments received and the pending legislation. The proposed amendment would require a debtor that lists a governmental unit as a creditor to identify, if known to the debtor, any department, agency, or instrumentality of the governmental unit through which the debtor is indebted. The proposed amendment drew six comments. The comments from attorneys for

government entities were critical of the final sentence, which states that failure to comply does not affect a debtor's legal rights. Judge Kressel said, and Judge Cordova agreed, that these criticisms had been stated previously by Mr. Kohn, and the Committee's judgment had been to retain the final sentence. Judge Duplantier said he was impressed that the commentators said they would prefer no amendment to one that contains the sentence to which they object. Mr. Rosen suggested modifying the sentence to say that failure to comply does not affect either party's rights. Professor Klee said most people try to comply with the rules, but that if the government does not believe that to be so, the Committee should not go ahead with the amendment, regardless of whether legislation is enacted. Judge Robreno questioned the wisdom of prescribing a rule that vitiates itself. He said the Committee should propose only a rule that is the right rule and, therefore, must first decide the correct policy. Mr. Smith asked how the courts are ruling in cases where the adequacy of notice to a governmental unit is at issue. Mr. Kohn said the results for the government in the cases so far have been mixed. He said that state governments have a much more difficult time participating in a case when a notice does not include the name of the agency through which the debt arises, especially if the debtor has moved across the country since incurring the debt. **A motion by Professor Klee to postpone indefinitely consideration of the proposed amendment carried by a vote of 8 to 3.**

Rule 1017(e). The proposed amendment drew one comment, and **a motion to approve the amendment carried on voice vote.**

Rule 2002(a)(6). The proposed amendment concerning notice of fee applications by professionals was **approved without objection.**

Rule 2002(j). The proposed amendment would require any notice sent to the United States attorney to include the name of the department, agency, or instrumentality involved in the matter. Judge Kressel said that the clerk relies on the mailing information provided by the debtor. Mr. Heltzel confirmed and added that if a clerk does any independent checking of addresses supplied by a debtor it is quite a rare occurrence. Professor Klee noted that Judge Arthur J. Spector had pointed out in his comment an inconsistency between the proposed amendment to this rule and proposed Rule 1007(m), that Rule 1007(m) contains a safe harbor provision while Rule 2002(j) does not. Professor Klee suggested postponing this amendment along with Rule 1007(m). **A motion to forward the proposed amendment to the Standing Committee failed on a voice vote. The Chairman said the proposed amendment would be postponed, along with Rule 1007(m).** Mr. Smith thanked Mr. Kohn for his efforts in the interest of improving notice to the governmental units and for bringing the concerns of government entities to the Committee's attention.

Rule 4003(b). The Reporter explained that the draft includes a re-styling of the rule, as required by the Standing Committee, and that the only substantive change would preserve for the trustee or creditor the timely filed motion to extend the time to object to a debtor's claimed exemptions when the court does not rule on the motion to extend time until after the deadline stated in the rule. He noted that one of the comments suggested changing the phrase "trustee or a creditor" to

"party." The Reporter said that changing "trustee or a creditor" to "party in interest" would not require republication because the change would be conforming the rule to the language used in § 522(l) of the Bankruptcy Code.

Professor Klee suggested deleting from the rule the phrase "or supplemental schedules," which appears in line 6 of the draft, or adding language stating that any supplemental schedules must relate to an exemption. Otherwise, he said, there is a question whether a new creditor added after the time runs would be able to object to a debtor's exemptions. Professor Morris noted that the term "supplemental schedule" appears only in this rule and in Rule 1007(h), which clearly ties it to the after-acquired property provisions of § 541(a)(5) of the Bankruptcy Code.

The Committee approved the draft with the recommended change to " a party in interest" and subject to review by the style subcommittee. Professor Klee asked that, if the amendment is not forwarded to the Standing Committee, the supplemental schedules issue be examined.

Rule 4004(c). The Reporter called attention to his recommendations that the phrase "pursuant to" in line 9 be changed to "under" and that the letters designating the subparts be made upper case, *e.g.*, "(A)" instead of "(a)." The only substantive change, he said, is the addition of subpart (f), which would allow the court to withhold the debtor's discharge if a motion to dismiss the case for substantial abuse is pending. Mr. Frank noted Judge Klein's comment concerning the problem of a discharge "automatically issued," even though the debtor never attended a § 341 meeting. The consensus was that adding language to cover that situation would be a substantive change that would require republication. **On a voice vote, the Committee approved the draft with upper case letters designating the subparts and with the change in line 9 to "under."**

Rule 5003(e). The Reporter noted that this proposed amendment, which would require the clerk to create and maintain a register of mailing addresses for federal and state governmental units would have to change if the pending bankruptcy reform legislation is enacted. Judge Gettleman said that, although there is good reason to defer other proposed amendments that would be affected by the legislation, this proposal can stand alone and should proceed. Mr. Kohn asked that the Committee change the language at page 15, lines 3-5, to say the clerk may list more than one address for an agency rather than that the clerk is not required to list more than one address. Mr. Heltzel said the clerks already oppose the amendment to require them to keep a register and changing the sentence to say "the clerk may" will put clerks under more pressure to do that. Judge Cordova said he thought the change would make little difference as many clerks already have registers and include more than one address. Judge Duplantier said if there is no difference, there is no reason to change the published language and that if the Committee were to change it, he would recommend republication in light of the clerks' opposition. Professor Morris asked what would be the effect to a debtor if there are multiple addresses and the debtor picks the wrong one. **A motion to approved the draft as published carried without objection.**

Official Form 1, Voluntary Petition. The Reporter directed the Committee to the pamphlet containing the preliminary draft amendments for the text of the form. He also noted the comments to the proposed addition of Exhibit "C" that opposed forcing the debtor to admit to liabilities that may be subject to dispute. Judge Kressel suggested changing the phrase "poses a threat . . . of harm" to "may pose a threat . . . harm." Mr. Rosen said using the phrase "may pose" could cause filers to submit a laundry list, because anything "may" pose a threat. Professor Klee said there is no issue if there has been an allegation of environmental threat; in that event, there should be disclosure. Rather, the debate is over whether disclosure should be required if only the debtor knows of the threat, he said. Professor Klee suggested adopting language from the comment, such as "if a governmental agency has determined or alleges that the property poses a threat or which the debtor has admitted might have such characteristics." Mr. Smith said the debtor and the lawyer have a serious duty to disclose imminent potential harm, and Mr. Tenenbaum added that Mr. Foltz earlier had pointed out that restricting the disclosure to government allegations leaves out many potentially harmful situations. [See Minutes of meeting of September 11-12, 1997, pages 10-11, for a report of Mr. Foltz's statement.] Mr. Patchan said the purpose of proposed Exhibit "C" is to alert the trustee to the need for immediate action. **A motion to adopt the proposed form with a change to "may pose" and amended to add also the phrase "or alleged by a government agency" drew a tie vote of 5 to 5, which the Chairman broke by voting in favor. A second motion to change the "may pose" language to "poses or is alleged to pose" carried on a voice vote.**

Official Form 7, Statement of Financial Affairs. The Committee discussed the comment from a forms publisher stating that the instructions to the form are ambiguous concerning whether an individual not engaged in business is free to skip questions 18-25, the "business" questions or is required to check the "None" boxes beside each of those questions. Judge Cristol said his district requires every debtor to answer every question. **The Committee approved revising the third sentence of paragraph 2 of the instructions to read "If the answer to an applicable questions is 'None,' mark the box labeled 'None.'"** Mr. Heltzel said that in districts such as his, where individual debtors not engaged in business do not answer the business questions, each case file is needlessly fattened with several extra pages of Form 7. He suggested that the forms subcommittee examine the possibility of separating the Statement of Financial Affairs into two forms, so that the only business debtors would file the part containing the business questions. **The chairman of the subcommittee agreed to consider the suggestion. The Committee also approved deleting "a." from question 10, because there is no "b."** Judge Gettleman noted the comment on question 16, requesting that Alaska be added to the list of community property states, based on new legislation in that state. Judge Gettleman questioned the wisdom of listing states at all, and Judge Duplantier observed that under the new Alaska law not every marriage produces community property. The consensus, however, was that listing the states is a guide, especially for those debtors who may formerly have resided in a community property state but have moved elsewhere. **The Committee approved adding the phrase "including Alaska" at the beginning of the list of states.**

The Committee approved forwarding five rules — Rules 1017(e), 2002(a)(6), 4003(b), 4004(c), and 5003(e) — and the two forms — Form 1 and Form 7 — to the Standing Committee and requesting a six-month delay of effective date for the revised forms.

On the second day of the meeting, the Forms Subcommittee reported that it would be impossible for it to complete the bifurcating of the Form 7 into two forms in time to obtain Committee approval of the revisions and present the forms to the June 1999 meeting of the Standing Committee. **A motion to proceed with Form 1 only failed for want of a second.** The Forms Subcommittee will revise Form 7 for the September 1999 Committee meeting, and **the Committee determined it would be best, in light of the changes proposed, to republish both Form 1 and Form 7 for comment.**

The "Litigation Package." The Reporter introduced the discussion by briefly summarizing the comments on the preliminary draft amendments. He noted that 172 comment letters are digested in the agenda materials but that four additional letters had been received for a total of 176. Many letters said they were sent on behalf of the writer and a group, such as "all the bankruptcy judges of this district" or "the bankruptcy section of the bar," so that the 176 letters actually represent a much larger group of people, including approximately half of all the bankruptcy judges. Most of the comments were negative, he said, and many were redundant. Several comments, however, also made specific suggestions that would have to be taken into account if the package were to go forward, he said. The letters raised 20 major themes or issues, he said, and he had summarized these in the form of questions in a separate memorandum for the Committee's consideration.

The first question is, is there a problem? Judge Duplantier said the overwhelming message of the comments is that, if there is a problem, it does not exist for the 99 percent of the cases that do not involve a serious dispute, and the proposed amendments, accordingly, were perceived as requiring paper shuffling by all participants with no corresponding benefit most of the time. Professor Resnick said the most common objections included the following: 1) the amendments require the court to set a hearing when the writer's court does not set one unless there is an objection; 2) the amendments should not exempt consumer debtors from the requirement to furnish affidavits; 3) there is no reason to require affidavits of any party, ever; and 4) "in our court, everything works fine."

Judge Gettleman said the Chicago commentators think the Committee misread the survey from which the litigation package grew. Professor Resnick said the report on the survey stated that the response rate was only 23 percent; the narrative responses, however, which were not published, had led the Long Range Planning Subcommittee to recommend giving attention to the area of motion practice. The subcommittee had reviewed this narrative material before undertaking the project.

Professor Resnick said much of the opposition to the proposed amendments comes from the fact that they would infringe the local rule authority of each court. There are national rules regulating the procedure in adversary proceedings, he said, but if those rules did not already exist, the idea of creating them would be resisted. Professor Klee said he was not in favor of the package as published. Judge Cristol said there is much good material in the package and if the Committee were to propose item-by-item improvements, that probably would result in 50 percent or more of the substance becoming rule. **A straw poll on sending the package forward with only minor tinkering drew no votes.**

The second question was whether the Committee should try to develop a package of proposed amendments to provide national uniformity for major issues. Mr. Rosen said he doubted that a clear line exists that could be used to identify matters appropriate for the national rules and said it would not be good for districts to operate under two sets of rules. He said he preferred the approach suggested by Judge Cristol, taking the proposals item-by-item, each on its merits. Mr. Smith said the essential tasks for the national rules are to provide the fundamentals and assure due process. He said in some courts it can be difficult to get a hearing even when there is an objection and a hearing is requested, so that he does not see the fundamentals in place even in his own district.

Professor Klee said the issue whether a judge can decide disputed issues of fact without testimony, *i.e.*, using only affidavits, is fundamental, as is the question of issuing an order without evidence. Professor Resnick said Civil Rule 55 should govern when a party defaults by failing to respond. Judge Cordova said the default situation is much different from that of a party who requests a hearing but cannot obtain one. Mr. Rosen said the rules should state minimal requirements for matters in which there is no contest and state principles to govern contests and full-scale disputes. The Reporter said that one aspect of the preliminary draft that commentators complained about was a perceived proliferation of types of proceedings and that Mr. Rosen's suggested approach might make a future proposal more acceptable.

The Reporter noted that the current Rule 9013 contains principles, *e.g.*, the moving party must serve the motion on the party against whom relief is sought, that the Committee could expand upon to cover the additional subjects on which there is a clear need for guidance. There appear to be three such subjects, he said. One is the proper use of affidavits in a contested matter. Another is telling the parties when a hearing will be a status conference and when they must bring witnesses. A third might be to prescribe a service list, which is not in the current rule but is in the published draft. **The consensus was to attempt to identify principles to be expressed in any future amendments by going through the published draft to ascertain which substantive points the Committee would want to add to current Rules 9013 and 9014.**

Judge Duplantier said that Civil Rule 43(e), which permits a court to decide a motion on affidavits, should apply in a bankruptcy case except when there is a genuine issue of material fact in a contested matter. In the event of a dispute over one or more material facts, whether the

proceeding is a trial or an evidentiary hearing on a motion, the dispute must not be resolved by affidavit, he said, but rather upon oral testimony as required by Civil Rule 43(a). In other words, he said, Civil Rule 43 applies. **The consensus was that the appropriate use of affidavits is an issue the Committee should work on.**

The Committee then considered the question whether to retain the framework of the preliminary draft, with Rule 9013 devoted to "applications" and Rule 9014 to motions with a list of matters to which it does not apply. The alternative would be to retain the structure of the current rules under which Rule 9013 governs motions and Rule 9014 governs contested matters. Judge Roettger noted the amount of opposition to the preliminary draft expressed in the written comments and suggested that any new proposals should avoid too close a resemblance to what was published. Mr. Frank said the Committee needs to decide a basic policy issue of whether the matters included in Rule 9013 and the matters excluded from Rule 9014 should be the Committee's decisions or should be left to local practice and discretion. Mr. Batson said multiple practices among judges in the same district is a problem, but that uniformity such as the Committee proposed in the published draft of Rules 9013 and 9014 is not advisable. Accordingly, he said, "nibbling" at the proliferation of different practices by proposing limited amendments to the national rules may be the best the Committee can do to foster greater uniformity. Judge Gettleman said that each of the district judges in the Northern District of Illinois has an individual website that is used to notify practitioners and parties of the procedures used by each judge.

Judge Kressel noted that many commentators like the proposed amendments to Rule 9013 and said he thinks bifurcation according to *ex parte* matters and potentially contested motions would work with a shortened Rule 9013. Mr. Rosen said the list of matters in the published draft of Rule 9013 that can be handled in a basically *ex parte* manner is not objectionable and probably can be retained for a future proposal. Professor Klee said he thinks the published draft of Rule 9013, modified to accommodate some of the comments received, could go forward; Rule 9014 could follow later after being reworked to focus on the use of affidavits and what kind of evidence is needed for default. Judge Duplantier said he thinks Rule 9013 needs to await Rule 9014 to make sure they both work together. Professor Klee said that Judge Robreno's principles, which were circulated at the Committee's September 1997 meeting, were a different approach; perhaps the Committee should delay further and take a fresh direction, he said. **A straw vote on whether to proceed resulted in 6 votes to continue going through the published draft to identify issues worthy of further consideration, and 4 votes to abandon the effort to amend the rules governing motion practice.**

The Committee went through the preliminary draft Rule 9014, subdivision by subdivision, to determine what elements of the proposed rule to retain. **The Committee decided to retain the title "Contested Matters." The Committee deleted from further consideration subdivisions a), b), d), e), f), g), k), l), m), n), and o).** With respect to **subdivision c), the Committee decided to delete the time period for serving a motion but keep the service list,** and to reconsider the specific parties named in the service list. On the

second day of the meeting, **the Committee reconsidered its decision concerning the service list and determined not to retain it.**

The Committee discussed whether to retain the authorization for a court to permit electronic service of a motion under a local rule, an innovative provision of the preliminary draft Rule 9014 which attracted no negative comment. Professor Klee suggested that the Committee consider instead turning to the technology subcommittee for an amendment to Rule 9036, so that electronic service could apply in bankruptcy cases generally. Professor Resnick noted that, under the current Rule 9014, Civil Rule 5, which governs service in civil proceedings, is not applicable to contested matters unless the court specifically orders otherwise; accordingly, amending Rule 9036 rather than Rule 9014 would be more consistent with the electronic service proposals being drafted under the auspices of the Standing Committee. Those proposals would include amendments to Rule 5 and other civil rules.

Concerning subdivision (h), Mr. Frank said he interpreted the preliminary draft as imposing no requirement of mandatory disclosure and suggested that the subcommittee should consider the issue and decide what the policy should be regarding discovery in contested matters initiated by motion. Professor Resnick said he had been told by Chief Bankruptcy Judge Louise DeCarl Adler (CA-S) that she had written a letter to the Civil Advisory Committee about their proposal to eliminate from Rule 26 the authority of a court to opt-out of the mandatory disclosure provisions. She said her reason for submitting the comment is that mandatory disclosure may not work well in bankruptcy matters where most adversary proceedings and other matters involve less than $10,000. The question, he said, is whether the Committee wants to retain an opt-out in the bankruptcy rules. **The consensus was to leave Rule 26 incorporated by reference in Rule 7026, as it is in the current Rule 9014, that is, applicable in contested matters. The Committee also agreed to delete the time periods stated in the published draft and concluded from these decisions that subdivision (h) generally should be deleted.**

The Committee determined that subdivisions (i) and (j) of the published draft should be studied further. Concerning subdivision (i), which provided for an initial hearing that would be a status conference unless there is no disputed issue of material fact or the court determines to hold an evidentiary hearing and notifies the parties to bring any witnesses, **the Committee decided to delete the status conference hearing requirement** and discussed how to require that notice be given of any evidentiary hearing. **The Committee determined that the two most important questions to answer in any new proposals to amend the rules governing motion practice are: 1) how does an attorney or party know when to bring witnesses to a hearing, and 2) when, how, and under what circumstances can the court conduct a trial by affidavits,** a subject which the published draft treated in subdivision (j). The consensus was that a party is entitled to reasonable notice of when a hearing is going to be evidentiary in nature. Mr. Rosen said that if one party brings witnesses and the other does not, there should be some penalty for the party who failed to bring witnesses. Judge Cristol said one possible approach would be to allow for a response and, once a response has been filed, to require the parties to meet and proceed as under civil procedure, but provide that if there is no response, no hearing

will be set. The consensus was that this is one approach that the Committee should consider. Mr. Batson said that in preparing any new proposals, the Committee also should review Rule 9029 for possible amendment, to assure that courts know what they need to cover in their local rules.

The Committee discussed the issue of the use of affidavits at hearings on "trial-type" motions. Judge Tashima said the Ninth Circuit has approved the use of affidavits as a substitute for direct examination. In re Adair, 965 F. 2d 777 (9th Cir. 1992). It was suggested that the Committee consider a rule that would authorize the use of affidavits but state that if a party objects to a witness' affidavit, the party must be permitted to cross examine the witness. The Reporter said that is the rule for trials now under Civil Rule 43(a), which applies to evidentiary hearings in bankruptcy cases, including those held in contested matters, under Bankruptcy Rule 9017. Another approach would be to draft an amendment that simply states that Civil Rule 43(e) applies in bankruptcy cases (including contested matters) to the same extent that rule applies in civil actions. One member asked whether the Committee should consider authorizing the court to grant relief on a motion without any evidence, *i.e.*, without an affidavit from the moving party when the respondent has defaulted, or leave the issue to be governed by Civil Rule 55 through its incorporation by reference in Bankruptcy Rule 7055, which applies in contested matters. **The consensus was that Rule 55 is sufficient.**

The Committee also decided to consider further an *ex parte* motion rule similar to the published draft Rule 9013.

Concerning the proposed amendments to those rules which in the published draft were carved out from the scope of Rule 9014, **the Committee determined to consider separately Rule 2014. The Committee referred this rule back to the Subcommittee on Attorney Conduct Including Rule 2014 Disclosure Requirements** for reconsideration in light of the comments directed toward that rule. The Reporter noted that the amendments to other rules that were included in the "Litigation Package" were conforming amendments the purpose of which was to eliminate separate service lists that now are a part of those rules. At the close of the discussion, **the Committee referred the full "Litigation Package" back to the Litigation Subcommittee to draft new proposals in conformity with the discussion at the meeting and with instructions to review also each of the conforming amendments that were proposed along with Rules 9013 and 9014.**

Injunctions in Plans. The Reporter briefed the Committee on the background of the proposed amendments, which would provide procedural protections to entities affected by injunctions included in a plan. The proposals would amend Rules 2002(c), 3016, 3017, and 3020. The Subcommittee on Injunctions in Plans had prepared drafts but reserved for the full Committee the resolution of two issues.

The first issue was whether to include in the amendments to Rule 3020, governing the order of confirmation, the phrase "and not by reference to the plan or other document." The

effect of including those words in the rule would be to require inclusion of an injunctive provision in an order confirming a plan that provides for injunctions. Judge Kressel said he, as a judge, does not want to enjoin what the plan enjoins; the parties may have agreed to terms which the judge would not have approved. Mr. Rosen said he did not think including the injunction in the order would make it the judge's injunction and the proposed amendment should avoid leading a judge to think additional testimony or other evidence might be needed at the confirmation hearing. Mr. Kohn said he was most interested in making sure all affected entities receive notice of injunctive provisions, although he said he did not understand how an injunction could come into being without an order. Upon a request by a member for examples of non-parties to the bankruptcy case that can be affected by injunctions in plans, some were stated to be 1) partners in a partnership, 2) future asbestos claimants, and 3) the Environmental Protection Agency. **A motion to delete from the proposed amendment to Rule 3020 the phrase "and not by reference to the plan or other document" carried by a vote of 5 to 4.** Members suggested that the description of the injunction in the order could be very general; for example, it could be placed above the "it is ordered" language or the order styled as one "confirming plan and enjoining entities."

The second question was whether the amendments should be broadened to cover more than injunctions, in particular whether the amendments should encompass releases of rights against an entity other than the debtor. Professor Klee said providing for releases in the rules would be interpreted as an attempt to legitimize third party releases and the Fifth and Ninth Circuits specifically prohibit them. **A motion to delete the language concerning releases from the proposed amendments carried on a voice vote.**

Professor Klee said that in the first sentence of the Committee Notes to Rules 2002 and 3016, the text mentions parties "receiving" notice. These sentences should be changed to say that parties must "be given" notice, he said. **The Committee approved the proposed amendments as modified by the Committee without objection.**

Form for Reaffirmation Agreement. Judge Kressel, as chairman of the Forms Subcommittee, said that in light of the Committee's discussion of proposed amendments concerning motion practice and possible action by Congress that probably would affect reaffirmation agreements, he recommended deleting from the proposed form the motion and order that were included in the agenda book for the meeting. There was no objection to the recommendation. Judge Kressel said the Committee also needed to decide whether to propose the form as an official form, publishing it for comment and delaying its effective date until the year 2000, or issuing the form as soon as possible as a procedural form under the authority of the Director of the Administrative Office to publish bankruptcy forms for optional use. Professor Klee said that although both the Senate and the House bill contain provisions on the subject of reaffirmation agreements, he did not expect any new law to have an effective date earlier than October 1, 2000. He said he did not advise waiting to issue the form. **The Committee agreed that the form should be issued as a Director's form and also should be published, so that it ultimately could become an official form, but that publication should be delayed until legislation has been enacted.** Professor

Klee said that sentence at the top of page two of the form which states that the executed form must be filed before it is binding should refer to filing with "the clerk of the bankruptcy court" not simply "the bankruptcy court." Some members said the form is substantive and that issuing it may be ill-advised. Mr. Smith said the phrase "telling the creditor in some other lawful way" in the third paragraph of the section of the form labeled Notice to Debtor is likely to be more confusing than helpful to a lay person. **The Committee agreed to change the sentence to read simply "by notifying the creditor that the agreement is canceled" and approved the form as modified.**

Shortening the Rules Process. The Executive Committee of the Judicial Conference asked the Standing Committee to consider methods by which the rules process could be streamlined, so that an amendment or new rule could be prescribed in a shorter time than the three years that the process currently requires. The Standing Committee, in turn, asked for suggestions from the Advisory Committee. Judge Scirica, the chairman of the Standing Committee, has written a letter to Judge WilliamTerrell Hodges, chairman of the Executive Committee and a former chairman of the Advisory Committee on Criminal Rules, stating the Standing Committee's view that the only periods in the rules process that could be shortened without jeopardizing the deliberative and public review components of the rules process would be the periods provided for review by the Supreme Court and Congress. As neither of these time periods was in the control of the judiciary, Judge Scirica's letter stated that the rules process should remain as it is. **The Committee agreed with this conclusion.**

Notice to Infants; Capacity to File. The Reporter reviewed the history of the draft amendments to improve the notice given to infants and incompetent persons of events in a bankruptcy case. In the draft of proposed new Rule 2002(g)(3), Professor Klee suggested moving the phrase "unless the court orders otherwise" from the end of the sentence to a location just prior to the word "notices." The Committee agreed. The Committee also decided to delete the phrase "or has reason to know," which was in brackets in the drafts, everywhere it appeared. The reference to "this rule" in Rule 2002(g)(3) was changed to "Rule 2002," and, in light of the Committee's deferral of action on the proposed subdivision (m) to Rule 1007 which was among the proposals concerning notice to governmental units, the cross-reference in the Committee Note to "Rule 1007(n)" was changed to "Rule 1007(m)." **A motion to approve the drafts of Rules 1007(m) and 2002(g)(3) carried without objection.**

Professor Morris reviewed the state of the law concerning the capacity of infants and incompetent persons to file a petition in bankruptcy and the considerations surrounding the requirements for filing a petition by a corporation. Professor Klee said that a simpler approach would be simply to say that Civil Rule 17 applies. [Civil Rule 17 currently is incorporated by reference by Rule 7017 and applicable in adversary proceedings.] Professor Resnick said he opposed the provisions concerning filing by a corporation because no problem exists and creating a rule could lead to unintended consequences. Mr. Frank said he thinks the proposed Rule 1004.1, specifying a procedure for a filing by an infant or incompetent person would be a service and that it would fill a gap in the rules. **A motion to postpone consideration of the**

draft amendments until the next meeting and to consider then whether to add to proposed Rule 1004.1 provisions similar to Civil Rule 17(b) was not opposed.

The Committee approved the forwarding to the Standing Committee with a request for publication and comment proposed amendments to the following rules: Rule 1007(m), Rule 2002(c), Rule 2002(g), Rule 3016, Rule 3017, Rule 3020, and Rule 9020.

Proposed Common Draft Amendments to Permit Electronic Service. The Reporter introduced the draft amendments to the civil rules prepared by Professor Edward H. Cooper, reporter to the Advisory Committee on Civil Rules, following the meeting of the Standing Committee's Subcommittee on Technology. Professor Resnick said the Standing Committee had requested feedback from all of the advisory committees with a view toward achieving uniform language for amendments to be published for comment in the fall of 1999. The draft included proposed amendments to Civil Rules 5(b), 6(e), 77(d), and 4(d). The proposed amendments to Rule 6(e) would extend to electronic service the additional three days for response currently afforded to parties when service is made by mail. The Reporter said he opposed affording the additional three days, but that Professor Cooper favored it as a means to encourage parties to use electronic service. Judge Duplantier said he would favor affording the three extra days for all service other than personal service but realized it would not be easy to draft such a provision. Mr. Rosen and Judge Robreno favored extending the three days to those who are served electronically, as in Professor Cooper's "Alternative 3," and others supported Judge Duplantier's approach. **The Committee agreed that the proposed amendment to Rule 77(d) was satisfactory and that bankruptcy clerks also should be able to serve notice of entry of an order or judgment electronically on consent of the receiving party, but that it would be premature to propose amendments to Civil Rule 4 that would permit a defendant to electronically waive service of a summons and complaint. The Committee agreed to submit for publication an amendment to Rule 9006(f) to extend the three-day extension now afforded when service is effected by mail to all forms of service other than personal delivery, if the proposed amendments to Civil Rule 5(b) are published.**

Information Items

Alternative Dispute Resolution Act of 1998. This law was enacted in October 1998. It provides for a wide array of alternative dispute resolution (ADR) procedures in all district courts and requires the district courts by local rule to make available to parties in civil actions at least one form of ADR. The Act expressly includes adversary proceedings in bankruptcy among the civil actions to which this requirement applies. The law does not require the bankruptcy courts to establish ADR programs, although any court may do so voluntarily. The Administrative Office is on record as interpreting the new law's reference to "adversary proceedings in bankruptcy" to mean only those proceedings as to which the reference has been withdrawn to the district court. Mr. McCabe noted that the judiciary had opposed the bill on the ground that the courts should not have a program mandated on them. Judge Small, in a letter to Judge Duplantier, had raised

the question whether a bankruptcy rule might be needed to cover the situation when an appellate court ADR program results in a settlement of a bankruptcy matter. Rule 9019 requires that all creditors be sent notice of any potential settlement, because the settlement may affect all creditors, and the parties should come back to the bankruptcy court, give notice, obtain approval of the settlement by a bankruptcy judge, and then dismiss the appeal. Judge Small said he was not pushing for a rule at this time but simply bringing the issue to the Committee's attention.

Subcommittee on Attorney Conduct, Including Rule 2014 Disclosure Requirements. The Standing Committee, at its June 1998 meeting, decided that each advisory committee would appoint two members to serve as an Ad Hoc Committee on Attorney Conduct under the leadership of the Chair and Reporter of the Standing Committee. The Ad Hoc Committee hopes to offer recommendations to the Standing Committee at its January 2000 meeting on whether there should be national uniform rules of attorney conduct in all federal courts. In conjunction with this effort, the Advisory Committee asked the Federal Judicial Center ("FJC") to conduct a survey on national uniform standards for attorney conduct in the bankruptcy courts.

Marie Leary of the FJC summarized the survey findings. Of the 77 responding chief bankruptcy judges, 47 (61 percent) said that their courts follow the local rules of attorney conduct of their respective federal district courts. Most bankruptcy courts do not have their own independently developed set of local rules governing attorney conduct; only seven percent of bankruptcy courts indicated that they do. Thus, proposed uniformity in district court attorney conduct rules could carry over to most of the bankruptcy courts, even if the proposed changes are not directly aimed at or applied to the bankruptcy courts. Nine percent indicated that their courts have a local bankruptcy rule that adopts standards other than those in the district court's local rules, and 12 percent said they have no local district or bankruptcy rule governing attorney conduct.

Looking at all bankruptcy judge respondents (chief judges and non-chief judges combined), the survey found that more than 75 percent were satisfied with the statutory and non-statutory standards they now use to resolve attorney conduct issues. Nearly 90 percent found no problematic inconsistencies between the statutory and non-statutory standards used in their district, and nearly 75 percent had never encountered an attorney conduct issue that was not adequately covered by existing standards. Representation of an adverse interest or conflict of interest involving 11 U.S.C. § 327 or § 1103 are the issues that arose most frequently, with 80 percent reporting one or more occurrences within the prior two years.

It would appear from the survey that if a set of core national rules governing attorney conduct were prescribed for the district courts and if those rules were carried over to the bankruptcy courts without taking into consideration the separate attorney conduct issues that face practitioners and judges in bankruptcy cases, the courts would continue to look beyond the core national rules for guidance. Originally, a second phase of the study was to survey a sample of bankruptcy practitioners, but Mr. Smith said that would not be necessary because the first phase had provided sufficient information.

Administrative Matters

The next meeting will be held September 27 - 28, 1999, at the Jackson Lake Lodge in Grand Teton National Park, Wyoming.

The Administrative Office will explore Key West, FL, and Monterey, CA, as possible sites for future meetings.

Respectfully submitted,

Patricia S. Channon

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE Item 8
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

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

FROM: **W. Eugene Davis, Chair**
Advisory Committee on Federal Rules of Criminal Procedure

SUBJECT: **Report of the Advisory Committee on Criminal Rules**

DATE: **May 12, 1999**

I. Introduction

The Advisory Committee on the Rules of Criminal Procedure met on April 22 and 23, 1999 at the Thurgood Marshall Federal Judiciary Building in Washington, D.C. and took action on a number of proposed amendments. The draft Minutes of that meeting are attached. This report addresses matters discussed by the Committee at that meeting.

First, the Committee reconsidered proposed style amendments to Rules 1 through 9 of the Rules of Criminal Procedure.

Second, the Committee discussed proposed amendments to the following rules:

- Rule 10. Arraignment & Rule 43, Presence of Defendant.
- Rule 12.2. Notice of Insanity Defense or Expert Testimony of Defendant's Mental Condition.
- Rule 26. Taking of Testimony.
- Rule 35. Reduction of Sentence

- Rule 43. Presence of Defendant.
- Rule 49. Service and Filing of Papers.

II. Action Items

The Criminal Rules Committee has no items requiring action by the Standing Committee

III. Information Items

A. The Restyling Project

The Committee has begun restyling the Criminal Rules. As part of that effort, two subcommittees have been formed to considered separate groups of rules over the next year. The first group of rules, Rules 1 through 9, were first considered by Subcommittee A (Chaired by Judge D. Brooks Smith), using a draft submitted by the Standing Committee's Style Subcommittee. Professor Stephen Saltzburg is serving as a special consultant to that Subcommittee. Subcommittee A met in March to review the various drafts and recommendations and at the April meeting presented its recommendations. Subcommittee B (Chaired by Judge David Dowd) will be studying Rules 11 through 22. Those rules will be discussed at a specially called meeting of the Advisory Committee in Portland, Oregon on June 21 and 22, 1999.

B. Criminal Rules Pending Further Discussion

At its April 1999 meeting the Committee discussed a number of proposed amendments to other Rules of Criminal Procedure. None of them are ready for publication and comment and each of them will be on the agenda for the Committee's consideration at its Fall 1999 meeting.

1. Rules 10 (Arraignment) and 43 (Presence of Defendant) (Ability of Defendant to Waive Appearance at Arraignment).

The Committee is actively considering amendments to Rules 10 and 43 which would permit a defendant to waive an appearance at his or her arraignment. The rule would require that the waiver be in writing and with the consent of the court. In conjunction with those amendments, the Committee will also consider the possibility of amending Rules 10 and 43 to permit a defendant to waive an

appearance for entering a plea on superseding indictment. Additionally, the Committee is considering whether any provision should be made for teleconferencing of criminal proceedings. To that end, a subcommittee has been appointed to study the issue and report to the Committee. The Committee's current draft has been submitted to the Subcommittee on Style for its consideration and recommendations.

2. Rule 12.2. Notice of Insanity Defense or Expert Testimony of Defendant's Mental Condition. (Court-Ordered Examination)

The Committee has continued discussion of amendments to Rule 12.2 that would accomplish two results. First, a defendant in a capital case — who intends to introduce expert testimony on the issue of mental condition at sentencing — would be required to give notice of an intent to do so. Second, the rule would make it clear that the trial court would have the authority to order a mental examination of a defendant who had given such notice. And third, the amendment would address the issue of releasing the results of that examination to the parties. At its April 1999 meeting, the Committee considered a report from the Federal Judicial Center that compared the procedures in ten states that have procedural rules similar to those being considered by the Committee. The Committee's current draft has been submitted to the Style Subcommittee for its consideration and recommendation.

3. Rule 26. Taking of Testimony (Electronic Transmission)

The Committee has approved an amendment to Rule 26 that would parallel Civil Rule 43 regarding the taking of testimony in court through means other than oral testimony. The amendment would permit the court to take testimony by remote transmission where it is in the interests of justice to do so, the proponent establishes compelling reasons for doing so, the court establishes appropriate safeguards, and the witness is unavailable within the meaning of Rule 804(a), Federal Rules of Evidence. The current draft of this amendment has also been submitted to the Style Subcommittee for its recommendations.

4. Rule 35(b). Reduction of Sentence.

The Committee is considering an amendment to Rule 35(b) to address an issue recognized in *United States v. Orozco*, 160 F.3d 1309 (11th Cir. 1998). In that decision the court focused on the question of whether a court may grant sentence relief to a defendant who has provided information to the government

within one year of sentencing (as required by the current rule) but the information is not actually useful to the government until much later. The court concluded that the plain language of Rule 35(b) prevented any relief being granted to the defendant in that situation and recommended that Congress consider a change to the rule. The Committee will be considering possible amendments to Rule 35 to address that problem.

5. Rule 49. Service and Filing of Papers

The Committee discussed materials submitted by the other Committees on proposals to adopt a uniform rule for electronic service. Although Criminal Rule 49 incorporates civil practice regarding service of papers, and to that extent considered the most recent draft of a proposal being considered by that Committee. The Committee took note of the fact that in those courts that are using electronic service the response has been largely positive. It also recognized, however, that to date, no court is using electronic filing in criminal cases. Although there is a general consensus that electronic filing would probably work in criminal cases for some service of papers, several members noted the potential problem of how proof of service would be accomplished. The Committee will continue to monitor developments in this area.

Attachment:

Draft Minutes of April 1999 Meeting

MINUTES [DRAFT]
of
THE ADVISORY COMMITTEE
on
FEDERAL RULES OF CRIMINAL PROCEDURE

April 22-23, 1999
Washington, D.C.

The Advisory Committee on the Federal Rules of Criminal Procedure met at the Thurgood Marshall Federal Judiciary Building in Washington, D.C. on April 22 and 23, 1999. These minutes reflect the discussion and actions taken at that meeting.

I. CALL TO ORDER & ANNOUNCEMENTS

Judge Davis, Chair of the Committee, called the meeting to order at 8:30 a.m. on Thursday, April 22, 1999. The following persons were present for all or a part of the Committee's meeting:

Hon. W. Eugene Davis, Chair
Hon. Edward E. Carnes
Hon. David D. Dowd, Jr.
Hon. D. Brooks Smith
Hon. John M. Roll
Hon. Susan C. Bucklew
Hon. Tommy E. Miller
Hon. Daniel E. Wathen
Prof. Kate Stith
Mr. Robert C. Josefsberg, Esq.
Mr. Darryl W. Jackson, Esq.
Mr. Henry A. Martin, Esq.
Mr. Laird Kirkpatrick, designate of the Asst. Attorney General for the Criminal Division
Professor David A. Schlueter, Reporter

Also present at the meeting were: Hon. James A. Parker, member of the Standing Committee and Chair of that Committee's Style Subcommittee; Professor Daniel Coquillette, Reporter to the Standing Committee; Mr. Roger Pauley, Jr. of the Department of Justice, Mr. John Rabiej and Mr. Mark Shapiro from the Rules Committee Support Office of the Administrative Office of the United States Courts; Ms. Laurel Hooper from the Federal Judicial Center; Ms. Nancy Miller, Judicial Fellow at the Administrative Office; Mr. Joseph Spaniol, consultant to the Standing Committee, and Professor Stephen A. Saltzburg, consultant to the Style Subcommittee of the Standing Committee,. Judge Davis, the Chair, welcomed the attendees.

II. APPROVAL OF MINUTES OF OCTOBER 1998 MEETING

Chief Justice Wathen moved that the Minutes of the Committee's October 1998 meeting in Cape Elizabeth, Maine be approved. Following a second by Mr. Josefsberg, the motion carried by a unanimous vote.

III. RULES PENDING BEFORE SUPREME COURT

The Reporter indicated that the following rules were pending before the Supreme Court:

1. Rule 6. Grand Jury (Presence of Interpreters; Return of Indictment);
2. Rule 11. Pleas (Acceptance of Pleas and Agreements, etc.);
3. Rule 24(c). Alternate Jurors (Retention During Deliberations);
4. Rule 30. Instructions (Submission of Requests for Instructions);
5. Rule 54. Application and Exception.

IV. RULES APPROVED BY STANDING COMMITTEE AND JUDICIAL CONFERENCE

The Reporter informed the Committee that both the Standing Committee (at its January 1999 meeting) and Judicial Conference (at its Spring 1999 meeting) had approved the following rules:

1. Rule 32.2. Criminal Forfeitures
2. Rule 7. The Indictment and Information (Conforming Amendment);
3. Rule 31. Verdict (Conforming Amendment);
4. Rule 32. Sentence and Judgment (Conforming Amendment); and
5. Rule 38. Stay of Execution (Conforming Amendment).

RULES AMENDMENTS EFFECTIVE DECEMBER 1, 1998

The Reporter also informed the Committee that amendments to the following Rules had become effective on December 1, 1998:

1. Rule 5.1 (Preliminary Examination; Production of Witness Statements);
2. Rule 26.2 (Production of Witness Statements; Applicability to Rule 5.1 Proceedings);
3. Rule 31 (Verdict; Individual Polling of Jurors);

4. Rule 33 (New Trial; Time for Filing Motion);
5. Rule 35(b) (Correction or Reduction of Sentence; Changed Circumstances); and
6. Rule 43 (Presence of Defendant; Presence at Reduction or Correction of Sentence).

V. CRIMINAL RULES CURRENTLY UNDER CONSIDERATION BY ADVISORY COMMITTEE

A. Proposed Style Amendments to Rules 1-9, Rules of Criminal Procedure

Judge Davis opened the discussion by noting that in addressing the proposed style changes —as originally drafted and then reviewed by Subcommittee A —the Committee would inevitably have to address the issue of whether to make an substantive changes as well. He also suggested that there be a preference for removing or addressing any ambiguities in the rules that have arisen since the rules were adopted; the Committee generally agreed with that approach. Finally, Judge Davis noted that it would be important to be alert to style changes that might inadvertently amount to changes in the substance of the Rule or create any unintended ambiguities. Other members agreed with that observation and Judge Parker noted that in addressing the style changes to the Appellate Rules, the Appellate Rules Committee had decided to make substantive changes as well.

Judge Smith, Chair of Subcommittee A, indicated that the subcommittee had reviewed the proposed style changes and had met for a one-day meeting to review the proposed changes. Each member of that subcommittee had been assigned one or more rules and was prepared to discuss the changes.

1. Rule 1. Scope. Judge Carnes explained that the proposed changes to Rule 1 included what is currently in Rule 60 (Title of Rules) and Rule 54 (Application and Exception). Following discussion, the Committee agreed by a vote of 8 to 2 to delete subdivision (a) in the redrafted rule (current Rule 60) because there was no need to indicate in the Rules themselves what the Rules will be called. (All remaining subdivisions in the restyled Rule 1 were renumbered). Judge Carnes further explained that the language in current Rule 54(2)(Offenses Outside a District or State), (3) (Peace bonds), and (4) (Proceedings Before United States Magistrate Judges) had not been incorporated into restyled Rule 1 because they were not needed.

He also pointed out that language in Rule 54(b)(5) relating to proceedings involving fishery offenses and proceedings against a witness in a foreign country had been deleted as being obsolete. Following discussion, the Committee decided by a vote of 10 to 0 to delete the language currently in Rule 54(c) relating to the definition of the words

"demurrer," " motion to quash," "plea in abatement," "plea in bar," and "special plea in bar" because those terms are obsolete and there is no need to cross-reference Rule 12, which addresses the topic of motions.

The Committee discussed use of the term "government attorney" as contrasted to the current term used in the Rules, "attorney for the government" in Rule 54(c). Following discussion, the Committee decided to add to the definition those attorneys authorized by law to conduct proceedings under the criminal rules in the capacity of prosecutor. That change was intended to cover such attorneys as those in the Office of Independent Counsel or Special Counsel.

In addressing the definition of the term "Magistrate Judge," the Committee decided to include the following language: "When these rules authorize a magistrate judge to act, a United States judge as defined in 28 U.S.C. § 451 may act."

The Committee also added a definition for "organization" as defined in 18 U.S.C. § 18. Finally, the Committee voted unanimously to arrange the definition of terms in restyled Rule 1(c) alphabetically. During the discussion, other minor stylistic changes were made to the rule.

2. Rule 2. Purpose and Construction.

Following a brief discussion concerning the title of the Rule, the Committee made a minor change to the text of Rule 2 to indicate that the "rules are to be interpreted to provide.." as opposed to the current language, "are intended to provide..."

3. Rule 3. The Complaint.

The Committee briefly addressed the issue of whether a complainant must personally appear before a judicial officer in swearing to a complaint. Professor Saltzburg reported that his research had shown that there is no such requirement. Following brief discussion concerning the relationship between Rules 3, 4, and 5 the Committee decided to tentatively approve Rule 3 pending research and possible redrafting to make those three rules consistent.

4. Rule 4. Arrest Warrant or a Summons on a Complaint.

In discussing the proposed changes to Rule 4(a), the Committee decided to include an element of discretion in those instances where the defendant fails to respond to a summons. The redrafted rule provides that the judge may issue a warrant, but must do so in those cases where the government requests that a warrant be issued. The Committee

also clarified language concerning the ability of the judge to issue more than one warrant or summons on the same complaint.

Rule 4(b), which simply notes that hearsay evidence may be used to establish probable cause, was deleted as being unnecessary; the caselaw now clearly recognizes that principle. In discussing proposed Rule 4(c), the Committee addressed the issue of whether the current language "nearest available magistrate" was the most appropriate standard. There was also some discussion on the question of whether some preference should be stated for requiring that a defendant be brought before a federal judge, rather than a state officer. After discussing the issue, the Committee decided to change the rule to require that a warrant must command that "the defendant be arrested and brought promptly before a federal judge or, if none is reasonably available, before a state or local officer;" The consensus was that this language would more accurately reflect the thrust of the original rule —that time is of the essence and the necessity of bringing a defendant before a judicial officer with some dispatch, regardless of the location of that officer —and to state a preference for using federal judicial officers rather than state officers.

In discussing Rule 4(d)(3) (Manner of executing warrant), Mr. Josefsberg and Mr. Martin raised the question of whether the defendant must request to see the warrant before an officer is obliged to show it to the defendant. Following discussion of the issue the Committee voted unanimously to approve the language as drafted.

During the discussion on Rule 4, other minor stylistic changes were made to the rule.

5. Rule 5. Initial Appearance.

In Rule 5(a), the Committee again discussed the issue of timely appearance of a defendant before a magistrate and decided to change the Rule to require that officers "promptly" bring a defendant to a judicial officer, and not necessarily the nearest officer.

There was some discussion concerning the need for Rules to distinguish between appearances that follow the filing of a complaint and those that follow the return of an indictment or information.

6. Rule 5.1. Preliminary Hearing in a Felony Case.

In considering the proposed style changes to Rule 5.1, the Committee addressed the issue of providing transcripts and recordings of the hearing to a defendant. Following extended discussion, the Committee decided to provide in the Rule that a judge could provide copies of the recordings to either party, upon request. And a copy of the

transcript could be made available to either party upon request and payment and in accordance with any Judicial Conference guidelines.

7. Rule 6. The Grand Jury.

Professor Stith explained the proposed changes to Rule 6. In particular she focused first on the language in Rule 6(b)(1) that deals with objections to the qualifications of the grand jurors before they take their oath. She pointed out that although there might be a remote possibility that a defendant would even know who the grand jurors are going to be, the language seems to have no real value, a view previously expressed by Professor Saltzburg in reviewing an earlier draft of the rule. Following discussion, the Committee voted 11-1 to remove the sentence in Rule 6(b)(1) that indicates that any challenges to the grand jurors must be made before they take their oath.

There was also some discussion regarding interchangeable use of the words "court" and "judge" throughout the rules. This matter was later referred to Judge Smith for further study.

Judge Stith also raised the question of whether the current language in Rule 6(e) concerning contempt for violations of the rule applied to any violations or only those involving a breach of the secrecy provisions in 6(e). After a short discussion, the Committee asked that the matter be research further.

Addressing Rule 6(e)(3), Judge Roll raised the question whether under 6(e)(3)(D)(ii), a defendant must articulate a particularized need for the grand jury information. That matter was also designated as one for further study. The Committee also added a new provision in 6(e)(3)(D) for addressing disclosure of grand jury information to lawyers of the armed forces. Other minor stylistic changes were also made to the rule.

8. Rule 7. The Indictment and the Information.

Discussion for Rule 7 focused on several areas. First, the Committee addressed the issue of whether Rule 7(a) needed to contain any reference to "hard labor." Following some discussion, it was decided that that issue needed additional research. Second, a question was raised about 7(b) vis a vis the ability of a defendant to waive an indictment and whether that must be done in open court. Following discussion, the Committee decided to leave the language as presented, which requires that the waiver be in open court. Third, the Committee discussed the need, if any, for including a reference to harmless error in Rule 7(c)(2), in light of Rule 52. The Committee ultimately decided to change the title of that subdivision to "Citation Error" which more accurately reflects the essence of the provision. Finally, in discussing Rule 7(e), which permits amendments to an

information, the Committee decided to conduct more research on the issue of whether an indictment could ever be amended.

9. Rule 8. Joinder of Offenses or Defendants.

The Committee discussed Rule 8 only briefly, making one minor stylistic change to the proposed revision.

10 Rule 9. Arrest Warrant or Summons on an Indictment or Information.

Discussion regarding Rule 9 focused primarily on the current provision in Rule 9(b)(1) that "the court may fix the amount of bail and endorse it on the warrant." Mr. Jackson reported that he had completed research on that language and had concluded that as written it probably was inconsistent with the Bail Reform Act. There was a question, however, whether the Committee should simply change the language to indicate that a magistrate could recommend the amount of bail, if any. Following a discussion on the issue, the Committee voted unanimously to remove the last sentence of 9(b)(1). The Committee also discussed the question of whether Rule 9 should be redrafted to make it more consistent with other Rules, such as Rules 4, 5, and 5.1 deal with the same general subject matter. The Committee also made several other minor stylistic changes to the Rule.

B. Proposed Amendments to Rules of Criminal Procedure

Before addressing several proposed amendments to the Rules, the Reporter raised the issue of whether any approved amendments should be published for comment. He noted that unless there was some compelling need to publish the proposed changes, it would be better to wait until the affected rules were "restyled" and published as an entire package in the next year or so. He added that to start what would amount to a dual track system of publication and comment could be confusing to the bench and the bar. Mr. Pauley responded that several of the proposed amendments were important because they addressed sometimes conflicting court decisions and should be published without delay. To do so might simply invite additional litigation. Mr. Rabiej pointed out that there is some sentiment for not routinely publishing rules changes every year and that the Supreme Court had expressed some concern about the number of amendments. The Committee ultimately voted 6 to 4 to decide on a case-by-case basis whether any substantive amendments should be published before the restyling package was ready for publication.

1. Rule 10. Arraignment & Rule 43. Presence of Defendant.

The Reporter provided some background information on the proposed amendments to Rules 10 and 43 that would permit the defendant to waive his or her appearance at the arraignment. He noted that at a prior meeting Judge Miller and Mr. Martin had agreed on some proposed language in a new (c)(i) that would make it clear that the defendant's ability to waive an appearance is available only where he or she is entering a plea of not guilty and that a waiver may not be used where the defendant, under Rule 7(b), must appear in open court to waive an indictment where he has been charged with a criminal information in a felony case. He continued by noting that at the October 1998 meeting the Committee had asked him to draft the appropriate amendment.

Judge Roll indicated that he had submitted a memo to the Committee that summarized the existing practice in both federal and state courts. He noted that some of the states that use teleconferencing do not require the defendant's consent to that procedure.

Chief Justice Wathen added that Maine and used teleconferencing and had ultimately rejected its use. ; Judge Bucklew noted that that is the case in Florida state courts and Judge Miller observed that Hawaii also uses that procedure.

Following additional discussion, Judge Davis appointed a subcommittee of Judge Roll (Chair), Judge Bucklew, Judge Miller, Mr. Martin, Mr. Jackson, and a representative from the Department of Justice. He asked that the subcommittee study the issue of whether to add a teleconferencing provision to Rule 10 and possibly other rules and report their findings and recommended amendments at the next meeting..

2. Rule 12.2. Notice of Insanity Defense or Expert Testimony of Defendant's Mental Condition.

The Reporter provided a brief background on the proposed changes to Rule 12.2, which would make three changes. First, the amendment would require the defendant to provide notice of an intent to introduce expert testimony in a capital case sentencing proceeding. Second, the amendment would authorize the defendant, who had provided such notice, to undergo a mental examination. And third, the proposed change would place some limits on the ability of the government to see the results of that examination before the penalty phase had begun. Based upon the Committee's discussion at the October 1998 meeting, he had drafted an amendment to the Rule. He also noted that the Judicial Center had been asked to study the practice in states concerning mental examinations and the procedures for disclosing the results to the prosecution and defense. The Chair recognized Ms. Laurel Hooper from the Judicial Center, who had conducted the study.

At the suggestion of Mr. Pauley, a minor stylistic change was made to Rule 12.2(a). During the general discussion which followed, several members noted that there are few federal capital cases from which to draw any meaningful experience. Several

members raised the question again about the timing of the disclosure of the report and whether the defense might wish to reconsider whether to give notice of a defense that focuses on the mental condition of the defendant. In addition, Judge Bucklew raised the issue of whether the disclosure of the defendant's statements, as provided in Rule 12.2(c)(3) would be triggered by lay testimony about the defendant's mental condition. The Reporter indicated that that issue could be researched for the next meeting. Further consideration of the amendment was deferred until the next meeting. The Reporter indicated that he would submit the most recent version of the amendment to the Style Subcommittee for its consideration.

3. Rule 26. Taking of Testimony.

The Reporter provided background information on the proposed changes to Rule 26, which had been approved at the October 1998 meeting. He explained that as a result of that meeting he had drafted the amendment to parallel the provisions for using a deposition in a criminal case, i.e., that the court must first find that the witness is unavailable to testify in court. He also pointed out that since the last meeting, the Second Circuit had affirmed the use of such procedures in *United States v. Gigante*, 166 F.3d 75 (2d Cir. 1999). Following discussion by the Committee regarding that decision and its impact on the proposed amendment, Chief Justice Wathen moved that the amendment be approved with the words "in the interest of justice" being added as a prerequisite for using remote transmissions. Judge Miller seconded the motion which carried by a unanimous vote.

The Reporter indicated that he would make the change and forward the proposed amendment to the Style Committee for its consideration.

