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COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

Tucson, Arizona
January 4-5, 2001

AGENDA
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
JANUARY 4-5, 2001

1. Opening remarks of the chair

   - Report on the Judicial Conference session

2. **ACTION** — Approval of Minutes

3. Report of the Administrative Office

   A. Legislative Report
   B. Administrative Report

4. Report of the Federal Judicial Center

5. Report of the Advisory Committee on Appellate Rules

6. Report of the Advisory Committee on Bankruptcy Rules

   A. Overview of proposed amendments published for comment
   B. Minutes and other informational items

7. Report of the Advisory Committee on Civil Rules

   A. Overview of proposed amendments published for comment
   B. Minutes and other informational items

8. Report of the Advisory Committee on Criminal Rules

   A. **ACTION** — Request to Stylize Rules Governing §§ 2254 and 2255 Proceedings
   B. Overview of proposed amendments published for comment, minutes, and other informational items

9. Report of the Advisory Committee on Evidence Rules

10. Status Report of Subcommittee on Attorney Conduct Rules

11. Report of Technology Subcommittee

12. Status of Local Rules Project

13. Long-Range Planning

14. Next Committee Meeting (Philadelphia, June 7-8, 2001)

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Item 1

PRELIMINARY REPORT

JUDICIAL CONFERENCE ACTIONS

September 19, 2000

****

All of the following matters requiring the expenditure of funds were approved by the Judicial Conference subject to the availability of funds, and to whatever priorities the Conference might establish for the use of available resources.

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At its September 19, 2000 session, the Judicial Conference:

Executive Committee

Approved a resolution in recognition of the substantial contributions made by the Judicial Conference committee chairs whose terms of service will end in 2000.

Agreed to communicate to Congress the following views on legislation to restrict judges' attendance at private educational seminars:

a. S. 2990 (106th Cong.) is overly broad; would have unintended consequences, such as prohibiting federal judges from reimbursed attendance at bar association meetings and law school seminars; raises potential constitutional issues, such as imposing an undue burden on speech; and would mandate an inappropriate censorship role for the Federal Judicial Center;

b. The proposed legislation raises a number of serious issues that deserve due consideration, including congressional hearings and an opportunity for the Judicial Conference to study and comment upon those issues and to take such action as is necessary and appropriate; and

c. In its present form, the Judicial Conference of the United States opposes S. 2990.

Committee on the Administration of the Bankruptcy System

Agreed to take the following actions with regard to bankruptcy judgeships:

a. Recommend to Congress that no bankruptcy judgeship be statutorily eliminated;
b. Advise the First, Eighth, and Ninth Circuit Judicial Councils to consider not filling vacancies in the District of Maine, the District of South Dakota, the Northern District of Iowa, and the District of Alaska (respectively) that currently exist or may occur by reason of resignation, retirement, removal, or death, until there is a demonstrated need to do so; and
c. Advise the Eighth Circuit Judicial Council that if a vacancy were to occur in the State of Iowa by reason of resignation, retirement, removal, or death of a bankruptcy judge, it should authorize the three remaining Iowa bankruptcy judges to administer cases within both Iowa districts.

Approved proposed amendments to chapter 5 of the Regulations of the Judicial Conference of the United States for the Selection, Appointment, and Reappointment of United States Bankruptcy Judges, dealing with reappointment of incumbent bankruptcy judges.

Approved the designation of Wilkesboro, North Carolina, as an additional place of holding bankruptcy court, and deleted the designation of Statesville as a place of holding bankruptcy court in the Western District of North Carolina.

Committee on the Budget

Approved the Budget Committee's budget request for fiscal year 2002, as amended by a Defender Services Committee recommendation to seek funds for a panel attorney hourly rate of $113 (see below), subject to amendments necessary as a result of new legislation, actions of the Judicial Conference, or any other reason the Director of the Administrative Office considers necessary and appropriate.

Committee on Codes of Conduct

Approved a revision to the Compliance Section of the Code of Conduct for United States Judges to clarify the Code's applicability to judges retired from regular active service.

Committee on Court Administration and Case Management

With regard to the posting of local rules on individual court websites:

a. Agreed to encourage appellate, district and bankruptcy courts to (1) post their local rules on their own websites by July 1, 2001, and if they do not have a website, to develop one, if only to post their local rules; (2) establish a local rules icon or post their local rules in a prominent location on their websites, to which a user could have ready access; and (3) include a uniform statement indicating that the rules are current as of a date certain; and

b. Directed the Administrative Office to link local court websites to its federal rules Internet web page.

Agreed to seek an amendment to the Jury Selection and Service Act so that the first sentence of 28 U.S.C. § 1866(g) reads as follows:

> (g) Any person summoned for jury service who fails to appear as directed may be ordered by the district court to appear forthwith and show cause for failure to comply with the summons.

With regard to the juror qualification questionnaire:

a. Agreed to revise the juror qualification questionnaire to read as follows:

> 10. RACE/ETHNICITY
>
> a. To assist in ensuring that all people are represented on juries, please fill in completely one or more circles which describe you. (See Note on reverse side.) Nothing disclosed will affect your selection for jury service.
>
> ○ -Black ○ -Asian ○ -Native American Indian
> ○ -White ○ -Native Hawaiian/Pacific Islander
> ○ -Other (specify) _____
>
> b. Are you Hispanic? ○ -yes ○ -no

and

b. Directed the Administrative Office to revise its Form JS-12 "Report on the Operation of the Jury Selection Plan" to add columns for courts to report the number and percentage of prospective jurors in their jury wheels who identify themselves on the juror questionnaire as Native Hawaiian/Pacific Islander, or who identify themselves in more than one racial group, and make any changes to both the juror qualification questionnaire and the JS-12 form necessary to implement these amendments.

Agreed to amend the language of subpart a of the addenda to the miscellaneous fee schedules for the appellate, district and bankruptcy courts, the United States Court of Federal Claims, and the Judicial Panel on Multidistrict Litigation (adopted by the Judicial Conference pursuant to sections 1913, 1914, 1926, 1930, and 1932 of title 28, United States Code) to read as follows:

a. The Judicial Conference has prescribed a fee for access to court data obtained electronically from the public records of individual cases in the court, including filed documents and the docket sheet, except as provided below.

Committee on Criminal Law

Approved for publication and distribution to the courts *Criminal Monetary Penalties: A Guide to the Probation Officer's Role*, Monograph 114, including revised forms for judgments in criminal cases (AO 245B-245I).

Committee on Defender Services

Agreed to request FY 2002 funding sufficient to raise Criminal Justice Act panel attorney rates to $113 per hour, effective April 1, 2002, to reflect implementation of the $75 hourly rate plus the Employment Cost Index adjustments from 1988 through 2002.

Supported legislation that would provide federal defenders with the same eligibility for student loan forgiveness as is granted to their counterparts in United States attorney offices.

Committee on Federal-State Jurisdiction

Took the position that if Congress determines to provide for complete relief for the resolution of Fifth Amendment takings claims in one judicial forum, then that forum should be an Article III court, and the present jurisdictional monetary ceiling of $10,000 for such claims brought under 28 U.S.C. § 1346 should be eliminated.

Committee on Financial Disclosure

Agreed to amend the Regulations on Access to Financial Disclosure Reports Filed by Judges and Judiciary Employees Under the Ethics in Government Act of 1978, as Amended, to add the following new paragraph:

5.2(g) A request for redaction and its supporting documents, except for copies of the financial disclosure report and any amendments thereto, are considered confidential and will only be used to determine whether to grant a request for redaction. Such documents are not considered to be a part of any report releasable under section 105(b)(1) of the Act.

Committee on the Judicial Branch

Resolved to pay on behalf of (a) all active Article III judges aged 65 and above, (b) senior judges retired under 28 U.S.C. § 371(b) or 372(a), and (c) judges retired under 28 U.S.C. § 371(a), who are enrolled in the Federal Employees' Group Life Insurance program, the full amount of any increases in the cost (and any expenses associated with such payments) of the judges' life insurance imposed after April 24, 1999.

Approved an amendment to the Travel Regulations for United States Justices and Judges to provide that a judge must submit his or her claim for reimbursement within 90 days after the judge completes official travel, and permit the Director to make an exception when necessary to meet special circumstances or in the best interest of the government.

Approved an amendment to the Travel Regulations for United States Justices and Judges to provide that on the day of return to a judge's official duty station or residence, a judge may (a) claim a *per diem* allowance for meals and other expenses of $46, or (b) itemize meals and other subsistence expenses up to a daily maximum of $100.

Approved an amendment to the Travel Regulations for United States Justices and Judges to clarify that judges should report non-case related travel using the Judges' Non-Case Related Travel Reporting System, and authorized the Director of the Administrative Office to make a conforming change to the judges' travel regulations should the title or website address of that system change.

Committee on Judicial Resources

In order to provide the staffing needed to perform the federal judicial support requirements and functions of the appellate court and circuit clerks' offices, the district clerks' offices, the district court pro se law clerk offices, the probation and pretrial services offices, and the bankruptcy clerks' offices, approved proposed staffing formulae for these offices for implementation in fiscal year 2001, and also approved the one-year continued use of high-year prisoner petition reporting as an interim device for the district clerks' offices.

Approved two additional court interpreter positions for the Southern District of Texas and five additional court interpreter positions (two of which are presently temporary positions) for the Western District of Texas for fiscal year 2002; if possible, the five additional court interpreter positions for the Western District of Texas should be funded in fiscal year 2001.

Approved a United States Court of Federal Claims request for seven clerk's office positions as part of the fiscal year 2002 budget request with the proviso that if the number of that court's senior/recalled judges should decrease, the court's allocation will be adjusted accordingly; and also supported accelerated funding for these seven positions as an unfunded requirement in fiscal year 2001.

Authorized a revision to the judiciary's leave policy to increase from seven days to 30 days each calendar year the amount of paid leave for employees to serve as organ donors.

Committee on the Administration of the Magistrate Judges System

Changed the methodology for reviewing magistrate judge positions to provide for district-wide reviews every five years for all district courts instead of the current cycle of every four years for districts with part-time magistrate judge positions and every five years for districts with full-time magistrate judge positions.

Approved an amendment to Section 4.02 of the Regulations of the Judicial Conference of the United States Establishing Standards and Procedures for the Appointment and Reappointment of United States Magistrate Judges to require that all part-time magistrate judge appointees to full-time magistrate judge positions, including those who were the subject of a full-field investigation prior to appointment to the part-time position, undergo an FBI full-field background investigation prior to appointment.

Approved recommendations for changes in specific magistrate judge positions.

Committee on Rules of Practice and Procedure

Approved proposed amendments to Bankruptcy Rules 1007, 2002, 3016, 3017, 3020, 9006, 9020, and 9022 and agreed to transmit them to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Approved proposed revisions to Official Bankruptcy Form 7.

Approved proposed amendments to Civil Rules 5, 6, 65, 77, 81, and 82, and a proposed abrogation of the Copyright Rules and agreed to transmit these changes to the Supreme Court for its consideration with the recommendation that they be adopted.

Committee on Security and Facilities

Agreed to amend jury box standards for courtrooms in the *United States Courts Design Guide* to accommodate only 12 jurors in magistrate judge courtrooms, 16 jurors in district courtrooms, and 18 jurors in special proceedings courtrooms or where otherwise required.

Endorsed, as a matter of policy, a cyclical maintenance program for court-occupied space, subject to the availability of appropriated funds.

Item 2

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of June 7-8, 2000
Washington, D.C.

Draft Minutes

The mid-year meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Washington, D.C. on Wednesday and Thursday, June 7-8, 2000. The following members were present for the entire meeting:

Judge Anthony J. Scirica, Chair
Judge Michael Boudin
Judge Frank W. Bullock, Jr.
Charles J. Cooper
Professor Geoffrey C. Hazard, Jr.
Judge Phyllis A. Kravitch
Gene W. Lafitte
Acting Associate Attorney General Daniel Marcus
Patrick F. McCartan
Judge J. Garvan Murtha
Judge A. Wallace Tashima

Chief Justice E. Norman Veasey and David H. Bernick each attended one day of the meeting. Roger A. Pauley, Director of the Office of Legislation, also participated on behalf of the Department of Justice. In addition, Judge James A. Parker, former member of the committee and chair of its style subcommittee, attended the entire meeting.

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; Patricia S. Ketchum, senior attorney in the Bankruptcy Judges Division; and Lynn Rzonca, assistant to Judge Scirica. Abel J. Mattos, Chief of the Court Administration Policy Staff of the Administrative Office, also participated in part of the meeting.

Representing the advisory committees were:

Advisory Committee on Appellate Rules —
Judge Will L. Garwood, Chair
Professor Patrick J. Schiltz, Reporter
Advisory Committee on Bankruptcy Rules —
Judge Adrian G. Duplantier, Chair
Professor Jeffrey W. Morris, Reporter
Advisory Committee on Civil Rules —
Judge Lee H. Rosenthal, Member
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 Milton I. Shadur, Chair
Professor Daniel J. Capra, Reporter

Judge Tommy E. Miller, a member of the Advisory Committee on Criminal Rules, assisted in the presentation of the report of that advisory committee.

Also taking part in the meeting were: Joseph F. Spaniol, Jr. and Professor R. Joseph Kimball, consultants to the committee; Professor Mary P. Squiers, Director of the Local Rules Project; and Marie C. Leary of the Research Division of the Federal Judicial Center.

INTRODUCTORY REMARKS

Judge Scirica thanked Judge Parker for his distinguished service as a member of the committee and as the chair of the style subcommittee. He pointed out that substantial progress had been achieved in restyling and improving the language of the federal rules, thanks to the excellent work of the style committee and the respective advisory committees. He noted that the revised, restyled body of appellate rules had been very well received by the bench and bar and that a complete set of restyled criminal rules was about ready for publication and comment.

Judge Scirica reported that no proposed rule amendments had been before the Judicial Conference at its March 2000 meeting for approval. He added that the Supreme Court had promulgated the rule amendments approved by the Conference in September 1999 — including the proposed changes to the discovery rules — and had forwarded them to Congress in accordance with the Rules Enabling Act. These amendments, he said, would take effect on December 1, 2000, unless Congress were to take action to reject them. He noted, however, that one lawyers' association had raised some objections to the discovery rules and that hearings might be convened in Congress to consider the amendments.

Judge Scirica pointed out that the committee and the Judicial Conference have an affirmative statutory responsibility to monitor and improve the federal rules. Nevertheless, he said, some proposed amendments to the rules have been controversial and have encountered opposition from parts of the bench or bar. As a result, he suggested, the rules process has become more visible, more political, and more difficult.

Judge Scirica reported that he and Professor Coquillette had met with the Chief Justice to keep him informed of on-going initiatives of the rules committees. He said that it

was also time for him to meet with the chairs of the advisory committees to take a fresh look at the rulemaking process and the future directions of the committees.

Judge Scirica reported that a provision in the omnibus bankruptcy legislation pending in Congress would provide for appeals — including interlocutory appeals — to be taken from the orders of bankruptcy judges directly to the courts of appeals as a matter of course. This would effectively eliminate the district courts from the bankruptcy appellate process. This provision, he said, was in conflict with the Judicial Conference's position that direct appeals to the court of appeals should be authorized only through a certification process limited to matters that raise important legal issues or questions of public policy. Judge Scirica reported that the Executive Committee of the Conference had been informed of the legislative problem and that negotiations with the Congress would be pursued.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee voted without objection to approve the minutes of the last meeting, held on January 6-7, 2000.

REPORT OF THE ADMINISTRATIVE OFFICE

Mr. Rabiej reported that the committee's two-year pilot program to receive public comments on proposed rule amendments electronically through the Internet had been successful. He said that the AO and the advisory committees would like to make the experiment permanent. Thus, all published amendments will continue to be posted on the Internet at the same time that they are distributed to the public in printed form. The bench and bar will continue to be invited to submit comments to the Administrative Office via the Internet.

The committee without objection approved making the pilot program permanent and continuing to accept public comments on proposed amendments in electronic form through the Internet.

Mr. Rabiej reported that the American Bar Association in February 2000 had passed a resolution calling for posting all local rules of court on a single Internet site maintained by the federal judiciary. He noted that the issue had been assigned to the Judicial Conference's Court Administration and Case Management Committee. That committee, he said, would expect input from the rules committees on the proposal.

Mr. Rabiej pointed out that more than half the federal courts had posted their local rules on their own, individual Internet sites. In addition, the judiciary's national web site, maintained by the Administrative Office, contains links to the sites of the individual courts.

He emphasized that the Standing Committee and the respective advisory committees had long supported the concept of posting all local court rules on the Internet as an effective means of providing prompt, accurate, and complete procedural information to the bar and public.

Mr. Rabiej reported that the advisory committees had discussed the proposal on several occasions and had reached a consensus that:

1. Individual federal courts should be encouraged to post their local rules on their own web sites.

2. Those courts without a web site should be encouraged to develop one, even if only to post their local rules.

3. Courts should be encouraged to post their local rules in a prominent location on their web site so that a user may readily locate them, such as by establishing a special icon designated for local rules information.

4. Courts should be encouraged to include a uniform statement immediately below the caption of the local rules to indicate that they are current.

5. Local court web sites should be directly linked to the national judiciary site maintained by the Administrative Office.

The committee approved the proposed actions outlined in Mr. Rabiej's presentation and asked that they be communicated to the Court Administration and Case Management Committee.

Mr. Rabiej pointed out that implementation of these recommendations would be voluntary for the courts, and inevitably not every rule of every court will be posted immediately. Judge Garwood added that the Advisory Committee on Appellate Rules had discussed on a preliminary basis the possibility of making local court rules ineffective until they are actually placed on the Internet or otherwise posted as prescribed by the Director of the Administrative Office.

One of the participants added that FED. R. CIV. P. 83(a) already requires the courts to send their local rules to the Administrative Office and to make them available to the public. He added that the rule could be used to mandate that every court establish an electronic link with the Administrative Office and keep its local rules up to date on its own site.

Another participant said that it was important to have two dates posted on the local rules web site: (1) the date of the most recent amendment to a particular rule; and (2) the date of the last general revision of the court's local rules as a whole.

REPORT OF THE FEDERAL JUDICIAL CENTER

Ms. Leary referred the members to a description of the list of various pending Federal Judicial Center projects, set out as Agenda Item 4.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Garwood and Professor Schiltz presented the report of the advisory committee, as set forth in Judge Garwood's memorandum and attachments of May 11, 2000. (Agenda Item 5)

Judge Scirica reported that the Standing Committee at its January 2000 meeting had approved for publication proposed amendments to FED. R. APP. P. 1, 4, 5, 15, 24, 26, 27, 28, 31, 32, 41, 44 and FORM 6. But, he added, proposed amendments to FED. R. APP. P. 4(a)(7), defining the entry of judgment, had been withdrawn for further consideration at the June 2000 meeting. The amendments, he said, involved complicated and troublesome interfaces between the appellate and civil rules that needed to be addressed through the joint efforts of both the appellate and civil advisory committees.

Amendments for Publication and Comment

1. Electronic Service

FED. R. APP. P. 25(c) & (d), 26(c), 36(b), 45(c)

Professor Schiltz reported that the package of amendments to the appellate rules governing electronic service were identical to the proposed companion amendments to the civil rules (and companion amendments to the bankruptcy rules), except in one respect. He explained that under the proposed amendments to both the appellate rules and the civil rules:

- service by electronic means would be permitted, but only on consent of the parties;
- the document that initiates a case, *i.e.*, the complaint or notice of appeal, would be excluded from the electronic service provisions;
- electronic service would be complete upon transmission;
- the "three-day" rule, giving the party being served an additional three days to act, would be made applicable to service by electronic means;
- the court itself could use electronic means to send its orders and judgments to parties; and
- the court could choose to provide electronic service for the parties through court facilities.

Professor Schiltz said that the only difference between the proposals related to the issue of failed transmission. He noted that the appellate and civil advisory committees both agreed that if a serving party learns that its service is not effective, it must attempt to serve the appropriate document again. The appellate committee, however, was concerned about potential abuse of this provision. Therefore, it added a provision — not included in the proposed amendments to the civil rules — that would require a party being served to notify the serving party within three days after transmission that the paper was not in fact received.

Professor Cooper responded that the Advisory Committee on Civil Rules did not believe that the provision was needed. He added that there is a risk of unintended implication if the rules were to address failure of electronic service explicitly, but not failure of other types of service.

Professor Cooper was asked by the chair to describe the proposed amendments to the civil rules in further detail.

He reported that the electronic service proposal had been published in August 1999 and that some changes had been made in the amendments as a result of the public comments. He pointed out that the amended Rule 5(b)(1) makes it clear that electronic service will apply only to service under Rules 5(a) and 77(d), and not to the service that initiates a case.

Professor Cooper noted that new Rule 5(b)(2)(D) provides that electronic service — or service by means other than those specified in the current rule — must be consented to by the party being served. He added that the Department of Justice had commented that the rule should require that the consent be made in writing. Accordingly, the advisory committee had inserted new language in the amendment requiring explicitly that service be made in writing. The committee note, though, makes it clear that the writing itself may be in electronic form.

Professor Cooper explained that the amendment specifies that service is complete on transmission. A party, moreover, may make service through the court's transmission facilities, as long as the court authorizes the practice by local rule.

Professor Cooper pointed out that paragraph 5(b)(3) had been added by the advisory committee following publication. It states that electronic service is not effective if the party making service learns that the attempted service failed to reach the person intended to be served.

He explained that the advisory committee had relied on the committee note to make the point that failed service is not effective service. Nevertheless, inclusion of an explicit statement in the text of the rule itself was prompted by consideration of the draft rule prepared by the Advisory Committee on Appellate Rules (FED. R. APP. P. 25(c)) and the desire to achieve uniformity in substance and language among the different sets of federal rules.

Professor Cooper explained that the draft paragraph 5(b)(3), as originally considered by the advisory committee, had not been limited to electronic service for fear that it might generate unintended negative implications as to the status of failed service by other means. But, he said, after reviewing the case law on the subject and considering the narrower scope of the proposed appellate rule, the Advisory Committee on Civil Rules had decided to limit the scope of the paragraph to failure of service by electronic means.

He added, however, that the advisory committee did not believe that it was necessary to include a specific time limit for notifying the serving party of a failed transmission. Several participants agreed that failed service is simply not a problem in district court practice because parties always re-serve a paper that does not reach the party being served. Thus, no time limits need be specified in the rules. They argued that paragraph 5(b)(3) was not necessary because the problems resulting from failed transmissions can readily be resolved through the exercise of judicial discretion and the development of case law.

Judge Scirica noted that the proposed amendments to the civil rules governing electronic service — as well as the companion amendments to the bankruptcy rules had been subjected to the public comment process and were ready for final approval by the Judicial Conference. On the other hand, the proposed amendments to the appellate rules had been presented to the Standing Committee only for authority to publish.

Judge Scirica said that the provisions in the two sets of rules should be the same. He pointed out, however, that paragraph (b)(3) of the proposed amendments to FED. R. CIV. P. 5 — specifying that electronic service is ineffective if the serving party learns that it did not reach the person to be served — was new material added by the advisory committee after publication. As such, it would normally have to republished for additional public comment.

The committee reached a consensus that there should be only one, uniform version of the proposed electronic service rules and that the appellate version should be altered to conform to the proposed civil version.

The Committee approved the proposed amendments to FED. R. CIV. P. 5(b) without objection.

Judge Boudin moved to conform the appellate rules to the civil rules by deleting the reference to three days in proposed new Rule 25(c)(4) and approving the other proposed electronic service amendments for publication, i.e., FED. R. APP. P. 25(c), 25(d), 26(c), 36(b), and 45(c). The motion was approved without objection.

Judge Scirica added that the reporters of the civil and appellate advisory committees should consult further with each other to make sure that the language of the proposed amendments was essentially identical.

2. Financial Disclosure

FED. R. APP. P. 26.1

The proposed amendments to Rule 26.1 *(corporate disclosure statement)* were addressed as part of the general discussion on financial disclosure, addressed later in these minutes at pages 28-31 of these minutes.

3. Other Amendments

FED. R. APP. P. 5(c) and 21(d)

Judge Garwood reported that the proposed amendments to Rule 5(c) *(appeal by permission)* and Rule 21(d) *(writs)* would correct an inaccurate cross-reference in the current rules to FED. R. APP. P. 32. In addition, the amendments would impose a new 20-page limit on petitions for permission to appeal and petitions for a writ of mandamus, prohibition, or other extraordinary relief.

FED. R. APP. P. 4(a)(7)

Professor Schiltz noted that the advisory committee had presented proposed amendments to Rule 4(a)(7) at the January 2000 meeting of the Standing Committee that would resolve case law splits among the circuits as to the finality of district court judgments and the time limit for filing a notice of appeal. He pointed out that members of the Standing Committee had expressed concerns about the amendments because, among other things, they would decouple the running of the time to file post-judgment motions (governed by the civil rules) from the running of the time to file appeals (governed by the appellate rules). Accordingly, the proposed amendments were deferred to the current meeting. In the interim, the advisory committee was asked to conduct further research into when judgments become effective for all purposes. It was also asked to work with the civil advisory committee and attempt to develop an integrated package of proposed amendments to the appellate rules and the civil rules.

Professor Schiltz reported that the two advisory committees had produced a set of proposed amendments that would resolve the concerns of the members. He said that FED. R. CIV. P. 58(b) would be amended to specify that when a judgment must be "set forth" on a separate document, it will be considered so entered when: (1) it is actually set forth on a separate piece of paper; or (2) 60 days after entry of the judgment on the civil docket, whichever is earlier. This provision, he said, would set a 60-day outer limit in determining the finality of a judgment for purposes of both a post-judgment motion and a notice of appeal. A companion amendment to FED. R. APP. P. 4(a)(7) would simply provide that a judgment is considered entered for purposes of the appellate rules when it is entered for purposes of the civil rules.

The proposed amendments would also clarify whether an order disposing of a post-judgment motion must itself be set forth on a separate piece of paper. FED. R. CIV. P. 58 would be amended to specify that orders that dispose of post-judgment motions do not have to be entered on a separate document. FED. R. APP. P. 4(a)(7), as revised, would simply refer to Civil Rule 58. Thus, the civil rules will govern, and there will be no separate appellate provision.

Judge Garwood and Professor Schiltz said that the proposed, companion amendments to FED. R. CIV. P. 58 and FED. R. APP. P. 4(a)(7) might not solve all the problems regarding the effectiveness of a judgment, but they would resolve the most serious and most frequent problems. They added that the public comment period would provide a good opportunity to discover any additional problems.

The committee approved the proposed amendments without objection.

Informational Items

Judge Garwood announced that Professor Schiltz would leave his position with the Notre Dame Law School to accept the position of associate dean of the newly established St. Thomas Law School in Minneapolis, Minnesota.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Duplantier and Professor Morris presented the report of the advisory committee, as set forth in Judge Duplantier's memoranda and attachments of May 11, 2000, and May 24, 2000. (Agenda Item 6)

Judge Duplantier summarized that the advisory committee was seeking final approval of amendments to eight bankruptcy rules and one official form. He pointed out that four of the proposed amendments deal with providing adequate notice to parties affected by an injunction included in a chapter 11 plan, and two deal with giving notice to infants or incompetent persons. He noted that the public hearings scheduled for January 2000 in Washington had been canceled for lack of witnesses.

Judge Duplantier reported that the advisory committee was also seeking authority to publish proposed amendments to six rules and one official form for public comment.

Amendments for Final Approval

FED. R. BANKR. P. 1007(m)

Judge Duplantier explained that the proposed amendment to Rule 1007 *(lists, schedules, and statements)* would require a debtor who knows that a creditor is an infant or incompetent person to include in the list of creditors or 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.

FED. R. BANKR. P. 2002(c) and (g)

Judge Duplantier reported that two amendments were proposed to Rule 2002 *(notices)*. New subdivision 2002(c)(3) would require that parties entitled to notice of a hearing on confirmation of a plan be given adequate notice of any injunction contained in the plan that would enjoin conduct not otherwise enjoined by operation of the Bankruptcy Code.

Subdivision 2002(g) would be revised to make it clear that when a creditor files both: (1) a proof of claim that includes a mailing address; and (2) a separate request designating a different mailing address, the last paper filed determines the proper address. In addition, a new paragraph (g)(3) would be added to assure that notices directed to an infant or incompetent person are mailed to the appropriate guardian or other legal representative identified in the debtor's schedules or list of creditors.

FED. R. BANKR. P. 3016(c)

Judge Duplantier said that a new subdivision (c) would be added to Rule 3016 *(filing of plans and disclosure statements)* to require that a plan and disclosure statement describe in specific and conspicuous language all acts to be enjoined by the provisions of a proposed injunction and to identify any entities that would be subject to the injunction.

FED. R. BANKR. P. 3017(f)

Judge Duplantier stated that a new subdivision (f) would be added to Rule 3017 *(court's consideration of a disclosure statement)* to assure that adequate notice of a proposed injunction contained in a plan is provided to entities whose conduct would be enjoined, but who would not normally receive copies of the plan and disclosure statement — or any information about the confirmation hearing — because they are not creditors or equity security holders in the case.

FED. R. BANKR. P. 3020(c)

Judge Duplantier said that subdivision (c) of Rule 3020 *(confirmation of a chapter 11 plan)* would be amended to require that the court's order confirming a plan describe in detail all acts enjoined by an injunction contained in a plan and identify the entities subject to the injunction. It would also require that notice of entry of the order of confirmation be mailed to all known entities subject to the injunction.

FED. R. BANKR. P. 9006(f)

The proposed amendment to Rule 9006 *(time)* is part of the package of proposed amendments authorizing service by electronic and other means in the federal courts. The companion amendments to FED. R. CIV. P. 5(b) were approved by the Standing Committee earlier in the meeting as part of the discussion of proposed amendments to the Federal Rules of Appellate Procedure. (See page 7 of these minutes.)

Judge Duplantier pointed out that Rule 9006(f), as amended, would explicitly authorize a party who is served by electronic means an additional three days to take any required action, just as if the party had been served by mail. Judge Duplantier added that the Advisory Committee on Bankruptcy Rules was very supportive of extending the "three-day rule" to all methods of service — including electronic service — other than service by personal delivery. He added, however, that the advisory committee was most concerned that the bankruptcy rules and the civil rules be uniform on this matter.

FED. R. BANKR. P. 9020

Judge Duplantier explained that the existing provisions of Rule 9020 *(contempt proceedings)* provide that the effectiveness of a bankruptcy judge's civil contempt order is: (1) delayed for 10 days; and (2) subject to *de novo* review by a district judge. The proposed amendment would delete the procedural provisions in the existing rule and replace them with a simple statement that a motion for an order of contempt made by the United States trustee or a party is governed by Rule 9014, which covers contested matters.

He pointed out that the amended rule does not address a contempt proceeding initiated *sua sponte* by a judge. The advisory committee, he said, noted that there is no provision in the civil rules dealing with contempt on a judge's own motion. It decided, therefore, not to include any provision in the bankruptcy rules on this point.

FED. R. BANKR. P. 9022(a)

Judge Duplantier stated that Rule 9022 *(notice of a judgment or order)* would be amended to authorize the clerk of court to serve notice of the entry of a bankruptcy judge's judgment or order by any method of service authorized by amended FED. R. CIV. P. 5(b),

including service by electronic means. He pointed out that the proposal — which mirrors the proposed amendment to FED. R. CIV. P. 77(d) — is part of the general package of amendments authorizing electronic service in the federal courts. (See the discussion above under FED. R. BANKR. P. 9006(f).)

OFFICIAL FORM 7

Judge Duplantier reported that the advisory committee would add four new questions to Official Form 7 *(statement of financial affairs)*, to solicit information from the debtor about community property, environmental hazards, tax consolidation groups, and contributions to employee pension funds. He pointed out that new Question 17, requiring information as to environmental hazards, represented a compromise because governmental agencies had wanted to require the debtor to disclose a good deal more information.

The committee approved the proposed amendments to Rules 1007, 2002, 3016, 3017, 3020, 9006, 9020, and 9022 and Official Form 7 without objection.

Amendments for Publication and Comment

FED. R. BANKR. P. 1004

Judge Duplantier and Professor Morris explained that subdivision (c) of Rule 1004 *(partnership petition)* would be deleted because it is substantive in nature. The amendments would make it clear that the rule merely implements § 303(b)(3)(A) of the Bankruptcy Code. They are not intended to establish any substantive standard for the commencement of a voluntary case by a partnership. The amended rule will deal only with involuntary petitions against a partnership.

FED. R. BANKR. P. 1004.1

Professor Morris stated that the proposed new Rule 1004.1 would fill a gap in the existing rules and address the filing of a petition on behalf of an infant or an incompetent person. He noted that it is patterned after FED. R. CIV. P. 17(c) and allows a court to make any orders necessary to protect the infant or incompetent person.

FED. R. BANKR. P. 2004(c)

Judge Duplantier reported that subdivision (c) of Rule 2004 *(examination)* would be amended to clarify that an examination may take place outside the district in which the case is pending. An attorney who is admitted to practice in the district where the examination is to be held may issue and sign the subpoena.

FED. R. BANKR. P. 2014

Judge Duplantier said that Rule 2014 deals with approval of the employment of a professional and with disclosure of the information necessary to determine whether the professional is "disinterested" under the Bankruptcy Code. He pointed out that the rule was being rewritten to make it conform more closely to the applicable provisions of the Code.

Professor Morris added that the revised rule might be controversial because it deals with employment standards and prerequisites for the payment of professionals. The current rule, he said, requires disclosure of the professional's connections with a broad range of persons and organizations. The revised rule would narrow the scope of the disclosures and leave the definition of disinterestedness exclusively to the Code.

FED. R. BANKR. P. 2015(a)(5)

Judge Duplantier said that paragraph (a)(5) of Rule 2015 *(duty to keep records, make reports, and give notice of case)* would be amended to provide that the duty of a trustee or debtor in possession to file quarterly disbursement reports will continue only as long as there is an obligation to make quarterly payments to the United States trustee. Professor Morris added that the change was technical in nature since it would merely conform the rule to 28 U.S.C. § 1930(a)(6), which was amended in 1996.

FED. R. BANKR. P. 4004(c)

Judge Duplantier explained that subdivision (c) of Rule 4004 *(grant or denial of discharge)* would be amended to postpone the entry of a discharge if a motion to dismiss a case has been filed under § 707 of the Bankruptcy Code. The current rule, he said, is narrower, as only motions to dismiss brought under § 707(b) postpone a discharge.