4. Rule 35(b). Correction or Reduction of Sentence.

The Reporter pointed out that Judge Carnes had drawn the Committee's attention to *United States v. Orozco*, 160 F.3d 1309 (11th Cir. 1998). In that decision the court had addressed a potential gap in the rule, that is whether a court may grant sentence relief to a defendant who has provided information to the government within one year of sentencing but the information is not actually useful to the government until much later. The court had concluded that the plain language of Rule 35(b) prevented any relief being granted to the defendant in that situation and recommended that Congress consider a change to the rule.

Mr. Pauley explained that the Justice Department agreed with the court's conclusion that a gap existed. He indicated that the Department would circulate a letter on the issue and suggest appropriate language for amending the rule.

5. Rule 49. Service and Filing of Papers.

The Reporter informed the Committee that the Technology Subcommittee of the Standing Committee had considered possible amendments to the Rules of Procedure that would permit electronic service of papers. The Civil Rules Committee was actively considering possible amendments to the Civil Rules that would probably form the basis for a uniform rule governing electronic service. Because Criminal Rule 49 incorporates civil practice regarding service of papers, it would be important for the Committee to inform the Civil Rules Committee of any concerns or issues that it thought should be addressed. He added that approximately 10 courts, bankruptcy and district courts (civil) were conducting pilot programs to determine the feasibility of electronic filing. To date, the response has been largely positive.

Several members noted the potential problem of how proof of service would be accomplished, especially where the defendant fails to appear in response to electronic notification. The Reporter indicated that the Committee would have additional opportunities to express its concerns and encouraged the members to continue to consider the issue and note any other potential problems.

VI DESIGNATION OF TIME AND PLACE OF NEXT MEETING.

The next meeting of the Committee was scheduled for June 21 and 22 in Portland Oregon to consider style changes to the Rules. Judge Davis indicated that he would circulate information about possible dates in October for the Fall 1999 meeting.

Respectfully Submitted,

David A. Schlueter
Professor of Law
Reporter, Criminal Rules Committee

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE Item 9A
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

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

FROM: **Honorable Fern M. Smith, Chair**
Advisory Committee on Evidence Rules

DATE: **May 1, 1999**

RE: **Report of the Advisory Committee on Evidence Rules**

I. Introduction

The Advisory Committee on Evidence Rules met on April 12th and 13th, 1999, in New York City. At the meeting, the Committee approved seven proposed amendments to the Evidence Rules, with the recommendation that the Standing Committee approve them and forward them to the Judicial Conference. The discussion of these proposed amendments is summarized in Part II of this Report. An appendix to this Report includes the text, Committee Note, GAP report, and summary of public comment for each proposed amendment.

The Evidence Rules Committee also agreed to proceed with a long-term project to draft a possible set of privilege rules, without deciding at this point whether any amendments to the Evidence Rules will actually be proposed. The discussion of this matter is summarized in Part III of this Report, and is more fully set forth in the draft minutes of the April meeting, which are attached to this Report.

II. Action Items -- Recommendations to Forward Proposed Amendments to the Judicial Conference

At its January, 1998 meeting, the Standing Committee approved the publication of proposed amendments to Evidence Rules 103, 404(a), 803(6) and 902. At its June, 1998 meeting, the Standing Committee approved the publication of proposed amendments to Evidence Rules 701, 702 and 703. The public comment period for all of these rules was the same--August 1, 1998 to March 1, 1999.

The Advisory Committee on Evidence Rules conducted two public hearings on the proposed amendments, at which it heard the testimony of 18 witnesses. In addition, the Committee received written comments from 174 persons or organizations, commenting on all or some of the proposed amendments.

The Committee has considered all of these comments in detail, and has responded to many of them through revision of the text or Committee Notes of some of the proposals released for public comment. The Committee has also considered and incorporated almost all of the suggestions from the Style Subcommittee of the Standing Committee. After careful review, the Evidence Rules Committee recommends that all of the proposed amendments, as revised where necessary after publication, be approved and forwarded to the Judicial Conference.

A complete discussion of the Committee's consideration of the public comments respecting each proposed amendment can be found in the draft minutes attached to this Report. The following discussion briefly summarizes the proposed amendments.

A. Action Item — Rule 103. Rulings on Evidence.

Courts are currently in dispute over whether it is necessary for a party to renew an objection or offer of proof at trial, after the trial court has made an advance ruling on the admissibility of proffered evidence. Some courts hold that a renewed objection or offer of proof is always required in order to preserve a claim of error on appeal. Some cases can be found holding that a renewed objection or offer of proof is never required. Some courts hold that a renewal is not required if the advance ruling is definitive. The Evidence Rules Committee has proposed an amendment to Rule 103 that would resolve this conflict in the courts, and provide litigants with helpful guidance as to when it is necessary to renew an objection or offer of proof in order to preserve a claim of error for appeal. Under the proposed amendment, if the advance ruling is definitive, a party need not renew an objection or offer of proof at trial; otherwise renewal is required. Requiring renewal when the advance ruling is definitive leads to wasteful practice and costly litigation, and provides a trap for the unwary. Requiring renewal where the

ruling is not definitive properly gives the trial judge the opportunity to revisit the admissibility question in the context of the trial.

Public comment on the proposed amendment's resolution of the renewal question was almost uniformly favorable. Some comments suggested that certain details might be treated in the Committee Note. For example, it was suggested that the Committee Note might specify that developments occurring after the advance ruling could not be the subject of an appeal unless their relevance was brought to the trial court's attention by way of motion to strike or other suitable motion. It was also suggested that the Committee Note refer to other laws that require an appeal to the district court from nondispositive rulings of Magistrate Judges. These suggestions were incorporated into the Committee Note.

The proposed amendment to Evidence Rule 103 that was issued for public comment contained a sentence that purported to codify and extend the Supreme Court's decision in *Luce v. United States*. Under *Luce* a criminal defendant must testify at trial in order to preserve the right to appeal an advance ruling admitting impeachment evidence. Lower courts have extended the *Luce* rule to comparable situations, holding, for example, that if the trial court rules in advance that certain evidence will be admissible if a party pursues a certain claim or defense, then the party must actually pursue that claim or defense at trial in order to preserve a claim of error on appeal. The proposal issued for public comment recognized that any codification of *Luce* would necessarily have to extend to comparable situations.

The public comment on the proposed codification and extension of *Luce* was generally negative. Substantial concerns were expressed about the problematic and largely undefinable impact of *Luce* in civil cases. The Evidence Rules Committee considered these comments and, after substantial discussion and reflection, determined that the comments had merit. The Committee therefore deleted the sentence from the published draft that codified and extended *Luce*. The Committee considered the possibility that deletion of the sentence could create an inference that the proposed amendment purported to overrule *Luce*. The Committee determined that such a construction would be unreasonable, because the proposed amendment concerns *renewal* of objections or offers of proof, but *Luce* concerns fulfillment of a condition precedent to the trial court's ruling. *Luce* does not require renewal of an objection or offer of proof; it requires the occurrence of a trial event that was a condition precedent to the admissibility of evidence. In order to quell any concerns about the effect of the proposed amendment on *Luce*, however, the Committee Note was revised to indicate that the proposed amendment is not intended to affect the rule set forth in *Luce*.

Recommendation — The Evidence Rules Committee recommends that the proposed amendment to Evidence Rule 103, as modified following publication, be approved and forwarded to the Judicial Conference.

B. Action Item — Rule 404(a). Character Evidence.

The proposed amendment to Evidence Rule 404(a) is designed to provide a more balanced presentation of character evidence when an accused decides to attack the alleged victim's character. Under current law, an accused who attacks the alleged victim's character does not open the door to an attack on his own character. The current rule therefore permits the defendant to attack an alleged victim's character without giving the jury the opportunity to consider equally relevant evidence about the accused's own propensity to act in a certain manner. The Evidence Rules Committee proposed the amendment in response to a provision in the Omnibus Crime Bill that would have amended Evidence Rule 404(a) directly. The Congressional proposal would have permitted the government far more leeway in attacking the accused's character in response to an attack on the alleged victim's character.

The proposed amendment as issued for public comment provided that an attack on the alleged victim's character opened the door to evidence of any of the accused's "pertinent" character traits. Public comment on this proposal suggested that the language should be narrowed to permit only an attack on the "same" character trait that the accused raised as to the victim. The Committee agreed that this modification was necessary to prevent a potentially overbroad use of character evidence. The public comment on the proposal, as so modified, was substantially positive.

Recommendation — The Evidence Rules Committee recommends that the proposed amendment to Evidence Rule 404(a), as modified following publication, be approved and forwarded to the Judicial Conference.

C. Action Item — Rule 701. Opinion Testimony by Lay Witnesses.

The proposed amendment to Evidence Rule 701 seeks to prevent parties from proffering an expert as a lay witness in an attempt to evade the gatekeeper and reliability requirements of Rule 702. As issued for public comment, the proposed amendment provided that testimony cannot be admitted under Rule 701 if it is based on "scientific, technical or other specialized knowledge." The language of the draft issued for public comment intentionally tracked the language defining expert testimony in Rule 702.

The public comment on the proposal was largely positive. Some members of the public went on record as opposing the proposal, but in fact their comments were directed at the proposed amendment to Evidence Rule 702. The major source of objection directly specifically

to the proposed amendment to Rule 701 has come from the Department of Justice. DOJ argued that it is appropriate to have overlap between Rules 701 and 702, so that experts could be permitted to testify as lay witnesses. DOJ also expressed concern that exclusion under Rule 701 of all testimony based on "specialized knowledge" would result in many more witnesses having to qualify as experts--leading to deleterious consequences because the government would have to identify many of those witnesses in advance of trial under the Civil and Criminal Rules governing disclosure.

At its April meeting, the Evidence Rules Committee carefully considered the objections of the Justice Department, and decided to revise the proposed amendment to address the concern that all testimony based on any kind of specialized knowledge would have to be treated as expert testimony. The proposed amendment, as revised, provides that testimony cannot qualify under Rule 701 if it is based on "scientific, technical or other specialized knowledge *within the scope of Rule 702.*" The Committee Note was also revised to emphasize that Rule 701 does not prohibit lay witness testimony on matters of common knowledge that traditionally have been the subject of lay opinions. The Committee believes that the proposed amendment, as revised, will help to protect against evasion of the Rule 702 reliability requirements, without requiring parties to qualify as experts those witnesses who traditionally and properly have been considered as providing lay witness testimony.

Recommendation — The Evidence Rules Committee recommends that the proposed amendment to Evidence Rule 701, as modified following publication, be approved and forwarded to the Judicial Conference.

D. Action Item — Rule 702. Testimony by Experts.

The proposed amendment to Evidence Rule 702 is in response to the Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* It attempts to address the conflict in the courts about the meaning of *Daubert* and also attempts to provide guidance for courts and litigants as to the factors to consider in determining whether an expert's testimony is reliable. The proposal is also a response to bills proposed in Congress that purported to "codify" *Daubert*, but that, in the Committee's view, raised more problems than they solved. The proposed amendment to Evidence Rule 702 specifically extends the trial court's *Daubert* gatekeeping function to all expert testimony, as affirmed by the Supreme Court in *Kumho Tire Co. v. Carmichael*, requires a showing of reliable methodology and sufficient basis, and provides that the expert's methodology must be applied properly to the facts of the case. The Committee has prepared an extensive Committee Note that will provide guidance for courts and litigants in determining whether expert testimony is sufficiently reliable to be admissible.

The public comment on the proposed amendment was mixed. Those in favor of the proposal believed that it was important to codify the *Daubert* principles by using general language such as that chosen in the proposed amendment. They noted that many courts, even after *Daubert,* had done little screening of dubious expert testimony. Those opposed to the proposed amendment argued that it would 1) permit trial judges to usurp the role of the jury; 2) lead to a proliferation of challenges to expert testimony; 3) allow judges to reject one of two competing methodologies in the same field of expertise; and 4) result in the wholesale rejection of experience-based expert testimony.

The Evidence Rules Committee considered all of these comments in detail. It determined that most of the concerns were not directed toward the proposal itself, but rather toward the case law that the proposal codifies, most importantly *Daubert* and *Kumho*. In order to allay concerns about the potential misuse of the amended Rule, however, the Committee revised the Committee Note to clarify that the amendment was not intended to usurp the role of the jury, nor to provide an excuse to challenge every expert, nor to prohibit experience-based expert testimony. The Note was also revised to emphasize that the Rule is broad enough to permit testimony from two or more competing methodologies in the same field of expertise. Finally, in response to public comment, the text of the proposal was revised slightly to avoid a potential conflict with Rule 703, which governs the reliability of inadmissible information used as the basis of an expert's opinion.

The Supreme Court granted certiorari in *Kumho* before the Standing Committee authorized the proposed amendment to Rule 702 to be released for public comment. *Kumho* was decided shortly after the public comment period ended. At its April meeting, the Evidence Rules Committee carefully considered the impact of *Kumho* on the proposed amendment. The Committee unanimously found that the Court's analysis in *Kumho* was completely consistent with, and supportive of, the approach taken by the proposed amendment. The Court in *Kumho* held that the gatekeeper function applies to all expert testimony; that the specific *Daubert* factors might apply to non-scientific expert testimony; and that the Rule 702 reliability standard must be applied flexibly, depending on the field of expertise. The proposed amendment precisely tracks *Kumho* in all these respects. The Court in *Kumho* emphasized the same overriding standard as that set forth in the Committee Note to the proposed amendment, i.e., that an expert must employ the same degree of intellectual rigor in testifying as he would be expected to employ in his professional life. The Committee also noted that the *Kumho* Court favorably cited the Committee Note to the proposed amendment to Evidence Rule 702 as issued for public comment.

For all these reasons, the Committee decided that the Supreme Court's decision in *Kumho* provided more rather than less reason for proceeding with the proposed amendment. The Committee Note was revised to include a number of references to *Kumho*. The Committee considered whether, in light of *Kumho's* resolution of the applicability of *Daubert* to non-scientific experts, it made sense to amend the Rule. The Committee unanimously agreed that the amendment would perform a great service even after the Court's resolution in *Kumho*. Even after *Kumho*, there are many unresolved questions about the meaning of *Daubert*, such as 1) the

standard of proof to be employed by the trial judge in determining reliability; 2) whether the trial court must look at how the expert's methods are applied; and 3) the relationship between the expert's methods and the conclusions drawn by the expert. Moreover, even without any obvious conflicts on the specifics, the courts have divided more generally over how to approach a *Daubert* question. Some courts approach *Daubert* as a rigorous exercise requiring the trial court to scrutinize in detail the expert's basis, methods, and application. Other courts hold that *Daubert* requires only that the trial court assure itself that the expert's opinion is something more than unfounded speculation. The Evidence Rules Committee believes that adoption of the proposed rule change, and the Committee Note, will help to provide uniformity in the *approach* to *Daubert* questions. The proposed amendment and the Committee Note clearly envision a more rigorous and structured approach than some courts are currently employing.

Finally, if the Rule is not amended, there is legitimate cause for concern that Congress will act to amend Rule 702. Prior codification efforts were shelved partly because of assurances that the Rules Committee was already considering a change to Rule 702. If the Committee fails to act, these congressional efforts may be renewed.

Recommendation — The Evidence Rules Committee recommends that the proposed amendment to Evidence Rule 702, as modified following publication, be approved and forwarded to the Judicial Conference.

E. Action Item -- Rule 703. Bases of Opinion Testimony by Experts.

The proposed amendment to Evidence Rule 703 would limit the disclosure to the jury of inadmissible information that is used as the basis of an expert's opinion. Under current law, litigants can too easily evade an exclusionary rule of evidence by having an expert rely on inadmissible evidence in forming an opinion. The inadmissible information is then disclosed to the jury in the guise of the expert's basis. The proposed amendment imposes no limit on an expert's opinion itself. The existing language of Evidence Rule 703, permitting an expert to rely on inadmissible information if it is of the type reasonably relied upon by experts in the field, is retained. Rather, the limitations imposed by the proposed amendment relate to the disclosure of this inadmissible information to the jury. Under the proposed amendment, the otherwise inadmissible information cannot be disclosed to the jury unless its probative value in assisting the jury to evaluate the expert's opinion substantially outweighs the risk of prejudice resulting from the jury's possible misuse of the evidence.

The public comment on the proposed amendment was largely positive. Most comments

agreed that under current practice, Rule 703 is all too often used as a device for evading exclusionary rules of evidence, and that the balancing test set forth in the proposal is necessary to prevent this abuse. Negative comments expressed concern that the proposal did not specify how the balancing test would apply in rebuttal, and did not mention whether a proponent might be able to introduce inadmissible information on direct examination in order to remove the sting of an anticipated attack on the expert's basis. In response to these comments, the Committee Note was revised to emphasize that the balancing test set forth in the amendment is flexible enough to accommodate each of these situations.

Other public comments suggested that the amendment clarify why inadmissible information relied upon by the expert might have probative value that would be weighed under the amendment's balancing test. In response to these comments, the Committee revised the text of the amendment to provide that the trial judge must assess the inadmissible information's "probative value in assisting the jury to evaluate the expert's opinion". Finally, the Committee adopted the suggestions of the Style Subcommittee of the Standing Committee, and made stylistic improvements to the proposal as it was released for public comment.

Recommendation — The Evidence Rules Committee recommends that the proposed amendment to Evidence Rule 703, as modified following publication, be approved and forwarded to the Judicial Conference.

F. Action Item — Rule 803(6). Records of Regularly Conducted Activity.

Under current law, a foreign record of regularly conducted activity can be admitted in a criminal case without the necessity of calling a foundation witness. 18 U.S.C. § 3505 provides that foreign business records may be admitted if they are certified by a qualified witness, under circumstances in which the law of the foreign country would punish a false certification. In contrast, the foundation for all other records admissible under Evidence Rule 803(6) must be established by a testifying witness. The intent of the proposed amendment to Evidence Rule 803(6) is to provide for uniform treatment of business records, and to save the parties the expense and inconvenience of producing live witnesses for what is often perfunctory testimony. The approach taken by the proposed amendment, permitting a foundation for business records to be made through certification, is in accord with a trend in the states. The proposed amendment to Rule 803(6) is integrally related to the proposed amendment to Evidence Rule 902, discussed below.

The public comment on the proposed amendment to Evidence Rule 803(6) was almost uniformly positive. The Committee made no changes to the text or Note of the proposal that was issued for public comment.

Recommendation — The Evidence Rules Committee recommends that the proposed amendment to Evidence Rule 803(6), as issued for publication, be approved and forwarded to the Judicial Conference.

G. Action Item — Rule 902. Self-authentication.

The Evidence Rules Committee recognized that if certification of business records is to be permitted, Evidence Rule 902 must be amended to provide a procedure for self-authentication of such records. In that sense, the proposed amendments to Rules 803(6) and 902 are part of a single package--the amendment to Rule 902 is only necessary if the amendment to Rule 803(6) is adopted, and conversely the amendment to Rule 803(6) would be a nullity if the amendment to Rule 902 were rejected.

The proposed amendment to Evidence Rule 902 sets forth the procedural requirements for preparing a declaration of a custodian or other qualified witness that will establish a sufficient foundation for the admissibility of business records. Public comment on the proposed amendment was almost uniformly positive. Some comments suggested minor changes in the language of the text, to provide more consistency in the terms "certification" and "declaration", and to refer to independent statutes and rules governing the procedures for a proper certification. The Evidence Rules Committee has revised the proposal that was issued for public comment in response to these suggestions. The Committee also incorporated suggested changes from the Style Subcommittee of the Standing Committee.

Recommendation — The Evidence Rules Committee recommends that the proposed amendment to Evidence Rule 902, as modified following publication, be approved and forwarded to the Judicial Conference.

III. Information Item

A. Privileges

A subcommittee has been appointed to begin a long-term project to attempt to draft a possible proposal to codify the privileges. The Evidence Rules Committee has determined that there are many questions on which the courts are divided, both as to the extent of well-accepted privileges and the existence of newer privileges. The Committee, noting that Congress has expressed an interest in codifying privileges on a case-by-case basis, has determined that an overriding look at the privileges in the context of the rulemaking process is a far better way of proceeding than is a patchwork legislative treatment. Moreover, the Committee believes that an investigation of the privileges would be a useful project even if the Committee never reaches the stage of formally proposing codified rules.

It should be stressed that no decision has been made to propose any new amendments to the Evidence Rules. Indeed, the Committee does not contemplate proposing any new amendments in the foreseeable future.

IV. Minutes of the April, 1999 Meeting

The Reporter's draft of the minutes of the Evidence Rules Committee's April, 1999 meeting are attached to this report. These minutes have not yet been approved by the Evidence Rules Committee.

Attachments:

Proposed Amendments, Committee Notes, GAP Reports, and Summaries of Public Comment
Draft Minutes (without attachments)

PROPOSED AMENDMENTS TO THE
FEDERAL RULES OF EVIDENCE*

Rule 103. Rulings on Evidence

(a) Effect of erroneous ruling.—Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) Objection.—In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(2) Offer of proof.— In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

---

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

Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.

(b) Record of offer and ruling. — The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form.

(c) Hearing of jury. — In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

(d) Plain error. — Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court.

COMMITTEE NOTE

The amendment applies to all rulings on evidence whether they occur at or before trial, including so-called "*in limine*" rulings. One of the most difficult questions arising from *in limine* and other evidentiary rulings is whether a losing party must renew an objection or offer of proof when the evidence is or would be offered at trial, in order to preserve a claim of error on appeal. Courts have taken differing approaches to this question. Some courts have held that a renewal at the time the evidence is to be offered at trial is always required. *See, e.g., Collins v. Wayne Corp.*, 621 F.2d 777 (5th Cir. 1980). Some courts have taken a more flexible approach, holding that renewal is not required if the issue decided is one that (1) was fairly presented to the trial court for an initial ruling, (2) may be decided as a final matter before the evidence is actually offered, and (3) was ruled on definitively by the trial judge. *See, e.g., Rosenfeld v. Basquiat,* 78 F.3d 84 (2d Cir. 1996) (admissibility of former testimony under the Dead Man's Statute; renewal not required). Other courts have distinguished between objections to evidence, which must be renewed when evidence is offered, and offers of proof, which need not be renewed after a definitive determination is made that the evidence is inadmissible. *See, e.g., Fusco v. General Motors Corp.*, 11 F.3d 259 (1st Cir. 1993). Other courts have asserted that an objection or offer of proof once made should be sufficient to preserve a claim of error because the trial court's ruling thereon constitutes "law of the case." *See, e.g., Cook v. Hoppin,* 783 F.2d 684, 691, n.2 (7th Cir. 1986). *But see Wilson v. Williams,* 161 F.3d 1078, 1084 (7th Cir. 1998) (declaring that "the *in limine* motion must be renewed at trial or it is waived"), *vacated and rehearing en banc granted,* _ F.3d _ (7th Cir. 1999). These differing approaches create uncertainty for litigants and unnecessary work for the appellate courts.

The amendment provides that a claim of error with respect to a definitive ruling is preserved for review when the party has otherwise satisfied the objection or offer of proof requirements of Rule 103(a). When the ruling is definitive, a renewed objection or offer of proof at the time the evidence is to be offered is more a formalism than a necessity. See Fed.R.Civ.P. 46 (formal exceptions unnecessary); Fed.R.Cr.P. 51 (same); *United States v. Mejia-Alarcon*, 995 F.2d 982, 986 (10th Cir. 1993) ("Requiring a party to renew an objection when the district court has issued a definitive ruling on a matter that can be fairly decided before trial would be in the nature of a formal exception and therefore unnecessary."). On the other hand, when the trial court appears to have reserved its ruling or to have indicated that the ruling is provisional, it makes sense to require the party to bring the issue to the court's attention subsequently. *See, e.g., United States v. Vest,* 116 F.3d 1179, 1188 (7th Cir. 1997) (where the trial court ruled *in limine* that testimony from defense witnesses could not be admitted, but allowed the defendant to seek leave at trial to call the witnesses should their testimony turn out to be relevant, the defendant's failure to seek such leave at trial meant that it was "too late to reopen the issue now on appeal"); *United States v. Valenti,* 60 F.3d 941 (2d Cir. 1995) (failure to proffer evidence at trial waives any claim of error where the trial judge had stated that he would reserve judgment on the *in limine* motion until he had heard the trial evidence).

The amendment imposes the obligation on counsel to clarify whether an *in limine* or other evidentiary ruling is definitive when there is doubt on that point. *See, e.g., Walden v. Georgia-Pacific Corp.,* 126 F.3d 506, 520 (3d Cir. 1997) (although "the district court told plaintiffs' counsel not to reargue every ruling, it did not countermand its clear opening statement that all of its rulings were tentative, and counsel never requested clarification, as he might have done.").

Even where the court's ruling is definitive, nothing in the amendment prohibits the court from revisiting its decision when the evidence is to be offered. If the court changes its initial ruling, or if the opposing party violates the terms of the initial ruling, objection must be made when the evidence is offered to preserve the claim of error for appeal. The error if any in such a situation occurs only when the evidence is offered and admitted. *United States Aviation Underwriters, Inc. v. Olympia Wings, Inc.,* 896 F.2d 949, 956 (5th Cir. 1990) ("objection is required to preserve error when an opponent, or the court itself, violates a motion *in limine* that was granted"); *United States v. Roenigk,* 810 F.2d 809 (8th Cir. 1987) (claim of error was not preserved where the defendant failed to object at trial to secure the benefit of a favorable advance ruling).

A definitive advance ruling is reviewed in light of the facts and circumstances before the trial court at the time of the ruling. If the relevant facts and circumstances change materially after the advance ruling has been made, those facts and circumstances cannot be relied upon on appeal unless they have been brought to the attention of the trial court by way of a renewed, and timely, objection, offer of proof, or motion to strike. *See Old Chief v. United States,* 519 U.S. 172, 182, n.6 (1997) ("It is important that a reviewing court evaluate the trial court's decision from its perspective when it had to rule and not indulge in review by hindsight."). Similarly, if the court decides in an advance ruling that proffered evidence is admissible subject to the eventual introduction by the proponent of a foundation for the evidence, and that foundation is never provided, the opponent cannot claim error based on the failure to establish the foundation unless the opponent calls that failure to the court's attention by a timely motion to strike or other suitable motion. *See Huddleston v. United States,* 485 U.S. 681, 690, n.7 (1988) ("It is, of course, not the responsibility of the judge *sua sponte* to ensure that the foundation evidence is offered; the objector must move to strike the evidence if

at the close of the trial the offeror has failed to satisfy the condition.").

Nothing in the amendment is intended to affect the provisions of Fed.R.Civ.P. 72(a) or 28 U.S.C. §636(b)(1), pertaining to nondispositive pretrial rulings by magistrate judges in proceedings that are not before a magistrate judge by consent of the parties. Fed.R.Civ.P. 72(a) provides that a party who fails to file a written objection to a magistrate judge's nondispositive order within ten days of receiving a copy "may not thereafter assign as error a defect" in the order. 28 U.S.C. §636(b)(1) provides that any party "may serve and file written objections to such proposed findings and recommendations as provided by rules of court" within ten days of receiving a copy of the order. Several courts have held that a party must comply with this statutory provision in order to preserve a claim of error. *See, e.g., Wells v. Shriners Hospital*, 109 F.3d 198, 200 (4th Cir. 1997)("[i]n this circuit, as in others, a party 'may' file objections within ten days or he may not, as he chooses, but he 'shall' do so if he wishes further consideration."). When Fed.R.Civ.P. 72(a) or 28 U.S.C. §636(b)(1) is operative, its requirement must be satisfied in order for a party to preserve a claim of error on appeal, even where Evidence Rule 103(a) would not require a subsequent objection or offer of proof.

Nothing in the amendment is intended to affect the rule set forth in *Luce v. United States,* 469 U.S. 38 (1984), and its progeny. The amendment provides that an objection or offer of proof need not be renewed to preserve a claim of error with respect to a definitive pretrial ruling. *Luce* answers affirmatively a separate question: whether a criminal defendant must testify at trial in order to preserve a claim of error predicated upon a trial court's decision to admit the defendant's prior convictions for impeachment. The *Luce* principle has been extended by many lower courts to other situations. *See*

United States v. DiMatteo, 759 F.2d 831 (11th Cir. 1985) (applying *Luce* where the defendant's witness would be impeached with evidence offered under Rule 608). *See also United States v. Goldman,* 41 F.3d 785, 788 (1st Cir. 1994) ("Although *Luce* involved impeachment by conviction under Rule 609, the reasons given by the Supreme Court for requiring the defendant to testify apply with full force to the kind of Rule 403 and 404 objections that are advanced by Goldman in this case."); *Palmieri v. DeFaria,* 88 F.3d 136 (2d Cir. 1996) (where the plaintiff decided to take an adverse judgment rather than challenge an advance ruling by putting on evidence at trial, the *in limine* ruling would not be reviewed on appeal); *United States v. Ortiz,* 857 F.2d 900 (2d Cir. 1988) (where uncharged misconduct is ruled admissible if the defendant pursues a certain defense, the defendant must actually pursue that defense at trial in order to preserve a claim of error on appeal); *United States v. Bond,* 87 F.3d 695 (5th Cir. 1996) (where the trial court rules *in limine* that the defendant would waive his fifth amendment privilege were he to testify, the defendant must take the stand and testify in order to challenge that ruling on appeal).

The amendment does not purport to answer whether a party who objects to evidence that the court finds admissible in a definitive ruling, and who then offers the evidence to "remove the sting" of its anticipated prejudicial effect, thereby waives the right to appeal the trial court's ruling. *See, e.g., United States v. Fisher,* 106 F.3d 622 (5th Cir. 1997) (where the trial judge ruled *in limine* that the government could use a prior conviction to impeach the defendant if he testified, the defendant did not waive his right to appeal by introducing the conviction on direct examination); *Judd v. Rodman,* 105 F.3d 1339 (11th Cir. 1997) (an objection made *in limine* is sufficient to preserve a claim of error when the movant, as a matter of trial strategy, presents the objectionable evidence herself on direct examination to minimize its prejudicial effect); *Gill v. Thomas,* 83

F.3d 537, 540 (1st Cir. 1996) ("by offering the misdemeanor evidence himself, Gill waived his opportunity to object and thus did not preserve the issue for appeal"); *United States v. Williams*, 939 F.2d 721 (9th Cir. 1991) (objection to impeachment evidence was waived where the defendant was impeached on direct examination).

GAP Report--Proposed Amendment to Rule 103(a)

The Committee made the following changes to the published draft of the proposed amendment to Evidence Rule 103(a):

1. A minor stylistic change was made in the text, in accordance with the suggestion of the Style Subcommittee of the Standing Committee on Rules of Practice and Procedure.

2. The last sentence of the text of the published draft was deleted, and the Committee Note was amended to reflect the fact that nothing in the amendment is intended to affect the rule of *Luce v. United States*.

3. The Committee Note was updated to include cases decided after the proposed amendment was issued for public comment.

4. The Committee Note was amended to include a reference to a Civil Rule and a statute requiring objections to to certain Magistrate Judge rulings to be made to the District Court.

5. The Committee Note was revised to clarify that an advance ruling does not encompass subsequent developments at trial that might be the subject of an appeal.

Summary of Comments on the Proposed Amendment to Evidence Rule 103(a)

Professor James J. Duane (98-EV-005) states that the first sentence of the proposed amendment to Evidence Rule 103 "is an excellent proposal, and exactly the right response to a situation that is desperately in need of clarity and reform." He argues for some changes in the Advisory Committee Note to more clearly reflect the import of the amendment. Professor Duane opposes the sentence in the proposed amendment that would codify the Supreme Court's decision in *Luce v. United States*, 469 U.S. 38 (1984). He suggests that the *Luce* rule violates the criminal defendant's constitutional right to testify. Professor Duane argues that if the reason for including *Luce* in the Rule is to avoid the perception that *Luce* was being overruled by negative implication, the less onerous alternative would be to mention in the Committee Note that there is no intent to overrule *Luce*.

Professor Richard Friedman (98-EV 007) agrees with the proposal excusing renewal of objection or offer of proof when the trial court has made a definitive advance ruling, subject to the proviso that when a party who makes the unsuccessful objection or offer of proof does not renew the matter at trial, then that party "should not be allowed to argue on appeal on the basis of information or changes of circumstances that arose after the initial objection or offer of proof." Professor Friedman opposes the language in the proposed amendment to Evidence Rule 103 that would codify the Supreme Court's decision in *Luce v. United States*. He argues that *Luce* is an unfair and controversial rule that should not be codified and, a fortiori, should not be extended beyond its fact situation.

Professor Laird Kirkpatrick (98-EV 011) agrees with the Committee's decision to excuse the requirement of a renewed

objection or offer of proof when the trial court's advance ruling is definitive. He contends, however, that there will be "recurring disputes" about whether a particular advance ruling is definitive. He notes that the Advisory Committee Note is "wise" to place the burden on counsel to clarify whether the ruling is definitive, but argues that there may be a tension between how lawyers want to have a ruling characterized and how judges may want it characterized.

The Fellows of the American College of Trial Lawyers (98-EV-016) favor the proposed amendment.

Professor Lynn McLain (98-EV-030) supports the codification of *Luce* but opposes the first sentence of the proposed amendment to Evidence Rule 103. He argues that the proposal will create "grist for arguments as to whether a particular ruling was 'definitive'." He also states that a rule requiring renewal of objections or offers of proof at trial ensures that the trial judge, if wrong in the pretrial ruling, is given an opportunity to correct that ruling in the light of trial. Thus, Professor McLain would "far prefer" a rule that clearly required a renewal of the objection or proffer at trial.

Hon. Edward R. Becker (98-EV-065), Chief Judge of the United States Court of Appeals for the Third Circuit, supports the proposed amendment to Evidence Rule 103, noting that it is "extremely well justified by the Committee's accompanying commentary."

Prentice H. Marshall, Esq. (98-EV-071) states that "the amendment to Rule 103 encouraging the use of pre-trial evidence motions/rulings is long overdue."

The Federal Courts Committee of the Chicago Council of Lawyers (98-EV-074) notes the "laudable purposes" of the proposed

amendment: "to clarify when and how often a party must object to evidentiary rulings to preserve them for appeal, to preclude distracting formal objections to evidence already disposed of pre-trial, and to prevent unintended waivers of objections." The Committee does not believe, however, that "the current draft achieves the desired clarity." It objects that the term "definitive ruling" is undefined. The Committee also concludes that the "condition precedent" language in the second sentence of the proposal released for public comment "may force litigants into untenable choices at trial." Plaintiffs, for example, may be forced to forego a claim if an advance ruling provided that the pursuit of the claim would open the door to damaging evidence. The Committee believes that a plaintiff in such circumstances "should be allowed to attack the *in limine* ruling . . . without having to sabotage her trial."

The State Bar of Arizona (98-EV-075) supports the adoption of the proposed amendment to Evidence Rule 103.

The National Association of Railroad Trial Counsel (98-EV-077) supports the proposed change to Evidence Rule 103. The Association concludes that the proposal "will clear up the confusion about timely objections when dealing with motions *in limine*."

The Chicago Chapter of the Federal Bar Association (98-EV-078) states that the proposed change to Evidence Rule 103 "is an important and desirable amendment which would clarify a constant point of confusion and would eliminate a procedural trap."

The Federal Practice Section of the Connecticut Bar Association (98-EV-079) endorses the proposed amendment to Evidence Rule 103.

The Phoenix and Tucson Chapters of the Federal Bar Association (98-EV-080) support the proposed amendment to Evidence Rule 103.

The Pennsylvania Trial Lawyers Association (98-EV-081) supports the first sentence of the proposal released for public comment, "since it provides litigants and the courts with some certainties as to when and under what circumstances a party must renew an objection." The Association opposes the second sentence of the proposal released for public comment "as being confusing in its application." The Association asserts that "the second sentence as written appears to permit testimony over an objection if the proponent promises to introduce subsequent testimony establishing the propriety of the testimony to which his opponent objects." In such a case, "if the proponent does not produce such testimony, the condition precedent is not satisfied, but the objector cannot rely on his objection unless he renews it. This is contrary to the salutary purpose of the first sentence" of the proposal, and "places an unfair burden on counsel who has made a timely objection when the burden should actually be placed on the proponent of the testimony to show that he did not make a misrepresentation to the court."

The Federal Rules of Evidence Committee of the American College of Trial Lawyers (98-EV-084) states that the proposed amendment to Evidence Rule 103 "would be a salutary addition to the Federal Rules of Evidence for two principal reasons. First, it would clarify existing law, which . . . varies among the Circuits. Second, it has the added virtue of establishing certainty by placing lawyers on notice of the circumstances under which it is necessary to renew pretrial objections. At present, counsel may place unwarranted reliance on a pretrial ruling, only to learn after the fact that the failure to renew an objection at trial has foreclosed appellate review." The Committee believes that "a major benefit of the

proposed addition to Rule 103(a) is that it is likely to stimulate counsel to inquire of the Court — or stimulate the Court *sua sponte* to remark — on the record whether a pretrial ruling is final." The Committee considers this notice function of the proposal to be "quite valuable."

The Committee on Federal Courts of the Association of the Bar of the City of New York (98-EV-088) supports the proposed amendment to Evidence Rule 103, for a number of reasons. First, "there is a substantial interest in having a uniform rule to address the effect of *in limine* motions that will be applicable in all federal courts." Second, "the proposed amendment is a sensible resolution of the circuit split", because the requirement imposed by some Circuits that a litigant must always renew an objection to evidence at the time of trial "has resulted in the inadvertent sacrifice of substantial rights by parties who think they have done enough by raising the issue pretrial." Third, "the requirement that a party renew an objection or an offer of proof at the time of trial serves no real substantial purpose in those cases where the issue can be resolved pretrial and the court has made a definitive ruling. . . . Indeed, such a requirement may result in the unnecessary expenditure of resources both by the litigants and by the court." The Committee concludes that "the Rule would eliminate the wasteful and unnecessary practice of renewing objections and offers of proof as to issues that can be and have been definitively resolved. On the other hand, the requirement that the ruling be 'definitive' will give the district court flexibility to provide guidance to the litigants as to its initial view with respect to the admissibility of evidence in those cases where a definitive ruling cannot be made without depriving itself of the ability to reconsider the decision in the developed context of the trial." The Committee suggests "that the Advisory Committee consider adding some commentary further defining the term 'definitive.'"

Professors Bruce Comly French and Elizabeth Phillips Marsh (98-EV-103) reported on a meeting of some members of the Committee on Rules of Evidence and Criminal procedure of the Criminal Justice Section of the American Bar Association. The professors noted that "there is no existing American Bar Association policy known to us that addresses these changes." Nonetheless, the professors report that a "number of attendees" objected to the proposed amendment insofar as it would codify and extend the principles of *Luce v. United States*, 469 U.S. 38 (1984).

Professor Myrna Raeder (98-EV-106) opposes the second sentence of the proposed amendment to Evidence Rule 103, and argues that applying the *Luce* rule to civil cases "will have unintended consequences and provide another procedural weapon for litigators to avoid decisions on the merits."

Russell T. Golla, Esq. (98-EV-112) supports the proposed amendment to Evidence Rule 103.

The Philadelphia Bar Association (98-EV-118) supports the adoption of the first sentence of the proposed amendment to Evidence Rule 103 (concerning whether objections to advance rulings must be renewed when the evidence is to be introduced). The Association states that the proposal "seems to strike an appropriate balance between the need for a detailed factual record for the consideration of errors on appeal and the need to avoid overly formalistic procedures in the conduct of a trial." The Association objects, however, to the second sentence of the proposed amendment, which would codify the principles of *Luce v. United States*, 469 U.S. 38 (1984). It argues that the rule could be inconsistent with the decision in *New Jersey v. Portash*, 440 U.S. 450 (1979) (refusing to override a state rule of evidence permitting a defendant to preserve a fifth amendment objection to impeachment evidence without testifying at trial). The

Association observes that if the second sentence of the proposal is deleted, the Committee Note to the Rule should be amended to indicate that there is no intent to overrule *Luce*.

The Court Rules and Administration Committee of the Minnesota State Bar Association (98-EV-126) recommends the adoption of the proposed amendment to Evidence Rule 103.

The International Academy of Trial Lawyers (98-EV-134) is in favor of the proposed amendment to Evidence Rule 103 "insofar as it eliminates the need for further objection or offer of proof once the court has made a definitive ruling on the record admitting or excluding evidence." The Academy is also in favor of the proposed amendment "insofar as it provides that where the court rules that there is a condition precedent to the admission or exclusion of the evidence, no claim of error may be predicated on the ruling unless the condition precedent is satisfied." However, the Academy suggests that language be added to the proposed amendment "to make it clear that if the court rules that evidence is admissible subject to the eventual introduction by the proponent of the evidence of a foundation for the evidence, the opponent of the evidence cannot claim error based on the failure of the proponent to establish the foundation unless the opponent calls that failure to the court's attention in a timely fashion in a motion to strike or other suitable motion."

Hon. Tommy E. Miller (98-EV-140), United States Magistrate Judge for the Eastern District of Virginia, is "in favor of the spirit of the proposed change" to Evidence Rule 103, but states that the proposal "does not take into consideration the procedures set forth in 28 U.S.C. 636(b)(1)(A) and F.R.Civ.P. 72(a) for objecting to rulings by Magistrate Judges." Under those provisions, if a Magistrate Judge makes a nondispositive ruling in a case not tried by the

Magistrate Judge pursuant to the consent of the parties, the objecting party to preserve a claim of error on appeal must file an objection to that ruling within 10 days and have the ruling considered by a District Judge. Judge Miller suggests that a cross-reference to these statutory and Rules provisions be included in Rule 103 "so that parties will be alerted to their duty to timely object."

The National Association of Independent Insurers (98-EV-141) supports the proposed amendment to Evidence Rule 103.

Jon B. Comstock, Esq. (98-EV-142) supports the proposed change to Evidence Rule 103. He has "always found it disconcerting how the rules have allowed parties and courts to be mired in so much uncertainty on this issue when a clarifying rule, such as the proposed amendment, could provide fair guidance to all parties."

M.R. Smith, Esq. (98-EV-169) supports the proposed amendment to Evidence Rule 103.

The Section on Courts, Lawyers and the Administration of Justice of the District of Columbia Bar (98-EV-172) agrees with the proposed change to Evidence Rule 103.

The Federal Magistrate Judges Association (98-EV-173) supports the proposed amendment to Evidence Rule 103 as a desirable means of establishing "a uniform practice regarding the finality of rulings on motions concerning the admissibility of evidence."

Nine members of the leadership of the Section of Litigation of the American Bar Association (98-EV-174) support the proposed amendment to Evidence Rule 103, on the grounds that the proposal "would clarify existing law and establish certainty by

placing lawyers on notice of the circumstances under which it is necessary to renew pretrial objections" and "would likely encourage counsel to inquire on the record whether a pretrial ruling is final."

Rule 404. Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes

(a) Character evidence generally. — Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) Character of accused. — Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same~~;~~, or if evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under subdivision (a)(2), evidence of the same trait of character of the accused offered by the prosecution;

(2) Character of alleged victim. — Evidence of a pertinent trait of character of the alleged victim of the

crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide case to rebut evidence that the alleged victim was the first aggressor;

(3) Character of witness.— Evidence of the character of a witness, as provided in rules 607, 608, and 609.

(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, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence

it intends to introduce at trial.

COMMITTEE NOTE

Rule 404(a)(1) has been amended to provide that when the accused attacks the character of an alleged victim under subdivision (a)(2) of this Rule, the door is opened to an attack on the same character trait of the accused. Current law does not allow the government to introduce negative character evidence as to the accused unless the accused introduces evidence of good character. *See, e.g., United States v. Fountain,* 768 F.2d 790 (7th Cir. 1985) (when the accused offers proof of self-defense, this permits proof of the alleged victim's character trait for peacefulness, but it does not permit proof of the accused's character trait for violence).

The amendment makes clear that the accused cannot attack the alleged victim's character and yet remain shielded from the disclosure of equally relevant evidence concerning the same character trait of the accused. For example, in a murder case with a claim of self-defense, the accused, to bolster this defense, might offer evidence of the alleged victim's violent disposition. If the government has evidence that the accused has a violent character, but is not allowed to offer this evidence as part of its rebuttal, the jury has only part of the information it needs for an informed assessment of the probabilities as to who was the initial aggressor. This may be the case even if evidence of the accused's prior violent acts is admitted under Rule 404(b), because such evidence can be admitted only for limited purposes and not to show action in conformity with the accused's character on a specific occasion. Thus, the amendment is designed to permit a more balanced presentation of character evidence when an accused chooses to attack the character of the alleged victim.

The amendment does not affect the admissibility of evidence of specific acts of uncharged misconduct offered for a purpose other than proving character under Rule 404(b). Nor does it affect the standards for proof of character by evidence of other sexual behavior or sexual offenses under Rules 412-415. By its placement in Rule 404(a)(1), the amendment covers only proof of character by way of reputation or opinion.

The amendment does not permit proof of the accused's character if the accused merely uses character evidence for a purpose other than to prove the alleged victim's propensity to act in a certain way. *See United States v. Burks,* 470 F.2d 432, 434-5 (D.C.Cir. 1972) (evidence of the alleged victim's violent character, when known by the accused, was admissible "on the issue of whether or not the defendant reasonably feared he was in danger of imminent great bodily harm"). Finally, the amendment does not permit proof of the accused's character when the accused attacks the alleged victim's character as a witness under Rule 608 or 609.

The term "alleged" is inserted before each reference to "victim" in the Rule, in order to provide consistency with Evidence Rule 412.

GAP Report--Proposed Amendment to Rule 404(a)

The Committee made the following changes to the published draft of the proposed amendment to Evidence Rule 404(a):

1. The term "a pertinent trait of character" was changed to "the same trait of character", in order to limit the scope of the government's rebuttal. The Committee Note was revised to accord with this change in the text.

2. The word "alleged" was added before each reference in the Rule to a "victim" in order to provide consistency with Evidence Rule 412. The Committee Note was amended to accord with this change in the text.

3. The Committee Note was amended to clarify that rebuttal is not permitted under this Rule if the accused proffers evidence of the alleged victim's character for a purpose other than to prove the alleged victim's propensity to act in a certain manner.

Summary of Comments on the Proposed Amendment to Evidence Rule 404(a)

Professor Richard Friedman (98-EV 007) states that the proposed amendment to Evidence Rule 404(a) "makes sense, at least up to a point." He believes that it should be "altered to make the evidence of defendant's character admissible only to the extent necessary to rebut an implication that may be drawn from the evidence of the alleged victim's character." He argues that allowing the defendant's character to be attacked is only justifiable when it is necessary to provide a balanced presentation after the defendant attacks the victim's character. This occurs only when the case is "symmetrical in nature", such as where there is a "mutually provocative altercation" and the defendant claims that the victim is the first aggressor.

Professor Laird Kirkpatrick (98-EV 011) states that a rule permitting the accused to be attacked on any "pertinent" character trait, after an attack on the victim's character, would be "overbroad." He argues that there is "no justification for opening the door to character traits of the defendant other than the one corresponding to the character trait of the victim about which the defendant offered

evidence." He also urges that the Committee Note should provide that "if evidence of the victim's character is offered by the defendant for a non-propensity reason, such evidence is not being offered pursuant to FRE 404(a) and does not open the door to evidence of the defendant's character."

The Fellows of the American College of Trial Lawyers (98-EV-016) favor the proposed amendment.

Hon. Edward R. Becker (98-EV-065), Chief Judge of the United States Court of Appeals for the Third Circuit, supports the proposed amendment to Evidence Rule 404(a), noting that it is "extremely well justified by the Committee's accompanying commentary."

Professor Douglas E. Beloof (98-EV-066) supports the proposed amendment to Evidence Rule 404(a). He states that the proposal promotes the interests that victims of crime have in the pursuit of truth. He concludes that the proposal rectifies the inequity in the current rule, which "permits the defendant to savage the character of the crime victim while assuring the defendant that he has complete immunity from even the possibility that his character can be put at issue."

Prentice H. Marshall, Esq. (98-EV-071) states that "the proposed amendment to Rule 404(a)(1) is reasonable."

The State Bar of Arizona (98-EV-075) supports the adoption of the proposed amendment to Evidence Rule 404(a).

The Phoenix and Tucson Chapters of the Federal Bar Association (98-EV-080) support the proposed amendment to Evidence Rule 404(a).

The Federal Rules of Evidence Committee of the American College of Trial Lawyers (98-EV-084) supports the proposed amendment to Evidence Rule 404(a), so long as it is limited to admitting the same character trait that the accused has raised with respect to the victim. In the Committee's view, the current rule "unfairly tilts the 'playing field' in favor of the accused" and "may lead to unjust acquittals." The Committee concludes that it is not an impingement on any fundamental right to permit the prosecution to "complete the picture of what occurred" by proving the accused's violent disposition, "particularly when it is the accused who 'opens the door' to the issue of violent character."

The Committee on Federal Courts of the Association of the Bar of the City of New York (98-EV-088) believes "that evidence of the character trait of the accused should be admitted under the proposed rule *only* if there is a logical nexus between the character evidence with respect to the victim and the character evidence with respect to the accused, i.e., that the character evidence pertaining to the defendant is relevant to rebut the character evidence offered with respect to the victim." The Committee asserts that the proposed amendment "raises constitutional problems with respect to a defendant's rights under the confrontation clause of the Sixth Amendment" because the proposal "could be construed as imposing an unwarranted penalty upon the defendant for presenting a defense and offering evidence attacking the character of the victim."

Professor David P. Leonard (98-EV-092) opposes the proposed amendment to Evidence Rule 404(a). He argues that the "balance" sought by the proposed amendment is "illusory" and concludes that "[t]he effort to create a kind of symmetry between the rights of the defendant to foreclose inquiry into character and the rights of the government to respond to the defendant's choice actually upsets the delicate balance maintained by the current rule."

Professors Bruce Comly French and Elizabeth Phillips Marsh (98-EV-103) reported on a meeting of some members of the Committee on Rules of Evidence and Criminal procedure of the Criminal Justice Section of the American Bar Association. The professors noted that "there is no existing American Bar Association policy known to us that addresses these changes." Nonetheless, the professors report that the "overwhelming majority of those present at the Committee meeting expressed the view that the proposed changed to Federal Rule of Evidence 404(a)(1) should not be implemented."

A Number of Professors of Evidence and Others Interested in Evidentiary Policy (98-EV-104) "respectfully urge the Standing Committee not to adopt the proposed amendment to Federal rule [sic] of Evidence 404(a)(1)."

Russell T. Golla, Esq. (98-EV-112) supports the proposed amendment to Evidence Rule 404(a).

The Court Rules and Administration Committee of the Minnesota State Bar Association (98-EV-126) believes that the proposed amendment to Evidence Rule 404(a), as it was released for public comment, "raises issues of constitutional fairness to the Defendant." The Committee "would like clarification on whether the trait offered by the prosecution is limited to the same trait as offered by the Defendant. The concern is that without such clarification, the prosecution could try to introduce evidence of a *different* trait, thus opening the door to prejudicial testimony and chilling a Defendant's trial strategy."

The National Association of Independent Insurers (98-EV-141) supports the proposed amendment to Evidence Rule 404(a).

Hon. William J. Giovan (98-EV-160) Judge for the Circuit Court for the Third Judicial Circuit of Michigan, believes that "in order to remedy the problem perceived by the Committee, it is preferable, instead of significantly expanding an exception to a favored rule of exclusion, to cut Rule 404(a)(2) back to the limited scope of the common law exception as it related to the victim of homicide."

M.R. Smith, Esq. (98-EV-169) supports the proposed amendment to Evidence Rule 404(a).

The Section on Courts, Lawyers and the Administration of Justice of the District of Columbia Bar (98-EV-172) agrees with the proposed changes to Evidence Rule 404(a).

The Federal Magistrate Judges Association (98-EV-173) states that the proposed amendment to Evidence Rule 404(a) "would make the current practice more even handed, however, the impact of the potential to punish a defendant for pursuing highly relevant information can not be overlooked."

Nine members of the leadership of the Section of Litigation of the American Bar Association (98-EV-174) believe that the proposed amendment to Evidence Rule 404(a), as it was issued for public comment, should be revised to permit an attack on the defendant's character only if the character trait is the same trait that the defendant raised as to the victim, and then only if the character trait is pertinent to the case.

Rule 701. Opinion Testimony by Lay Witnesses

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, ~~and~~ (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue~~.~~, and (c) not based on scientific, technical or other specialized knowledge within the scope of Rule 702.

COMMITTEE NOTE

Rule 701 has been amended to eliminate the risk that the reliability requirements set forth in Rule 702 will be evaded through the simple expedient of proffering an expert in lay witness clothing. Under the amendment, a witness' testimony must be scrutinized under the rules regulating expert opinion to the extent that the witness is providing testimony based on scientific, technical, or other specialized knowledge within the scope of Rule 702. *See generally Asplundh Mfg. Div. v. Benton Harbor Eng'g*, 57 F.3d 1190 (3d Cir. 1995). By channeling testimony that is actually expert testimony to Rule 702, the amendment also ensures that a party will not evade the expert witness disclosure requirements set forth in Fed.R.Civ.P. 26 and Fed.R.Crim.P.16 by simply calling an expert witness in the guise of a layperson. *See* Joseph, *Emerging Expert Issues Under the 1993*

Disclosure Amendments to the Federal Rules of Civil Procedure, 164 F.R.D. 97, 108 (1996) (noting that "there is no good reason to allow what is essentially surprise expert testimony", and that "the Court should be vigilant to preclude manipulative conduct designed to thwart the expert disclosure and discovery process"). *See also United States v. Figueroa-Lopez*, 125 F.3d 1241, 1246 (9th Cir. 1997) (law enforcement agents testifying that the defendant's conduct was consistent with that of a drug trafficker could not testify as lay witnesses; to permit such testimony under Rule 701 "subverts the requirements of Federal Rule of Criminal Procedure 16(a)(1)(E)").

The amendment does not distinguish between expert and lay *witnesses*, but rather between expert and lay *testimony*. Certainly it is possible for the same witness to provide both lay and expert testimony in a single case. *See, e.g., United States v. Figueroa-Lopez*, 125 F.3d 1241, 1246 (9th Cir. 1997) (law enforcement agents could testify that the defendant was acting suspiciously, without being qualified as experts; however, the rules on experts were applicable where the agents testified on the basis of extensive experience that the defendant was using code words to refer to drug quantities and prices). The amendment makes clear that any part of a witness' testimony that is based upon scientific, technical, or other specialized knowledge within the scope of Rule 702 is governed by the standards of Rule 702 and the corresponding disclosure requirements of the Civil and Criminal Rules.

The amendment is not intended to affect the "prototypical example[s] of the type of evidence contemplated by the adoption of Rule 701 relat[ing] to the appearance of persons or things, identity, the manner of conduct, competency of a person, degrees of light or darkness, sound, size, weight, distance, and an endless number of items that cannot be described factually in words apart from

inferences." *Asplundh Mfg. Div. v. Benton Harbor Eng'g*, 57 F.3d 1190, 1196 (3d Cir. 1995).

For example, most courts have permitted the owner or officer of a business to testify to the value or projected profits of the business, without the necessity of qualifying the witness as an accountant, appraiser, or similar expert. *See, e.g., Lightning Lube, Inc. v. Witco Corp.* 4 F.3d 1153 (3d Cir. 1993) (no abuse of discretion in permitting the plaintiff's owner to give lay opinion testimony as to damages, as it was based on his knowledge and participation in the day-to-day affairs of the business). Such opinion testimony is admitted not because of experience, training or specialized knowledge within the realm of an expert, but because of the particularized knowledge that the witness has by virtue of his or her position in the business. The amendment does not purport to change this analysis. Similarly, courts have permitted lay witnesses to testify that a substance appeared to be a narcotic, so long as a foundation of familiarity with the substance is established. *See, e.g., United States v. Westbrook,* 896 F.2d 330 (8th Cir. 1990) (two lay witnesses who were heavy amphetamine users were properly permitted to testify that a substance was amphetamine; but it was error to permit another witness to make such an identification where she had no experience with amphetamines). Such testimony is not based on specialized knowledge within the scope of Rule 702, but rather is based upon a layperson's personal knowledge. If, however, that witness were to describe how a narcotic was manufactured, or to describe the intricate workings of a narcotic distribution network, then the witness would have to qualify as an expert under Rule 702. *United States v. Figueroa-Lopez, supra.*

The amendment incorporates the distinctions set forth in *State v. Brown*, 836 S.W.2d 530, 549 (1992), a case involving former Tennessee Rule of Evidence 701, a rule that precluded lay witness

testimony based on "special knowledge." In *Brown,* the court declared that the distinction between lay and expert witness testimony is that lay testimony "results from a process of reasoning familiar in everyday life", while expert testimony "results from a process of reasoning which can be mastered only by specialists in the field." The court in *Brown* noted that a lay witness with experience could testify that a substance appeared to be blood, but that a witness would have to qualify as an expert before he could testify that bruising around the eyes is indicative of skull trauma. That is the kind of distinction made by the amendment to this Rule.

GAP Report--Proposed Amendment to Rule 701

The Committee made the following changes to the published draft of the proposed amendment to Evidence Rule 701:

1. The words "within the scope of Rule 702" were added at the end of the proposed amendment, to emphasize that the Rule does not require witnesses to qualify as experts unless their testimony is of the type traditionally considered within the purview of Rule 702. The Committee Note was amended to accord with this textual change.

2. The Committee Note was revised to provide further examples of the kind of testimony that could and could not be proffered under the limitation imposed by the proposed amendment.

Summary of Comments on the Proposed Amendment to Evidence Rule 701

The Product Liability Advisory Council (98-EV-001) supports the proposed amendment to Evidence Rule 701 as necessary

to prevent "surprise expert testimony or to thwart the expert disclosure rules." The Council concludes that "the proposed amendment is consistent with the federal courts' interpretation of Rule 701" and that in the absence of specialized knowledge or training, "no witness should be able to offer a personal opinion on scientific or technical subjects."

Peter B. Ellis, Esq. (98-EV-002) strongly supports the Advisory Committee's proposed amendment to Rule 701. He declares that the proposed amendment "has the virtue of substantially clarifying the ambiguous distinction between 'lay' and 'expert' testimony, and should tend to eliminate the markedly inconsistent rulings that have surrounded this issue . . ." He concludes that the amendment "should reduce the incidence of unfair surprise that results from both sharp practice and genuine misconception." Mr. Ellis notes that "unexpected expert opinion from a 'lay witness' can place the opposing party at a substantial disadvantage" and that the remedy of a deposition during the trial imposes a substantial burden on trial counsel and is often inadequate as well, "particularly where one's ability effectively to impeach the witness's opinion would require substantial additional document discovery or depositions of the witness's co-workers." Mr. Ellis disagrees with the contention that the proposed amendment works a major change in the law. He states that the proposed amendment "merely clarifies what I have always understood to be the appropriate line of demarcation between 'lay' and 'expert' opinion. In my experience, trial judges find the interplay between Rules 701 and 702 to be unclear and confusing, and the amendment would go a long way toward eliminating that confusion."

Professor Richard Friedman (98-EV 007) argues that the proposed amendment is "likely to be counterproductive." He contends that the proposal, as issued for public comment, draws "too

sharp a dichotomy between testimony that is and is not based on specialized knowledge." He concludes that any possibility of discovery abuse should be handled by amendment of the Civil and Criminal Rules, "not by a potentially restrictive and confusing limitation on the lay opinion rule."

Lawyers for Civil Justice (98-EV-009) support the proposed amendment to Evidence Rule 701 as necessary to eliminate a "growing and very troubling prospect: that expert testimony is being 'sneaked in' under the guise of a lay witness because of the lower threshold standards for lay witnesses."

Professor Laird Kirkpatrick (98-EV 011) opposes the proposed amendment, contending that many types of lay opinions that routinely have been admitted would be excluded under the proposal as issued for public comment—such as testimony of a lay witness that a certain substance was cocaine.

The Fellows of the American College of Trial Lawyers (98-EV-016) favor the proposed amendment to Evidence Rule 701.

The Committee on Federal Procedure of the New York State Bar Association (98-EV-017) supports the proposed amendment to Evidence Rule 701, as being necessary to prevent an "end run" around the requirements for expert testimony imposed by Evidence Rule 702 and the discovery provisions of the Civil and Criminal Rules.

The Defense Research Institute (98-EV-020) states that the proposed amendment to Evidence Rule 701 "should help eliminate increasing attempts to present expert testimony through lay witnesses without subjecting the testimony to *Daubert* scrutiny or the disclosure requirements of Fed.R.Civ.P. 26."

E. Wayne Taff, Esq. (98-EV-021) states that the proposed amendment to Rule 701 is not only beneficial, but also "critical to ensuring the integrity of testimony presented in the United States District Courts."

Kevin J. Dunne, Esq. (98-EV-025) favors the proposed revision to Rule 701 because it "helps prevent expert testimony from inappropriately 'coming in the back door.'"

Diane R. Crowley, Esq. (98-EV-029) states that "[t]he changes to Rule 701 will prevent subterfuge involving experts who cannot meet the reliability test of Rule 702 and attempt to bring in their opinions as a lay witness not subject to such judicial scrutiny. Without the revised Rule 701 to prevent such conduct, the benefits to be derived from the revised Rule 702 will be greatly diminished."

Harold Lee Schwab, Esq. (98-EV-033) states that the Advisory Committee "properly notes the very real risk factor" that "expert witnesses might proffer opinions under the guise of lay testimony and thereby evade the reliability requirements of FRE 702 and the disclosure requirements of Fed.R.Civ.P. 26 and Fed.R.Crim.P. 16." He concludes that the proposed amendment "properly reinforces the original intent of [Evidence Rule] 701."

James A. Grutz, Esq. (98-EV-036) opposes the proposed amendment to Evidence Rule 701.

Thomas A. Conlin, Esq. (98-EV-037) is in favor of the proposed amendment. He states: "Under the changes proposed by the committee, there will be a bright line between opinion testimony which is coming in as expert testimony — and must therefore meet the expert foundational requirements — and that which is coming in as a lay opinion."

Scott B. Elkind, Esq. (98-EV-038) opposes the proposed amendment to Evidence Rule 701, asserting that it would "impair the rights of aggrieved parties" by prohibiting lay witnesses from expressing opinions based on specialized knowledge.

Richard L. Duncan, Esq. (98-EV-044) is opposed to the proposed change to Evidence Rule 701.

The Chemical Manufacturers Association, the Defense Research Institute, the Federation of Insurance and Corporate Defense Counsel, the International Association of Defense Counsel, Lawyers for Civil Justice, the National Association of Manufacturers, and the Product Liability Advisory Council (98-EV-047) support the proposed amendment to Evidence Rule 701, noting that it is "designed to prevent lay witnesses from testifying as experts and thereby circumventing the reliability requirements of Rule 702 and the disclosure requirements relating to expert witnesses" and that these "salutary purposes fully justify the Proposed Amendment insofar as it would apply in civil litigation."

William B. Dodero, Esq. (98-EV-052) states that the proposed amendment to Evidence Rule 701 is part of "a much-needed revision which will finally allow trial courts to fulfill their role as gatekeeper for the admission of expert evidence."

Jay H. Tressler, Esq. (98-EV-055) favors the proposed amendment to Evidence Rule 701. He states that "all too often" a person described as a lay witness "is called upon to offer expert opinions never before disclosed under Rule 26." He concludes that "[t]estimony of lay witnesses should not be admitted under Rule 701 if the testimony is based upon 'scientific, technical, or other

specialized knowledge.' Lay witnesses testimony on matters of common knowledge which have been traditionally admitted can and should be allowed under Rule 701."

The Committee on Civil Litigation of the United States District Court for the Eastern District of New York (98-EV-056) opposes the proposed amendment, because the proposal "would not enlighten the courts on the difference between lay and expert testimony."

The Minnesota Defense Lawyers Association (98-EV-057) "strongly supports" the proposed change to Evidence Rule 701. The Association has found "so-called 'expert' testimony routinely being offered, on both sides of the litigation, which is not based on scientific, technical, or other specialized knowledge." The Association concludes that the evidence rules "must require proper foundation before this 'evidence' finds its way to a jury."

Charles F. Preuss, Esq. (98-EV-062) states that the proposed amendment "would appropriately limit lay witness testimony to matters of common knowledge" and that this limitation would prevent "expert testimony from coming in the back door."

Professor Michael H. Graham (98-EV-063) supports the proposed amendment to Evidence Rule 701.

Hon. Edward R. Becker (98-EV-065), Chief Judge of the United States Court of Appeals for the Third Circuit, supports the proposed amendment to Evidence Rule 701, noting that it is "extremely well justified by the Committee's accompanying commentary." Judge Becker does not believe that the term "specialized knowledge" is vague, and predicts that review of trial court rulings in this area "will be largely deferential."

Steven H. Howard, Esq. (98-EV-067) opposes the proposed amendment to Evidence Rule 701.

William A. Coates, Esq. (98-EV-068) states that the proposed amendment to Evidence Rule 701 "appropriately" limits lay witness testimony to opinions or inferences not based on scientific, technical or other specialized knowledge. He concludes that the proposal "is consistent with the federal court's interpretations of Rule 701 in which persons have been permitted to testify as a lay witness only if their opinions or inferences do not require any specialized knowledge and cannot be reached by any ordinary person."

Prentice H. Marshall, Esq. (98-EV-071) states that the proposed amendment to Evidence Rule 701 is "appropriate."

The Federal Courts Committee of the Chicago Council of Lawyers (98-EV-074) believes that the proposed amendment to Evidence Rule 701 responds to a "non-problem." The Committee would, in any event, "expect district courts to temper the revised rule with common sense. For instance, we would not expect that every treating physician would have to be qualified as an expert witness or that an auto mechanic who worked on a defective car would be barred from testifying about the repair record, even if the testimony is based partly on specialized knowledge."

The State Bar of Arizona (98-EV-075) supports the adoption of the proposed amendment to Evidence Rule 701.

The National Association of Railroad Trial Counsel (98-EV-077) supports the proposed change to Evidence Rule 701. The Association concludes that the proposal would "eliminate the practice of proffering an expert as a lay witness thereby avoiding both the

reliability requirements of Rule 702 and the disclosure requirements pertaining to expert testimony."

The Chicago Chapter of the Federal Bar Association (98-EV-078) supports the proposed amendment to Evidence Rule 701.

The Federal Practice Section of the Connecticut Bar Association (98-EV-079) endorses the proposed amendment to Evidence Rule 701, on the ground that it "would prevent the offering of expert testimony from a lay witness, which would otherwise circumvent the reliability requirements of Rule 702 and the corresponding disclosure requirements of expert testimony."

The Phoenix and Tucson Chapters of the Federal Bar Association (98-EV-080) support the proposed amendment to Evidence Rule 701.

The Pennsylvania Trial Lawyers Association (98-EV-081) supports the proposed amendment to Evidence Rule 701, "with the exception of the inclusion of the words 'specialized knowledge' which we contend should be eliminated." The Association expresses concern that the "specialized knowledge" limitation in the proposed amendment would require witnesses who would testify to the identity of handwriting or to the speed of a vehicle to be qualified as experts. The Association believes "that the words 'scientific' and 'technical' sufficiently demonstrate the type of testimony which should not be permitted by a lay witness."

The Federal Rules of Evidence Committee of the American College of Trial Lawyers (98-EV-084) supports the proposed amendment to Evidence Rule 701, stating that it will help to prevent "the inappropriate admission of expert evidence under the guise of lay testimony, often to the surprise of adverse parties."

J. Ric Gass, Esq. (98-EV-090) states that the proposed amendment to Evidence Rule 701 is an "important and necessary and appropriate" revision.

J. Greg Allen, Esq. (98-EV-093) opposes the proposed amendment to Evidence Rule 701.

Alvin A. Wolff, Jr., Esq. (98-EV-095) opposes the proposed amendment to Evidence Rule 701.

Alan Voos, Esq. (98-EV-096) opposes the proposed amendment to Evidence Rule 701. He states that "individuals with hands-on, real-life experience are quite frequently more qualified to testify on scientific, technical or other specialized matters" and that they should be allowed to do so under Rule 701.

The Federal Bar Council Committee on Second Circuit Courts (98-EV-097) states that "the integrity of the amendments to FRE 702 calls likewise for the adoption of the proposed amendment to FRE 701 to avoid the possibility of 'end runs' around FRE 702."

Professors Bruce Comly French and Elizabeth Phillips Marsh (98-EV-103) reported on a meeting of some members of the Committee on Rules of Evidence and Criminal procedure of the Criminal Justice Section of the American Bar Association. The professors noted that "there is no existing American Bar Association policy known to us that addresses these changes." Nonetheless, the professors report that "[t]hose present at the meeting split evenly on the question of whether Rule 701 should be amended, particularly if Rule 702 is not changed."

The Association of American Trial Lawyers (98-EV-108) opposes the proposed amendment to Evidence Rule 701, on the

ground that it would "extend the Rule 702 restrictions into yet another area." The Association also states that the "potential breadth of this proposal leads us to wonder if even high-school-level coursework used in developing an opinion could excluded [sic] on the ground that it is 'specialized'!"

The Board of Governors of the Oregon State Bar (98-EV-110) states that the proposed amendment to Evidence Rule 701 "appropriately distinguishes lay witnesses from experts whose testimony is based on scientific, technical, or other specialized knowledge."

The New Hampshire Trial Lawyers Association (98-EV-111) opposes the proposed change to Evidence Rule 701 as "a further effort to unreasonably restrict and constrain the trial as a search for truth."

Russell T. Golla, Esq. (98-EV-112) supports the proposed amendment to Evidence Rule 701.

James B. Ragan, Esq. (98-EV-113) objects to the proposed amendment because "[b]y making the addition proposed almost any lay witness opinions can be excluded through careful cross-examination."

The Ohio Academy of Trial Lawyers (98-EV-114) opposes the proposed amendment to Evidence Rule 701.

Hon. Carl Barbier (98-EV-115), District Judge for the Eastern District of Louisiana, states that the proposed amendment to Evidence Rule 701 does "not seem objectionable."

Michael W. Day, Esq. (98-EV-116) opposes the proposed amendment to Evidence Rule 701.

The Philadelphia Bar Association (98-EV-118) supports the proposed amendment to Evidence Rule 701, but recommends that the Committee Note be revised to clarify the meaning of "specialized" knowledge "and should address directly whether the amendment would change the result in cases that have traditionally regarded certain opinions as nonexpert, even though based on knowledge that could be considered 'specialized' in some sense — e.g., the opinion of the owner of a business on its value or anticipated profits." The Association states that the amendment "appears to be a beneficial change to reestablish the distinction between lay and expert opinions. It would also discourage evasion of the requirement for pretrial disclosure of expert opinions through characterizing the opinions as 'lay' rather than 'expert'."

The Sturdevant Law Firm (98-EV-119) opposes the proposed amendment to Evidence Rule 701.

The Board of Governors of the Maryland Trial Lawyers Association (98-EV-120) opposes the proposed amendment to Evidence Rule 701.

The Lawyers' Committee for Civil Rights Under Law (98-EV-123) has "serious concerns" regarding the proposed amendment to Evidence Rule 701.

The Arizona Trial Lawyers Association (98-EV-124) opposes the proposed amendment to Evidence Rule 701.

The Washington Legal Foundation (98-EV-125) states that "some courts have been too lenient in permitting lay witnesses to

testify on complicated, technical subjects" and that the result of admitting such testimony "is to defeat Rule 702's carefully established limitations on use of testimony on technical subjects." The Foundation "wholeheartedly supports this proposed revision, which makes explicit what should have been clear (but apparently was not) from the current text of Rule 701: parties seeking to introduce opinion testimony of a technical nature may do so *only* if they can meet the requirements of Rule 702 regarding testimony by experts."

The Court Rules and Administration Committee of the Minnesota State Bar Association (98-EV-126) is concerned "that the Rule, as drafted, may actually preclude lay testimony based upon specialized knowledge, where the testimony does not rise to the level of expert testimony."

Nissan North America, Inc. (98-EV-130) supports the proposed amendment to Evidence Rule 701.

Michael A. Pohl, Esq. (98-EV-133) opposes the proposed amendment to Evidence Rule 701.

The International Academy of Trial Lawyers (98-EV-134) is in favor of the proposed amendment to Evidence Rule 701, contending that there is "no justifiable reason for not requiring that testimony based on scientific, technical or other specialized knowledge should not be treated as expert opinion, subject to the requirements of Rule 702, and subject to the disclosure requirements of the Criminal and Civil Rules . . ."

Rod D. Squires, Esq. (98-EV-136) opposes the proposed amendment to Evidence Rule 701.

B.C. Cornish, Esq. (98-EV-137) opposes the proposed amendment to Evidence Rule 701.

The National Association of Independent Insurers (98-EV-141) supports the proposed amendment to Evidence Rule 701.

Jon B. Comstock, Esq. (98-EV-142) strongly supports the proposed change to Evidence Rule 701. He states that this "simple modification will have a significant and commendable effect on trial practice."

Ken Baughman, Esq. (98-EV-146) opposes the proposed amendment to Evidence Rule 701.

Pamela O'Dwyer, Esq. (98-EV-147) opposes the proposed amendment to Evidence Rule 701.

Matthew B. Weber, Esq. (98-EV-152) opposes the proposed amendment to Evidence Rule 701, on the ground that it is "an unnecessary limit on the discretion of the court, which is well suited to control the presentation of this type of evidence."

J. Michael Black, Esq. (98-EV-153) is opposed to the proposed amendment to Evidence Rule 701.

Norman E. Harned, Esq. (98-EV-155) opposes the proposed change to Evidence Rule 701.

P. James Rainey, Esq. (98-EV-156) opposes the proposed amendment to Evidence Rule 701.

Daniel W. Aherin, Esq. (98-EV-157) opposes the proposed amendment to Evidence Rule 701, on the ground that it is "geared

towards preventing individual litigants from presenting reasonable expert testimony."

The Atlantic Legal Foundation (98-EV-158) supports the proposed amendment because it favors "improving the reliability of opinion evidence generally."

Paul T. Hoffman, Esq. (98-EV-159) opposes the proposed amendment to Evidence Rule 701.

Edward J. Carreiro, Jr., Esq. (98-EV-162) opposes the proposed amendment to Evidence Rule 701.

R. Gary Stephens, Esq. (98-EV-163) opposes the proposed amendment to Evidence Rule 701.

Anthony Tarricone, Esq. (98-EV-166) opposes the proposed amendment to Evidence Rule 701.

Annette Gonthier Kiely, Esq. (98-EV-167) opposes the proposed amendment to Evidence Rule 701, opining that "it effectively eliminates a whole sector of our society, those whose hands-on experience has given them a superior knowledge in a technical, skilled or other specialized area from giving an opinion which is reliable, well-founded and of assistance to the trier-of-fact in determining the facts in issue."

M.R. Smith, Esq. (98-EV-169) supports the proposed amendment to Evidence Rule 701.

Navistar International Transportation Corp. (98-EV-171) supports the proposed amendment to Evidence Rule 701, stating that it "will allow the courts to determine which testimony needs to be

scrutinized under the *Daubert* guidelines, thus precluding expert testimony from so-called lay witnesses to be 'back-doored' without the proper scrutiny."

The Section on Courts, Lawyers and the Administration of Justice of the District of Columbia Bar (98-EV-172) agrees with the proposed change to Evidence Rule 701.

The Federal Magistrate Judges Association (98-EV-173) supports the proposed amendment to Evidence Rule 701 as a helpful "loophole-closing change."

Nine members of the leadership of the Section of Litigation of the American Bar Association (98-EV-174) support the proposed amendment to Evidence Rule 701.

Brian T. Stern, Esq. (98-EV-177) opposes the proposed amendment to Evidence Rule 701, contending that the Advisory Committee "had no empirical evidence to support any claim of abuse" under the current Rule 701.

The National Employment Lawyers Association (98-EV-179) opposes the proposed amendment to Evidence Rule 701, contending that the Advisory Committee "had no empirical evidence to support any claim of abuse" under the current Rule 701.

Rule 702. Testimony by Experts

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by

knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise~~.~~, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

COMMITTEE NOTE

Rule 702 has been amended in response to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and to the many cases applying *Daubert*, including *Kumho Tire Co. v. Carmichael*, 119 S.Ct. 1167 (1999). In *Daubert* the Court charged trial judges with the responsibility of acting as gatekeepers to exclude unreliable expert testimony, and the Court in *Kumho* clarified that this gatekeeper function applies to all expert testimony, not just testimony based in science. *See also Kumho*, 119 S.Ct. at 1178 (citing the Committee Note to the proposed amendment to Rule 702, which had been released for public comment before the date of the *Kumho* decision). The amendment affirms the trial court's role as gatekeeper and provides some general standards that the trial court must use to assess the reliability and helpfulness of proffered expert testimony. Consistently with *Kumho*, the Rule as amended provides that all types of expert testimony present questions of admissibility for the trial court in deciding whether the evidence is reliable and helpful. Consequently, the admissibility of all expert testimony is governed by the principles of Rule 104(a). Under that Rule, the proponent has the burden of establishing that the pertinent

admissibility requirements are met by a preponderance of the evidence. *See Bourjaily v. United States,* 483 U.S. 171 (1987).

Daubert set forth a non-exclusive checklist for trial courts to use in assessing the reliability of scientific expert testimony. The specific factors explicated by the *Daubert* Court are (1) whether the expert's technique or theory can be or has been tested—that is, whether the expert's theory can be challenged in some objective sense, or whether it is instead simply a subjective, conclusory approach that cannot reasonably be assessed for reliability; (2) whether the technique or theory has been subject to peer review and publication; (3) the known or potential rate of error of the technique or theory when applied; (4) the existence and maintenance of standards and controls; and (5) whether the technique or theory has been generally accepted in the scientific community. The Court in *Kumho* held that these factors might also be applicable in assessing the reliability of non-scientific expert testimony, depending upon "the particular circumstances of the particular case at issue." 119 S.Ct. at 1175.

No attempt has been made to "codify" these specific factors. *Daubert* itself emphasized that the factors were neither exclusive nor dispositive. Other cases have recognized that not all of the specific *Daubert* factors can apply to every type of expert testimony. In addition to *Kumho,* 119 S.Ct. at 1175, *see Tyus v. Urban Search Management,* 102 F.3d 256 (7th Cir. 1996) (noting that the factors mentioned by the Court in *Daubert* do not neatly apply to expert testimony from a sociologist). *See also Kannankeril v. Terminix Int'l, Inc.,* 128 F.3d 802, 809 (3d Cir. 1997) (holding that lack of peer review or publication was not dispositive where the expert's opinion was supported by "widely accepted scientific knowledge"). The standards set forth in the amendment are broad enough to require consideration of any or all of the specific *Daubert* factors where

appropriate.

Courts both before and after *Daubert* have found other factors relevant in determining whether expert testimony is sufficiently reliable to be considered by the trier of fact. These factors include:

> (1) Whether experts are "proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying." *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1317 (9th Cir. 1995).
>
> (2) Whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion. *See General Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997) (noting that in some cases a trial court "may conclude that there is simply too great an analytical gap between the data and the opinion proffered").
>
> (3) Whether the expert has adequately accounted for obvious alternative explanations. *See Claar v. Burlington N.R.R.*, 29 F.3d 499 (9th Cir. 1994) (testimony excluded where the expert failed to consider other obvious causes for the plaintiff's condition). *Compare Ambrosini v. Labarraque*, 101 F.3d 129 (D.C.Cir. 1996) (the possibility of some uneliminated causes presents a question of weight, so long as the most obvious causes have been considered and reasonably ruled out by the expert).
>
> (4) Whether the expert "is being as careful as he would be in his regular professional work outside his paid litigation consulting." *Sheehan v. Daily Racing Form, Inc.*, 104 F.3d

940, 942 (7th Cir. 1997). *See Kumho Tire Co. v. Carmichael,* 119 S.Ct. 1167, 1176 (1999) (*Daubert* requires the trial court to assure itself that the expert "employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field").

(5) Whether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give. *See Kumho Tire Co. v. Carmichael,* 119 S.Ct.1167, 1175 (1999) (*Daubert's* general acceptance factor does not "help show that an expert's testimony is reliable where the discipline itself lacks reliability, as, for example, do theories grounded in any so-called generally accepted principles of astrology or necromancy."); *Moore v. Ashland Chemical, Inc.,* 151 F.3d 269 (5th Cir. 1998) (en banc) (clinical doctor was properly precluded from testifying to the toxicological cause of the plaintiff's respiratory problem, where the opinion was not sufficiently grounded in scientific methodology); *Sterling v. Velsicol Chem. Corp.,* 855 F.2d 1188 (6th Cir. 1988) (rejecting testimony based on "clinical ecology" as unfounded and unreliable).

All of these factors remain relevant to the determination of the reliability of expert testimony under the Rule as amended. Other factors may also be relevant. *See Kumho,* 119 S.Ct. 1167, 1176 ("[W]e conclude that the trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable."). Yet no single factor is necessarily dispositive of the reliability of a particular expert's testimony. *See, e.g., Heller v. Shaw Industries, Inc.,* 167 F.3d 146, 155 (3d Cir. 1999) ("not only must each stage of the expert's testimony be reliable, but each stage must be evaluated practically and flexibly without bright-line exclusionary (or inclusionary)

rules."); *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1317, n.5 (9th Cir. 1995) (noting that some expert disciplines "have the courtroom as a principal theatre of operations" and as to these disciplines "the fact that the expert has developed an expertise principally for purposes of litigation will obviously not be a substantial consideration.").

A review of the caselaw after *Daubert* shows that the rejection of expert testimony is the exception rather than the rule. *Daubert* did not work a "seachange over federal evidence law," and "the trial court's role as gatekeeper is not intended to serve as a replacement for the adversary system." *United States v. 14.38 Acres of Land Situated in Leflore County, Mississippi,* 80 F.3d 1074, 1078 (5th Cir. 1996). As the Court in *Daubert* stated: "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." 509 U.S. at 595. Likewise, this amendment is not intended to provide an excuse for an automatic challenge to the testimony of every expert. *See Kumho Tire Co. v. Carmichael,* 119 S.Ct.1167, 1176 (1999) (noting that the trial judge has the discretion "both to avoid unnecessary 'reliability' proceedings in ordinary cases where the reliability of an expert's methods is properly taken for granted, and to require appropriate proceedings in the less usual or more complex cases where cause for questioning the expert's reliability arises.").

When a trial court, applying this amendment, rules that an expert's testimony is reliable, this does not necessarily mean that contradictory expert testimony is unreliable. The amendment is broad enough to permit testimony that is the product of competing principles or methods in the same field of expertise. *See, e.g., Heller v. Shaw Industries, Inc.*, 167 F.3d 146, 160 (3d Cir. 1999) (expert testimony cannot be excluded simply because the expert uses one test

rather than another, when both tests are accepted in the field and both reach reliable results). As the court stated in *In re Paoli R.R. Yard PCB Litigation*, 35 F.3d 717, 744 (3d Cir. 1994), proponents "do not have to demonstrate to the judge by a preponderance of the evidence that the assessments of their experts are correct, they only have to demonstrate by a preponderance of evidence that their opinions are reliable. . . . The evidentiary requirement of reliability is lower than the merits standard of correctness." *See also Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1318 (9th Cir. 1995) (scientific experts might be permitted to testify if they could show that the methods they used were also employed by "a recognized minority of scientists in their field."); *Ruiz-Troche v. Pepsi Cola,* 161 F.3d 77, 85 (1st Cir. 1998) ("*Daubert* neither requires nor empowers trial courts to determine which of several competing scientific theories has the best provenance.").

The Court in *Daubert* declared that the "focus, of course, must be solely on principles and methodology, not on the conclusions they generate." 509 U.S. at 595. Yet as the Court later recognized, "conclusions and methodology are not entirely distinct from one another." *General Elec. Co. v. Joiner,* 522 U.S. 136, 146 (1997). Under the amendment, as under *Daubert,* when an expert purports to apply principles and methods in accordance with professional standards, and yet reaches a conclusion that other experts in the field would not reach, the trial court may fairly suspect that the principles and methods have not been faithfully applied. *See Lust v. Merrell Dow Pharmaceuticals, Inc.*, 89 F.3d 594, 598 (9th Cir. 1996). The amendment specifically provides that the trial court must scrutinize not only the principles and methods used by the expert, but also whether those principles and methods have been properly applied to the facts of the case. As the court noted in *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 745 (3d Cir. 1994), "*any* step that renders the analysis unreliable . . . renders the expert's testimony inadmissible.

This is true whether the step completely changes a reliable methodology or merely misapplies that methodology."

If the expert purports to apply principles and methods to the facts of the case, it is important that this application be conducted reliably. Yet it might also be important in some cases for an expert to educate the factfinder about general principles, without ever attempting to apply these principles to the specific facts of the case. For example, experts might instruct the factfinder on the principles of thermodynamics, or bloodclotting, or on how financial markets respond to corporate reports, without ever knowing about or trying to tie their testimony into the facts of the case. The amendment does not alter the venerable practice of using expert testimony to educate the factfinder on general principles. For this kind of generalized testimony, Rule 702 simply requires that: (1) the expert be qualified; (2) the testimony address a subject matter on which the factfinder can be assisted by an expert; (3) the testimony be reliable; and (4) the testimony "fit" the facts of the case.

As stated earlier, the amendment does not distinguish between scientific and other forms of expert testimony. The trial court's gatekeeping function applies to testimony by any expert. *See Kumho Tire Co. v. Carmichael,* 119 S.Ct. 1167, 1171 (1999) ("We conclude that *Daubert's* general holding -- setting forth the trial judge's general 'gatekeeping' obligation -- applies not only to testimony based on 'scientific' knowledge, but also to testimony based on 'technical' and 'other specialized' knowledge."). While the relevant factors for determining reliability will vary from expertise to expertise, the amendment rejects the premise that an expert's testimony should be treated more permissively simply because it is outside the realm of science. An opinion from an expert who is not a scientist should receive the same degree of scrutiny for reliability as an opinion from an expert who purports to be a scientist. *See Watkins v. Telsmith,*

Inc., 121 F.3d 984, 991 (5th Cir. 1997) ("[I]t seems exactly backwards that experts who purport to rely on general engineering principles and practical experience might escape screening by the district court simply by stating that their conclusions were not reached by any particular method or technique."). Some types of expert testimony will be more objectively verifiable, and subject to the expectations of falsifiability, peer review, and publication, than others. Some types of expert testimony will not rely on anything like a scientific method, and so will have to be evaluated by reference to other standard principles attendant to the particular area of expertise. The trial judge in all cases of proffered expert testimony must find that it is properly grounded, well-reasoned, and not speculative before it can be admitted. The expert's testimony must be grounded in an accepted body of learning or experience in the expert's field, and the expert must explain how the conclusion is so grounded. *See, e.g.*, American College of Trial Lawyers, *Standards and Procedures for Determining the Admissibility of Expert Testimony after* Daubert, 157 F.R.D. 571, 579 (1994) ("[W]hether the testimony concerns economic principles, accounting standards, property valuation or other non-scientific subjects, it should be evaluated by reference to the 'knowledge and experience' of that particular field.").

The amendment requires that the testimony must be the product of reliable principles and methods that are reliably applied to the facts of the case. While the terms "principles" and "methods" may convey a certain impression when applied to scientific knowledge, they remain relevant when applied to testimony based on technical or other specialized knowledge. For example, when a law enforcement agent testifies regarding the use of code words in a drug transaction, the principle used by the agent is that participants in such transactions regularly use code words to conceal the nature of their activities. The method used by the agent is the application of extensive experience to analyze the meaning of the conversations. So

long as the principles and methods are reliable and applied reliably to the facts of the case, this type of testimony should be admitted.

Nothing in this amendment is intended to suggest that experience alone — or experience in conjunction with other knowledge, skill, training or education — may not provide a sufficient foundation for expert testimony. To the contrary, the text of Rule 702 expressly contemplates that an expert may be qualified on the basis of experience. In certain fields, experience is the predominant, if not sole, basis for a great deal of reliable expert testimony. *See, e.g., United States v. Jones,* 107 F.3d 1147 (6th Cir. 1997) (no abuse of discretion in admitting the testimony of a handwriting examiner who had years of practical experience and extensive training, and who explained his methodology in detail); *Tassin v. Sears Roebuck,* 946 F.Supp. 1241, 1248 (M.D.La. 1996) (design engineer's testimony can be admissible when the expert's opinions "are based on facts, a reasonable investigation, and traditional technical/mechanical expertise, and he provides a reasonable link between the information and procedures he uses and the conclusions he reaches"). *See also Kumho Tire Co. v. Carmichael,* 119 S.Ct.1167, 1178 (1999) (stating that "no one denies that an expert might draw a conclusion from a set of observations based on extensive and specialized experience.").

If the witness is relying solely or primarily on experience, then the witness must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts.. The trial court's gatekeeping function requires more than simply "taking the expert's word for it." *See Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 43 F.3d 1311, 1319 (9th Cir. 1995) ("We've been presented with only the experts' qualifications, their conclusions and their assurances of reliability. Under *Daubert,* that's not enough."). The more subjective

and controversial the expert's inquiry, the more likely the testimony should be excluded as unreliable. *See O'Conner v. Commonwealth Edison Co.*, 13 F.3d 1090 (7th Cir. 1994) (expert testimony based on a completely subjective methodology held properly excluded). *See also Kumho Tire Co. v. Carmichael*, 119 S.Ct. 1167, 1176 (1999) ("[I]t will at times be useful to ask even of a witness whose expertise is based purely on experience, say, a perfume tester able to distinguish among 140 odors at a sniff, whether his preparation is of a kind that others in the field would recognize as acceptable.").

Subpart (1) of Rule 702 calls for a quantitative rather than qualitative analysis. The amendment requires that expert testimony be based on sufficient underlying "facts or data." The term "data" is intended to encompass the reliable opinions of other experts. See the original Advisory Committee Note to Rule 703. The language "facts or data" is broad enough to allow an expert to rely on hypothetical facts that are supported by the evidence. Id.

When facts are in dispute, experts sometimes reach different conclusions based on competing versions of the facts. The emphasis in the amendment on "sufficient facts or data" is not intended to authorize a trial court to exclude an expert's testimony on the ground that the court believes one version of the facts and not the other.

There has been some confusion over the relationship between Rules 702 and 703. The amendment makes clear that the sufficiency of the basis of an expert's testimony is to be decided under Rule 702. Rule 702 sets forth the overarching requirement of reliability, and an analysis of the sufficiency of the expert's basis cannot be divorced from the ultimate reliability of the expert's opinion. In contrast, the "reasonable reliance" requirement of Rule 703 is a relatively narrow inquiry. When an expert relies on inadmissible information, Rule 703 requires the trial court to determine whether that information is

of a type reasonably relied on by other experts in the field. If so, the expert can rely on the information in reaching an opinion. However, the question whether the expert is relying on a *sufficient* basis of information—whether admissible information or not—is governed by the requirements of Rule 702.

The amendment makes no attempt to set forth procedural requirements for exercising the trial court's gatekeeping function over expert testimony. *See* Daniel J. Capra, *The* Daubert *Puzzle*, 38 Ga.L.Rev. 699, 766 (1998) ("Trial courts should be allowed substantial discretion in dealing with *Daubert* questions; any attempt to codify procedures will likely give rise to unnecessary changes in practice and create difficult questions for appellate review."). Courts have shown considerable ingenuity and flexibility in considering challenges to expert testimony under *Daubert*, and it is contemplated that this will continue under the amended Rule. *See, e.g., Cortes-Irizarry v. Corporacion Insular*, 111 F.3d 184 (1st Cir. 1997) (discussing the application of *Daubert* in ruling on a motion for summary judgment); *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 736, 739 (3d Cir. 1994) (discussing the use of *in limine* hearings); *Claar v. Burlington N.R.R.*, 29 F.3d 499, 502-05 (9th Cir. 1994) (discussing the trial court's technique of ordering experts to submit serial affidavits explaining the reasoning and methods underlying their conclusions).

The amendment continues the practice of the original Rule in referring to a qualified witness as an "expert." This was done to provide continuity and to minimize change. The use of the term "expert" in the Rule does not, however, mean that a jury should actually be informed that a qualified witness is testifying as an "expert". Indeed, there is much to be said for a practice that prohibits the use of the term "expert" by both the parties and the court at trial. Such a practice "ensures that trial courts do not inadvertently put their

stamp of authority" on a witness' opinion, and protects against the jury's being "overwhelmed by the so-called 'experts'." Hon. Charles Richey, *Proposals to Eliminate the Prejudicial Effect of the Use of the Word "Expert" Under the Federal Rules of Evidence in Criminal and Civil Jury Trials,* 154 F.R.D. 537, 559 (1994) (setting forth limiting instructions and a standing order employed to prohibit the use of the term "expert" in jury trials).

GAP Report--Proposed Amendment to Rule 702

The Committee made the following changes to the published draft of the proposed amendment to Evidence Rule 702:

1. The word "reliable" was deleted from Subpart (1) of the proposed amendment, in order to avoid an overlap with Evidence Rule 703, and to clarify that an expert opinion need not be excluded simply because it is based on hypothetical facts. The Committee Note was amended to accord with this textual change.

2. The Committee Note was amended throughout to include pertinent references to the Supreme Court's decision in *Kumho Tire Co. v. Carmichael*, which was rendered after the proposed amendment was released for public comment. Other citations were updated as well.

3. The Committee Note was revised to emphasize that the amendment is not intended to limit the right to jury trial, nor to permit a challenge to the testimony of every expert, nor to preclude the testimony of experience-based experts, nor to prohibit testimony based on competing methodologies within a field of expertise.

4. Language was added to the Committee Note to clarify that no single factor is necessarily dispositive of the reliability inquiry mandated by Evidence Rule 702.

Summary of Comments on the Proposed Amendment to Evidence Rule 702

The Product Liability Advisory Council (98-EV-001) supports the proposed amendment to Evidence Rule 702 "without reservation." The Council states: "As set forth in the Advisory Committee Notes to this proposed rule, these amendments would ensure that before expert testimony can be presented to a trier of fact, it has met a threshold test of its reliability, which precisely expresses the intent of the Supreme Court as set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 591, 594 (1993), and *General Electric Co. v. Joiner*, 118 S.Ct. 512 (1997)."

Bert Black, Esq., and Clifton T. Hutchinson, Esq. (98-EV-003) would prefer that no changes be made to Evidence Rule 702. To the extent the proposed amendments go forward, they suggest that the rule refer to an expert's "reasoning" rather than "principles or methods." They also argue that the proposal "misses what we believe is an important distinction between validity and reliability."

Professor Edward J. Imwinkelreid (98-EV-004) supports the proposed amendment to Evidence Rule 702 insofar as it requires that expert testimony be the product of reliable principles and methods, and that the witness apply the principles and methods reliably to the fact of the case. He approves the proposal's requirement of "sound procedure" which is a "fundamental guarantee of the value of scientific testimony." Professor Imwinkelreid

suggests, however, that the proposed subpart (1) of the rule be amended to require that "expert testimony is sufficiently based upon reliable case specific facts or data."

Professor Richard Friedman (98-EV 007) believes that the proposed amendment to Evidence Rule 702 is unnecessary. He also fears that "requiring a non-scientific expert to speak in terms of reliable principles and methods creates too rigorous a demand."

James D. Bartolini, Esq. (98-EV-008) fears that the proposed amendment "will result in expensive and protracted *Daubert* hearings before the case is reached for trial" and "will be primarily a hammer used against all claimants and all experts, however innocuous their expert opinions are."

Lawyers for Civil Justice (98-EV-009) state that the "proposed revisions to Rule 702 will strengthen judicial decision making by ensuring that scientific expert testimony will have a greater degree of reliability before it is presented to the jury. By enhancing the trial court's role as gatekeeper for the admission of expert evidence, the proposed revisions add emphasis to the principles articulated" in *Daubert* and *Joiner*. The group concludes that the proposed amendment "enforces the important principles of *Daubert*, clarifies ambiguities and conflicts in interpretations and wisely affirms the vital role of the trial judge as gatekeeper for all expert testimony."

The Evidence Project (98-EV-010) agrees that Rule 702 should be amended but argues that the Advisory Committee's proposed amendment suffers from "a number of flaws" that are "both structural and substantive in nature." The perceived structural flaw is that Evidence Rule 702 "lumps two separate issues—qualifications of the testifying expert and the reliability of the principles underlying

of the testifying expert and the reliability of the principles underlying the testimony—under the rubric of a single rule." The perceived substantive flaw is that the amendment "does nothing to assist judges in discerning what is meant" by reliable expert testimony." Finally, the Evidence Project recommends that the preponderance of the evidence standard of admissibility should be placed explicitly in the Rule, rather than in the Committee Note.

Professor Laird Kirkpatrick (98-EV 011) states that the proposed amendment is likely to have a "problematic application" with respect to experts who rely mainly on experience. He states that a witness's "experience may not include much in the way of 'principles and methods' but may still be helpful to the jury if based on repeated observations of similar events."

The Association of Trial Lawyers of America (98-EV-012) is opposed to the proposed amendment to Evidence Rule 702. The Association states that the proposal "would render inadmissible the testimony of many experts who have testified without controversy since the inception of the Federal Rules of Evidence." Also, "it would massively increase the costs to the courts and the litigants, requiring interminable Rule 702 hearings."

Hon. Myron Bright (98-EV-013), Judge of the Eighth Circuit Court of Appeals, believes that the current Evidence Rule 702 is operating well and should not be amended. He argues that the proposed amendment unjustifiably shifts power from the jury to the judge, "without any true standards." The confusion in the courts over the meaning of *Daubert* should, in Judge Bright's view, be handled by adjudication rather than by rulemaking.

The Fellows of the American College of Trial Lawyers (98-EV-016) favor the proposed amendment.

The Committee on Federal Procedure of the New York State Bar Association (98-EV-017) generally supports the proposed amendment to Evidence Rule 702, stating that the standard imposed "is sufficiently particular to provide guidance over the range of expert opinion testimony . . . While sufficiently general so that it does not impose a specific test obviously inapplicable to certain forms of expertise today, much less to those that may be invented in the next ten or twenty years." However, the Committee is opposed to subpart (1) of the proposed proviso to Rule 702 as it was issued for public comment (i.e., that the expert's testimony must be "sufficiently based on reliable facts or data"), on the ground that this standard "improperly impinges on the role of the trier of fact." The Committee concludes that "Courts addressing reliability issues should only examine the methodology and the application of the methodology to the facts, not the facts themselves."

Charles D. Weller, Esq. (98-EV-018) submitted an article that was useful to the Advisory Committee in its analysis of whether proposed expert testimony is the product of reliable principles and methods.

William Petrus, Esq. (98-EV-019) objects to the proposed amendment to Evidence Rule 702 insofar as it extends the *Daubert* analysis to mechanical engineering experts. He argues that the rule would work a particular "hardship" on plaintiffs in automobile product liability litigation because "the only people with the means to design a new car, test that new car and crush its roof to determine roof strength would be employees of automobile manufacturers."

The Defense Research Institute (98-EV-020) states that the proposed amendment to Evidence Rule 702 "will add greater clarity regarding the duties of the trial judge and require a greater degree of reliability before the testimony is presented to the jury." The Institute

states that "proper exercise by the court of its expert witness gatekeeper function on an early and continuing basis will facilitate earlier reasonable resolution of the court action, thereby reducing cost and delay rather than increasing it."

E. Wayne Taff, Esq. (98-EV-021) states that the proposed amendment to Evidence Rule 702 is not only beneficial, but also "critical to ensuring the integrity of testimony presented in the United States District Courts." He states that the proposal "will insure that the finder of fact has a reliable basis upon which to make a determination, without resort to conjecture or speculation."

Hon. D. Brock Hornby (98-EV-023), Chief Judge of the United States District Court for the District of Maine, argues that the proposed amendment to Evidence Rule 702 will impose substantial litigation costs due to "the proliferation of motions to preclude expert testimony and *voir dire* hearing held in advance of trial that the growing elaborateness of the gatekeeping rules entails." Judge Hornby asks: "Where is the evidence that lawyers are not able to cross-examine effectively and show whatever limitations there are on the bases for expert opinion testimony that is not scientific?"

Professor Eileen A. Scallen (98-EV-024), suggests that "the Committee explicitly make the admissibility of expert testimony an issue to be determined under Fed.R.Evid. 104(b) . . . as an issue of relevancy conditioned on fact." She argues that "[g]iving the sole power to the judge to determine reliability usurps the jury's traditional role in evaluating the credibility of evidence." She concludes that "text, precedent, historical and constitutional concerns, as well as pragmatic considerations, suggest that the Advisory Committee should take the opportunity of amending the expert testimony rules to clarify that the admissibility of expert testimony is to be determined under Federal Rule of Evidence 104(b)."

Kevin J. Dunne, Esq. (98-EV-025) supports the proposal to amend Evidence Rule 702. In his view, complaints that the proposal deprives the jury of its role in assessing the weight of the evidence are unfounded. He states: "The phrase, 'it goes to the weight' has become synonymous with *laissez-faire* judging and a license for admissibility of junk science. Indeed, this . . . argument can be used to eliminate all rules of evidence . . ."

Thomas E. Carroll, Esq. (98-EV-027) opposes the proposed amendment insofar as it would embody the principles of *Daubert*. He contends that *Daubert* has "tripled the cost of litigation in matters involving significant issues of expert testimony." He concludes that the proposal overlooks "the ability of juries, good lawyers who subject testimony of experts to extensive cross-examination, and the ability of judges to rules under FRE 702 as it now stands."

Norman W. Edmund (98-EV-028) suggests that the proposed amendment make a more specific reference to, and explication of, the scientific method.

Diane R. Crowley, Esq. (98-EV-029) "wholeheartedly" supports the proposed amendment to Evidence Rule 702. She states that "[i]t is important to point out to the critics of change that the proposed version of Rule 702 does not impose the full *Daubert* criteria on every opinion offered by every expert witness. . . . The proposed change asks for nothing more than indications of reliability . . ."

Professor Lynn McLain (98-EV-030) opposes the proposed amendment to Evidence Rule 702. He complains that the proposal "would make the court, in every case involving expert testimony, go through a time-consuming tripartite preliminary fact-finding exercise." He also objects that the proposal "seems to push the judge

into a 104(a) role that impinges on the jury's fact-finding." Professor McLain claims that the sufficiency of an expert's basis should be decided under the conditional relevance standard of Evidence Rule 104(b).

Pamela F. Rochlin, Esq. (98-EV-032) objects to the proposed changes to Evidence Rule 702. She declares that the proposal would "allow judges, whose decisions will be reviewable on an abuse of discretion standard only, to eliminate plaintiff's experts and similarly dismiss plaintiff's cases." She also expresses concern that the proposed rule "will require a *Daubert* hearing in every case where experts are proffered" thus adding "another layer of time and expense to already crowded court dockets."

Harold Lee Schwab, Esq. (98-EV-033) states that the Advisory Committee "properly decided not to codify the *Daubert* guidelines in the [text] of the rule since it is obvious that one or more of the factors articulated in that case might not apply to some other expert and his/her discipline whereas other non-enumerated factors might be relevant. The standards set forth in the amendment are broad enough to encompass one or more of the *Daubert* factors but also other factors where appropriate." Mr. Schwab concludes that "[t]here can be no valid objection to this amendment."

Henry G. Miller, Esq. (98-EV-034) opposes the proposed change to Rule 702 on the ground that it is "autocratic and less than egalitarian to so distrust the jury's determination of which expert to believe."

Robert M. N. Palmer, Esq. (98-EV-035) opposes the proposed amendment's extension of the *Daubert* gatekeeping function to non-scientific expert testimony. He argues that application

of "the *Daubert* principles to all expert opinion would work to the benefit of large corporations and to the very serious detriment of injured consumers even where the expert opinions and principles underlying them are not seriously disputed."

James A. Grutz, Esq. (98-EV-036) is opposed to the proposed amendment to Evidence Rule 702 on the ground that it places "far too much discretion in the trial court's hands" leaving the potential for "eroding away a litigant's right to trial by jury."

Thomas A. Conlin, Esq. (98-EV-037) opposes the proposed amendment to Evidence Rule 702, stating that the proposed amendatory language is "superfluous." He declares that courts can use existing rules to "weed out testimony which is — essentially — without *foundation*." Mr. Conlin encourages the Advisory Committee to "let cross-examination work its wonders, and let jurors, not judges, decide cases."

Scott B. Elkind, Esq. (98-EV-038) opposes the proposed amendment to Evidence Rule 702, asserting that it would "impair the rights of aggrieved parties" by applying the *Daubert* principles to non-scientific experts.

John Borman, Esq. (98-EV-039) opposes the proposed amendment to Evidence Rule 702 as an unwarranted expansion of the trial court's gatekeeping role. He concludes: "The proposed rule will permit trial judges to choose between opposing witnesses, exclude expert testimony where the judge disagrees, and infringe on the litigant's constitutional right to a jury trial."

Donald A. Shapiro, Esq. (98-EV-040) is opposed to the proposed amendment to Evidence Rule 702. He states that the proposal provides "too much discretion to the trial judges to exclude

expert testimony" and might allow trial judges "to pick and choose which experts they dislike and to bar their testimony as opposed to letting juries decide the credibility and reliability of experts."

Michael J. Miller, Esq. (98-EV-042) is opposed to the proposed amendment, on the ground that it will empower federal judges to "arbitrarily" determine the admissibility of expert testimony. He concludes that the proposal "will ultimately add an enormous amount of litigation to the courts as defendants will assert every plaintiff's expert is outside of the perceived defense mainstream."

M. Robert Blanchard, Esq. (98-EV-043) states that "the proposed change to Rule 702 will permit trial judges to simply choose which side of the case they want to win, as happens too often already, and will infringe on the litigants' constitutional right to a jury trial."

Richard L. Duncan, Esq. (98-EV-044) is opposed to the proposed change to Evidence Rule 702. He argues that the proposed amendment would "infringe a litigant's constitutional right to a jury trial and create unequal justice" because it would "invite the wealthier litigant to raise the standards of proof to an impossibly high level which a poor litigant will be unable to afford and will encourage the tendency of hourly paid attorneys to substitute Motions in Limine for a trial on the evidence."

The Chemical Manufacturers Association, the Defense Research Institute, the Federation of Insurance and Corporate Defense Counsel, the International Association of Defense Counsel, Lawyers for Civil Justice, the National Association of Manufacturers, and the Product Liability Advisory Council (98-EV-047) "fully support" the proposed amendment to Rule 702, on the grounds that it "clarifies the trial court's function as gatekeeper with

respect to the admissibility of all types of expert testimony, not just scientific testimony, and sets some meaningful standards for determining the reliability and the admissibility of such testimony." These organizations suggest, however, "that the Committee consider adding language to the Note emphasizing the need for focus on the expert's reasoning; the need for a valid explanatory connection between the information relied upon and the conclusion reached; and the need to clarify the relationship between 'validity' and 'reliability.'"

The National Board of the American Board of Trial Advocates (98-EV-049) "opposes the proposed amendment to Evidence Rule 702 because it invades the province of the jury, adversely impacts and even preempts the fact-finding and decision-making powers of the jury, places an onerous burden on the judiciary, litigants and counsel and does not promote the efficient administration of justice."

The Lawyers' Club of San Francisco (98-EV-050) opposes the proposed amendment to Evidence Rule 702. It contends that "the proposed amendment is a dramatic enlargement of the power of the trial judge in controlling what is and what is not admissible expert testimony." The Club concludes that under the amendment, the trial court could "choose between two opposing witnesses, and exclude the testimony of the witnesses with which they disagree, thereby taking away the right to a jury trial on the opinion governing the outcome of the case."

William B. Dodero, Esq. (98-EV-052) states that the proposed amendment to Evidence Rule 702 is part of "a much-needed revision which will finally allow trial courts to fulfill their role as gatekeeper for the admission of expert evidence." He observes that "[t]he uniformity in having all circuits apply the same threshold

requirements prior to the admission of expert testimony will ensure at least some basic level of reliability prior to the admission of expert opinion", and that the proposed amendment "will allow the courts to embark on a simple three-part analysis prior to the admission of any expert testimony."