FED. R. BANKR. P. 9014

Judge Duplantier reported that the advisory committee recommended two changes in Rule 9014 *(contested matters)* that would address complaints voiced by the bar about the way that contested matters are handled in some districts.

Judge Duplantier explained that the first proposed amendment, set forth as new subdivision (d), would govern the use of affidavits in disposing of contested matters. He said that a number of bankruptcy courts now routinely resolve contested matters on the basis of affidavits alone. He added that the practice was controversial, and there was a split of opinion as to its legality and advisability.

Judge Duplantier stated that the proposed amendment would provide that if the court needs to resolve a disputed material issue of fact in order to decide a contested matter, it must

hold an evidentiary hearing at which witnesses testify. It may not rely exclusively on affidavits in those circumstances. Contested matters, thus, would be handled in the same manner as adversary proceedings and trials in civil cases in the district courts under FED. R. CIV. P. 43.

The second amendment would address complaints from the bar that some courts schedule contested matters for a hearing without informing the parties in advance as to whether evidence will be taken from witnesses at the hearing. Lawyers, therefore, bring their witnesses to court, only to learn that live testimony will not be allowed. Judge Duplantier said that the proposed amendment would require the courts to establish procedures giving parties advance notice of whether a scheduled hearing will be an evidentiary hearing at which witnesses may testify.

FED. R. BANKR. P. 9027

Judge Duplantier said that Rule 9027(a)(3) *(notice of removal)* would be amended to make it clear that if a claim or cause of action is initiated in another court after a bankruptcy case has been commenced, the time limits for filing a notice to remove that claim or cause of action to the bankruptcy court apply, whether or not the bankruptcy case is still pending. In other words, he said, if a state court action is filed after a bankruptcy discharge has been granted, the action should be removable, whether or not the bankruptcy case is still pending.

OFFICIAL FORM 1

Judge Duplantier reported that the advisory committee recommended amending Official Form 1 *(Voluntary Petition)* to require that the debtor disclose the ownership or possession of property that may pose a threat of imminent and identifiable harm to public health or safety. He noted that the change may be controversial because it could be seen as calling for self-incrimination. But, he said, the advisory committee had drafted the language carefully to avoid the problem by requiring disclosure only of property that "to the best of the debtor's knowledge, poses or is alleged to pose" a threat to public health or safety.

Professor Morris pointed out that the petition form itself will require the debtor to check a box declaring whether there is any property posing an alleged harm. If so, the debtor must also attach new Exhibit C setting forth more detailed information about the alleged harm. This information, he said, would be filed by the debtor at the beginning of a case, so it would be flagged early for the attention of affected government agencies.

The committee approved the proposed amendments to Rules 1004, 2004, 2014, 2015, 4004, 9014, and 9027, proposed new Rule 1004.1, and proposed amendments to Official Form 1 for publication and comment without objection.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Rosenthal, acting for Judge Paul V. Niemeyer, the chair of the advisory committee, and Professor Cooper presented the report of the advisory committee, as set forth in Judge Niemeyer's memorandum and attachments of May 2000. (Agenda Item 7)

Rules for Final Approval

1. Electronic Service

FED. R. CIV. P. 5(b) and 6(e)

Professor Cooper pointed out that the proposed amendments to Rule 5(b) *(making service)* authorizing service by electronic means had been approved by the Standing Committee earlier in the meeting during its consideration of the report of the Advisory Committee on Appellate Rules. (See page 7 of these minutes.)

Professor Cooper explained that the advisory committee, in its August 1999 request for public comments, had *not* recommended that Rule 6(e) *(additional time after service)* be amended. The proposed amendment would extend the "three-day rule" to electronic service. Nevertheless, he said, the committee included it in its publication as an alternative proposal.

After reviewing the public comments and considering the proposed companion amendments to the bankruptcy rules, the advisory committee agreed unanimously to approve the proposed amendment to Rule 6(e). Thus, when service is made electronically — or by any means other than personal service — the party being served will be allowed an extra three days to act. He pointed out that electronic service is not in fact always instantaneous, and transmission problems may need some time to be straightened out. In addition, he said, inclusion of the three-day provision may encourage consents. Finally, he added, the advisory committee was convinced that the provisions of the civil rules should be consistent with those of the bankruptcy rules, which adopt the three-day rule.

The committee approved the proposed amendment to Rule 6(e) without objection.

FED. R. CIV. P. 77(d)

Professor Cooper noted that the proposed amendments to Rule 77(d) *(notice of orders or judgments)* reflect the changes proposed in Rule 5(b) and would authorize the clerk of court to serve notice of the entry of an order or judgment by electronic or other means.

The committee approved the proposed amendments without objection.

2. Abrogation of the Copyright Rules

Professor Cooper reported that the Advisory Committee recommended abrogation of the obsolete Copyright Rules of Practice under the 1909 Copyright Act. He noted that the advisory committee had urged elimination of these rules as long as 37 years ago.

FED. R. CIV. P. 65(f)

Professor Cooper pointed out that a new subdivision (f) would be added to Rule 65 *(injunctions)* to make the rule applicable to copyright impoundment proceedings.

FED. R. CIV. P. 81(a)

Professor Cooper said that Rule 81(a) *(proceedings to which the federal rules apply)* would be amended to eliminate its reference to copyright proceedings. In addition, the rule's obsolete reference to mental health proceedings in the District of Columbia would be eliminated, and its reference to incorporation of the civil rules into the Federal Rules of Bankruptcy Procedure would be restyled.

The committee approved abrogation of the copyright rules and the proposed amendments to Rules 65 and 81 without objection.

3. Technical Amendment

FED. R. CIV. P. 82

Professor Cooper reported that the proposed amendment to Rule 82 *(jurisdiction and venue not affected by the federal rules)* was purely a technical conforming change that could be made without publication. He said that the text of the current rule refers to 28 U.S.C. §§ 1391-1393. But Congress repealed § 1393 in 1988. Thus, the reference needed to be changed to 28 U.S.C. §§ 1391-1392.

The committee approved the proposed amendment without objection.

Amendments for Publication and Comment

1. Judgments

FED. R. CIV. P. 54(d) and 58

Judge Rosenthal noted that the Standing Committee had discussed the proposed amendments to Rules 54 *(judgments and costs)* and 58 *(entry of judgment)* earlier in the meeting as part of its consideration of the report of the Advisory Committee on Appellate

Rules and its approval of companion amendments to FED. R. APP. P. 4(a)(7). (See pages 8-9 of these minutes.)

She explained that Civil Rule 58(b) would be amended to provide that when the civil rules require that a judgment be set forth on a separate document, it will be deemed to have been entered for purposes of finality either: (1) when it is actually set forth on a separate document; or (2) when 60 days have run from entry on the civil docket, whichever is earlier.

Professor Cooper explained that under the rules a judgment is not effective until it is set forth on a separate document and entered on the civil docket. But, he said, in practice this requirement is ignored in many cases. Thus, failure to enter a final judgment on a separate document means that the time to file a post-judgment motion under the civil rules or a notice of appeal under the appellate rules never begins to run.

Professor Cooper added that the new Rule 58(b) is the central provision in the proposed amendments to integrate the civil and appellate rules. It would work in tandem with the proposed amendments to FED. R. APP. P. 4(a). As a result, a judgment would become final at the same time for purposes of both the civil and appellate rules.

Professor Cooper said that the proposed amendment to Rule 54(d) would delete the separate document requirement for an order disposing of a motion for attorney fees.

Professor Cooper suggested that the term "judgment," as used in the civil rules, is overly broad and may lead to a number of difficult theoretical problems. But, he said, the advisory committee had found no indication that the theoretical problems occur in practice. Thus, it saw no reason to reopen the definition of judgment in Rule 54(a). He added that the advisory committee had also decided not to reopen the separate document requirement of Rule 58.

The committee approved the proposed amendments for publication and comment without objection.

2. Financial Disclosure

The advisory committee's proposed new Rule 7.1 was discussed and approved by the Standing Committee later in the meeting as part of its consideration of proposed financial disclosure rule amendments. (See pages 28-31 of these minutes.)

3. Applicability of the Rules to Section 2254 and 2255 Cases and Proceedings

FED. R. CIV P. 81(a)

Professor Cooper reported that Rule 81(a)(2) *(applicability of the rules in general)* would be amended to make its time limits consistent with the Rules Governing Section 2254 Cases and the Rules Governing Section 2255 Proceedings.

The committee approved the proposed amendment for publication and comment without objection.

Information on Pending Projects

Judge Rosenthal referred briefly to several projects pending before the advisory committee and pointed out that they were described in greater detail at Tab 7B of the agenda materials.

She noted that the advisory committee's discovery subcommittee was continuing to explore a number of discovery issues, particularly those flowing from discovery of computer-based information. She said that the subcommittee had conducted a mini-conference with lawyers, judges, and forensic computer specialists to hear from them about the problems they have encountered with discovery of information in automated form. She added that the subcommittee had identified and discussed in a preliminary way several problems cited by practitioners. The central questions, she said, are: (1) whether the current federal rules are adequate to deal with the impact of the new technology; and (2) whether any of the problems identified are subject to rule-based solutions.

Judge Rosenthal reported that a subcommittee of the advisory committee was continuing to look at Rule 23 *(class actions)* to determine whether any additional changes in that rule might be appropriate. She pointed out that the committee had been examining Rule 23 since 1991. It had collected a great deal of empirical information and opinions from the bar, which have been published in extensive working papers. She noted that the committee's earlier proposals to amend Rule 23 had stirred substantial controversy, and it had not been possible to reach consensus on key issues. In addition, she said, the substantive law of class actions had been addressed recently by the Supreme Court.

Judge Rosenthal said that the subcommittee's initial sense was that further changes are not called for in Rule 23. Nevertheless, it would continue to explore such discrete areas as attorney fees, procedures for approving settlements, the terms of settlements, and providing protection for absent class members.

Judge Rosenthal reported that a subcommittee had been appointed to study the use of special masters. She noted that the current Rule 53 focuses on special masters as fact finders,

but courts are using masters increasingly for various pretrial management and post-judgment purposes. She pointed out that the Federal Judicial Center had presented the advisory committee with an excellent empirical report on the use and practices of special masters in the district courts.

Finally, Judge Rosenthal reported that a subcommittee had been appointed to study the feasibility of creating an alternative set of simplified civil procedure rules that would be appropriate for some cases as a means of reducing costs and delays. The draft proposal would incorporate such features as early and firm trial dates, shorter discovery deadlines, reduced amounts of discovery, and curtailed motion practice.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Davis, Judge Miller, and Professor Schlueter presented the report of the advisory committee, as set forth in Judge Davis's memorandum and attachments of May 8, 2000. (Agenda Item 8)

Amendments for Publication and Comment

Judge Davis reported that the advisory committee was seeking authority to publish three proposals for public comment:

1. a complete, restyled set of Criminal Rules 1-60, set forth in two separate packages;

2. proposed changes to the Rules Governing § 2254 Cases and § 2255 Proceedings; and

3. a new Criminal Rule 12.4, governing financial disclosure.

1. Comprehensive Review and Restyling of the Criminal Rules

Judge Davis said that the advisory committee had been working on restyling the entire body of Federal Rules of Criminal Procedure for more than a year. He noted, however, that several of the committee's proposed amendments had been under consideration before the restyling project began. And, as part of the restyling effort, the committee identified several amendments that might be considered substantive or controversial.

Therefore, he said, the advisory committee had decided to seek authority to publish the restyled body of rules in two separate packages. The first would consist of all the rules containing merely stylistic changes. The second would contain those rules in which the committee is proposing substantive changes, *i.e.*, Rules 5, 5.1, 10, 12.2, 26, 30, 32, 35, 41,

and 43. He added that these substantive changes had been deleted from the purely "style" package, and a reporter's note to the style package will explain that additional, substantive changes are being proposed and published simultaneously in a separate package.

Judge Davis noted that the revised Rules 1-31 had been approved for publication by the Standing Committee at its January 2000 meeting. He added that the advisory committee had considered the various suggestions made by members of the Standing Committee at that meeting, and it had incorporated them into a revised draft for publication. He proceeded to summarize the significant, non-style changes made by the advisory committee in Rules 1-31 following the January meeting.

Rules 1-31

FED. R. CRIM. P. 5

Judge Davis pointed out that the revised Rule 5 *(initial appearance)* would authorize an initial appearance to be conducted by video teleconferencing if the defendant waives the right to be present. He noted that the advisory committee would also publish an alternate version of the rule that would permit the court to conduct the appearance by video teleconferencing without the defendant's consent.

Judge Davis reported that the advisory committee had concluded that Rule 5 should be expanded to address all initial appearances. Thus, material currently located in Rule 40 *(commitment to another district)* would be moved to Rule 5. The revised rule also would provide explicitly that Rules 32.1 *(revoking or modifying probation or supervised release)* and Rule 40 *(commitment to another district)* apply when a defendant is arrested for violating the terms of probation or supervised release or for failing to appear in another district.

FED. R. CRIM. P. 10

Judge Davis reported that Rule 10 *(arraignment)* would be amended to allow video teleconferencing of arraignments upon the consent of the defendant. As with Rule 5, the advisory committee would also publish an alternate version of the rule permitting the court to conduct an arraignment by video teleconferencing without the defendant's consent.

FED. R. CRIM. P. 24

Judge Davis noted that the advisory committee had presented the Standing Committee in January 2000 with a proposed amendment to Rule 24 that would equalize the number of peremptory challenges at 10 per side. But, he said, the proposal would be controversial. Therefore, the advisory committee decided after further consideration to delete the proposed amendment from the restyling project and defer it for later consideration on the merits.

FED. R. CRIM. P. 26

Judge Davis reported that the proposed amendments to Rule 26 *(taking testimony)* would conform the rule in some respects to FED. R. CIV. P. 43. First, it would allow testimony from witnesses at remote locations. Second, it would delete the term "orally" from the current rule in order to accommodate witnesses who are unable to present oral testimony and may need a sign language interpreter.

Judge Davis noted that questions had been raised at the January 2000 meeting as to the possible impact of the amendments on FED. R. EVID. 804. He explained that the advisory committee had narrowed the proposed amendment to apply to those situations in which a witness is "unavailable" only within the meaning of paragraphs (4) and (5) of Evidence Rule 804(a).

Rules 32-60

Judge Davis reported that the advisory committee had considered proposed style revisions in Rules 32-60 at a special meeting in January 2000, at two subcommittee meetings, and at its regularly scheduled meeting in April 2000. He proceeded to discuss the rules that the advisory committee believed included one or more substantive changes or changes that warranted further elaboration.

FED. R. CRIM. P. 32

Judge Davis reported that Rule 32 *(Sentence and Judgment)* had been completely reorganized to make it easier to follow and apply. He pointed out that one proposed change in the rule may generate controversy. The current rule, he said, requires a court to rule on all unresolved objections to the presentence report. The revised rule would require the court to rule only on all unresolved objections to a "material" matter in the report.

Judge Davis noted that the Bureau of Prisons relies on the presentence report to make decisions about defendants in its custody. One member said that the current rule apparently requires judges to rule on matters that do not affect their sentence because the Bureau of Prisons may need the information for its own administrative purposes. During the discussion that ensued, various members offered the following points: (1) a court should not be burdened by having to decide matters not required for its sentencing decision because the Bureau of Prisons may need certain information; (2) defendants should not be penalized for non-essential information contained in the presentence report; (3) defense counsel have an obligation to ask the court to delete any objectionable information in the report; (4) the courts could ask probation officers to exercise greater discretion in keeping certain information out of the reports; and (5) the advisory committee could ask the Bureau of Prisons to reconsider some of its procedures.

Mr. Marcus said that the Bureau of Prisons needs and appreciates all the information it can obtain from the court. He pointed out that the Bureau has a difficult problem in obtaining relevant and accurate information from other sources, and it faces serious operational problems because of the volume of its caseload. He expressed concern about any effort that might restrict the Bureau from using any information that it currently receives from the court.

Judge Scirica recommended that the proposed rule be published for comment. He further suggested that the advisory committee take into account the various concerns expressed by the members and initiate discussions with the Bureau of Prisons. He said that the advisory committee should be prepared to address these matters when it returns to the Standing Committee for approval of the rule following publication.

Professor Schlueter reported that new paragraph (h)(5) would fill a gap in the current rules by requiring the court to give notice to the parties if it contemplates departing from the sentencing guidelines on grounds not identified either in the presentence report or in a submission by a party. He pointed out that this procedure is required by case law.

FED. R. CRIM. P. 32.1

Professor Schlueter said that Rule 32.1 *(revoking or modifying probation or supervised release)* had been completely restructured, but no significant changes had been made. He pointed out that language had been added that would govern an initial appearance when a person is arrested in a district that does not have jurisdiction to conduct a revocation proceeding.

FED. R. CRIM. P. 35

Judge Davis reported that Rule 35 *(correction or reduction of sentence)* would be amended to delete current subdivision (a), specifying district court action on remand, because it simply is not necessary.

Judge Davis said that subdivision (b) includes a substantive change that had been under consideration by the advisory committee before the restyling project. He pointed out that the amendment responds to the decision of the Eleventh Circuit in *United States v. Orozco,* 160 F. 3d 1309 (11th Cir. 1998), in which the court of appeals had urged an amendment to the current rule to address the unforseen situation in which a convicted defendant provides information to the government within one year of sentencing, but the information does not become useful to the government until more than a year has elapsed.

Concern was expressed by some of the members as to whether the proposed rule resolved all the issues raised by the *Orozco* case. Judge Davis and Professor Schlueter

suggested that the revised rule be published for comment and that the advisory committee consider the implications of *Orozco* further during the comment period.

FED. R. CRIM. P. 40

Judge Davis pointed out that much of the substance of Rule 40 *(commitment to another district)* would be relocated to Rule 5.

FED. R. CRIM. P. 41

Judge Davis reported that the advisory committee would make significant changes in Rule 41 *(search and seizure)*. First, he said, the revised rule had been substantially reorganized. Second, it would explicitly authorize "covert entry warrants" allowing law enforcement agents to enter property to obtain information, rather than to seize property or a person. He pointed out that two circuit courts of appeals had authorized this type of search warrant under the language of the current rule.

Judge Davis explained that the advisory committee would expand the definition of "property" in the text of the revised rule, at subparagraph (a)(2)(A), to include "information." Likewise, new paragraph (b)(1) would authorize a judge to issue a warrant, not only to search and seize, but also to "covertly observe," a person or property.

Judge Davis pointed out that new paragraph (f)(5) would require the holder of the warrant to notify the owner of the property by delivering a copy of the warrant within seven days. On the government's motion, the court could extend the time to deliver the warrant to the property owner on one or more occasions.

Judge Miller reported that he had used the Administrative Office's electronic list-server to ask all magistrate judges about their experience with covert searches. He said that the responses from the magistrate judges demonstrated that these searches were being used widely, especially in environmental cases. He added, though, that covert search warrants are a matter of general concern to magistrate judges because neither the rule nor a statute authorizes them explicitly. He added that magistrate judges were unanimous in asking the advisory committee for additional guidance and authority on the matter.

One member suggested that the proposed amendment may be inappropriate because it could be viewed as a substantive law. Professor Schlueter replied that the advisory committee had intended only to provide the procedures for a practice that has been in common use for years.

Judge Davis added that the advisory committee had agreed by a split vote to include covert entry warrants in the revised rule because it is better to have clear recognition of them in the rules, rather than to have judges rely on a limited body of case law. When asked to

elaborate on why some members of the advisory committee had opposed the provision, Judge Davis responded that the reasons cited included: (1) objections to covert entry searches as a matter of policy; (2) concerns over the adequacy of the notice provisions in the proposed rule; and (3) a sense the case law should be given additional time to develop.

FED. R. CRIM. P. 42

Judge Davis reported that revised Rule 42 *(criminal contempt)* sets out more clearly the procedures for conducting a contempt proceeding. It would also add language to reflect the holding of the Supreme Court in *Young v. United States ex rel Vuitton,* 481 U.S. 787 (1987), that the court should ordinarily request that a contempt be prosecuted by a government attorney. A private attorney should not be appointed unless the government first refuses to prosecute the contempt.

FED. R. CRIM. P. 43

Judge Davis said that Rule 43 *(defendant's presence)* requires the defendant to be present at various proceedings in a criminal case. But a new exception would be added to subdivision (a) to reflect the proposed amendments to Rules 5 and 10, allowing video teleconferencing of initial appearances and arraignments. Thus, the language of the revised rule would provide that the defendant must be present "(u)nless this rule, Rule 5, or Rule 10 provides otherwise."

FED. R. CRIM. P. 46

Professor Schlueter reported that subdivision (i) to Rule 45 *(release from custody)* had been difficult to restyle. It had been added to the rules by Congress and was awkwardly written. The advisory committee, he said, decided not to make any change in what appeared to be the intention of Congress.

FED. R. CRIM. P. 48

Professor Schlueter stated that Rule 48 *(dismissal)* gives a court authority to dismiss charges against the defendant due to government delay. He pointed out that it is a speedy trial provision that was in effect before enactment of the Speedy Trial Act. The advisory committee, he said, was concerned that if it merely restyled Rule 48, its action might have the unintended effect of overruling the Speedy Trial Act through the supersession clause of the Rules Enabling Act. 28 U.S.C. § 2072(b).

Professor Schlueter said that the advisory committee was of the view that the separate provisions of Rule 48 are still viable, as they cover pre-indictment delays. Therefore, it decided to state explicitly in the committee note that Rule 48 operates independently of the

Speedy Trial Act and that no change is intended in the relationship between the rule and the Act.

FED. R. CRIM. P. 49

Professor Schlueter reported that subdivision (c) of Rule 49 *(serving and filing papers)* would be broadened to reflect the changes being made in FED. R. CIV. P. 5(b) and 77(b) to permit a court to provide notice of its judgments and orders by electronic and other means.

FED. R. CRIM. P. 51

Professor Schlueter reported that the restyling of Rule 51 *(preserving claimed error)* raised another supersession clause issue. The advisory committee would add a new sentence at the end of the rule to state explicitly that any ruling admitting or excluding evidence is governed by the Federal Rules of Evidence. The committee, he said, was concerned that without the sentence an argument might be made that re-enactment of Rule 51 would supersede FED. R. EVID. 103.

FED. R. CRIM. P. 53

Professor Schlueter reported that the word "radio" would be deleted from Rule 53 *(courtroom photographing and broadcasting prohibited)*. In addition, he said, the advisory committee had been concerned as to whether other rules may allow video teleconferencing in light of Rule 53's blanket prohibition on broadcasting judicial proceedings from the courtroom. Therefore, it would add language to Rule 53 to recognize explicitly that the rules themselves may contain exceptions to the prohibition, such as the proposed amendments to Rules 5 and 10 authorizing video teleconferencing of initial appearances and arraignments.

The committee without objection approved for publication and comment:

1. **the package of proposed style revisions to Rules 1-60;**
2. **the separate package of proposed amendments to Rules 5, 5.1, 10, 12.2, 26, 30, 32, 35, 41, and 43.**

2. Rules Governing §§ 2254 and 2255 Proceedings

Judge Davis reported that the advisory committee had appointed an ad hoc subcommittee to review the Rules Governing § 2254 Cases and § 2255 Proceedings to determine whether any changes were required as a result of the Antiterrorism and Effective Death Penalty Act of 1996. In addition, he said, the subcommittee had tried without success to combine the two sets of rules.

RULE 1

Judge Davis said that advisory committee had recommended amending Rule 1 *(scope of the rules)* of both sets of rules to make them applicable to actions brought under 28 U.S.C. § 2241, which most commonly involve prisoners challenging the execution of their sentence. But, he said, a number of complications had been discovered recently, and the advisory committee decided to withdraw the proposed amendments to Rule 1.

RULE 2

Judge Davis explained that the language of Rule 2 *(petition)* of both sets of rules would be amended to conform to the usage of FED. R. CIV. P. 5(e). Thus, the reference would be to a petition "filed with" the clerk, rather than one "received by" the clerk.

RULE 3

Judge Davis said that Rule 3 of both sets of rules *(filing petition)* would also be amended to conform with the language of FED. R. CIV. P. 5(e). The first part of the rule would be deleted because it conflicts with the requirement of FED. R. CIV. P. 5(e) that the clerk must file any papers submitted, but may refer them to the court for consideration of any defects.

RULE 6

Judge Davis reported that Rule 6 *(discovery)* of the § 2254 Rules would be amended to correct a statutory reference to the Criminal Justice Act.

RULES 8 and 10

Judge Davis said that the only changes proposed in Rules 8 *(evidentiary hearing)* and 10 *(powers of magistrate judges)* would reflect the change in the title of United States magistrate to United states magistrate judge.

RULE 9

Judge Davis reported that the only substantive change proposed in the §§ 2254 and 2255 Rules was found in Rule 9 *(delayed or successive petitions)*. He said that both sets of rules would be amended to reflect the provisions of the Antiterrorism and Effective Death Penalty Act imposing limits on the ability of a petitioner to file successive habeas corpus petitions. The Act provides that a second or successive petition must first be presented to the court of appeals for an order authorizing the district court to consider it.

One of the participants suggested that the language of the proposed amendment, which would require the applicant to "move" for an order in the court of appeals, may be inadequate. He pointed out that petitioners will inevitably claim that they have in fact "moved" for an order authorizing the district court to consider the petition, whether or not the court of appeals has granted the order. Therefore, he suggested that the pertinent sentence be restructured to provide that a district court may not consider a petition until the court of appeals has authorized it to do so. Judge Scirica announced that there was a consensus on the committee to make the suggested change.

One of the members pointed out that there was a gender-specific reference on line 6 of Rule 3 of the § 2255 Rules that should be restyled. Professor Schlueter responded that the advisory committee had made only minimal changes in the rules, and it was not proposing any amendments to the part of the rule that contains the gender-specific reference. He added that the advisory committee had not attempted to restyle or modernize the §§ 2254 and 2255 Rules and had agreed to defer that project to a future date.

Some participants suggested that it would be very simple to take care of the specific reference in Rule 3. They added that all rules published for comment should be gender neutral as a matter of policy. Judge Scirica asked the chairs and reporters to work together to develop a uniform policy on this matter for all the rules.

The committee without objection approved for publication and comment the proposed amendments to the Rules Governing Section 2254 Cases and the Rules Governing Section 2255 Proceedings.

After the meeting, it was discovered that the materials before the committee contained the proposed corrections to the Criminal Justice Act references: (1) in Rule 6(a) of the § 2254 Rules, but not in Rule 8(c) of the § 2254 Rules; and (2) in Rule 8(c) of the § 2255 Rules, but not in Rule 6(a) of the § 2255 Rules. **The committee by mail vote approved correcting the Criminal Justice Act references in Rules 6(a) and 8(c) of both sets of rules.**

3. Financial Disclosure

The advisory committee's proposed new Rule 12.4 was discussed and approved separately, as part of the Standing Committees consideration of proposed financial disclosure rule amendments. (See pages 28-31 of these minutes.)

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Shadur and Professor Capra presented the report of the advisory committee, as set forth in Judge Shadur's memorandum and attachments of May 1, 2000. (Agenda Item 9)

Judge Shadur reported that he had informed the committee in January 2000 that the advisory committee had completed its review of all the evidence rules and it was now engaged in some specific projects. He pointed out, for example, that the advisory committee was looking at privileges, under the direction of a subcommittee chaired by Judge Jerry Smith. He added that the committee was very conscious of the controversial nature of attempting to do anything in the area of privileges.

Judge Shadur also pointed out that the advisory committee had considered proposed amendments to FED. R. EVID. 608 and 804, which would be brought to the Standing Committee at its next meeting.

Judge Shadur reported that Professor Capra had produced a study and report for the advisory committee on those rules of evidence in which the case law has diverged materially from either the apparent meaning of the rule or the committee note. The document, he said, would be very useful in avoiding traps for the unwary practitioner. He added that the Federal Judicial Center and others had agreed to publish it. He emphasized that the advisory committee makes it clear that the document had been prepared simply to assist the bar, and it does not constitute an official committee note.

FINANCIAL DISCLOSURE

Judge Scirica pointed out that the committee had spent a good deal of time on financial disclosure issues at its January 2000 meeting. He said that financial disclosure was not, strictly speaking, a procedural issue. Nevertheless, there had been some embarrassing incidents reported in the press, and the Codes of Conduct Committee was urging the rules committees to promulgate new federal rules on financial disclosure.

FED. R. APP. P. 26.1
FED. R. CIV. P. 7.1
FED. R. CRIM. P. 12.4

Judge Scirica said that the draft amendments to the appellate, civil, and criminal rules set forth in Agenda Item 11 of the materials were all based on current FED. R. APP. P. 26.1 *(corporate disclosure statement).* Rule 26.1 requires a nongovernmental corporate party to file a statement with the court of appeals identifying all its parent corporations and listing any publicly held company that owns 10% or more of its stock.

Judge Scirica pointed out that there is currently no corresponding national rule requiring corporate disclosure in the district courts, although 19 district courts have adopted a version of FED. R. APP. P. 26.1 as a local rule. Moreover, many individual judges impose their own, additional disclosure requirements.

Judge Scirica said that the most recent proposal before the committee, submitted jointly by the reporters, contains a two-track proposal: (1) a national rule requiring minimal information; and (2) additional requirements that could be adopted by the Judicial Conference at a later date. He said that inclusion of this provision in the proposal would give the judiciary the flexibility to make adjustments promptly if circumstances change.

Thus, the proposed new FED. R. CIV. P. 7.1, and its counterparts in the criminal and appellate rules, would be based on the current FED. R. APP. P. 26.1, in that it would require a party to file two copies of either: (1) a statement that identifies its parent corporations and any publicly held company that owns 10% of more of its stock; or (2) a statement declaring that it has nothing to report under the rule. But a party would also have to file copies of any supplemental information required by the Judicial Conference. The statements would be filed by a party with its first appearance, pleading, petition, motion, response or request addressed to the court. A party would also be required to file a supplemental statement promptly upon any change in circumstances.

Professor Coquillette pointed that there was a fundamental difference of opinion between the Codes of Conduct Committee and the advisory committees. The Codes of Conduct Committee, he said, favored adopting civil and criminal rules that essentially just repeat FED. R. APP. P. 26.1. It contends that the provision allowing the Judicial Conference to require additional information is unnecessary.

On the other hand, the advisory committees believe that simply adopting the appellate rule is insufficient. They contend that authorizing additional requirements is necessary because it would give the Judicial Conference authority to make changes from time to time, without having to invoke all the formality and take all the time required by the rulemaking process. In addition, he said, additional requirements could be developed by Judicial Conference resolution and put in place very quickly — well before the two to three years that it would take for new federal rules to take effect. One member added that immediate Conference action would be more impressive for political and public reasons than adopting a rule that would take up to three years to take effect.

Some participants suggested that the whole subject involved an administrative matter that does not belong in the federal rules. They argued that it should be handled by Judicial Conference resolution alone. They added that the Conference could simply ask the Director of the Administrative Office to issue a standard form that parties would have to complete for the clerk, similar to the form that parties must now complete disclosing whether they are involved in any related cases.

Other members replied, however, that the Judicial Conference was not likely to approve a form without a rule, especially when the Codes of Conduct Committee is opposed to having a form and is urging adoption of a rule. Another participant said that if the Judicial Conference were merely to issue a form, it would likely not have the authority to preclude

local variations. By acting through the rules process, there would be clear authority to require national uniformity.

Some members added that a federal rule on financial disclosure statements was both appropriate and beneficial because it would give direction to the bar and inform the parties of their obligations. It was also pointed out that FED. R. APP. P. 26.1 has been in place for more than a decade and has been very effective.

One member said that he would vote to approve both the new rule and the additional requirements, but he pointed out that the proposal was really unnecessary on the merits. He argued that it would not solve the real issues of recusal, nor would it address the kinds of problems that had generated the negative press reports. He argued that the matter was largely a political and media issue.

Professor Coquillette reported that the proposed new civil, criminal, and appellate rules on financial disclosure were identical, except in one respect. He explained that the Advisory Committee on Civil Rules was of the view that the rule should contain a specific requirement that the clerk of court actually deliver a copy of the disclosure statements to each judge acting in the case. Professor Cooper added that the advisory committee was convinced that the provision was justified by differences in district court practice from appellate practice. Judge Rosenthal commented that the issue was of concern to the district courts, as opposed to the courts of appeals, because district judges and magistrate judges cannot otherwise count on promptly receiving every piece of paper that is filed. Judge Davis added that the criminal rule should be the same as the civil rule. Judge Garwood pointed out, however, that the appellate rules committee saw no need for such a requirement in the courts of appeals.

Professor Coquillette said that another key issue was whether the new national rules should allow local court variations. He explained that FED. R. APP. P. 26.1 does not address the matter, but its accompanying committee note invites the courts of appeals to expand on the information that must be disclosed by corporate parties. He said that all but three of the circuits in fact do so, and they solicit information about such matters as subsidiaries, partnerships, and real estate holdings. He noted that the proposals now before the committee, like Rule 26.1, would not prohibit courts from expanding on the national disclosure requirements.

Judge Scirica added that there is no agreement among the courts themselves on what information should be disclosed, as illustrated graphically by the wide variety of local circuit court rules expanding on FED. R. APP. P. 26.1. He said that there might be strong opposition within the Judicial Conference to any proposed amendment that would eliminate the current authority of courts to add local disclosure requirements. Therefore, he said, it makes good sense to present the Conference with proposals that allow some local variations.

Professor Cooper pointed out that FED. R. APP. P. 26.1 had been narrowed recently to eliminate the requirement that corporate parties disclose their subsidiaries, although some circuits continue to require this information through local rules. He said that there is a bewildering array of material contained in the local circuit rules that could be considered for inclusion in the future, but the matter would best be handled through additional requirements set forth by the Judicial Conference.

Judge Scirica and Professor Coquillette said that the Codes of Conduct Committee was opposed to allowing local court variations from the national requirement, but it had indicated that it would defer to the rules committee on this matter.

The committee approved the proposed amendment to FED. R. APP. P. 26.1 and the proposed new FED. R. CIV. P. 7.1 and FED. R. CRIM. P. 12.4 without objection.