Jay H. Tressler, Esq. (98-EV-055) is in favor of the proposed amendment to Evidence Rule 702. He states that the proposal "offers a necessary extension of the gatekeeper function" that is needed to "avoid unreliable, untested opinions which have not been predicated upon reliable methodology or subjected to adequate peer review scrutiny."

The Committee on Civil Litigation of the United States District Court for the Eastern District of New York (98-EV-056) opposes the proposed amendment to Evidence Rule 702, on the ground that it is "unnecessary." The Committee states that the proposal "would not clarify the *Daubert* test; it merely changes the vocabulary that would be used."

Weldon S. Wood, Esq. (98-EV-058) supports the proposed amendment to Evidence Rule 702.

Michael S. Allred, Esq. (98-EV-059) opposes the proposed amendment on the ground that it will "place the federal bench in a position that it can entertain or exclude evidence at a whim based upon a subjective appraisal of the testimony."

Russell W. Budd, Esq. (98-EV-061) opposes the proposed revision to Evidence Rule 702. He believes that the proposal "will license the trial judge to usurp the role of the jury".

Charles F. Preuss, Esq. (98-EV-062) supports the proposed amendment and observes that the Committee Note "appropriately acknowledges the relevance of the non-exclusive checklist of factors discussed in *Daubert* and other cases for assessing the reliability of scientific expert testimony, but no attempt is made to codify them as part of Rule 702."

Professor Michael H. Graham (98-EV-063) supports the proposed amendment to Evidence Rule 702. He states that the proposal "correctly asks whether *any* expert's explanative theory is 'the product of reliable principles and methods.' Thus the focus is switched from whether the explanative theory actually 'works' . . . to whether the explanative theory is the product of, i.e., is derived applying, reliable principles and methods . . . thereby providing the court with sufficient confidence that it 'may work.'" Professor Graham argues that the position taken by the proposal is consistent with the position taken by "many Courts of Appeals."

Frank Stainback, Esq. (98-EV-064) supports the proposed amendment to Evidence Rule 702 and states that it is "important that an attempt be made to provide a more uniform interpretation of *Daubert* in the federal courts."

Hon. Edward R. Becker (98-EV-065), Chief Judge of the United States Court of Appeals for the Third Circuit, supports the proposed amendment to Evidence Rule 702, noting that it is "extremely well justified by the Committee's accompanying commentary."

Steven H. Howard, Esq. (98-EV-067) opposes the proposed amendment to Evidence Rule 702.

William A. Coates, Esq. (98-EV-068) supports the proposed amendment because it helps to "insure that scientific expert testimony must have some measure of reliability before it is presented to a jury."

William Petrus, Esq. (98-EV-070) opposes the proposed amendment to Evidence Rule 702. He contends that the proposal imposes unnecessarily strict limitations on the admissibility of expert testimony, under which "hundreds of thousands of dollars would be required to satisfy pedantic concerns."

Prentice H. Marshall, Esq. (98-EV-071) states that the proposed amendment to Evidence Rule 702 is "appropriate" although he wonders whether the proposal will "increase the proliferation of motions for summary judgment based upon a motion to strike under the *Daubert* case."

Trial Lawyers for Public Justice (98-EV-072) oppose the proposed amendment to Evidence Rule 702. They argue that the rule "will pose undue restrictions on the admissibility of expert testimony"; that it would "unwisely expand trial judges' gatekeeping role, by permitting them to substitute their judgments on reliability of expert testimony for that of the experts' peers"; and that "the text of the rule and the Advisory Committee Note are unclear as to how courts should determine evidentiary reliability."

The Federal Courts Committee of the Chicago Council of Lawyers (98-EV-074) contends that the proposed amendment "raises the bar" on such "historically probative evidence" as police and mechanics' testimony.

The State Bar of Arizona (98-EV-075) supports the adoption of the proposed amendment to Evidence Rule 702.

The Seventh Circuit Bar Association (98-EV-076) believes that the proposed amendment to Evidence Rule 702 is "warranted" and "will bring greater rigor and uniformity to a trial judge's application of the Supreme Court's *Daubert* decision.

The National Association of Railroad Trial Counsel (98-EV-077) states that the proposed amendment to Evidence Rule 702 "would be a welcomed change considering the confusion in this area."

The Chicago Chapter of the Federal Bar Association (98-EV-078) supports the proposed amendment to Evidence Rule 702.

The Federal Practice Section of the Connecticut Bar Association (98-EV-079) endorses the proposed amendment to Evidence Rule 702.

The Phoenix and Tucson Chapters of the Federal Bar Association (98-EV-080) support the proposed amendment to Evidence Rule 702.

The Pennsylvania Trial Lawyers Association (98-EV-081) opposes the proposed amendment to Evidence Rule 702. It fears that under the proposal, "courts may feel compelled to evaluate expert testimony under a unitary, rigid standard that does not take into account the nature of the opinions being offered."

The Federal Rules of Evidence Committee of the American College of Trial Lawyers (98-EV-084) states that the proposed amendment to Evidence Rule 702 "accurately and clearly states the three-pronged reliability requirement for establishing admissibility of expert evidence under *Daubert, General Elec. v. Joiner,* 118 S.Ct. 512 (1997), and the better reasoned opinions of the

Joiner, 118 S.Ct. 512 (1997), and the better reasoned opinions of the lower federal courts." The Committee also "strongly supports the proposal to make explicit that the reliability premise of *Daubert* applies to all expert evidence." The Committee notes that "a number of difficult issues have and will arise with respect to the reliability of evidence proffered by 'experts by experience,' particularly in those instances in which there is adverse expert testimony based upon apparently reliable scientific or technical knowledge." The Committee concludes, however, that "the Advisory Committee is right to leave those issues for resolution by the courts over time."

Professor Adina Schwartz (98-EV-085) states that "[b]y allowing admissibility to be based not on stature among scientists but on judges' own scientific views or extra-scientific biases, proposed Rule 702 licenses unjustified encroachment on the jury's role."

Professor Victor Gold (98-EV-086) criticizes the proposed amendment as imposing "an enormous burden on trial judges to evaluate the reliability of expert testimony in all fields of knowledge." Such a burden "may encourage judicial resort to arbitrariness and bias on issues that can be outcome determinative but usually will be rubberstamped by appellate courts under a toothless standard of harmless error."

John R. Lanza, Esq. (98-EV-087) states that the proposed amendment "now places the trial court not as 'a gatekeeper' but as a 'super juror'. This results in costly evidentiary hearings and in preclusion of case determinant expert testimony, based upon the trial judge's interpretation of facts."

Dr. Michael A. Centanni (98-EV-089) urges that the Committee Note to the proposed amendment to Rule 702 "include

two basic questions that are fundamental to determining reliable science— 'Does the science work, and Why?'"

J. Ric Gass, Esq. (98-EV-090) states that the proposed amendment to Evidence Rule 702 is an "important and necessary and appropriate" revision.

The Oregon Trial Lawyers Association (98-EV-091) opposes the proposed amendment to Evidence Rule 702. The Association contends that "[t]his substantial change to Rule 702 would render inadmissible the testimony of many experts who have testified without controversy since the creation of the Federal Rules of Evidence." It concludes that the proposed amendment "would result in an additional layer of litigation, more complex than a summary judgment proceeding, where the court is to determine not only whether there are material facts in dispute, but also to make a determination regarding the reliability of those facts, a task which will prove expensive and time consuming for the litigants and the court."

J. Greg Allen, Esq. (98-EV-093) opposes the proposed amendment to Evidence Rule 702, arguing that "more discretion given to the trial court judges on the allowance of expert testimony" will result in "inequitable treatment."

Shawn W. Carey, Esq. (98-EV-094) states that the proposed amendment "would be unduly burdensome and would prevent doctors whose diagnosis are based on years of training and experience to be second guessed unless they performed scientific experiments."

Alvin A. Wolff, Jr., Esq. (98-EV-095) opposes the proposed amendment to Evidence Rule 702 on the ground that it "would trample the rights of Plaintiffs who would be denied their day in Court."

Alan Voos, Esq. (98-EV-096) opposes the proposed amendment to Evidence Rule 702. He states that "[r]ather than codifying *Daubert* the Committee should formulate a rule which does away with *Daubert* and allows new, cutting edge, but reliable scientific expert testimony to assist triers of fact in civil trials."

The Federal Bar Council Committee on Second Circuit Courts (98-EV-097) states that "although the current Rule could remain 'as is' . . . it would be rather anomalous not to reflect the substance of the Supreme Court's decision in the very Rule that deals with the matter raised in *Daubert*. Accordingly, the Committee supports the proposed amendment's purpose to incorporate the gatekeeper function announced in *Daubert* into FRE 702." The Committee asserts that the proposed amendment "correctly focuses on the reliability of the facts, the principles or methods of analysis, and the application of such principles or methods to the facts." It believes that "it is impractical to seek more precise formulations." The Committee also asserts that the proposed amendment's application to non-scientific expert testimony "is highly desirable" and that :the gatekeeping function announced in *Daubert* is even more important in the 'soft' disciplines than in the hard sciences." The Committee notes that under *Daubert*, as under the proposed amendment, it is possible that more experienced-based expert testimony will be excluded than had previously been the case. However, where that testimony is in fact unreliable, "the exclusion of such testimony should be regarded as the desirable and intended consequence of a vigorous application of the *Daubert* principles."

The Montana Trial Lawyers Association (98-EV-098) opposes the proposed amendment to Evidence Rule 702, stating that the reliability requirements set forth in the proposal "go way beyond judicial gatekeeping and usurp the fact finder and jury roles." The Association states that "[t]he very term 'reliability' is inherently a

credibility determination" and that the factors bearing on reliability set forth in the Committee Note should not be dispositive.

Kelly Elswick, Esq. (98-EV-099) objects to "the additional criteria in proposed Rule 702 as applied to non-scientific expert testimony. The problem with this rule is that a great deal of expertise, in fact most expertise, is based upon experience. . . . Therefore, there are no delineated formulas to follow."

The Trial Lawyers Association of Metropolitan Washington, DC (98-EV-100) strongly opposes the proposed change to Evidence Rule 702. The Association believes that the proposal "raises the bar of admissibility on expert opinions to a height that totally usurps the jury's traditional role as the fact-finder. By requiring that federal judges make 'reliability' findings about the facts and methods used by experts, the proposed rule would have judges become the real triers of fact concerning experts." The Association asserts that the proposal is based on a factual assumption that jurors are incompetent—a reflection of "an elitist bias." It concludes that the proposed amendment also creates "a bias against experienced-based experts by trying to measure them against standards that have no bearing on their work."

The Michigan Trial Lawyers Association (98-EV-101) opines that the proposed amendment "does not adequately define 'reliable facts or data,' 'reliable principles and methods,' or the manner in which the judge is supposed to determine whether the expert has 'applied the principles and methods reliable [sic] to the facts of the case." The Association asserts that the "lack of clarity in the proposed amendment will spawn protracted litigation, creating a significant burden on litigants and the courts." It concludes that "[t]rial judges do not, and should not, have the authority to exclude experts merely because the expert, for example, represents the

minority view in his or her field, or disagrees with the leading authority on a particular subject. The proposed amendment, however, would do just that."

Peter S. Everett, Esq. (98-EV-102) objects to the proposed amendment on the ground that it is "designed to apply the *Daubert* decision more broadly." Mr. Everett declares that *Daubert* is premised upon "an unhealthy disrespect for the abilities of jurors to sort out meritorious claims from those that lack merit."

Professors Bruce Comly French and Elizabeth Phillips Marsh (98-EV-103) reported on a meeting of some members of the Committee on Rules of Evidence and Criminal procedure of the Criminal Justice Section of the American Bar Association. The professors noted that "there is no existing American Bar Association policy known to us that addresses these changes." Nonetheless, the professors report that some Committee members at the meeting expressed the view that "the attempt to codify the *Daubert* decision . . . created more problems than it solved."

A Number of Professors of Evidence and Others Interested in Evidentiary Policy (98-EV-105) state that the "proposed changes to Federal Rule of Evidence 702 may upset settled practices and expectations, have unintended consequences and create more problems than they solve. The new rule will not increase the predictability of the outcome of challenges to the admissibility of expert testimony. Instead, the changes in the rule may incur high costs in the form of unintended consequences and increased litigation."

Professor Myrna Raeder (98-EV-106) opposes the proposed amendment as containing "amorphous language." She suggests instead that the Committee adopt a proposal that would employ the *Frye* test as a rebuttable presumption of admissibility.

Timothy W. Monsees, Esq. (98-EV-107) states that the proposed amendment to Rule 702 represents "a very bad change for plaintiffs."

The Association of American Trial Lawyers (98-EV-108) opposes the proposed amendment to Evidence Rule 702. It expresses concern with the factors bearing on reliability set forth in the Committee Note, and asserts that "all of them have the potential, if they are adopted by a court as a focus of expert testimony scrutiny, to become unfairly outcome-determinative."

Michigan Protection and Advocacy Service (98-EV-109) opposes the proposed amendment to Evidence Rule 702, on the ground that it will "invade the province of the jury, denying parties a fair opportunity to present a complete case or defense." The Service expresses concern that the proposal "affords greater likelihood that one party's expert might be barred simply because the other side's expert followed a more conventional — albeit not necessarily more reliable — method to support the opinion."

The Board of Governors of the Oregon State Bar (98-EV-110) opposes the proposed change to Evidence Rule 702. The Board concludes that the proposed amendment "would result in a substantive change in the law without a sufficient analysis or justification having been demonstrated or consensus obtained to support the amendment." In the Board's view, the result of the proposal "would be that more experts would be excluded under the amendment than would ever have been excluded under *Frye*, a result inapposite to the Supreme Court's objectives when it held in favor of the proponents of the scientific evidence in *Daubert*." The Board's conclusion is word-for-word identical to the conclusion set forth by the Oregon Trial Lawyers Association (98-EV-071).

The New Hampshire Trial Lawyers Association (98-EV-111) believes that the proposed amendment to Evidence Rule 702 poses "a significant threat to the trial as a truth-finding process" and "will foster an extensive and extremely expensive practice of trying to limit or prevent outright the testimony of virtually any witness who has not submitted his or her opinions to some scientific journal or peer review."

Russell T. Golla, Esq. (98-EV-112) supports the proposed amendment to Evidence Rule 702.

James B. Ragan, Esq. (98-EV-113) objects to the part of the proposed amendment to Evidence Rule 702 that requires the trial judge to determine that the expert reliably applied the principles and methods to the facts of the case. This question, in his view, "is more appropriately decided by the jury."

The Ohio Academy of Trial Lawyers (98-EV-114) opposes the proposed amendment to Evidence Rule 702, arguing that the proposal "may extend the trial, as there will be a hearing within the trial to determine if the experts can testify."

Hon. Carl Barbier (98-EV-115), District Judge for the Eastern District of Louisiana, states that the proposed amendment to Evidence Rule 702 "would no doubt encourage litigants to file more *Daubert* motions."

Michael W. Day, Esq. (98-EV-116) opposes the proposed amendment to Evidence Rule 702, arguing that it would bar "much experience-based or specialized knowledge opinion evidence by non-scientists that is currently admitted routinely in the courts."

John P. Blackburn, Esq. (98-EV-117) opposes the proposed amendment to Evidence Rule 702. He is concerned that the proposal will make it more difficult for plaintiffs to "prove their cases."

The Sturdevant Law Firm (98-EV-119) opposes the proposed amendment to Evidence Rule 702, arguing that it is "a dramatic enlargement of the power of the trial judge in controlling what is and what is not admissible expert testimony" and that it "seriously alters the right of the litigants to a trial by jury."

The Board of Governors of the Maryland Trial Lawyers Association (98-EV-120), opposes the proposed amendment to Evidence Rule 702, on the ground that the Committee should adopt a "wait and see" attitude in light of the Supreme Court's recent consideration of expert evidence issues. The Board also declares that "[t]estimony of experts, that has always been admissible, both before and after the adoption of Rule 702 would be excluded by the proposed changes adopting and applying the *Daubert* restrictions."

James B. McIver, Esq. (98-EV-121) opposes the proposed amendment to Evidence Rule 702, arguing that it is "a change not needed and would have adverse effects on obtaining truth and justice in America."

Stephen M. Vaughan, Esq. (98-EV-122) opposes the proposed amendment to Evidence Rule 702, arguing that it is "a change not needed and would have adverse effects on obtaining truth and justice in America."

The Lawyers' Committee for Civil Rights Under Law (98-EV-123) has "serious concerns" regarding the proposed amendment to Evidence Rule 702.

The Arizona Trial Lawyers Association (98-EV-124) opposes the proposed amendment to Evidence Rule 702 and believes that "the efforts to expand *Daubert* beyond the limits of scientific causation testimony is ill advised and contrary to the constitutional rights of citizens to a trial by *jury*." The Association declares that under the proposed amendment, "experts testifying based on their experience or knowledge are prohibited." It states that "perhaps" the Advisory Committee "thinks that it was appropriate that Galileo was blinded for his radical ideas".

The Washington Legal Foundation (98-EV-125) "applauds the proposed amendment to Rule 702; it will make clearer that the district court's gatekeeping function is as fully applicable to proposed nonscientific expert testimony as it is to proposed scientific expert testimony." As to experience-based experts, the Foundation agrees with the Advisory Committee's position that "[a]t the very least, any expert ought to be able to explain his/her methodology, such that others could attempt to follow the same path . . ."

The Court Rules and Administration Committee of the Minnesota State Bar Association (98-EV-126) has three concerns about the proposed amendment to Evidence Rule 702. First, "the Rule needs to address more specifically, in some fashion, the expert who is qualified through on-the-job training and experience (as opposed to formal schooling). Second, the Rule or the Committee Note should clarify that "trial testimony can include expert testimony based on contradictory principles used by different experts." Third, the words "the product of" in proposed subpart (2) should be changed to "based upon"; the concern is that the proposed language "would seem to suggest that some empirical studies have been made to support the expert testimony when, in fact, this may not be the case with specialized knowledge expert testimony, for example."

The Connecticut Trial Lawyers Association (98-EV-127) opposes the proposed amendment to Evidence Rule 702, on the ground that it would "massively expand the judge's 'gatekeeping' role beyond what the Supreme Court required in *Daubert*."

Eliot P. Tucker, Esq. (98-EV-128) opposes the proposed amendment to Evidence Rule 702, contending that it is "another erosion on the right to trial by jury that the federal courts seem hell-bent on fostering."

The Law Firm of Shernoff, Bidart, Darras & Arkin (98-EV-129) opposes the proposed amendment to Evidence Rule 702, arguing that the proposal "will expand the already-existing danger to consumer actions arising from *Daubert* itself and inappropriately limits the jury's power to make the very determination it was designed and intended by the framers of the Constitution to make."

Nissan North America, Inc. (98-EV-130) supports the proposed amendment to Evidence Rule 702, on the ground that it "will help curtail 'junk science' testimony by unqualified experts."

Hon. Stanwood R. Duval, Jr. (98-EV-131), District Judge for the United States District Court of the Eastern District of Louisiana, is opposed to the proposed amendment to Evidence Rule 702. He contends that the proposal will encourage "*Daubert* motions in every case where there's an expert." Judge Duval states that "although the Advisory Committee notes are helpful, the text of the rule shall be law if passed."

George Chandler, Esq. (98-EV-132) believes that "the restriction of the right to call experts by making the *Daubert* case a rule of evidence would have a devastating effect on the right of a fair trial to individual claimants."

Michael A. Pohl, Esq. (98-EV-133) opposes the proposed amendment to Evidence Rule 702. He asserts that applying *Daubert* to the testimony of experts in cases such as those involving family physicians, securities issues or employment-related matters "would tend to stack the deck against the proponent of the evidence when issues of the credibility of the witnesses in those type cases should normally be left to the trier of fact."

The International Academy of Trial Lawyers (98-EV-134) is unable to reach a consensus with regard to "the wisdom of adopting the proposed amendment to Rule 702." Those in favor of the proposal assert that "it will remove any confusion over whether the principles of *Daubert* apply to all expert testimony rather than only scientific testimony" and that there is "no reason why an engineer should not be subject to the same scrutiny as an epidemiologist although not all of the *Daubert* factors may apply to a particular expert." Those opposed to the proposal point out "that a substantial number of circuits have held that *Daubert* applies only to expert testimony based on scientific principles."

Barry J. Nace (98-EV-135) opposes the proposed amendment to Evidence Rule 702, concluding that "if we are going to have any opportunity for a jury to decide the credibility and the weight to be given to opinion testimony, then reliability should not be something decided by the trial court." He also asserts that the proposal's reliability requirements are in conflict with Rule 703, which "requires only that the experts use facts or data reasonably relied upon by experts."

Rod D. Squires, Esq. (98-EV-136) opposes the proposed amendment to Evidence Rule 702, on the ground that "extending *Daubert* any further will result in more injured people's claims being adversely affected and the cost of litigation unnecessarily increasing."

B.C. Cornish, Esq. (98-EV-137) opposes the proposed amendment to Evidence Rule 702, asserting that "the application of the *Daubert* ruling to all opinion testimony defies common sense." He claims that under the proposal, professional counselors could not testify to mental anguish, and treating physicians could not testify about what caused a patient's condition.

Tyrone P. Bujold, Esq. (98-EV-138) opposes the proposed amendment to Evidence Rule 702. He contends that the proposal rests on the unjustified premise that jurors "are frequently confused by charlatan experts." He concludes that "[w]e need not fear the jury system. And we need not create pinched rules which give trial judges far more than they need, want, or is required."

Martin M. Meyers, Esq. (98-EV-139) opposes the proposed amendment to Evidence Rule 702 insofar as it purports to extend *Daubert* principles to nonscientific expert testimony. He asserts that a consequence of the proposed amendment "is that run of the mill professionals will be further discouraged from testifying because the burden upon them to justify their testimony at pre-trial *Daubert* hearings will be more that they can reasonably be expected to undertake and keep up with their other professional duties. This will drive both plaintiffs and defendants further into the hands of professional testifiers, something that the rules should discourage rather than encourage."

The National Association of Independent Insurers (98-EV-141) supports the proposed amendment to Evidence Rule 702.

Jon B. Comstock, Esq. (98-EV-142) strongly supports the proposed change to Evidence Rule 702. He states that "Courts need

uniform direction as to how to be a gatekeeper for 'expert' testimony." He would go "one step further" and delete all references to "experts" in the text of the Rule.

Honorable Anthony J. Scirica Laizure, Esq. (98-EV-143) opposes the proposed amendment to Evidence Rule 702, on the ground that it is "unnecessary" and "will put those challenging the status quo at a distinct disadvantage."

Edward D. Robinson, Jr. , Esq. (98-EV-144) "agrees with the Committee's concern that junk science should not form the basis of expert opinion." He opposes the proposed amendment, however, on the ground that it does not provide "sufficient guidance for a district judge to determine whether an expert with a broad experiential base (as opposed to data driven base) should be permitted to offer an opinion."

Karl Protil, Esq. (98-EV-145) strongly opposes the proposed amendment to Evidence Rule 702, and states that *"Daubert* was never intended to apply to standard of care opinions — these are not subject to the scientific method." He concludes that the proposal usurps the role of the jury.

Ken Baughman, Esq. (98-EV-146) opposes the proposed amendment to Evidence Rule 702, arguing that its effect "will be to raise the cost of litigation to the average citizen and limit his or her access to the court system."

Pamela O'Dwyer, Esq. (98-EV-147) opposes the proposed amendment to Evidence Rule 702, arguing that it will "increase the costs to litigants."

Jesse Farr, Esq. (98-EV-148) opposes "evidentiary changes that would disallow experience based consideration and/or expert testimony."

The Prison Law Office (98-EV-149) opposes the proposed amendment to Evidence Rule 702.

Martha K. Wivell, Esq. (98-EV-150) opposes the proposed amendment because it "gives no guidance as to how trial judges should assess the adequacy of an expert who is relying principally on experience." She also concludes that the proposal "makes litigation in Federal courts more expensive because it would require a *Daubert* hearing in virtually every case."

Jeffrey P. Foote, Esq. (98-EV-151) opposes the proposed amendment to Evidence Rule 702, and does not believe "that the gatekeeper function of *Daubert* should be extended to all expert testimony." He also takes issue with the Committee Note's reference to opinions developed expressly for the purposes of testifying, stating that if this reference is strictly construed, "it will eliminate a substantial amount of helpful expert testimony."

Matthew B. Weber, Esq. (98-EV-152) opposes the proposed amendment to Evidence Rule 702, on the ground that it is "unnecessary, overly restrictive, and will serve to bar much opinion evidence based on specialized knowledge or experience of non-scientists."

J. Michael Black, Esq. (98-EV-153) is opposed to the proposed amendment to Evidence Rule 702, declaring that "our form of government . . . has become a plutocracy and the proposed rules changes, if enacted, will only act to further the control of special interests over our government."

Anthony Z. Roisman, Esq. (98-EV-154) states that the proposed amendment to Evidence Rule 702 is "ill-advised and will cause substantial disruption to the orderly conduct of litigation or unfairly limit the rights of litigants." He concludes that the proposal increases "the likelihood that cases will be decided on the basis of who has the most resources, not who has the most justice, on their side."

Norman E. Harned, Esq. (98-EV-155) opposes the proposed change to Evidence Rule 702, on the ground that its effect "is to substitute trial of the facts by judges rather than by juries."

P. James Rainey, Esq. (98-EV-156) opposes the proposed amendment to Evidence Rule 702. He states that a "Wood Carver should not have to met [sic] the same standards that the Chemical Engineer would have to met [sic] in order to testify about his specialties."

Darrell W. Aherin, Esq. (98-EV-157) states that "some federal judges at the trial level are usurping the role of the jury. The current climate appears to be so probusiness I would hope that any proposed rules won't lead to further unfairness and deny access to the courts for individual litigants."

The Atlantic Legal Foundation (98-EV-158) generally supports the proposed amendment to Evidence Rule 702. It states that the proposal will "prevent miscarriages of justice resulting from misunderstanding by lay triers of fact concerning the validity of 'expert' opinions." It also notes that "[a]s *Daubert* recognized, the determination of whether expert opinion satisfies the standards for admissibility is to be decided by the judge under Rule 104(a), part of the court's longstanding 'gatekeeping' function with respect to expert opinion." The Foundation observes that while the reliability standards

set forth in the proposal are "somewhat general, it probably cannot be made more detailed or explicit and still retain general applicability." However, the Foundation believes that Subpart (1) of the proposed proviso to Evidence Rule 702 (as it was issued for public comment) "goes too far in requiring courts to determine whether expert opinion is 'sufficiently based upon reliable facts or data.'" It states that courts addressing reliability issues "should only examine the methodology and the application of the methodology to the facts, not the facts themselves."

Paul T. Hoffman, Esq. (98-EV-159) opposes the proposed amendment to Evidence Rule 702, asserting that it engrafts on non-scientific experts "the strict science-based *Daubert* rules."

Hon. Russell A. Eliason (98-EV-161), Magistrate Judge for the United States District Court of the District of North Carolina, proposes that Evidence Rule 702 be amended to subject expert testimony to the following restrictions: "The courts shall consider (1) the nature of the discipline and the degree to which it is capable of rendering valid, credible, or simply accepted conclusions, (2) whether the testimony is sufficiently based upon reliable facts or data, (3) whether the testimony must be given subject to restrictions, limitations or cautions because it cannot be demonstrated to be the product of reliable principles and methods, and (4) whether the principles and methods may be reliably applied to the facts of the case."

Edward J. Carreiro, Jr., Esq. (98-EV-162) opposes the proposed amendment to Evidence Rule 702.

R. Gary Stephens, Esq. (98-EV-163) opposes the proposed amendment to Evidence Rule 702 on the ground that it imposes

unnecessarily rigid requirements on experts, and will increase the cost of litigation.

The Law Firm of Saltz, Mongeluzzi, Barrett and Bendesky (98-EV-164) opposes the proposed amendment to Evidence Rule 702, on the ground that it "will have a negative impact on a plaintiff's practice." The Firm asserts that there are "many reasons why the defense would be compelled to challenge each and every expert" under the proposed amendment.

Warren F. Fitzgerald, Esq. (98-EV-165) states that the proposed amendment to Evidence Rule 702 is "unnecessary and will have a detrimental effect upon the fair evaluation of relevant opinion evidence from experts."

Anthony Tarricone, Esq. (98-EV-166) states that the proposed amendment to Evidence Rule 702 would "substitute the judge as finder of fact instead of the jury by removing from the jury consideration of the weight and credibility of evidence." He does not believe that the is "sufficient justification" for the proposed change.

Annette Gonthier Kiely, Esq. (98-EV-167) states that the proposed amendment to Evidence Rule 702 "threatens the traditional role of the jury as the finder of fact by empowering the judge to exclude evidence, whose weight and credibility has traditionally been and should continue to be assessed by the jury in determining the facts in issue."

David Dwork, Esq. (98-EV-168) opposes the proposed amendment to Evidence Rule 702, asserting that "an extension of the *Daubert* decision could have a restrictive impact on the presentation of relevant, credible, and material evidence merely because the expert does not meet rigid criteria which do not in all cases reflect on his or

her expertise."

M.R. Smith, Esq. (98-EV-169) supports the proposed amendment to Evidence Rule 702.

Douglas K. Sheff, Esq. (98-EV-170) asserts that the proposed amendment to Evidence Rule 702 "would be an affront to the jury system and much of what the founding fathers intended when they created the finest means ever devised to determine disputes."

Navistar International Transportation Corp. (98-EV-171) supports the proposed amendment to Evidence Rule 702 stating that it will "properly clarify the gatekeeper function of *Daubert* and enhance the value of expert testimony by requiring that there is real substance behind the opinions proffered."

The Section on Courts, Lawyers and the Administration of Justice of the District of Columbia Bar (98-EV-172) agrees with the proposed change to Evidence Rule 702.

The Federal Magistrate Judges Association (98-EV-173) supports the proposed changes to Evidence Rule 702 "because they address and adequately resolve two problems frequently arising before trial judges as a result of the Supreme Court's decision in *Daubert*. First of all, it was not at all clear whether the Supreme Court intended *Daubert* to apply to only scientific testimony or should be applied to all expert testimony. . . . Second, the criteria set forth by the Supreme Court for evaluating scientific expert testimony frequently would be, either in whole or in part, inapplicable to the scientific testimony proffered in any given case. The standards set forth in the amendments are broad enough to require consideration of any or all of the specific *Daubert* factors and other relevant considerations as appropriate." The Association concludes that the

standards set forth in the proposed amendment provide "the trial court, as a gatekeeper, with greater discretion and latitude to either admit or deny proffered expert testimony while at the same time providing the trial judge with greater guidance that was provided by the Supreme Court's limited decision in *Daubert*."

Nine members of the leadership of the Section of Litigation of the American Bar Association (98-EV-174) support the proposed amendment to Evidence Rule 702. They suggest, however, that Subpart (3) of the proposal be revised to address the possibility that an expert might testify to general principles without attempting to apply those principles to the facts of the case.

Merl H. Wayman, Esq. (98-EV-175) opposes the proposed amendment to Evidence Rule 702.

Mary J. Hoeller, Esq. (98-EV-176) opposes the proposed amendment to Evidence Rule 702.

Brian T. Stern, Esq. (98-EV-177) opposes the proposed amendment to Evidence Rule 702 as "an unwarranted attempt to derive tests for non-scientific expert testimony from a Supreme Court decision concerned with scientific experts."

The National Employment Lawyers Association (98-EV-179) opposes the proposed amendment to Evidence Rule 702, stating that the "vague terms in the proposed amendment invite judges to go beyond their gatekeeping function to usurp the role of the jury in determining of the credibility and probative value of an expert's opinion."

Rule 703. Bases of Opinion Testimony by Experts

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

COMMITTEE NOTE

Rule 703 has been amended to emphasize that when an expert reasonably relies on inadmissible information to form an opinion or inference, the underlying information is not admissible simply because the opinion or inference is admitted. Courts have reached different results on how to treat inadmissible information when it

is reasonably relied upon by an expert in forming an opinion or drawing an inference. *Compare United States v. Rollins,* 862 F.2d 1282 (7th Cir. 1988) (admitting, as part of the basis of an FBI agent's expert opinion on the meaning of code language, the hearsay statements of an informant), *with United States v. 0.59 Acres of Land,* 109 F.3d 1493 (9th Cir. 1997) (error to admit hearsay offered as the basis of an expert opinion, without a limiting instruction). Commentators have also taken differing views. *See, e.g.,* Ronald Carlson, *Policing the Bases of Modern Expert Testimony,* 39 Vand.L.Rev. 577 (1986) (advocating limits on the jury's consideration of otherwise inadmissible evidence used as the basis for an expert opinion); Paul Rice, *Inadmissible Evidence as a Basis for Expert Testimony: A Response to Professor Carlson,* 40 Vand.L.Rev. 583 (1987) (advocating unrestricted use of information reasonably relied upon by an expert).

When information is reasonably relied upon by an expert and yet is admissible only for the purpose of assisting the jury in evaluating an expert's opinion, a trial court applying this Rule must consider the information's probative value in assisting the jury to weigh the expert's opinion on the one hand, and the risk of prejudice resulting from the jury's potential misuse of the information for substantive purposes on the other. The information may be disclosed to the jury only if the trial court finds that the probative value of the information in assisting the jury to evaluate the expert's opinion substantially outweighs its prejudicial effect. If the otherwise inadmissible information is admitted under this balancing test, the trial judge must give a limiting instruction upon request, informing the jury that the underlying information must not be used for substantive purposes. See Rule 105. In determining the appropriate course, the trial court should consider the probable effectiveness or lack of effectiveness of a limiting instruction under the particular circumstances.

The amendment governs only the disclosure to the jury of information that is reasonably relied on by an expert, when that information is not admissible for substantive purposes. It is not intended to affect the admissibility of an expert's testimony. Nor does the amendment prevent an expert from relying on information that is inadmissible for substantive purposes.

Nothing in this Rule restricts the presentation of underlying expert facts or data when offered by an adverse party. See Rule 705. Of course, an adversary's attack on an expert's basis will often open the door to a proponent's rebuttal with information that was reasonably relied upon by the expert, even if that information would not have been discloseable initially under the balancing test provided by this amendment. Moreover, in some circumstances the proponent might wish to disclose information that is relied upon by the expert in order to "remove the sting" from the opponent's anticipated attack, and thereby prevent the jury from drawing an unfair negative inference. The trial court should take this consideration into account in applying the balancing test provided by this amendment.

This amendment covers facts or data that cannot be admitted for any purpose other than to assist the jury to evaluate the expert's opinion. The balancing test provided in this amendment is not applicable to facts or data that are admissible for any other purpose but have not yet been offered for such a purpose at the time the expert testifies.

The amendment provides a presumption against disclosure to the jury of information used as the basis of an expert's opinion and not admissible for any substantive purpose, when that information is offered by the proponent of the expert. In a multi-party case, where one party proffers an expert whose testimony is also beneficial to

other parties, each such party should be deemed a "proponent" within the meaning of the amendment.

GAP Report--Proposed Amendment to Rule 703

The Committee made the following changes to the published draft of the proposed amendment to Evidence Rule 703:

1. A minor stylistic change was made in the text, in accordance with the suggestion of the Style Subcommittee of the Standing Committee on Rules of Practice and Procedure.

2. The words "in assisting the jury to evaluate the expert's opinion" were added to the text, to specify the proper purpose for offering the otherwise inadmissible information relied on by an expert. The Committee Note was revised to accord with this change in the text.

3. Stylistic changes were made to the Committee Note.

4. The Committee Note was revised to emphasize that the balancing test set forth in the proposal should be used to determine whether an expert's basis may be disclosed to the jury either (1) in rebuttal or (2) on direct examination to "remove the sting" of an opponent's anticipated attack on an expert's basis.

Summary of Comments on the Proposed Amendment to Evidence Rule 703

Professor Richard Friedman (98-EV 007) believes that the proposed amendment to Evidence Rule 703 "is generally a good one,

at least in criminal cases." He argues that the proposal should be amended, however, to make more explicit the point that otherwise inadmissible information relied upon by an expert, if admitted at all, is admitted for "the sole purpose of explaining the expert's testimony."

Lawyers for Civil Justice (98-EV-009) support the proposed amendment to Evidence Rule 703, "which would limit the disclosure to the jury of inadmissible information that is used as the basis of an expert's opinion." They argue, however that the Rule or Committee Note should provide more "guidance in applying the suggested limiting instructions."

The Evidence Project (98-EV-010) asserts that the proposed amendment does not go far enough. The Project argues that the trial judge, in balancing under the amended Rule 703, would have to find the information highly reliable in order to allow its disclosure to the jury; if that is the case, the judicial determination of reliability "should make the evidence admissible for substantive use by the jury as well." The Project concludes that the problems in the current rule "can be resolved only by precluding the expert from relying on inadmissible evidence or admitting the otherwise inadmissible evidence because the expert has assessed its reliability and concluded it is trustworthy."

Professor Laird Kirkpatrick (98-EV 011) strongly supports the proposed amendment. He argues, however, that the reference in the text of the proposal to probative value and prejudicial effect should be made more specific. He states that the Committee Note "uses more apt language than the proposed amendment itself" and suggests that the language in the Note should be transferred to the Rule (as it was issued for public comment).

Thomas E. McCutchen, Esq. (98-EV-015) states that the proposed amendment "may result in greater expense because of the necessity of calling additional witnesses, such as medical malpractice cases, since the proposed amendment will exclude evidence which is now disclosed to the jury."

The Fellows of the American College of Trial Lawyers (98-EV-016) favor the proposed amendment.

The Committee on Federal Procedure of the New York State Bar Association (98-EV-017) endorses the proposed amendment to Evidence Rule 703. The Committee states that "the balance in the proposed amendment appears to be right, since it is the proponent of the expert witness who has control over the information on which the expert will rely and who is most likely to be the party to try to sneak otherwise inadmissible information into evidence through an expert."

The Defense Research Institute (98-EV-020) urges the Committee to revise the proposed amendment to Evidence Rule 703 to completely prohibit disclosure to the jury of inadmissible information relied upon by an expert.

E. Wayne Taff, Esq. (98-EV-021) strongly supports "those portions of the proposed amendment to Rule 703 which would limit disclosure to the jury of inadmissible information used as the basis for an expert's opinion." He states that "the simple rules of logic support the amendment." He argues, however, that inadmissible information used as the basis of an expert's opinion should never be disclosed to the jury.

Hon. D. Brock Hornby (98-EV-023), Chief Judge of the United States District Court for the District of Maine, states that the

proposed amendment to Evidence Rule 703 is "bad policy and unworkable." He argues that the proposal "will lead to expert *ipse dixits*, or opinions with disclosure of only some of the bases for the opinion, as well as battles over what is a disclosure and whether certain data are truly inadmissible bases or not." He also suggests that if a balancing test is to be established, "why not stick with Rule 403?"

Kevin J. Dunne, Esq. (98-EV-025) states that the use of inadmissible information by an expert, and the subsequent disclosure of that information to the jury in the guise of supporting the expert's opinion, is "a game that should not be condoned, and the proposed amendments to Rule 703 should help to put a stop to it."

Diane R. Crowley, Esq. (98-EV-029) states that the proposed change to Evidence Rule 703 is a "step in the right direction" but that it needs "further refinement." She suggests that the proposed balancing test be deleted, or that "a requirement of judicial scrutiny along the lines set forth in the proposed Rule 702 be added before the otherwise inadmissible facts may be disclosed to the jury."

Professor Lynn McLain (98-EV-030) states that the proposed amendment to Evidence Rule 703, as issued for public comment, should be revised to clarify the probative value that the trial court should consider when an expert relies on inadmissible information.

Professor Ronald L. Carlson (98-EV-031) strongly supports the proposed amendment, stating that the current Rule 703 "might be abused by opportunistic counsel." Professor Carlson "vigorously" agrees with the proposal's "presumption against disclosure to the jury of otherwise inadmissible information uses as the basis of an expert's opinion or inference."

Harold Lee Schwab, Esq. (98-EV-033) states that the proposed amendment provides "a valid test which should preclude end run attempts by ingenious counsel to avoid the exclusionary rules."

Thomas J. Conlin, Esq. (98-EV-037) believes that on balance "Rule 703 works just fine as it exists today."

Scott B. Elkind, Esq. (98-EV-038) opposes the proposed amendment to Evidence Rule 703.

The Chemical Manufacturers Association, the Defense Research Institute, the Federation of Insurance and Corporate Defense Counsel, the International Association of Defense Counsel, Lawyers for Civil Justice, the National Association of Manufacturers, and the Product Liability Advisory Council (98-EV-047) state that the proposed amendment to Evidence Rule 703 "creates a necessary and welcome presumption" against disclosure of otherwise inadmissible information that is used as the basis of an expert's opinion and that the proposal "should greatly assist in discouraging the admission of backdoor hearsay and other inadmissible information in the guise of reasonable, trustworthy and reliable data considered by the expert in forming an opinion." These organizations suggest, however, that the Committee Note might be revised "to provide further guidance as to whether or not otherwise inadmissible information should be disclosed to the jury." Such guidance might include criteria such as: "(1) Is the underlying data reasonable and trustworthy? (2) Is the information seriously disputed? (3) Is the data case specific? and (4) Will the opponent have a meaningful opportunity to rebut the information or is it of a type that cannot meaningfully be rebutted?"

The National Board of the American Board of Trial Advocates (98-EV-049) opposes the last sentence of the proposed amendment to Evidence Rule 703 "because it creates confusion in light of existing law and has significant potential for creating mischief by apparently inviting parties to proffer otherwise inadmissible evidence."

The Lawyers' Club of San Francisco (98-EV-050) opposes the proposed amendment to Evidence Rule 703, arguing that it "will have the effect of precluding the jury from knowing the reasons for an expert's opinion where the judge determines that the probative value of the opinion or inference does not substantially outweigh its prejudicial effect."

William B. Dodero, Esq. (98-EV-052) states that the proposed amendment to Evidence Rule 703 is part of "a much-needed revision which will finally allow trial courts to fulfill their role as gatekeeper for the admission of expert evidence."

Jay H. Tressler, Esq. (98-EV-055) supports the proposed amendment, because "[a]ll too often, an expert will be fed self-serving information by counsel which would not be admissible at trial" and "the expert then gains permission to discuss the content of the otherwise inadmissible testimony."

The Committee on Civil Litigation of the United States District Court for the Eastern District of New York (98-EV-056) opposes the proposed amendment. The Committee believes "that Rule 703 is working" and is not persuaded by assertions that the Rule has been "misused to permit introduction of inadmissible evidence before the jury through the backdoor."

Michael S. Allred, Esq. (98-EV-059) opposes the proposed amendment on the ground that it will "place the federal bench in a position that it can entertain or exclude evidence at a whim based upon a subjective appraisal of the testimony."

Charles F. Preuss, Esq. (98-EV-062) supports the proposed amendment to Evidence Rule 703, but argues that "a potential troubling aspect of this amendment is the lack of criteria upon which the trial court is to weigh the probative value of the underlying inadmissible information against its prejudice." Mr. Preuss suggests that the Committee Note should "provide more guidance for the trial courts who must decide this difficult balancing process."

Professor Michael H. Graham (98-EV-063) believes that the proposed amendment to Evidence Rule 703 is "ill-advised." He argues that there is "no problem in practice worth addressing" and questions how judges are to conduct the balancing required by the proposed amendment.

Frank Stainback, Esq. (98-EV-064) believes that the proposed amendment to Rule 703 will be a positive change, because it "will eliminate the proponent's ability to present otherwise inadmissible evidence to the jury under the guise of that evidence being the basis for an expert's opinion."

Hon. Edward R. Becker (98-EV-065), Chief Judge of the United States Court of Appeals for the Third Circuit, supports the proposed amendment to Evidence Rule 703, noting that it is "extremely well justified by the Committee's accompanying commentary."

Steven H. Howard, Esq. (98-EV-067) opposes the proposed amendment to Evidence Rule 703.

The Federal Courts Committee of the Chicago Council of Lawyers (98-EV-074) contends that the proposed amendment to Evidence Rule 703 "creates an apparent imbalance between the parties as they examine a witness." The Committee suggests that the Rule or the Committee Note "should reflect a door-opening presumption that once inadmissible evidence has been introduced on cross-examination, on redirect a witness would ordinarily be granted latitude to respond by completing the picture with other facts that would otherwise be inadmissible (that is, but for the cross-examination)."

The State Bar of Arizona (98-EV-075) supports the adoption of the proposed amendment to Evidence Rule 703.

The National Association of Railroad Trial Counsel (98-EV-077) supports the proposed amendment to Evidence Rule 703.

The Chicago Chapter of the Federal Bar Association (98-EV-078) states that the proposed amendment to Evidence Rule 703 is "an important and desirable change which clarifies another issue in dispute. The Chapter enthusiastically endorses the proposal."

The Federal Practice Section of the Connecticut Bar Association (98-EV-079) endorses the proposed amendment to Evidence Rule 703, noting that under the proposal the trial court "would have some discretion" to allow disclosure to the jury of inadmissible information reasonably relied upon by the expert.

The Phoenix and Tucson Chapters of the Federal Bar Association (98-EV-080) support the proposed amendment to Evidence Rule 703.

The Pennsylvania Trial Lawyers Association (98-EV-081) supports the proposed amendment to Evidence Rule 703, noting that it restates the existing rule of law in "many jurisdictions." The proposal also "serves the purpose of preventing inadmissible hearsay which, in many instances, would go beyond the relevant scientific or technical information upon which the expert witness relies. It precludes the possibility of admitting irrelevant or prejudicial factual information, as well."

Professor James P. Carey (98-EV-082) states that the proposed amendment to Rule 703 is a "laudable attempt" to clarify the circumstances under which inadmissible information reasonably relied upon by the expert can be disclosed to the jury. He is concerned, however, about the general references in the proposal (as it was released for public comment) to probative value and prejudicial effect. Professor Carey concludes that allowing judges "to roam the fields of probativeness" creates a danger of more frequent disclosure of inadmissible underlying information. He suggests a complete prohibition on disclosure of inadmissible information relied upon by an expert, which would place "an incentive on the proponent of expert testimony to present witnesses to establish a basis (or resort to hearsay exceptions), which in itself would go some way toward meeting the various concerns which have resulted in our making judges gatekeepers."

The United States District Court of Oregon and its Local Rules Advisory Committee (98-EV-083) support the proposed amendment to Evidence Rule 703, asserting that it "will assist trial courts and parties by considering the probative value of the information and the risk of prejudice."

The Federal Rules of Evidence Committee of the American College of Trial Lawyers (98-EV-084) favors the

proposed amendment to Evidence Rule 703, because "there has been far too much use of the current Rule as a 'back door' to bring otherwise inadmissible and highly prejudicial evidence to the attention of juries, sometimes resulting in unfair verdicts. The proposed amendment should substantially rein in this practice." The Committee concludes that the balancing test in the proposal is "an appropriate and fair process for decision-making by trial judges" and the Committee is "strongly of the view that the presumption against admissibility created by the amendment is essential to the achievement of the purpose of the revised Rule."

John R. Lanza, Esq. (98-EV-087) states that because the proposed amendment does not prohibit the opponent from eliciting inadmissible information used as the basis of the expert's testimony, the proposal is "unfair to the proponent of the expert, and the expert testimony." He contends that the Rule will make it appear as if "the proponent purposely hid facts and data from the jury." He also asserts that the proposal "would interfere with the flow of the expert's testimony and the corroboration of the expert, potentially resulting in conclusory testimony by the expert.

J. Ric Gass, Esq. (98-EV-090) states that the proposed amendment to Evidence Rule 703 is an "important and necessary and appropriate" revision.

J. Greg Allen, Esq. (98-EV-093) opposes the proposed amendment to Evidence Rule 703, arguing that "the trial court should not be given discretion in this area because they are not experts in the particular fields."

Alvin A. Wolff, Jr., Esq. (98-EV-095) opposes the proposed amendment to Evidence Rule 703, on the ground that it "would

deprive the jury of an opportunity to understand the basis of the expert's opinions."

Alan Voos, Esq. (98-EV-096) opposes the proposed amendment to Evidence Rule 703 on the ground that it "will make it virtually impossible to properly elicit direct testimony from experts on all points of anticipated cross-examination."

The Federal Bar Council Committee on Second Circuit Courts (98-EV-097) supports the concept of the proposed amendment to Evidence Rule 703, but suggests that the version released for public comment be amended in two respects. First, the reference to "probative value" should be changed to specify that the trial judge is to assess the value of the inadmissible information in helping the jury to evaluate the expert's opinion. Second, the "reasonable reliance" requirement that is currently in the Rule should be deleted, since the amendment to Rule 702 (as it was released for public comment) would require that the expert have a reliable basis of knowledge.

Professors Bruce Comly French and Elizabeth Phillips Marsh (98-EV-103) reported on a meeting of some members of the Committee on Rules of Evidence and Criminal procedure of the Criminal Justice Section of the American Bar Association. The professors noted that "there is no existing American Bar Association policy known to us that addresses these changes." Nonetheless, the professors report that the proposed amendment "drew opposition from approximately two thirds of those present. Members who opposed the new form of the rule expressed the concern that the proposed changes will usurp the traditional role of the jury."

The Association of American Trial Lawyers (98-EV-108) opposes the proposed amendment to Evidence Rule 703 for four

reasons: the proposal "would add language that is surplusage"; the proposal "appears likely to lead to more satellite litigation over what parts of the expert's basis for the opinion and the opinion itself will be admissible and which will not"; the proposal "does not take into account the common practice during trial of using expert testimony before the jury to describe and characterize documents (not yet in evidence) produced by an opponent, for the purpose of orienting the jury to the evidence that will be adduced;" and "the expert will often need to discuss the data (perhaps including inadmissible material) on which the opinion is based, lest the jury conclude that the opinion is in fact nothing more than the expert's *ipse dixit*."

The New Hampshire Trial Lawyers Association (98-EV-111) does not believe that the proposed amendment to Evidence Rule 703 "provides any significant additional guidance to trial judges in determining how the jury should be instructed with respect to the information which the expert considered or relied upon."

Russell T. Golla, Esq. (98-EV-112) supports the proposed amendment to Evidence Rule 703.

The Ohio Academy of Trial Lawyers (98-EV-114) supports the proposed amendment to Evidence Rule 703.

Hon. Carl Barbier (98-EV-115), District Judge for the Eastern District of Louisiana, states that the proposed amendment to Evidence Rule 703 does "not seem objectionable."

Michael W. Day, Esq. (98-EV-116) opposes the proposed amendment to Rule 703, contending that the proposal "would often deprive the jury of an opportunity to understand the basis of the expert's opinion."

The Philadelphia Bar Association (98-EV-118) supports the proposed amendment to Evidence Rule 703, "insofar as it gives judges the power to exclude disclosure of underlying facts that would otherwise be inadmissible." The Association is "aware of instances in which an expert witness is retained primarily for the purpose of introducing the otherwise inadmissible underlying facts, with the opinion being merely the means to that end." The Association recommends "further study", however, of whether "the presumption should be for or against disclosure of the underlying facts." The Association also recommends deletion of the phrase "to the jury" and "would avoid referring to the 'probative value' of the underlying facts and would instead refer to 'their value in assisting the trier of fact to understand the opinion or inference.'"

The Sturdevant Law Firm (98-EV-119) opposes the proposed amendment to Evidence Rule 703, on the grounds that it is too "restrictive" and that "the jury will not have the underlying facts or data that the expert relies upon, and therefore has no basis to consider the merits of the expert's opinion."

The Arizona Trial Lawyers Association (98-EV-124) is opposed to the proposed amendment to Evidence Rule 703.

The Court Rules and Administration Committee of the Minnesota State Bar Association (98-EV-126) recommends the adoption of the proposed amendment to Evidence Rule 703.

Nissan North America, Inc. (98-EV-130) supports the proposed amendment to Evidence Rule 703.

The International Academy of Trial Lawyers (98-EV-134) is unable to reach a consensus with regard to "the wisdom of adopting the proposed amendments to Rule 703." Those in favor of the

proposal point out that "Rule 703 as it presently exists represents a loop hole exception to other exclusionary rules such as hearsay" and that one "can readily envision situations where a court permits hearsay evidence to be admissible under 703, concluding that the evidence passes Rule 403 muster, although clearly the evidence should not be received." Further, "the proposed amendment serves to better guarantee a correct judicial determination in each case and consistency throughout the circuits." Those opposed to the proposal argue that the presumption against disclosure of inadmissible information relied upon by an expert is too "stringent" and that "[s]ufficient safeguards are now present in Rule 403."

B.C. Cornish, Esq. (98-EV-137) finds the proposed amendment to Evidence Rule 703 "troublesome" and states that "[t]he attempt to correct the occasional misuse of the rule as currently written will keep juries from understanding the basis of the expert's opinion."

Martin M. Meyers, Esq. (98-EV-139) opposes the proposed amendment to Evidence Rule 703. He asserts that under the proposal, property appraisers would not be permitted to disclose the comparable properties that they used in assessing value.

The National Association of Independent Insurers (98-EV-141) supports the proposed amendment to Evidence Rule 703.

Jon B. Comstock, Esq. (98-EV-142) supports the proposed change to Evidence Rule 703, stating that there has been "routine abuse" under the current Rule, and that "this rule change will produce fairness to all parties."

Karl Protil, Esq. (98-EV-145) strongly opposes the proposed amendment to Evidence Rule 703. He states that an expert "should be

allowed to state the facts upon which he relied. If not, then you undermine that expert's credibility and allow the opponent to argue that the expert's opinion is not based on a proper foundation."

Ken Baughman, Esq. (98-EV-146) opposes the proposed amendment to Evidence Rule 703.

Pamela O'Dwyer, Esq. (98-EV-147) opposes the proposed amendment to Evidence Rule 703.

The Prison Law Office (98-EV-149) opposes the proposed amendment to Evidence Rule 703.

Jeffrey P. Foote, Esq. (98-EV-151) opposes the proposed amendment to Evidence Rule 703.

Matthew B. Weber, Esq. (98-EV-152) opposes the proposed amendment to Evidence Rule 703, on the ground that it "will be obfuscating numerous issues which this rule is specifically designed to illuminate."

J. Michael Black, Esq. (98-EV-153) does not agree "with any proposal which would prevent experts from relying on hearsay, scientific data."

Norman E. Harned, Esq. (98-EV-155) opposes the proposed change to Evidence Rule 703.

Daniel W. Aherin, Esq. (98-EV-157) opposes the proposed amendment to Evidence Rule 703, on the ground that it is "geared towards preventing individual litigants from presenting reasonable expert testimony."

The Atlantic Legal Foundation (98-EV-158) supports the proposal's placement of the burden on the proponent to show that the otherwise inadmissible facts or data relied upon by an expert should be disclosed to the jury. The Foundation suggests, however, that criteria should be added to the Committee Note for "the court to use in deciding whether to admit the otherwise inadmissible evidence."

Paul T. Hoffman, Esq. (98-EV-159) opposes the proposed amendment to Evidence Rule 703, in the belief that the proposal would prohibit experts from relying on inadmissible facts or data.

Hon. William J. Giovan (98-EV-160) Judge for the Circuit Court for the Third Judicial Circuit of Michigan, states that the proposed amendment to Evidence Rule 703 "does not go far enough" and suggests that the Rule be amended "to restore the former requirement that expert opinion be based upon facts that are in evidence." He asserts that a return to the common-law rule is the only way to avoid "the practical obliteration of the hearsay rule."

Hon. Russell A. Eliason (98-EV-161), Magistrate Judge for the United States District Court of the District of North Carolina, proposes that Evidence Rule 703 be amended to delete the second sentence of the current Rule, and to replace it with the following language: "If the expert relies on facts or data which the court has ruled to be inadmissible evidence, but such evidence is of the type reasonably relied upon by experts in the particular field in formulating conclusions about the subject and the court finds the conclusions to be sufficiently helpful and reliable pursuant to Rule 702, then the court may permit the expert to testify and the evidence shall be disclosed to the jury under appropriate limiting instructions unless the prejudicial effect outweighs their probative value."

Edward J. Carreiro, Jr., Esq. (98-EV-162) opposes the proposed amendment to Evidence Rule 703.

R. Gary Stephens, Esq. (98-EV-163) opposes the proposed amendment to Evidence Rule 703, on the ground that it will force counsel to qualify for admissibility all evidence relied upon by an expert, thus unnecessarily increasing the cost of litigation.

Warren F. Fitzgerald, Esq. (98-EV-165) states that the proposed amendment to Evidence Rule 703 is "an undue restriction upon the ability of qualified experts to provide the sometimes necessary explanations of the foundations of their opinions."

Anthony Tarricone, Esq. (98-EV-166) opposes the proposed amendment to Evidence Rule 703 on the ground that it "would undoubtedly extend the length and complexity of discovery and trial by mandating the introduction in evidence of information and data that, while relied upon by the expert, are not necessary for the court's and jury's consideration."

Annette Gonthier Kiely, Esq. (98-EV-167) states that the proposed amendment to Evidence Rule 703 should not be adopted "since it is redundant and will open the door to needless and costly collateral evidentiary disputes."

David Dwork, Esq. (98-EV-168) states that the proposed amendment to Evidence Rule 703 "will merely invite lengthy disputes and voir dire examinations on issues that are more appropriately and effectively dealt with currently by cross-examination and the presentation of opposing evidence."

M.R. Smith, Esq. (98-EV-169) supports the proposed amendment to Evidence Rule 703.

Navistar International Transportation Corp. (98-EV-171) supports the proposed amendment to Evidence Rule 703, but suggests "that further guidelines need to be incorporated into the proposed change to Rule 703 if the change is to be meaningful."

The Section on Courts, Lawyers and the Administration of Justice of the District of Columbia Bar (98-EV-172) agrees with the proposed change to Evidence Rule 703. It suggests, however, that the Committee Note should "clarify that a party need not seek a ruling of the Court if the other party agrees that the probative value of the otherwise inadmissible evidence substantially outweighs its prejudicial effect."

The Federal Magistrate Judges Association (98-EV-173) opposes the proposed amendment to Evidence Rule 703 on the ground that it is "unnecessary."

Nine members of the leadership of the Section of Litigation of the American Bar Association (98-EV-174) favor the proposed amendment to Evidence Rule 703. They argue that the current rule "has too often been used as a 'back door' for the admissibility of otherwise inadmissible and highly prejudicial evidence". They suggest, however, that the proposal be revised to address "the latitude to be given to the proponent on re-direct examination to fairly address the issues raised when the opponent of the evidence, during cross-examination pursuant to Rule 705, requires the expert to expose some or all of the underlying facts or data."

The Litigation Section of the District of Columbia Bar (98-EV-178) opposes the proposed amendment to Evidence Rule 703 on the ground that it is "unnecessary". The Section contends that the proposal "would have the practical effect of encouraging surprise objections to what may be the most critical part of a litigant's case."

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

* * * * *

(6) Records of regularly conducted activity.—A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification,

unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

* * * * *

COMMITTEE NOTE

The amendment provides that the foundation requirements of Rule 803(6) can be satisfied under certain circumstances without the expense and inconvenience of producing time-consuming foundation witnesses. Under current law, courts have generally required foundation witnesses to testify. *See, e.g., Tongil Co., Ltd. v. Hyundai Merchant Marine Corp.*, 968 F.2d 999 (9th Cir. 1992) (reversing a judgment based on business records where a qualified person filed an affidavit but did not testify). Protections are provided by the authentication requirements of Rule 902(11) for domestic records, Rule 902(12) for foreign records in civil cases, and 18 U.S.C. § 3505 for foreign records in criminal cases.

GAP Report--Proposed Amendment to Rule 803(6)

The Committee made no changes to the published draft of the proposed amendment to Evidence Rule 803(6).

Summary of Comments on the Proposed Amendment to Evidence Rule 803(6)

Professor Richard Friedman (98-EV 007) states that the proposed amendment to Evidence Rule 803(6) is "generally salutary" and "may save some expense."

The Fellows of the American College of Trial Lawyers (98-EV-016) favor the proposed amendment to Evidence Rule 803(6).

Professor Lynn McLain (98-EV-030) supports the proposed amendment to Evidence Rule 803(6), noting that Maryland adopted a similar rule in 1994.

Hon. Edward R. Becker (98-EV-065), Chief Judge of the United States Court of Appeals for the Third Circuit, supports the proposed amendment to Evidence Rule 803(6), noting that it is "extremely well justified by the Committee's accompanying commentary."

The Civil Justice Reform Act Advisory Group for the United States District Court of the Western District of Washington (98-EV-073) endorses the proposed amendment to Evidence Rule 803(6).

The State Bar of Arizona (98-EV-075) supports the adoption of the proposed amendment to Evidence Rule 803(6).

The National Association of Railroad Trial Counsel (98-EV-077) supports the proposed amendment to Evidence Rule 803(6).

The Chicago Chapter of the Federal Bar Association (98-EV-078) states that the proposed amendment to Evidence Rule

803(6) "makes sense and should be approved."

The Federal Practice Section of the Connecticut Bar Association (98-EV-079) endorses the proposed amendment to Evidence Rule 803(6).

The Phoenix and Tucson Chapters of the Federal Bar Association (98-EV-080) support the proposed amendment to Evidence Rule 803(6).

The Pennsylvania Trial Lawyers Association (98-EV-081) supports the proposed amendment to Evidence Rule 803(6).

The Federal Rules of Evidence Committee of the American College of Trial Lawyers (98-EV-084) believes that the proposed amendment to Evidence Rule 803(6) brings the Rule "into conformity with the increasingly common practice of the federal courts" and "appropriately" imposes "some of the burden with respect to the foundation requirements to the party challenging the evidence."

The Committee on Federal Courts of the Association of the Bar of the City of New York (98-EV-088) opposes the proposed amendment to Evidence Rule 803(6) as applied to criminal cases.

Professors Bruce Comly French and Elizabeth Phillips Marsh (98-EV-103) reported on a meeting of some members of the Committee on Rules of Evidence and Criminal procedure of the Criminal Justice Section of the American Bar Association. The professors noted that "there is no existing American Bar Association policy known to us that addresses these changes." Nonetheless, the professors report that a "substantial majority" of those present "were concerned, as a matter of underlying policy to promote cross-examination and potentially, as a matter of confrontation rights, that

this change might unduly impair a criminal defendant's ability to cross-examine witnesses who would no longer take the stand to establish the foundation for business records."

Professor Myrna Raeder (98-EV-106) is "troubled by the elimination of a custodian from Rule 803(6)." She recognizes that under the proposed amendment 'the opponent can always raise the question of untrustworthiness, but the rule places the burden on the opponent to demonstrate untrustworthiness, which in criminal cases with limited discovery is harder to do than in civil cases."

Russell T. Golla, Esq. (98-EV-112) supports the proposed amendment to Evidence Rule 803(6).

The Philadelphia Bar Association (98-EV-118) supports the proposed amendment to Evidence Rule 803(6).

The Court Rules and Administration Committee of the Minnesota State Bar Association (98-EV-126) recommends the adoption of the proposed amendment to Evidence Rule 803(6).

The National Association of Independent Insurers (98-EV-141) supports the proposed amendment to Evidence Rule 803(6).

Jon B. Comstock, Esq. (98-EV-142) supports the proposed change to Evidence Rule 803(6).

M.R. Smith, Esq. (98-EV-169) supports the proposed amendment to Evidence Rule 803(6).

The Section on Courts, Lawyers and the Administration of Justice of the District of Columbia Bar (98-EV-172) agrees with the proposed change to Evidence Rule 803(6).

The Federal Magistrate Judges Association (98-EV-173) supports the proposed amendment to Evidence Rule 803(6).

Nine members of the leadership of the Section of Litigation of the American Bar Association (98-EV-174) support the proposed amendment to Evidence Rule 803(6).

Rule 902. Self-authentication

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

* * * * *

(11) Certified domestic records of regularly conducted activity. — The original or a duplicate of a domestic record of regularly conducted activity that would be admissible under Rule 803(6) if accompanied by a written declaration of its custodian or other qualified person, in a manner complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority,

certifying that the record—

(A) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;

(B) was kept in the course of the regularly conducted activity; and

(C) was made by the regularly conducted activity as a regular practice.

A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.

(12) Certified foreign records of regularly conducted

activity.—In a civil case, the original or a duplicate of a foreign record of regularly conducted activity that would be admissible under Rule 803(6) if accompanied by a written declaration by its custodian or other qualified person certifying that the record—

(A) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;

(B) was kept in the course of the regularly conducted activity; and

(C) was made by the regularly conducted activity as a regular practice.

The declaration must be signed in a manner that, if falsely made, would subject the maker to criminal penalty under the laws of the country where the declaration is signed. A party intending to offer a

record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.

COMMITTEE NOTE

The amendment adds two new paragraphs to the rule on self-authentication. It sets forth a procedure by which parties can authenticate certain records of regularly conducted activity, other than through the testimony of a foundation witness. See the amendment to Rule 803(6). 18 U.S.C. § 3505 currently provides a means for certifying foreign records of regularly conducted activity in criminal cases, and this amendment is intended to establish a similar procedure for domestic records, and for foreign records offered in civil cases.

A declaration that satisfies 28 U.S.C. §1746 would satisfy the declaration requirement of Rule 902(11), as would any comparable certification under oath.

The notice requirement in Rules 902(11) and (12) is intended to give the opponent of the evidence a full opportunity to test the adequacy of the foundation set forth in the declaration.

GAP Report--Proposed Amendment to Rule 902

The Committee made the following changes to the published draft of the proposed amendment to Evidence Rule 902:

1.Minor stylistic changes were made in the text, in accordance with suggestions of the Style Subcommittee of the Standing Committee on Rules of Practice and Procedure.

2. The phrase "in a manner complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority" was added to proposed Rule 902(11), to provide consistency with Evidence Rule 902(4). The Committee Note was amended to accord with this textual change.

3. Minor stylistic changes were made in the text to provide a uniform construction of the terms "declaration" and "certifying."

4. The notice provisions in the text were revised to clarify that the proponent must make both the declaration and the underlying record available for inspection.

Summary of Comments on the Proposed Amendment to Evidence Rule 902

Professor Richard Friedman (98-EV 007) states that the proposed amendment to Evidence Rule 902 is "generally salutary" and "may save some expense." He suggests one change: that the proponent should not only make available the records sought to be admissible, but should also assure that the certifying witness be made available for a deposition on the subject matter of the certification.

Professor Dale A. Nance (98-EV-014) endorses the goal of the proposed amendment to Evidence Rule 902, however he suggests certain revisions in the wording of the proposal as issued for public comment. He proposes that the reference to admissibility under Rule 803(6) should be deleted. He also suggests that the notice provisions should be modified to make clear that the opponent would have an opportunity to challenge the declaration signed by the custodian or other qualified witness.

The Fellows of the American College of Trial Lawyers (98-EV-016) favor the proposed amendment to Evidence Rule 902.

Professor Lynn McLain (98-EV-030) supports the proposed amendment to Evidence Rule 902, noting that Maryland adopted a similar rule in 1994.

Hon. Edward R. Becker (98-EV-065), Chief Judge of the United States Court of Appeals for the Third Circuit, supports the proposed amendment to Evidence Rule 902, noting that it is "extremely well justified by the Committee's accompanying commentary."

The State Bar of Arizona (98-EV-075) supports the adoption of the proposed amendment to Evidence Rule 902.

The National Association of Railroad Trial Counsel (98-EV-077) supports the proposed amendment to Evidence Rule 902.

The Chicago Chapter of the Federal Bar Association (98-EV-078) supports the proposed amendment to Evidence Rule 902.

The Federal Practice Section of the Connecticut Bar Association (98-EV-079) endorses the proposed amendment to Evidence Rule 902.

The Phoenix and Tucson Chapters of the Federal Bar Association (98-EV-080) support the proposed amendment to Evidence Rule 902.

The Pennsylvania Trial Lawyers Association (98-EV-081) supports the proposed amendment to Evidence Rule 902. The Association believes "that the procedures for admitting domestic records and foreign records should be similar."

The Federal Rules of Evidence Committee of the American College of Trial Lawyers (98-EV-084) supports the proposed amendment to Evidence Rule 902, declaring that it "appropriately" reallocates "some of the burden with respect to the foundation requirements to the party challenging the evidence." The Committee states that the proposal's notice requirement "ensures that the Rule will achieve the benefit of efficiency without undue risk of unfairness."

The Committee on Federal Courts of the Association of the Bar of the City of New York (98-EV-088) opposes the proposed amendment to Evidence Rule 902 as applied to criminal cases, "both because of Confrontation Clause concerns, and also because the Committee is concerned that, given the restricted scope of pretrial discovery available in criminal cases, the opponent of the evidence (which may be either the prosecution or the defense) may have insufficient information to weigh the need to the testimony of the custodian until the evidence is offered at trial." The Committee concludes that the proposed amendment "would prevent the opponent of the document from having any chance to challenge its authenticity

or admissibility unless the opponent had the foresight and the knowledge to articulate a challenge to it in advance. While it may be reasonable to require such foresight in civil cases, the Committee is concerned that it may be unreasonable" in criminal cases.

Professors Bruce Comly French and Elizabeth Phillips Marsh (98-EV-103) reported on a meeting of some members of the Committee on Rules of Evidence and Criminal procedure of the Criminal Justice Section of the American Bar Association. The professors noted that "there is no existing American Bar Association policy known to us that addresses these changes." Nonetheless, the professors report that a "substantial majority" of those present "were concerned, as a matter of underlying policy to promote cross-examination and potentially, as a matter of confrontation rights, that this change might unduly impair a criminal defendant's ability to cross-examine witnesses who would no longer take the stand to establish the foundation for business records."

Russell T. Golla, Esq. (98-EV-112) supports the proposed amendment to Evidence Rule 902.

The Philadelphia Bar Association (98-EV-118) supports the proposed amendment to Evidence Rule 902, but suggests that the language of the proposal, as issued for public comment, be amended to more closely track the language of Evidence Rule 803(6). The Association also recommends that the Committee Note refer to statutory authority governing certifications and declarations under oath. Finally, the Association recommends that the notice provisions in the proposal should specify that the notice must be given in time to permit a pretrial deposition of the witness making the declaration.

The Court Rules and Administration Committee of the Minnesota State Bar Association (98-EV-126) recommends the adoption of the proposed amendment to Evidence Rule 902.

The National Association of Independent Insurers (98-EV-141) supports the proposed amendment to Evidence Rule 902.

Jon B. Comstock, Esq. (98-EV-142) supports the proposed change to Evidence Rule 902.

M.R. Smith, Esq. (98-EV-169) supports the proposed amendment to Evidence Rule 902.

The Section on Courts, Lawyers and the Administration of Justice of the District of Columbia Bar (98-EV-172) agrees with the proposed change to Evidence Rule 902.

The Federal Magistrate Judges Association (98-EV-173) supports the proposed amendment to Evidence Rule 902, because it "retains concepts of fairness for the parties, reduce[s] trial time, and minimize[s] the parties' expenses" and therefore it is "in the best interests of all concerned and of the system at large." The Association suggests, however, that paragraphs (11) and (12) of the proposal, as released for public comment, be reworded for consistency "so that both read as a certification under oath or on a written declaration to avoid confusion".

Nine members of the leadership of the Section of Litigation of the American Bar Association (98-EV-174) support the proposed amendment to Evidence Rule 902. They suggest, however, the addition of "a general requirement that the adverse party

must provide notice of intent to challenge the admissibility of the evidence sufficiently in advance of trial to provide the proponent a fair opportunity to obtain and present live testimony."

Item 9B

Advisory Committee on Evidence Rules

Draft Minutes of the Meeting of April 12-13, 1999

New York, N.Y.

The Advisory Committee on the Federal Rules of Evidence met on April 12th and 13th at Fordham University in New York City.

The following members of the Committee were present:

Hon. Fern M. Smith, Chair
Hon. Milton I. Shadur, Acting Chair for the first day of the meeting
Hon. David C. Norton
Hon. Jerry E. Smith
Hon. James T. Turner
Professor Kenneth S. Broun
Laird Kirkpatrick, Esq.
Gregory P. Joseph, Esq.
Frederic F. Kay, Esq.
John M. Kobayashi, Esq.
David S. Maring, Esq.
Professor Daniel J. Capra, Reporter

Also present were:

Hon. Anthony J. Scirica, Chair of the Standing Committee on Rules of Practice and Procedure
Hon. Frank W. Bullock, Jr., Liaison to the Standing Committee on Rules of Practice and Procedure
Hon. Richard Kyle, Liaison to the Civil Rules Committee
Hon. David D. Dowd, Liaison to the Criminal Rules Committee
Professor Daniel R. Coquillette, Reporter, Standing Committee on Rules of Practice and Procedure
Professor Leo Whinery, Reporter, Uniform Rules of Evidence Drafting Committee
Roger Pauley, Esq., Justice Department

Peter G. McCabe, Esq. Secretary, Standing Committee on Rules of Practice and Procedure

John K. Rabiej, Esq., Chief, Rules Committee Support Office
Joe Cecil, Esq., Federal Judicial Center

Opening Business

Judge Shadur chaired the first day of the meeting. Judge Fern Smith was available by way of telephone conference call on the first day, and was present to chair the second day of the meeting. Judge Shadur opened the meeting by asking for approval of the minutes of the October, 1997 meeting. These minutes were unanimously approved.

The Committee then considered the proposed amendments to the Evidence Rules that had been released for public comment. The proposed amendments covered Evidence Rules 103, 404(a), 701, 702, 703, 803(6) and 902. The Committee evaluated the public comments received on the proposals, considered changes to the proposed amendments and Committee Notes, and approved the proposals, as modified, for recommendation to the Standing Committee that they be approved and referred to the Judicial Conference. What follows is a breakdown of the discussions, and the action taken, with respect to each of the proposals.

Rule 702

The proposal to amend Rule 702 requires that expert testimony have a sufficient basis, that the expert employ reliable principles and methods, and that those principles and methods are reliably employed to the facts of the case. The intent of the proposal is to recognize and refine the Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals* and its progeny.

Judge Shadur opened the discussion on Rule 702 by noting that in deciding how to amend the Rule, the Committee was not technically bound by the Supreme Court's intepretation of the existing Rule 702 in *Daubert* and in the recent case of *Kumho Tire v. Carmichael.* However, all members of the Committee were in agreement that the approach taken by the Supreme Court--an approach that is followed in the proposal issued for public comment--provided an excellent and definitive means of regulating unreliable expert testimony. There was unanimous agreement that if the Rule is to be amended, it should stick as closely as possible to the Supreme Court's teachings in *Daubert* and *Kumho.*

The Committee then considered some of the major criticisms and suggestions that arose in the public comment period. The topics addressed are listed by number:

1. Proliferation of motions challenging expert testimony

Some public commentators were concerned that the proposed amendment would lead to a flood of motions challenging expert testimony. A discussion ensued in which some members said they had encountered no increase in challenges to experts since *Daubert*, while other members noted some (but not major) increase. Committee members noted that the public comment had expressed particular concern about the possibility that motions to exclude would increase due to the proposed amendment's extension of the gatekeeper function to non-scientific expert testimony. Since the Supreme Court had resolved that question in *Kumho* consistently with the proposed amendment, Committee members considered most of the concern over a proliferation of motions to be mooted by the *Kumho* decision.

While the concerns expressed in the public comment period did not, in the Committee's view, warrant a rejection or limitation of the language in the text of the proposed amendment, the Committee unanimously agreed to add language to the Committee Note indicating that the amendment is not intended to provide an excuse for an automatic challenge to the testimony of every proffered expert. This language, and supporting authority, is included in the Committee Note attached as an appendix to these minutes.

2. Infringing the Right to Jury Trial

Some public commentators asserted that the proposed amendment would deny plaintiffs a right to jury trial, because it would allow the trial judge to exclude expert testimony by deciding credibility questions that should be left to the jury. The Committee found these general criticisms to be unjustified. To the extent the criticism was based on trial judges acting as gatekeepers, this is simply the result of the proposed amendment's codification of *Daubert* and *Kumho*. Even if Rule 702 were not amended, plaintiffs would have to deal with the trial judge's gatekeeping function in excluding the testimony of any expert if that testimony is unreliable. Moreover, the right to jury trial does not mean that litigants are permitted to bring any evidence, no matter how dubious or prejudicial, before a jury. Rather, the right to jury trial means that it is the jury's role to consider all the *reliable* evidence that is not unduly prejudicial, privileged, etc.. There is a legitimate concern that the jury, unschooled in the ways of experts, will if unregulated give undue weight to expert testimony that is in fact unreliable. Therefore, a rule of evidence excluding unreliable expert testimony--such as either the current or the amended Rule 702-- does not violate the right to jury trial.

For all these reasons, the Committee unanimously agreed that any concerns over the loss of the right to jury trial did not warrant a change in the text of the proposed amendment to Evidence Rule 702. The Committee agreed, however, to add to the Committee Note a quotation

from the Court in *Daubert*, in which the Court indicates that "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." This language, and supporting authority, is included in the Committee Note attached as an appendix to these minutes.

3. Extending the Gatekeeper Function to Non-scientific Expert Testimony

Some public commentators objected to the proposed amendment's explicit extension of the *Daubert* gatekeeping function to the testimony of non-scientific experts. These comments were rendered before the Supreme Court's decision in *Kumho*, however. The Court in *Kumho*, citing favorably the Committee Note to the proposed amendment released for public comment, held that the *Daubert* gatekeeping function must be applied to all expert testimony. The *Kumho* Court emphasized the same flexible standards for assessing reliability that are set forth in the proposed amendment and Committee Note. The Committee therefore decided that there was no need to modify either the text or the note of the proposed amendment to address any concerns about extending the gatekeeper function to non-scientific expert testimony.

4. Competing Methodologies in the Same Field

Some public commentators have expressed the concern that the proposed amendment to Rule 702 fails to recognize that there might be two or more competing reliable methodologies in the same field. The Committee considered these criticisms and concluded unanimously that the broad language of the proposed amendment, which refers to "reliable principles and methods", is broad enough testimony based on competing methodologies in the same field, where both are reliable. In order to assuage any concerns on the matter, the Committee agreed to add language to the Committee Note providing that the amendment "is broad enough to permit testimony that is the product of competing principles or methods in the same field of expertise." This language, and supporting authority, is included in the Committee Note attached as an appendix to these minutes.

5. Experience-based Experts

A few public commentators took the position that the proposed amendment would exclude the testimony of any expert relying on experience, rather than scientific or technical knowledge. The Committee considered these comments and found them to be without merit. Rule 702 specifically states that experts may be qualified by experience. The proposed amendment, in requiring that experts must employ reliable principles and methods, in no way implies that experience cannot qualify under its terms. The Committee therefore unanimously rejected a suggestion that the term "experience" be included together with the terms "principles

and methods" in the text of the proposed amendment. Such a change might give too much weight to experience as a basis for expert testimony.

The Committee nonetheless agreed to amend the Committee Note to emphasize that the testimony of experience-based experts can qualify under the Rule. The revision provides, among other things, that in certain fields, "experience is the predominant, if not sole, basis for a great deal of reliable expert testimony." This language, and supporting authority, is included in the Committee Note attached as an appendix to these minutes.

6. Requiring the Testimony to be Sufficiently Based on Reliable Facts or Data

Several organizations expressed concern that the reference in Subpart (1) of the proposed amendment to an expert's reliance on "reliable facts or data" would create several problems. One possibility is that the trial judge could exclude the expert's testimony on the ground that the judge did not believe the underlying data; the concern is that this type of credibility determination could usurp the jury's role. Another possibility expressed in the public comment is that the reference to "reliable facts or data" could be construed to prohibit an expert from relying on hypothetical facts or data. Finally, and most importantly, the commentators noted a possibly problematic overlap between imposing a limitation on reliable facts or data in Rule 702, and imposing a similar limitation on otherwise inadmissible facts or data under Rule 703.

The Committee considered all of these criticisms and collectively found that some or all had merit. The Committee noted that the problems derived from the focus on "reliable" facts or data in Subpart (1). The intent of Subpart (1) is to assure that the expert has relied on a sufficient *quantity* of information; calling for a qualitative assessment (by requiring the information to rise to some independent level of reliability) risks a conflict with Rule 703. Nor is a qualitative assessment of the underlying data necessary in Subpart (1). Subparts (2) and (3) already require the expert to use reliable principles and methods and to apply those principles and methods reliably, so there is virtually no chance that deletion of the term "reliable" from Subpart (1) would result in the admission of unreliable expert testimony.

The Committee therefore unanimously agreed to revise Subpart (1) of the proposed amendment to Rule 702, to delete the word "reliable", and to restylize the language of Subpart (1) to provide that an expert's opinion must be based on "sufficient facts or data". The proposed Committee Note was modified where necessary to take account of this minor change. A subsequent motion was made to delete Subpart (1) entirely from the proposed amendment. This motion failed by a vote of eight to two.

7. Focus on an Expert's Reasoning

One public comment suggested that the proposed amendment should be revised to focus on an expert's "reasoning" rather than the use of "principles and methods". The Committee considered this comment and unanimously concluded that the suggested change was one of style rather than substance, that any stylistic change was not for the better, and therefore that the proposal should not be amended to focus on "reasoning."

8. Retaining the Existing Rule:

The Committee considered and discussed several public comments suggesting that Rule 702 should not be amended at all. One member of the Committee expressed some sympathy with this position. But the remaining Committee members were of the view that the amendment should be forwarded to the Standing Committee, for a number of reasons. First, even after the *Kumho* decision, there are a number of *Daubert* questions on which the courts disagree, including the appropriate standard of proof and the rigor with which expert testimony should be scrutinized. Second, Congress has in the past shown an interest in "codifying" *Daubert*, and the Committee was concerned that these previous legislative proposals created many more problems than they solved. The Committee resolved that it was necessary to respond to these Congressional initiatives with the kind of flexible and carefully drafted amendment that the Committee has proposed.

9. Generalized Expert Testimony:

One public comment expressed the concern that the proposed amendment would preclude the testimony of experts who would testify only to instruct the jury on general principles--what one Committee member referred to as expert "tutorials." The cause of the concern was Subpart (3) of the proposed amendment, which states as a condition of admissibility that "the witness has applied the principles and methods reliably to the facts of the case." With respect to expert "tutorials", the argument could possibly be made that the expert has not attempted to apply any principles or methods to the facts of the case.

The Committee engaged in an extensive discussion and analysis of whether the proposed amendment should be revised to more specifically permit the testimony of experts who testify to general principles only. One possibility considered was to revise the proposal to provide that the witness must apply the principles and methods reliably to "the issues in the case." But this proposal was found by a majority of Committee members to call for a distinction without a difference.

Ultimately, the Committee agreed, by a vote of seven to three, that the existing text of the proposal was clear enough to indicate that an expert tutorial would be admissible, so long as

the expert's testimony was reliable and fit the facts of the case. The Committee then voted unanimously to revise the Committee Note to emphasize that reliable expert testimony can be admitted even where the expert makes no attempt to apply any methodology to the specific facts of the case. Among other things, the revision states that the amendment "does not alter the venerable practice of using expert testimony to educate the factfinder on general principles." This language, and supporting authority, is included in the Committee Note attached as an appendix to these minutes.

10. Public Comment Suggestions to Revise Committee Note

The Committee considered two sets of public comments that had suggested certain revisions to the Committee Note to the proposed amendment to Evidence Rule 702.

One comment suggested that the Committee Note be amended to state that Rule 104(b), rather than Rule 104(a), provides the standard of proof for determining the reliability of expert opinion under Rule 702. The Committee considered this comment and unanimously determined that the suggestion was inconsistent with a number of important precedents: 1) the Supreme Court in *Daubert* expressly stated that the trial judge's gatekeeper function is found within Rule 104(a), and this position was reiterated implicitly in *Joiner v. General Electric* and *Kumho*; 2) the recent amendment adding Evidence Rule 804(b)(6) specifically states in the Committee Note that admissibility questions thereunder are to be decided under Rule 104(a)--the Committee found no distinction between issues decided by the judge under Rule 804(b)(6) and those decided by the judge under Rule 702; and 3) for admissibility determinations by the judge, Rule 104(a) sets the basic rule, to which Rule 104(b) is the exception that is applicable in certain very limited situations. The Committee unanimously determined that none of the reasons for employing the exceptional Rule 104(b) standard applied to the trial judge's determination of the reliability of an expert's opinion.

A second set of comments expressed concern with the Committee Note that was released for public comment, insofar as the Note suggests certain factors that a trial court could consider in determining whether an expert's testimony is reliable. The concern was that the listed factors might be read as being dispositive of the reliability question. The Committee agreed to add language to the Committee Note providing that "no single factor is necessarily dispositive of the reliability of a particular expert's testimony."This language, and supporting authority, is included in the Committee Note attached as an appendix to these minutes.

11. Style Subcommittee

The Evidence Rules Committee considered a change suggested by the Style Subcommittee of the Standing Committee. That change substituted the word "if" for the words

"provided that" at the beginning of the proposed amendment to Rule 702. The Committee unanimously agreed to adopt the suggestion.

12. Kumho

The Committee unanimously resolved to add language to the Committee Note to take account of the Supreme Court's decision in *Kumho*. The sense of the Committee was that the analysis in *Kumho* is completely consistent with and supportive of, the approach taken by the proposed amendment and Committee Note; therefore it would be appropriate to cite and quote *Kumho* throughout the Committee Note. All of this language, and supporting authority, is included in the Committee Note attached as an appendix to these minutes.

12. Recommendation

A motion was made and seconded to recommend to the Standing Committee that the proposed amendment to Evidence Rule 702, as modified following publication, be approved and forwarded to the Judicial Conference. That motion passed by a unanimous vote.

A copy of the proposed amendment to Rule 702, and the proposed Committee Note to Rule 702, is attached to these minutes.

Rule 701

The Committee considered the proposed amendment to Evidence Rule 701. As released for public comment, the proposal would preclude testimony under Rule 701 if it were based on "scientific, technical, or other specialized knowledge." The goal of the amendment is to prevent testimony from being admitted under Rule 701 when in fact it is expert testimony and treated as such by the proponent.

An extensive discussion ensued on whether it was appropriate to establish a bright line between expert and lay testimony. Justice Department representatives argued that the proposal would create uncertainty, and would result in many more witnesses being subject to the disclosure provisions applicable to experts. They argued further that any expansion of discovery rules should not come by way of a rule of evidence. Other members argued, in contrast, that the proposal would not change existing law in any substantial way. A proponent who purports to present lay witness testimony that is based on extensive experience will have to establish a foundation in any case--the experiential foundation that would qualify the witness under Rule 701 would be the same as the foundation necessary to establish the witness as an expert under

Rule 702. Justice Department representatives argued in response that the real problem was one of finding it necessary to disclose such witnesses in advance of trial.

Ultimately, the Committee agreed that both the text and the Note to Rule 701 had to be revised to accommodate DOJ concerns about pretrial disclosure of witnesses such as eyewitnesses testifying on the basis of extensive, particularized experience. The Committee agreed that there was no intent to prevent such witnesses from testifying under Rule 701. On the other hand, the Committee was strongly of the view that a proponent should not be permitted to end-run the requirements of Rule 702 simply by calling testimony "lay witness testimony" when in fact the proponent emphasizes the witness' specialized knowledge and expertise.

After extensive discussion on possible compromise language, and taking account of the suggestions of the Justice Department, the Committee ultimately agreed to one change in the text of the proposal that was issued for public comment. That change modifies the exclusion of testimony under Rule 701 to testimony "not based on scientific, technical or other specialized knowledge **within the scope of Rule 702.**" The inference is, therefore, that some specialized knowledge may provide a permissible basis of lay witness testimony--just not the specialized knowledge that is traditionally within the scope of expert witness testimony. Corresponding changes were made to the Committee Note, and the Note was also amended to delete a paragraph that had implied that all testimony based on specialized knowledge must be considered expert testimony. Finally, a section was added to the Committee Note indicating that there was no intent to prevent lay witnesses from traditionally accepted subjects such as the value of property and the fact that a certain substance was a narcotic. This new section of the Committee Note also elaborates on the distinction between lay testimony, which "results from a process of reasoning familiar in everyday life", while expert testimony "results from a process of reasoning which can be mastered only by specialists in the field."

Recommendation:

A motion was made and seconded to recommend to the Standing Committee that the proposed amendment to Evidence Rule 701, as modified following publication to address the Justice Department's concerns over the scope of the Rule, be approved and forwarded to the Judicial Conference. Nine Committee members voted in favor of the motion. The Justice Department representative abstained.

A copy of the proposed amendment to Rule 701, and the proposed Committee Note to Rule 701, is attached to these minutes.

Rule 703

The proposed amendment to Evidence Rule 703 would impose limitations on the

disclosure to the jury of otherwise inadmissible information used as the basis of an expert's opinion.The Committee considered some of the major criticisms and suggestions that arose in the public comment period concerning the proposed amendment to Evidence Rule 703. The topics addressed are listed by number:

1. A Change to the Rule is Unnecessary

The intent of the proposed amendment is to prevent an opponent from bringing unreliable hearsay or other inadmissible evidence before the jury in the guise of information relied upon by an expert. A few public comments argued that the Rule need not be amended, on the ground that courts have been guarding against the abuses that the amendment seeks to prevent. But based on an extensive review of the case law, as well as other public comments and the experiences of the Committee members, the Committee unanimously agreed that there remains a substantial risk that parties will use the existing Rule 703 as a backdoor means of evading exclusionary rules. Consequently, the Committee determined that the Rule should be amended to guard against that risk.

2. Rebuttal, and Response to an Anticipated Attack on the Expert's Basis

Some public comments suggested that the Committee Note should be amended to clarify that a proponent may be able to bring out inadmissible used by the expert on rebuttal, if the opponent attacks the basis of an expert's opinion on cross-examination. Along the same lines, these public comments suggested that the Note address whether an expert's inadmissible basis could be brought out on direct in an effort to "remove the sting" of an anticipated attack on the expert's basis. The Committee concluded that the possibilities of disclosing inadmissible information relied upon by an expert— either for rebuttal or in anticipation of an attack on the expert's basis— are encompassed within the balancing test set forth in the proposed amendment. There was therefore no need to amend the text of the Rule to account for these possibilities. The Committee did agree, however, to amend the Committee Note to clarify that the balancing test should be applied to questions of rebuttal and anticipated attack. The added language provides that "an adversary's attack on an expert's basis will often open the door to a proponent's rebuttal with information that was reasonably relied upon by the expert, even if that information would not have been discloseable initially under the balancing test provided by this amendment." It further provides that "in some circumstances the proponent might wish to disclose information that is relied upon by the expert in order to 'remove the sting' from the opponent's anticipated attack," and that the trial court "should take this consideration into account in applying the balancing test provided by this amendment."

3. Requiring Proponents to Qualify Evidence Relied on by an Expert

One public commentator suggested that the proposed amendment would result in wasted expense, because it would force a proponent to qualify evidence as admissible even if it was only to be used as part of the basis of an expert's testimony. The Committee found this suggestion to be without merit. If information relied on by an expert is in fact admissible, there is no legitimate reason why a proponent would want or need to admit it solely to explain the basis of an expert's testimony and not for substantive purposes. Nor is there a legitimate reason to forego the process of qualifying evidence that is in fact admissible.

4. Information "Not in Evidence"

At its October, 1998 meeting , the Evidence Rules Committee tentatively concluded that the proposed amendment should refer to information "not in evidence" rather than information that is "otherwise inadmissible." The thought was that the reference to information "not in evidence" would provide more clarity. However, on reconsideration, the Committee unanimously determined that the phrase "not in evidence" would be problematic. It would subject even admissible information used by an expert to the strict balancing test simply because the information was not yet put in evidence at the time of the expert's testimony. This could lead to disruption in the order of proof because a proponent could be forced to qualify evidence out of the ordinary sequence, in order to avoid the strict balancing test of the proposed amendment.

After extensive discussion, the Committee resolved to return to the "otherwise inadmissible" language that had been included in the version of the proposed amendment that was issued for public comment. The Committee also resolved to address the concern of some public comments that it might be confusing to refer to the "probative value" of "otherwise inadmissible" evidence. The Committee unanimously agreed to add language to the text of the Rule to indicate that the probative value to be assessed is the degree to which the otherwise inadmissible information assists the jury in understanding the expert's opinion. The Committee Note was also revised to accord with the change in the text. This language is included in the proposed amendment and Committee Note attached as an appendix to these minutes.

5. Explicating Balancing Factors in the Committee Note

The Committee considered the suggestion of some public commentators that the Committee Note to the proposed amendment to Rule 703 should be revised to add a list of factors that a trial court should consider in determining whether otherwise inadmissible information relied on by an expert should be disclosed. Committee members generally expressed a reluctance to include such a checklist. Members were confident that trial judges were

experienced in balancing probative value and prejudicial effect in a variety of situations. There was also a concern that by including some factors, courts and litigants might draw a negative inference concerning other factors that are not expressly included on the list. The Committee therefore unanimously agreed that the suggested addition should not be adopted.

6. Recommendation

A motion was made and seconded to recommend to the Standing Committee that the proposed amendment to Evidence Rule 703, as modified following publication, be approved and forwarded to the Judicial Conference. The motion was passed by a unanimous vote.

A copy of the proposed amendment to Rule 703, and the proposed Committee Note to Rule 703, is attached to these minutes.

Rule 103

The proposal to amend Rule 103 that was issued for public comment would provide that a party need not renew an objection or offer of proof where the trial court has made a definitive advance ruling admitting or excluding evidence. It further codifies and extends the rule of *Luce v. United States*. *Luce* held that a criminal defendant who objects to an advance ruling admitting impeachment evidence must take the stand to preserve any claim of error for appeal.

The Chair began the discussion on Rule 103 by stating that she did not believe it was the Committee's role to expand the application of *Luce*--that was an important policy issue that should be left to the courts. Several Committee members echoed this sentiment, and stated that the proposed Rule should leave the applicability of *Luce* to case law. The way this could be done would be to delete the second sentence of the proposed amendment (the sentence codifying and extending *Luce*), and to state in the Committee Note that there was no intent to address any of the questions raised in *Luce*.

The Justice Department representatives objected to this solution, arguing that deleting the second sentence of the proposal would implicitly overrule *Luce*, and that this implication could not be corrected by a Committee Note. They argued that most of the expressed concern over the second sentence was in its application to civil proceedings. The Justice Department representatives suggested that the text of the proposal could be changed to limit the second sentence, concerning *Luce*, to criminal cases. Some members responded that this solution would

implicitly overrule some of the court decisions that had in fact applied *Luce* in a civil setting. The Justice Department representatives responded that the Committee Note could state that there was no intent to deal with *Luce* in a civil setting. It was unclear to many Committee members, however, why a Committee Note would be considered sufficient to clarify any ambiguity about the effect of the Rule on *Luce* in civil cases when, according to the Justice Department, a Committee Note would not be sufficient to clarify any ambiguity about the effect of the Rule on *Luce* in every case.

Other Committee members rejected the contention that dropping the sentence on *Luce* could be construed as an implicit overruling of that decision. The first sentence of the proposed amendment states that there is no need to renew an objection or offer of proof when the advance ruling is definitive. But *Luce* has nothing to do with renewing an objection--rather, it requires a party to testify in order to preserve a claim of error with respect to the admission of impeachment evidence. Testifying and renewing an objection are separate concepts.

Other Committee members, addressing the Justice Department's proposal to limit the *Luce* language to criminal cases, noted that such a limitation had been rejected by the Standing Committee when a previous version of an amendment to Rule 103 was proposed for release for public comment.

A motion was made to delete the second sentence of the proposed amendment to Rule 103 that was issued for public comment; to amend the Committee Note to indicate that there is no intent to disturb *Luce;* and to add language to the Committee Note describing why the question of renewal of objection or offer of proof is different from the question confronted by the Court in *Luce.* This motion passed by a vote of 7 to 3. A second motion was made to retain the second sentence but limit it to criminal cases, and to amend the Committee Note accordingly. This motion failed by a vote of 7 to 3.

After these votes, Committee members expressed concern that Justice Department objections to the deletion of the second sentence of the proposal might result in the rejection of the proposed amendment in its entirety. The sense of the Committee was that it would be most unfortunate if the first sentence of the proposal were to be rejected due to expressed objections over the deletion of the second sentence. Therefore, in a separate vote, the Committee unanimously agreed that it would prefer to have an amendment with the *Luce* language, limited to civil cases, rather than to have no amendment at all.

Magistrate Judge's Rulings:

28 U.S.C section 636(b)(1) and Fed.R.Civ. P. 72(a) require that a party who would object to the nondispositive determination of a magistrate judge on a matter adjudicated without consent of the parties must file an objection with the district court within ten days of the ruling, in order to preserve a claim of error on appeal. A public commentator expressed concern that the

proposed amendment to Evidence Rule 103(a) could be construed as in conflict with the statute and the Civil Rule, because the proposed amendment states that a party need not renew an objection or offer of proof as to pretrial definitive rulings.

The Committee, after discussion, determined that there was no inconsistency between the proposed amendment and the statute and Civil Rule. The proposed amendment provides that an objection or offer of proof need not be *renewed* at trial when the pretrial ruling is definitive. The statute and Civil Rule do not require a renewal of an objection; rather, they require the party to essentially *appeal* the Magistrate Judge's ruling to the district court, in order to preserve the right to appeal further to the court of appeals. The Committee therefore found it unnecessary to amend the text of the proposal to refer to 28 U.S.C section 636(b)(1) and Fed.R.Civ. P. 72(a).

The Committee did agree, however, that it would be useful to add language to the Committee Note that would mention the statute and Civil Rule, and to state that there is no intention to abrogate those provisions. The Committee unanimously agreed to add the following language to the Committee Note:

> Nothing in the amendment is intended to affect the provisions of Fed.R.Civ.P. 72(a) or 28 U.S.C. §636(b)(1), pertaining to nondispositive pretrial rulings by magistrate judges in proceedings that are not before a magistrate judge by consent of the parties. Fed.R.Civ.P. 72(a) provides that a party who fails to file a written objection to a magistrate judge's nondispositive order within ten days of receiving a copy "may not thereafter assign as error a defect" in the order. 28 U.S.C. §636(b)(1) provides that any party "may serve and file written objections to such proposed findings and recommendations as provided by rules of court" within ten days of receiving a copy of the order. Several courts have held that a party must comply with this statutory provision in order to preserve a claim of error. *See, e.g., Wells v. Shriners Hospital*, 109 F.3d 198, 200 (4th Cir. 1997)("[i]n this circuit, as in others, a party 'may' file objections within ten days or he may not, as he chooses, but he 'shall' do so if he wishes further consideration."). When Fed.R.Civ.P. 72(a) or 28 U.S.C. §636(b)(1) is operative, its requirement must be satisfied in order for a party to preserve a claim of error on appeal, even where Evidence Rule 103(a) would not require a subsequent objection or offer of proof.

Subsequent Foundation

The Committee reviewed a public comment suggesting that the Committee Note to the proposed amendment to Rule 103 be revised to address the problem arising when evidence is admitted subject to connection or foundation, and the proponent never ends up satisfying that foundation requirement. In such circumstances, the objecting party should not be led to believe

that an initial objection at the time of the advance ruling would be sufficient to preserve a claim of error predicated on the proponent's failure to establish a foundation. The Committee agreed that it would be useful to amend the Committee Note to provide guidance to practitioners on this question. The Committee voted unanimously to add language to the Committee Note providing that "if the court decides in an advance ruling that proffered evidence is admissible subject to the eventual introduction by the proponent of a foundation for the evidence, and that foundation is never provided, the opponent cannot claim error based on the failure to establish the foundation unless the opponent calls that failure to the court's attention by a timely motion to strike or other suitable motion."

Style Subcommittee

The Style Subcommittee of the Standing Committee suggested a minor change to the proposed amendment to Evidence Rule 103 as it was released for public comment. The suggestion was to move the clause "at or before trial" to a different place in the first sentence of the proposal. The Committee unanimously agreed to this change.

Recommendation:

A motion was made and seconded to recommend to the Standing Committee that the proposed amendment to Evidence Rule 103, as modified following publication, be approved and forwarded to the Judicial Conference. The motion was passed by a vote of seven to three.

A copy of the proposed amendment to Rule 103, and the proposed Committee Note to Rule 103, is attached to these minutes.

Rule 404(a)

The proposed amendment to Evidence Rule 404(a) that was issued for public comment would provide that if an accused attacks the victim's character, this opens the door to an attack on a "pertinent" trait of character of the accused. At its October, 1998 meeting, the Committee tentatively agreed to change the word "pertinent" to the word "same", thus limiting the door-opening effect to the very trait of character as to which the accused attacked the victim. The Committee Note was also tentatively revised to accord with this textual change, and to clarify that the Rule does not apply if the accused proffers evidence of the victim's character for some purpose other than proving the victim's propensity to act in a certain way. These tentative changes were approved by the Committee at the April meeting, as appropriate and helpful limitations and clarifications.

The Committee also discussed a suggestion that all the references in Rule 404 to a "victim" should be changed to refer to an "alleged victim." Use of the term "alleged" would provide consistency with Rule 412, and would reflect the reality that at the time the character evidence is proffered, the victim's status is alleged, not proven. The Committee agreed to make this change to the text of the proposed amendment, and to make corresponding changes to the Committee Note.

The Committee then discussed the underlying merits of the proposed rule change. Some members expressed concern that the proposal imposes an unjustified penalty on an accused who decides to attack the victim's character; but most members were of the view that the proposal is necessary to prevent a one-sided presentation of character evidence.

Recommendation:

A motion was made and seconded to recommend to the Standing Committee that the proposed amendment to Evidence Rule 404(a), as modified following publication, be approved and forwarded to the Judicial Conference. The motion was passed by a vote of nine to one.

A copy of the proposed amendment to Rule 404(a), and the proposed Committee Note to Rule 404(a), is attached to these minutes.

Rule 803(6)

The proposed amendment to Evidence Rule 803(6) would provide a means of qualifying business records without the necessity of calling a witness to testify at trial. The public comment on the proposal was almost uniformly favorable. The Committee considered one public comment arguing that the proposal could violate a criminal defendant's right to confrontation. But after extensive research into the case law, the Committee found that there is no viable confrontation question where the record itself fits the requirements of a business record and is qualified by a sworn declaration of the custodian or other qualified witness. The Committee unanimously found that there was no need to amend either the text or the Committee Note of the proposal that was released for public comment.

Recommendation:

A motion was made and seconded to recommend to the Standing Committee that the proposed amendment to Evidence Rule 803(6), as issued for public comment, be approved and forwarded to the Judicial Conference. The motion was passed by a unanimous vote.

A copy of the proposed amendment to Rule 803(6), and the proposed Committee Note to Rule 803(6), is attached to these minutes.

Rule 902

The proposed amendment to Rule 902 would provide a means of authenticating certain business records, other than through the live testimony of a foundation witness. The proposal is intended to work in tandem with the amendment to Evidence Rule 803(6). The intent of the amendment is to provide similar treatment for domestic records, and foreign records in civil cases, as is provided for foreign records in criminal cases by 18 U.S.C. section 3505.

Right to Confrontation:

A Justice Department representative suggested that the Committee Note to the proposed amendment to Evidence Rule 902 include a statement that the admission of business records through certification of a qualified witness does not violate a criminal defendant's right to confrontation. Most Committee members thought it unwise, however, to opine about constitutional issues in a Committee Note. The suggestion was therefore rejected.

Tracking Section 3505

18 U.S.C. 3505 provides that foreign business records can be admitted in criminal cases by way of certification of a qualified witness. The proposed amendment to Rule 902 seeks to apply the principles of section 3505 to all domestic business records, and to foreign business records in civil cases. The proposed amendment is not a carbon copy of section 3505, however. For example, section 3505 contains a provision that an objection to the record must be entered before trial, or it is deemed waived. It also provides that the court's ruling on a motion to exclude the record must be made before trial. There are no similar procedural provisions in the proposed amendment to Evidence Rule 902.

A Justice Department representative argued that because the language section 3505 differed from that of the proposed amendment, the proposed Rule 902(12) should be expanded to criminal cases. This would in effect provide the government two means of qualifying foreign business records in criminal cases--section 3505 and Rule 902(12). Committee members generally opposed this suggestion, expressing concern that it would result in much confusion. Nor did the Committee find any reason to replicate section 3505 word for word in the Evidence Rules. Section 3505 contains intricate procedural provisions, the type of which are not generally found in the Evidence Rules. The suggestion from the Justice Department representative failed for want of a motion.

Records Admissible Under Rule 803(6)

One public comment suggested that the reference in the proposed amendment to records admissible under Rule 803(6) would create a problematic circularity. The argument was that a record is only admissible under Rule 803(6) if a qualified witness authenticates the record at trial, or if the record is certified in accordance with Rule 902. But since the proposed amendment to Rule 902 refers back to admissibility under Rule 803(6), the public commentator envisioned an endless cycle of inadmissibility. The Committee concluded that this concern could be remedied by revising the text of the proposal slightly to refer to a "record of regularly conducted activity that would be admissible under Rule 803(6) if accompanied by a written declaration of its custodian or other qualified person . . . " Committee members expressed the opinion that it was important to refer to Rule 803(6) in the proposed amendment to Rule 902--such a reference was necessary to provide a connection between the two rules. The Committee voted unanimously to modify the language of the text of Rules 902(11) and (12) to refer to records "that would be admissible under Rule 803(6) if accompanied by a written declaration of its custodian or other qualified person".

Record Made by a Regularly Conducted Activity

One public comment suggests that the reference in the proposed amendment to records "made by the regularly conducted activity as a regular practice" is awkward, because, it is asserted, an activity cannot make a record. The Committee considered this criticism and determined that the chosen language was appropriate--it tracked the terms of Rule 803(6) and 18 U.S,C. 3505, both of which refer to records made by an activity.

Explication of Certification Standards

A public comment suggested that the text of the proposed amendment be amended to refer to rules and statutes governing the methods of proper certification. The Committee noted that Rule 902(4), governing authentication of public records, contains language providing for certification "in a manner complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority". The Committee unanimously agreed that it would be appropriate and helpful to add identical language to Rule 902(11). Similar language could not be added to Rule 902(12), however, since that provision governs foreign business records, and certification of those records could not be expected to follow a manner complying with domestic law. The Committee also agreed, in accordance with a tentative decision reached at the October meeting, to amend the Committee Note to provide a reference to 28 U.S.C. §1746, the most important statutory provision governing affirmations under oath. The language added to

the text and Committee Note can be found in the appendix to these minutes.

Notice Provision

The Committee determined, in response to a suggestion in a public comment, that it would be useful to specify that the proponent must make both the underlying record and the signed declaration available in advance of trial. The Committee also affirmed a tentative decision reached at the October meeting--that the text of the Rule specify that the opponent should have sufficient time to challenge the declaration of the custodian or other qualified witness. These changes were agreed to by unanimous vote.

Some public commentators suggested that the notice provisions should be amended to provide more procedural detail. But the Committee unanimously concluded that such an approach would be inconsistent with the notice provisions found in other Evidence Rules, which are mostly cast in general terms.

Style Subcommittee

The Style Subcommitee of the Standing Committee made a number of suggestions for restylizing the proposed amendment to Rule 902. Some of the suggestions were mooted because they were made with respect to proposed revisions that were not adopted. The Evidence Rules Committee unanimously agreed to all of the other suggestions except one--the suggestion for restylizing the phrase "in a manner complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority" was not adopted because the existing phrase is drawn verbatim from other Evidence Rules, and the Committee believed it appropriate to use consistent terminology throughout the Evidence Rules.

Recommendation:

A motion was made and seconded to recommend to the Standing Committee that the proposed amendment to Evidence Rule 902, as modified following publication, be approved and forwarded to the Judicial Conference. The motion was passed by a unanimous vote.

A copy of the proposed amendment to Rule 902, and the proposed Committee Note to Rule 902, is attached to these minutes.