ATTORNEY CONDUCT

Judge Scirica reported that the special subcommittee on attorney conduct had conducted a superb conference with members of the bench and bar in February 2000 and had received many useful suggestions. He said that considerable progress had been made toward reaching a consensus on draft rules — if draft rules were to be promulgated — and that Professors Cooper and Coquillette had refined the earlier draft proposals. He pointed out that several alternatives were still under consideration, and that the subject matter of attorney conduct had been divided into three potential federal rules:

1. a suggested Federal Rule of Attorney Conduct 1 to govern attorneys generally;

2. a possible Federal Rule of Attorney Conduct 2 to address certain problems faced by federal government attorneys; and

3. a possible Federal Rule of Attorney Conduct 3 to address attorney conduct in bankruptcy practice.

Professor Coquillette said that the enabling statute requires the Judicial Conference to work towards procedural consistency in the federal courts. But, he said, attorney conduct is an area in which there is now virtually no consistency among the courts. He added that about 30% of the federal courts have not adopted local rules consistent with the conduct rules of their states.

Professor Coquillette said that the area in which the most progress can be made is with proposed Federal Rule of Attorney Conduct 1. He reported that there is now a clear

consensus that attorney conduct should be governed generally by the states. He added that his research, and that of the Federal Judicial Center, had revealed that there were very few issues of exclusively federal conduct. Therefore, promulgation of a general federal rule requiring that a federal court to follow the attorney conducts rules of the state in which they are located would eliminate about 200 existing local federal court rules and restore vertical consistency to the system.

Professor Coquillette said that Federal Rules of Attorney Conduct 2 and 3 could be taken up after Rule 1. He pointed out that there are legitimate federal interests that need to be protected, and he recognized that the Department of Justice has real concerns that must be addressed. He noted that pending legislation in Congress, if enacted, would require the judiciary to propose specific solutions to government attorney problems within prescribed one-year and two-year time frames. With regard to bankruptcy practice, he said, the Advisory Committee on Bankruptcy Rules has the expertise to address attorney conduct issues, but it would prefer to wait until final decisions are made regarding proposed Federal Attorney Conduct Rule 1.

Professor Coquillette reported that Professor Cooper had prepared six variations of a proposed Federal Attorney Conduct Rule 1, set forth in Agenda Item 10 of the committee materials. The six versions vary in the level of detail, he said, but all share the common theme that federal courts should look to state law on matters of professional responsibility. They also recognize, however, that federal courts must retain control over their own practice and procedure, and they have a statutory responsibility to control who may appear before them as an attorney.

Chief Justice Veasey said that the Conference of Chief Justices would support the simplest of the six variations, *i.e.*, a single sentence specifying that state attorney conduct rules apply. He expressed concern about proposed Federal Rule of Attorney Conduct 2. Professor Coquillette responded that the proposed rules will not be approved by the Judicial Conference unless there is a clear consensus for them. Mr. Marcus added that the Department of Justice had no problems with Federal Rule of Attorney Conduct 1, but it needed to have its special concerns and problems addressed, either by legislation or by a new Federal Rule of Attorney Conduct 2.

One member emphasized that there were essential federal interests at stake beyond those of the Department of Justice. He said that states may go too far in attempting to regulate conduct, as local bars or other interest groups within a state may seek to leverage ethics rules for their own purposes. Thus, it would not be appropriate to declare that anything a state chooses to include in its ethics rules should necessarily be binding on a federal court.

One member said that it was unlikely that there would be a resolution of the Department's concerns until after the next national election. He pointed out that negotiations between the Department and the states had not produced a final agreement on the issue of

contacts by government attorneys with represented parties. Moreover, he said, there were substantial differences in Congress, and between the two houses of Congress, on the appropriate roles of the Department of Justice and the states in controlling government attorney conduct. The McDade amendment, he said, is still law, although there is legislation pending to repeal or modify it. And the American Bar Association is in the process of actively considering these conduct issues as part of its Ethics 2000 project.

REPORT OF THE LOCAL RULES PROJECT

Professor Coquillette stated that the local rules project had three goals: (1) to identify inconsistent local rules, (2) to identify areas where there are subjects addressed in local court rules that should be addressed in the national rules; and (3) to encourage the courts to post orders and practices on the Internet in order to assist the bar. He noted that recent amendments to FED. R. CIV. P. 83(b), requiring an attorney to have actual notice of any procedural requirement not set forth in a local rule, had its genesis in the last local rules project.

Professor Squiers reported that she had been working on the new local rules project since the summer. She said that she had read all the local rules of the district courts and had entered them into a computer program, sorted by rule content and topic. She added that she had just started work on writing the report and would have substantial material to present to the committee at its January 2001 meeting.

Professor Squiers said that she had contacted the circuit executives to inquire about the activities of their respective circuit councils in reviewing local district court rules. She reported that the circuit executives had responded that neither they nor their circuit councils are directly involved in the rulemaking process for the district courts or in the actual promulgation of local district court rules. She added, however, that some circuits had on occasion suggested local rules for the districts to adopt.

Professor Squiers reported that all the circuit councils have some sort of review process in place to examine new local rules and amendments to existing local rules. But, she added, none of the circuits has written standards to determine what may constitute an "inconsistency" between a local rule and a national rule or statute. Rather, reviews of local rules and amendments are made by the councils on a case-by-case basis.

Professor Squiers also said that she had asked the circuit executives about the existence of standing orders, internal operating procedures, general orders, and other written directives that serve as the functional equivalent of local rules. She reported that there is generally no review of these directives in most of the circuits, but that councils clearly would act if any of these devices were seen as an attempt to avoid the local rulemaking process.

Some members stated that local orders and practices are a serious problem for the bar and have taken on the character of local rules. They recommended that Professor Squiers obtain copies of standing orders and similar documents. Judge Scirica agreed, and he suggested that Professor Squiers write to the chief judges of the circuits on the matter.

REPORT OF THE TECHNOLOGY SUBCOMMITTEE

Mr. Lafitte reported that one of the most important policy issues currently facing the judiciary is to identify and protect appropriate privacy interests as part of its implementation of the new Electronic Case Files project. The project, which is finishing its pilot stage and is about to begin national deployment, places the documents in a case file in electronic form and makes them available to the public through the Internet. He said that there is a tension between: (1) the long-established policy and common law right of public access to court records; and (2) the privacy interests of litigants and third parties when court documents contain sensitive personal, medical, financial, and employment records. These records, he said, to date have been "practically obscure" in court files, but would now be placed on Internet for world-wide distribution.

Mr. Lafitte pointed out that the Court Administration and Case Management committee had appointed a special subcommittee on privacy to sort out the issues and that he was the liaison to that subcommittee from the rules committees. He reported that the subcommittee was considering several alternatives and was seeking feedback from the rules committees and other Judicial Conference committees. Eventually, he said, the subcommittee would circulate a draft document for public comment and present its views to the various Judicial Conference committees at their winter 2000-2001 meetings. Then the Court Administration and Case Management Committee would likely make appropriate recommendations to the Judicial Conference in March 2001.

Mr. Lafitte said that six alternatives were under consideration. He noted that they were summarized very effectively in Professor Capra's memorandum in Agenda Item 12 of the meeting materials. The alternatives, he said, were as follows:

1. Do Nothing – Under this alternative, privacy interests would be decided on a case-by-case basis, as litigants could seek protective orders and sealing orders from the court by way of motion.

2. "Public is public" – Under this alternative, everything now available to the public in the court's paper file would be made available in electronic form. This alternative, Mr. Lafitte said, would be similar to the "Do Nothing" approach.

3. "Public is Public," But Limit What is Public – This alternative would treat paper files and electronic files in the same way, but the public file would be refined. Thus, certain kinds of sensitive information now available at the courthouse would be excluded from the public file, such as social security numbers or medical information.

4. Limited Remove Electronic Access – This alternative would allow electronic access to all public information at the courthouse, but certain categories of information could not be accessed remotely through the Internet. Mr. Lafitte said that members of the privacy subcommittee had expressed concerns over this approach because it would result in different access policies for the same information.

5. Waiting Period – Under this alternative, a waiting period would be imposed between the electronic filing of a document and its posting on the Internet. The parties would have an opportunity during this period to ask the court for a protective order on a document-by-document basis.

6. Case File Archiving – A policy would be developed to archive documents and limit the life span of a case on the Internet. Mr. Lafitte observed that this action did not address the main issues at stake.

Professor Capra said that the only option that was likely to require a rule-based solution was Alternative 3, limiting what is included in the public file. He said, however, that this approach would be controversial, and it would be bound to encounter objections from news organizations, which have enjoyed full access to all paper records for years.

Professor Capra pointed out that the new electronic system is technically capable of providing different categories of users with different levels of access. Thus, for example, the parties to a case might be given greater electronic access to the source documents in a case than the general public.

Professor Capra reported that the President had established a working group in the executive branch to study the issues of privacy in consumer bankruptcy cases and that Administrative Office staff would coordinate with the working group. In addition, he noted that the technology subcommittee has been in contact with the Advisory Committee on Bankruptcy Rules regarding privacy issues.

Mr. Mattos said that the Court Administration and Case Management Committee had not reached any conclusions on the key privacy issues. But, he said, there is a consensus on the committee that: (1) parties in a case should be given notice that their documents are public and may be placed on the Internet; and (2) the bar should be educated as to the public nature of the documents they file.

Several members suggested that consideration be given to the administrative burdens of operating an electronic system in which some official case documents are included and some are not. They said that if electronic public access is to be limited, the focus should be placed on excluding categories of cases, rather than categories of documents.

Professor Capra noted that the proposed new amendments to the federal rules that authorize electronic service — together with the current rules that authorize electronic filing — contemplate the use of local rules to implement a court's electronic procedures. He said that the technology subcommittee thought that it might be useful to prepare sample local rules and orders to assist the courts as they implement the electronic case files system. In addition, he said, Administrative Office staff could serve as an effective clearing house of information to inform courts about the rules, orders, and procedures that have been adopted by other courts.

STATISTICS

Mr. Rabiej reported that the Administrative Office was seeking better statistical data and other information on district court proceedings, which could be captured through the new electronic case management and case file system being developed. This effort is part of the implementation of Recommendation 73 of the *Long Range Plan for the Federal Courts,* which calls for the courts to "define, structure, and, as appropriate, expand their data-collection and information-gathering capacity" to obtain better data for judicial administration, planning, and policy development.

Mr. Rabiej said that the Administrative Office was asking the committee to identify any types of new data and other information that it might need to assist in its mission, such as empirical data on the impact of various procedural requirements set forth in the rules. He pointed out that Administrative Office and Federal Judicial Center staff had prepared preliminary tables identifying and prioritizing various types of case events that might be useful in conducting future research for the committees. He recommended that the reporters review the materials and offer suggestions to the staff.

NEXT COMMITTEE MEETING

The next committee meeting had been scheduled for January 4 and 5, 2001.

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

November 27, 2000

MEMORANDUM TO STANDING RULES COMMITTEE

SUBJECT: *Legislative Report*

For your information, I have attached a chart showing the status of the rules-related bills introduced in the 106th Congress. The Congress is in recess until December 5. Major appropriations bills need to be addressed during the "lame duck" session, including the appropriations bill for the judiciary. Although unlikely, Congress may also act on other bills.

We have closely monitored and acted on several bills since the committee's June meeting. The bills are discussed below.

Federal Courts Improvement Act of 2000

On November 11, 2000, President Clinton signed the Federal Courts Improvement Act of 2000. (Public Law No. 106-518.) The Act contains provisions affecting the federal judiciary that were recommended by the Judicial Conference. Several provisions amend the law governing the petty-offense, misdemeanor, and contempt authority of a magistrate judge, which require conforming rules amendments. The Advisory Committee on Criminal Rules is reviewing the Act and determining whether the necessary rules changes need not be circulated for public comment because they conform to statutory changes. If so, the rules amendments might be inserted in the published rules package now under consideration and would be brought to this committee's attention at its June 2001 meeting.

Protective Orders

On July 6, 2000, Judge Scirica sent a letter to Chairman Hatch expressing concern about reported attempts to attach Senator Kohl's protective-order provisions to bills under the Judiciary Committee's consideration. (Attached.) Senator Kohl had introduced the Sunshine in Litigation Act of 1999 (S. 957) on May 4, 1999. The bill would require a judge in every instance to make specific findings that the issuance of a protective order would not detrimentally affect public health or safety. Senator Kohl's provisions were eventually added to the Defective Product Penalty Act of 2000 (S. 3070), but the full Senate Judiciary Committee took no action on either bill.

Class Actions

In September 1999, the House passed the Interstate Class Action Jurisdiction Act of 1999 (H.R. 1875), which would establish minimal-diversity federal jurisdiction in class actions. On September 26, 2000, the Senate Judiciary Committee reported favorably the Class Action Fairness Act of 2000 (S. 353). (Senate Report No. 106-420.) Among other provisions, the bill creates minimum-diversity federal jurisdiction over a class action if the class includes at least 100 persons and the matter in controversy exceeds $2 million. The bills have some similar provisions, but vary in others. The full Senate has not taken action on the bill. A class-action bill likely will be reintroduced early in the 107th Congress.

On September 13, 1999, the House passed the Multidistrict, Multiparty, Multiforum Trial Jurisdiction Act of 1999 (H.R. 2112). The Act would undo *Lexecon v. Milberg Weiss,* 523 U. S. 26 (1998). It would also establish minimal-diversity federal jurisdiction over claims arising from a single mass accident. On October 27, 1999, the Senate passed an amended House bill, which omitted the single-accident provisions. No conference has been held, and the bill appears to have failed.

Methamphetamine Bill

Judge Scirica sent a letter to Chairman Hyde on June 27, 2000, recommending that the Senate decline accepting a provision amending Criminal Rule 41(d) in the Senate-passed Methamphetamine Anti-Proliferation Act of 1999 (S. 486). (Attached.) Section 301(b) of the Act would amend Rule 41(d) by limiting its reach explicitly to instances when tangible property only has been seized. Rule 41(d) now requires the government to promptly notify a person whose premises have been searched and tangible or intangible property seized. Accordingly, a person whose intangible property was seized, e.g., officers photographing premises or taking a sample of a substance, would no longer be entitled under the Act to receive notice of the executed warrant.

Judge Scirica recommended that the House Judiciary Committee delete the provision because it was inconsistent with the Judicial Conference's longstanding policy against direct legislative amendment of the rules. In addition, a proposed amendment to Rule 41 was being circulated for public comment addressing the notice issue arising in "sneak and peek" warrants. Judge Scirica urged the committee to defer and allow the rulemaking process to proceed.

A later attempt was made to attach the methamphetamine bill to the Bankruptcy Reform Act, which showed promise of enactment at that time. In the end, the methamphetamine bill was included as Title 36 of the Children's Health Act of 2000. (Public Law No. 106-310.) But the Rule 41(d) provision was omitted from the Act.

Military Extraterritorial Jurisdiction Act of 2000

The Military Extraterritorial Jurisdiction Act of 2000 (S. 768) was passed by Congress and presented to the President on November 13, 2000. The bill establishes federal jurisdiction over offenses committed overseas by civilians serving with the Armed Forces outside the United States. It inserts a new § 3265 in Title 18, United States Code, that authorizes a federal magistrate judge to conduct an initial appearance proceeding by telephone when a person is arrested for committing a crime overseas while employed by the United States Armed Forces. The Advisory Committee on Criminal Rules is considering conforming amendments to the rules.

Attorney Conduct Rules

On September 27, 2000, Senator Leahy submitted an amendment to the Professional Standards for Government Attorneys Act (S. 855), which he earlier had introduced on April 21, 1999. The original bill addresses the standards of professional conduct governing government attorneys. It would require the Judicial Conference to submit to the Chief Justice within one year a report containing recommendations establishing a uniform rule governing government attorney contacts with represented parties. The amended version also requires a report to be submitted to Congress within two years reviewing "any areas of actual or potential conflict between specific federal duties related to the investigation and prosecution of violations of federal law and the regulation of government attorneys."

Senator Leahy unsuccessfully attempted in late July and early September to attach his amendment to another bill that was being acted on by the Senate Judiciary Committee. In late September it was reported that Senator Hatch endorsed the proposal. An effort was quickly mounted to locate promising legislative vehicles to attach the attorney-conduct rules amendment. Meanwhile, Chairman Hyde relented from his former steadfast opposition to Senator Leahy's proposal. Several alternative compromise proposals were drafted by congressional staff and floated, but no consensus developed, ensuring the bill's failure in the waning days of the Congress. Senator Leahy promised to reintroduce his proposal early in the next Congress. At each of these stages, Judge Scirica has kept the Judicial Conference's Executive Committee informed of developments.

Bankruptcy Reform

The House and Senate each passed separate comprehensive bankruptcy reform bills earlier in the congressional session. Letters had been sent to Congress expressing concern over provisions in each bill affecting the judiciary generally, including several rules-related provisions. Many of the other provisions in the bills would require numerous conforming rules amendments.

At a late stage in the legislation, the House-passed version was amended to provide a new appeal procedure that authorized direct appeal to a court of appeals when a district judge failed to act on the appeal within 30 days. Interlocutory appeals would also be submitted directly to a court of appeals under the changes. The House reviewed the Judicial Conference's concerns to these provisions and decided to delete the interlocutory appeal provision, but it retained the direct-appeal provision.

Conferees were appointed by the House and Senate to reach a settlement. Much of the legislative work on a conference bill has been done behind closed doors. And a scaled-down, compromise bill was rumored, but negotiations stalled. It now appears likely that no bankruptcy reform legislation will be passed this year, although it will be reintroduced early next year.

John K. Rabiej

Attachments

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
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CIVIL RULES

W. EUGENE DAVIS
CRIMINAL RULES

MILTON I. SHADUR
EVIDENCE RULES

June 27, 2000

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

Dear Chairman Hyde:

I write on behalf of the Judicial Conference's Committee on Rules of Practice and Procedure (Standing Committee) to express concern regarding § 301(b) of the Methamphetamine Anti-Proliferation Act of 1999 (S. 486). The bill was approved by the United States Senate on November 19, 1999, and referred to your committee on January 27, 2000.

Rule 41(d) of the Federal Rules of Criminal Procedure requires the government to promptly notify a person whose premises have been searched and property seized. Section 301(b) of the Act would amend Rule 41(d) by limiting its reach explicitly to instances when tangible property has been seized. As a result, a person whose intangible property was seized, e.g., officers photographing premises or taking a sample of a substance, would no longer be entitled under the revised rule to receive notice of the executed search warrant.

The Judicial Conference has a longstanding position opposing direct amendment of the Federal Rules of Practice and Procedure outside the Rules Enabling Act rulemaking process. 28 U.S.C. §§ 2071-2077. For this reason, I urge you and your colleagues to decline to support § 301(b) of S. 486.

There is another reason to defer action. During the past 12 months the Advisory Committee on Criminal Rules has been considering at the request of the Department of Justice proposed amendments to Rule 41(d) that would address the same subject covered by § 301(b). At its June 7-8 meeting, the Standing Committee approved the advisory committee's recommendation to publish for comment in August 2000 proposed amendments to Rule 41(d) that would regulate and establish procedures for such covert observations, including in particular appropriate notice provisions. For this additional reason, further action on § 301(b) of the Act might be better deferred to allow the Rules Enabling Act rulemaking process to proceed.

The advisory committee recognized the authority of a law enforcement officer to seek a warrant for the purpose of covertly observing—on a noncontinuous basis—a person or property so long as the person is later provided notice of the search warrant. Federal law enforcement officers have obtained warrants, based on probable cause, to make a covert search—not for the purpose of seizing property but instead to observe and record information. *See United States v. Villegas*, 899 F.2d 1334, 1336 (2d Cir. 1990), *citing Dalia v. United States*, 441 U.S. 238 (1979) and *Katz v. United States*, 389 U.S. 347 (1967).

The advisory committee was particularly concerned, however, that adequate notice provisions be included in any proposed rule amendment regulating covert observations. The committee found compelling the opinion in *United States v. Freitas*, 800 F.2d 1451 (9th Cir. 1986), *citing United States v. New York Telephone Co.*, 434 U.S. 159, 169 (1977), in which the court held that a warrant for a covert search was invalid because it failed to provide any notice to the person whose premises were being covertly observed in violation of the Fourth Amendment. Under the amendments to Rule 41(b) proposed by the advisory committee, the government must provide notice to the person whose property was covertly observed within 7 days of execution. The time for providing the notice may be extended for good cause for a reasonable time, on one or more occasions. I have enclosed a copy of the proposed amendments along with the Committee Note explaining its purpose.

The Standing Committee expects that the public comments stage will provide helpful insights into the proposed rule amendments, which involve cutting-edge issues and particularly complicated areas of the law.. The public comment stage will also provide an opportunity to those persons and organizations who have an important interest in the proposed rule changes to respond to them. At the end of the rulemaking process, this added scrutiny by the public, rules committees, Judicial Conference, and Supreme Court will provide Congress with a much better record on which to base its decision.

The elimination of § 301(b) will not frustrate the purpose of the Methamphetamine Anti-Proliferation Act. But its deletion would further the policies of the longstanding Rules Enabling Act rulemaking process that has been established by agreement of Congress and the courts. I look forward to continuing this dialogue with you on this important matter.

Sincerely,

Anthony J. Scirica
United States Court of Appeals

Enclosure

cc: Members of the House Judiciary Committee

PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO RULE 41 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE

The amendments to Rule 41 will be published along with other proposed rules amendments in August 2000 with a request for comment from the bench, bar, and public.

Rule 41. Search and Seizure

(a) **Scope and Definitions.**

(1) ***Scope.*** This rule does not modify any statute regulating search or seizure, or the issuance and execution of a search warrant in special circumstances.

(2) ***Definitions.*** The following definitions apply under this rule:

(A) "Property" includes documents, books, papers, other tangible objects, and information.

(B) "Daytime" means the hours between 6:00 a.m. and 10:00 p.m. according to local time.

(C) "Federal law enforcement officer" means a government agent (other than an attorney for the government) who is engaged in the enforcement of the criminal laws and is within any category of officers authorized by the Attorney General to request the issuance of a search warrant.

(b) **Authority to Issue a Warrant.** At the request of a federal law enforcement officer or an attorney for the government:

(1) a magistrate judge having authority in the district — or if none is reasonably available, a judge of a state court of record in the district — may issue a warrant to search for and seize, or covertly observe on a noncontinuous basis a person or property located within the district; and

(2) a magistrate judge may issue a warrant for a person or property outside the district if the person or property is located within the district when the warrant is issued but might move outside the district before the warrant is executed.

(c) **Persons or Property Subject to Search or Seizure.** A warrant may be issued for any of

the following:

(1) evidence of the commission of a crime;

(2) contraband, fruits of crime, or other items illegally possessed;

(3) property designed for use, intended for use, or used in committing a crime; or

(4) a person to be arrested or a person who is unlawfully restrained.

(d) **Obtaining a Warrant.**

(1) ***Probable Cause.*** After receiving an affidavit or other information, a magistrate judge or a judge of a state court of record must issue the warrant if there is probable cause to search for and seize, or covertly observe, a person or property under Rule 41(c).

(2) ***Requesting a Warrant in the Presence of a Judge.***

(A) *Warrant on an Affidavit.* When a federal law enforcement officer or an attorney for the government presents an affidavit in support of a warrant, the judge may require the affiant to appear personally and may examine under oath the affiant and any witness the affiant produces.

(B) *Warrant on Sworn Testimony.* The judge may wholly or partially dispense with a written affidavit and base a warrant on sworn testimony if doing so is reasonable under the circumstances.

(C) *Recording Testimony.* Testimony taken in support of a warrant must be recorded by a court reporter or by a suitable recording device, and the judge must file the transcript or recording with the clerk, along with any affidavit.

(3) ***Requesting a Warrant by Telephonic or Other Means.***

(A) *In General.* A magistrate judge may issue a warrant based on information communicated by telephone or other appropriate means, including facsimile transmission.

(B) *Recording Testimony.* Upon learning that an applicant is requesting a warrant, a magistrate judge must:

(i) place under oath the applicant and any person on whose testimony the application is based; and

(ii) make a verbatim record of the conversation with a suitable recording device, if available, or by court reporter, or in writing.

(C) *Certifying Testimony.* The magistrate judge must have any recording or court reporter's notes transcribed, certify the transcription's accuracy, and file a copy of the record and the transcription with the clerk. Any written verbatim record must be signed by the magistrate judge and filed with the clerk.

(D) *Suppression Limited.* Absent a finding of bad faith, evidence obtained from a warrant issued under Rule 41(d)(3)(A) is not subject to suppression on the ground that issuing the warrant in that manner was unreasonable under the circumstances.

(e) Issuing the Warrant.

(1) ***In General.*** The magistrate judge or a judge of a state court of record must issue the warrant to an officer authorized to execute it and deliver a copy to the district clerk.

(2) ***Contents of the Warrant.*** The warrant must identify the person or property to be searched or covertly observed, identify any person or property to be seized, and designate the magistrate judge to whom the warrant must be returned. The warrant must command the officer to:

(A) execute the warrant within a specified time no longer than 10 days;

(B) execute the warrant during the daytime, unless the judge for good cause expressly authorizes execution of the warrant at another time; and

(C) return the warrant to the magistrate judge designated in the warrant.

(3) ***Warrant by Telephonic or Other Means.*** If a magistrate judge decides to issue a warrant under Rule 41(d)(3)(A), the following additional procedures apply:

(A) *Preparing a Proposed Duplicate Original Warrant.* The applicant must prepare a "proposed duplicate original warrant" and must read or otherwise transmit the contents of that document verbatim to the magistrate judge.

(B) *Preparing an Original Warrant.* The magistrate judge must enter the contents of the proposed duplicate original warrant into an original warrant.

(C) *Modifications.* The magistrate judge may direct the applicant to modify the proposed duplicate original warrant. In that case, the judge must also modify the original warrant.

(D) *Signing the Original Warrant and the Duplicate Original Warrant*. Upon determining to issue the warrant, the magistrate judge must immediately sign the original warrant, enter on its face the exact time when it is issued, and direct the applicant to sign the judge's name on the duplicate original warrant.

(f) Executing and Returning the Warrant.

(1) ***Notation of Time.*** The officer executing the warrant must enter on the face of the warrant the exact date and time it is executed.

(2) ***Inventory.*** An officer executing the warrant must also prepare and verify an inventory of any property seized and must do so in the presence of:

(A) another officer, and

(B) the person from whom, or from whose premises, the property was taken, if present; or

(C) if either of these persons is not present, at least one other credible person.

(3) ***Receipt.*** The officer executing the warrant must:

(A) give a copy of the warrant and a receipt for the property taken to the person from whom, or from whose premises, the property was taken; or

(B) leave a copy of the warrant and receipt at the place where the officer took the property.

(4) ***Return.*** The officer executing the warrant must promptly return it—together with a copy of the inventory — to the magistrate judge designated on the warrant. The judge must, on request, give a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant.

(5) ***Covert Observation of a Person or Property.*** If the warrant authorizes a covert observation of a person or property, the government must within 7 days deliver a copy to the person whose property was searched or observed. Upon the government's motion, the court may on one or more occasions for good cause extend the time to deliver the warrant for a reasonable period.

(g) **Motion to Return Property.** A person aggrieved by an unlawful search and seizure of property or by the deprivation of property may move for the property's return. The motion must be filed in the district where the property was seized. The court must receive evidence on any factual issue necessary to decide the motion. If it grants the motion, the court must return the property to the movant, but may impose reasonable conditions to protect access to the property and its use in later proceedings.

(h) **Motion to Suppress.** A defendant may move to suppress evidence in the court where the trial will occur, as Rule 12 provides.

(i) **Forwarding Papers to the Clerk.** The magistrate judge to whom the warrant is returned must attach to the warrant a copy of the return, inventory, and all other related papers and must deliver them to the clerk in the district where the property was seized.

Rule 41
Substantive Change Package
May 10, 2000

COMMITTEE NOTE

The language of Rule 41 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

Rule 41 has been completely reorganized to make it easier to read and apply its key provisions. Additionally, several substantive changes have been made.

First, revised Rule 41 now explicitly includes procedural guidance for conducting covert entries and observations. Federal law enforcement officers have obtained warrants, based upon probable cause, to make a covert search—not for the purpose of seizing property but instead to observe and record information. Those observations may assist officers in confirming information already in the possession of law enforcement officials and in turn may assist in deciding whether, and by what means, to pursue further investigation. For example, agents may seek a warrant to enter the office of suspected conspirators to determine the layout of the office for purposes of seeking additional warrants to establish surveillance points or to determine the number and identity of the participants.

Currently, Rule 41(a) recognizes the possibility that a search may occur of property without any subsequent seizure taking place. But the remainder of the rule addresses only traditional searches where the objective is the seizure of tangible property. Nonetheless, the courts have approved the authority of law enforcement agencies to search for and seize intangible evidence or information. *See, e.g.*, *Silverman v. United States*, 365 U.S. 505 (1961) (conversations overheard by microphone touching heating duct); *Berger v. New York*, 388 U.S. 41 (1967) (wiretap of conversations); *United States v. Knotts*, 460 U.S. 276 (1983) (beeper); *United States v. Karo*, 468 U.S. 705 (1984) (beeper); *United States v. Biasucci*, 786 F.2d 504 (2d Cir.), *cert. denied*, 479 U.S. 827 (1986) (visual information gathered by video camera); *United States v. Torres*, 751 F.2d 875 (7th Cir. 1984) (television surveillance of safe house); *United States v. Taborda*, 635 F.2d 131 (2d Cir. 1980) (warrant required to view private area through telescope).

Although the foregoing cases involved Fourth Amendment intrusions because they involved monitoring activities within the defendant's zone of reasonable expectation of privacy, they did not explicitly address the authority of agents to make covert entries. There is authority for the view, however, that both the Constitution and Rule 41 are broad enough to authorize a "surreptitious entry" warrant—for the purpose of observing tangible and intangible evidence. *United States v. Villegas*, 899 F.2d 1334, 1336 (2d Cir. 1990), *citing*

Dalia v. United States, 441 U.S. 238 (1979) and *Katz v. United States*, 389 U.S. 347 (1967); *United States v. Freitas*, 800 F.2d 1451 (9th Cir. 1986), *citing United States v. New York Telephone Co.*, 434 U.S. 159, 169 (1977) (Rule 41 is not limited to tangible items). *See also United States v. Freitas*, 856 F.2d 1425 (9th Cir. 1988) (on remand, court held that good faith exception to exclusionary rule applied; officers had reasonably relied on search warrant, based on probable cause, to surreptitiously search for information; failure to provide notice under Rule 41(d) was technical error). *See also United States v. Villegas*, *supra*, 899 F.2d at 1334-35 (2d Cir. 1990) (approving search warrant for "sneak and peek" entry of defendant's buildings; court noted that Rule 41 does not define the extent of court's power to issue search warrant). In some respects, the covert entry search for a noncontinous observation is less intrusive than other types of conventional intrusions. As the court in *United States v. Villegas* observed:

> [A covert entry search] is less intrusive than a conventional search with physical seizure because the latter deprives the owner not only of privacy but also of the use of his property. It is less intrusive than a wiretap or video camera surveillance because the [covert entry] physical search is of relatively short duration,...and produces information as of a given moment, whereas the electronic surveillance is ongoing and indiscriminate, gathering in any activities within its mechanical focus. Thus, several of the limitations on wiretap or electronic surveillance, such as duration and minimization, would be superfluous in the context [of a covert entry search].

The Committee agrees that Rule 41 does not define the limits of the Fourth Amendment, and is cognizant that the Supreme Court has upheld the validity of covert entries with delayed notification, *see, e.g., Dalia v. United States*, 441 U.S. 238, 247-248 (1979) ("The Fourth Amendment does not prohibit per se covert entry performed for the purposes of installing otherwise legal electronic bugging equipment"); *United States v. Donovan*, 429 U.S. 428, 429 n. 19 (1977). The Committee also considered the argument that it would be premature to amend Rule 41 in order to codify the views of only two circuits that have expressly addressed the type of covert search addressed in the amendment, and that it would be better to await further caselaw developments. Nonetheless, the Committee believed that on balance, it would be beneficial to address the procedures (in particular the notice provisions) for covert entry searches in the Rule itself. Accordingly, revised Rule 41(b) recognizes the authority of officers to seek a warrant for the purpose of covertly observing—on a noncontinous basis—a person or property. These types of intrusions are to be distinguished from other continuous monitoring or observations that would be governed by statutory provisions or caselaw. *See* Title III, Omnibus Crime Control and Safe Streets Act of 1968, *as amended* by Title I of the 1968 Electronic Communications Privacy Act, 18 U.S.C. §§ 2510-2520; *United States v. Biasucci*, *supra* (use of video camera); *United States v. Torres*, *supra* (television surveillance).

Under revised Rule 41(e)(2), the warrant must describe the person or property to be covertly observed.

Revised Rule 41(f)(5) explicitly requires that if a covert entry search warrant has been issued, the government must provide notice to the person whose property was searched within 7 days of the execution. The time for providing notice may be extended for good cause for a reasonable time, on one or more occasions. This notice requirement parallels the notice requirement for the traditional search but makes allowance for the fact that the functions of covert entry searches would be frustrated by prior or contemporaneous notice of the entry. *See, e.g., United States Villegas, supra; United States v. Freitas, supra.*.

The second substantive change is in revised Rule 41(b)(1). That provision requires law enforcement personnel to first attempt to obtain a warrant from a federal judicial officer. If none is reasonably available, they may seek a warrant from a state judge. This preference parallels similar requirements in Rules 3, 4, and Rule 5. The Committee understands that this change may have a dramatic impact in some districts, which experience a heavy criminal caseload and rely routinely on state judges for assistance. That practice seems to be the exception rather than the general rule, however. On balance, it is important to state a clear preference that in the normal situation federal judicial authorities should be involved in pretrial processing of federal prosecutions. The amendment is not intended to create any new ground for contesting the validity of a search warrant or seeking to suppress evidence on the ground that it was issued by the "wrong" judge.

Finally, two minor changes have been made to Rule 41(e), which governs the procedures for issuing warrants under the rule. First, Rule 41(e)(1) requires that after issuing a warrant, the magistrate judge or state judicial officer must deliver a copy of the warrant to the district clerk. Further, under Rule 41(e)(3), the warrant must designate the magistrate judge to whom the warrant must be returned. The Committee believed that these changes would provide for more efficient processing of warrants, particularly in those instances where a state court judge has issued the warrant.