Privileges

At the October meeting, the Chair appointed a Subcommittee to conduct a preliminary investigation into whether it would be advisable for the Evidence Rules Committee to begin a project that might propose a codification of the law of privileges. The Subcommittee reported at the meeting, and unanimously recommended that the Committee should begin a long-term project to attempt to draft proposed rules that would codify the federal law of privileges. The Subcommittee noted that there are many questions on which the courts are divided, both as to the extent of well-accepted privileges and the existence of newer privileges. The Subcommittee also noted that Congress has expressed an interest in codifying privileges on a case-by-case basis, and asserted that if Congress was determined to tinker with privilege law, it would be better to conduct a more wide-ranging review through the rulemaking process. Finally, the Subcommittee noted that the lack of a codified privilege law created a major gap in the Evidence Rules--a gap that should be closed at some point.

The Committee unanimously agreed that an investigation of the privileges would be a useful project even if the Committee never reached the stage of formally proposing codified rules. In light of this general agreement, the Chair appointed a subcommittee to begin an investigation into codification of the privileges. It was suggested that the Subcommittee begin by reviewing the proposed codification of the original Advisory Committee on Evidence Rules. The Subcommittee consists of Laird Kirkpatrick, David Maring, and the Reporter. Ken Broun will act as a consultant to the Subcommittee. The Committee was in general agreement that this would be a long-term project.

Technology

Judge Turner, who is the Evidence Rules Committee's representative on the Technology Subcommittee of the Standing Committee, reported on developments in the Standing Committee's technology project. The current focus is on promulgation of rules that will permit electronic filing with consent of the parties. The Technology Subcommittee has held a meeting with a number of judges and lawyers involved in pilot electronic filing projects, and has fashioned a proposed amendment to the Civil Rules that would permit electronic filing with consent of the parties. No changes to the Evidence Rules are contemplated, at least in the immediate future, though the Evidence Rules Committee will continue to monitor technological developments in the presentation of evidence..

Uniform Rules

Professor Whinery, the Reporter for the Uniform Rules of Evidence Drafting Committee, reported on developments in the Uniform Rules project. The Drafting Committee is revising the working draft after its first reading before the Uniform Laws Commissioners. The Uniform Rules Committee has generally followed the Federal Rules of Evidence, but Professor Whinery noted that there are some marked differences. For example, Proposed Uniform Rule 702 establishes a presumption of admissibility for expert testimony that passes the *Frye* test, and a presumption of inadmissibility for expert testimony that does not. Then the Rule provides a number of factors that would be relevant to overcoming the presumption one way or another. Also, the Uniform Rules have been amended throughout to update language that might not accommodate the presentation of evidence in electronic form.

New Business

The Chair noted that this April meeting has completed a cycle of the Committee--the end of a three-year-long project to propose a package of amendments to the Evidence Rules, most importantly the rules governing expert testimony. The Committee, after discussion, agreed that barring unforeseen developments (such as Congressional activity), there is no need to propose any amendments to the Evidence Rules in the near future.

Next Meeting

The next meeting of the Evidence Rules Committee is scheduled for October 25th and 26th in Washington, D.C.

The meeting was adjourned at 11:45 a.m., Tuesday, April 13th

Respectfully submitted,

Daniel J. Capra
Reed Professor of Law

DRAFT MINUTES

Standing Committee Attorney Conduct Rules Subcommittee

The Attorney Conduct Rules Subcommittee of the Standing Committee on Rules of Practice and Procedure met at the Administrative Office of the United States Courts in Washington, D.C., on May 4, 1999. Judge Anthony J. Scirica was present as Chair of the Standing Committee. Subcommittee members who attended included Professor Daniel J. Capra; Darryl W. Jackson, Esq.; Judge John W. Lungstrum (as liaison from the Committee on Court Administration and Case Management); Myles V. Lynk, Esq.; Judge John M. Roll; Judge Lee H. Rosenthal; Gerald K. Smith, Esq.; Judge Jerry E. Smith; Hon. John Charles Thomas; and Chief Justice E. Norman Veasey. Professor Geoffrey C. Hazard, Jr., attended by telephone link-up. Edward H. Cooper attended as Reporter for the Civil Rules Advisory Committee. The Department of Justice was represented by Acting Assistant Attorney General David W. Ogden, Geoffrey Bestor, and Thomas Pirelli. The Administrative Office was represented by John K. Rabiej, Karen Kremmer, and Mark Miskovsky. The Federal Judicial Center was represented by Marie Leary and Robert Niemic. Roland Dahlin, Federal Public Defender for the Southern District of Texas, also participated.

The primary materials considered at the meeting were an agenda book prepared by Professor Daniel R. Coquillette, Standing Committee Reporter, and a Working Papers book of Special Studies of Federal Rules Governing Attorney Conduct. The studies reproduced in the Working Papers book were conducted by Professor Coquillette or by Marie Leary.

Introduction

Judge Scirica opened the meeting by expressing deep regret that a terrible automobile accident had made it impossible for Professor Coquillette to guide the meeting as had been planned. Professor Capra, Reporter for the Evidence Rules Advisory Committee, agreed at the last minute to assume the duty of introducing the four options discussed in the agenda book. Deep appreciation for his help was expressed both at the opening and at the conclusion of the meeting.

Judge Scirica noted that the origins of the current subcommittee lie in the concerns that Congress expressed over local district court rules. Those concerns led to initiation of the Standing Committee's Local Rules Project in 1988. As the Local Rules Project proceeded, it became apparent that local rules dealing with attorney conduct should be put aside for independent consideration. The attorney-conduct rules are very important, and present issues quite different from the issues that surround most other local rules. Attorney-conduct rules were put aside, but not forgotten. Several studies have been made over the last four years, and conferences have been held. The Standing Committee has reviewed the fruits of these works at intervals, and has suggested directions for further work.

The studies have revealed these central problems: Rules governing attorney conduct vary from district to district, and among the circuits. Federal rules often vary from local state rules, and at times conflict with the state rules. Federal courts, at the same time, realize that traditionally attorney licensing and discipline have fallen into the sphere of state authority. Issues of federalism and separation of powers abound in this area. In addition, special problems arise when particular

attorney conduct rules — including those adopted by the states — seem to conflict with substantive law. The Department of Justice, further, encounters special problems as its attorneys — commonly admitted to practice in only one state — seek to enforce federal law on a nationwide basis.

This first meeting of the ad hoc subcommittee is designed to frame the issues, not to resolve them. The object is to work toward as much resolution as the judiciary can prudently accomplish. If a consensus can be reached on one or more of the options presented by the agenda book, it is hoped that a second meeting can be held to consider specific proposals late in August or early in September. If that meeting can produce agreement on a course of action, it will be recommended for consideration at the fall meetings of the several Advisory Committees, aiming at consideration by the Standing Committee in January 2000. This time frame, however, may change. Congress is actively interested in some of these issues. The American Bar Association Ethics 2000 Commission is hard at work. The Conference of Chief Justices has become engaged.

One specific set of issues has come to the fore. The Department of Justice is deeply concerned about the restrictions that some states have placed on contacts with represented persons during the pre-indictment, pre-complaint phase of criminal and civil investigations. These issues are addressed by Rule 4.2 of the Model Rules of Professional Conduct, and in different form by Rule 10 in the draft Federal Rules of Attorney Conduct. As important as these issues are, they are but one set of issues. They should not dominate the consideration of the broader framework that includes them but many other issues as well.

The Four Options: Summary

Four options are described in the agenda materials. Each was sketched briefly to set the stage for later elaboration.

The first option is to do nothing. This course would leave in place the welter of local rules that now govern attorney conduct in federal courts. There is no reason to suppose that, left alone, these rules will gradually converge on a common point. To the contrary, recent experience suggests that if anything the variety of approaches will multiply.

The second option is to adopt a national policy that requires each federal court to adhere to state rules. This approach is commonly described as the "dynamic conformity" model because it would include adoption of each change in the governing state law as the change occurs. One subsidiary question is whether adoption of the formally prescribed state rules should include adoption of state-court interpretations of the rules, or whether federal courts should assert a power of independent interpretation that disregards the meaning given to state rules by state courts. Case law interpretation is an important part of actual state law; in some areas, such as conflicts of interest, case law is at least as important as the enacted rules.

The third option is to adopt a set of Federal Rules of Attorney Conduct that addresses the issues that most commonly arise in federal proceedings. These "core" rules are illustrated by Rules 2 through 10 of the draft rules. Rule 1 completes the system by prescribing the policy of dynamic conformity to state law for all matters not covered by the specific federal rules. The draft rules are drawn from the ABA Model Rules, modified to articulate the version of the rules that is most

common among the variations adopted by the states. Modest style revisions also are made to conform more nearly to the style conventions adopted for the federal rules of procedure.

The fourth option is to adopt a complete set of federal rules of attorney conduct, and to create an independent disciplinary mechanism to administer them.

A fifth option was considered in earlier discussions, but dismissed. This option would develop a model local rule, with the hope that most districts would choose to adopt the model rule and achieve uniformity in this way. The difficulty with this option is that a model district-court rule was in fact developed several years ago, and has not commanded widespread acceptance. There is little reason to hope that a modified model would fare better.

In considering these options, the questions raised by the Department of Justice must be kept in proportion. Work continues on many fronts to develop a version of Model Rule 4.2 that will accommodate the reasonable needs of attorney-directed investigations, both civil and criminal. The most recent draft in the agenda book is from March 1; still more recent drafts are being developed. Meanwhile, the "McDade amendment," 28 U.S.C. § 530B, took effect on April 19.

General Observations

Chief Justice Veasey described the traditional and persisting allocation of authority and responsibility that has recognized the primary role of the states in regulating admission to practice, attorney conduct, and attorney discipline. He has been involved in these issues as a member of the Standing Committee, President-Elect of the Conference of Chief Justices, and chair of the Ethics 2000 Commission. The various proposals for federal regulation of attorney conduct raise anew the proper role of state-based ethics rules and enforcement.

In 1994 the Attorney General of the United States gave notice of intent to preempt state law regulation of Department of Justice attorneys. The Conference of Chief Justices adopted a resolution to protest this step. Eventually the Eighth Circuit held the regulation invalid. The Conference entered into negotiations with the Attorney General. A discussion draft of Rule 4.2 was prepared in December, 1997; it is only a discussion draft, not a position approved by the Conference. Discussion of this draft in fact was polarized. That draft is a dead issue.

The Conference recognizes that it has a role to play, but is waiting for the ABA to come up with a unified position. It would be ideal to have a position that wins the concurrence of the Department of Justice.

The Commission on Ethics 2000 is an ABA commission that aims to propose a new set of Model Rules for adoption at the July 2000 ABA annual meeting. This project remains work in progress. Chief Judge Veasey has recused himself from consideration of Rule 4.2 in the Ethics 2000 discussions because his role with the Conference of Chief Justices is primary in this area. Professor Hazard is leading the effort on this. One possible outcome may be a minimal change in the language of the Rule that authorizes contact with a represented person "by court order," coupled with extensive commentary on the circumstances that may justify a court order. But it is difficult to

predict the outcome. There are at least three contending drafts at the moment, representing the positions of the Department of Justice, the Ethics 2000 Commission, and the Standing Committee.

The ABA Standing Committee on Ethics and Professional Responsibility remains unified against Department of Justice preemption of state regulation. Senator Hatch, on the other hand, has introduced a bill that would preempt state law. Senator Leahy has introduced a bill that would ask the Judicial Conference to recommend a "Rule 4.2," but that otherwise would rely on state law. This bill would lead to a Federal Rule of Civil Procedure and a Federal Rule of Criminal Procedure governing contacts with represented persons. The rules would incorporate choice-of-law provisions. Enactment of this bill would reduce the responsibility felt by the Standing Committee to develop rules of ethics.

It is better to leave development of the Rules of Professional Responsibility to the ABA and the Ethics 2000 Commission. Many years off in the future, changes in the organization of law practice may justify reconsideration of the primary role of state regulation. But for the present and near future, the Conference of Chief Justices believes that state regulation should continue. The Conference does not believe that the Supreme Court has authority under the Enabling Act to preempt state regulation. Congress does have preemption authority, but it should exercise great restraint.

Judge Scirica reminded the subcommittee that the Standing Committee became involved in these questions as part of the Local Rules Project. It did not deliberately launch a project to write rules of professional responsibility.

Professor Hazard, who was prevented by a court engagement from attending in person, addressed the subcommittee by telephone. He offered several observations. First, state ethics rules should govern all lawyers, including lawyers for the United States government. This is proper federalism. It would be a serious mistake for the federal government — whether through congress or the judiciary — to become embroiled in regulating attorney ethics.

Second, there is good reason to be sympathetic to the problems that confront the Department of Justice in making ex parte contacts during pre-prosecution investigations. Model Rule 4.2 refers to other law, leaving the door open to develop law that differentiates the special responsibilities of prosecutors from the rules that apply in other situations. This problem needs to be addressed. Substantial help would be given by adding "or by court order" to Rule 4.2, as seems likely to happen. But United States Attorneys deserve better guidance. The Ethics 2000 Commission is inclined to add the "by court order" language, but is not likely to go farther. The kind of protection the Department of Justice wants will not be there. It should be up to the federal government, "somehow or other," to provide a more guiding answer.

Third, the McDade Bill has largely superseded the 4 options described in the agenda book. The bill establishes dynamic conformity for government lawyers. Of course there are choice-of-law questions, but these are subsidiary. 28 U.S.C. § 530B is the right rule for federal attorneys. The Judicial Conference has to work in this framework.

Fourth, the Judicial Conference should not do anything unless requested or required to act by statute. The Department of Justice has a problem, but is not one that the Judicial Conference is

committed to resolve. If Congress asks for action by the federal judiciary, on the other hand, it would not be ultra vires to respond.

The Senate bill introduced by Senator Hatch takes an unsatisfactory approach. It says that the Department of Justice is to write the rules they like; this is imprudent. Rules promulgated by the Department will lack the desirable political and moral force. It is better that someone else recognize the Department's needs. The bill introduced by Senator Leahy makes sense. It asks a neutral body — the Supreme Court, through the Enabling Act structure — to take on the responsibility. The Standing Committee is not the ideal body to resolve these questions, but there is no other body to do it.

The present and various drafts of Rule 4.2 provide a good beginning. Congress can write the statute, or it could create a special rulemaking body. But the Standing Committee should not take on the Rule 4.2 problem on its own. More generally, there should not be special federal rules for attorney conduct. There are no problems peculiar to the federal courts, nor do the federal courts have special needs that are not protected by state rules.

As distinguished from rules of attorney conduct, procedural rules can set up standards of behavior that are higher than those required by professional responsibility. Civil Rule 11 and 28 U.S.C. § 1927 are examples.

It is particularly important that federal courts not undertake to adopt rules that would bind lawyers "when they are sitting in their offices." There are few transactions today that are purely state law or federal law. An attorney should not have to cope with two sets of professional responsibility requirements, if ever, until it at least is clear that litigation will be launched in a federal court. The problems that would arise are underscored by considering the circumstance of litigation filed in state court, only to be removed to federal court.

Judge Scirica agreed that § 530B has changed the landscape, but observed that Congress continues to consider revision or even repeal of § 530B. By informal means, it has been made clear that Congress would be receptive to advice from the judiciary. He then asked Professor Hazard whether the relationship between state regulation and possible federal regulation would be affected by changes in the ways in which law practice is organized.

Professor Hazard agreed that practice is increasingly interjurisdictional. The lawyer in St. Louis has to travel to Chicago, the lawyer in London to Dallas. The states should think about the resulting questions more than they have thought about them. In addition to the geographic dispersion of practice, there is the "multidisciplinary" expansion. The most pressing example is the accountant in the law firm. The multidiscipline question, however, does not bear on the relationship between state and federal regulation.

Assistant Attorney General Ogden stated that the Department of Justice has a lot at stake in this area. The McDade bill indeed has changed the landscape. As it stands, § 530B is a problem for the Department. The problem is not that a majority of state rules or courts are adverse to law enforcement, or to the federal government. Generally, courts and ethics agencies have recognized the special needs of law enforcement. The problem is that Rule 4.2 has changed. It no longer refers

to contact with a "party," but to contact with a "person." And there are "outlier" jurisdictions that prohibit pre-indictment contacts that have long been used in investigation and that continue to be of crucial importance. Minnesota and Oregon are examples. Oregon finds that undercover operations involve "deceit" that is improper for a lawyer to direct. Such rules create a potential for serious mischief.

Possible problems with state regulation are aggravated because the rules are not models of clarity. As "ominous" interpretations appear, prosecutors become nervous. Prosecutors do not authorize contacts they would have authorized before. The Department has had to institute a procedure to approve contacts that gives some reassurance, even if it cannot give protection against state enforcement agencies.

The consequences of unduly restrictive state rules and interpretations reach across the board of law enforcement. Either the Hatch bill or the Leahy bill, now pending in the Senate, would help. And it is not clear that present § 530B should be seen as a barrier that prevents the Standing Committee from creating federal rules that become federal law that supersedes inconsistent state rules.

Thomas Pirelli continued the exposition of Department of Justice concerns. The Department believes that there is authority to regulate attorney conduct by federal rules. The question of what rule applies is answered by Model Rule 8.5, which directs use of the rules of the court in which an attorney is litigating. This rule should protect the attorney who complies with forum rules against conflicting rules administered by the attorney's own bar. This is a good rule. Unfortunately, fewer than 10 states have adopted Rule 8.5. The Department interprets § 530B to look to the rules of the court where an action is pending.

The Department does not lose applications to federal court for authority to contact a represented person during a pre-indictment, pre-complaint investigation. But applications are denied by state courts. In the few days since § 530B took effect, the Department has had at least one failure in a situation in which it had information that the defendant was planning something, although it was not clear whether the plan was to bribe or commit violence against a witness.

Professor Hazard advised, speaking as a friend of the Department on these issues, that it would not be wise to seek advisory opinions from local state bar ethics committees. Such committees generally take the most conservative possible stance. He also noted that § 530B refers to "local rules of court"; that does not seem the vocabulary to describe national rules of court. The distinction between local rules and national rules is an old and familiar one.

Assistant Attorney General Ogden repeated the view that § 530B does not foreclose adoption of a federal rule. But § 530B is not as bad for the Department of Justice as would be a rigid rule of conformity to state practice that does not permit an escape valve where a state rule is — in a way that is eccentric, or perhaps more common — antithetical to federal interests.

Professor Hazard found force in the point that § 530B encourages the defense bar to seek amendments of state attorney-conduct rules that favor defendants. And there have been situations where the defense bar has been particularly effective.

Professor Hazard then asked Geoffrey Bestor whether it would be wise for the Standing Committee to begin work on a rule that gives content to the "authorized by law" clause in Rule 4.2. One reason to start work now is that the Leahy bill may be enacted; it could be useful to have a head-start. A different reason would be to lay the groundwork for independent reevaluation within a year or so, when the picture is likely to be clearer — the Standing Committee would be in a better position, with a polished draft, to decide whether to move ahead or to abandon the enterprise. Mr. Bestor responded that the Standing Committee has authority to decide what are to be the rules in federal court. Federal courts should interpret the applicable rules in light of federal interests and policies even when the federal court has adopted the text of the local state rules. In applying the class-action provisions of Civil Rule 23, for example, federal courts work free from state rules of champerty and maintenance. Section 530B should not be read to require dynamic conformity to state rules in the sense that state-court interpretations of state rules are adopted. That reading would be disastrous. Only one case has addressed the question that would arise if a federal court rules that particular conduct of an attorney was proper, and a state disciplinary body then seeks to impose sanctions for the same conduct — and that case provided dictum that the federal approval precludes state discipline. Professor Hazard suggested that there is an "Erie" question, and that for this purpose it is important to distinguish between state-bar ethics committee opinions and state court rulings.

Mr. Bestor went on to suggest that there is no reason to adopt a comprehensive set of federal attorney-conduct rules coextensive with the Model Rules or any other complete system. But it makes sense to adopt "core" rules. Definition of the scope of the core rules may be a complex matter. Such issues as confidentiality and conflicts of interest concern the federal courts when they arise in connection with what happens in court. Enforcement of core federal rules need not entail a formal federal disciplinary structure. Federal courts can enforce by ad hoc means or by referral to state authorities.

Marie Leary provided succinct summaries of the findings of two studies that the Federal Judicial Center had done on questions of attorney conduct in district courts and in bankruptcy courts. She observed that it would be difficult to rely on these studies alone to determine whether distinctions should be drawn between the attorney-conduct rules for district courts and those for bankruptcy courts. The pattern revealed by the studies does suggest, however, that bankruptcy courts will find ways to address issues peculiar to bankruptcy practice that are not covered by explicit provisions in whatever general body of rules may apply.

In response to questions, Professor Hazard agreed that the purpose of "dynamic conformity" to state law, if that approach should be adopted, requires that state-court interpretations of state rules be followed. The "Erie" question would be only the common question of the sources to be consulted in determining what state law is, and how much weight to give to the views expressed by different sources. Hence the suggestion that the views of state bar ethics committees cannot claim the weight that court opinions have as evidence of state law. A choice to adhere to state law will require a choice of the state law to follow; if some issues are allocated to specific federal principles, it also will be necessary to identify the divide between matters governed by state law and federal law. The models in the agenda book use such vague terms as "in connection with a case or proceeding pending

in a district court." Although these terms are vague, they may be the best that can be done. Much will depend on whether to reach beyond matters connected to proceedings in a federal court. The models do reach such matters, and invoke choice-of-law principles patterned on Model Rule 8.5. Before going this far, it is necessary to decide whether there is a federal interest in speaking to attorney conduct that is not connected to proceedings in federal court. There may be little federal interest. A lawyer who fails to file federal tax returns, for example, is subject to state disciplinary procedures, and the Internal Revenue Service can protect federal fiscal interests — it is not at all clear why federal courts should seek to become involved in such matters. And even if federal rules are limited to conduct in connection with federal proceedings, it is important to remember that a great deal of lawyer activity may be undertaken before there is any reason to predict that the outcome will be proceedings in federal court. It also is important to remember that issues that go directly to federal adjudicatory interests can be addressed by rules of procedure.

Another question put to Professor Hazard asked about the special problems encountered in bankruptcy proceedings. The bankruptcy statutes provide an "adverse interest" standard for disqualification, but the standard is interpreted differently by different courts and the interpretations seem to be trending toward gradually lower standards. Disqualification in collective proceedings, moreover, presents difficulties that are distinct from the problems in ordinary adversary litigation. Professor Hazard noted that during the American Law Institute work on the Restatement Third of the Law Governing Lawyers, it was asked that the Restatement address conflicts of interest in bankruptcy. It was concluded, however, that these questions could not be addressed in the Restatement framework. Bankruptcy often entails multilateral proceedings that combine negotiation and litigation in unique ways. The conflicts-of-interest problems have become exacerbated as large law firms have entered bankruptcy practice. It would be good for the Bankruptcy Rules Committee to consider these questions.

Finally, Professor Hazard suggested that if it is consistent with the sentiment of Congress, Rule 4.2 problems can profitably be separated out from more general questions of attorney conduct.

The Four Options: In More Detail

Professor Capra led detailed discussion of the four options identified in the agenda book.

The first option is to do nothing that would interfere with the present system of regulation by local rules. Professor Coquillette has made a compelling case that the present system is fragmented. One problem is "vertical disuniformity" — it often happens that within a single state, different rules apply to conduct in state court or in federal court. This disuniformity occurs even when a federal court directly adopts the same ABA model that the state has adopted. States commonly introduce their own variations into the basic ABA model, and interpretation even of the same text may lead federal courts in different directions than are taken by state courts. The differences grow if the federal court adopts a different model than the state has adopted. There have been horror stories of cases where one law requires conduct that the other law prohibits. In addition to this vertical disuniformity, the local-rule model entails wide variations in the rules applied by different federal courts. In many ways, the local-rule world seems the worst of all possible worlds. The consequences of all this disuniformity are more important than might be guessed from the case

law. The most common problems are conflicts of interest and disqualification. Lawyers in these areas want to know about the rule in advance, so that they can comply.

A different problem posed by local rules is that some of the rules are vague and confusing. At the worst, the local rules may be so vague as to violate due process requirements. This problem might be addressed by undertaking to address the bad drafting directly. But the model local rule that has been available for several years has not been picked up by the district courts.

It was asked whether there is any actual impetus for reform. The answer is that in fact, as confirmed by the Federal Judicial Center study, attorneys who have had to deal with the local rules do believe that reform is necessary.

The second option is adherence to the law of the state that encompasses each district. Conformity to state law would be dynamic, incorporating each development of state law as it occurs. This approach would be taken directly for the Civil Rules and the Criminal Rules; modifications likely would be desirable for the Bankruptcy Rules. This approach would greatly reduce vertical disuniformity within any single state. The extent of the reduction would depend on the degree of deference to state-court interpretation of state rules. At the same time, different rules of attorney conduct would apply in different federal courts.

The bankruptcy "adverse interest" statutory standard came back for discussion. The need to comply with state rules is assumed in bankruptcy, and this creates difficulty. Questions arise such as the propriety of representing a trustee, debtor-in-possession, or creditor's committee, when this client may do things — in the exercise of often great powers — that are adverse to the interests of someone who is your client in unrelated matters.

Incorporation of state standards carries with it the cost that at times federal interests will be defeated by the state standards.

The third option is to adopt the policy of dynamic conformity to state law for many matters, but to adopt uniform federal rules for "core" topics of greatest interest to the federal system. The model in the agenda book essentially adopts conformity for matters that do not affect litigation behavior or are seldom encountered. This approach would establish horizontal uniformity among federal courts, subject to the ever-present qualification that different federal courts may reach inconsistent interpretations of a common federal enactment.

One question that must be confronted is whether § 530B forecloses adoption of core federal rules to the extent that the rules would regulate the conduct of federal-government attorneys.

One consequence of federal rules would work out through state rules, since many states have choice-of-law rules that would adopt the federal rules as to conduct connected to federal proceedings. Similarly, there is a common tradition that bars imposition of disciplinary sanctions for acts that comply with the rules of the court in which an attorney is litigating.

Adoption of core federal rules inevitably will continue the existence of disparities between federal rules and local state rules. This is true no matter what model the federal rules might adopt. But subject to that constraint, questions within the ambit of the core rules would be addressed by the

federal rule for proceedings in federal court. This would be true for proceedings following removal from a state court. If a case is transferred within the federal system, the core rules would continue to apply, but the state law that governs other matters might well change — this special setting might justify departure from the general rule that transfer under 28 U.S.C. § 1404 carries with the case the choice-of-law rules and results that apply in the transferring court.

A decision to follow the "core rules" model would not of itself determine what matters should be addressed by the federal rules. An illustration of the questions that might arise is presented by Rule 4(c) of the draft rules. This rule prohibits a lawyer from preparing an instrument that effects a substantial gift to the lawyer, unless the client is related to the lawyer. It may be asked whether the federal courts need to have a rule that addresses this question.

The fourth option is to adopt a comprehensive set of federal rules of professional responsibility. The advantage would lie in creation of a complete, integrated code that would achieve uniformity across the federal system. The disadvantages would be an enlarged set of the disadvantages that would attach to a system of core federal rules, supplemented by state law. And a comprehensive system would raise even more troubling questions about the need to use the Enabling Act process for this purpose. It is, moreover, difficult to imagine adoption of a comprehensive federal code without also creating an enforcement structure. Reliance on state enforcement agencies could lead to interpretations at odds with the purposes of the federal rules, resistance to enforcement of rules different from the state rules, and justifiable resentment that federal courts — having created their own rules independent of state law — were unwilling to assume the burden of enforcement.

General discussion followed this survey of the four options. It was urged that the Subcommittee could act to abandon the comprehensive approach without further difficulty. The Standing Committee, to be sure, had considered abandoning one or more of the four options, and concluded that it should not yet do so. But the Subcommittee may not need much consideration to conclude that a complete set of federal rules does not make sense. It was suggested again that adoption of a comprehensive federal code would, as a practical matter, entail creation of a federal enforcement scheme. How could state authorities be asked to enforce federal rules? It was responded that this view might rest on an unnecessarily skeptical view that state authorities would be unwilling to enforce federal rules, and that there was little reason to assume state authorities would be unwilling. At the same time, it was suggested that there is no need to address conduct outside federal court proceedings.

The question of state willingness to enforce federal rules was again advanced with the observation that a state court is not interested in figuring out what the federal rules might mean, and would have no enthusiasm for assuming the burden of federal enforcement work.

It also was urged that federal courts do not "license." Federal courts can debar only from federal courts. If a federal judge believes that a lawyer should be debarred from appearing before any judge of the court, moreover, it would be better to invoke a disciplinary mechanism that involves others. But it was observed that in bankruptcy procedure, there is an enforcement mechanism in place now — it is denial of compensation. Delegation or abandonment of enforcement to state

authorities, moreover, would weaken the federal interest in correct interpretation and proper application of the federal rules.

State disciplinary authorities, moreover, do react to information that a lawyer has been disciplined by a federal court. They undertake independent inquiries to determine whether state discipline also is appropriate.

It also was suggested that there is a genuine Enabling Act question whether there is authority to promulgate rules regulating attorney conduct that is not related to practice in a federal court.

At the end of this discussion, the subcommittee unanimously approved abandonment of the fourth option. A comprehensive set of federal rules of attorney conduct does not make sense.

Attention then turned to the "do nothing" option. State courts are not likely to insist that the present system of local rules serves significant state interests. Instead, they would recognize that Enabling Act authority extends into the area of attorney conduct, and that the present fragmentation of approach is unseemly. The Model Rule approach might be sufficient if most districts were willing to adhere to the model, but there is little reason to believe that any model would achieve this level of success. There should be something that binds the district courts.

The do-nothing option, however, persists as the default rule that is effective now, and that will remain in effect unless something is put in its place. To some extent the adoption of § 530B has moved beyond reliance on fragmented local rules by adopting state-law standards for United States government attorneys. But the default remains in place for others.

It was suggested that the do-nothing option should not be rejected as a matter of philosophy. Fragmentation is tolerable. The subcommittee should develop the dynamic-conformity and core rules approaches. Once those approaches have been refined, it will be time to consider whether the results are better than simply doing nothing. The subcommittee agreed that this was the wise course.

Discussion of dynamic conformity and core rules models quickly became intertwined. Dynamic conformity to state law could be supplemented by only a small number of narrow and precisely focused rules that address matters of special federal interest. This approach would be quite different from the present model that provides core rules covering a wide swath of attorney-conduct issues.

It was urged that the best approach may be to adopt dynamic conformity to state rules with only a few federal rules that respond to special federal concerns. The Rule 4.2 questions of investigation-stage contacts with represented persons would be an obvious example of potentially dominating federal interests.

The dynamic conformity model also raises the question whether federal courts should limit adoption of state law to the text of the state rules, asserting a power of independent interpretation to meet particular federal interests, or whether adoption of state rules should include state-court interpretation of the state rules. It was suggested that there is no apparent reason to adopt state rule language without also adopting the state-court interpretations. If there is concern that state rules may not take account of federal interests, the federal interests should be identified and embodied in

explicit rules. It would be foolish to pretend to the bar that there is a single system while giving the lie to uniformity by adopting inconsistent interpretations of uniform texts. Even during the reign of Swift v. Tyson, state-court interpretations of state statutes were treated as part of the statutes, controlling on federal courts.

Disqualification motions were offered as an example. New York state courts do not allow "screening" to defeat imputed disqualification. Federal courts are more receptive. None of this is addressed by any rule. The practice of ethical screening is a judicial gloss, one way or the other. Technically, these decisions do not apply the Code of Professional Responsibility. This example illustrates the central point that it is essential to define just what is being incorporated from state practice. What does it mean to apply "standards of attorney conduct" to "conduct in connection with a case or proceeding pending in a district court"? What matters fall into the realm of "procedure" rather than "attorney conduct"?

Returning to departures from state-law conformity, it was suggested that there must be a clear idea of the federal interests that justify departure from state rules.

An example of federal interests was offered by referring to Model Rule 3.8. In half a dozen states, this rule is used to regulate subpoenas of attorneys to appear before a grand jury. This practice is too much a matter of federal procedure to be left to state rules of professional responsibility. Other states have rules that purport to regulate the prosecutor's responsibilities to produce evidence before a grand jury. Again, this is a matter of procedure that cannot be left to state regulation. And a few states are approaching adoption of the Singleton rule, announced and then abandoned by the Tenth Circuit, that severely curtailed the inducements that might be offered a witness to induce truthful testimony. "It is not a neat fit"; state rules are drafted without considering the needs and interests of the federal system.

Bankruptcy was again offered as an example. Bankruptcy has its own standards of "adverse interest." It would be difficult to embrace state law on conflicts of interest. And there is an emerging independent bankruptcy view of the circumstances in which conflicts of interest should be imputed within a firm. The needs of bankruptcy may make it necessary to rely on development of special rules, independent of the general federal approach to civil or criminal litigation.

Turning to a different front, it was asked whether dynamic conformity could work for courts of appeals as well as it can work for district courts. It will not do to govern all questions before a court of appeals by reference to the state in which the court happens to sit — indeed, some of the courts of appeals sit in different places within the circuit. The draft rules in the agenda book provide an example of the approach that can be taken to choice among different state laws within a circuit, but the questions are not easily answered.

Returning to the question of the federal interests that may warrant adoption of independent federal rules, it was explained that the topics selected for the core rules model were identified by surveying all federal cases since 1990 to determine what questions arise most frequently in federal courts. The questions commonly arise, however, in contexts that do not involve discipline. Conflict-of-interest questions, for example, ordinarily arise on motions to disqualify. Confidentiality issues

most often are discussed in opinions that address such matters as evidentiary privilege. These contexts suggest quite different perspectives on the question of federal rules. From one perspective, the issues actually before the court are intimately involved with the conduct of federal proceedings, suggesting powerful federal interests akin to the interests that justify adoption of the federal rules of procedure and evidence. From another perspective, the settings suggest that the federal courts have little interest in addressing questions of professional responsibility from the perspective of professional discipline. The procedural needs of the federal courts should be addressed as matters of procedure — the question whether proceedings should be disrupted by substitution of new attorneys as a remedy for a perceived conflict of interest, for example, involves vital federal interests. The question whether an attorney should be subject to professional discipline for falling into the same circumstances of potential conflict is in some ways separate. If a federal court should decide that its own needs justify denial of disqualification in the interest of uninterrupted federal proceedings, however, that decision should protect the attorney against state-imposed discipline for continuing with the representation.

Whatever is made of these conundrums, they should be addressed directly. Purported adherence to state rules, subject to an ad hoc power to depart when federal interests are involved, is likely to defeat the purposes of dynamic conformity. Lawyers will not know what rules govern their conduct, state interests will not be served, and federal courts will be forced to invent their own rules on a case-by-case basis.

Adoption of exceptions to meet special federal interests was addressed with skepticism. There is particular reason to be skeptical if one party — the Department of Justice — gets to carve out the exceptions that serve its interests. And exceptions for "big cases" have a way of spilling over to ordinary cases.

From another perspective, there is no principle that could justify adoption of dynamic conformity except when, on a case-by-case basis, a federal court does not like it. But it remains possible to craft limited and clearly stated exceptions that clearly identify the federal interests that justify uniquely federal rules. The justifiable exceptions, however may be much narrower than the core rules illustrated in the agenda book.

A broad set of core rules that supersede a general but increasingly residual principle of dynamic conformity also may not solve the problems we now have. As always, we must consider the implications a broad set of federal rules would have for creation of a federal enforcement system.

On behalf of the Department of Justice, it was argued that dynamic conformity should not come at the price of binding federal courts to state-court interpretation of state rules. The Department needs predictability, and protection against state discipline. Without predictability and protection, Department attorneys will not be free to enforce federal law as vigorously as should be. It is not easy to predict over time all of the things that one state court or another may do to cause serious problems for federal law enforcement. The Oregon "deceit" concept that bars sting operations, undercover investigations, and the like is an example. It seems to reach even the use of "testers" to ferret out housing discrimination. It would be better to add to a dynamic conformity

approach not only specific federal rules that address clear federal needs, but also a clause that allows exceptions to accommodate specific, but not easily foreseen, federal needs.

In response, it was noted that much of the interest in specific federal rules has grown from the problems that Rule 4.2 presents to investigative activities in a few states. There has not been any general hue and cry to suggest that state rules often thwart significant federal interests. Why not rely on Congress to adopt whatever special rules may be needed to support effective federal law enforcement?

Further support was voiced for the "surgical" approach. The approach that seeks to deal with the legitimate needs of the Department of Justice by preempting state rules goes too far. One part of the Leahy bill seeks to stimulate development of a "Rule 4.2" in the Enabling Act process. The surgical approach makes it easier to adopt a dynamic conformity rule, and to adhere in general to state-court interpretations as well as the bare text of the state rules.

The needs of the Department of Justice were characterized as special and very particular. Any decision to set aside state regulation of professional practice "is a struggle." The burden on the Department to persuade the states to change their views is not all that troubling. We should continue to debate whether legislation is the better way to address the "Rule 4.2" problem.

A response was that Rule 4.2 is not the only problem to confront prosecutors. Application of a state rule requiring court permission to subpoena a defense attorney to appear before a grand jury, for example, has been held to conflict with Criminal Rule 6. We should not rely on legislation without careful exploration of all the areas that may present problems.

Several members then returned to the question of adopting state rules without also adopting state-court interpretations. Each agreed that it is not "interpretation" to assert an overriding federal interest that changes the meaning of the rule. Federal policies should be pursued only through explicitly stated exceptions. To do otherwise is to use the state rules as merely advisory things. In some areas, indeed, case law can be as important as the text of the rules. "Reasonable belief" is a phrase much used in conflict-of-interests rules; specific interpretation of this general standard is required, and when clear state guidance is available — perhaps a relatively rare event — it is a critical part of the rule and its meaning.

It was asked whether any exceptions should be made to a dynamic conformity policy. It will be difficult to anticipate the situations in which federal interests truly supervene. The difficulties of anticipation could be met by drafting an open-ended provision that allows exceptions to meet pressing federal interests, but that approach might prove hard to contain in practice.

This discussion led to the suggestion that it is better to begin by stating specific exceptions to reach identifiable federal interests. The Rule 4.2 problem is an example. Beyond that point, a structured form of an open-ended exception, a safety valve, would be better than becoming trapped in a situation in which specified exceptions can be supplemented only by invoking the full Enabling Act process. It must be remembered that the source of most problems is not rules that are adhered to by most states, but instead the eccentric rule or interpretation that is adopted by one or only a few

states. There must be a system that enables federal courts to protect federal interests against these outlying state rules.

This plea for federal exceptions was met by the question whether a federal rule can actually protect a lawyer who relies on the federal rule against discipline by state authorities. A federal statute could preempt state discipline — can an Enabling Act Rule? Apart from this uncertainty, adoption of specific federal rules should rest not on theory, but on identifiable federal interests.

The approach that would include relatively broad federal rules for core situations was urged to be contrary to the underlying spirit of dynamic conformity. It would be better to forge specific exceptions for particular federal interests.

It was observed that the very first provision in the Virginia statutes is that the common law of England is the common law of Virginia, unless supplanted by statute, case law, or policy. Dynamic conformity to state law would be similarly diluted to very thin stuff if it were accompanied by sweeping or open-ended exceptions.

Another suggestion was that it would be better to supplement a general rule of dynamic conformity with both specific exceptions and a more general safety valve than to supplement the general rule only with a general safety valve. The specific exceptions would, by force of example, narrow the implied reach of the safety valve. As often, however, the true difficulty will be encountered in seeking to shape the details of this approach.

There was sufficient interest in the safety-valve approach to suggest that it would be useful to draft a careful, criteria-based provision. This approach could remain consistent with a basic approach that relies primarily on specific and narrow exceptions, and would be much different than the broader core rule approach. Bankruptcy needs would be set aside as special problems to be addressed by the Bankruptcy Rules. The "adverse interest" phrase in the bankruptcy statutes should not be controlled by state-court interpretation. A federal rule would be desirable.

The question of making specific federal rules to meet specific federal needs was again addressed from a state-court perspective. It remains important to consider whether the subcommittee should develop proposals on the Rule 4.2 issues, given the enactment of § 530B, or whether it would be better to wait to determine whether Congress actually invites rulemaking in this area. And it is equally important to remember that exceptions that seem specific may be gradually expanded by interpretations that the subcommittee would not condone.

Recognizing that Congress can indeed address the Rule 4.2 problem, it was again urged that enactment of § 530B should not remove the problem from consideration in the Enabling Act process. Dynamic conformity in itself implies a change in the way we operate. Nothing in § 530B precludes us from considering law-enforcement concerns. If we should develop a Federal Rule of Civil Procedure and a Federal Rule of Criminal Procedure that provide a sound balance for Rule 4.2 problems, that would affect application of § 530B. The specific federal rule would preempt state law, leaving no state law that federal prosecutors must comply with. And it must be remembered that this effect would hold only in a small number of states — most states permit contacts with

represented persons when authorized by law, and the federal rules would be law that authorizes contacts within their reach.

The approach taken to drafting the core rules set out in the agenda book was further explained. The topics chosen were those that arise most frequently in federal courts, albeit they ordinarily arise in settings that do not involve professional discipline. The Model Rules were used as the template. When states have adopted varying forms of the Model Rules, the most common form was used. Modest styling changes were made to conform to federal rules conventions. It is not clear how to think about the fact that federal courts encounter these problems in contexts that are more procedural than disciplinary. It would be possible to conclude that the special federal interests that continue to cause concern are indeed procedural interests. Federal courts have little independent interest in professional discipline; their interest is in ensuring that lawyers who pursue federal litigation remain free to adopt practices that support strong preparation before litigation is filed and that support adherence to federal procedure after litigation is filed.

One of the bills pending in Congress would follow the core rules approach by asking for core rules on specified topics. The topics chosen are much like those addressed by the draft FRAC, with attorney fees added to the list.

If the core rules approach is taken, it is anticipated that the model used for the eventual draft would be the ABA Model Rules as amended in response to the recommendations of the Ethics 2000 Commission. This approach will, over time, bring the federal rules into the highest achievable level of integration with state rules. Immediate integration would not be possible because states will react to the new ABA rules at different times. And unless the new ABA rules should provide a new experience, it is likely that some states will continue to adopt variations on the ABA rules or even refuse to adopt the new rules at all. It even is possible that the close similarity of federal rules with state rules will prove a source of confusion. The question whether an "ethics wall" avoids imputation of conflicts of interest from a lawyer to a firm, for example, is not addressed on the face the current draft Attorney Conduct Rule 6. The same language in a state rule might be given a meaning different than the meaning attributed to the federal rule.

It was observed that draft Attorney Conduct Rules 2 through 5 deal with matters that can occur in or out of court. Rule 6 is different. Rules 8 and 9 do not seem to raise federal interests. Rule 7(d), covering candor toward the tribunal in an ex parte proceeding, is the analogue of a Model Rule that has been applied in many states to reach grand jury proceedings; it touches on corresponding interests of the Department of Justice. Rule 9, dealing with truthfulness in statements to others, is the analogue of the rule relied upon in Oregon to bar sting operations, discrimination testers, and undercover investigations. Adoption of Rule 9 as a federal rule would put interpretation in the hands of federal courts. But adoption of a federal rule would not answer all questions — it is not clear whether a federal rule could extend to state officials involved in joint federal-state operations. It is important to be able to operate under a single, uniform, controlling rule — but very difficult to know how to achieve that result.

The confidentiality rules may touch on federal interests as well. The Ethics 2000 draft Rule 1.6 would allow a lawyer to disclose confidential information to the extent the lawyer reasonably

believes necessary to rectify or mitigate substantial injury to financial interests or property resulting from a client's crime or fraud furthered by the client's use of the lawyer's services. Discussion of the details of the confidentiality rules suggested other areas as well in which there might be some federal interest and in which the drafting might be refined.

This discussion was offered as an illustration of the reasons why the subcommittee should not recommend further pursuit of the reasonably comprehensive set of core rules illustrated by the FRAC draft.

It was agreed that further discussion of the FRAC draft would be held in abeyance, pending consideration by the Reporter of the questions raised at this meeting and any responding modifications that may seem desirable.

Investigation Contacts With Represented Persons

Discussion turned to the problems the Department of Justice has encountered when lawyers undertake to direct investigations that include contacts with persons who are represented by attorneys.

Chief Justice Veasey noted that although the Ethics 2000 Commission has published some rules for comment, it has not published any suggestions to revise Model Rule 4.2. The March 1, 1999 draft adds a provision that allows contact under a court order, and provides comment language explaining this provision. The ABA Standing Committee on Ethics has a different draft Rule 4.2; it is not clear how they will pursue it. There is not yet any way to guess what consensus may emerge. Contention continues to surround this issue.

Assistant Attorney General Ogden observed that the Department of Justice has worked with the Conference of Chief Justices on these issues. The draft FRAC 10 is a good approach. The Department also has been working with the ABA, both through the Ethics 2000 Commission and the Standing Committee on Ethics. The process has been useful, although it has proved difficult to have two quite different proposals going forward in different ABA committees. What the Department wants to achieve is the interpretation of Rule 4.2 that is now in place in many states: lawyers can supervise pre-indictment, pre-complaint investigations in which investigators contact represented persons. Some states have read Rule 4.2 to prohibit this conduct. And the definition of a corporate "client" for this purpose continues to be troubling to the Department as it pursues investigations into antitrust, civil-rights, environmental, and similar violations. Some of the broad definitions of a corporate client would bar contact with a whistle-blower on the theory that the whistle-blower is, as part of the corporation client, represented by the corporation's attorney. There are other difficult issues as well. A represented person, for example, may take the initiative in approaching a prosecutor and asking to talk without a lawyer present; common examples are the whistle-blower or a "foot soldier" for a mob.

The Department of Justice finds helpful the concept of allowing contact under a court order. But the draft does not suggest any substantive standard, and that is a concern. The Department faces specific situations, and would like guidance in the rule. The Department also is concerned about the frequency with which it may need to seek court orders if there are no other provisions authorizing

contact. A survey was made of a number of United States Attorney offices in an attempt to guess how many applications would be required. If we assume a broad definition of the corporate client, and further assume that there is little defining case law, the largest offices estimate that they would need to seek court permission more frequently than once a day. There has been tremendous uncertainty on this front since § 530B went into effect. It would be very useful to have something that the Department can administer with confidence, and thus without the need to seek court orders on a daily basis.

The Department does not believe it is appropriate to make contact with a person who is the subject of an indictment or complaint after the indictment or complaint has issued. Exceptions may be appropriate, however, when there is an ongoing crime, or a new crime, or a risk of violence directed against a witness.

The restrictive interpretations of Rule 4.2 do not pose the same difficulties for state prosecutors in those states as they pose for the Department of Justice. State prosecutors typically are less involved with investigations. The Department has found it desirable to have deeper involvement in investigations. Lawyer involvement helps to protect the rights of people caught up in the investigation.

It was suggested that the expense of protecting represented persons against inappropriate contacts, whether the expense flows from requiring a court order or other requirements, should not defeat the protection. If a right is worthy of protection, expense should not be a concern.

It was reiterated that in the vast majority of jurisdictions, Rule 4.2 is interpreted to impose no restrictions on pre-indictment or pre-complaint contacts. In a very small number of jurisdictions there is a clear contrary rule. In a few other jurisdictions the rule is not clear — but the lack of a clear rule means that federal attorneys do not want to run the risk of violation, and behave as though contact were prohibited. And it must be remembered that lawyer-directed contacts by a non-lawyer do not present the same concerns as contacts by a lawyer.

The approach that would allow contact under court order was questioned on the ground that courts will routinely grant permission. Applications for search warrants are almost always granted; why should applications for contact fare differently? The first response was that the purpose of obtaining a court order is to reassure and protect the prosecutor, who may fear professional discipline. But judges will not welcome the burden of these applications, and clear rules will be a better approach for most problems. The second response was that the rate of granting the requests that are made is only part of the picture. Many requests for warrants are rejected by prosecutors, who seek to advance only the requests that are reasonably supported; many police officers forgo asking support by a prosecutor because they expect that support will be withheld. A court-order requirement will be more effective than might appear.

The burden of a court-order approach to contact with a represented person will not end with the approval proceeding itself. There will be post-indictment motions as well, just as with search warrants, exacting further work.

In support of Rule 4.2 revision, it was asked why it is proper for a law-enforcement officer who is not a lawyer to contact a represented person, but it is not proper when a lawyer suggests the contact to the law-enforcement officer. The Department of Justice agrees that rights are more likely to be protected if a lawyer can do this. Most states agree. The judicious and efficient use of resources is enhanced when prosecutors are involved from the beginning of each investigation. And there are situations in which the rights of the represented person also are better protected — when a person comes to a prosecutor and says "I want another lawyer, please help me," there often are strong reasons to permit the contact. But these needs are best addressed by clear, black-letter provisions that address the specific situations that arise often enough to be identified and addressed. Judicial oversight should be reserved for the unusual situations. The range of problems is sufficiently narrow that this specific rule approach is feasible. The draft FRAC 10 is an attractive beginning; with a few changes, it could be made a good solution.

Two judges observed that the court-order approach for contact with a represented party is a bad idea. It absorbs scarce judicial resources. Judges, moreover, will tend to defer to the Assistant United States Attorney who presents the request. If the judge is not to be a virtual rubber stamp, the judge must fill the void left by the absence of an adversary — and this is a difficult burden for a judge to assume. The workload implications provide a possible reason for involvement by the Judicial Conference. But it continues to be a problem to know whether it is appropriate to go forward without a clear indication that Congress welcomes Judicial Conference involvement. The Standing Committee became involved only through the Local Rule Project, not because of an independent determination to inquire into federal-court regulation of attorney conduct. Members of the Standing Committee and advisory committees are working on the Rule 4.2 questions in a variety of capacities. The Chief Justice has written to Congress to describe the subcommittee and its timetable. Further developments will help to clarify the best role for the judiciary.

The draft FRAC 10 was again commended. It draws a bright line for the pre-indictment, pre-complaint setting. It allows contact by an investigating agent supervised by a lawyer, but has exceptions that prohibit the agent from gleaning attorney-client information, efforts to persuade the client to discharge the lawyer, and so on. This is less than the Department of Justice has now — in most jurisdictions, the prosecuting attorney can directly contact the witness. But the Department could live with a rule that bars prosecutor contact when a person is known to be represented in the matter under investigation. The dangers of such a rule are slight — a lawyer always tells his client not to talk to anyone, and a client who is satisfied with the representation will not talk.

Returning to the definition of a corporate client, it was urged that it is too broad to include within the definition anyone whose statements may be admissions of the corporation, or anyone whose acts may be imputed to the corporation. The Department of Justice prefers something more like a "control group" test that focuses on responsibility for conduct of the litigation.

This discussion led to the question whether the Judicial Conference and the Enabling Act process are the place to work through these issues. The problems are truly policy issues about law enforcement, not neutral procedure questions about running the courts. And of course it remains a question whether Congress would welcome help from the judiciary in approaching these problems.

It was suggested that most states bar contact with a person whose statements can be admitted; if a federal rule permits the contact, won't there be problems? The response — perhaps reading a different meaning into the question — was that the focus in drafting Rule 4.2 revisions is on contacts directed by a government attorney, not on contacts made or directed by an attorney in private practice.

The subcommittee was reminded that Senator Leahy's bill relies on dynamic conformity, but urges the Judicial Conference to submit to the Chief Justice a report recommending amendments of the Civil and Criminal Rules to establish a "uniform national rule governing attorneys for the Government with respect to communications with represented persons and parties." This approach may be opposed by others who might see it as a challenge to the recently adopted § 530B. The bill introduced by Senator Hatch also incorporates state law, but would prohibit application of state ethics rules to a federal prosecutor "to the extent that the State law or rule is inconsistent with Federal law or interferes with the effectuation of Federal law or policy, including the investigation of violations of Federal law." That exception is broad. The bill also would require the Attorney General to adopt regulations prohibiting Department of Justice employees from engaging in nine enumerated forms of conduct, and would establish a Commission on Federal Prosecutorial Conduct.

Valedictory

The meeting concluded with expressions of appreciation by Judge Scirica to all who participated, and with particular thanks to Chief Justice Veasey for his appearance in many different roles and to the representatives of the Department of Justice. Professor Capra also was thanked for helping to provide guidance through the agenda materials.

The next steps will be to work to refine the dynamic conformity principle and the core federal rules approach. Professor Coquillette will work with the reporters for the Civil and Criminal Rules Advisory Committees, and perhaps with the reporter for the Appellate Rules Advisory Committee as well. The Bankruptcy Rules Advisory Committee will continue to work on the unique problems that confront bankruptcy practice.

In order to seize the opportunity to have materials ready for consideration at the fall advisory committee meetings, the next subcommittee meeting will be scheduled for the end of August or very early in September.

Respectfully submitted,

Edward H. Cooper
Reporter, Civil Rules Advisory Committee

Item 11-13

REPORT ON CONFERENCE OF ECF SUBCOMMITTEE OF JUDICIAL CONFERENCE COMMITTEE ON AUTOMATION AND TECHNOLOGY

I attended the conference of the Electronic Case Filing subcommittee of the Judicial Conference Committee on Automation and Technology ("CAT") held in Kansas City on April 21. Judge James Robertson chairs the subcommittee and chaired the meeting. Judge Nottingham, chair of CAT, was in attendance. The conference apparently resulted from a presentation by Gary Bockweg at the January meeting of CAT covering the overall ECF project and the rather fast movement toward use of ECF systems in the federal judiciary. In addition to subcommittee members, and among others in attendance were Judge John Lungstrum, representing the Judicial Conference Committee on Administration and Case Management ("CACM"), Pam White, Assistant Director of the Office of Information Technology, Mel Bryson, Chief, Technology, Policy Planning & Information Office, the Clerk of Court of the Western District of Missouri, and several members of his staff who have been dealing with the electronic case filing project there, and lawyers from a Kansas City firm that had used the Missouri procedures. Of course, Gary Bockweg was in attendance, and I was invited as a representative of the Standing Committee

Judge Robertson introduced the meeting by calling it a "brainstorming session." After brief remarks, he invited Gary Bockweg to discuss the present status of the ECF project. Gary reported that in addition to the prototype courts currently using ECF other courts will serve as prototypes. He indicated that 36 courts have expressed interest in the filing system and he anticipated there would be another 14 or 15 new courts using the system Currently, there are about 10,000 cases in the nine prototype courts assigned to ECF, with about 2,000 lawyers who have "signed up" to use this system Approximately 50% of those have actually used it The decision has been made on the hardware and software that will provide the necessary case

management and ECF capability, with the national roll-out to commence in July of the 2000. It was reported that by 2001 the entire federal judiciary would have the capability to use ECF

After Gary's report Pat Bruney, the Chief Deputy Clerk of the Western District of Missouri, made a presentation of the history of and the use of the system in that court. She described the numbers and types of cases in which the system is being used in the various divisions of the Western District, and the various court committees that are concerned with aspects of the system These include a Rules Committee comprised of judicial officers and liaison from the bar, which is concerned with court rules dealing with the subject; and a Communications Committee that is charged with the "marketing" of ECF to the members of the bar of the court (through teams of trainers and advocates using their printed materials). She mentioned that this Communications Committee had been in touch with about 2500 people, with the main effort commencing in June 1997 to get needed information to the courts and others There is a Training Committee comprised of the training staff of the court and lawyers who provide hands-on lawyer training. There is an Automation Committee and a Process Committee. In October of 1997 the first case was introduced to ECF in this district, and by the Spring of 1998, there were 30 cases. During the course of this presentation there was a free-ranging discussion of various questions as to how the system operates

After Ms. Bruney's presentation, two lawyers from the Brian Cave firm of Kansas City discussed their own experiences with the system. That firm, and these particular individuals, appear to be technologically proficient. They are very high on ECF, but they are cognizant that lawyers are somewhat worried about mistakes in the filing process. This discussion was followed by a brief demonstration of ECF in Missouri Western

Thereafter there was more general discussion about how to proceed, and about individual issues such as privacy, the handling of *pro se* cases, exhibits which cannot be put in filing format, and the like. These individual issues were considered by the group to be "policy" matters to be addressed by those having oversight of the project, and at one point Judge Robertson suggested the formation of a multi-committee "working group" to address those issues. Everyone present seemed to feel that it was essential that there be Rules Committee representation and involvement with the ECF subcommittee of CAT

I reported to the group on the work of the Technology Subcommittee of the Standing Committee, and the ongoing efforts concerning amendment of FRCP 5 to authorize electronic service Judge Nottingham brought up more than once the need to address "signatures" under electronic case filing because of Rule 11 and other relevant rules.

The group decided not to formalize at this time a "working group" or to set another meeting. Judge Lungstrum (of CACM) suggested that the ECF subcommittee of CAT could play the role of the "working group" suggested by Judge Robertson as further developments occur.

The meeting essentially served to inform those in attendance as to the current status of ECF and to provoke discussion of issues to be addressed and how they should be addressed. All seemed to feel that more experience with ECF is needed to bring about its acceptance "culturally " Interest was expressed in formulating model local rules that might be used by courts as they begin to experiment.

May 12, 1999

Gene W Lafitte

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

ANTHONY J. SCIRICA
CHAIR

PETER G. McCABE
SECRETARY

May 10, 1999

MEMORANDUM TO: Gene W. Lafitte, Esq.
Chair, Subcommittee on Technology
Committee on Rules of Practice and Procedure

SUBJECT: Staff Paper on Privacy and Access to Electronic Case Files

I am forwarding for consideration by the Subcommittee on Technology a staff paper discussing the legal issues, existing judiciary policy and practice, and policy alternatives facing the federal courts as they develop policies on public access to, and protection of privacy interests in, information contained in electronic case files. This paper is also being provided to members of the Judicial Conference Committees on Automation and Technology, Court Administration and Case Management, and Administration of the Bankruptcy System.

Although the issues discussed in this paper do not require immediate action by the Rules Committees, the judiciary's need to develop coherent, consistent policies in this area may require that the federal rules be revised over time to reflect privacy concerns and mechanisms for public access to case file information developed by the Judicial Conference with the assistance of other committees. In addition, this paper provides background information that the Subcommittee and the respective Rules Committees may find useful when developing procedural rules on electronic filing.

My staff and I are available to provide assistance to your subcommittee, and the Rules Committees generally, in addressing these issues.

Peter G. McCabe
Secretary to the Committee

Attachment

cc: Members of the Technology Subcommittee
Chairs, Standing and Advisory Rules Committees

May 5, 1999

PRIVACY AND ACCESS TO ELECTRONIC CASE FILES: LEGAL ISSUES, JUDICIARY POLICY AND PRACTICE, AND POLICY ALTERNATIVES

May 5, 1999

PRIVACY AND ACCESS TO ELECTRONIC CASE FILES: LEGAL ISSUES, JUDICIARY POLICY AND PRACTICE, AND POLICY ALTERNATIVES

INTRODUCTION

The documents in federal court case files are, for the most part, available only in paper form. But with technology developing rapidly, some case files now are being maintained in electronic form. Assuming that this trend continues,[1] the ability to obtain documents from a case file will no longer depend on physical access to paper documents maintained in court file rooms. Instead, the official case file will be a collection of electronic documents or images stored in a court's computer database. The use of this technology will make it possible for courts to offer new types of access to case files, including access from locations outside the courthouse. Indeed, universal and unrestricted access to case files over the Internet is no longer a futuristic proposal; it is already possible in many courts.[2]

There is increasing recognition in the court community that the advent of electronic case files may require new policies that address both the access and privacy implications of the new technology. Some have begun to argue that case files — long presumed to be open for public inspection and copying unless sealed by court order — contain private or sensitive information that should be protected from unlimited public disclosure and dissemination in the new electronic environment. Others argue that electronic files should be treated the same as paper files in terms of public access, and that existing practices are adequate to protect privacy interests.[3]

Judicial branch concern about this issue must be viewed in the context of the ongoing national debate over privacy regarding computer databases and other aspects of information

---

[1] Nine courts are now operating electronic case file systems developed by the Administrative Office, a few courts have developed their own version of electronic filing, and several courts are creating electronic case files by imaging some or all incoming pleadings. More broadly, the Case Management/Electronic Case Files Initiative, under the direction of the Judicial Conference Committee on Automation and Technology, is developing and implementing electronic case files as part of the development of a new case management system. Current schedules forecast the beginning of national implementation in 2000.

[2] To see how federal courts have begun to use the Internet to allow access to electronic case files, visit court websites such as the Bankruptcy Court for the Southern District of California (ecf.casb.uscourts.gov), or the District Court for the Eastern District of New York (ecf.nyed.uscourts.gov).

[3] For a thoughtful discussion of the points of view on this issue, *see* "Should You be Able to Access Bankruptcy Files from the Internet?" in *Bankruptcy Court Decisions*, Vol. 32, Issue 21 (Aug. 4, 1998).

technology. Congress, for example, is considering numerous legislative proposals to protect personal data from unwarranted disclosure or use. There is no doubt that case files may contain sensitive personal information such as medical records, employment records, detailed financial information, tax returns, Social Security numbers, and other personal identifying information. Allowing access to case files through the Internet, depending on how it is accomplished, can make such personal information available easily and almost instantly to anyone who seeks it out. These concerns, coupled with the rapid development of electronic case file technology, underscore the need to review judiciary policy on access to case files.

This paper, developed by staff of the Office of Judges Programs, is meant to facilitate the development of appropriate policy on access to electronic case files. The discussion is intended to address only *case file documents*, and not other categories of judicial branch records — such as personnel, financial, or administrative records — that may be governed by different access law or policy. For purposes of the paper, the term "case file" (whether electronic or paper) is presumed to include the collection of documents officially filed by the litigants or the court in the context of litigation, the docket entries that catalog such filings, and transcripts of judicial proceedings. These documents are presumed to be available to the public for inspection and copying. The case file generally *does not include* several other types of information, including: non-filed discovery material, trial exhibits that have not been admitted into evidence, drafts or notes by judges or court staff, and various documents that are sometimes known as "left-side" file material.[4] Sealed material, although part of the case file, is accessible only by court order.

The paper includes five main sections:

I. An overview of the law on access to judicial proceedings and case files, and related law on access to executive branch information.

II. A review of current judiciary policies on access to case files. This section also includes a summary of emerging policies in the courts that are now operating electronic filing or document imaging systems.

III. Information on state court and foreign court policies on access to electronic case files, with a focus on principles that may be instructive in the federal court context.

IV. A discussion of the potential privacy implications of electronic access to case files.

V. An initial discussion of policy options on access to electronic case files.

---

[4] These may include, for example, cover letters to the clerk or judge that attorneys send with documents intended for filing.

SUMMARY OF CONCLUSIONS

This paper proceeds on the basis of the following tentative assumptions and conclusions:

- The rapid development of electronic case files will fundamentally affect the traditional model of case file access. In particular, remote electronic access to case files will greatly increase the potential for broader public disclosure of case file documents.

- The transition to electronic case files systems raises important legal and policy issues that are not addressed explicitly in current law or judiciary access policies.

- There is a strong legal presumption that the documents in case files, unless sealed, are public records available for public inspection and copying. This presumption is rooted in both constitutional and common law principles.

- Many state courts are required by statute or court rule to restrict access to certain types of case files, such as juvenile criminal files, divorce and family law matters. In contrast, sealing all or part of a federal case file requires a case-by-case determination by a judge.

- The traditional reliance on litigants to protect their privacy interests through protective orders or motions to seal may be inadequate to protect privacy interests in the new electronic environment.

- Making case files available to the public on the Internet may lead to the dissemination of information that would harm the privacy interests of individuals. It also may deter litigants from using the federal courts to resolve their disputes. Even assuming a very low incidence of abuse, it would be prudent to consider fashioning an access policy that minimizes the risk of harm both to individuals and to the federal court system.

- Assuming that the judiciary decides to address this issue by devising national guidelines on access to electronic case files, the potential policy options might include developing restrictions on public access to certain categories of sensitive personal information in electronic case files.

- Policy development should focus not only on balancing privacy and access interests, but also on avoiding undue burdens on judges and court resources.

I. THE LAW ON ACCESS TO CASE FILES AND RELATED PRIVACY INTERESTS

The federal courts have long held that there is a general right of public access to judicial records, including documents contained in case files. The right is rooted in both the common law and, more recently, in the First Amendment of the Constitution. It is equally well-established that although the documents in a case file are presumptively available to the public, they may be sealed by court order if a compelling need for secrecy outweighs the strong presumption in favor of access. The protection of personal privacy has been recognized as one of the interests that may warrant shielding case file documents from public disclosure.

This section will discuss:

- Common law right of access to judicial proceedings and case files
- Access rights based on the Constitution
- Statutory and rule-based access requirements
- Executive branch access law, and recent policy proposals.

A. The common law right of access to judicial proceedings and records

In numerous cases the federal courts, including the Supreme Court, have held that there is a common law right "to inspect and copy public records and documents, including judicial records and documents." *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978). The common law right, and the presumption of public access to court records in particular, "allows the citizenry to monitor the functioning of our courts, thereby insuring quality, honesty, and respect for our legal system." *In re Continental Illinois Securities Litigation*, 732 F.2d 1303, 1308 (7th Cir. 1984). Public observation of the judicial process also serves to "diminish possibilities for injustice, incompetence, perjury, and fraud," and to give the public "a more complete understanding of the judicial system and a better perception of its fairness." *Republic of the Philippines v. Westinghouse Electric Corp*, 949 F.2d 653, 660 (3d Cir. 1991) (citing earlier cases and history of common law right).

Federal courts have applied the common law right in disputes over access to case files in a variety of judicial proceedings. *See, e.g., United States v. Amodeo*, 44 F.3d 141 (2nd Cir. 1995) (investigative report filed in a criminal case); *Westinghouse*, 949 F.2d at 660-62 (papers filed in connection with a motion for summary judgment); *Littlejohn v. BIC Corp.*, 851 F.2d 673, 678-80

(3rd Cir. 1988) (the transcript of a civil trial and exhibits admitted at trial); *F.T.C. v. Standard Financial Management Corp.*, 830 F.2d 404, 408-10 (1st Cir. 1987) (documents filed with the court in civil adjudicatory proceedings); *In re National Broadcasting Co. (United States v. Presser)*, 828 F.2d 340, 344-345 (6th Cir. 1987) (disqualification proceedings of judges and attorneys); *Bank of America National Trust & Savings Ass'n. v. Hotel Rittenhouse Associates*, 800 F.2d 339, 343-46 (3rd Cir. 1986) (settlement documents); *Publicker Industries Inc. v. Cohen, 733 F.2d 1059, 1066-67 (3rd Cir. 1984)* (transcripts of a hearing for a preliminary injunction).[5]

The courts of appeals generally have given deference to trial judges' decisions on access issues. Judges' discretion in this area, however, is somewhat limited by the strength of the access presumption. Most of the appellate courts have recognized a "strong presumption" in favor of access, holding that only compelling reasons justify denying access to information in the case file. *See, e.g., United States v. Beckham*, 789 F.2d 401, 409-15 (6th Cir. 1986) (trial court "must set forth substantial reasons for denying" access to its records); *F.T.C. v. Standard Financial Management Corp.*, 830 F.2d at 410 (the burden of overcoming the presumption of open judicial records is on the party seeking to maintain the court records in camera); *In re National Broadcasting Co. (United States v. Jenrette)*, 653 F.2d 609, 613 (D.C. Cir. 1981) (access may be denied in the interest of justice if the trial court weighs "the interests advanced by the parties in light of the public interest and the duty of the courts"). Other courts of appeals, however, view the presumption simply as one factor for the trial judge to balance in considering access issues. *See Securities and Exchange Commission v. Van Waeyenberghe*, 990 F.2d 845, 848 (5th Cir. 1993) (noting that "while other circuits have held that there is a strong presumption in favor of the public's common law right of access to judicial records, we have refused to assign a particular weight to the right"); and *United States v. Webbe*, 791 F.2d 103, 106 (8th Cir. 1986) (declining to "adopt in toto" the holdings of several other circuits that recognize a "strong presumption" in favor of access).

Despite the legal presumption that judicial records are open for public inspection, it is equally clear that the common law right of access is not absolute. The Supreme Court in *Nixon v. Warner Communications* observed that:

> [E]very court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes.

435 U.S. at 596.

---

[5] Although it is clear that documents in criminal case files are also subject to the common law right of access, legal disputes over access to such documents often focus on First Amendment arguments. *See, e.g., United States v. McVeigh*, 119 F.3d 806 (10th Cir. 1997) (denying press requests for access to sealed documents in Oklahoma City bombing trial); *United States v. Corbitt*, 879 F.2d 224 (7th Cir. 1989) (addressing request for access to presentence reports under both the common law and First Amendment).

The decision to deny public access involves a balance between the presumption in favor of access, on the one hand, and the privacy or other interests that may justify restricting access. These interests include the possibility of prejudicial pretrial publicity, the danger of impairing law enforcement or judicial efficiency, and the privacy interests of litigants or third parties. *See United States v. McVeigh*, 119 F.3d 806, 811 (10th Cir. 1997); *United States v. Amodeo*, 71 F.3d. 1044, 1047-50 (2d Cir. 1995).

The case law concerning the common law right of access to judicial records highlights several key legal issues that may be relevant to judicial branch policy on access to electronic case files. These include the definition of "judicial record" for purposes of access, the scope of access rights to discovery material, and the special access issues related to videotaped trial testimony.

Several courts of appeals have addressed what documents qualify as "judicial records" to which the common law access right applies. There seems to be general agreement among those courts that the common law presumption attaches to the broad array of *filed* documents. *See, e.g., Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 782 (3rd Cir. 1994) (holding that a settlement agreement that was *not filed* with the court is not a judicial record accessible under the common law doctrine); *Pratt & Whitney Canada, Inc. v. United States*, 14 Cl. Ct. 268, 273 (1988) (right of access attaches to "pleadings, orders, notices, exhibits and transcripts filed"); *F.T.C. v. Standard Fin. Mgmt. Corp.*, 830 F.2d at 409 ("documents which are submitted to, and accepted by, a court of competent jurisdiction in the course of adjudicatory proceedings, become documents to which the presumption of public access applies"); *Crystal Grower's Corp. v. Dobbins*, 616 F.2d 458, 460-61 (10th Cir. 1980) (right of access attaches to docketing statement, joint appendix and briefs filed in court of appeals).

There is some tension, however, among the courts of appeals with respect to whether the presumption of access attaches to *all* filed documents, or only to filed documents that the court relies on to make certain substantive decisions. The Second Circuit, in *United States v. Amodeo*, 44 F.3d at 145, summarized that approach:

> We think that the mere filing of a paper or document with the court is insufficient to render that paper a judicial document subject to the right of public access. We think that the item filed must be relevant to the performance of the judicial function and useful in the judicial process in order for it to be designated a judicial document.

The First and D.C. Circuits have articulated a similar approach to the common law right. *See Anderson v. Cryovac, Inc.*, 805 F.2d 1, 12-13 (1st Cir. 1986) (applying the common law right only to "materials on which a court relies in determining the litigants' substantive rights"); and *United States v. El-Sayegh*, 131 F.3d 158 (D.C. Cir. 1997) (concluding that a plea agreement filed solely to allow the district court to rule on the government's motion to seal the agreement,

and later withdrawn when the plea agreement fell through, was not subject to public access). These cases do not, however, attempt to list particular types of information that may be withheld from disclosure under this analysis.

A related issue is the scope of the common law right of access to discovery documents.[6] The Supreme Court has held that *non-filed discovery documents* do not shed light on the performance of the judicial function and therefore are not subject to common law access rights. *See Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984). That case involved a First Amendment challenge to a court's protective order prohibiting the parties from disseminating information obtained through the discovery process. The Court observed that such protective orders do not restrict access to a traditionally public source of information. 467 U.S. at 32-34.

A request for access to *filed* discovery material may require different legal analysis. Such information generally is held to be subject to the common law right, but the access determination may depend on how the discovery documents are used in the judicial process. In general, filed discovery documents that are attached to *non-discovery* motions and briefs are subject to the common law access right. But some courts of appeals have denied access to discovery documents that are filed with motions concerning the discovery process itself (e.g., documents filed in connection with motions to compel discovery). *See Leucadia, Inc. v. Applied Extrusion Technology Inc.*, 998 F.2d 157, 164 (3rd Cir. 1993) (holding that there is a "presumptive right of public access to all of the material filed in connection with nondiscovery pretrial motions, whether those motions are case dispositive or not, but no such right as to discovery motions and their supporting documents"); and *Anderson v. Cryovac, Inc.*, 805 F.2d 1, 13 (1st Cir. 1986) (no access to discovery documents submitted in connection with discovery motions).

Disputes over access to videotaped testimony reveal additional limitations on the common law right. In such cases, the courts have held that the common law right of access may be satisfied by providing access to written transcripts of videotaped testimony. *See United States v. McDougal*, 103 F.3d 651 (8th Cir. 1996). In that case the press sought a copy of President Clinton's videotaped testimony, even though the court already had released a transcript of the testimony. In denying access to a videotape, the *McDougal* court noted that "substantial access to the information provided in the videotape had already been afforded," and "there exists a potential for misuse of the tape, a consideration specifically recognized in *Nixon v. Warner Communications.*" 103 F.3d at 657.

B. Constitutional right of access to judicial proceedings and records

In addition to the older common law right of public access, the Supreme Court more

---

[6] The Federal Rules may also affect access to discovery material. *See* Federal Rules discussion below.

recently has recognized a limited First Amendment right of access to judicial proceedings. In *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575-78 (1980), the Court held that "in guaranteeing freedoms such as those of speech and press, the First Amendment can be read as protecting the right of everyone to attend trials so as to give meaning to those explicit guarantees." Since *Richmond Newspapers*, the Court has revisited the First Amendment right of access only in the context of criminal proceedings. *See Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982) (closure of criminal proceeding during testimony of under-age rape victim was unconstitutional); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984) *(Press Enterprise I)* (upholding public access to voir dire on 1st Amendment grounds); *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986) *(Press Enterprise II)* (upholding right to attend preliminary hearing). The Court in *Press Enterprise II* established a two-part inquiry to determine whether any particular stage of a criminal proceeding should be open to the public. Under that test, courts should consider: 1) "whether the place and process have historically been open to the press and general public;" and 2) "whether public access plays a significant positive role in the functioning of the particular process in question." 478 U.S. at 8.

There is not yet a definitive Supreme Court ruling on whether there is a First Amendment right of access to court documents (in addition to the common law right discussed above). Nonetheless, several courts of appeals have extended the scope of *Richmond Newspapers* and *Press Enterprise II* to grant a limited First Amendment right to various types of judicial records, both criminal and civil. *See, e.g., In re Search Warrant for Secretarial Area Outside Offices of Gunn*, 855 F.2d 569, 573 (8th Cir. 1988) (applied First Amendment analysis in affirming order to seal affidavits accompanying search warrants); *In re Continental Illinois Securities Litigation*, 732 F.2d 1302 (7th Cir. 1984) (extending First Amendment access right to a "special litigation report" filed in support of a motion to dismiss a shareholder derivative suit); and *Publicker Industries v. Cohen*, 733 F.2d 1059, 1067-70 (3d Cir. 1984) (holding that the reasons supporting a First Amendment right of access to criminal proceedings apply with equal force to civil trials and case file documents). The Tenth Circuit, however, recently declined to decide whether there is a First Amendment right to judicial documents, noting the lack of Supreme Court holdings on the issue since *Press Enterprise II*. *See United States v. McVeigh*, 119 F. 3d 806, 811 (10th Cir. 1997).

C. Statutory and rule-based requirements on access to judicial records

Although the legal requirement of public access to federal court case files is based largely on the common law, and more recently on constitutional principles, statutes and the Federal Rules also affect access to case files.

Federal statutory access rights are few, but where they exist they are broad. In the district courts, copies of transcripts of court proceedings (including the original notes or other original

records of the court reporter) must be available in the clerk's office for public inspection without charge. *See* 28 U.S.C. § 753(b). In bankruptcy, any "paper filed ... and dockets of a bankruptcy court are public records and open to examination by an entity at reasonable times without charge." 11 U.S.C.§ 107(a). The statute also allows bankruptcy courts to restrict access to case file information to protect trade secrets, or to "protect a person with respect to scandalous or defamatory matter contained in a paper" filed in a bankruptcy court. 11 U.S.C. § 107(b).

Federal statutes also govern document retention and archiving in the judicial branch. The Federal Records Act requires courts other than the Supreme Court to preserve certain case file records consistent with standards developed by the National Archives and Records Administration. The Judicial Conference establishes records management policies consistent with the Federal Records Act. *See* 28 U.S.C. § 457 (1994); and *Guide to Judiciary Policies and Procedures*, Vol. XIII, Ch. XVII. These policies require permanent preservation of all appellate case files, several categories of civil, criminal, and bankruptcy case files, and specified portions of other case files or other records (e.g., dockets and judgment and order books).

The Federal Rules of Procedure affect public access less directly, through the rules that address the duties of the clerk of court to maintain records. The clerk of court is the official "custodian" of court records and the keeping of court dockets and case files are key responsibilities of the clerk of court. *See* Fed. R. App. P. 45(b) (court of appeals); Fed. R. Civ. P. 79(a) and 28 U.S.C. § 457 (district courts); and 28 U.S.C. § 156(e) and Fed. R. Bankr. P. 5003(a) (bankruptcy courts).

The Federal Rules define "the record" as the papers and exhibits filed in the district court, the transcript of any proceedings, and the docket. But the Rules do not directly address access to case files. *See* Fed. R. App. P. 10(a) (defining the record on appeal as "the original exhibits and papers filed in the district court, the transcript of proceedings, if any, and a certified copy of the docket entries prepared by the clerk of the district court); and Fed. R. App. P. 16(a) (defining the record on review or enforcement of administrative agency action as "the order sought to be reviewed or enforced, the findings or report on which it is based, and the pleadings, evidence and proceedings before the agency).

The Federal Rules also indirectly affect access to case files by giving judges broad discretion to issue orders that protect case-related information from unauthorized disclosure. "Protective orders," which may address both filed and non-filed documents, may include specific conditions on the disclosure of information or may prohibit disclosure altogether. *See* Fed. R. Civ. P. 26(c) (protective orders).

The rules do not articulate standards for deciding motions to seal or unseal case file documents. Presiding judges have broad discretion to seal individual documents or entire files, provided that the interests in nondisclosure outweigh the general presumption that case files are

public documents. Procedural issues relating to sealing, such as the mechanics of ensuring that sealed files are not inadvertently disclosed, are generally left to local rules.

Even when a document or file is sealed by court order, the court may consider motions to unseal such records. The Department of Justice, in particular, follows a "Policy With Regard to Open Judicial Proceedings," that assumes a "strong presumption against closing proceedings or portions thereof."[7] Department attorneys are obligated to review the continuing need to seal a document or file, and they must file a motion to unseal if there is no longer a need to withhold case files from public disclosure.

Presentence reports are confidential court documents that may be disclosed only pursuant to statute, rules of procedure, case law, or specific order of the court. *United States v. Charmer Industries, Inc.*, 711 F.2d 1164 (2d Cir. 1983). Disclosure of the presentence report is controlled by 18 U.S.C. § 3552(d) and Fed. R. Crim. P. 32(b), which require that the report be provided to the government, the defendant, and the defendant's counsel prior to sentencing. There are also certain circumstances outside of the disclosure provisions in which courts have determined that fundamental fairness requires disclosure of exculpatory evidence in a presentence report to a criminal defendant. Beyond these circumstances, the report may be disclosed only upon an express order of the court. The defendant's limited right to inspect the presentence report does not in any way erode the confidentiality of the report. *See United States v. Charmer Industries, Inc., supra.*

D. Executive branch access law and emerging policy

The statutes governing public access to executive branch records are broader than those relating to the judicial branch. The Freedom of Information Act (FOIA) and Privacy Act, the primary statutes in this area, do not govern access to judicial branch documents, but the judiciary has looked to these statutes for general guidance in determining how to respond to public requests for administrative records and other non-case related documents. *See, e.g., Guide to Judiciary Policies and Procedures*, Vol. I, Ch. X, § 1297.1 (Release of Personal Information) (stating that although the FOIA and Privacy Act do not apply to the judicial branch, "it is the policy of the Administrative Office to follow their intent").

The executive branch is also in the process of developing policies relating to electronic information technology and access to electronic records compiled both by government and commercial entities. Although those policies would not apply to the judicial branch, they may provide insights for the development of new judicial branch access policies.

---

[7] *See* "Policy With Regard to Open Judicial Proceedings," 28 C.F.R. § 50.9.

1. Freedom of Information Act and Privacy Act

The Freedom of Information Act, 5 U.S.C. §552, sets out the standards for public access to executive branch records. The Act reflects a presumption that existing records are available to the public, either in paper or electronic form, subject to a set of exemptions. 5 U.S.C. § 552(b).

The Privacy Act, 5 U.S.C. § 552a, has two primary goals: to provide broad access by an individual to the federal government's records about him or her, and to limit access to those same records by third parties. The Privacy Act was passed, in part, out of concern about the impact of computer data banks on individual privacy. *See United States Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 766 (1989). There is tension between the Privacy Act and the FOIA's goal of broad access to government records. Because of the inter-relation between the two, the balance between protecting individual privacy and the public interest in access is governed by the FOIA.

Among the FOIA's exemptions are those aimed at protecting personal private information. Exemption 4 protects confidential commercial or financial information. Exemption 6 protects personal information the disclosure of which would "constitute a clearly unwarranted invasion of privacy," and exemption 7 protects law enforcement information the disclosure of which would "reasonably be expected to constitute an unwarranted invasion of personal privacy." Exemptions 6 and 7 require courts to balance the public interest and individual privacy interests.

The FOIA and Privacy Act do not apply to the judicial branch. 5 U.S.C. §§ 551(1)(B) & 552(f). See also *United States v. Frank*, 864 F.2d 992,1013 (3d Cir. 1988); *Warth v. Department of Justice*, 595 F.2d 521, 522-23 (9th Cir. 1979). But the Administrative Office follows the intent of FOIA in responding to public information requests for administrative records. Thus, documents that would be released under FOIA are generally made available, and those that fit within the FOIA exemptions are withheld.

In *United States Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989), a case interpreting FOIA exemption 7, the Supreme Court recognized a privacy interest in information that is publicly available through other means, but is "practically obscure." The Court specifically noted:

> the vast difference between the public records that might be found after a diligent search of courthouse files, county archives, and local police stations throughout the country and a computerized summary located in a single clearinghouse of information.

489 U.S. at 764. The fact that, as in that case, information summarized in a criminal "rap sheet"

had been available to the public did not eliminate all privacy interests.

In weighing the public interest in releasing personal information against the privacy interests of individuals, the Court defined the public's interest as "shedding light on the conduct of any Government agency or official," 489 U.S. at 773, rather than acquiring information about a particular private citizen. It also noted that "the fact that an event is not wholly private does not mean that an individual has no interest in limiting disclosure or dissemination of the information." 489 U.S. at 770.

2. Recent executive branch initiatives to protect privacy

Privacy issues related to the use of technology have become a policy priority in the executive branch. In 1995 an inter-agency group issued "Principles for Providing and Using Personal Information," also known as the Privacy Principles, a set of non-binding guidelines designed to assist both public and private entities in developing policies that balance privacy and access interests.[8] The Privacy Principles recognize the need to respect reasonable expectations of privacy, and to maintain a relationship between the purpose for the original information collection and its eventual use. Building on the Privacy Principles, a Commerce Department task force recently developed "Principles of Fair Information Practices" that are meant to "support private sector efforts to implement meaningful, consumer-friendly, self-regulatory regimes to protect privacy."[9] The principles include nine specific characteristics of effective self-regulation to protect privacy: "awareness, choice, data security, data integrity, consumer access, accountability, consumer recourse, verification and consequences."

President Clinton has emphasized the federal government's responsibility to protect privacy interests in personal information the government collects and disseminates. In May 1998 the President issued a memorandum on privacy issues for the heads of all executive branch agencies.[10] The memo directs agencies to ensure that new technologies do not erode Privacy Act

---

[8] *See* "Privacy and the National Information Infrastructure: Principles for Providing and Using Personal Information," issued by the Information Infrastructure Task Force (June 6, 1995), available at http://www.iitf.nist.gov/ipc/ipc/ipc-pubs/niiprivprin_final.html.

[9] *See Elements of Effective Self-Regulation for the Protection of Privacy*, a report of the Commerce Department's National Telecommunications and Information Administration, available on the Department of Commerce website at http://www.ntia.doc.gov/ntiahome/privacy/6_5_98fedreg.htm.

[10] *See* President Clinton's Memorandum for the Heads of Executive Departments and Agencies entitled "Privacy and Personal Information in Federal Records," May 14, 1998, available at http://www.epic.org/privacy/laws/clinton-privacy-memo-598.html. The following is a key excerpt from the President's memorandum:

protections, examine how new technologies can be used to enhance personal privacy, and review existing privacy practices. The General Services Administration also has developed "Top Privacy Principles for Federal Websites," advising agency Chief Information Officers to place a "high priority on ensuring that the privacy of personal information is maintained."[11] The key GSA privacy principles are:

- Place a high priority on protecting the public's privacy at Federal web sites.
- Stay up-to-date on the impact changes in web site technology have on privacy.
- Notify the public using an appropriate privacy notice whenever you are collecting data on the Internet.
- Use information only for the purpose for which it was gathered as disclosed in the privacy notice.
- Protect privacy for all forms of data (text, graphics, sound and video).
- Balance the Freedom of Information Act (FOIA) and the Privacy Act.
- Information obtained to conduct system administration functions must still be protected.
- Involve and coordinate with the agency's privacy officer when developing applications using the Internet.

It shall be the policy of the executive branch that agencies shall:

(a) assure that their use of new information technologies sustain, and do not erode, the protections provided in all statutes relating to agency use, collection, and disclosure of personal information;
(b) assure that personal information contained in Privacy Act systems of records be handled in full compliance with fair information practices as set out in the Privacy Act of 1974;
(c) evaluate legislative proposals involving collection, use, and disclosure of personal information by the Federal Government for consistency with the Privacy Act of 1974; and
(d) evaluate legislative proposals involving the collection, use, and disclosure of personal information by any entity, public or private, for consistency with the Privacy Principles.

[11] Memorandum for Chief Information Officers and federal Webmasters, entitled "Top Privacy Principles for Federal Websites," from Joan D. Steyaert, Deputy Associate Administrator for Information Technology, GSA Office of Governmentwide Policy for Ensuring Privacy on the Internet, dated May 1998 (available at http://www.itpolicy.gsa.gov/mke/fedwebm/privacy.htm).

II. JUDICIARY POLICY ON ACCESS TO CASE FILES

A. National policies on access to case files

Although the judiciary has no comprehensive national policy on access to case files, several factors may explain this absence. Disputes over access to case files traditionally have been addressed on a case-by-case basis by individual judges applying the legal standards discussed above. In addition, the clerk of court is the custodian of an individual court's case files, and the clerk exercises control over case files at the direction of the court. It appears that individual court policies and practices have been adequate, at least within the context of traditional paper case files.

There has been some recent effort by the Judicial Conference to address the access and privacy issues inherent in the electronic dissemination of judicial branch data. In April 1998 the Executive Committee of the Conference, responding in part to proposed legislation to require Internet dissemination of information related to bankruptcy cases, directed that "release of data held by the federal judiciary shall be subject to appropriate privacy concerns and safeguards." Similar language, which would give the Judicial Conference the authority to develop policies to protect privacy interests in bankruptcy data, was included in the bankruptcy reform legislation:[12]

> The national policy of the United States should be that all data held by bankruptcy clerks in electronic form, to the extent such data reflects only public records (as defined in section 107 of title 11 of the United States Code), should be released in a usable electronic form in bulk to the public *subject to such appropriate privacy concerns and safeguards as the Judicial Conference of the United States may determine*. (italics added).

The Conference has established one national policy that may affect the dissemination of electronic case files. The policy requires the AO to remove "judge-specific" information when compiling statistical information about the caseload of the courts. *See* JCUS-Sept. 1995, at 87-88 (reaffirming earlier policy on this issue). Under the approved policy, if judge-identifying information is released it may be done only at the individual court level, "since court staff are in a better position to provide current and accurate information about circumstances related to specific judges or cases." The main exception to this policy has been for reports of motions and bench trials pending over six months and civil cases pending more than three years. Those

---

[12] Bankruptcy Reform Act of 1998, H.R. 3150, 105th Cong. 2d Sess. (1998) at section 703. Legislation containing this language was passed by both the House and Senate, but no bill was enacted. An identical bill, H.R. 833, has been introduced in the 106th Congress.

judge-specific reports are required by the Civil Justice Reform Act, which also requires that the reports be available to the public.

B. Individual court policies on access to case files

Court records are maintained by the clerk of court, and case files are the official record of litigation in the federal courts. As a general rule, all pleadings, orders, notices, exhibits, and transcripts filed with the clerk of court are public records, and they are made available on request through the clerk's office unless sealed by order of the court.

Although court procedures for public access to case files may vary, it is standard practice that case files are open for inspection and copying during normal business hours. There is also a general presumption that court files are available to anyone upon request; courts do not make access determinations based on the status of the requestor.

Judges address privacy interests in case files mainly through discretionary sealing of files or documents. Although judges may act *sua sponte*, sealing of case files usually occurs on a case-by-case, or document-by-document, basis in response to the filing of a motion to seal.

C. Electronic Public Access services

The federal judiciary has offered various electronic public access ("EPA") services for many years.[13] These services permit the public to gain quick access to official court information

---

[13] These services include the following:

1) *Public Access to Court Electronic Records (PACER)* PACER allows registered users to gain electronic access to official case information and court dockets. In accordance with Judicial Conference policy, most courts charge a $.60 per minute access fee for this service. Each court controls its own case information database; therefore, there are some variations among jurisdictions as to the information available through PACER. Note: At its September 1998 meeting the Judicial Conference established a fee of $.07 per page for access to PACER information through a federal judiciary Internet site.

2) *U.S. Party/Case Index* The U.S. Party/Case Index, which consists of a subset of PACER data, allows searches to determine whether or not a party is involved in federal litigation. The search will provide a list of case numbers, filing locations and filing dates for those cases matching the search criteria. In accordance with Judicial Conference policy, most courts charge a $.60 per minute access fee for this service, and users must register with the PACER Service Center.

3) *Appellate Bulletin Board System (ABBS)* All courts of appeals offer public users electronic access to

and records from outside the courthouse.

The public uses data collected through EPA services in several ways. It appears that most usage is by parties monitoring a case's progression through the court system. However, private data resellers also use EPA services — especially PACER — to collect large amounts of data from the courts. For many years, two data resellers have collected data on all new bankruptcy cases on a daily or weekly basis. These companies collect such information for compilation into private databases. In turn, subscribers to these private databases use the information for mailing lists, background investigations, case tracking, and credit bureau reporting. Another company recently began collecting and reselling PACER data on district court cases. Private companies have also begun to serve as electronic access "middlemen" by dialing into PACER to conduct searches for their subscribers. All of these private services have substantial user fees associated with them.

Until recently, the privacy implications of EPA systems have not been considered significant deterrents to their continued development. The Administrative Office's Office of General Counsel was consulted throughout the development of each of the EPA services. It has provided advice on issues including the appropriateness of providing Social Security numbers in the PACER systems and in using the Social Security number as a search field in the U.S. Party/Case Index, as well as the implications of the Fair Credit Reporting Act in connection with dissemination of bulk data by bankruptcy courts.

There were some privacy concerns expressed when the U.S. Party/Case Index was made available in 1997. The U.S. Party/Case Index is a national locator service for cases filed in federal

---

appellate court decisions (slip opinions) and other court information such as court oral argument calendars, case dockets, local court rules, notices and reports, and press releases. Most appellate courts offer both slip opinions and case dockets on the same public access computer. Information on these systems can be viewed on-line or downloaded into a user's computer. The $.60 per minute access fee generally applies to this service.

4) *Voice Case Information System (VCIS) and Appellate Voice Information System (AVIS)* VCIS and AVIS use an automated voice response system to read a limited amount of bankruptcy or appellate case information directly from the court's database in response to Touch-Tone telephone inquiries. Access to the VCIS and the AVIS currently is offered at no cost.

5) *U.S. Supreme Court Electronic Bulletin Board System* The U.S. Supreme Court Electronic Bulletin Board System provides on-line access to the Court's automated docket, argument calendar, order lists, slip opinions, rules, and other general information. Access to the BBS is presently provided at no cost.

6) *U.S. Supreme Court Clerk's Automated Response Systems (CARS)* The U.S. Supreme Court Clerk's Automated Response Systems (CARS) permits caller using a touch-tone telephone to obtain the status of cases on the Supreme Court automated docket from an automated voice synthesizer response system. Access to the CARS is provided at no cost.

court. The Index allows registered PACER users to perform national or regional searches on party name, social security number, or tax identification number in the bankruptcy index, party name or nature of suit in the civil index, and party name in the criminal and appellate indices. The information made available from the U.S. Party/Case Index is a subset of the information made available through the PACER systems. The Index does not provide compilations of bankruptcy or other case file data; it does not provide a list of names with corresponding Social Security numbers; and the result of a name search does not include the Social Security number. The Social Security number is just one data field that may be used to search or query the system. (In fact, many believe that the Social Security number is a necessary query field because a name alone may not allow accurate identification of a case or party).

As the EPA services move to the Internet, new privacy concerns have been expressed. It should be noted, however, that a user password and identification number will be required for access to PACER through the Internet, just as it is currently required for dial-up PACER access.

D. Emerging policies on access to electronic case files

The courts that are currently operating the electronic case file system sponsored by the AO generally permit anyone to view, print, and download any documents filed in the system. Those courts do not, however, provide public access to all the data reports and database search capabilities available to the court. The courts control access to the system, for filing purposes only, by issuing user identifications and passwords. Through this type of access restriction, the courts control who can *file* electronic documents. Access to view files generally is not limited, and anyone with Internet access is permitted to view files and all documents in them. The courts are not accepting sealed documents for electronic filing, so electronic access to sealed material is not currently an issue.

Several courts have implemented programs to create electronic images of some or all filed documents. Like the electronic case file courts, those courts generally do not restrict access to the imaged case files.

None of the courts has developed comprehensive policies to address privacy interests in electronic case files. Some courts have begun, however, to devise policies that are intended to address privacy issues. Two of those courts are:

Eastern District of New York: This court offers litigants a special procedure to request the exclusion of certain documents from the electronic case file. In its order implementing the electronic case file system, the court allows litigants to apply for an "order prohibiting the electronic filing" of specified documents to avoid "prejudice" to privacy interests or proprietary rights. *See* Administrative Order 97-12, at 24-25 (E.D.N.Y. 1997).

Northern District of Ohio: This court recently added some Social Security cases to its system, but decided not to file electronic images of the administrative record in the court's electronic case file system. This decision was motivated, in part, by privacy concerns because the administrative record often contains sensitive medical records and other personal data concerning benefit claimants.

III. OTHER COURT POLICIES, LEGISLATIVE PROPOSALS, AND LEGAL SCHOLARSHIP ON PRIVACY ISSUES

A. Potential insights from state and international court practices

Many state courts and court systems outside the United States have begun to experiment with electronic filing. Those courts inevitably will face the challenge of developing access policies that account for privacy interests. Because of the broad array of cases that the state courts address, however, many state court case files that contain sensitive personal information are shielded already from public disclosure by statute and judiciary policies. Many state courts, for example, do not provide public access to divorce records, juvenile criminal information, child custody and adoption files, and similar sensitive case file information. Likewise, in some foreign court systems there is no general legal presumption that all case files, or specific documents associated with litigation, are public documents.

Despite existing limitations on disclosure of certain types of paper case files, state and foreign courts are confronting privacy issues as they implement electronic case files systems. The federal courts should continue to monitor developments in other court systems to gain insights into the development of electronic access policies. In particular, it is worth noting that some state courts are subject to access laws similar to the FOIA, and so may have had the need to articulate why certain elements of the case file might be exempt from public disclosure.[14]

The following is information on some of the court systems that are developing policies on privacy and access to electronic records:

California Courts

In a rule that became effective January 1, 1999, the California Judicial Council gave trial courts detailed guidance on developing access policies that recognize privacy interests.[15] The objective is to "provide a trial court with a reasonable framework for providing public access to its electronic records." Courts are encouraged to offer public access, but the rule directs that "such access should not harm legitimate privacy interests or compromise protections established by law or court order." It also directs courts to grant public access "only when the record is

---

[14] For a summary of state law and policy on access to court records, see Susan Jennen, "Privacy and Public Access to Electronic Court Information: A Guide to Policy Decisions for State Courts," published by the National Center for State Courts, 1995.

[15] *See* 1999 California Rules of Court, Sec. 38 (Access to electronic records), available at http://www.courtinfo.ca.gov/rules/1999/appendix/standard-84.htm#P2744_245513

identified by the name or number of a case and only on a case-by-case basis." Although each court may develop its own access policies, the rule requires each court to "submit to the Judicial Council a copy and an evaluation of its access policies."

The California rule also addresses access for litigants, and excludes several broad categories of documents from remote electronic access:

> This standard applies only to public access to the electronic records that trial courts prepare, own, use, or retain. The standard does not apply to electronic access by a person who is a party to a case or the attorney of such a person, the electronic filing of documents, or the electronic distribution of any court calendar records. A court should not grant access to an electronic record that is sealed, is made confidential, or is required to be expunged after a time or event determined by law or an order of the court. Cases involving family law, child support, juvenile law, mental health, probate, criminal law, or public offenses ... should not be included in electronic records made available through remote access.[16]

Arizona Courts

The Arizona court system recently implemented a new rule on public access to court records. The rule treats paper and electronic records similarly. Both are presumptively available for public inspection unless otherwise shielded from public disclosure by statute or court rule.[17] The presiding judge of each court may establish "limitations on remote electronic access based on the needs of the court." Users of the system also must agree to "access the information only as instructed by the court, to not attempt any unauthorized access, and to consent to monitoring by the court of all use of the system."

Federal Court of Australia

Although the Federal Court of Australia has not yet implemented electronic filing, the court has a long-standing rule effectively shielding much case file information from public disclosure. The public file is limited to the main documents that reflect the court's action in a case, such as the complaint, answer, most court orders, and most pleadings. Except with leave of court, a person who is not a party to a case may not inspect such documents as affidavits,

---

[16] 1999 California Rules of Court, Sec. 38.

[17] *See* Rule 123 of the Arizona Supreme Court, effective Dec. 1, 1997.

interrogatories, admissions, subpoenas, or deposition transcripts.[18] Because of these existing limits on public access, the Australian courts may not need additional restrictions on access to electronic files to protect privacy interests.

B. Legislative proposals on access/privacy issues

As public concern over privacy and electronic data has grown, so has legislative activity on electronic privacy issues. Numerous bills have been introduced to protect personal privacy interests relating to the collection and use of personal data by both private and government entities. Bills have identified the use of medical records and Social Security numbers as problem areas, but there has been no consensus on how — or whether — legislation should be crafted to protect privacy.[19] Although none of the pending legislation in Congress directly addresses information contained in federal court case files, the judiciary should follow legislative developments in this area.

Some of the bills introduced in the 105th or 106th Congress are:

H.R. 354 (106th Congress). Collections of Information Antipiracy Act. Creates new property rights for owners of databases of public information.

H.R. 358 (106th Congress). Patients' Bill of Rights Act of 1999. Requires health plans and insurers to protect confidentiality of medical records and allow patient access.

H.R. 367 (106th Congress). Social Security On-line Privacy Protection Act of 1999. Limits disclosure of Social Security numbers by interactive computer services.

H.R. 448 (106th Congress). Patient Protection Act of 1999. Sets rules on confidentiality of health care information

HR 1367 (105th Congress). Federal Internet Privacy Protection Act of 1997.

---

[18] *See* Australia Federal Court Rules, Order 46 (Registries) available at http://www.austlii.edu.au/au/other/fca/order46.pdf

[19] The Health Insurance Portability and Accountability Act of 1996 (Public Law 104-191) contains a provision protecting the privacy and confidentiality of medical data. Under that law, if Congress does not pass medical privacy legislation by August 1999, the Department of Health and Human Services is required to issue regulations on that issue by April 2000.

Prohibits Federal agencies from making available through the Internet certain confidential records with respect to individuals, and provides for remedies in cases in which such records are made available through the Internet.

S. 393 (106th Congress). Congressional Openness Act. Provides Internet access to Congressional documents, including certain Congressional Research Service publications, Senate lobbying and gift report filings, and Senate and Joint Committee documents.

C. Legal scholarship on privacy issues

Although there has been significant legal scholarship on privacy and access to government records, most of that research does not take into account the recent dramatic advances in information technology. The following articles, however, provide useful insights on the issues discussed in this paper:

1. Jerry Kang, "Information Privacy in Cyberspace Transactions," 50 Stanford L. Rev. 1193 (1998) (a primer on cyberspace privacy issues, particularly those relating to commercial transactions, with a detailed argument to allow only "functionally necessary" use of personal information unless the party providing the information expressly agrees otherwise).

2. Flavio Komuves, "We've Got Your Number: An Overview of Legislation and Decisions to Control the Use of Social Security Numbers as Personal Identifiers," 16 John Marshall J. Computer and Information L. 529 (1998) (addresses legal limitations on the use and dissemination of Social Security numbers, and recommends legislation to limit the abuse of Social Security numbers and other personal identifying numbers).

3. Lillian R. Bevier, "Information About Individuals in the Hands of Government: Some Reflections on Mechanisms for Privacy Protection," 4 William & Mary Bill of Rights J. 455 (1995) (examines how the federal government uses information provided by individuals, and considers whether there should be additional limits on how government may use such information).

4. Louis Hubener, "Rights of Privacy in Open Courts — Do They Exist?" 2 Emerging Issues in State Const. L. 189 (1989) (reviews how state and federal courts have balanced rights of public access and individual privacy, highlighting cases in which privacy rights successfully have been asserted to protect litigants, other participants in the judicial process, and third parties from unwarranted disclosures of personal information).

5. Robert C. Post, "The Social Foundations of Privacy: Community and Self in the Common Law Tort," 77 Calif. L. Rev. 957 (1989) (a philosophical analysis of privacy law, arguing that the vast expansion of mass media endangers privacy values).

IV. THE POTENTIAL PRIVACY IMPLICATIONS OF ELECTRONIC CASE FILES

Before the advent of electronic case files, the right to "inspect and copy" court files depended on physical presence at the courthouse. Unless a case achieved notoriety for some reason, sensitive information in the file was unlikely to circulate outside those directly concerned with the case. The inherent difficulty of obtaining and distributing paper case files effectively insulated litigants and third parties from the harm that could result from misuse of information provided in connection with a court proceeding. The Supreme Court in *Reporters Committee* referred to the relative difficulty of gathering paper files as "practical obscurity." *See United States Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989).

This situation is rapidly changing as a result of technology. The potential now exists to provide access to case files through the Internet, 24-hours-a-day. Depending on how it is implemented, an electronic case files system can provide instantaneous access to files from any location by computer. Sensitive information in a case file, unless sealed or otherwise protected from disclosure, can be made available for downloading, storage, and printing. This level of access is occurring on a limited basis now, through a combination of the introduction of electronic filing and document management in the courts, the proliferation of personal computers in individual homes and offices, and the widespread use of the Internet.

The courts face increasing demands for electronic access to public court records, especially bankruptcy records. The National Bankruptcy Review Commission, for example, recommended to Congress that "all data held by bankruptcy clerks in electronic form, to the extent it reflects only public records as defined in Bankruptcy Code § 107, should be released in electronic form to the public, on demand."[20] There is potentially great commercial value in certain personal information in case files. In addition, academics, the press, and others are interested in using case files for research purposes.

A related issue is whether courts should provide — or be permitted to provide — case file information in a format that is specially tailored to a particular requester. Electronic case file systems likely will increase the courts' capability to provide aggregated or otherwise specially compiled data related to case files.

---

[20] Report of the National Bankruptcy Review Commission, (NBRC Report), Vol. 1, Recommendation 4.1.1, p. 39, October 20, 1997. This recommendation was incorporated into pending bankruptcy reform legislation. *See* discussion on p. 16.

The rapid development of technology is challenging the courts to find ways to balance privacy interests and open access. Will the courts continue to be "custodians" of records, and distributors of those records only upon specific request? Or will the Internet effectively require the courts to become "disseminators" or "publishers" of file information? Will the courts inadvertently become "locator services," effectively providing compilations of case data that are now only provided by specialized commercial interests? The following analogy illustrates the significant difference between paper and electronic files in thinking about these issues: Courts generally make paper files available upon request, one-at-a-time, to individuals who ask about a particular file. By making files available through the Internet, the court essentially displays and indexes all files and offers them to the public for review and copying at any time.

These new circumstances place into conflict two primary government obligations:

1) information held by government generally should be available to allow for effective public monitoring of government functions; and

2) certain private or sensitive information in government files may require protection from indiscriminate disclosure.

In the context of court records, the Supreme Court in *Nixon v. Warner Communications* summed up this dilemma as follows:

> It is uncontested ... that the right to inspect and copy judicial records is not absolute. Every court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes. For example, the common-law right of inspection has bowed before the power of a court to insure that its records are not used to gratify private spite or promote public scandal through the publication of the painful and sometimes disgusting details of a divorce case. Similarly, courts have refused to permit their files to serve as reservoirs of libelous statements for press consumption, or as sources of business information that might harm a litigant's competitive standing.

435 U.S. at 596-97 (citations and internal quotations omitted).

In other parts of the government and in the commercial world, sensitivity to privacy concerns is rising. In part, the increased awareness of privacy issues is a response to high-profile incidents involving accidental disclosure of confidential information from computer databases. The Social Security Administration, for example, reconsidered its decision to make benefit

estimates available over the Internet.[21] Similarly, a credit reporting company's attempt to make individual credit reports available over the Internet led to the delivery of reports to the wrong individuals within the first hours of its operation, compromising the personal privacy of several people and forcing the company to cancel the service. These and other incidents have focused attention on the opportunities for abuse of electronic access to personal information, even when measures are taken to shield that information from unauthorized disclosure.

Two primary positions appear to be emerging in the court community with respect to the privacy issues relating to electronic case files.

The first position is sometimes referred to with the shorthand expression "public is public." The essence of this position is the assumption that the *medium* in which case files are stored does not affect the *presumption* that there is a right of public access. Advocates of this position suggest that it would be inappropriate, for example, to maintain one set of public records in the courthouse, while excluding some of those documents from the publicly-available electronic record. They suggest that current mechanisms for protecting privacy — primarily through protective orders and motions to seal — are adequate even in the new electronic environment. Some have also suggested that the proper focus for alternative access policies should be determining whether particular information should be deemed "public" in any format — electronic or paper — rather than on potential exclusion of "public" information from the electronic case file.

Advocates of the "public is public" position note that it is both impossible, and indeed inappropriate, to offer litigants the same expectation of privacy in court records that may apply to other information divulged to the government. The judicial process depends on the disclosure of all relevant facts, either voluntarily or involuntarily, to allow the judge or jury to make informed decisions. In bankruptcy cases, for example, a debtor must disclose a Social Security number or taxpayer ID and detailed financial information that the bankruptcy trustee needs to administer the case, and that creditors need to fully assert their rights. A debtor's complete financial information is in the public file, and concealment of property or information about property is grounds for criminal prosecution. Similarly, in many types of civil and criminal cases — for example, those involving personal injuries, criminal allegations, or the right to certain public benefits — case files often must contain sensitive personal information. To a certain extent, then, litigants must expect to abandon a measure of their personal privacy at the courthouse door.

A second position on the privacy issue focuses on the relative "obscurity" of paper case files as compared to electronic files. Advocates of this position observe that unrestricted Internet

---

[21] *See* "Internet Access to Personal Earnings and Benefits Information," General Accounting Office, document number GAO/T-AIMD/HEHS-97-123 (May 6, 1997)

access to case files undoubtedly would compromise privacy and, in some situations, it could increase the risk of personal harm to litigants or others whose private information appears in case files.[22] Bankruptcy cases are often suggested as examples of this risk because they contain detailed personal financial information. It also has been noted that case files contain information on non-litigants who often are not able — or not aware how — to protect their privacy by seeking to seal sensitive information.