REPORTERS' NOTES

In publishing the "style" changes to the Federal Rules of Criminal Procedure, the Committee decided to publish separately any rule that includes what it considered at least one major substantive change. The purpose for this separate publication is to highlight for the bench and the bar any proposed amendments that the Committee believes will result in significant changes in current practice. Rule 41 is one of those rules. This version of Rule 41 includes a significant amendment concerning the authority of a court to approve search warrants for covert entries for the purpose of making observations. Another version of Rule 41, which does not include this provision, is being published simultaneously in a separate pamphlet.

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

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MILTON I. SHADUR
EVIDENCE RULES

July 6, 2000

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

Dear Mr. Chairman:

I write to express the concern of the Judicial Conference's Committee on Rules of Practice and Procedure regarding reported attempts to attach to bills under your committee's consideration proposed amendments to Rule 26(c) of the Federal Rules of Civil Procedure dealing with protective orders. The most recent version of the proposed amendment is contained in the Sunshine in Litigation Act of 1999 (S. 957), which was introduced by Senator Herb Kohl on May 4, 1999. It would require a judge to make particularized findings of fact that information subject to a discovery request is not relevant to the protection of public health or safety before approving any protective order.

The Advisory Committee on Civil Rules has carefully studied various proposals addressing concerns over abuses involving protective orders, including earlier versions contained in H.R. 2017 (102d Congress) and S. 1404 (103d Congress). In 1995, the advisory committee crafted a proposal that it believed would meet the concerns of the competing interests, but the proposal was returned by the Judicial Conference for further study. The advisory committee later completed a study of the general scope and nature of discovery to identify and address its impact on litigation cost and delay. Protective orders were examined as part of the study. On March 23, 1998, the advisory committee wrote to the chairman of the House Judiciary Committee describing its comprehensive study and opposing attachment of a similar protective-order provision to a bill under that committee's consideration.

The advisory committee is convinced that the reasons for opposing legislation that would require a judge to make particularized findings of fact regarding discovery materials remain compelling. No change along these lines is appropriate, because the present rule already addresses in a meaningful fashion the concerns relating to public safety while at the same time balancing the competing interests of the parties to the suit. The following discussion sets out the history and reasons for the committee's position.

Judiciary's Response to Concerns Regarding Protective Orders

The Advisory Committee on Civil Rules began serious study of protective order practices in November 1992 in response to pending legislation. The committee sought to inform itself whether the problems suggested by the legislation existed, and to bring the strengths of the Rules Enabling Act

process to bear on the problems that might be found. It also asked the Federal Judicial Center to undertake a study of protective order practice to shed light on the frequency of protective orders, the kinds of litigation in which protective orders were entered, the frequency of stipulated protective orders, and the kinds of information protected. It considered lengthy law review articles and the recommendations of the Federal Courts Study Committee.

These studies all suggested that there is no need to make it more difficult to issue discovery protective orders. The studies generally showed:

- that there is no evidence that protective orders in fact create any significant problem in concealing information about public hazards or in impeding efficient sharing of discovery information;

- that much information can be gathered from parties and nonparties during discovery that no one would have a right to learn outside the needs of a particular lawsuit;

- that discovery would become more burdensome and costly if the parties cannot reasonably rely on protective orders; and

- that administration of a rule creating broader rights of public access would impose great burdens on the court system.

The advisory committee also kept in mind the wide variety of interests that are involved with protective orders. Although it is common to focus on the often legitimate needs to protect trade-secret and other confidential commercial information, protective orders often protect intensely personal privacy interests. The Federal Judicial Center study, for example, found that the most frequent use of protective orders occurs in civil rights and employment discrimination litigation. The privacy interests protected often are those of nonparties, who have had no voice in the decision whether to initiate litigation and little or no interest in the outcome. An added concern is that discovery has been designed from the very beginning to function without need of judicial supervision. Courts are not equipped to supervise the details of discovery. Voluntary exchanges of information remain indispensable. It would be counterproductive and expensive to attempt to add hurdles that impede the efficient entry of protective orders.

The advisory committee found little reason to believe that protective orders prevent desirable sharing of information in related litigation or defeat public access to information about unsafe products. Federal courts are sensitive to these issues and respond to them effectively. Perhaps more important, the advisory committee concluded that there is a better way to ensure that all courts follow present practice. Rule 26(c) can expressly provide for modification or dissolution of protective orders, including provision for modification or dissolution on motion by a nonparty.

Proposed amendments to Rule 26(c) were published for public comment in 1993. Substantial comments were made. The draft was revised in light of those comments and was published in 1995 for a second round of comment. Extensive comments were received. The advisory committee reviewed

all the comments and the testimony at the public hearings on proposed Rule 26(c). Comments supporting the proposal generally showed agreement that it would clarify and confirm the general and better current practice. Comments opposing the proposal, including written opposition from Senator Kohl, indicated concern about explicit recognition of the widespread use of stipulated protective orders and also continued to advocate a broad public "right to know." Many of the opposing comments suggested that it would be better to leave Rule 26(c) unchanged. Ultimately, the proposed amendments to Rule 26(c) were returned to the advisory committee by the Judicial Conference for further study.

The advisory committee began consideration of the scope of discovery at its October 1996 meeting. A Discovery Subcommittee, chaired by Judge David F. Levi, was formed. The subcommittee met with a large group of lawyers drawn from all branches of the profession and convened a national symposium, which was held in September at the Boston College School of Law. It reviewed suggestions from the major national lawyer associations. The entire advisory committee also participated in the American Bar Association's conference on the RAND report on the Civil Justice Reform Act.

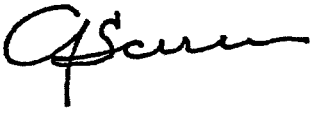
After this exhaustive study, the advisory committee continues to strongly oppose legislation that would amend Rule 26(c) to require a judge to make particularized findings of fact for every protective order request.

CONCLUSIONS

The advisory committee has determined that the instances when protective orders impede access to information that affects the public health or safety are not widespread. A number of experts on the subject have examined the commonly cited illustrations and have concluded that information sufficient to protect public health and safety has always been available from other sources. The advisory committee has studied this matter carefully and concluded that no change to the present protective-order practice is warranted. But it is important to approach whatever perceived problem there may be with care, lest discovery be made even more complex and costly. Attempts to increase access to discovery information may indeed backfire, as parties become less and less willing to exchange information without prolonged discovery litigation. It is not necessary to transform a private dispute-resolution mechanism into a public information mechanism, and doing so would have profound effects on private litigation.

For these reasons, I urge you to decline to support the proposed amendment to Rule 26(c) in any pending legislation being considered by your committee. Thank you for your consideration.

Sincerely yours,



Anthony J. Scirica
United States Court of Appeals

cc: Members of the Senate Judiciary Committee

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) Pub. L. No 106-37.

- 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; Text inserted in H. R. 775 as passed Senate (CR S6998) on 6/15/99
- Provisions affecting rules: federalizing Y2K class actions and heightened pleading requirements

S. 248 Judicial Improvement Act of 1999 (See S. 2915 — Pub. Law No. 106-518)

- 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 Administrative 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 (3 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 (6 co-sponsors)
- Date Introduced: February 3, 1999
- Status: Referred to the Committee on Judiciary 5/4/99 Subcommittee on Administrative Oversight and the Courts; hearings held on May 4, 1999; Letter sent by Director to Senate Judiciary Committee on October 7,1999
- Committee on the Judiciary. Ordered to be reported without amendment favorably on 6/27/00. Report issued on September 28, 2000 (Senate Rpt. No. 106-420)
- 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) (Pub. L. No. 106-37)

- 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 Y2K class actions

S. 625 *Bankruptcy Reform Act of 1999* (See also H.R. 833)

- 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, 1999; Committee on Judiciary reported to Senate with amendments. (Report No. 106-49 May 11, 1999.) Placed on Senate Legislative Calendar; 11/19/99 Unanimous consent agreement in Senate to vote on cloture motion on Jan. 25 (CR S15061); 2/2/2000 Senate passed companion measure H.R. 833 in lieu of this measure by Yea-Nay Vote. 83 - 14. Letter sent from Director to Grassley
- 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.~~ Deleted from the passed version
  - Sections 102, 221, 319, 421, 433, 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: September 6, 2000, hearings held before subcommittee.
- 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 (14 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 (28 co-sponsors)
- Date Introduced: March 25, 1999
- Status: Referred to the Committee on Judiciary; 10/5/99 hearing held by Sub. Administrative Oversight and the Courts.
- Provisions affecting rules:
  - Section 301 requires the board of the Asbestos Resolution Corporation to establish procedures for ADR;
  - Section 307(j) creates a penalty for an inadequate offer; and
  - Section 402 bars class actions in asbestos cases without the consent of each defendant, and governs removal.

S. 855 Professional Standards for Government Attorneys Act of 1999

- Introduced by: Leahy (0 co-sponsors)
- Date Introduced: April 21, 1999
- Status: Referred to the Committee on Judiciary. On September 27, 2000, an amendment substituted.
- Provisions affecting rules:
  - Requires the Judicial Conference to submit to the Chief Justice a report that includes recommendations with respect to amending the Federal Rules of Civil and Criminal Procedure to provide for such a uniform national rules governing conduct of government attorneys. Directs the Judicial Conference, in developing recommendations, to consider: (1) the needs and circumstances of multi-forum

and multi-jurisdictional litigation; (2) the special needs and interests of the United States in investigating and prosecuting violations of Federal criminal and civil law; and (3) practices that are approved under Federal statutory or case law or that are otherwise consistent with traditional Federal law enforcement techniques.

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. May 18, 1999 partially incorporated into S. 254
- 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 videoconferencing of several types of proceedings in 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 (10 co-sponsors)
- Date Introduced: April 30, 1999; amendment introduced 4/13/00 (but not acted on)
- Status: Referred to the Committee on Judiciary. An amendment in the nature of a substitute introduced on April 13, 2000.
- 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 materially 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, 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

S. 1360 Secret Service Protection Privilege Act of 1999

- Introduced by: Leahy (0 co-sponsors)
- Date Introduced: July 13, 1999
- Status: Referred to the Committee on Judiciary.
- Provisions affecting rules:
  - Section 3 amends title 18 to establish a secret service privilege (EV501)

S. 1437 Thomas Jefferson Researcher's Privilege Act of 1999

- Introduced by: Moynihan (0 co-sponsors)
- Date Introduced: July 26, 1999
- Status: Referred to the Committee on Judiciary.
- Provisions affecting rules:
  - Section 3 would amend CV45 to allow a court to quash a subpoena requiring disclosure of information relating to study or research of academic, commercial, scientific, or technical issues
  - Section 4 adds EV502 which would create a privilege for information relating to study or research of academic, commercial, scientific, or technical issues

S. 1700 "Hunt for the Truth Act" (H.R.3233 Identical bill; and S. 2073)

- Introduced by: Durbin (1 co-sponsors)
- Date Introduced: October 6, 1999
- Status: Referred to the Committee on Judiciary.
- Provisions affecting rules:

- Section 2 would add new criminal Rule 33.1 allowing a judge upon motion of the defendant to order post-conviction forensic DNA testing if the technology for that type of testing was not available when the defendant was convicted.

S. 2073 Innocence Protection Act of 2000 **(see H.R 3233 and 4167 and S. 1700)**

- Introduced by: Leahy (5 co-sponsors)
- Date Introduced: February 10, 2000
- Status: Referred to the Committee on Judiciary.
- Provisions affecting rules:
  - Section 202 would amend habeas provisions in 2254
  - Possible Criminal Rule 33 implications

HOUSE BILLS

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

- Introduced by: Gallegly (27 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 (16 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) Public Law: 106-37 (07/20/99)

- 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; Signed by President on 7/20/99
- Provisions affecting rules:
  - Section 103 establishes special ("fraud-like") pleading requirements
  - Section 404 establishes federal jurisdiction of Y2K class actions over $1 million

H.R. 833 Bankruptcy Reform Act of 1999 (See S. 625)

- 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; Read twice in the Senate 5/12/99; letter to conferees sent 3/17/00)
- 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. 967 Multiparty, Multiforum Jurisdiction Act of 1999 (See H.R. 2112)

- Introduced by: Sensenbrenner (1 co-sponsor)
- Date Introduced: March 3,1999
- Status: Referred to the Committee on Judiciary; Mar 16, 1999: Referred to the Subcommittee on Courts and Intellectual Property.
- Provisions affecting rules:
  - Minimal diversity for class actions arising from single-event mass tort

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

- Introduced by: Chabot (43 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; Judicial Conference opposes this proposal.
- 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. 1283 Fairness in Asbestos Compensation Act of 1999 (See S. 758)

- Introduced by: Hyde (75 co-sponsors)
- Date Introduced: March 25, 1999
- Status: 3/25/99 Referred to the House Committee on the Judiciary; 3/9/00 Mark-up held; 3/16/00 ordered reported. House Report No. 106-782 on July 24, 2000.
- Provisions affecting rules:
  - Section 205 eliminates consolidation of cases, including class action filings (court has discretion to consolidate certain cases)

H.R. 1658 Civil Asset Forfeiture Reform Act **(Public Law No: 106-185.)**

- Introduced by: Hyde (59 co-sponsors)
- Date Introduced: May 4, 1999
- Status: 5/4/99 Referred to the House Committee on the Judiciary; Measure passed House on June 24, 1999, received in the Senate June 28, 1999; Passed Senate with an amendment by Unanimous Consent on 3/27/2000;
- Provisions affecting rules
  - Section 2 adds a new section 983(a)(4) to title 18, U.S.C that may conflict with the recently approved amendments to Rule C(4) of the *Supplemental Rules for Certain Admiralty and Maritime Cases*

H.R. 1752 Federal Courts Improvement Act of 1999 **(Public Law No. 106-518)**

- Introduced by: Coble (1 co-sponsors)
- Date Introduced: May, 11, 1999
- Status: 09/09/99 Reported to House from the Committee on the Judiciary with amendment. Signed on November 13, 2000.
- Referred to Senate Committee on May 23, 2000
- Provisions affecting rules
  - Sec. 208 Provides for the sunset of provisions requiring a civil justice expense and delay reduction plan.
  - Sec. 210 would allow 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

H.R. 1852 Multidistrict Trial Jurisdiction Act of 1999 (See H.R. 2112)

- Introduced by: Sensenbrenner (2 co-sponsors)
- Date Introduced: May 18, 1999
- Status: 5/19/99 Referred to the Subcommittee on Courts and Intellectual Property. 5/20/99 Subcommittee Consideration and Mark-up Session Held; 5/20/99 Forwarded by Subcommittee to Full Committee by Voice Vote; Ordered to be reported by voice vote July 27, 1999.
  - Addresses Lexecon issue.

H.R. 1875 Interstate Class Action Jurisdiction Act of 1999

- Introduced by: Goodlatte (37 co-sponsor)
- Date Introduced: May 19, 1999
- Status: Referred to the Committee on Judiciary; Hearings Held on July 21, 1999, Mark-up held July 27, 1999 and August 3, 1999; Ordered to be Reported (Amended) by the Yeas and Nays: 15 - 12.; letter from Executive Committee generally stating Judiciary's opposition on July 26, 1999; more detailed letter followed on August 23, 1999; 09/23/99 Measure passed House, amended, (222-207) . 11/19/99 Referred to Senate Committee on the Judiciary.
- Provisions affecting rules: None directly; general class action considerations; extends minimal diversity to all class actions

H.R. 2112 Multidistrict; Multiparty, Multiforum Trial Jurisdiction Act of 1999 (See H.R. 1852)

- Introduced by: Sensenbrenner (2 co-sponsors)
- Date Introduced: June 9, 1999
- Status: 9/13/99 Measure passed House; 9/14/99 referred to the Senate Committee on Judiciary; 10/27/99 Measure passed and modified by Senate to exclude "single-event" mass tort choice of law provisions; 11/16/99 Conference scheduled in House
- Provisions affecting rules
    - Addresses Lexecon issue and choice of law issues for single-event mass torts.

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.* (See also H.J. Res 64)

- 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; 9/30/99 passed House; 10/4/99 placed on Senate Legislative Calendar; 2/10/00 Judge Sullivan testified before the House Subcommittee on the Constitution urging a statutory approach
- Provisions affecting rules
- Calls for a Constitutional amendment enumerating victim's rights.

Item 3B

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

November 27, 2000

MEMORANDUM TO THE STANDING RULES COMMITTEE

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

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

Internet

The Judicial Conference has prescribed procedures governing the rulemaking process, which require that rules-related materials be made available to the public. Moreover, the Standing Rules Committee and five advisory 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."

About one year ago, we established the Federal Rulemaking web site (http://www.uscourts.gov/rules) on the judiciary's Internet site. The web site contains proposed amendments to the rules, pending rules before the Judicial Conference, Supreme Court, and Congress, committee meeting minutes, committee membership lists, a schedule of upcoming meetings, and various rules-related brochures and pamphlets. We plan to add committee agenda materials, Federal Judicial Center reports and surveys, and reports on major projects, including class actions, mass tort, and attorney conduct rules. Opening the Internet Rules web site completes the first phase of a long-range plan to establish an Internet-based communications model, which will, among other things, allow us to deal directly with the committees' reporters and their work product.

We are redesigning the face of the Federal Rulemaking web site. Several models have been developed. The committees' reporters will be asked to review and comment on them.

Electronic Comments

We are receiving comments on the proposed rules amendments via the Internet on the Federal Rulemaking web site. The comments are circulated electronically to the pertinent committee members. As of November 22, we have received 22 comment letters, four of them electronically.

Local Rules on the Internet

At its September 2000 session, the Judicial Conference approved the recommendation of the Committee on Court Administration and Case Management to encourage courts to post their local rules on the Internet by July 1, 2001. A memorandum advising the courts of the Conference's actions was sent on November 13, 2000. We are in the process of establishing links from the Federal Rulemaking web site to the web sites of the courts that have posted their local rules.

Committee and Subcommittee Meetings

For the six-month period from June 7-8, 2000, to January 4-5, 2001, the office staffed six meetings, including one Standing Committee meeting, three advisory committee meetings, one subcommittee meeting, and one special conference. The office has arranged and participated in numerous conference calls involving committee chairs, reporters, or subcommittee members.

The office has made logistical arrangements for four public hearings on the proposed rules amendments, a conference on attorney conduct rules, and several subcommittee meetings scheduled for January and February 2001.

Automation Project (FRED/Documentum)

After three years of testing a new document management software as the agency's prototype (FRED), the agency adopted a different software as its agency-wide document management system — Documentum. The new software was purchased, customized, and installed on our computers beginning in early 1999. Again our office is serving as a prototype for the agency-wide system.

We have encountered serious and persistent problems in operating the new software, which have delayed and disrupted office operations. An in-house study has identified technical defects in the software. The study also suggests that the initial design of the data-inputting screens was flawed; it is too complicated and cumbersome. Many modifications to the screen are necessary to transform it into a user-friendly system. An outside contractor has been hired to conduct a comprehensive review of all technical problems with the

software and to redesign the data-inputting screens. Meanwhile the office continues to struggle with defective software. We must constantly cross-check or repeat our data inputting, which causes substantial delay and frustration.

We are taking these extraordinary measures with Documentum because it holds great promise for an automated system that will improve our overall technical support and, perhaps, finally provide direct access to documents on the system to the 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 designs; enhanced indexing and searching capabilities; and possible remote access to our database. The manual system is being maintained while we complete testing of the automated system.

Tracking Rule Amendments

The docket sheets of all suggested amendments for 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 each committee meeting, and they are included in each agenda book. The time chart showing the status of all rules changes has been updated. It will be distributed at the meeting.

The office continues to research our historical records for information on earlier committee action on every new proposed amendment. The microfiche collection of rules-related documents was searched for prior committee action on each rule change under consideration by the advisory committees at their respective fall meetings. Pertinent documents were forwarded to the appropriate reporter for consideration.

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 . . . [t]hereafter the records may be transferred to a government record center. . . ."

All rules-related documents from 1935 through 1993 have been entered on microfiche and indexed. The documents for 1994, 1995, and 1996 have been catalogued and shipped to the national record center. The process for documents from 1997 will be completed shortly. The microfiche collection continues to prove useful to us and the public in researching prior committee positions.

Manual Tracking

Our manual system of tracking comments continues to work well. From August 1 to November 22, the office received, acknowledged, forwarded and followed-up on 22 comments and many suggestions. Each comment was numbered consecutively, which enabled committee members to determine instantly whether they had received all of them. We will continue to distribute the comments electronically using Adobe PDF. We found that that process allowed us to distribute the comments much faster and more cheaply.

State Bar Points-of-Contact

In August 1994, the president of each state bar association was requested to designate a point-of-contact for the rules committee to solicit and coordinate that state bar's comments on the proposed amendments. For the first time since we started this project, the Standing-Committee outreach to the organized bar has resulted in all state bars designating a point-of-contact.

The points-of-contact list was again updated this year in time to include the new names in *The Request for Comment* pamphlet on proposed amendments published in August 2000. Several state bars updated their designated point-of-contact. The process is being repeated every year to ensure that we have an accurate and up-to-date list. Hopefully, the points-of-contact will continue to facilitate submission of comments from these organizations.

Mailing List

The Administrative Office has purchased another automated mailing list system. It has replaced the old system and is fully operational. It has substantially reduced the time involved in maintaining and expanding the mailing list. A contractor has been hired to maintain all mailing lists for the Administrative Office. We plan to add additional names of attorneys and law professors to our regular mailing list.

Miscellaneous

On November 1, 2000, we delivered to the Supreme Court the proposed amendments to the Bankruptcy and Civil Rules, including the abrogation of the Copyright Rules, approved by the Judicial Conference in September 2000. We reformatted the submission from "WordPerfect" to "Word" to allow the Court to post the amendments on its Internet web site.

In October 2000, the Civil Rules Subcommittee on Discovery held a conference on issues arising from discovery of electronic information. Representatives from organizations, including the American Bar Association, various bar organizations, and the Department of Justice discussed the scope of problems rising from the discovery of computer-generated information.

John K. Rabiej

Agenda Item IV
Committee on Rules of
Practice and Procedure
January 4-5, 2001
Information Item

Federal Judicial Center Update

For each Rules Committee meeting, the Federal Judicial Center provides an update on projects related to Committee interests. The educational programs listed below make up a small number of the seminars and in-court programs offered in-person or electronically. The research projects described below are a few of the projects undertaken by the Center, many in support of Judicial Conference committees.

I. The Federal Judicial Television Network

As of October 2000, the Administrative Office has installed downlink antennas in 279 court locations, and antennas have been ordered for several more locations to complete the network. Center staff manage the FJTN and assist both Center and AO staff to produce the FJTN broadcasts. The Center's program schedule for the first half of 2001 will feature a variety of original programs for judges and court staff.

Programs for Judges. Recent Center programs for judges included handling federal capital cases, the annual review of the Supreme Court's term, and an orientation for new law clerks (with segments on ethics, writing, and, new this year, federal jurisdiction). Programs scheduled for the coming months include a discussion of sentencing issues raised by the Supreme Court's *Apprendi v. New Jersey* decision and a six-part series on science in the courtroom that will include discussions of *Markman* and *Daubert* hearings. In addition, if major bankruptcy legislation is enacted, the Center will broadcast a program on the new legislation.

Programs for Court Staff. A sampling of our schedule of original broadcasts for court staff during the first half of calendar 2001 includes: programs for clerks on their role as public information officers (with the Administrative Office); multi-part presentations for managers on leadership and writing skills; and a broadcast for all court staff on structured on-the-job training. Probation and pretrial services officers will see: additions to the series on substance abuse and the series on guidelines and sentencing; a broadcast on working with mentally disordered offenders; and a new special needs offenders program on white collar crime. Several new editions of the Center's *Perspectives on Probation and Pretrial Services* and *Court to Court* educational television magazines are also scheduled.

II. Research Projects and Activities

The following are examples of active Center research projects that may be of interest to members of the committee:

• **Bankruptcy Appeals**. Based in part on the discussions by the Bankruptcy Committee, we are going forward with some follow-up research, in particular, a survey of attorneys who have handled a bankruptcy appeal in the district court, the Bankruptcy Appellate Panel (BAP), or the court of appeals. This work will build on information about the state of bankruptcy appeals found in the earlier report, and will expand our knowledge of the performance of the BAPs (why people opt in or out, etc.). We have devised the sampling strategy and are currently developing a database containing the names and addresses of attorneys to be surveyed.

• **Civil Litigation Management Manual**. At the request of the Court Administration and Case Management Committee, the Center and the Administrative Office have been developing a civil litigation management manual. The manual is one of the few requirements of the Civil Justice Reform Act that did not sunset in 1997. FJC and AO staff have worked with an advisory group of seven district and magistrate judges and two liaison judges from CACM. The full draft of the manual has been approved by the advisory group and was sent to the full Court Administration and Case Management Committee on September 30 for review at the Committee's December meeting. The Committee's recommendations regarding the manual will be considered by the Judicial Conference at its March 2001 meeting.

• **Design for Possible New District Court Time Study.** As part of its responsibility to monitor and consider matters relating to the case weights used for district courts, the Statistics Subcommittee of the Committee on Judicial Resources asked the Center to prepare a design for updating the current case weights. An advisory group of district court judges has met with the project staff to review aspects of the proposed study design.

• **Discovery of Evidence in Electronic Form.** The Discovery Subcommittee of the Civil Rules Advisory Committee asked the FJC to conduct a survey of United States Magistrate Judges about computer-based discovery in civil litigation. During the summer of 2000, Center staff contacted approximately 430 judges, approximately 360 of whom responded via either the World Wide Web or fax. The survey collected quantitative and qualitative data from the judges and received nominations of some 20 cases for further in-depth study. The case studies are expected to serve as the core of our research on behalf of the Discovery Subcommittee, which is considering whether amendments to the discovery provisions of the Federal Rules of Civil Procedure are necessary or desirable. In addition, this summer Center staff supported the Subcommittee's efforts to organize a "mini-conference" on computer-based discovery, which was held on October 27 at the Brooklyn Law School.

• **Handbook on Courtroom Technology**. We are working with the National Institute for Trial Advocacy to develop a handbook on courtroom technology. This handbook, designed primarily for judges, will explain the principal aspects of courtroom technology and will set out case-management options that judges might consider when confronted by requests from lawyers in particular cases. In addition to discussing various forms of digital evidence (e.g., digital photographs, videotapes, videoconferencing, and computer animations), the handbook will also cover case-management issues raised by electronic evidence presentation systems such as evidence cameras and real-time court reporting. We have established a group of judges and attorneys to advise us in developing the handbook, and on related projects. The judges represent the district, appeals, and bankruptcy courts and have varying degrees of experience with technology. They include members of Judicial Conference committees with jurisdiction related to the use of courtroom technology (Committee on Automation and Technology, Committee on Court Administration and Case Management, and the Standing Committee on Rules of Practice and Procedure).

• **National Sentencing Policy Institute**. In September, the Center under the auspices of the Criminal Law Committee and in cooperation with the Federal Bureau of Prisons, the U.S. Sentencing Commission and the Federal Corrections and Supervision Division of the Administrative Office, conducted an institute at Phoenix, Arizona for nearly 200 participants.

• **Notices in Class Action Litigation**. The Class Action Subcommittee of the Advisory Civil Rules Committee asked the Center to develop model notice forms for consumer, securities, employment, personal injury, and property class actions. The subcommittee's request was an outgrowth of previous Center work on class actions for the Civil Rules Committee.

• **Visiting Judges**. The Center will soon publish a new handbook on effective use of visiting judges. The handbook, which developed out of work the Center did for the Judicial Officers Resources Working Group, includes information for chief judges about how to find a visiting judge and for other judges about how to become a visiting judge.

• **Research Reports Published Since Last Report or In Press**:

- Alternative Structures for Bankruptcy Appeals
- Case Management Procedures in the Federal Courts of Appeals
- Case Studies of Mass Tort Limited Fund Class Action Settlement and Bankruptcy Reorganization by Professor Elizabeth Gibson (in press)
- Judicial Guide to Managing Cases In ADR (in press)
- Reference Manual on Scientific Evidence 2nd Edition
- Special Masters' Incidence and Activity: Report to the Judicial Conference's Advisory Committee on Civil Rules and Its Subcommittee on Special Masters

- Visiting Judges in the Federal District Courts: A Guide for Judges & Court Personnel (in press)

III. Other Items of Interest

• **Conference for Chief District Judges.** The Center will conduct its annual Conference for Chief District Judges April 18-20, 2001. Topics will include leadership and management issues.

• **Executive Institute.** On September 24-26, 2001, the Center will conduct an Executive Institute at Gettysburg, PA. The program, for chief judges and other judges in leadership positions, will address leadership in a changing environment where the bases of authority are not always clear.

Item 5

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

DATE: November 30, 2000

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

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

The Advisory Committee on Appellate Rules did not meet this fall. Several proposed amendments to the Federal Rules of Appellate Procedure were published for comment in August, and the items on our study agenda unrelated to the proposed amendments were not sufficient in number or urgency to justify a fall meeting.

The Advisory Committee will meet again on April 11 and 12 in New Orleans. At that meeting, we will review comments on the proposed amendments that were published in August and turn to several unrelated items. Those items are listed on study agenda, which is attached.

Advisory Committee on Appellate Rules
Table of Agenda Items — Revised December 2000

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 09/97 Draft approved 10/98 for submission to Standing Committee in 01/00 Approved for publication by Standing Committee 01/00 Published for comment 08/00
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 09/97 Discussed and retained on agenda 04/98 Draft approved 10/98 for submission to Standing Committee in 01/00 Approved for publication by Standing Committee 01/00 Published for comment 08/00
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 09/97 Draft approved 10/98 for submission to Standing Committee in 01/00 Approved for publication by Standing Committee 01/00 Published for comment 08/00
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 Ass'n	Awaiting initial discussion Retained on agenda with medium priority 09/97 Discussed and retained on agenda 04/98 Draft approved 10/98 for submission to Standing Committee in 01/00 Approved for publication by Standing Committee 01/00 Published for comment 08/00
97-05	Amend FRAP 24(a)(2) in light of Prison Litigation Reform Act.	Advisory Committee	Awaiting initial discussion Retained on agenda with high priority 09/97 Draft approved 04/98 for submission to Standing Committee in 01/00 Approved for publication by Standing Committee 01/00 Published for comment 08/00

FRAP Item	Proposal	Source	Current Status
97-07	Amend FRAP 28(j) to allow brief explanation.	Jack Goodman, Esq.	Awaiting initial discussion Retained on agenda with low priority 09/97 Draft approved 04/98 for submission to Standing Committee in 01/00 Approved for publication by Standing Committee 01/00 Published for comment 08/00
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 09/97 Draft approved 04/98 for submission to Standing Committee in 01/00 Approved for publication by Standing Committee 01/00 Published for comment 08/00
97-12	Amend FRAP 44 to apply to constitutional challenges to state laws.	Advisory Committee	Awaiting initial discussion Retained on agenda with low priority 09/97 Draft approved 04/98 for submission to Standing Committee in 01/00 Approved for publication by Standing Committee 01/00 Published for comment 08/00
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 09/97 Discussed and retained on agenda 04/98 Discussed and retained on agenda 10/99 Discussed and retained on agenda 04/00
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 09/97 Draft approved 10/98 for submission to Standing Committee in 01/00 Approved for publication by Standing Committee 01/00 Published for comment 08/00
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 09/97 for submission to Standing Committee in 01/00 Approved for publication by Standing Committee 01/00 Published for comment 08/00

FRAP Item	Proposal	Source	Current Status
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 09/97 Draft approved 04/98 for submission to Standing Committee in 01/00 Approved for publication by Standing Committee 01/00 Published for comment 08/00
97-31	Amend FRAP 47(a)(1) to require that all new and amended local rules take effect on December 1. (Related to No. 98-01.)	Luther T. Munford, Esq.	Awaiting initial discussion Retained on agenda with medium priority 09/97 Draft approved 04/98 for submission to Standing Committee in 01/00 04/98 draft withdrawn; discussed further and retained on agenda 10/99; will await action by other Advisory Committees on similar proposals
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 04/98 for submission to Standing Committee in 01/00 Approved for publication by Standing Committee 01/00 Published for comment 08/00
98-01	Amend FRAP 47(a) to provide that local rules do not become effective until filed with the Administrative Office. (Related to No. 97-31.)	Standing Committee	Awaiting initial discussion Draft approved 04/98 for submission to Standing Committee in 01/00 04/98 draft withdrawn; discussed further and retained on agenda 10/99; will await action by other Advisory Committees on similar proposals
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 04/98 Draft approved 10/98 for submission to Standing Committee in 01/00 10/98 draft withdrawn; discussed further and retained on agenda 04/99 Revised draft approved 10/99 for submission to Standing Committee in 01/00 Standing Committee deferred action 01/00 Further revised draft approved 04/00 for submission to Standing Committee in 06/00 Approved for publication by Standing Committee 06/00 Published for comment 08/00

FRAP Item	Proposal	Source	Current Status
98-06	Amend FRAP 4(b)(5) 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 Draft approved 10/99 for submission to Standing Committee in 01/00 Approved for publication by Standing Committee 01/00 Published for comment 08/00
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 Draft approved 10/99 for submission to Standing Committee in 01/00 Approved for publication by Standing Committee 01/00 Revised draft approved 04/00 for submission to Standing Committee in 06/00 Approved for publication by Standing Committee 06/00 Published for comment 08/00
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 Approved for publication by Standing Committee 01/00 Published for comment 08/00
99-01	Amend FRAP 24(a)(3) to address potential conflicts with Prison Litigation Reform Act.	Hon. Will Garwood (CA5)	Awaiting initial discussion Discussed and retained on agenda 04/99 Draft approved 10/99 for submission to Standing Committee in 01/00 Approved for publication by Standing Committee 01/00 Published for comment 08/00
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 Revised draft approved 10/99 for submission to Standing Committee in 01/00 Approved for publication by Standing Committee 01/00 Published for comment 08/00

FRAP Item	Proposal	Source	Current Status
99-03	Amend unspecified rules to permit electronic filing and service.	Subcommittee on Technology	Awaiting initial discussion Discussed and retained on agenda 04/99 Draft approved 04/00 for submission to Standing Committee in 06/00 Approved for publication by Standing Committee 06/00 Published for comment 08/00
99-06	Amend FRAP 33 to incorporate notice provisions of FRBP 7041 and 9019.	Hon. L. Edward Friend II (Bankr. N.D. W. Va.)	Awaiting initial discussion Discussed and retained on agenda 04/00; awaiting proposal from Bankruptcy Rules Committee
99-07	Amend FRAP 26.1 to broaden financial disclosure obligations.	Standing Committee	Awaiting initial discussion Discussed and retained on agenda 10/99 Draft approved 04/00 for submission to Standing Committee in 06/00 Approved for publication by Standing Committee 06/00 Published for comment 08/00
99-09	Amend FRAP 22(b) to specify procedure for obtaining certificate of appealability.	Hon. Anthony J. Scirica (CA3)	Awaiting initial discussion Discussed and retained on agenda 04/00; awaiting proposal from Department of Justice
00-03	Amend FRAP 26(a)(4) & 45(a)(2) to use "official" names of legal holidays.	Jason A. Bezis	Awaiting initial discussion Discussed and retained on agenda 04/00
00-04	Add new FRAP 4.1 to explicitly authorize "indicative rulings."	Solicitor General Waxman	Awaiting initial discussion Discussed and retained on agenda 04/00; awaiting revised proposal from Department of Justice
00-05	Amend FRAP 3 to address notice of appeal filed on behalf of corporation but not signed by attorney.	Hon. Diana Gribbon Motz (CA4)	Awaiting initial discussion Discussed and retained on agenda 04/00
00-06	Amend FRAP 4(b)(4) to address failure of clerk to file notice of appeal when requested by defendant under FRCrP 32(c)(5).	Hon. Frank H. Easterbrook (CA7)	Awaiting initial discussion
00-07	Amend FRAP 4 to specify time for appeal of order granting or denying motion for attorney's fees under Hyde Amendment.	Hon. Stanwood R. Duval, Jr. (E.D. La.)	Awaiting initial discussion

FRAP Item	Proposal	Source	Current Status
00-08	Amend FRAP 4(a)(6)(A) to clarify whether a moving party "receives notice" of the entry of a judgment when that party learns of the judgment only through a verbal communication.	Hon. Stanwood R. Duval, Jr. (E.D. La.)	Awaiting initial discussion
00-09	Amend FRAP 22 to clarify post-AEDPA treatment of certificates of probable cause.	Stuart Buck	Awaiting initial discussion
00-10	Add rule to require neutral assignment of judges to panels.	Hon. William R. Wilson, Jr. (E.D. Ark.)	Awaiting initial discussion
00-11	Amend FRAP 35(a) to provide that disqualified judges should not be considered in assessing whether "[a] majority of the circuit judges who are in regular active service" have voted to hear or rehear a case en banc.	Hon. Edward E. Carnes (CA11)	Awaiting initial discussion
00-12	Amend FRAP 28, 31 & 32 to specify the length, timing, and cover colors of briefs in cases involving cross-appeals.	Solicitor General Waxman	Awaiting initial discussion
00-13	Amend FRAP 29 to empower court to preclude the filing of a particular private amicus brief, even if all parties have consented.	Hon. Michael Boudin (CA1)	Awaiting initial discussion

Item 6A

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

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

FROM: A. Thomas Small, Chair
Advisory Committee on Bankruptcy Rules

DATE: November 30, 2000

RE: Report of the Advisory Committee on Bankruptcy Rules

I. Introduction

The Advisory Committee on Bankruptcy Rules met on September 21-22, 2000 in Harriman, New York

II. Action Items

The Advisory Committee on Bankruptcy Rules will not be presenting any matters for action at the Standing Committee's meeting in Tucson, Arizona on January 4-5, 2001.

III. Information Items

A. *Publication of Proposed Rule Amendments*

At its June 2000 meeting, the Standing Committee authorized the publication of a preliminary draft of proposed amendments and an addition to the Bankruptcy Rules. There are seven proposed rules amendments and one proposed new rule. There is also a proposed amendment to Official Form 1.

The preliminary draft was published in August, 2000 for comment by the bench and bar. The deadline for submitting comments is February 15, 2001, and the public hearing is scheduled in Washington, DC for January 25, 2001. Thus far, five written comments have been received, and we have received no requests for personal appearances at the public hearing. The Advisory Committee will review all of the comments at its March 2001 meeting. The Advisory Committee expects to present these proposed rules and form amendments and proposed rule for

approval by the Standing Committee at its June 2001 meeting.

B. *Privacy and Public Access*

The Advisory Committee is studying a variety of issues relating to the protection of the privacy of participants in the bankruptcy process while maintaining appropriate levels of public access to the information contained in bankruptcy files. The Advisory Committee will be presenting proposed amendments to the bankruptcy rules and forms to the Standing Committee at its June 2001 meeting. Like all proposals regarding these issues, the recommendations must strike a careful balance between the protection of legitimate privacy interests while maintaining appropriate levels of access to the information by other participants in the process as well as the public. Additional statutory constraints such as those set out in Sections 107 and 342 of the Bankruptcy Code must be accommodated.

C. *Financial Disclosure Rules*

The Advisory Committee is currently studying the proposals of the other advisory rules committees to determine the extent of appropriate disclosure in bankruptcy cases and proceedings. The Advisory Committee will consider these matters again at its March 2001 meeting. The Advisory Committee is working to conform its proposed rule as closely as possible to the proposals of the other committees while addressing the particular problems presented by bankruptcy law and practice.

D. *Proposed Bankruptcy Law Legislation*

Congress continues to consider bankruptcy reform legislation. In their last session, both the House and the Senate passed their own versions of the legislation by substantial majorities. Differences in the bills, and other factors (including a threatened veto) resulted in no legislation being enacted. It is likely that bankruptcy reform bills will be introduced early in the next Congress. The Advisory Committee will continue to monitor these developments focusing particularly on the need for adoption of new rules and the amendment of existing rules to take account of legislative developments.

Attachments:

Draft of the minutes of the Advisory Committee meeting of September 21-22, 2000.

Item 03

ADVISORY COMMITTEE ON BANKRUPTCY RULES

Meeting of September 21 - 22, 2000
Arden Conference Center
Harriman, New York

Draft Minutes

The following members attended the meeting:

District Judge Adrian G. Duplantier, Chairman
District Judge Robert W. Gettleman
District Judge Ernest G. Torres
District Judge Norman C. Roettger, Jr.
Bankruptcy Judge A. Jay Cristol
Bankruptcy Judge Robert J. Kressel
Bankruptcy Judge Donald E. Cordova
Bankruptcy Judge James D. Walker, Jr.
Professor Mary Jo Wiggins
Professor Alan N. Resnick
Leonard M. Rosen, Esquire
Eric L. Frank, Esquire
Howard L. Adelman, Esquire
J. Christopher Kohn, Esquire

Professor Kenneth N. Klee attended the second day of the meeting. District Judge Bernice B. Donald was unable to attend. Professor Jeffrey W. Morris, Reporter, attended the meeting. Bankruptcy Judge Marcia S. Krieger, a member of the Committee on the Administration of the Bankruptcy System ("Bankruptcy Administration Committee"), attended, as did Peter G. McCabe, Secretary to the Committee on Rules of Practice and Procedure ("Standing Committee") and Assistant Director, Administrative Office of the United States Courts ("Administrative Office"). An incoming member of the committee, K. John Shaffer, Esq., also attended, and the incoming chairman, Bankruptcy Judge A. Thomas Small, attended part of the meeting by telephone.

The following additional persons attended the meeting: Kevyn D. Orr, Director of the Executive Office for United States Trustees ("EOUST"); Richard G. Heltzel, Clerk, United States Bankruptcy Court for the Eastern District of the New Jersey; James J. Waldron, Clerk, United States Bankruptcy Court for the District of New Jersey; John K. Rabiej, Chief, Rules Committee Support Office, Administrative Office; Patricia S. Ketchum, Bankruptcy Judges Division, Administrative Office; and Robert Niemic, Research Division, Federal Judicial Center.

Bankruptcy Judge Cecelia G. Morris, and Dean Karsonis and George Angelish, law clerks to Judge Morris, attended parts of the meeting as observers.

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 of 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 March 2000 meeting.

The Chairman noted that his term was ending along with that of several other members -- Judge Kressel, Judge Cordova, Professor Klee, and Mr. Rosen -- and said he had enjoyed both the work of the Committee and the friendships that had developed from it. He welcomed K. John Shaffer, Esq., as an incoming member. The Chairman further noted that Richard G. Heltzel, the clerk of court who had served as adviser since 1988, also would be leaving the Committee and would be replaced by James J. Waldron, whom he welcomed to the meeting. Later, the Committee presented Mr. Heltzel with a certificate of appreciation for his long and exceptional service.

June 2000 Meeting of the Standing Committee. The Chairman reported that he and the Reporter had attended the meeting and that the Standing Committee had approved the amendments proposed by the Committee to Rules 1007, 2002, 3016, 3017, 3020, 9006, 9020, and 9022, and Official Form 7. The Standing Committee agreed to transmit the proposed amendments to the Judicial Conference with a recommendation that they be approved and forwarded to the Supreme Court for its consideration. The Standing Committee similarly had approved the electronic service amendments proposed by the Advisory Committee on Civil Rules to Rules 5, 6, and 77. The Chairman noted that the Committee's recommendation that parties be given three additional days to respond when served electronically had prevailed, as reflected in the proposed amendments to Rule 6. This was one of several aspects in which the relevant advisory committees had worked together to assure consistency among the federal rules. All of these proposed amendments were on the consent calendar for the Judicial Conference session scheduled for September 19. As such, he said, they would have been approved automatically and would be forwarded to the Supreme Court.

The Standing Committee also approved for publication and comment the preliminary draft amendments to Rules 1004, 2004, 2014, 2015, 4004, 9014, and 9027, and Official Form 1, that had been submitted by the Committee. The comment period on the proposed amendments will conclude on February 15, 2001.

In addition, he said, the Standing Committee had approved and sent to the Committee on Court Administration and Case Management a recommendation supported by the Committee that individual courts post their local rules on a court website. The recommendation included support for creating a link to each court's website from the Internet web page maintained by the Administrative Office.

June 2000 Meeting of the Bankruptcy Administration Committee.

Professor Resnick, who had represented the Committee at the meeting, noted that the Bankruptcy Administration Committee had discussed at length the issue of individual privacy and public access to bankruptcy case information and had made some specific recommendations that would be discussed later in the meeting. He said the Bankruptcy Administration Committee, at the request of the Committee on Federal-State Relations, also had discussed mass tort cases and whether the Judicial Conference should endorse the recommendations of the National Bankruptcy Review Commission for handling mass torts in the bankruptcy courts. A subcommittee would be studying the matter further, he said. Professor Resnick said he was surprised to learn, during a discussion of whether the United States Court Design Guide should require that jury boxes be installed in bankruptcy courtrooms, that only 15 jury trials had been held in the bankruptcy courts in the two-and-a-half years prior to the meeting. A decision was made not to require jury boxes, he said. Judge Krieger added that the Bankruptcy Administration Committee also had discussed the continuing need for certain judgeships and would be recommending that no authorized position be eliminated even though some circuits were not filling vacancies in districts with low caseloads. With respect to Iowa, which has four judgeships evenly distributed over two districts, she said, the Bankruptcy Committee had recommended that, in the event of a vacancy, the remaining three judges all be authorized to handle cases in both districts.

Action Items

Rule 2016. The Reporter said the proposed new subdivision (c) of the rule arose from a suggestion that Rule 2016, which prescribes the manner and timing of disclosures by attorneys for debtors of compensation paid or agreed to be paid to them should apply also to bankruptcy petition preparers. A member suggested deleting the first sentence of the Reporter's draft as repetitive of the statute and deleting the phrase "or at another time as the court may direct" on lines 5 and 6 to conform the draft to § 110(h)(1) of the Code, which specifies ten days. In response to questions and comments from members, the Reporter stated that the rule would impose on a petition preparer most of the requirements already imposed on attorneys, such as a duty to supplement a declaration previously filed if further compensation is received or an agreement is made to pay further compensation. By requiring a petition preparer to provide the United States trustee's office with a copy of the declaration, the rule would help that office obtain the information necessary to carry out its statutory duty to seek an injunction against any petition preparer who violates the provisions of § 110. On the second day of the meeting, the Reporter presented a redrafted amendment and Committee Note incorporating the comments of the members.

Professor Wiggins noted that § 110(f)(1) states that a petition preparer may not use the word "legal" to advertise or advertise under any category that includes the word "legal," yet Official Form 19 requires disclosure only of the name of the individual who worked on the documents. She suggested that the form should be amended to include the name under which the

petition preparer does business, to assist the United States trustee with enforcement under § 110(f)(1).

On the second day of the meeting, the Reporter presented a redraft of the proposed amendment, with the addition of a re-styling of subdivision (b) to convert its final sentence from the passive to the active voice. After discussion of the style issues raised by subdivision (b) generally, **a motion to leave subdivision (b) of the rule unchanged was unopposed.** After discussion, **the Committee approved the re-draft of subdivision (c) with the following changes: in line 24, insert "of the Code" after "§ 110(h)(1); in line 26, substitute "immediately prior to" for the word "of" in the middle of the line, and change "case" to "petition"; remove the brackets around the sentence beginning with the words "The declaration" on line 27; and add the following new sentence at the end of the subdivision, "The bankruptcy petition preparer shall transmit a copy of the declaration and any supplemental declaration to the United States trustee not later than the date when it is filed.". In the Committee Note, the Committee approved deleting all but the first sentence and adding, at the end of that sentence, the phrase "of the Code."**

Rule 8014. The Reporter introduced a draft of an amended rule that would more closely conform to the equivalent appellate rule, Federal Rule of Appellate Procedure 39. The Committee discussed the terminology used in the draft and several suggested style changes. A member noted that the draft did not include subdivision (c) of Rule 39, which directs each court of appeals to adopt local rules governing the maximum that could be imposed as costs for copies and suggested adding similar language to the draft, for example, "the rate applicable in the circuit under Rule 39(c) unless the district court or bankruptcy appellate panel has adopted a separate rule," On the question of whether to use the term bankruptcy "court" as the place where certain costs are taxed, a usage derived from the Rule 39 reference to the district court, the Committee discussed whether the words "judge" or "clerk" could be used instead. As it is the clerk who taxes costs, and the judge intervenes only when there is an objection, designating the judge to tax costs would not be appropriate. The question then arose concerning whether "bankruptcy clerk" would be proper, as there are consolidated courts where there is no bankruptcy clerk, and some bankruptcy cases that are handled by district court judges. A member then questioned the draft rule's approach of taxing of all costs by the bankruptcy court, even the costs of copies of the brief, which in Rule 39 is taxed by the clerk of the court of appeals. Other members questioned the wisdom of having two clerks tax different costs and suggested that the approach taken by the draft, having one clerk tax all costs, might be preferable. **A motion to table the proposed amendment carried by a vote of 9 to 4.**

Official Form 15. Judge Kressel introduced the proposed amendment, which is intended as a conforming amendment that would implement amendments to Rule 3020 that are due to take effect December 1, 2001. The amendments to Rule 3020 would require the order confirming a plan that includes an injunction against conduct not otherwise enjoined under the Code to include language specifically describing the injunction and the entities subject to the injunction. He said the conforming nature of the amendment would make it eligible for adoption without publication

for comment and that the amended form could take effect simultaneously with the amended rule. At Mr. Rosen's suggestion, the draft amendment was changed to read as follows: "*[If the plan provides for an injunction against conduct not otherwise enjoined under the Code, include the information required by Rule 3020.]* " **There was no objection to approving the proposed amendment as modified and sending it forward without publication.**

Official Forms. Mr. Adelman said Form 15 does not serve a debtor who needs to take a confirmation order to state court. With such a bare bones order, he said, a debtor's attorney has to educate the state court judge on the provisions of the Bankruptcy Code that establish the requirements for confirming a plan. He said he would prefer a form that incorporated the provisions of § 1141 of the Code. Judge Kressel said he would view that as a step backward. He said it is dangerous to add statutory material unless all of it is included. He noted that the trend of the Committee over the last decade had been to eliminate such text, most recently from the discharge order. He added that there probably will be a forms review conducted over the next year or two, and that project would afford an opportunity to reconsider past decisions. The review project had been postponed repeatedly, he said, because the Committee was waiting for congressional action on a bankruptcy reform bill. Ultimately, with respect to the reaffirmation agreement, he said, the Committee decided to proceed with a Director's form that could be modified quickly if Congress enacted different requirements for those agreements. The Committee also had received a number of complaints about the Proof of Claim form since it had last been revised in 1994, he said. Judge Duplantier encouraged Mr. Adelman to contact Judge Small about joining the Forms Subcommittee. Judge Duplantier also noted that, as chairman of the Subcommittee on Privacy and Public Access, Mr. Adelman would be working in coordination with the Forms Subcommittee on a review of the official forms at the request of the Bankruptcy Administration Committee. [See below.]

Subcommittee on Privacy and Public Access. Mr. Adelman described the alternative approaches discussed by the subcommittee during the summer. He said the subcommittee's consensus was to "go slow" and allow the fundamental policy to develop, as rules must follow policy rather than make it. At least five other Judicial Conference committees also are studying the issue, but have not concluded their work, he said. The bankruptcy system is limited in the restraints it can apply, he added, because the Bankruptcy Code itself requires disclosure of a debtor's Social Security number on certain documents. He noted also that the executive branch is conducting a study of the financial privacy of individuals in bankruptcy cases, the report of which is due at the end of the year.

Mr. Orr stated that the EOUST is one of the three executive branch offices conducting the study of privacy in bankruptcy cases and added that the deadline for the public to submit comment had been extended by two weeks to permit more persons to participate. He added that several dozen bills touching on privacy issues had been introduced in the current Congress, indicating a high level of public interest in the subject. Judge Duplantier added that the proposed bankruptcy reform legislation, which contrastingly would require debtors to disclose even more "private" financial information than in the current forms, shows that the issues are far from

settled. Mr. McCabe noted that policies may need to be different for different types of court records. For example, he said, it may be that criminal case records will not be placed on the Internet. He also pointed out that the policy that documents filed with the court are public trumps other policies more protective of privacy, so that information that is confidential while in the custody of the executive branch, particularly the medical records in Social Security disability cases, could be placed on the Internet if the case is appealed to the courts. He said legislation, perhaps authorizing the Judicial Conference to establish policies, may be needed to resolve the problem.

Judge Walker urged the Committee to consider all alternatives. Re-examining the official forms with the intent of eliminating requests for information that is not needed may not prove fruitful, he said. The trustee and other parties in the case need the information. The Bankruptcy Code, however, provides that any document filed with the clerk is a public record, and from that statutory policy follows the widely accepted idea that anything filed ought to be available on the Internet. An alternative, he said, might be to revamp the process of who gets what information in a bankruptcy case. A list of creditors and a reduced amount of other information might be filed with the clerk and the debtor's duty to supply the rest be modeled after civil discovery. Although the disclosures would occur away from the court, he said, there would need to be rules governing the process. The idea might not be a good one, ultimately, but it should be examined, he said.

The chairman asked whether the Committee supported the idea of reviewing the official forms from a privacy standpoint. Professor Resnick said the Bankruptcy Administration Committee had discussed privacy at length at its meeting and made some recommendations, including requests to the Committee for a review of the official forms. Judge Krieger added that the Bankruptcy Administration Committee members had expressed concern not only for the privacy of debtors but also for the privacy of third parties, such as patients in a medical facility, whose names may appear in the information submitted by a debtor. Professor Resnick noted that the Committee had taken the lead in proposing amendments to facilitate electronic filing and is uniquely situated again to lead the search for solutions to the problems created in part by electronic filing. He noted that the Bankruptcy Administration Committee had recommended specifically that the Committee consider altering the forms to require disclosure of the only the final four digits of a debtor's Social Security number. He suggested moving without further consideration toward publishing for comment revised official forms that would require disclosure only of the final four digits of a Social Security number, customer number, or account number. Comments provided by interested parties such as creditors, debtor advocates, and persons concerned with privacy issues generally would indicate whether the proposal is a useful one, he said. Other members spoke in support of this proposal.

Judge Walker said he would add that it should be made clear that the full Social Security number must be disclosed to any party in interest upon request. **A motion to 1) publish for comment proposed amendments to the official forms restricting the disclosure of Social Security and customer or other account numbers to the last four digits of the numbers, and 2) directing the relevant subcommittees to review the official forms generally with a view**

toward removing information from automatic disclosure with the understanding that it remains discoverable, passed without opposition. Judge Krieger asked the subcommittees to keep in mind the privacy interests not only of debtors but also of third parties, and a member requested the privacy subcommittee to consider recommending that the Committee officially support the Bankruptcy Administration Committee's proposal to request an amendment to § 107(b) of the Bankruptcy Code to permit a bankruptcy judge to provide protection from disclosure based on privacy concerns.

Proposed Rule 7007.1. The Reporter introduced the proposed amendment and presented the background for it, a request from the Standing Committee and the Committee on Codes of Conduct. The proposed amendment would require any nongovernmental corporate party in an adversary proceeding to file with the party's first pleading a statement disclosing the party's corporate parents and the identity of any publicly held company that owns ten percent or more of the party's stock. A companion amendment to Rule 9014 would extend the disclosure obligation to parties in contested matters. The appellate, civil, and criminal advisory committees already have proposed similar amendments, and the Reporter pointed out the differences between the draft before the Committee, which was offered on behalf of the Subcommittee on Attorney Conduct, including Rule 2014 Disclosure Requirements, and the proposals of the other advisory committees.

Professor Morris noted that the draft does not require the debtor to file with the petition a statement containing disclosures required of other parties. The subcommittee's rationale, he said, was that the judge does not have to act in a bankruptcy case until some matter actually comes before the judge in the form of a motion or adversary proceeding. The Chairman said he believes the judge should have the information about a debtor's corporate parents and ownership by other publicly held companies at the inception of the case. A member said it also would be more efficient for the debtor to file the disclosure with the petition, as doing so would save having to repeat the procedure each time the debtor is involved in an adversary proceeding or contested matter during the case. **There was a consensus that disclosure by the debtor should be required at the inception of the case.** The Chairman said the Committee should use its best judgment about whether to require more disclosure than recommended by the Committee on Codes of Conduct, so long as there is a good bankruptcy reason for doing so. Mr. McCabe and Mr. Rabiej both observed that, while the Standing Committee seemed to support the idea of permitting courts to expand the scope of required disclosure through local rules, the Committee on Codes of Conduct does not.

Professor Resnick suggested putting any new rule in Part IX of the rules, so that it would apply to all proceedings, and others suggested that the requirement to file the statement with the petition be added to Rule 1007, with the information reported on Exhibit "A" to the petition. Professor Klee asked for the Committee's views on whether the disclosure of holdings should be of all types of stock or only of common. In his opinion, preferred stock is more like debt, he said, and might not need to be disclosed. Judge Duplantier said the value of preferred stock could be affected by rulings in the case, and Mr. Rosen pointed out that preferred stock also can

be converted to common. The purpose of the rule is to disclose whether another company owns part of the debtor. Mr. Rosen said the principle is the same, regardless of the type of stock , and the rule should require disclosure of stock of any class. After further discussion, **the consensus was that the ten percent should apply either to any class or to the aggregate,** in order to ensure that, for example, a debtor or other party would have to disclose the identity of any company that holds five percent of the debtor's or other party's common stock and five percent of the debtor's or other party's preferred stock. **It also was the consensus that disclosure should be required of any company that "directly or indirectly owns" the threshold percentage of stock.**

The draft rule restricts disclosure to ownership interests of "publicly held" companies. Mr. Adelman, however, said that many companies that are not publicly traded but have more than 500 shareholders and must report to the Securities and Exchange Commission as if they were publicly traded. He suggested the disclosure requirements should apply to them. The Committee also discussed whether the debtor or other party also should disclose its ownership interests in subsidiaries. The draft rules being proposed by the other advisory committees require disclosure only of parents. Mr. Rabiej said the reason stated for this narrowing of the scope of disclosure was that most of the problems that have arisen came about because the judge did not have access to the relevant information. Information about corporate parents, he said, does not appear to be readily available, although information about subsidiaries, apparently, is available. The Chairman suggested that the matter of subsidiaries be researched empirically and discussed with the other advisory committees.

Mr. Rabiej said he would send to the Committee members copies of the comments the other advisory committees receive in response to their published drafts. Many members supported the idea of going beyond the scope of the proposals made by the other advisory committees, but the Chairman cautioned that the Committee should not extend the rule without a good reason.

Judge Walker raised the problem of compliance that a small town collection lawyer for a large national bank might face under the draft rule. The local lawyer would not have the information that needed to be disclosed, and, even when the information were available, it would not be economical or efficient to require the same document to be filed in the many tens of motions for relief from stay filed on behalf of a large national creditor by its local counsel. He suggested that the Committee provide for some alternate method of compliance to cover the small town/big bank situation.

The Committee recommitted the matter to the subcommittee with instructions to present a new draft reflecting the above discussion at the March 2001 meeting.

Rule 3015. The Reporter introduced the proposed amendment. The intent of the proposal was to relieve the clerk of the expense of mailing each chapter 13 debtor's plan to creditors or, if the plan is not filed with the petition, of mailing two notices, as well as the plan.

A second rationale was to afford creditors the benefit of the full plan in those jurisdictions that substitute a summary of the plan in the notice of the confirmation hearing, all as part of the initial notice of the filing of the case and meeting of creditors. The summary must be very brief to fit on the notice and rarely provides meaningful information about the terms of the plan. A member commented that the complete plan would be available on the Internet in a court that either accepted filings electronically or scanned all paper documents. Another said there did not appear to be any reason to impose the additional cost of mailing the plan on the debtor. The Reporter indicated that there did not appear to be any demand for the amendment beyond the clerk who had requested it. **A motion to take no action was unopposed.**

Rule 2002(h). The Reporter introduced the proposal, which would permit a court in a chapter 12 or chapter 13 case to cut off notices to any creditor who had not filed a timely proof of claim. Rule 2002(h) already permits the cessation of notice in a chapter 7 case to any creditor who has not filed a timely proof of claim. The proponent of the suggested amendment had noted that the Bankruptcy Code had been amended to add late filing as a ground for disallowance of a claim in a chapter 13 case and advocated an extension of the chapter 7 rule on that basis. The Reporter said the statutory change only made a late-filed claim subject to objection, not disallowed automatically. He said there may be further reasons not to amend the rule, most importantly the likelihood that an event affecting the creditor may occur late in the case, such as conversion to chapter 7. **A motion to leave the rule unchanged was unopposed.**

Fraudulent Service of Pleadings/Altered Bar Coding of Zip Codes. After discussion, the **consensus was that the problem described could not be solved by rule, and the Committee would take no action.**

Information Items

Technology Subcommittee. Judge Cristol reported that he and Judge Donald had conferred by telephone and had concluded that the most important technological issue is the one already discussed by the Committee in another context -- that of individual privacy in the context of bankruptcy case files being available on the Internet. He said the subcommittee members had many questions but no answers on this issue. He added that Judge Donald's law clerk is one of the authors of an article titled "Privacy in the Federal Bankruptcy Courts" published in the current issue of the Notre Dame Journal of Law, Ethics & Public Policy, copies of which he had distributed at the meeting. In addition, he said, the spread to all the courts of the judiciary's new Case Management/Electronic Case Files project would raise for the Committee's consideration many provisions in the rules that might either be amended or reinterpreted in an electronic environment. Judicial Conference approval of a policy, supported by the Committee, to encourage each court to publish its local rules on a website, is a very positive step, he said.

Federal Judicial Center Activities. Mr. Niemic referred the Committee to the update in the agenda book on the FJC's project to collect information about various forms of electronic and digital evidence to assist judges in assessing their admissibility and to evaluate the need for rules

changes to accommodate these new forms of evidence. He noted that, although the project encompasses all federal trial courts, it is being directed by Beth Wiggins, who formerly worked with the Committee, and that a bankruptcy judge is a member of the advisory committee for the project.

In addition, he said, Ms. Wiggins is in the process of updating a table originally developed in 1995 showing how bankruptcy courts had reacted to the 1993 amendments to Rule 26 of the Federal Rules of Civil Procedure, in particular, those courts which had opted out of the mandatory disclosure and pre-hearing meeting requirements. On December 1, 2000, he noted, the 1993 authorization for opting out will be withdrawn as new amendments take effect. The updated table was not yet complete, he said, but Ms. Wiggins had provided copies showing as much current information as she had available for the meeting. Copies of the completed table would be mailed to the Committee about one month following the meeting, he said.

A member asked how the amendments to Rule 26 would affect bankruptcy proceedings. Professor Resnick responded that the amended rule would be incorporated by reference as Rule 7026 and would apply in adversary proceedings. With respect to contested matters, he said, Rule 9014 states that Rule 7026 applies in contested matters "unless the court orders otherwise." It is an open question, he said, whether the phrase "unless the court orders otherwise" authorizes a court to adopt a local rule opting out of Rule 7026 in contested matters. The Chairman said those contested matters that resemble civil litigation should be governed by the amended Rule 26, which will bring significant changes also to the many district courts that opted out under the 1993 amendments.

Administrative Matters

Judge Small greeted the Committee by telephone during the September 22 session and said he looked forward to working with the members over the next three years. He expressed regret that he was unable to attend the meeting in person.

Judge Duplantier referred the Committee to the list of subcommittees and their members in the meeting agenda book and noted that many vacancies will occur due to expiring terms. He suggested that members discuss their subcommittee preferences with Judge Small, who would be making the needed appointments.

Judge Duplantier closed the meeting by thanking the Committee members and staff for both their work and their friendship over the years. He said his experiences with the Committee had been among the most pleasurable of his career.

The Committee selected September 13 - 14, 2001, as the dates for its next fall meeting and discussed several West Coast locations as possible meeting sites.

Respectfully submitted,

Patricia S. Ketchum

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

Item 7A

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

From: David F. Levi, Chair, Advisory Committee on the Federal Rules of Civil Procedure

Date: December 1, 2000

Re: Report of the Civil Rules Advisory Committee

Introduction

The Civil Rules Advisory Committee met on October 16 and 17, 2000, in Tucson, Arizona. It voted to recommend approval of one change in the Supplemental Admiralty Rules for adoption as a technical amendment without publication, and to recommend approval for publication in August, 2001, of closely related technical changes in other Admiralty Rules provisions. These are the sole action items recommended for consideration at the January 2001 meeting of the Standing Committee. Part I of this report explains the recommendations.

Part II summarizes ongoing Advisory Committee work in three areas. The Advisory Committee hopes to present recommendations to the Standing Committee in June as to at least some — and perhaps all — of these areas. They are summarized now in the belief that the June discussion will be advanced if time permits initial discussion for familiarization with these topics in January.

I. Action Items: Technical Amendments — Admiralty Rules

Four technical changes are recommended to adapt the Admiralty Rules to provisions of the Civil Asset Forfeiture Reform Act of 2000, 114 Stat. 202 ff. One change is so narrowly technical that it is recommended for adoption without publication. Although the other three proposed amendments also are recommended with a similar technical and conforming purpose, the changes may not be as narrow as intended; publication is recommended as to them.

The provisions of the Admiralty Rules to be amended are themselves new. The Supreme Court transmitted them to Congress on April 17, 2000, to take effect on December 1. These rules grew out of a years-long project that stemmed from joint study by the Department of Justice and the Maritime Law Association. The purpose of the changes was to separate some procedural aspects of civil forfeiture proceedings from the procedures long used for true in rem admiralty proceedings.

Attention was paid to forfeiture reform bills pending in Congress during the drafting stages, but it was not possible to anticipate the precise form of the law that came to be enacted, also in April 2000.

Because the new Admiralty Rules took effect on December 1, it would be possible to resolve inconsistencies with the new statute by invoking the supersession provision of the Rules Enabling Act, 28 U.S.C. § 2072(b). There was no purpose to supersede yet-to-be-enacted legislation, however, and no reason has appeared to resist the specific provisions of the new statute. The legislation is more recently drafted, even if earlier effective, and the nature of the specific inconsistencies will demonstrate the reasons for choosing to conform the Rules to the statute.

The proposed changes were worked out in close consultation with representatives of the Department of Justice. The details are intricate, and may seem obscure to those who are not versed in admiralty or forfeiture practice. The full memorandum presenting the proposals to the Advisory Committee is set out in an appendix as a more extensive discussion of the details than seems necessary to present the four proposals recommended by the Advisory Committee.

(1) Time To Claim. Amended Admiralty Rule C(6)(a)(i)(A) provides that a statement of interest in an in rem civil forfeiture action must be filed "within 20 days" after specified events. New 18 U.S.C. § 983(a)(4)(A) provides that a person claiming an interest in property seized for forfeiture must file a claim "not later than 30 days" after somewhat differently specified events (see Item (2) below). The 20-day period in the new Rule was chosen under the impression that a 20-day period was specified in some versions of the long-pending forfeiture reform legislation. If it had been known that Congress favored a 30-day period, as adopted in the new statute, a 30-day period would have been provided in Rule C(6). It is recommended that the 20-day period in Rule C(6) be changed to a 30-day period. This change will avoid an inadvertent supersession of the statute. The change is so narrowly technical that it is recommended for adoption as a technical conforming change, without publication for comment.

Because Rule C(6)(a)(i)(A) also would be amended under the proposal described as Item (2), but only after publication, the present change should be set out separately:

(a) Civil Forfeiture. In an in rem forfeiture action for violation of a federal statute:

(i) a person who asserts an interest in or right against the property that is the subject of the action must file a verified statement identifying the interest or right:

(A) within ~~20~~ 30 days after the earlier of (1) receiving actual notice of execution of process, or (2) completed publication of notice under Rule C(4), or

(B) within the time that the court allows * * *

Committee Note

Rule C(6)(a)(i)(A) is amended to adopt the 30-day period for filing a claim provided by 18 U.S.C. § 983(a)(4)(A), which was enacted shortly before Rule C(6)(a)(i)(A) took effect.