Advocates of the second position acknowledge that it is difficult to predict how often court files may be used for "improper purposes" in the new electronic environment. They suggest that the key to developing electronic access policies is not the ability to predict the frequency of abuse, but rather the assumption that even a few incidents of mischief with court files could cause great personal harm.

---

[22] *See* "Should You be Able to Access Bankruptcy Files from the Internet?" in *Bankruptcy Court Decisions*, Vol. 32, Issue 21 (Aug. 4, 1998).

V. POLICY ANALYSIS AND ALTERNATIVES

A. Initial policy assumptions

This section of the paper is intended as a starting point for reviewing potential alternatives for development of judiciary policy on access to electronic case files. Based on the analysis and information presented in Parts I - IV of this paper, some initial assumptions to guide policy development might include:

- The public should share the benefits of technology, including more efficient access to case files.
- Litigants and their attorneys should have full electronic access to the files in any case in which they are participating.
- Other individuals and entities (i.e., the public, the press) should have a level of access to case files that is consistent with protecting privacy and other legitimate interests in nondisclosure.
- The time is ripe for the judiciary to consider developing national policies on electronic access to case file information because: 1) many courts already have made their electronic files available on the Internet; and 2) the Judicial Conference has authorized the development of policies that account for the privacy issues inherent in the electronic dissemination of court data.
- The judiciary has a strong interest in developing electronic access policies, and if necessary proposing legislation, to account for the needs of the judicial branch. If the judiciary does not take action, Congress may enact legislation that limits the judiciary's options.
- There may be considerable value in adopting a core national approach to the issue of access to electronic case files, rather than allowing each court to develop potentially conflicting local policies. Uniform national policies for the federal courts would ensure similar privacy protections regardless of which federal court is the custodian of a particular case file.
- A national policy should maintain at least the current level of access to case files at each court location during normal business hours. Although some restrictions on electronic access may be advisable, generally unrestricted access to case files is consistent with current law and will promote the

efficient use of the new technologies to serve both the public and the courts.

- Denying remote access altogether is not a viable alternative because it would eliminate many of the key benefits associated with electronic filing systems.

- It may be necessary to develop specific sets of procedures to provide case file information for use by academic researchers and commercial interests. These procedures might include, for example, providing case file information that has been stripped of personal identifying information.

B. Factors that may justify some electronic access restrictions

Several legal and policy considerations tend to justify limited restrictions on electronic access to case files to protect privacy interests. These include the following:

Balancing access and privacy interests in public information would be consistent with recent actions by the executive branch.

The executive branch is showing increasing interest in protecting privacy interests in government and commercial information. Congress also is struggling to find ways to protect medical records and other sensitive personal information from unwarranted disclosure. As the President stated in his recent memorandum directing federal agencies to review their privacy policies:

> Increased computerization of Federal records permits this information to be used and analyzed in ways that could diminish individual privacy in the absence of additional safeguards. As development and implementation of new information technologies create new possibilities for the management of personal information, it is appropriate to reexamine the Federal Government's role in promoting the interests of a democratic society in personal privacy and the free flow of information.[23]

---

[23] President Clinton's Memorandum for the Heads of Executive Departments and Agencies entitled "Privacy and Personal Information in Federal Records," May 14, 1998, available at http://www.epic.org/privacy/laws/clinton-privacy-memo-598.html.

Congress is likely to recognize the judiciary's responsibility to act in this area.

In bankruptcy reform legislation passed by both the House and Senate last year but not enacted, Congress recognized that the Judicial Conference should be allowed to implement "safeguards" to protect privacy interests in bankruptcy court records.[24] It is reasonable to assume that Congress would recognize the judiciary's interest in developing appropriate electronic access policies, and grant the Judicial Conference statutory authority to do so.

Access rights, whether based on the common law or on the Constitution, are not absolute.

The inherent authority of the judiciary to control the dissemination of case files may justify restrictions on access to electronic case files to protect privacy. The existing limits on the common law access right, as articulated in the case law, give courts latitude to distinguish among case file documents based on their function in the litigation process, and to limit access as necessary to balance privacy interests against access rights. *See Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 596-97 (1978).

The loss of "practical obscurity" suggests a need to evaluate access policy.

Traditional methods of protecting privacy interests, inherited from days of paper case files, may offer inadequate protections in the coming era of electronic case files. Although judges currently balance privacy and access interests primarily through the consideration of motions to seal records on a case-by-case basis, the implementation of electronic case files may justify rethinking the generally passive role that courts and judges play in this area.

The judiciary has a special custodial responsibility to balance access and privacy interests in making decisions about the disclosure and dissemination of case files.

Like other government entities that collect and maintain sensitive personal information, the judiciary must balance the public interest in open court records against privacy and other legitimate interests in nondisclosure. The courts are custodians of personal and sensitive documents by virtue of the fact that litigants and third parties are compelled by law to

---

[24] A bankruptcy reform bill containing identical language concerning privacy safeguards is pending in the 106th Congress as H.R. 833.

disclose certain information to the courts for adjudicatory purposes.

Bankruptcy debtors, for example, must divulge intimate details of their financial affairs for review by the case trustee, creditors, and the judge. In today's paper file environment, where documents remain in file cabinets at the courthouse, debtors do not expect this otherwise private information to be disclosed to friends, neighbors, and the general public. In the electronic age, though, the information may be available on the Internet for all the world to see. Thus, although there is no "expectation of privacy" in case file information, there is certainly an "expectation of practical obscurity" that will be eroded through the development of electronic case files. Appropriate limits on electronic access to certain file information may allow the courts to balance these interests in the context of the new electronic environment.

Access need not mean the easiest and broadest possible access.

Courts have a duty rooted in tradition, the common law, and the Constitution to provide access, but at this point there is no statutory obligation to disseminate case files electronically. The case law on access to videotaped testimony, discovery material, and documents that are not "relevant to the performance of the judicial function" may provide insights to developing a policy that appropriately limits access to certain electronic case files or documents in them. *See, e.g., United States v. McDougal*, 103 F.3d 651 (8th Cir. 1996); *Leucadia, Inc. v. Applied Extrusion Technology Inc.*, 998 F.2d 157, 164 (3rd Cir. 1993); and *United States v. Amodeo*, 71 F.3d. 1044, 1047-50 (2d Cir. 1995).

New forms of access may unduly raise the privacy "price" that litigants must pay for using the courts.

Litigants — and third parties not involved in litigation — are often compelled to divulge sensitive information in the course of litigation. The prospect of unlimited disclosure of personal information in case files may undermine public confidence in the litigation process in general, and the federal courts in particular.

Unlimited electronic disclosure of case files may not promote the underlying goals of providing access to case files.

The primary purpose of access to case files as articulated in case law — promoting effective public monitoring of the courts — may be accomplished without unlimited disclosure of all documents in case files. This consideration is especially relevant with respect to documents in the file that are only marginally related to the adjudication process.

C. National policy alternatives on access to electronic case files

Three broad alternatives merit consideration in fashioning a national policy on access to electronic case files. Outlined below, they include: 1) providing the broadest possible access to electronic files; 2) taking a more narrow and cautious approach by excluding all, or most, sensitive information from case files altogether; and 3) devising a "middle-ground" approach that would provide virtually complete access to all records at the courthouse, but would limit remote electronic access to a subset of case file information. Each alternative is presented in turn, together with a list of major issues for further research and analysis.

As an initial matter, there appear to be few problems — in terms of privacy issues — with allowing essentially unlimited public access to most documents in federal court case files. The focus, instead, should be on isolating for analytical purposes those documents and categories of information that pose privacy issues, and then on deciding how to handle that material in an electronic system. Therefore, the key issue in designing an access policy appears to be the extent to which, and the means by which, "sensitive" information should be made available to the public in an electronic system.

Alternative 1: Extend current open access policies to cover electronic case files

This approach would implement the philosophy that the public case file should not be treated differently simply because it is in electronic rather than paper form. Electronic case files would be "open" for public access to the same extent as paper case files. There would be no restrictions on remote access. Litigants and others would be expected to assert their privacy interests through the regular motions process, and disputes over access would be addressed on a case-by-case basis.

The following are some of the likely implications and questions related to this alternative:

- It assumes that litigants will protect themselves — to the extent they can — by seeking protective orders or filing motions to seal case files or particular documents.

- Conversely, this approach implicitly assumes that judges may become more willing to intervene to protect litigants from harmful disclosures through electronic case files.

- It does not account for any qualitative difference between paper and electronic access.

- This alternative may lead to an increase in motions to seal information, or to otherwise exclude it from electronic access.

- Even assuming an increase in motions to seal, it may be difficult to justify sealing much sensitive information under current legal standards. This may be especially true with respect to bankruptcy records, which are subject to public disclosure by statute, and other sensitive information such as medical records that may be directly relevant to underlying litigation.

Alternative 2: Review the elements of the "public" case file to better accommodate privacy interests

This alternative would focus on evaluating the need to file particular information or documents in the public case file, whether in paper or electronic format. It is a variant of Alternative 1 because it assumes that the entire "public" file would be made available electronically without restriction. But the long-term goal would be the recognition of privacy interests by excluding — on a system-wide rather than case-by-case basis — certain information from public case files. Many state court systems have essentially adopted this approach by sealing all files in specific types of cases, such as many family law and juvenile matters.

This approach assumes that certain information, now routinely filed, should be excluded from the case file that is available for public inspection. Implementing this approach would require a systematic review of the information and documents that courts currently require — or allow — to be filed. The goal of such a study would be to develop a new definition of the "public case file" that would better accommodate privacy interests.

The following are some of the likely implications and questions related to this alternative:

- It assumes there is a "core" group of documents (or categories of information) that must be maintained as the public case file.

- Conversely, it assumes that the judiciary could identify case file information that implicates privacy interests, and could justify excluding that information from the public case file in certain situations.

- If documents used in the judicial process are excluded from the public case file, this approach may enhance opposition by the press and others on the basis of "court secrecy."

Alternative 3: Provide limited access to certain electronic case file information to address privacy concerns

Like Alternative 2, this alternative would focus on identifying *categories* of case file information or documents that may implicate privacy concerns. But rather than redefining the contents of the public case file, it would involve limiting remote electronic access to certain types of information, and providing for "levels of access" to electronic case files.

This approach assumes that the complete electronic case file would be available for public review *at the courthouse only*, just as the entire paper file is available for inspection in person. Remote electronic access to case files, though, would be limited depending on the level of access granted to a particular individual. At least four levels of access to electronic files might be appropriate:

1. Judges and court staff presumably would have unlimited remote access to all electronic case files.

2. Similarly unlimited access might also be extended to certain other key participants in the judicial process, such as the U.S. Attorney, the U.S. Trustee, and bankruptcy case trustees. Alternatively, however, these participants might be treated like other litigants for access purposes.

3. Litigants and their attorneys would be given unrestricted access to the files relevant to their own cases.

4. The general public would have remote electronic access to a subset of the entire case file, including pleadings, briefs, orders, and opinions.

Under this alternative, certain documents with privacy implications would be excluded from unlimited remote electronic access, but those documents would remain accessible to anyone at the courthouse. Various documents that may be candidates for limited electronic access include medical records, tax records, employment records, third-party sensitive information, or financial information in bankruptcy cases. Although discovery information generally is not filed with the court, it also may be appropriate to limit access to documents filed in connection with discovery motions.

Additional elements of this approach might include:

- Requiring all users to register with the court and obtain a unique password to gain access to *any* electronic case file or document.

- Allowing unrestricted public access to most elements of the case file, while requiring registration and a password for access to certain sensitive information.

- Charging a fee for public access through the Internet to any case file information, or to selected documents within case files.

Implementing this alternative would, presumably, expose litigants to a similar level of potential public disclosure of private information regardless of the format of the case file. Accordingly, to the extent that litigants and others have an expectation that paper files are not widely accessible without considerable effort, this policy may allow that expectation to be carried into the electronic case file era. At the same time, the "practical obscurity" of case files would be partially lifted, in the sense that most case file information would be available on the Internet.

The following are some of the likely implications and questions related to this alternative:

- It assumes the development of a tentative list of information and documents that should be restricted to "courthouse only" access.

- It assumes there is a "core" group of documents (or categories of information) that should be made available electronically without restrictions.

- This approach raises additional questions about who will decide what categories require protection from remote electronic access.

- Limits on remote electronic access may affect the acceptance of electronic filing by the bar and litigants.

- It raises questions about the judiciary's ability to monitor unauthorized disclosure by those who would have full access to electronic files.

- It raises technical questions about the ability to provide various levels of remote electronic access to case files.

- Implementation of this policy might require legislation (at least as to bankruptcy files).

- Subjecting users of court websites to a registration requirement could raise

First Amendment or other significant legal issues.

- Additional privacy protections may create satellite litigation.
- This approach could lead to confusion over the various categories of information and levels of access.

Item 14-15

AGENDA # _____
Summer 1999

Subject: Long-Range Program Planning and Budgeting (Action)

Judicial Conference committees with planning responsibility continue to make progress in strengthening and integrating long-range planning and budgeting activities. At last winter's meetings, committees were asked to initiate efforts to strengthen planning and budgeting processes by discussing program trends and issues and considering their long-term implications. This process will continue to evolve. Also, committees were asked to begin preparing budget requirements on a five-year horizon, starting with the summer meeting cycle.

As it matures, the planning process will support decision-making about program issues and policies, and provide input for budgetary decisions. A routine component of committees' planning efforts will be to quantify the impact of program changes so that they are incorporated in long-range budget estimates.

Planning is a continuous process. As time allows, committees are asked to begin to take the following steps at the summer meetings:

1) Discuss the long-range planning process and the preliminary list of key strategic issues identified at the April 1999 long-range planning meeting. Think about strategic issues of importance to the judiciary over the next five years. Consider your committee's role in addressing cross-committee issues as well as issues of importance primarily to your committee. (See Attachments 1 and 2)

   - Begin to identify current and projected problems, trends, and initiatives that will affect your programs. Discuss program goals that you would like to achieve. Begin to define the most important strategic issues for your committee's future consideration and action, and for cross-committee discussion. In your committee's report to the Judicial Conference, provide a preliminary list of any issues you identify so that they can be incorporated in the list of issues to be considered as the planning process unfolds.

2) Determine how best to integrate long-range planning into your normal course of business.

   - Begin to address those issues that will or may have the greatest impact on your mission and program areas. Some issues may take considerable time to work through. The planning process steps described in Attachment 1, Part Three, can serve as a guide.

3) Review the judiciary long-range budget estimates and committee-specific assumptions and estimates. (Refer to Attachments 3 and 4) For overall program budgeting:

- Identify program trends and initiatives that will affect future costs (increases or decreases).

- Discuss whether and how to improve the methodology and assumptions behind the estimates to help improve their reliability and increase their usefulness for planning.

- Consider, as new planning information develops over time, how to improve the reliability and usefulness of the budget estimates.

4) Begin improving information sent forward to the Judicial Conference supporting program and policy initiatives.

- For program initiatives that will result from this meeting, estimate the future savings or budget requirements through 2005.

- In the future, in conjunction with new program or policy recommendations, follow the steps in the planning process because they will assist committees in developing and recommending new initiatives and in estimating budget requirements. Beginning with the Winter 1999 meetings, for any significant program initiative or policy recommendation forwarded for Judicial Conference approval and/or incorporation in the judiciary's budget, committees should provide the following information:

  - Description of the issue (i.e., the problem or goal) that the initiative will address

  - Specific benefits or outcomes expected as a result of the recommended action

  - The estimated impact--across relevant programs--on staffing and other resources, operations, services, individuals or institutions, and/or the quality of justice

  - Budget estimates (or expected savings), by major resource category, for the initial year and the subsequent four years.

The goal for long-range budgeting is to develop long-range resource forecasts that reflect program plans. The judiciary's ability to do this well will be an evolving process. The long-range estimates will serve as planning tools to help the judiciary assess its overall

financial situation and consider whether changes in program direction or priorities should be studied. The committee's long-range budget estimate does *not* represent its future budget requests. The budget forecast represents a snapshot of future spending trends based on the best assumptions and information available at a specific point in time. It will be important to revise long-range estimates frequently as better information becomes available.

Attachment 1: Report from the Judiciary Long-Range Planning Meeting
Attachment 2: Preliminary List of Committee-Specific Planning Issues
Attachment 3: Consolidated Long-Range Budget Estimates
Attachment 4: Committee-Specific Assumptions and Estimates

Judiciary Long-Range Planning Meeting

April 26-27, 1999

Report

Administrative Office of the United States Courts
Office of Management Coordination and Planning

JUDICIARY LONG-RANGE PLANNING

Contents

PART ONE: SUMMARY REPORT
APRIL 1999 LONG-RANGE PLANNING MEETING

An enhanced long-range program planning and budgeting process was launched in a meeting in Washington, D.C. on April 26-27, 1999. The meeting was led by Judge Lloyd D. George (D. NV), a member of the Judicial Conference's Executive Committee who coordinates for the Executive Committee the long-range process, including the cross-committee planning process. Twenty-one Judicial Conference committee chairs and planning liaisons representing 14 Conference committees participated in the meeting. Also in attendance were Administrative Office Director Leonidas Ralph Mecham, Associate Director Clarence A. Lee, and Management Coordination and Planning Officer, Cathy A. McCarthy, who provides principal staff support for the integrated long-range planning process. Other senior Administrative Office committee staff also attended. A list of participants is included as an appendix.

The meeting resulted in these major accomplishments:

- Endorsement of the importance of committee and cross-committee planning, and defined the purpose and goals for the enhanced long-range planning process
- Identification of strategic issues that need to be addressed
- Definition of a planning process for identifying, analyzing and addressing strategic issues, and developing integrated plans and budgets

Purpose and Goals for the Long-Range Planning Process

Judge Lloyd D. George, Judge John G. Heyburn II, Leonidas Ralph Mecham, Clarence A. Lee, Jr., and the other participants discussed and clarified the purpose and goals for the new process.

The purpose of the enhanced planning process is to support the judiciary's mission by defining goals and developing plans and budgets to achieve them.

Through the planning process, Judicial Conference committees will:

- Identify and address strategic issues facing the judiciary
- Consider judiciary-wide consequences of program and policy choices
- Articulate the judiciary's mission-related budget requirements

Strategic Issues: Judiciary-Wide and Program Issues

Cathy McCarthy presented an overview of federal court programs, and trends in the judiciary's work, personnel and costs. In reviewing the work of the courts from an historical perspective, examining information depicting high and low-growth areas, and considering forecasts of future work, the group engaged in a lively discussion of trends and issues. The information provoked meaningful insights and raised many questions. As a result, the group enhanced and refined a preliminary list of key strategic issues, and generated questions to be explored.

Strategic issues were defined by considering what factors most imperil the judiciary's ability to achieve its mission and attain its goals, as well as those factors and initiatives that offer the most promise for preserving and enhancing them. A revised list of key strategic issues reflecting the planning meeting discussion is included in Part Two of this report. It is expected that this list will change regularly, and it is also expected that committees will develop their own lists of key issues and questions to explore within their program areas.

One noteworthy addition to the list of strategic issues was the inclusion of an issue directed at preserving the quality of justice. This addition is rooted in the group's observation that ensuring the continued quality of justice is not only a core value, but there is a compelling need to understand how to assess the effects of trends and actions on the quality of justice. Another issue of interest that resulted from the review of data related to a desire to understand how the growth

in judiciary personnel other than Article III judges, including the growing number of magistrate judges in the district courts, has affected the administration of justice and the role of the Article III judge.

Two specific planning issues were covered in greater detail: FY2000 Funding, and Preparing for Electronic Case Files.

FY2000 Planning. The need to develop a contingency plan to be ready to cope with the possibility of a shortfall in Fiscal Year 2000 appropriations was presented by Judge John G. Heyburn II, Chair of the Budget Committee, and George Schafer, Assistant Director for Finance and Budget. Input from committees about where cuts can be made, if necessary, was requested. The group agreed that the long-term impact of severe budget constraints could have serious consequences. The discussion underscored the need for greater attention to understanding and articulating the resource requirements for supporting the judiciary's mission and programs.

Preparing for Electronic Case Files. Judge Edward W. Nottingham, Chair of the Committee on Automation and Technology, and Pamela B. White, Assistant Director for Information Technology, and Gary L. Bockweg of the Office of Information Technology described the case management and electronic case files project. Because this initiative will affect nearly everyone in the judiciary and cuts across programs and committee interests, it presented a good opportunity to identify strategic planning issues relating to the question of what needs to be done to prepare for a future with electronic case files. The participants broke into groups to discuss the potential impact on judges, chambers staff, clerks' offices and other court staff, the bar and the public. The comments on this topic showed a great depth of interest, and a substantial number of important issues were identified for further consideration. A report on this topic is included as Appendix A.

Long-Range Planning Process

The participants endorsed the need for following a simple, but structured process approach to long-range planning. Beginning with an overall review of program missions and goals, the five-step planning process involves:

1. Defining strategic issues
2. Assessing each issue
3. Identifying and analyzing possible actions
4. Recommending courses of action
5. Developing plans and budget estimates.

The elements of each of these process steps are outlined in Part Three. Following this process will generate better information, and it will assist committees in developing and recommending new program initiatives and in estimating budget requirements. Importantly, for any significant program initiative or policy recommendation forwarded for Judicial Conference approval and/or incorporation in the judiciary's budget, committees should be able to provide the following information:

- Description of the issue (i.e., the problem or goal) that the initiative will address
- Specific benefits or outcomes expected as a result of the recommended action
- The estimated impact--across relevant programs--on staffing and other resources, operations, services, individuals or institutions, and/or quality of justice
- Budget estimates (or expected savings), by major resource category, for the initial year and subsequent four years.

A description of the roles of the committees and others in the planning process is in Part Four. Many committees are already engaged in planning. Because important program issues often affect more than one committee, better planning across committee lines is seen as vital. The participants strongly endorsed the continuing need for regular cross-committee planning discussions.

The next planning meeting will occur in September 1999, at the meeting of the Conference committee chairs with the Executive Committee prior to the Judicial Conference session.

PART TWO: KEY CROSSCUTTING STRATEGIC ISSUES

The federal judiciary's fundamental mission is to provide ***Equal Justice Under Law.*** The federal courts exist to maintain the rule of law by providing just and timely resolutions of the disputes that Article III of the United States Constitution and Congress have assigned to them.

Effective planning requires the identification of factors that most imperil the judiciary's ability to attain its goals, as well as those that offer the most promise for preserving and enhancing them. Policy, operational, and resource plans and decisions should support the judiciary's mission and goals.

Program planning begins with the identification of strategic issues, which can be broad or narrow in scope. At the broadest level are judiciary-wide issues that cut across Judicial Conference committee and program lines. An initial list of key crosscutting issues, and some related issues, follows.

- **Maintaining the quality of justice**
  - Determining how to measure quality of justice
  - Assessing the effects of changes on the quality of justice

- **Coping with changing work and increasing workload**
  - Managing increasing criminal filings
  - Making effective use of available judicial resources across the judiciary
  - Assessing the cause and implications of the growth in magistrate judges, staff attorneys, and other groups in relation to Article III judgeships

- **Managing resources effectively**
  - Allocating, organizing, and using staff resources efficiently
  - Achieving economies

- **Making effective use of technology and information**
  - Preparing for electronic case files
  - Implementing several major information technology applications and systems over the next five years
  - Protecting the security of sensitive information

- **Preserving judicial independence and maintaining effective external communications and relationships**
  - Obtaining adequate funding for the judiciary
  - Ensuring the judiciary has adequate and secure facilities

- **Attracting and retaining a highly competent workforce**
  - Seeking adequate pay for judges
  - Improving benefits programs for judges and judiciary employees

- **Ensuring effective judicial governance and management and communications mechanisms**
  - Achieving consensus on priorities and directions

These issues can be broken into more specific issues that fall within the purview of individual committees. Coordination across committee lines will result in better planning and integration of programs and policies in these areas.

PART THREE: LONG-RANGE PROGRAM PLANNING PROCESS

5 Steps in the Planning Process

1. Define strategic issues
2. Assess each issue
3. Identify and analyze possible actions
4. Recommend courses of action
5. Develop plans and budget estimates

The Elements of Each Step

1 Define Strategic Issues

Strategic issues may be **problems to solve** OR **goals to achieve.**

⇨ Consider what has happened, what is happening, what may happen, and what you want to happen--in order to identify the range of challenges facing the judiciary and its programs.

⇨ Consider all trends, events, initiatives, and policies that will or may affect your programs over the next five years. What problems are there? What changes may be necessary? What changes are desired? Where can improvements be made?

⇨ Decide what issues are most important for program success. These may represent problems that require action, or they may reflect goals to pursue. Strategic issues can be broad or narrow in focus. Issues can emerge and change frequently.

⇨ For each strategic issue, identify the key questions to explore.

❷ Assess Each Issue

(a) What do we know? What do we need and want to know?

⇨ Determine your information requirements

- historical data (workload, staffing, costs, etc.)
- forecasts
- program performance indicators/benchmarks
- expert opinions
- results of studies/research

⇨ Review and question all assumptions. Think about possible future scenarios, including *"what if...?"* analysis.

(b) Analyze driving forces

For **problems** or **trends**:

⇨ Identify underlying causes

This will help you determine if the problem may be addressed through countermeasures that target the underlying source of a problem.

⇨ Determine the effects of the problem

Understanding the nature and scope of the effects will help you determine ways to mitigate them.

For **goals**:

⇨ Be specific in defining what you are seeking to achieve.

This will help in aiming initiatives to achieve the desired results, and it will ultimately help in measuring the success of any actions taken.

❸ Identify and Analyze Possible Actions

(a) Speculate freely on possible courses of action.

⇨ Think about all of the possibilities for solving a problem, moving in a desired direction, or achieving a desired outcome.

(b) Analyze each possible action in order to determine how well it will solve the problem or achieve the goal.

⇨ Consider how **feasible** it is, including factors such as:

- Support or opposition expected
- Timing, complexity, risk, and/or other constraints

⇨ Articulate **expected results**

- Identify the benefits and/or outcomes to be achieved.
- Compare alternatives to determine which actions are most likely to achieve the goal or address the problem.

⇨ Estimate **costs, savings, and impact** on:

- Resources: staffing, operating costs, facilities, etc.
- Processes: practices, systems, and operations
- Quality of justice or services
- Institutions and individuals: image, behavior, relationships, etc. In particular, consider any potential long-term adverse impact on an independent judiciary as contemplated by the U.S. Constitution.

⇨ Consult with other committees to consider and assess cross-committee program impact and coordinate possible actions.

❹ Recommend Courses of Action

⇨ Based on feasibility, expected results/benefits, cost considerations and impact, determine preferred actions.

❺ Develop Plans and Budget Estimates

Following the steps in the planning process will assist committees in developing and recommending new program initiatives, and in estimating budget requirements.

⇨ Submit initiatives and associated budget requirements through the normal Judicial Conference budget and policy mechanisms.

For any significant program initiative or policy recommendation forwarded for Judicial Conference approval and/or incorporation in the judiciary's budget, committees should be able to provide the following information:

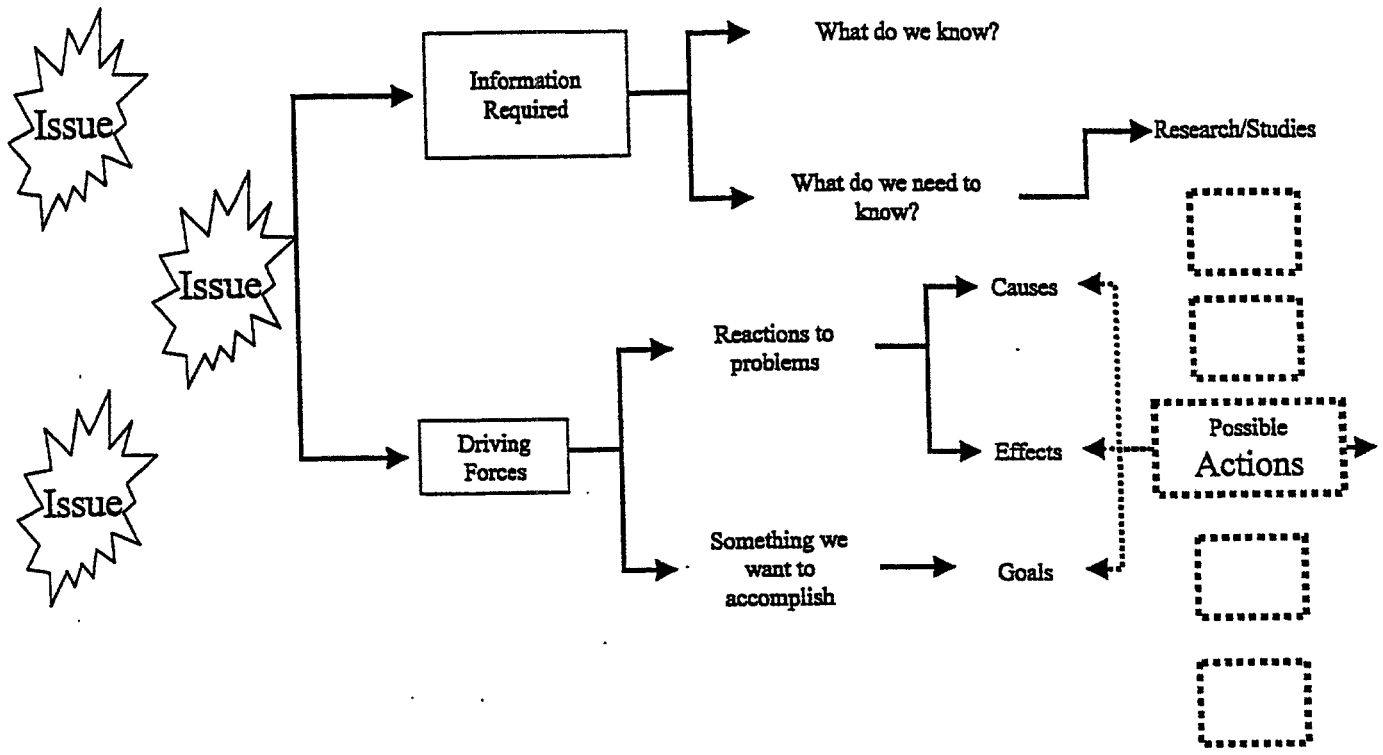
- Description of the issue (i.e., the problem or goal) that the initiative will address
- Specific benefits or outcomes expected as a result of the recommended action
- The estimated impact--across relevant programs--on staffing and other resources, operations, services, individuals or institutions, and/or quality of justice
- Budget estimates (or expected savings), by major resource category, for the initial year and subsequent four years.

➥ Planning is a continuous process.

Working Through Strategic Issues

Step 1. Define Strategic Issues

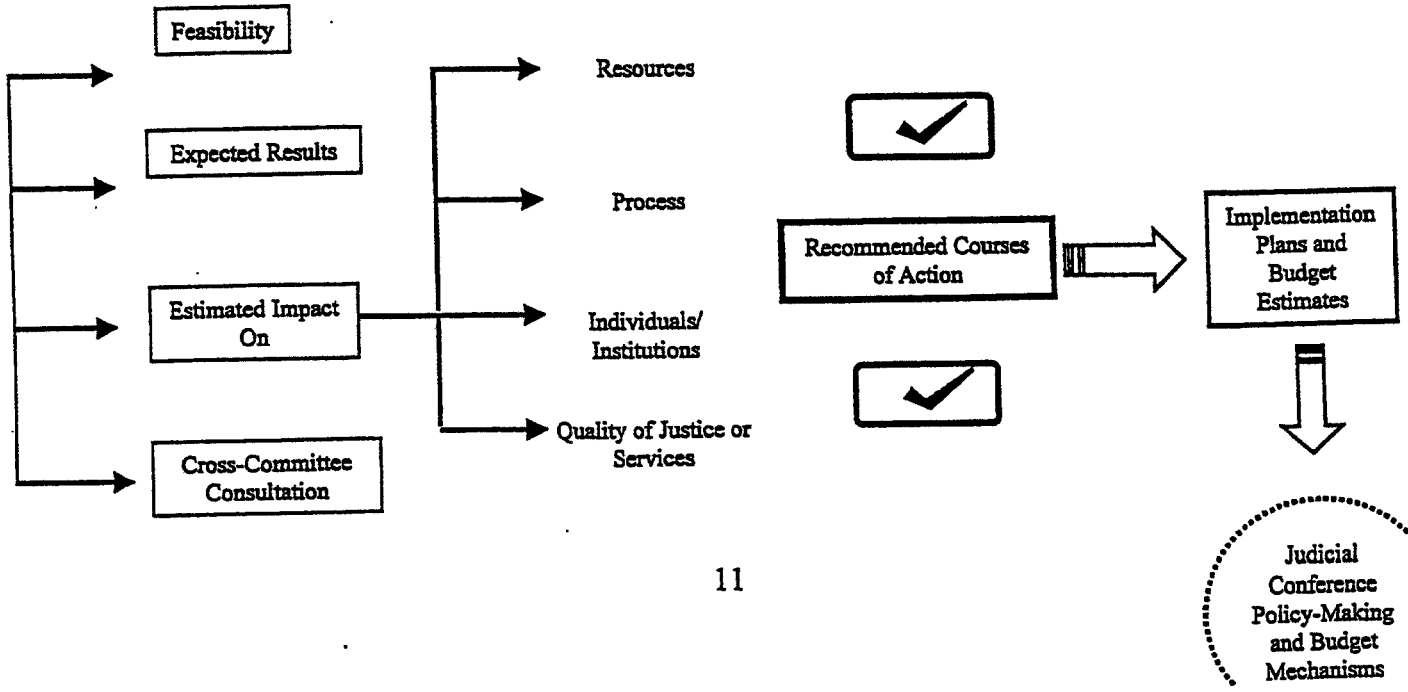
Step 2: Assess Each Issue



Step 3: Identify and Analyze Possible Actions

Step 4: Recommend Courses of Action

Step 5: Develop Plans and Budget Estimates



PART FOUR: ROLES IN THE LONG-RANGE PLANNING AND BUDGETING PROCESS

Summary

Following the Judicial Conference's approval of the *Long Range Plan for the Federal Courts* in September 1995, Chief Justice William H. Rehnquist determined that the responsibility for planning should rest with the various committees of the Judicial Conference, with the Executive Committee assigned a coordinating role.

To facilitate the planning process, at its meeting in February 1999 the Executive Committee determined that the long-range planning process would be enhanced if it made use of the chairs of appropriate Conference committees rather than designated liaisons from committees. This change is particularly important in light of increased need for emphasis on long-range budget projections, since it is the chairs who interact on behalf of their committees with the Budget Committee. In addition, the Executive Committee determined that planning meetings would be held as part of the regularly scheduled meetings of the chairs at the time of the Judicial Conference, so long as any committee with planning responsibility not normally attending the Conference was included.

The enhancements to the judiciary's planning and budgeting process do not change existing jurisdictional authorities or decision-making processes of any committees of the Judicial Conference. This process supports decision-making about program issues and policy as well as how to distribute funding among competing entities. It will result in (a) the identification of judiciary program, management and resource issues, (b) the generation of better program information, cost estimates, forecasts, "what if" scenarios, and other products to aid in program assessment, consensus-building, and decision-making, and (c) the development of long-range budget estimates that incorporate plans, priorities, trends and initiatives.

An important feature of the strengthened long-range planning and budgeting process is more robust program planning and budgeting by Judicial Conference committees. The cyclical nature of planning and budgeting will

engage the committees in substantive discussions continually, thereby developing greater sophistication in considering program issues and in the quality of information available to support policy and resource decisions.

Another important feature of this process is the use of committee chairs to lead the planning activities within each committee and, meeting semiannually as a group, to address cross-committee and "big picture" issues. Because program plans and budgets will be viewed across committee lines, the effects of one program on another and on the administration of justice overall can be considered more easily. The Budget Committee, the Executive Committee, and ultimately the Judicial Conference will benefit from the committees' collective thinking and from richer program and budget information.

Committee Planning Role

Planning is an intrinsic part of the committees' general oversight and policy-recommending functions, and many topics need planning attention due to their potential long-term and significant impact on the core functions and resources of the judiciary. Tactical and strategic planning in a committee's program area is vitally important, especially under conditions of scarce resources. By identifying trends and issues impacting the committee's programs, determining the direction of programs, summarizing new initiatives and plans, assessing the impacts on other areas of the judiciary, and forecasting the long-range resource requirements, better connections among program missions, management, and budgeting will be achieved. Some committees are using planning subcommittees to help them do this work. Other committees may find it useful to create subcommittees for this purpose.

The integration of program and financial planning by committees will enable them to:

- Examine historical and ongoing costs to understand what drives them.
- Estimate the short- and longer-term resource impact of possible changes.
- Consider longer-term resource needs and priorities beyond the 18-month budget formulation cycle.

- Examine the resource implications of program directions and decisions into the future.

- Identify information needs and subjects for analysis.

- Improve their ability to define future scenarios, forecast program developments and trends, and determine their impact on resource requirements.

- Develop budget estimates based on program missions and plans, rather than the inverse. Committees with fiscal responsibilities will develop out-year estimates within the context of the 5-year plans for their programs.

- Provide program committee expertise, perspective, and experience as an integral part of budget and policy decision-making.

Role of the Committee Chair

The committee chair is the focal point to promote tactical and strategic planning and to achieve the linkage of planning with budgeting for the committee. Within the committee and in the planning subcommittees where they exist, the chair can:

- Facilitate the discussions on identifying strategic program and resource issues, and defining future program directions and overall resource requirements.

- Share information generated during and as a result of the crosscutting planning discussions so that the committee can determine changes that may occur or be required in their programs as a result of initiatives in other program areas.

- Review staff analysis of resource use or long-range issues that were suggested at previous committee meetings.

- Help the committee to consider cross-committee issues when making recommendations to the Budget Committee, Executive Committee and Judicial Conference.

Role of the Committee Chairs Collectively

The committee chair planning meeting will serve as a forum for broad participation to confer on judiciary-wide issues and share information on the future direction of the judiciary and its programs. The committee chairs will identify topics to be addressed in planning meetings. When convened collectively, each committee chair will have the opportunity to exchange information of significance to judiciary-wide plans and issues.

The chairs' planning meeting may address the benefits, costs, and other implications of programs within the jurisdictions of their respective committees and provide information about their committee's direction on issues that may impact the mission and operations of the judiciary. Additionally, cross-committee discussions will contribute to the development of a unified forecast of the resources needed for future operations.

The chairs will meet semiannually in connection with their attendance at the Judicial Conference. The meetings, reports and work products will provide the opportunity for the chairs to:

- Share their respective committees' substantive planning discussions.
- Gain a broad-based awareness and understanding of significant issues and trends affecting the judiciary's programs and mission.
- Identify and discuss strategic issues and goals.
- Advise on judiciary-wide priorities and funding needs.

Role of the Executive Committee

The Executive Committee will give direction to ensure that all the necessary planning discussions take place. Under the guidance of the designated planning coordinator for the Executive Committee, the committee chairs will engage in comprehensive discussions so that individual committee perspectives can be brought to bear on topics that affect the entire judiciary. Moreover, the

Executive Committee may identify areas for future planning or suggest topics that are important judiciary-wide or that individual committees should consider.

In addition, the committee strategic planning discussions can provide the Executive Committee with enhanced program information for allocating scarce resources. The Executive Committee may seek input from the committee chairs in conjunction with development of the annual financial plan.

Role of the Budget Committee and its Economy Subcommittee

The enhanced planning process will not change the current development and decision-making processes involved with formulating the judiciary's annual budget. The Budget Committee will benefit from the chairs' planning discussions. Also, chairs will become more aware of competing priorities. The Budget Committee will continue to consult with the chairs of committees with spending responsibilities during budget formulation, and the Budget Committee will retain its responsibility for formulating the budget request and presenting it to the Judicial Conference for approval. The broader discussions among the committee chairs on issues crossing committee lines will significantly enhance the budget formulation process. The chairs can advise their committees and the Budget Committee on important information about program plans, trends, and relative priorities among competing requirements.

The Budget Committee may identify cross-cutting budget issues for consideration by individual committees and the chairs meeting collectively. Further, the Budget Committee will discuss with appropriate committees their projection methods and short-, medium-, and long-range budget estimates. The committee will provide guidance and advice to help improve forecasting methodologies and assist with developing the forecasts. The Economy Subcommittee will continue to stimulate the identification and assessment of opportunities to improve the efficiency and economy of the judiciary's activities.

Role of Administrative Office Staff

Enhanced support to the committees for long-range planning and budgeting will be provided by AO staff. Organizational changes instituted by Director Mecham, with overall coordination by the Associate Director for Management

and Operations and the Office of Management Coordination and Planning, will aid in coordinating planning and budgeting among the Office of Finance and Budget, Statistics Division, and the program divisions. The Office of the Judicial Conference Executive Secretariat will also continue in its role of coordinating cross-committee matters.

A steering group, composed of key planning and budgeting staff members of the Office of Management Coordination and Planning and the Office of Finance and Budget, provide the lead staff support for implementation of the long-range planning and budgeting initiative. Staff for all committees with planning responsibilities participate in a working group which is called together regularly by the steering group to ensure coordination and communication among committee staffs in implementing the initiative. Also participating substantively in this effort is the staff of the Statistics Division.

Committee staff will support the committees within the full program planning and resource forecasting process. Staff will develop and share information to accomplish the following activities:

- Assessing the impact of crosscutting issues on each committee's program area.
- Determining the likely impact of a particular program's initiatives on other committees' areas.
- Estimating resource implications and working with the Budget Division to determine costs.
- Analyzing major program initiatives or cost savings under various possible scenarios.
- Developing program planning and budgeting assumptions.
- Identifying topics for in-depth analysis.

Role of AO Advisory Structure

Obtaining input from court officials in the identification of strategic issues and in the development of plans and budgets is important to the Administrative Office. Input from the court advisory groups regarding program operational requirements and the potential impact of resource decisions will be essential. Advisory groups will:

- Identify program, operational, and financial issues that affect the courts.

- Contribute to the development of planning products and proposals, and provide advice on strategic planning matters.

Appendix A: Preparing for Electronic Case Files -- A Cross-Committee Planning Issue

At the April 1999 Committee Chairs and Planning Liaisons meeting, an issue-oriented planning process was presented that committees could use to identify and analyze issues relevant to their specific programs. Although issues will change over time, the benefits of the process is to first identify crosscutting issues and define them in narrower terms so that committees can deal with them.

Judge Edward W. Nottingham, Chair of the Committee on Automation and Technology, described the Committee's electronic case files initiative as an example of a crosscutting issue. Electronic case files is a component of a broader project, Case Management/Electronic Case Files (CM/ECF). The electronic case files capability of this application could have a major impact on the way courts do business. He was assisted by Pamela White, Assistant Director for Information Technology, and Gary Bockweg, Project Manager.

Overview

The meeting participants discussed the issue in small groups in order to gain first-hand experience in the new planning process. The groups identified a variety of crosscutting and specific related issues within the general issue of "preparing for electronic case files." Issues identified in the group break-out sessions include:

- Training requirements for judges and staff
- Judge acceptance and resistance
- Possibility of juror access
- *Pro se* access
- Scope of public, media, bar access
- Cost-benefits, effectiveness, and adaptability for small courts
- Security of information and sealed motions
- Authentication and proof of service requirements
- Staffing impact/costs
- Cultural changes/psychology of decision-making
- Shift of costs from litigants to courts (or vice versa)

- Possible diminishment of judges' secretary duties
- Possible shifts in clerical functions from clerk's office to chambers
- Preserving individual judge flexibility of operation
- Funding and fees
- Impact on small practitioners
- Dual systems during implementation
- Archiving records and changes in technology
- Large size files
- Use of service providers
- Cross-governmental system compatibility
- Back-up systems

The planning exercise was meant to identify issues for the participants. Many of the issues were already known to the Committee on Automation and Technology, and all will be addressed during the course of the project.

Presentations

Judge Nottingham explained that the electronic case files initiative has been a major undertaking of the Committee on Automation and Technology for a number of years and a product of its long-range planning process. Each year the Committee reviews and updates the *Long Range Plan for Information Technology in the Federal Judiciary* and submits it for consideration to the Judicial Conference. Electronic case files is one of the major initiatives listed in the *Plan*. When this initiative was first started, the focus was on exploring the feasibility of electronic case files. In the process of working with courts, the relationship of electronic case files to the ongoing efforts to develop requirements and build a new case management system to replace the Integrated Case Management Systems (ICMS) became evident. Thus, the goal of the project became to deliver to the courts a replacement case management system with an electronic case files capability. Courts will be able to determine whether they will implement the case management system with or without turning on the electronic case files features. For the cross-committee planning discussion, the group focused on the electronic case files capability of the new system and its potential impact on the courts.

Therefore, the overall goal of the Committee's initiative is to develop a judiciary-wide system based on a common foundation which provides the added and optional features of electronic case files. The vision of the electronic case

files aspect is to accept electronic delivery of documents from attorneys, chambers, etc. and retrieve them from the system; to allow for electronic document management, including security/archival features; and to generate notices electronically. Benefits include immediate docket entries and immediate local/remote access. Additional attorney benefits include saved time and expense, 24-hour access/filing, and eventually, no, or at least minimal, paper.

The Administrative Office's systems team is continuing to refine nine ongoing prototypes. The system will be ready for initial general distribution by mid-2000. Within the spectrum from all paper to all electronic records, courts will pick and choose features they want and are ready for. Each court can move at its own pace.

The Committee is pursuing a number of issues related to electronic case files capability. One is the requirement for a signature. This is in part a technical issue, and in part an issue that involves other committees; for example, possible Rule 11 and other rules changes are being considered by the Rules Committee. Technical issues include: use of Internet, use of standard file formats, use of commonly-available commercial systems, mix of image/full text, and security. Other issues relate to *pro se* filings, cost effectiveness, staffing shifts, fees, attorney docketing, attorney readiness, privacy, summonses, and coordination with state courts.

The Committee recognizes many issues related to electronic case files will benefit from advice from other committees. It has already been coordinating with some committees. For the last couple of years, liaison judges from Court Administration and Case Management Committee have participated periodically in project discussions. Recently, a number of liaison judges gathered in the Western District of Missouri to see firsthand how the prototype is being implemented there. Now that the project is getting final approval on its direction, the time is at hand to talk seriously about the issues, deal with them, get input and come to resolution about them.

Planning Meeting Discussions

To discuss this issue and identify specific issues from the perspective of other Conference committees, the planning meeting participants formed four discussion groups to identify impacts on the various components of the courts.

Each group reported on the issues identified. The following is a synopsis of the group reports:

Overall Impacts

Summary: The discussion sessions brought out a great deal of concern on security issues. Participants recognized that no system can be made completely secure. Reliability of systems was an equal concern. There was concern about how courts would keep operating when the systems were down.

During the transition, there would be a need for evaluation of not only technology but also resource implications of the implementation process. Of concern is not just impacts on budget and cost but also training of staff. Accurate assessment could be difficult because of differing ways courts and judges operate. Courts want to preserve flexibility but also must address resource issues. Similarly, the participants' thinking was to implement civil cases first until systems designers determine how to deal with criminal cases and prisoner issues.

Specific Questions:
What should be done about a juror who reads the docket sheet of a case he or she is sitting on?
Can we guarantee document and file security? Privacy of sealed documents?
How secure are firewalls?
What will happen to a system when many people want to and need to participate and there is a system crash?
How will *pro ses* and prisoners fit into this system?
What are the front end costs? The ultimate costs? Will we really achieve economies? Is this not a transfer of the cost of paper from the lawyers to the courts?
Can we estimate the costs of judge/staff/lawyer training? Who will pay?
How can we calculate the costs of implementation?
Can we insure long-term access to archived documents?
Should there be new filing fees to accommodate new costs?

Impacts on Judges

Summary: The electronic case files system has implications for the process judges use to decide cases, both from a cultural and physical point of view. The issue underscores the psychology of decision-making. Many signposts of decision-making will change, and acceptance would come through training and experience with the system. For example, instead of signing one's name at the bottom of a piece of paper, one might need only press the "send" button.

There will be physical changes related to replacing the handling of paper with reading from the computer screen and typing on a keyboard. Judges familiar with the systems say that the more they deal with a screen and its varied type fonts, the more familiar it seems. Keeping a file in view on one's desk is different from storing it electronically in the desktop computer. Many people will not read a screen until it looks like a book. These are some of the subtleties of the process that designers should be paying attention to for the educational effort.

Electronic case file systems mirror the growing reliance on technology, generally. Too much pressure to change, however, could meet with substantial resistance. There is a need to get more judges comfortable with electronic case files, so other electronic initiatives should go forward successfully first. A judge's ability to make decisions, concentrate on things, deal with many topics over several hours, and do all this on a screen will take some training and getting used to. This may be more than a skill issue, but will ultimately be resolved through attrition. Younger judges will adapt more readily, and the problem will disappear over time.

Specific Questions:
Are the courts ready? Are the judges ready? Are the lawyers ready?
What can be done about the judge or staff member who refuses to embrace technology? Can the system be set up to accommodate individual needs?
Is it a generational question? What about the "look and feel" of real paper as a communication itself?
Will these systems bring about a loss of local autonomy of operations? Will they bring about standardization?

What about a court for which it doesn't make economic sense? There may be courts so small that costs of equipment, training, people, etc. all add up to more than the benefits.
Shall we delay start of criminal case electronic case files until we have gained experience on the civil side?
Can we afford to be as democratic as we have in the past in terms of picking or choosing what an individual court or judge wants to do?

Impacts on Chambers Staff

Summary: The impact of electronic case files on chambers staff is intricately related to how individual courts and judges do their business. There is also an impact on the relationship between chambers staff and clerk's office staff, particularly docket clerk and case manager positions. Chambers staff might well be assuming a number of clerical functions previously performed in clerk's office, such as docketing. This could foreshadow possible restructuring of chambers staff.

Specific Questions:
What will be the impact on the work done by chambers staff and in their relationship to clerks' offices?
Will there be a shift of clerical functions once done by clerks' offices?
Will there be a change in the relationship of the clerk's office to the court itself?
Will there be a diminishing role for judges' secretaries?

Impacts on Clerks' Offices and Other Court Staff

Summary: Although there may be a great deal of resistance among older, less computer-proficient staff, the major issues include overall economics and efficiencies. There was concern about cost and whether there would ultimately be cost savings. The courts will need more expensive personnel. It was felt that double docketing — running both paper and electronic systems — would be very costly.

Systems concerns included archiving of documents to ensure that, as technology changes, old archived files will be retrievable in later years. Also, the systems should be designed to accommodate the large-size files.

Specific Questions:
How costly will it be to run parallel systems during implementation? What about the costs of running parallel systems forever?
Can the courts compete to hire more technically talented people?
Clerks' office space will need to be reconfigured — in what ways?
What will it cost for the printing of files for those who wish to use paper? Will we need better and more printers?
Will this result in resource tradeoffs (clerk positions traded in for hardware)?
Can we insure long-term access to archived documents?

Impacts on the Bar and Public

Summary: The electronic case files project is regarded as requiring a massive educational effort. The public may not be enthusiastic consumers. There was concern generally about training the bar and the public for use of electronic files. Similarly, the participants were concerned about lawyers and that differences among firms and lawyers around country would create a complex training need. Some were especially worried about small practitioners and *pro se* litigants, although most participants agreed that acceptance will occur over time.

The federal courts may need to reach out to state courts and state or federal agencies to achieve some compatibility of systems. There is much to be gained from having state habeas case files compatible with federal systems; the same is true of large agency records.

Specific Questions:
Can this system be "sold" to the rural or small law office?
Who will pay for the training? Will it all be public funding?
How will the courts deal with sealed files and motions?
Are there proof of service issues?
How to insure that parties have access to case information before the media?
Should we reach out to state courts and federal agencies to coordinate on information transfer questions?

Appendix B: Participants in the April 1999 Long-Range Planning Meeting

Committee Representatives	Administrative Office Staff
Planning Coordinator Hon. Lloyd D. George	Clarence A. Lee, Jr. Cathy A. McCarthy William M. Lucianovic Kerry Monaghan Cecilee Goldberg
Executive Committee Hon. Lloyd D. George Leonidas Ralph Mecham	Karen K. Siegel Wendy Jennis
Committee on Automation and Technology Hon. Edward W. Nottingham, Chair	Pamela B. White Mel Bryson Gary L. Bockweg Terry Cain
Committee on the Administration of the Bankruptcy System Hon. Michael J. Melloy	Francis F. Szczebak William T. Rule II
Committee on the Budget Hon. John G. Heyburn II, Chair Hon. William G. Young	George H. Schafer Gregory D. Cummings
Committee on Court Administration and Case Management Hon. D. Brock Hornby, Chair Hon. Patricia M. Wald	Noel J. Augustyn Abel J. Mattos Mark S. Miskovsky
Committee on Criminal Law Hon. Charles R. Butler	Kim M. Whatley
Committee on Defender Services Hon. Robin J. Cauthron, Chair Hon. Nancy G. Edmunds	Theodore J. Lidz Steven G. Asin
Committee on Federal-State Jurisdiction Hon. Walter K. Stapleton, Chair	Karen M. Kremer Mark W. Braswell

Committee on Intercircuit Assignments Hon. Stanley S. Harris, Chair	David L. Cook
Committee on the Judicial Branch Hon. David R. Hansen, Chair Hon. Joyce Hens Green	Steven M. Tevlowitz
Committee on Judicial Resources Hon. Julia Smith Gibbons, Chair Hon. Rebecca R. Pallmeyer	Ellyn L. Vail H. Allen Brown
Committee on the Administration of the Magistrate Judges System Hon. Harvey E. Schlesinger, Chair Hon. G. Thomas Van Bebber	Thomas C. Hnatowski Charles E. Six
Committee on Rules of Practice and Procedure Hon. C. Roger Vinson	John K. Rabiej Mark D. Shapiro
Committee on Security and Facilities Hon. Norman H. Stahl, Chair Hon. William M. Skretny	Ross Eisenman William J. Lehman
	Other Administrative Office Staff: Steven R. Schlesinger Jeffrey A. Hennemuth Nancy G. Miller