(2) "[S]ervice of Government's Complaint". The 30-day period that new § 983(a)(4)(A) sets for filing a claim runs "after the date of service of the Government's complaint, or, as applicable, not later than 30 days after the date of final publication of notice of the filing of the complaint." New Rule C(6)(a)(i)(A) sets the period to run "after the earlier of (1) receiving actual notice of execution of process, or (2) completed publication of notice under Rule C(4)." The provisions that relate to publication of notice seem consistent, and no change is recommended in Rule C(6) on this account. It seems likely that the publication-of-notice provision will control the claim time in many proceedings. But there is a difference between the "date of service of the Government's complaint" and "actual notice of execution of process." The most likely difference in practice will occur when the claim is filed by a person who was not served but who claims an interest in the forfeiture property. An actual notice requirement offers greater protection, although the protection will be cut off 30 days after completed publication of notice. It might be urged that the government should be content to rely on the 30-day period that runs from completed publication, invoking a shorter period only as to a claimant who had actual notice. But that is not the choice made in the statute, and on balance it has seemed better to conform the Rule to the statute. This recommendation seems sufficiently important to require publication for comment. To avoid confusion, the text published for comment should incorporate the 30-day period recommended as Item (1), perhaps with a footnote to indicate that the 30-day change is impending on a faster track:

(a) Civil Forfeiture. In an in rem forfeiture action for violation of a federal statute:

(i) a person who asserts an interest in or right against the property that is the subject of the action must file a verified statement identifying the interest or right:

(A) within 30[1] days after the earlier of (1) ~~receiving actual notice of execution of process~~ the date of service of the Government's complaint or (2) completed publication of notice under Rule C(4), or

(B) within the time that the court allows * * *.

Committee Note

Rule C(6)(a)(i)(A) is amended to adopt the provision enacted by 18 U.S.C. § 983(a)(4)(A), shortly before Rule C(6)(a)(i)(A) took effect, that sets the first alternative time for filing a verified statement as 30 days after the date of service of the Government's complaint.

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[1] The change from the 20-day period provided in present Rule C(6)(a)(i)(A) to a 30-day period is pending, but is expected to take effect before the present proposal can take effect.

(3) "Serve" or "File" an Answer. This proposed change not only conforms to the new statute, but also catches up a drafting oversight in new Rule C(6)(b)(iv). The starting point is new Rule C(6)(a)(iii), which provides that a party who files a statement of interest in a forfeiture proceeding "must serve an answer within 20 days after filing the statement." New § 983(a)(4)(B) provides that the party "shall file an answer to the Government's complaint for forfeiture not later than 20 days after the date of the filing of the claim." These provisions need not be inconsistent; both service and filing can be accomplished within 20 days. The statute does constrain the operation of Civil Rule 5(d), which allows a reasonable time after service for filing, but it has not seemed wise to amend Civil Rule 5(d) to supersede the new statute. The relationship between statute and Rule 5(d) may create a trap for the unwary, however, so it is recommended that Rule C(6)(a)(iii) be amended to require both service and filing within 20 days.

Review of this question showed that new Rule C(6)(b)(iv) calls for the answer in a true admiralty proceeding to be "filed" within 20 days after the statement of interest. That provision was a drafting oversight; the ordinary requirement is that an answer be served within the time set by rule, and it seems wise to conform this practice with the practice adopted in Rule C(6)(a) as well as other rules. It is recommended that the filing requirement in Rule C(6)(b)(iv) be changed to a service requirement.

Both recommendations seem simple enough, but it is recommended that they be published for comment, in part because of the recommendation that the change in Rule C(6)(a) proposed as Item (2) be published:

(6) Responsive Pleading; Interrogatories.

(a) Civil Forfeiture. In an in rem forfeiture action for violation of a federal statute: * * *

(iii) a person who files a statement of interest in or right against the property must serve and file an answer within 20 days after filing the statement.

(b) Maritime Arrests and Other Proceedings. In an in rem action not governed by Rule C(6)(a): * * *

(iv) a person who asserts a right of possession or any ownership interest must ~~file~~ serve an answer within 20 days after filing the statement of interest or right.

Committee Note

Rule C(6)(a)(iii) is amended to give notice of the provision enacted by 18 U.S.C. § 983(a)(4)(B) that requires that the answer in a forfeiture proceeding be filed within 20 days. Without this notice, unwary litigants might rely on the provision of Rule 5(d) that allows a reasonable time for filing after service.

Rule C(6)(b)(iv) is amended to change the requirement that an answer be filed within 20 days to a requirement that it be served within 20 days. Service is the ordinary requirement, as in Rule 12(a). Rule 5(d) requires filing within a reasonable time after service.

(4) "Arrest" of Real Property. New Rule C(3)(a)(i), carrying forward the practice established by former Rule C(3), requires the clerk to issue a summons and warrant for the arrest of forfeiture property. New 18 U.S.C. § 985 provides that real property that is the subject of a civil forfeiture action "shall not be seized before entry of an order of forfeiture." In lieu of seizure, the government initiates an action to forfeit real property by filing a complaint, posting notice on the property, and serving notice on the property owner along with a copy of the complaint. Provision is made for arrest in certain circumstances.

The arrest provision in Rule C(3) is too broad. An exception to the warrant requirement is recommended to reflect the new statute. Although this change is a narrow and conforming one, it is recommended that it be published for comment, in part because of the recommendation that the change proposed as Item (2) be published:

(3) Judicial Authorization and Process.

(a) Arrest Warrant.

(i) When the United States files a complaint demanding a forfeiture for violation of a federal statute, the clerk must promptly issue a summons and a warrant for the arrest of the vessel or other property without requiring a certification of exigent circumstances, but if the property is real property the United States must proceed under applicable statutory procedures.

Committee Note

Rule C(3) is amended to reflect the provisions of 18 U.S.C. § 985, enacted by the Civil Asset Forfeiture Reform Act of 2000, 114 Stat. 202, 214-215. Section 985 provides, subject to enumerated exceptions, that real property that is the subject of a civil forfeiture action is not to be seized until an order of forfeiture is entered. A civil forfeiture action is initiated by filing a complaint, posting notice, and serving notice on the property owner. The summons and arrest procedure is no longer appropriate.

II. Pending Projects

The Advisory Committee is considering three topics that may come to this Committee with recommendations for action at the June 2001 meeting. They are described below in the expectation that June deliberations will be advanced by any opportunity that can be made for advance familiarization.

In addition to these three topics, the Discovery Subcommittee is pursuing a long-range study of the ever-changing issues that are gradually growing up around discovery of computer-based information. The most easily understood reason for caution is that technology continues to evolve at a dizzying pace; two meetings held seven months apart, in March and October, provided graphic demonstrations of the changes that can outstrip any possible speed of the rulemaking process. It is difficult to predict when — or even whether — there may be reasons to recommend rules changes so compelling as to overcome the risks of limited present information and immediate obsolescence.

Another long-range project is considering the question whether it is possible to develop simplified rules that will provide better justice in some forms of actions. The concern is that the full sweep of the present Civil Rules may be more elaborate than some cases can bear. A draft set of simplified rules has been prepared to illustrate some of the approaches that might be taken to provide speedier and lower-cost procedures. At the same time, it is recognized that the present rules offer many flexible opportunities to expedite procedure in cases that would benefit from expedition. A panel of judges addressed the October meeting on such topics as a voluntary "small claims" procedure, differentiated case management programs that assign some cases to tracks that provide reduced discovery over shortened periods and speedy trials, and the "Rocket Docket" practices in the Eastern District of Virginia. No determinate direction has yet been set for this project, which has been confided to a subcommittee for further consideration.

CLASS ACTIONS

Beginning in 1991, the Advisory Committee has devoted unremitting attention to professional and popular laments that class-action practice should be improved. Many observers believe that the 1966 Rule 23 amendments transformed and eventually entrenched this area of procedure, and many believe that the procedure has had profound substantive consequences in many areas of the law. A decade of struggle with these observations has confirmed a conclusion that was anticipated on all sides — "improvement" means vastly different things to different proponents of change.

Earlier Rule 23 studies aimed at the substantive criteria for class certification and, in conjunction with the Ad Hoc Working Group on Mass Torts, at the possible adaptation of Rule 23 for mass-tort litigation. The work was carried on with the aid of empirical studies by the Federal Judicial Center and, more recently, the RAND Institute for Civil Justice. Many conferences were held, and hundreds of witnesses and comments greeted proposals that were published in 1996.

Several topics considered during this process remain open for further study, but new Rule 23(f) is the only amendment adopted so far. Several circuits already have elaborated the standards that will guide decisions whether to permit interlocutory appeals under Rule 23(f) from class certification decisions. Rule 23(f) seems well on the way toward accomplishing its twin goals: establishing appellate control of occasional ill-advised decisions to grant or deny certification, and generating a body of appellate law to guide future certification decisions.

The Rule 23 Subcommittee is now turning its attention away from the criteria for certification and toward the processes of class actions. The final scope of its agenda has not been set, but a number of topics are being developed into working drafts. None of these drafts had evolved to a point that would support detailed review and recommendation for publication at the October meeting. It is not clear whether all can reach that point by the time of the April 2001 Advisory Committee meeting, nor whether it would be wise to publish some Rule 23 revisions for comment before a complete package has been made ready. For the moment, what can be offered is a review of the major areas of inquiry.

It must be emphasized that this review is only a picture of deliberations up to the time of the December Subcommittee meeting. New problems will have emerged, and old ones will have come to be seen in different perspectives. The references to draft rules describe only Reporters' drafts, not any text approved — or in many cases even reviewed — by the Subcommittee.

Settlement Review. One prominent settlement issue — certification of settlement-only classes — has been set aside. The Supreme Court has recently addressed this issue, lower courts are responding, and it has seemed wise to defer any consideration of possible rule amendments as this developing process matures.

Many participants in the continuing Rule 23 study process have expressed concern that judicial review of proposed class action settlements under Rule 23(e) is limited by the lack of effective adversary challenge. Courts are accustomed to being informed by parties who vigorously contest with each other. Once class representatives and class adversaries have agreed on a settlement, however, all present the court with a common front. The settlement is presented as a matter of great advantage to the class, providing assured and immediate relief in place of a long and costly struggle with an uncertain outcome. Various revised and much lengthened versions of Rule 23(e) have been studied. Some of the changes are relatively simple, such as one that would explicitly require the common practice of providing a hearing. Others are more complex and continue to shift.

The standard for approving a settlement is commonly described by demanding that the settlement be "fair, reasonable, and adequate." That standard can be stated in the rule, leaving the review process as open-ended as it is now. No suggestion has yet been made that the process should not remain open-ended — it has been accepted that the factors that affect the fairness, reasonableness, and adequacy of a settlement cannot be captured in a closed list. But there is great uncertainty whether it would provide helpful guidance to district courts to provide in Rule 23(e) a

list of factors that often have been considered. The evident advantages of such a list may be offset by the risks that any list will encourage many courts to exclude consideration of factors not on the list, and that the review process may become a check-list that simply moves through factors that are manifestly not relevant to a particular settlement at the expense of focusing on the factors that are relevant. There also is a nearly aesthetic objection that it ill becomes the Federal Rules to include a "laundry list." A further concern is that a list might be used to encourage consideration of factors that have not yet come to prominence in the case law. An obvious compromise is to state a general standard in the rule, leaving helpful suggestions either to Committee Note or to the Manual for Complex Litigation. A recent draft Rule listing 14 factors has been followed by another draft that relegates all 14 to (rather dense) discussion in a draft Note.

The process of settlement review has presented a number of problems more difficult than the criteria for approval. Perhaps the most significant issue is whether class members should be afforded an opportunity to request exclusion from the class after settlement terms are made known. An opportunity to request exclusion provides a strong measure of adequacy, but also may make it more difficult to hold together a truly desirable settlement. Early drafts presented the issue in expansive form, providing an opportunity to opt out of the settlement even in a "mandatory" (b)(1) or (b)(2) class action. An alternative draft scales back to an opportunity to opt out of a (b)(3) class settlement that ripens into exclusion from the class if the settlement is approved. A further reduction has been considered, simply advising — either in a rule list of approval factors or in the Note — that an opportunity to request exclusion is one factor that bears on approval.

The role of objectors in the settlement process has generated a clear set of problems with no ready solutions. The perception that class representatives and class adversaries may join forces in a way that deprives the court of adequate information to review a proposed settlement suggests that objectors can add a highly desirable element of adversariness to the review. Much experience supports this conclusion. At the same time, experienced practitioners support the view that objectors often appear for self-serving reasons, seeking to benefit themselves (often by claiming attorney fees) rather than to benefit the class. "Professional objectors" are said to trade on the opportunity to augment delay, confusion, and expense, provoking separate settlements or cosmetic changes in the class settlement in return for abandoning the objections. The challenge is to find rule provisions that will encourage and support "good" objectors while deterring "bad" objectors.

The successive draft provisions that would support objectors have progressed from strong support to considerably reduced support in at least two dimensions. One dimension involves compensation for the costs of objecting. An early draft would have required compensation — including attorney fees — for making successful objections, and would have allowed compensation for making objections that, although unsuccessful, enhanced the review process. This provision has been reduced to one that allows compensation, in the court's discretion, only for successful objections. The changes were due in part to concern about encouraging the activities of objectors who are motivated by wrong purposes or who are simply ill-informed. But there also was concern about designating a source of payment: who, among the class, class representatives, or class

adversary should be forced to pay for unsuccessful objections? And who should be forced to pay for a "successful" objection that, by defeating the settlement, may lead to expensive and unsuccessful further litigation or even to abandonment of the class action without resolution?

Another form of support for objectors is provided in the form of discovery to support well-informed objections. An early draft required that an objector be afforded discovery "reasonably calculated to aid the court in appraising the merits of the class claims, issues, or defenses." This provision met the objection that the very purpose of settlement may be to avoid the costs of extensive discovery on the merits. A somewhat different objection was that if settlement is reached after extensive discovery, an objector's discovery may involve expensive review of the completed discovery and invasive inquiry into the work-product decisions that shaped the discovery program. More generally, it was again urged that allowing a right of discovery would unduly encourage bad-faith objectors. This discovery provision has been reduced, for the moment at least, to a provision that requires an objector to show reason to doubt the reasonableness, fairness, or adequacy of the settlement before having access to discovery on the merits of the class claims.

Yet another discovery question involves an objector's desire to learn about any "side agreements" or the course of settlement negotiations. No explicit provision is made for discovery of the negotiation process itself. Alternative provisions have been suggested for discovery of side agreements: one would require that "all agreements or understandings made in connection with the proposed settlement" be disclosed and summarized in the notice of proposed settlement. The other would permit discovery of such agreements. It has proved difficult to define in rule language the kinds of side agreements that may be subject to inquiry.

A different problem posed by objectors arises when an objector seeks to settle the objection. There is a fear that the great power arising from the delay and cost of litigating objections may be wielded to extract settlement terms that unjustifiably favor the objector. A draft provision would require court approval of an agreement settling objections, based on the view that an objector who takes on the role of objecting on behalf of a class assumes duties to the class similar to the duties assumed by a class representative. A settlement affording the objector terms more favorable than the objector would win under the proposed settlement would be proper under the draft only if the terms "are reasonably proportioned to facts or law that distinguish the objector's position from the position of other class members." It will prove difficult to draft language that gives much more guidance than this. And there are doubts about asking the trial court to deal with objections after an appeal is taken, but offsetting doubts about asking an appellate court to review a proposed settlement.

Other questions have been raised about objectors. The most fundamental question is whether it is useful and possible to draft provisions specifically framed to deter bad-faith objections. It is possible to make a cross-reference to Rule 11, a redundant tack that has been taken in some other rules provisions. Anything more effective is likely to prove difficult. The particular suggestion that an unsuccessful objector should be made to pay the costs incurred to respond to the objections would

entail a great risk of deterring good-faith objectors, and has not yet been reduced to even tentative draft form.

Beyond supporting objectors, another method to overcome the possible lack of adversary testing of a proposed settlement has been proposed. This approach would authorize the court to appoint a magistrate judge or another person to undertake an independent investigation of the proposed settlement; in effect, the court's agent would operate in the ways that would be followed by a well-supported and well-intentioned objector. There are obvious concerns about injecting the court into the roles usually undertaken by adversaries, even through an agent, but this provision has found substantial support.

Attorney Appointment and Fees. Much popular, and some professional, dissatisfaction with class-action practice arises from the perception that courts frequently award excessive attorney fees. There is a well-developed body of case law dealing with fee awards, both under fee-shifting statutes and under common-fund theories, but it may be useful to draft a rule that captures this law in a way that guides and eases the court's task. There also may be room to suggest consideration of factors not now frequently mentioned in the cases. One example, urged by the RAND study and reflected in many pending bills to regulate class-action practice, is the suggestion that fee awards should be based not on the theoretical maximum amount that might be distributed to class members but should be based instead on amounts actually claimed or distributed.

The Subcommittee has not yet discussed any detailed fee draft. At least in the beginning, the Subcommittee has put aside the question whether to adopt a choice between the "lodestar" and "percentage-of-recovery" approaches to calculating fees. There is a difficult question whether any attempt should be made, within Enabling Act constraints, to affect the underlying grounds for imposing liability for fees — for example, could members of a defendant class be made liable to share the responsibility for the class attorney's fees? There is a question whether it is wise to enumerate a list of factors to be considered in determining the amount of an award, just as there has been a question whether a settlement-review rule should contain a list of review factors. Questions arise as to hearings, the need for findings, the role of objectors, and the like. These and other issues remain to be worked through.

The Subcommittee also has yet to discuss a detailed draft rule on appointing counsel for a class. The basic question is whether the rules should emphasize the responsibility of the court to ensure that the class has the best available counsel, moving beyond the common threshold of considering the competence of counsel as part of the determination whether class representatives will adequately represent the class. A related question is whether the rules should explicitly state — in keeping with drafts that have been before the Advisory Committee since 1991 — that class counsel is a fiduciary responsible to represent the best interests of the class. Although this statement might seem to trench on state regulation of professional responsibility, it would be an integral element in defining the nature of a federal class action. The class, in this view, would be the primary client, speaking primarily through the named class representatives but commanding the central professional

obligations of class counsel.

Many subsidiary questions surround consideration of a rule on appointing class counsel. One difficulty arises from appointing counsel for a defendant class; the problems may be quite different from those that attend appointment of counsel for a plaintiff class, and may arise so infrequently that the rule should be confined to plaintiff class counsel. Another difficulty is presented by the question whether an attempt should be made to restrict activities by would-be counsel before appointment to represent the class. Some pre-appointment activities are inevitable — seeking class certification, conducting discovery on class certification issues, resisting pre-certification dispositive motions, and the like. Other pre-appointment activities may be desirable at times, even if fraught with risk; preliminary or even final settlement negotiations are an example.

More detailed issues also arise. A rule on appointing class counsel can specify a list of factors to consider in selecting between competing applicants when competing applicants appear. The rule could encourage, or discourage, competitions with respect to fees and related arrangements. It may be desirable to attempt to reduce or eliminate any reward for the simple act of filing the first class action. Still other issues will emerge.

A final issue cuts across at least the fee and settlement issues, and might relate in some ways to appointment of class counsel. The Third Circuit established a rule that prohibited simultaneous negotiations on the merits of class relief and on the amount of a fee award for class counsel. Simultaneous negotiations were seen to create unacceptable conflicts of interest. More recently, however, in *Evans v. Jeff D.*, 475 U.S. 717 (1986), the Supreme Court seemed to bless simultaneous negotiations. During the course of earlier Rule 23 hearings, several witnesses lamented that the Third Circuit rule had been a good one and urged that it be restored. The underlying issues are complex, and may be affected by the distinction between fee awards based on statute and fee awards based on common-fund analysis. The Subcommittee may conclude that the issues are too complex to yield to present rulemaking proposals.

Appeal Standing. Some participants in earlier Rule 23 hearings urged reconsideration of the rule, common in many circuits, that an objector can appeal a class-action judgment only by winning intervention in the trial court. The rule has been supported by the need to maintain control of the action in class representatives, class counsel, and the trial court. These expressions may be polite ways of noting concern that a more open opportunity to appeal would cause lengthy disruptions of the proceedings, with concomitant delays in distributing class relief, at the behest of wishful, ill-informed, or selfishly motivated objectors. On the other hand, the class judgment binds all class members. Our system of constituting trial courts, establishing procedural rules, and constituting appellate courts, makes appellate review an integral part of the process. Class representatives may litigate ineptly despite the court's responsibility to ensure adequate representation, or may accept ill-considered settlements in circumstances beyond the reach of effective review. So long as an issue tendered for appeal has been properly presented in the trial court, there is an argument that a power to defeat any appeal cannot be entrusted to class representatives, class counsel, or even the trial court.

This question remains under study.

Notice. The difficulty of framing adequate class-action notices is notorious. Many of the class-action bills that have been introduced in Congress include "plain English" notice requirements. At the request of the Advisory Committee, the Federal Judicial Center has undertaken to study a large set of good sample notices and to develop a model set. There may be some value in emphasizing a "plain English" requirement in the provisions of Rule 23. It also may be desirable to make explicit a requirement that some notice be provided to class members in "mandatory" class actions certified under Rule 23(b)(1) or (b)(2). Actions on behalf of mammoth classes whose members have claims only for small amounts of money may deserve something less than individual notice to each class member that can be identified. And the benefits that defendants realize from final disposition by class judgment may support reconsideration of the rule that representatives of a plaintiff class pay the full costs of effecting notice. These questions have been discussed intermittently over the years, and remain on the agenda for further consideration.

Overlapping Classes. One source of class-action problems has arisen when claims on behalf of similar or overlapping classes are filed in different courts. The problems commonly include competing, conflicting, and overlapping actions in both state and federal courts. Legislative solutions can draw from a full array of jurisdictional opportunities, and may achieve a delicate balance of state and federal interests. A variety of approaches have been sketched by bills in Congress, and legislative action may yet occur. It may be possible, however, to achieve some partial solutions in the rulemaking process. This topic remains open to further consideration.

SPECIAL MASTERS: RULE 53

The Rule 53 project has been deferred for several years because it will require substantial effort that could not be mustered in competition with the needs of the discovery and class-action projects. As work on the new discovery amendments wound down, room was made on the agenda to revive this project. A Rule 53 Subcommittee was appointed to develop the initial Rule 53 redraft. The Federal Judicial Center agreed to undertake empirical research on contemporary uses of special masters. The final report is published as Willging, Hooper, Leary, Miletich, Reagan, & Shapard, *Special Masters' Incidence and Activity* (FJC 2000). Discussion of the Subcommittee's report to the Advisory Committee has helped set the framework for further work on the draft rule.

The major reason for considering Rule 53 is that the use of special masters has developed in directions that simply are not addressed by Rule 53. Rule 53 is framed around the use of trial masters who hear evidence and report the evidence or make recommended findings of fact, or who perform accountings. The Supreme Court has sharply curtailed the use of trial masters. See *La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957); *Los Angeles Brush Mfg. Corp. v. James*, 272 U.S. 701 (1927). Nonetheless, the FJC study shows that trial masters still are appointed with some frequency. Rule 53 does not speak in any meaningful way to two broad categories of special-master practice that have come to prominence since 1938. Masters now are frequently used for pretrial purposes;

discovery masters and settlement masters are perhaps the most common examples. Masters also are frequently used for post-trial purposes, at times in helping to enforce complex decrees and often as "monitors" to supervise and perhaps investigate compliance with complex decrees. The FJC study not only documents the frequent use of masters in these roles, but also reports that orders appointing masters are as likely to cite no authority for the appointment as to cite Rule 53. The failure to reflect critically or often about the source of authority to appoint a master may be in part due to the frequent apparent consent of the parties; orders appointing masters were entered without opposition in some 70% of the cases studied. The failure to contest, however, need not reflect enthusiastic consent: some of the lawyers interviewed reported that they had not wanted a master, but had refrained from objecting for fear of offending the judge.

One reform to be accomplished by an amended Rule 53 would be to address directly the pretrial and post-trial special-master practices that have emerged. As with other rules, it is possible to draft a rule that sets out detailed lists of duties that can be assigned to pretrial, trial, and post-trial masters. It may be better to speak in general categories. An alternative approach is to list a number of possible duties or powers and to direct that an order appointing a master specify the duties and powers to be assumed by the master. Various approaches can be found within this spectrum and will be explored.

Consideration of more specific issues has led to some doubts about the use of trial masters in jury trials. Rule 53(e)(3) now provides that in a jury action the master is not to report the evidence, but the master's findings "are admissible as evidence of the matters found and may be read to the jury." Even if the evidence submitted to the master were by some unusual circumstance indistinguishable from the evidence submitted to the jury, it is difficult to understand how a jury is supposed to cope with the findings as "evidence." There even is some question whether trial masters should be available in bench trials, apart from the traditional role in "accountings."

The trial-master questions relate to another and perhaps still broader set of questions. Special master practice grew up long before the institution of magistrate judges. Magistrate judges can and do perform many of the functions assigned to special masters, and do so without requiring the parties to pay master fees. The draft rule would provide that absent consent of the parties, a master may be appointed for purposes other than trial purposes only for duties that "cannot be performed adequately by an available district judge or magistrate judge of the district." The magistrate-judge statute, however, provides that a judge may designate a magistrate judge to serve as a special master in any civil case, on consent of the parties, without regard to the "exceptional condition" limit of Civil Rule 53(b). 28 U.S.C. § 636(b)(2). More work needs to be done to consider the relationship between Rule 53 and magistrate judges, and particularly the possible justifications for assigning master duties to a magistrate judge, whether the duties embrace matters that could not be assigned to the magistrate judge acting as magistrate judge or embrace matters that could be assigned in the magistrate judge role.

The FJC study reported frequent uncertainties about the propriety of ex parte communications, at the level of communications either between parties and master or between master and court. The draft proceeds on the premise that ex parte communications may be desirable or even necessary in some situations; a settlement master, for example, almost invariably must be able to engage in ex parte communications with the parties. It would provide only that the order appointing a master must specify the circumstances, if any, in which ex parte communications are authorized.

Of course there are many other details that may be addressed. Present Rule 53 is highly detailed in some directions that may deserve simplification. It may be open to adding details not now there — one example is a provision that would speak to conflicts of interest. These questions, however, generally involve the familiar drafting choices between detailed direction and more open-ended authority. Satisfactory resolutions seem within reach.

JURY INSTRUCTIONS: RULE 51

Consideration of Rule 51 began with a suggestion from the Ninth Circuit Council that something be done to legitimate local district rules that require submission of jury instruction requests before trial begins. Rule 51 now provides that a party may file requests "[a]t the close of the evidence or at such earlier time during the trial as the court reasonably directs." The Criminal Rules Committee has taken the lead in removing this limitation, and similar revision of Rule 51 is easily accomplished.

Revision of Rule 51, however, has raised the question whether other changes should be made. The text of Rule 51 does not address the relationship between requests and objections as clearly as might be wished. Rule 51 does not refer at all to the "plain error" doctrine that has been accepted by most of the courts of appeals, despite the literal rejection of any plain error exception by Rule 51's language. All of this case law doctrine can be expressed clearly in Rule 51, and the first discussion draft sought to do so.

If Rule 51 is to be restated, the occasion might be seized to move beyond clear expression of current Rule 51 doctrine. The revised draft to be considered at the April meeting would require the court to inform counsel of all proposed instructions, not merely action on instruction requests. It also would speak to supplemental instructions. Other draft provisions would reflect growing practices, such as the use of preliminary and interim instructions.

Consideration of Rule 51 is reasonably advanced. The April Advisory Committee meeting may produce a draft that can be recommended for publication.

APPENDIX: ADMIRALTY RULES MEMORANDUM

NOTE: Civil Asset Forfeiture Reform Act of 2000: Technical Conforming Changes to Admiralty Rules

Four suggestions have been made to conform the Admiralty Rules to the provisions of the Civil Asset Forfeiture Reform Act of 2000, 114 Stat. 202 ff.

All of these suggestions share a common twist. The Admiralty Rules involved, C(3) and C(6), have been amended and will take effect, absent action by Congress, on December 1, 2000. The Civil Asset Forfeiture Reform Act of 2000 was enacted on April 25, 2000. Under the supersession provision of 28 U.S.C. § 2072(b), the newer Rule C provisions will prevail unless they are amended to conform to the statute. The first of the changes easily qualifies for adoption, and almost as easily qualifies for adoption as a technical conforming amendment without publication. It is so simple that if there is a sense of real urgency, it could be recommended to the January 2001 Standing Committee meeting for forwarding to the March 2001 Judicial Conference, aiming for adoption by the Supreme Court and transmission to Congress to take effect on December 1, 2001. A more ordinary pace would lead to action by the Judicial Conference in September 2001, leading to an effective date of December 1, 2002. The other changes described as (3) and (4) are not as easy; one or both may deserve adoption without publication, but fast-track treatment seems doubtful. The final change — item (2) below — presents genuinely difficult problems.

(1) Time To Claim

Rule C(6)(a)(i)(A) provides that a statement of interest in the property involved in an in rem forfeiture action must be filed "within **20** days after the earlier of (a) **receiving actual notice of execution of process**, or (2) completed publication of notice under Rule C(4) * * *." New 18 U.S.C. § 983(a)(4)(A) provides:

> In any case in which the Government files in the appropriate United States district court a complaint for forfeiture of property, any person claiming an interest in the seized property may file a claim asserting such person's interest in the manner set forth in the Supplemental Rules for Certain Admiralty and Maritime Claims, except that such claim may be filed not later than **30** days **after the date of service of the Government's complaint** or, as applicable, not later than **30** days after the date of final publication of notice of the filing of the complaint.

Despite the many minor variations between the text of the statute and the text of Rule C(6), the statutory incorporation of the "manner set forth in" the Admiralty Rules seems to iron out several possible problems apart from two that arise from the "except" clause. The first of these two problems arises from the difference between the 20-day period provided by Rule C(6) and the 30-day period provided by the statute. The second, discussed separately below, arises from the "date of

service" provision.

The 20-day period in Rule C(6) was adopted at a time when at least some versions of the legislation that ultimately became § 983 adopted a 20-day period. It was believed that the 10-day period retained for admiralty proceedings in Rule C(6)(b)(i)(A) was important, but the 20-day period was recommended for forfeiture proceedings in deference to the apparent preferences of Congress. Had the pending legislation then provided a 30-day period, the 30-day period would have been adopted in Rule C(6)(a)(i)(A). The Department of Justice would welcome amendment of Rule C(6)(a)(i)(A) to conform to the new statute.

There is no reason to stick to the supersession provision to set aside a statute that was not even known when Rule C(6)(a)(i)(A) was drafted.

It is recommended that Admiralty Rule C(6)(a)(1)(A) be amended to conform to § 983(a)(4)(A):

(a) Civil Forfeiture. In an rem forfeiture action for violation of a federal statute:

(i) a person who asserts an interest in or right against the property that is the subject of the action must file a verified statement identifying the interest or right:

(A) within ~~20~~ 30 days after the earlier of (1) receiving actual notice of execution of process, or (2) completed publication of notice under Rule C(4), or

(B) within the time that the court allows; * * *

(2) "[S]ervice of the Government's Complaint"

The most difficult question presented by § 983(a)(4)(A) arises from designation of one of the alternative events that start the 30-day period for filing a claim[2] to property seized for forfeiture. Under the statute, the period starts to run on "the date of service of the Government's complaint." Under Rule C(6)(a)(i)(A) the period starts on "receiving actual notice of execution of process." The differences between these provisions are greater — and certainly more complicated — than may appear.

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[2] The statute refers to a "claim." The term is used here to reflect the statute. "Claim" has a narrower meaning in maritime practice than it has in the new forfeiture statute. For that reason it was avoided in drafting new Rule C(6), where both for forfeiture and in rem admiralty proceedings the procedure is to file a statement of interest. For forfeiture it is "an interest in or right against the property"; for admiralty it is "an interest in the property." The admiralty provision is limited to a right of possession or ownership; other interests are advanced by intervention. There is no thought to amend Rule C(6) to reflect the statutory usage.

The difference between "service of the * * * complaint" and "execution of process" is a starting point. Civil forfeiture continues to be an in rem proceeding. The initial pleading is a complaint, see Rule C(2). The initial process under Rule C(3)(a) is a summons and warrant for arrest unless forfeiture is demanded of real property. The complaint should be served with the warrant; if that is done, "service of the complaint" is the same as "execution of process." There is a difference only if for some reason the complaint is not served with the summons and warrant. For real property, there is no arrest; under new 18 U.S.C. § 985(c), described in item (4) below, the complaint is filed with the court and served on the owner. Here "execution of process" even more clearly seems to mean the same thing as "service of the complaint." The prospect that some litigants will contend that a distinction exists may, however, suggest the usefulness of bringing the rule into line with the statute. The more important reason for adapting Rule C(6) to the statutory language, however, is the "actual notice" requirement that appears only in Rule C(6).

Rule C(6) provides a person making a claim greater protection than the statute whenever the actual notice required by Rule C(6) does not occur or occurs later than the "service" described in the statute. When the person claiming an interest is a person served, the difference is likely to be minor — by far the most obvious circumstance will be that service by mail is complete on mailing, while actual notice is likely to occur later. In rare cases service will go astray and the "actual notice" requirement of Rule C(6) will make a more significant difference. The "actual notice" requirement also makes a difference when service of the complaint is not made on the person claiming an interest. Since forfeiture is an in rem proceeding, initial process often is not served on the person claiming an interest. Some persons claiming an interest will actually learn of the execution of process, although not personally served, but the fact often will be disputed and difficult to resolve. Some persons claiming an interest will learn of published notice before publication is completed, but this fact too will be difficult to establish. And because different persons are likely to have actual notice at different times, the deadline for filing claims will be different for different persons.

Assuming that there is a significant difference between Rule C(6) and new § 983(a)(4)(A), it remains to ask which is better. Both Rule and statute provide an alternative deadline by requiring that a statement of interest be filed within 30 days of "completed" (or, in the statute, "final") publication of notice. This provision avoids the problem of proving actual notice and the prospect that different persons asserting an interest will have actual notice (if at all) at different times. It seems likely that most of the difficulties will be cured by the publication provision so long as notice is published in all civil forfeiture proceedings.[3] More importantly, reliance on published notice to

[3] The Department of Justice believes that the requirement of publication is firmly established by new § 983(a)(3)(A). This statute provides that if a claim is filed for property seized in a nonjudicial forfeiture proceeding, the government "shall file a complaint for forfeiture in the manner set forth in the Supplemental Rules * * * or return the property pending the filing of a complaint * * *." Supplemental Rule C(4) requires notice by publication in an in rem action unless the property is released under Rule E(5). The release provision does not seem to interfere with the publication

begin the period for filing a statement of interest reflects a long tradition that in rem proceedings can cut off rights without providing actual notice. The function of setting an earlier deadline when service is accomplished before publication is completed is to shorten the effective limitations period. There is much to be said for the view that the shorter period is desirable only when there is actual notice, but that is not the choice made in the statute.

The Department of Justice believes that the Rule should be brought into line with the statute. This task is easily accomplished. The change will leave the Rule subject to whatever ambiguities inhere in the statute, but it will avoid the still greater ambiguities that arise from seemingly inconsistent statute and rule provisions. On balance, the change seems desirable:

> The statement of interest must be filed:
>
> **(A)** within ~~20~~ 30 days after the earlier of (1) ~~receiving actual notice of execution of process~~ the date of service of the Government's complaint or (2) completed publication of notice under Rule C(4), * * *

The change would be "technical" in the sense that it is designed to avoid conflict with a statute enacted after the Rule was proposed but before the Rule is to take effect. The difference between requiring actual notice and not requiring actual notice, however, is significant. And there is a risk that unknown complications lurk in the shadows. Publication for comment seems important, particularly to provide an opportunity to hear from those whose practice involves defending against forfeitures.

If Rule C(6) is amended, the Committee Note might well be limited to a simple statement

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of notice in forfeiture proceedings. Rule E(5)(a) provides for release of property on filing a "special bond," but forfeiture seizures are excepted. Rule E(5)(c) provides for release of property by stipulation and does not expressly except forfeiture property. It appears that the Department of Justice has at times agreed to release of forfeiture property, on posting bond. Seizure of foreign fishing vessels has at times been followed by such agreed release. And release may be allowed as to real property because the new scheme provided by § 985 relies on seizure only in special circumstances — release would be in keeping with the spirit of the statute that less drastic security measures are preferred. If Rule E(5)(c) does allow release by stipulation without publication, release probably does no harm to the interests of persons who might have stated an interest in the forfeiture property.

New § 983(e) sets out notice provisions that, when unraveled, appear to apply only to nonjudicial forfeitures. The Department of Justice view is that no other statute supersedes the invocation of Rule C(4) by § 983(a)(3)(A), and that publication is required even when real property is forfeited despite the provision of new § 985, discussed in item (4) below, dispensing with seizure.

that the changes are made to bring the rule into agreement with the new statute.

(3) "Serve" or "File" an Answer

Another inconsistency is created by § 983(a)(4)(B). Admiralty Rule C(6)(a)(iii) provides that a person who files a statement of interest in a forfeiture proceeding "must **serve** an answer within 20 days after filing the statement." New § 983(a)(4)(B) provides that a person asserting an interest in seized property "shall **file** an answer to the Government's complaint for forfeiture not later than 20 days after the date of the filing of the claim."

The Department of Justice is concerned that this discrepancy will lead to litigation, and thinks it important to adapt the forfeiture portion of Rule C(6) to the statute.

The simplest adaptation would be to amend Rule C(6)(a)(iii) to require that the answer be filed within 20 days. This approach would be bolstered by the fact that the parallel time-to-answer provision for in rem admiralty proceedings, Rule C(6)(b)(iv), calls for an answer to be **filed** within 20 days after the statement of interest.

This question may not yield to such simple adaptation to the statute. Ordinarily an answer is served. See, e.g., Civil Rule 12(a). Before the current amendments, Admiralty Rule C(6), which applied interchangeably to civil forfeiture proceedings and to in rem admiralty actions without distinction, called for the answer to be served. Civil Rule 5(a), which applies in admiralty proceedings unless inconsistent with the Admiralty Rules, requires service of every pleading subsequent to the original complaint. Service of an answer seems important; simply filing the answer, relying on the opposing party to find it in the court files, is a strange way to proceed. (Nothing on the face of Civil Rule 5 appears to require service of every document that must be filed; Rule 5(d) does require filing of every document that must be served "within a reasonable time after service.")

The better position may be that there is no inconsistency between § 983(a)(4)(B) and the forfeiture provision in Rule C(6)(a)(iii). Rule C(6)(a) requires that the answer be served; Rule 5(d) requires that it be filed. Section 983(a)(4)(B) does not speak directly to service, but tightens the filing requirement of Civil Rule 5(d). The only difference is that the statute requires filing within the 20-day time set by Rule C(6) for service, while Rule 5(d) requires filing within a reasonable time after service. This minor difference is regrettable, but it may be better to live with it than to dispense with any express requirement that the answer be served.

Whether or not there is an inconsistency between Rule C(6) and the statute, it is wise to require service of an answer. The provision for simply filing the answer in the admiralty portion of new Rule C(6) is an inadvertent oversight. Of the several possible approaches to the situation, the best is to conform the forfeiture provision to the statute and to amend the admiralty provision to require service — but only service — within 20 days. The result is that a 20-day filing requirement

applies only to civil forfeiture proceedings, but that requirement derives from the new statute. The following amendments to Rule C(6) are recommended, with the support of the Department of Justice:

(6) Responsive Pleading; Interrogatories.

(a) Civil Forfeiture. In an in rem forfeiture action for violation of a federal statute: * * *

(iii) a person who files a statement of interest in or right against the property must serve and file an answer within 20 days after filing the statement.

(b) Maritime Arrests and Other Proceedings. In an in rem action not governed by Rule C(6)(a): * * *

(iv) a person who asserts a right of possession or any ownership interest must ~~file~~ serve an answer within 20 days after filing the statement of interest or right.

If any of these changes is to be made in Rule C(6), there is a separate question whether the change should be accomplished on an expedited basis without publication and comment. The distinction between filing and service seems more important than the difference between a 20-day and 30-day time to file the initial statement of interest. Publication of a proposal for comment would at least begin the process of drawing attention to the question. On the other hand, the changes are intended primarily to bring Rule and statute together, reducing as far as possible the awkward consequences of unforeseen and unintended supersession. The decision whether to request adoption without publication deserves serious discussion.

(4) "Arrest" of Real Property

New Rule C(3)(a)(i), drawn from the final sentence of present Rule C(3), provides that "[w]hen the United States files a complaint demanding a forfeiture for violation of a federal statute, the clerk must promptly issue a summons and a warrant for the arrest of the vessel or other property without requiring a certification of exigent circumstances."

New 18 U.S.C. § 985, 114 Stat. 214, provides that real property that is the subject of a civil forfeiture action "shall not be seized before entry of an order of forfeiture." In lieu of seizure, the government is to initiate a civil forfeiture action against real property by filing a complaint, posting notice on the property, and serving notice on the property owner along with a copy of the complaint.

The arrest provision in Rule C(3)(a)(i) now seems too broad. Actions to forfeit real property must somehow be excluded; there is no reason to resist the statute and insist on arrest. A variety of approaches could be taken. The simplest might be:

When the United States files a complaint demanding a forfeiture for violation of a federal statute, the clerk must promptly issue a summons and a warrant for the arrest of the vessel or other property without requiring a certification of exigent circumstances, but if the property is real property the United States must proceed under {applicable statutory procedures}[Title 18, U.S.C., § 985].[4]

Committee Note

Rule C(3) is amended to reflect the provisions of 18 U.S.C. § 985, enacted by the Civil Asset Forfeiture Reform Act of 2000, 114 Stat. 202, 214-215. Section 985 provides, subject to enumerated exceptions, that real property that is the subject of a civil forfeiture action is not to be seized until an order of forfeiture is entered. A civil forfeiture action is initiated by filing a complaint, posting notice, and serving notice on the property owner. The summons and arrest procedure is no longer appropriate.

Again, it is important to consider whether this change can properly be adopted as a conforming amendment without publication and comment. It is difficult to imagine much need for comment, apart from drafting issues; the purpose of § 985 is to improve life for real property owners and occupants, the Department of Justice has no desire to quarrel with § 985, and it is desirable to bring the Rule into conformity with the statute.

[4] The alternatives are included to permit discussion. The Department of Justice prefers "applicable statutory procedures." Reference to a specific statute today incurs the risk that the statute may be renumbered tomorrow, and that other statutes may be adopted. The Committee Note can provide adequate guidance to the provisions of 18 U.S.C. § 985.

Item 7B

DRAFT MINUTES

CIVIL RULES ADVISORY COMMITTEE

October 16 and 17, 2000

The Civil Rules Advisory Committee met on October 16 and 17, 2000, at La Paloma in Tucson, Arizona. The meeting was attended by Judge David F. Levi, Chair; Sheila L. Birnbaum, Esq.; Judge John L. Carroll; Justice Nathan L. Hecht; Professor John C. Jeffries, Jr.; Mark O. Kasanin, Esq.; Judge Richard H. Kyle; Professor Myles V. Lynk; Assistant Attorney General David W. Ogden (by telephone); Judge Lee H. Rosenthal; Judge Thomas B. Russell; Judge Shira Ann Scheindlin; and Andrew M. Scherffius, Esq.. Judge Paul V. Niemeyer attended as outgoing chair. Professor Edward H. Cooper was present as Reporter, and Professor Richard L. Marcus was present as Special Reporter for the Discovery Subcommittee. Judge Michael Boudin attended as liaison from the Standing Committee, and Professor Daniel R. Coquillette attended as Standing Committee Reporter. Judge James D. Walker, Jr., attended as liaison member from the Bankruptcy Rules Advisory Committee. Peter G. McCabe and John K. Rabiej represented the Administrative Office. Thomas E. Willging represented the Federal Judicial Center. Judge T.S. Ellis, III, Judge Jean C. Hamilton, and Judge William W Schwarzer attended to present a panel discussion on differentiated case management, expeditious case processing, and the possibility of developing a small-claims procedure. Observers included Loren Kieve (ABA Litigation Section); Alfred W. Cortese, Jr.; Sharon Maier (ABA Litigation Section — Rule 23 Subcommittee); Jon Cuneo; and Fred Souk.

Judge Levi opened the meeting by introducing the new members, Justice Hecht and Judge Russell. He noted that Mark Kasanin's term of appointment has been extended, furthering the benefits of continuity provided by veteran Committee members. And he expressed appreciation for the service rendered by Justice Durham during her years as a Committee member.

Appreciation: Judge Niemeyer

Judge Levi further expressed the thanks of the Committee to Judge Niemeyer for his work as member and then chair. He noted that Judge Niemeyer had guided the Committee through many topics, including some that were contentious. Judge Niemeyer continually insisted that in all projects, both noncontentious and contentious, the Committee look beyond the technical details to consider the larger issues of policy and social interest that shape good procedure. In areas of potential danger, he saw to it that the Committee took the time necessary to become fully informed. Efforts were made to hear from as many different voices as possible. Public comments and testimony at hearings were studied carefully. Conferences were arranged. Empirical work by the Federal Judicial Center was regularly sought. The Committee emerged from the work with a solid foundation for each project. A resolution of thanks and appreciation from Chief Justice Rehnquist was read to hearty applause.

Judge Niemeyer responded by noting that the Committee's process has been satisfying and fulfilling. Among the rules launched during his time with the Committee is the class-action appeal rule, Rule 23(f). Although Congress has not yet adjourned, it seems likely that the discovery amendments scheduled to take effect on December 1 will indeed remain on schedule. Other recent work has included such long-pending projects as a package of amendments to the Admiralty Rules

and abrogation of the Copyright Rules of Practice. The Committee's work has been in the finest traditions of American lawmaking. "Town meetings" were held, experts were consulted, studies were encouraged. Large numbers of alternative proposals were studied. The level of debate, discussion, and compromise has been of the highest. "Sometimes, during discussions, we came in close." When there was a close division of views, the Committee refused to act; instead it continued to work until consensus was achieved. The public hearings were very helpful — those who participated took the Committee and its work seriously, and the Committee took them seriously. When the Committee eventually came to agreement on a desirable rules change, Committee members became advocates for the change, first in the Standing Committee and by going also to the bar associations and other associations. Testimony was given in Congress, and work was done with Congressional staff. Congress showed real respect for the Committee's knowledge, approach, and work. The Judicial Conference, the final step of and Advisory Committee's direct advocacy, also took the Committee's work seriously. The Department of Justice and its members on the Committee, Frank Hunger and David Ogden, also were very thoughtful and helpful participants in the process.

Judge Niemeyer continued his remarks by noting that institutions such as this Committee thrive on tradition more than on written rules. Committee traditions account for much of the impressive quality of its deliberations and work. All of the members who have served on the Committee over the past seven years have worked hard and made valuable contributions. The Federal Judicial Center has provided strong research support, not only through the regular relationship through Tom Willging but also throughout the entire research staff. Relations with other Judicial Conference committees have worked rather well, in part because of support from the Administrative Office and particularly from John Rabiej. Professor Marcus has been very helpful, in the grandest tradition, as special reporter for the discovery subcommittee.

Service with the Committee, in short, has been a privilege and a pleasure.

Judge Levi expressed the Committee's appreciation to Susan Niemeyer for her regular participation and support in Committee activities. Professor Coquillette brought Judge Scirica's regrets for not being able to attend the meeting, and respects to Judge Niemeyer.

Rules Update

Judge Levi summarized the "pipeline" of rules proposals. Three packages of amendments are slated to take effect December 1, 2000, unless Congress acts to defer. Rules 4 and 12 deal with service and time to answer when an officer of the United States is sued in an individual capacity for acts in connection with official duties. Admiralty Rules B, C, E, and Civil Rule 14, seek to distinguish forfeiture practice from admiralty practice in response to the great expansion of forfeiture proceedings in recent years. Discovery reforms are embodied in amendments of Rules 5, 26(a), 26(b)(1), 26(b)(2), 26(d), 26(f), 30, and 37(c).

The Judicial Conference in September approved and will transmit to the Supreme Court amendments in Rules 5, 6, and 77 to deal with electronic service of papers after initial process, as well as a package that would abrogate the antique Copyright Rules of Practice and adopt a new Rule 65(f) to confirm the application of Rule 65 interlocutory procedures to copyright seizures.

New rules proposals were published for comment in August. One proposal would adopt a new Rule 7.1 on corporate disclosure, to parallel a revised form of Appellate Rule 26.1 and a new criminal rule. Amendments to Rules 54 and 58 would integrate with proposed amendments of Appellate Rule 4 to end the "time bomb" problems that have arisen when failure to enter judgment on a separate document means that appeal time never starts to run. Comments on these proposals are due by February 15, 2001. A hearing has been scheduled for January 29, 2001, in San Francisco in conjunction with hearings on proposed Appellate and Criminal Rules changes. It is too early to guess whether there will be any persons who wish to testify on the Civil Rules proposals at that hearing.

Legislative Report

John Rabiej delivered a report on Administrative Office efforts to track legislation that might affect civil procedure. Thirty or forty bills have come into this category. Congress is working toward adjournment, somewhat later than expected, and this phase of the process is difficult to monitor because omnibus appropriations bills frequently are used to enact unexpected provisions that had not been successful in more direct legislative attempts.

Concern continues to attach to discovery protective orders. A longstanding "sunshine-in-litigation" proposal was attached for a while to legislation designed to establish criminal penalties for failures to disclose product defects and recall information. The discovery provisions, however, have been removed from the bill that appears to be on the way to enactment.

There is good hope that the Judicial Improvements bill will pass. This bill includes a provision that will "sunset" the one remaining provision of the Civil Justice Reform Act.

Several class-action and attorney conduct bills bear directly on the work of the rules committees. The House passed a minimum-diversity class-action bill, and the Senate Judiciary Committee reported out a different bill. The Senate class-action bill includes a provision that would require the Judicial Conference to make recommendations. Class-action legislation is likely to emerge again in the next Congress. There also has been active attention to attorney-conduct rules for government attorneys. Senator Leahy is sponsoring a bill that would require the Judicial Conference to report recommendations within a year with respect to contacts with represented persons, and to report within two years on other government attorney-conduct issues. Different proposals are being considered in the House, including adoption of the Rule 4.2 proposal of the Ethics 2000 Commission that would permit contact with a represented person when approved by court order. Again, if no legislation is adopted in this Congress these issues are likely to reappear in the next Congress. Professor Coquillette noted that it is this level of Congressional interest, and particularly the provisions that would direct prompt consideration by the Judicial Conference, that has stimulated the continuing work of the Attorney Conduct Subcommittee.

April Minutes

The draft minutes for the April 2000 meeting were approved, subject to correction of typographical and style errors.

Rule 23

Judge Rosenthal reported for the Rule 23 Subcommittee. The subcommittee is approaching the continuing Rule 23 project by attempting to determine whether there are amendments that are sensible and feasible, remembering the need to ensure that a seemingly desirable change will actually work in relation to the changing nature of class actions.

Much time and effort have been devoted to Rule 23 over a period of many years. Proposals were published for comment in 1996; the only one of those proposals to be adopted up to now is new Rule 23(f). Rule 23(f) already is working as hoped. Several courts of appeals have articulated the standards used to act on petitions for leave to appeal, and the courts of appeals already are beginning to use these appeals to provide greater guidance on class-certification issues. Rule 23(f) also will provide a relief valve for the pressures that can flow from grant or refusal of class certification. Rule 23(f), however, does not of itself address the many concerns reflected in the 1996 hearings and the work that led to the 1996 proposals and flowed from considering those proposals.

Mass-tort problems came to occupy a very basic role in committee work. The great pressures that flow from attempts to work through mass-tort litigation have affected Rule 23 as well as many other areas of procedure. The debates over Committee proposals were revealing — there is disagreement and real uncertainty about the means appropriate to address the dislocations caused by mass torts.

"Consumer" class actions also have been studied. There is a great divide on the question whether these classes are appropriate. Opponents argue that the "private attorney general" concept masks efforts to win through litigation goals that cannot be won in the political process, or more simply to enrich attorneys. But supporters argue that the benefits can be enormous, both for the public good and for providing often small but still meaningful remedies to individual class members. The published proposal to allow a court considering class certification to weigh the benefits of a class victory against the burdens of class litigation withered under vigorous cross-fire from these opposing camps.

The concern to define the appropriate roles for class litigation continues. But this is an increasingly dynamic area. From 1990, there have been increasing filings first in federal courts, and more recently in state courts. This growth inspired the Committee's work, just as it inspired lawyers. But now we are hearing that many state courts are changing the practices that brought fame to some courts for "drive-by" class certifications. Statutes, court rules, and court decisions have restricted the liberal certification practices that flourished for a few years.

Another trend may have peaked and receded. Settlement classes became familiar in several substantive areas, and then an attempt was made to extend this practice to mass-tort cases. The Amchem and Ortiz decisions have cut back on mass-tort settlement classes; it is thought that these decisions have made it impossible to settle some mass-tort classes, and more difficult to settle those that do eventually settle. As settlement comes to seem less likely, greater judicial management has resulted. As part of the certification process, the parties may be asked to provide plans of the tasks and time that would be required to prepare for trial. And, if certifications to not dwindle down because settlement-only certifications are restricted, the result may be more class-action trials.

All of these questions have been illuminated by the empirical work undertaken by the Federal Judicial Center and the Rand Institute for Civil Justice.

The subcommittee has made a preliminary decision to focus its efforts on the process of class actions, not the standards for class certification. Certification standards already are perceived to be exacting. The processes of appointing counsel, making fee awards, and reviewing proposed settlements have become the central subjects. The general question is whether Rule 23 can do more to provide structural assurances of fairness.

Another development has been overlapping, duplicative class actions, and class actions that are parallel to nonclass proceedings that involve large numbers of aggregated plaintiffs. It is difficult to find means within the scope of the Rules Enabling Act to deal with the inefficiencies and unfairness that can result from overlapping and competing class actions.

The materials in the agenda book have not matured to a stage that would support detailed discussion and revision. They are more preliminary, but designed to support discussion of the advisability of working further on these topics. The four Rule drafts address review of class settlements (but not settlement-class certification), attorney appointment, attorney fees, and appeal standing. The model notice and related forms being developed by the Federal Judicial Center raise also the question whether the notice provisions of Rule 23 should be revised. These models are intended to focus discussion, but not to exclude consideration of other possible Rule 23 revisions. Suggestions for other topics that might be developed will be welcomed.

The draft Rule 23 codifies current "best practices" for reviewing settlements. It does not attempt to restate or revise the criteria to be considered, nor does it attempt to set out a complete and exclusive list. It does not attempt to restate or revise the settlement-class teachings of the Amchem and Ortiz opinions. It seems likely that as Rule 23(f) appeals are heard and resolved, there will be a better foundation to consider whether to address settlement-class certification explicitly in Rule 23.

The settlement-review rule includes a provision that would allow class members to opt out after the terms of a proposed settlement are made known, whether or not there was an earlier opportunity to opt out and without regard to the general rule that class members cannot opt out of mandatory Rule 23(b)(1) or (b)(2) classes. This provision was developed in part in recognition of the "hybrid" classes certified under Rule 23(b)(2) that include both injunctive or declaratory relief with damages relief, but it reaches all forms of classes. There is substantial controversy and uncertainty surrounding both the proposed opportunity to opt out of the settlement of a mandatory class and the proposed requirement that a second opportunity be allowed when a settlement is announced after expiration of the initial period for opting out of a (b)(3) class. It has been protested that increased opportunities to opt out will make it more difficult to achieve settlement. But at the same time it is recognized that often successful settlements have been achieved in (b)(3) classes that have been certified at the same time as a proposed settlement is preliminarily approved, giving an opportunity to opt out after the initial settlement agreement.

Another set of problems arises from the role of objectors. What provisions should be made for discovery? Should successful objectors be awarded expenses, including attorney fees?

Objections can be made for good reasons, but objections also can be made for obstruction, delay, or the hope of being bought off. It is very difficult to draft rule terms that distinguish between "good" and "bad" objectors. The draft invokes Rule 11, but this device may be both redundant and ineffective.

Disclosure or discovery of "side agreements" is another topic that has proved difficult to grasp. How can such agreements be defined? There are many kinds of understandings that may be reached, whether or not articulated, in the process of hammering out a class settlement. Some are trivial. Some are important, but only to a few class members. Further development seems desirable before this topic can be addressed by the rule.

There is a continuing demand for greater judicial scrutiny of proposed settlements. Draft Rule 23(e)(5) seeks to distill the most obvious things that have been articulated by the courts. But the list itself obviously raises the question whether it is wise to encumber the rule with so many factors. One risk of this approach is that practice may be frozen around the list. The list cannot be complete, but factors not in the list may be taken less seriously. Some or even many of the factors in the list may not be relevant to a particular settlement, but a court may feel obliged to consider and make findings with respect to each. These risks are diminished if the list is set out in a Committee Note, not in the rule, or is relegated to some other place such as the Manual for Complex Litigation. Yet the earlier hearings on Rule 23 provided advice that there is a need for greater scrutiny and guidance. And some of the factors in the list seem to move beyond things that have been clearly identified in current practice; examples are provided by the focus on plans for distributing an award to class members, and by the consideration of the reasonableness of attorney-fee provisions.

Present decisions provide little guidance on "appointment" of class counsel. The draft rule would give courts a greater opportunity to seize control at the outset. It is not clear whether this much judicial involvement is desirable. The draft also imposes severe limits on what an attorney may do on behalf of a class before being appointed as class counsel. These provisions need much more study, in face of challenges that they ignore much common, desirable, and often necessary practice. The danger of impairing class interests also may be questioned in light of the fact that the class is not technically bound by acts taken before class certification.

The class attorney appointment rule lists several factors to be considered in selecting counsel. Many have been recognized for years in addressing the effective representation requirement, and are not controversial. But there is a new one, asking whether selection of counsel can be done in a way that facilitates coordination with other actions. There are few opportunities to effect coordination by rule provisions, and this one may both prove effective and avoid the federalism concerns that surround many alternative proposals.

The attorney-fee draft presents first the question whether the rules should address this topic at all. There is a lot of sentiment to do something that will help the process of making careful awards, but there is much disagreement whether a court rule is the proper means of proceeding. There is equally disagreement as to the factors that might be adopted. The factors included in the draft rule draw from the RAND report, and many of them focus on tying fees to the benefits actually won for class members. The draft deliberately avoids any choice between lode-star and percentage-of-recovery approaches to fee calculations. It requires disclosure of side agreements, again raising

the question of defining the agreements that must be disclosed and raising also the question whether courts should be concerned at all with the arrangements for dividing the awarded fee among different lawyers.

The draft on appeal standing responds to the rule in many circuits that a class member must win intervention to have standing to appeal the judgment in a class action. The first question is whether the intervention procedure is in fact the better procedure, asserting a measure of control that will discourage ill-informed or mischievous appeals.

Clear-language proposals have regularly been made for class-action notice rules. A simple rule demand for clear language, however, may not accomplish much. Better results may flow from providing good examples. With this thought in mind, the Federal Judicial Center agreed to undertake to collect good notice examples and then to synthesize a model notice from the best examples. This work is well under way, and will continue; the current drafts are included in the agenda materials. Much good may flow from making the final product available through the Center by on-line availability to lawyers, use in judicial training, and other means.

The subcommittee has a tentative but ambitious goal to develop concrete proposals for detailed consideration at the Committee meeting next April. Refined versions of the present drafts would be presented.

Following this introduction, there was a review of several features of the drafts, including items not described in the introduction.

The provision for revealing "the terms of all agreements or understandings made in connection with the proposed settlement, dismissal, or compromise" is set forth alternatively as a requirement of disclosure in the notice of proposed settlement or as a proper subject for discovery by an objector. Objections have been made as to each approach, but it also has been urged that these matters are so important that both should be adopted — a summary should be required with the notice of proposed settlement, and further discovery should be available to an objector.

The question of a right to opt out of a proposed settlement includes a wrinkle that has not been much discussed. The draft speaks of an opportunity to request exclusion from the class. Disapproval of the settlement, however, may mean that those who sought to opt out of the settlement would prefer to remain in the class. Thought should be given to providing that exclusion from the settlement means exclusion from the class only if the settlement is approved.

The provision for discovery to aid in appraisal of the apparent merits of the class position might be revised in ways that reduce the concern that discovery will go so far as to undermine one of the principal objects of settlement. Discovery might be aimed at information "reasonably necessary to support the objections," or discovery might be conditioned on a preliminary showing of reasons to doubt the adequacy of the settlement.

The provisions on objectors include a new subparagraph, draft Rule 23(e)(4)(B), that limits the ability of an objector to settle the objections on terms that yield the objector treatment more favorable than the terms available under the class settlement. The concern is that a class member who advances objections on behalf of the class is both assuming a fiduciary duty to the class, similar

to the duty of a court-recognized class representative, and is assuming powers of delay and obstruction that draw from the need or desire to conclude the settlement. If the settlement indeed is inadequate as to the class, any added benefit wrung from the class adversary should be spread over the class unless the objector occupies a distinctive position that is not fairly reflected in the class definition. These concerns are reflected in the requirement that court approval must be won. The draft is intended to require approval by the trial court, even if an appeal is pending. It may prove desirable to discuss the relationships between trial court and appellate court when the settlement is reached pending appeal: under present procedure, the objector can simply settle and withdraw the appeal. It does not seem a markedly different or untoward interference with the appeals court's jurisdiction to condition this result on approval by the trial court. The trial court is likely to be in a much better position than the appeals court to appraise the terms of the settlement.

One of the factors listed for review of a proposed settlement is the extent of participation in settlement negotiations by class members or class representatives, a judge, a magistrate judge, or a special master. This factor reflects recurring suggestions that courts should play a role in structuring settlement negotiations to protect against self-serving or inadequate representation by designated class representatives and class counsel. Familiar suggestions include appointment of a class guardian, creation of a steering committee of nonrepresentative class members, use of a special master in a role somehow different from that of a class guardian, or direct judicial involvement. The Committee has regularly concluded that an attempt to graft such devices onto Rule 23 is likely to produce more confusion than benefit. But formal or informal efforts along these lines may prove valuable in particular cases. Actual use of one or another of these devices may provide useful reassurance that the settlement reflects generally held class interests.

Another of the factors would consider the probable resources and abilities of the parties to pay, collect, or enforce the proposed settlement judgment. A settlement that seems to promise generous but illusory benefits may not be as wise as a differently structured settlement that, in the end, may prove more useful. It may prove difficult to translate this abstract concern into practice. And there is a risk that this factor will encourage sloppy consideration of the increasingly questioned "limited fund" concept, encouraging courts to accept uncritically the terms of a settlement that the parties seek to justify primarily on the ground that nothing more is possible.

The list of factors also would permit consideration of the existence and probable outcome of claims by other classes and subclasses. This factor relates to the factor that would authorize comparison to results actually achieved for others, but goes beyond it. The comparison would not be entirely one-way: it would authorize consideration of the risk that this settlement would seize for this class an unfair portion of the assets likely to be available for other claimants. The most notorious concern in this dimension relates to "futures" claimants who have not yet filed actions, and who may not yet have mature claims or even be aware that they may have claims. There are manifest grounds for concern in this direction, but at the same time it is difficult to ask a court to disapprove a proposed settlement because it is too generous to the only parties before the court.

The last factor singled out for preliminary attention was the one that authorizes consideration of rejection of a similar settlement by another court. It is difficult to preclude approval of a settlement that has been earlier rejected; further information may show that a proposal that once

seemed inadequate is indeed reasonable and adequate. But perhaps some means should be attempted to strengthen this effort to defeat attempts to "shop" a settlement by successive presentation to different courts. An attempt even might be made to restrict the opportunity of a state court to approve a settlement that has been rejected by a federal court, treating disapproval as a judgment binding on the same class or a substantially identical class.

A final and distinct feature of the Rule 23(e) draft is paragraph (6), a continuation of a concept that has carried forward from early draft revisions. This paragraph would authorize the court to appoint a magistrate judge or another person to conduct "an independent investigation and report to the court on the fairness" of a proposed settlement. The purpose of this provision is to overcome the failure of adversariness that arises when the parties have joined in presenting and championing a proposed settlement. The court's agent is charged to undertake an investigation in the way that an objecting class member might do, if the objector had sufficient funds, incentive, and ability to pursue the inquiry. The potential advantage is apparent, particularly in actions that do not spontaneously yield well-financed and properly motivated class-member objectors. The potential disadvantages are equally apparent in the form of delay, cost, and the potential for recommendations that rest on an unduly optimistic view of the costs and prospects of further litigation on the class claim. The virtue of the device in enabling an investigation that a judge could not properly undertake in the office of judge, moreover, may also be a vice — the court's role as neutral arbiter of the dispute may seem compromised when the court appoints an agent to investigate rather than to receive presentations by the adversaries.

The first question in the discussion was whether draft Rule 23(e)(6) contemplates that the investigator appointed by the court could consider all of the factors listed in draft Rule 23(e)(5) for court review. The answer was that the terms of the investigation would be defined by the court: it could be completely open-ended, but also might be confined to one or a few specific inquiries. It was further suggested that although this role is not a familiar one for courts, the device could become usefully productive in some cases.

Turning to the provisions for objectors, it was noted that there are professional objectors who "go from settlement to settlement"; "they want to be, and unfortunately are, bought off." "Their weapon is time." There is one who has filed objections in at least 20 cases in the last two years. Objecting to class-action settlements has become a cottage industry. If we guarantee discovery, there will be still more objectors. Under present practice, discovery can extend even to the settlement negotiation process if there is a showing of probable collusion. The need for discovery by objectors is much reduced by the common practice under which the settling parties make the results of their pre-settlement discovery available to the objectors. The proposals aimed at objectors may make it more — too much more — difficult to achieve settlements. The Association of the Bar of the City of New York and the Department of Justice have expressed concerns that the proposals would discourage settlements. And we do not need to do anything to encourage objectors; we have them now. As it is, objectors thrive because it is always possible to negotiate a small increment in the settlement and then point to the change as the basis for an award of fees. A settlement that provides coupons to be redeemed within six months can be modified to allow redemption within eight or nine months, and so on.

A broader perspective was taken by asking generally what the Committee is — and should be — trying to do. Over the years, it has been said that there are weaknesses in the class-action process. The question is to identify and remedy the weaknesses that are susceptible of cure. Rule 23 establishes a form of public representation; courts have a special interest and responsibility, unlike the situation when an attorney is directly responsible only to an individual client, and the client is responsible for the attorney. Who is looking after the public — either the specific "public" of class members, or the broader public that may be served when a class action is used for public enforcement purposes? Is it to be only the class attorney, who often is self-selected? Most class members do not know the class attorney. The defendant wants peace. The result is an undemocratic process that may dispatch the claims of class members without due regard for their interests.

On this view, one thing that can be done is to improve transparency. Next, we can recognize that the court is in charge of the class attorney, and the attorney is accountable to the court. Many of the class-action bills pending in Congress reflect this view.

There is not much that can be done to elicit greater involvement by class members. Notice will not get them directly involved, but they are involved in a more attenuated sense even when they may not want to be involved. It would be better to move toward opt-in classes, but that approach is not likely to survive the Enabling Act process.

We should constantly remember that there are historic reasons for the mandatory (b)(1) and (b)(2) classes. If we take that away, we lose much of our legitimacy.

A separate rule on appointment of class counsel and fee awards, together, would be a good idea.

These remarks were met by the observation that judges have all these powers now.

The role of class attorneys was reintroduced with the observation that veterans of the class-action debates have regularly heard that class actions have moved beyond attorney representation of clients. The goal has become "fairness" in some more general sense. Continued efforts should be made to draft rules on attorney appointment and fees, and on other matters, that may improve the fairness of the process. The prospect that such proposals will encounter stiff opposition should not dissuade the subcommittee.

It was said again that courts have the necessary powers of regulation and control, but with the elaboration that it is difficult to find the support that does exist in the case law. Codification in Rule 23 will make the powers more effective. Courts are willing to take hold and assert themselves. The subcommittee should continue work on its proposals to stimulate debate and reach acceptable resolutions.

The "laundry list" of factors in draft Rule 23(e)(5) was questioned by asking whether it implies that the court should consider all of these factors in each case. A settlement effected through negotiations that do not involve anyone other than the class representatives, class adversary, and counsel may be entirely proper; does draft Rule 23(e)(5)(E) suggest that the settlement should be doubted on this score? The Rules do not often resort to laundry lists; perhaps this approach should be dropped.

It was suggested that the draft rules deal with attorney conduct, and that great sensitivity must be observed. Federal intrusion on regulation of attorneys is a "third rail" in federal-state relations. That is why the Standing Committee has a hard-working subcommittee on Rules of Attorney Conduct. The attorney-conduct inquiry has not focused on the role of attorneys in class actions. But attorney appointment and fees are topics that are addressed by state rules. So is fiduciary responsibility to the class. There is a new body of law developing under the "fiduciary duty" label, outside the formal Rules of Professional Responsibility. The Federal Rules already address attorney conduct through such provisions as Appellate Rule 46, Civil Rule 11, and so on. But many people believe that the Federal Rules should not address attorney conduct, and care should be taken in approaching these topics.

Texas experience was noted. The courts considered these topics, and decided that they were better fit for legislation. The legislature, however, wanted nothing to do with such problems, and if anything is to be done it is now up to the courts to do it. Doing it remains a challenge. The idea that class members should be able to opt out of a (b)(1) or (b)(2) class settlement deserves skeptical attention. The long list of settlement-review factors may have unintended effects; it is difficult to control the impact of such lists. But Rule 23 is social engineering in the courtroom; courts have created the rule, and have a duty to fix it when that proves possible. The problem of professional objectors is one that deserves attention; some frame the question as pirates who prey on the other pirates involved in class litigation, but it remains true that class members should know what went into the settlement and have an opportunity to object.

The question of "side agreements" was framed by asking what sorts of agreements may be made incident to settlement. One form has been that seen in the Amchem and Ortiz cases, where counsel separately negotiated settlements of the present cases in parallel with class settlement of future claims. That process was very public, and consciously addressed. Other agreements involve such things as splitting attorney fees in ways that courts do not learn about — there is a real question whether courts should care how a total fee is divided once it has been set. Increasingly, fees are set separately under agreements that in form provide that the fees do not come out of the class recovery. But possible concerns remain that the agreement for a fee award up to a stated ceiling was negotiated in tandem with the class settlement, and that the total fee may seem excessive if part of it is shunted off to counsel who did little work and incurred little risk in relation to the allocated share. Another form of agreement may be settlement for individual class members represented by an objecting attorney on terms more favorable than general class terms, capitalizing on the costs of objection-induced delay. Other agreements may involve understandings that discovery results will not be shared with lawyers in other cases, that other class actions will not be brought or that individual plaintiffs will not be represented in related litigation [some states apparently permit such agreements]. In some litigation these agreements have been reached after an inquiry into separate agreements was made on the record. In others, objectors have been bought off, apparently with a share of class counsel fees, but discovery has been denied as to the terms.

The general observation was made that there is no assurance that tomorrow's practice will be the same as today's practice.

A number of "picky" points were raised. The draft rules do not address the question of settlement on appeal by a class representative, a question involved in the recent Ninth Circuit decision in the United Airlines litigation. The possibility that a settlement should be evaluated for its effect on future claimants, draft Rule 23(e)(5)(H), is troubling — why should the court be concerned with more than fairness to the class before it? The expressed concern that an independent court-directed investigation under draft Rule 23(e)(6) takes the court outside ordinary judicial functions, on the other hand, is overstated; the court has to take on a nonadversary, class-protecting role in class litigation. The draft rule on attorney fees seems to authorize awards in circumstances that may involve so much substantive lawmaking as to fall outside the Enabling Act. And, more broadly, it should be asked whether it is wise to attempt to make rules when the background of practice is continually changing.

Turning back to objectors, it was observed that draft Rule 23(e)(4)(A) provides for fee awards to objectors, but does not speak to fee awards against objectors apart from the invocation of Rule 11. This should be addressed; bad objectors do exist, and mere reference to Rule 11 is not sufficient deterrence.

The Rule 23(e)(4)(B) attempt to regulate settlements with objectors, focusing on terms "reasonably proportioned to facts or law that distinguish the objector's position from the position of other class members" was questioned on the ground that the "reasonably proportioned" concept is "not crystal clear."

It also was urged that the provision for court direction of an independent investigation of a proposed settlement should be beefed up. "Sunshine, transparency" are important. A third party can be critically useful as an adversary to the joined forces of class counsel and class opponent. A "guardian ad litem" for the class is a good idea.

It was asked what information is now made public in fee applications. The answer was that usually there is a paragraph or two in the notice of proposed settlement that describes what fees may be sought. The actual applications run to hundreds of pages, providing detailed information. But interest in the information is seldom shown.

The draft rule on appointing class counsel was the next topic of discussion. The introduction of the draft began by emphasizing that the draft is a rough first pass that has not been considered at any length by the subcommittee. The very first part, subsection (a)(1), does two very different things. The first sentence states simply that an attorney may not act on behalf of a class until appointed by the court.

The second sentence of draft (a)(1), set out in brackets, covers a substantial portion of a proposition that has proved highly controversial. In broadest form, the proposition is that no one can act on behalf of a class until the class is certified. This proposition is scaled back in the draft, but the draft still would provide that no one may conduct court proceedings on any matter related to class certification or the merits of the class claims, and no one may engage in out-of-court settlement discussions, until appointed to represent the putative class. Supporters of this approach urge that official approval is required to ensure that an attorney who seeks to represent a class is competent, does not have disabling conflicts of interest, and has at least a moderately effective class

representative to supervise the representation. The dangers of pre-appointment activity are thought to be particularly great with respect to settlement negotiations, where an attorney may sell out class interests in return for an understanding as to attorney fees.

The balance of the draft, subdivision (b), would establish an appointment procedure that requires an application for appointment even if only one attorney seeks to represent the class. The information required in an application is, for the most part, similar to information routinely considered in determining whether a named class representative will, with the help of intended counsel, adequately represent the class. One part of the information identifies "the terms proposed for attorney fees and expenses"; this inquiry would legitimate, but not directly encourage, the "bidding" practices that have attracted renewed interest in recent decisions. As noted earlier, another new factor asks whether appointment of counsel who represents parties or a class in parallel litigation could facilitate coordination or consolidation to reduce the problems of parallel litigation. A separate paragraph, (b)(4), sets out alternatives that would direct either that no consideration be given to the fact that one applicant has filed the action, or that no significant weight be given to this fact.

The first comment went to attorney responsibility issues. An attorney deciding whether to file a class action may not know until the actual filing whether the action will be in a state court or a federal court. The attempt to regulate what is done on behalf of a class before filing trenches heavily on state regulation of attorney conduct in circumstances that may not yield even the eventual justification that the action has come to federal court and to generate corresponding federal interest. State chief justices dislike present local federal court rules on attorney conduct. Anything that addresses such questions as who can represent a class, fiduciary duties, and the like, invades state territory. Most states take the position that state rules bind an attorney admitted to practice in the state no matter what court the attorney may act in. This proposal should be coordinated with the Attorney Conduct Subcommittee.

A second comment was that the rule is misdirected. It aims at all class actions, but routine class actions do not need it. There are many class actions in which no one is competing to represent the class, and no one can be induced to become a competitor.

The draft rule was defended by asking how an attorney comes by authority to represent a class. It is not enough to say that Rule 23 establishes the authority. The representative class-member client may or may not be a "real client" at all; some class representatives are recruited by, and subservient to, class counsel. But even when the class representative has genuinely and independently selected class counsel, the class representative has no authority to act for the class until the court authorizes it. The court is responsible for binding the class to representation by this attorney, and should be active in discharging its responsibility. The draft rule requires a hearing, and that is good.

It was asked whether it would help to attempt to tailor the rule more closely to the different needs of different kinds of cases. The Private Securities Litigation Reform Act, for example, establishes a procedure for selecting lead plaintiffs, who then are responsible for picking class counsel. Any rule should recognize this statutory procedure, and perhaps should simply cede to it.

From a somewhat different perspective, it was widely agreed that the factors listed in the draft subdivision (b) all are considered by courts now in determining whether to certify a class. The anticipated quality of representation by counsel is an important part of the certification decision. What, then, is added by establishing a formal procedure for appointing class counsel?

Turning back to the feature that prohibits any action on behalf of a class before appointment as class counsel, it was noted that many things are done before a certification decision. Discovery on the certification question is common. The draft seems to prohibit any of this activity before appointment. That is too rigid. Some softening, at least, is necessary.

It also was noted that particularly difficult problems will arise with respect to counsel for a defendant class. One common problem is that no one defendant wishes to be responsible for paying the incremental costs that come with representation of the class: how is it fair for a court to appoint counsel in such circumstances? How, for that matter, will the court get any application for appointment? But a quite different problem arises when a defendant is willing or even eager to provide representation for the class: how can we trust that there will be no conflicts of interest among class members, and how can we protect against them? These problems may be so difficult as to require that an attorney-appointment rule be limited to plaintiff classes. But any such limit might stir speculation that the rule rests on hostility to plaintiff classes.

Class Attorney Fees

Another draft rule would address determination of fees for class counsel. As noted earlier, it does not attempt to choose between lode-star and percentage-of-recovery methods of setting fees. For the most part, at least, this rough initial draft simply sets out factors that are familiar from present practice. But it does raise some difficult questions.

A first range of questions goes to authority to make a rule governing attorney fees. There is firm ground as to fees based on statutory provisions, when a settlement includes fee-payment terms, and when an award is made out of a class recovery. But the draft would authorize an order for payment by members of the class, or by a party opposing the class, on more open-ended terms. Payment by class members may seem particularly important with respect to a defendant class, and might alleviate the concerns with appointing a defendant-class attorney. Payment by a class adversary who has lost to the class may seem attractive as well, but what distinguishes class litigation from other litigation that is covered by the uniquely "American Rule" that generally bars fee shifting? Finding Enabling Act authority for these general provisions may prove difficult or even impossible.

Brief discussion suggested a general anticipation that any rule on attorney fees will be met with vigorous opposition from plaintiff-class counsel.

It was asked why the general Rule 54(d)(2) provisions, which include specific reference to submissions by class members, are not adequate to the task. These provisions establish a procedure for seeking a fee award, but do not address the grounds for making an award or the criteria for measuring it. The question posed by the draft is whether a rule addressing these questions is desirable, and whether — if desirable — can be adopted in the rulemaking process.

It was noted that the American Bar Association Model Rules of Attorney Conduct include a provision that attorney fees must be reasonable. In theory, a district court can proceed directly against an attorney who charges an unreasonable fee. The local rulemaking process has asserted authority over attorney fees. Direct disciplinary procedures are possible.

Judge Rosenthal concluded this discussion by noting that the question for the moment is not authority but guidance for a court embarked on determining a fee award. A rule could give support to measure the award in an orderly and disciplined way. But work is needed to harmonize with other rules and to consider cross-references, particularly to Rule 54(d)(2).

Appeal Standing

Draft Rule 23(g) in the agenda materials is new; it has not been considered at all by the subcommittee. It would authorize appeal from a class-action judgment by a class member. The proposal was spurred by a submission from attorneys in the California Attorney General's office. The rule in several circuits is that a class member can achieve "standing" to appeal a class-action judgment only by winning intervention in the district court. If intervention is denied, the order denying intervention can be appealed, but the class-action judgment can be appealed only upon reversal of the order denying intervention. This procedure has been adopted in the belief that allowing class members to appeal would undermine control of the class action by the court-approved representatives and their lawyers, and frustrate the court's own responsibility.

The argument for permitting appeal by class members is simple. They will be bound by the judgment. Individual rights or defenses will be taken away by the judgment. Our entire system of procedure and trial-court responsibility is built on the premise that appeal is available as a matter of right to test the correctness of the judgment. A person who is to be bound should have a right to appeal. This argument takes on special force when the class judgment rests, as so often happens, on a settlement that has been approved by the court. There is a risk not only that the class representatives have entered into an improvident settlement, but also that the trial court may not have sufficient adversarial input to test the adequacy of the settlement and may be affected by a temptation to conclude troublesome litigation.

The structure of the draft builds from these arguments to permit appeal by a class member from any judgment based on a settlement or dismissal approved under Rule 23(e), and from any other judgment that is not appealed by a class representative. This structure reflects a belief that a settlement is so distinctively precarious that a non-representative class member should be able to appeal even in the no-doubt unusual situation in which a class representative also is appealing. Perhaps the distinction is over refined. The draft Committee Note serves as the vehicle for addressing obvious surrounding problems: a class member can present on appeal only issues that were properly preserved in the trial court; if a class member appeals before a class representative takes an appeal, the class member's appeal "is suspended, and should expire upon submission of the appeal on the merits"; if many class members appeal, the court of appeals can designate one or more to serve as class representatives for the appeal. The Note also identifies the question whether appeal standing should be restricted to the final judgment. A class member, for example, may wish to appeal under Rule 23(f) from an order granting certification of a class, arguing that certification is improper, that the named representatives are inadequate, that the class has been defined too broadly,

and so on. The court of appeals can protect itself, the district court, and the appointed class representatives by denying permission to appeal. The danger of delay and strategic misuse may seem to overwhelm these advantages, however; further thought is needed.

Discussion began by asking whether there is a real problem that needs to be addressed. It was further asked whether a Civil Rule can supersede standing rulings by the courts — is this a rule of procedure at all? And even if a rule can properly address the question, is it wise to permit appeals that can tie a case up for years after those initially responsible have become satisfied with its conclusion?

It was recognized that the question is a tricky one. Perhaps there is no real problem with current practice; there are no empirical data to demonstrate that bad dispositions of class actions are surviving only because nonrepresentative class members are unable to win intervention to appeal under present practice. Just as with anything else that increases the role of objectors, we must be careful.

Notice

Thomas Willging presented the notice and related drafts being developed by the Federal Judicial Center. He noted that the draft "is still in mid-point." They hope to find a linguist to review it, and then will test it on groups of non-lawyers. There are a number of issues yet to be resolved. Perhaps the most important remaining challenge will be an attempt to draft a one-page summary that has a chance of being read and understood by class members.

Another issue goes to the language used to describe the preclusive effects of remaining in a class. The scope of claim preclusion that attaches to a class-action judgment may appropriately be somewhat different from the scope of claim preclusion that follows individual litigation. Finding language to capture these concepts in a way that means anything to nonlawyers will be difficult.

It would be helpful to have Committee members submit their own top five candidates for words or phrases that should be eliminated as jargon.

Further attention is needed with respect to the part of the notice that describes what a class member can expect to receive from the litigation. The present draft has two alternatives: one in a loss-per-unit form (so many cents per share of stock), the other in a loss-per-person form (a fund divided per capita by an uncertain number of claimants). There are serious questions whether either example is useful outside the securities litigation field that inspired each.

The sections on selecting an individual attorney and on making individual appearances "seemed to get out of control." Rule 23 does require notice of the right to appear. These matters will be considered further.

Mr. Willging was asked whether forms would be prepared for other types of litigation. He responded that the aim is to develop a "skeleton" that can be adapted to several forms of action. No attempt will be made to develop a generic form in the elaborate detail of the notice created for the current fen-phen litigation.

It was noted that the subcommittee may continue to consider possible amendments to Rule 23 addressing the notice obligation. It might help to specifically include a reminder of the need to seek "plain English" in notices. The time may have come to recognize the need to attempt some form of notice in Rule 23(b)(1) and (b)(2) class actions. It may be possible to soften the requirement of notifying all identifiable class members in actions that involve very large classes and no more than very low dollar recoveries for any individual class member. These issues remain open on the agenda.

The concluding remark was that a one-page summary form, if it can be created, will be the most useful possible product of this work.

Simplified Procedure

The simplified procedure project was launched as a broad response to the Advisory Committee's responsibility to consider the overall working of the Civil Rules. Section 331 of the Judicial Code instructs the Judicial Conference to "carry on a continuous study of the operation and effect of the general rules of practice and procedure," and to recommend to the Supreme Court "[s]uch changes in and additions to those rules as the Conference may deem desirable to promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay * * *." These goals, reflected in Civil Rule 1, remain elusive. The continuing process of attempting to adapt the Civil Rules to new forms of litigation and evolving litigation behavior often seems to make the Rules less simple. It is important to draw back from the details from time to time, and to ask whether larger-scale revisions may be appropriate. The Committee has had discovery on its agenda continually for more than thirty years, and occasionally has asked whether the pleading rules might be asked to carry a more substantial share of the pretrial communication function. The simplified procedure project is designed to ask whether the time has come to pare back some of the complexities, perhaps by designating some categories of cases for a package of rules that would enhance pleading and disclosure, while diminishing the role of discovery.

Judge Kyle introduced the Simplified Rules Subcommittee report by noting that the Subcommittee's purpose at this meeting is to seek a sense of direction. The topic was put on the agenda by Judge Niemeyer, who was asked to summarize the initial directions of inquiry.

Judge Niemeyer gave the background. The Committee's discovery work led to consideration of the burdens of discovery and the relationship between discovery and notice pleading. We have never dared to reopen the 1938 package of notice pleading and discovery. The 1938 reform was a reaction to the spirit of technicality that had come to dominate Code pleading. Discovery was to be managed by attorneys, with the court as a backstop. The most vigorous complaints over the years have arisen from the conduct of depositions and "scorched earth" tactics. Any attempt to revise the present integrated system of pleading and discovery for all actions, however, would be extraordinarily perilous. Rather than take on the whole system, the Simplified Procedure project is designed to begin with some discrete categories of litigation. If success is achieved with these cases, the experience may provide the foundations for more general revisions several years in the future.

Part of the inspiration for this project has been the American Law Institute Transnational Rules of Civil Procedure project. That project seeks to identify the central tasks of adjudication that

are common to all procedural systems and to develop simple rules that can discharge those tasks effectively.

It is hard to know what would happen if simplified rules were adopted. If they were made optional, would people opt into them? Can we properly make any such rules mandatory for some categories of cases?

The project has been discussed, in preliminary form, with several bar groups and with groups of district judges. There has been much positive reaction. But there also has been concern about possible interference with local ADR rules, and more generalized concern. One particular concern must be met head-on: the proposal is not to develop a cheap and inferior set of rules for "small claims." It is an attempt to develop rules that will give better results in cases that may be overwhelmed by full application of all the procedures available under the general Civil Rules. We should remember that discovery is not used at all in something like 40% of federal civil actions, and is little used in another 25% to 30%. Perhaps these cases would benefit from rules that, at little cost, require more detailed initial pleading and disclosure.

It has seemed desirable to pursue this effort. One goal may be to develop a set of optional rules that are so attractive that litigants will choose to be governed by them.

To pursue these questions in a larger perspective, the Subcommittee has invited Judges Ellis, Hamilton, and Schwarzer to present experiences and proposals that look in different directions. Those who have questioned the broad attempt to develop a set of simplified rules have looked in several directions. One direction challenges the assumption that the federal rules are "too much" for many cases that are, or better would be, in the federal courts. The very fact that most federal civil actions involve little or no discovery suggests that the rules are not too complex. The theory that federal procedure is too complex, moreover, must deal with the fact that many states have chosen to follow the federal rules for their own courts of general jurisdiction, and that many of the state systems that have developed their own traditional models can hardly be found simpler than the federal model. Perhaps most importantly, it is urged that federal courts already have the power to adopt simplified procedures for cases that deserve them. The sweeping management powers established by Civil Rule 16, and the broad judicial discretion built into the discovery rules, ensure that no litigant need be overwhelmed by strategic misuse of procedural opportunities. Individual case management is protection enough. In addition, several courts have developed differentiated case management plans that ease the potential burdens of individualized management. These plans establish presumptive procedural limits for each of several "tracks," and encourage the parties to work together in choosing the appropriate track.

The question, in short, is a familiar one: time and again, a proposed procedural revision is met by the response that the flexibility and discretion built into the Civil Rules establish ample authority to accomplish the goals sought by the revision. The issue may be not so much the adequacy of present rules as the adequacy of implementation. The conclusion that present rules are adequate in the abstract need not defeat revision — it may be easier to guide discretion by general rules than to supervise case-by-case exercise of discretion. But it is important to know how the present rules are working.

It must be emphasized that the draft Simplified Rules are not at all the type of rules that might be developed specifically for pro se litigation. To the contrary, they are simplified only to those who have a professional understanding of procedure. They are not a complete, self-contained system. They only supplement the Civil Rules for certain issues, most notably pleading, disclosure, and discovery. The Civil Rules continue to apply to all matters not directly governed by the draft Simplified Rules. Implementation requires expert knowledge of all of the Civil Rules, both general and simplified.

Judge Schwarzer described a small-claims procedure that he has developed for consideration. The proposal is an "anti-Rules" proposal in the sense that it depends entirely on party consent. It begins with the observation that many actions in federal courts involve dollar stakes that are low in relation to the cost of litigation. The Federal Judicial Center review showed that for the actions in which the amount of the demand is known, more than 11% involved demands for less than $50,000, and more than 16% involved demands for less than $150,000. There also are many cases pursued pro se. The purpose of this model is to facilitate rapid, inexpensive access to justice for small-stakes cases. The result also might be to save some judicial resources.

This small-claims proposal is consensual. The action would be filed in the same way as any action. Possible election of the small-claims rules would be raised at the initial scheduling conference or by similar means. Once the rules are selected, the common obstacles to speedy disposition are removed. There are no motions, no conferences after the initial conference, and little discovery because the time frame for getting to trial does not allow much time for discovery. All complexities are avoided. Jury trial is eliminated. There is no need to adopt any new procedure rules. A general order could establish the system.

The incentives for electing this system begin with a guaranteed trial date in 30 or 60 days. This speedy trial guarantee is possible only if most judges of the court join in the system; each judge would agree to be available for a period of one or two months to give priority to these cases. The early trial system also is likely to change the judge's role, assigning more responsibility to the judge because the parties have not had as much opportunity to be prepared. Such rapid access to justice is important, and may attract many litigants.

Another incentive could be developed by establishing a cap on damages, perhaps $75,000. Plaintiffs might agree in return for speedy and inexpensive trial, while defendants would be attracted by the limit on recovery.

Although no rules changes are needed to establish this system on a local basis, the proposal might be supported by adding consideration of expedited procedures to the list of topics considered at the Rule 26(f) conference.

This system would provide "rough and ready justice," but there may be room for that in our system.

Judge Hamilton introduced the differentiated case management plan of the Eastern District of Missouri by observing that when the Civil Justice Reform Act was enacted, "we were in quiet desperation. Our case management needed overhaul." They reacted by adopting differentiated case management, developing the ADR program, and putting magistrate judges "on the wheel" to be

assigned at random to try civil cases subject to the right of any party to opt for trial before a district judge.

The differentiated case management plan has five tracks, including three that set expected times to trial: an expedited track, with 12 months to trial; a standard track, with 18 months to trial; and a complex track, with 24 months to trial. The other tracks are for "administrative" cases that involve disposition on records that have already been developed (such as social security disability review cases), and pro-se prisoner cases.

The expedited track was designed to have no Rule 16 component. But we have found that most lawyers have trouble thinking of their cases in this mold, so there are not many cases assigned to this track. It has not matured the way we thought — the problem seems to be a psychological one, not a pragmatic one. But lawyers may want more than 12 months to prepare for trial. The court has not yet thought whether there are ways to force more cases into this track. There also are very few cases in the complex track. Most cases seem to be standard cases.

To make the track system work, judges must take care to enforce the time rules.

One thing that has changed is that the court has gone back to voluntary disclosure. Lawyers, initially suspicious, have come to think that voluntary disclosure is a good thing.

Adoption of the differentiated case management system involved a real culture change. It has been very helpful. Probably it has not increased the number of settlements, but it seems to encourage early settlements. Lawyers get together before the first Rule 16 conference. They propose time schedules that ordinarily can be adopted without change — they are careful in framing the initial schedule because they know that most of the court's judges are reluctant to allow changes once the plan is adopted.

The process of adopting the differentiated case management program was itself good for the district. Judges were brought together not only with lawyers but also with the court staff. Judges are more amenable to suggestions for change; the court has fine-tuned many things as it has gone along.

Judge Ellis began his description of the "rocket docket" practices in the Eastern District of Virginia by noting that the set of draft simplified rules seems well done. But the effort is like the virtuoso design of a good concrete canoe — the world has no need even for the most expertly designed concrete canoe. The Rulemaking process is long and arduous. Before entering the fray, there should be a major demonstration of need, founded on empirical studies that show what the need is. The burden of proof is on the proponents of change. As one obvious question: how many cases involving stakes of less than $50,000 are delayed in resolution because of current rules? It is necessary to figure out the problem before devising a fix. There do not seem to be any studies that show a need, and it is not likely that any studies that may be undertaken will show a need. But any change should be preceded and supported by empirical study.

Lawyers want a truce in rulemaking. We have rules changes almost every year, and important rules changes every few years. The capacity of the bench and bar to absorb change should not be taxed without a strong showing of important advantages to be won.

Some courts have devised procedures for categories of cases, called differentiated case management. This tells us, first, that some courts perceive a need for this in their local circumstances, but does not tell us that any particular local plan will work for other courts. The Eastern District of Virginia practices would not work in the Southern District of New York — the practices would not even be perceived as fair there. Eastern District judges are not proselytizing for export of their practices. The adoption of local plans tells us, next, that courts already have power to do this. Rather than devise new national rules, the most that may be needed is to have the Federal Judicial Center include information about the adoption and use of local plans as part of its educational program.

It does not seem likely that there is a large group of cases that are delayed by current rules. And there is a risk that a plan that adopts a specific target for time-to-disposition will simply entrench the target as the norm, when speedier disposition could be achieved.

The level of differentiation in this docket management plan begins with standard orders. The standard orders, however, can be changed. Lawyers agree to additional time more frequently than had been anticipated.

The Eastern District of Virginia program was initiated by Judge Walter Hoffman in 1962; that was the old rocket docket. Along about 1977 Judge Albert V. Bryan Jr. came to the court, and became the architect of the present system. The system is simple, with three basis components.

First, there is a quick, fixed, and immutable trial date. It is, however, a mistake to set the trial date at the time the action is filed. Instead, the court sends out a standard scheduling order setting a four- or five-month discovery cutoff, and a final pretrial conference date. Trial is about a month from the final pretrial conference. Many "big" cases are filed in the court, often involving lawyers from outside the district; by the time of the final pretrial conference, the lawyers from outside have been educated by local counsel to understand that there are *no* continuances.

Second, there has to be judicial discipline to try cases. Judges should not hesitate for fear of being wrong. Judges "should do our best, thoroughly and thoughtfully," but expeditiously. It also helps to have an effective summary judgment practice, supported by the circuit court.

Third, there must be a supportive local legal culture. The culture has developed over the years; it is far more important and effective than local district rules could be.

The result of this system is that there are only a few exceptions to the practice of holding trial from six to nine months after filing. That is not because the district has an unusual mix of cases. To the contrary, it seems to have a typical mix. Some very complicated cases begin and end within this time frame. Even patent actions, with the substantial amounts of time required for "Markman" hearings, can be managed in this way.

Magistrate judges discharge the court's responsibilities with respect to discovery. They work hard.

The practices in the Eastern District of Virginia probably cannot be exported to other districts. But the district does not need to import an additional layer of simplified rules.

General discussion began with the suggestion that the time has come to reexamine the consensus that individual case assignment is the best vehicle for intensive case management. We should look hard at the model that makes any judge available to try any case; we may find that this system in fact works better. It was noted that in the Eastern District of Virginia the Alexandria court has a master docket. In other parts of the district individual dockets are used. The master docket supports flexibility, but in all parts of the district judges are available to try cases assigned to a different judge. This is important.

Other devices as well can be used to speed trials. In Alexandria a jury is picked in no more than two hours, apart from a big capital case or equally momentous actions. The local legal culture accepts the proposition that a witness cannot be kept on the stand for a day and a half in the hope of "getting a nibble." Cases do try fairly quickly. It is recognized that a jury trial has a maximum length of two or three weeks if there is any hope of jury comprehension. In a very long case, the lawyers may be asked, after using half of the time they claim to need to examine a witness, what else they want to ask.

It was asked whether the Eastern District of Virginia practices are supported by the local bar because they think the practices serve their interests? The answer was uncertain. The leadership of the judges may have been important in the beginning, when there were few judges and they were "very strong." But the local culture is now ingrained, and such cultures do not change rapidly. Court rules do not trump culture. Change does occur over time — the mix of cases changes. But the rocket docket general practice has not changed much in thirty years, apart from making better use of magistrate judges in discovery and settlement. The practice works. "Lawyers know it." The lawyers manage the system without requiring management by the judges.

It was urged that another layer of rules, adopted in the name of simplification, is not what we need just now. One feature of the draft rules would require that each document that may be used to support a claim be attached to the pleading stating the claim; "we do not need this mess." Another feature would restore the 1993 initial disclosure practice, and perhaps expand it; we should not revive that practice. The entirely consensual proposal advanced by Judge Schwarzer has much to commend it, but it may be asked whether we need even to rely on magistrate judges. How about using lawyers as pro tem judges? A panel of qualified and willing lawyers could be established, one of whom would be assigned to each case in the system. This works in California state courts. This is "ADR with teeth," done with party consent. Not many lawyers can take $50,000 cases; such a system might make justice available to persons who now are unable to proceed.

It was noted that each of the three systems described by the judges panel sets time limits, and does not change anything in the Rules to give direction on how the time limits are to be met. There is a judge there, however, to make the time limit credible. So it was noted that in the Eastern District of Missouri the judge has control of the trial date and ordinarily will not change it once it has been set, but the parties control most matters on the way to meeting the trial date. Practice in the District of Minnesota is much the same. These systems are quite different from the draft "simplified rules." Has there been anything done in local Civil Justice Reform Act plans that is similar to the simplified rules?

It was observed that "any set of rules exists in delicate tension with local culture." Since the 1983 amendments, Rule 16 has contributed to substantial changes in local legal cultures. The initial disclosure provisions in the 1993 version of Rule 26(a)(1) had a similar effect in some districts. National rules can make a difference, but should be used sparingly for this purpose. The question is whether there is a need for special rules for the many small-stakes cases that do, or might better, come to federal courts. The very fact that there are many small-stakes cases in federal courts now may suggest that there is no need for new rules. One alternative is to reconsider the question whether individual dockets contribute to delay in getting to trial. It has also been suggested that Rule 83 should be changed to authorize innovative local rules, with permission of the Judicial Conference, to provide a framework for controlled experimentation.

It was noted that state systems commonly have small-claims courts. In Texas, a separate track was created in district courts, available initially on election of a plaintiff who must agree to limit any recovery to a maximum of $50,000; defendants cannot easily get out of this track. Discovery is limited, amendment of the pleadings is limited, and other procedural opportunities also are curtailed. After two years, "no one uses it." It was hoped that it would be used by banks in collection actions, in small personal-injury actions, and the like. But there have been perhaps 100 cases on this track.

A similar experience was reported for the "expedited track" adopted in the Southern District of New York. Lawyers did not want it, viewing it as a lesser procedure. The "small" cases are not a problem there. "They tend to go away." Lawyers recognize the small cases, know they cannot afford to try them, limit discovery, and settle. When a small case comes to a Rule 16 conference, it is assumed that it will involve one deposition for each party, and will go to trial in six months. This is done without creating a differentiated case management program.

The suggestion that Rule 83 might be amended to authorize experimental local rule procedures was met with the observation that this basic proposal was advanced several years ago and withdrawn in the Standing Committee. The continuing emphasis on national uniformity, and the continuing valiant efforts to curtail disuniformity stemming from local rules, suggest that any proposal along these lines will meet vigorous resistance.

Non-prisoner pro se cases get the same process as other cases in the Eastern District of Virginia. They may involve relatively low damages, and perhaps an injunction. They get done. There are pro se clerks for prisoner cases; that work is more specialized. Few of the prisoner pro se cases get to hearing or trial.

Motions in the Eastern District of Virginia are handled on Fridays. Every judge is required to be available on Friday, and commonly encounters many unfamiliar cases. Motions are decided orally from the bench; the order then gets typed up. Many motions are disposed of in a single day, often including complex cases. Only a small number are taken under advisement. Good law clerks are an indispensable help.

It was noted that so-called "firm" trial dates infuriate lawyers if they prove to be fictional. And discovery cut-offs should be set just before a real trial date, not a fictitious one. This can be accomplished only with a major cultural change in the federal courts.

The Committee expressed thanks to the panel members for their very informative and helpful presentations.

Discovery Subcommittee

The Discovery Subcommittee has scheduled a discussion of discovery of computer-based information for October 27 in Brooklyn. Judge Carroll asked Professor Marcus to describe the plans. Professor Marcus observed that at the April meeting he had suggested that the March conference had moved us forward, but that perhaps we were no closer to the starting line. The October 27 meeting "may bring us within sight of the starting line."

More than three years ago, during the meetings and hearings that led to the discovery amendments scheduled to take effect this December 1, lawyers started telling us that the Committee should think about discovery of computer-based information. Those questions were deferred while more familiar questions were addressed. The March conference increased our level of familiarity.

The fact that a second conference has been scheduled does not indicate a determination that something must be done now. "Doing nothing remains a strong option" for the time being. The list of participants for the conference has been filled in. The materials for the conference include first drafts on a number of rules amendments that might be considered, but there is no implicit suggestion that any of these drafts should be pursued further. And the drafts do not pursue such topics as more aggressive teleconference trials; revising rules language that stems from the dawn of the computer revolution; addressing the issues that arise when a party wants to seek discovery by addressing queries directly to another person's computer system. The models, however, are intended to give concrete perspective and a basis for discussion. The "low impact" proposals tell people to talk about issues of computer-based discovery. The others tell people what to do about it.

It would be possible to expand the initial disclosure model to address explicitly the need to include computer-stored information in response to discovery, but to excuse any obligation to provide back-up or deleted information unless the court orders it. Provisions on preserving computer-based material are possible, but we do not do that for other forms of information that may become the subject of discovery request. The problems of preservation may be distinctive, however, because of the lament that in many computer systems the only way to ensure that full information is preserved is to stop operating the system. Cost-allocation questions will be sensitive and difficult to approach. Questions of inadvertent privilege waiver also persist, both with respect to computer-based information and more generally.

After the conference, the subcommittee may be in a position to decide whether the time has come to attempt to draft rules changes for discovery of computer-based information. It will be necessary to understand why it is appropriate to attempt special provisions for such information, and then to determine what to try to provide.

Admiralty Rules

A substantial set of amendments to the Supplemental Admiralty Rules are set to take effect on December 1. These amendments reflect the fruit of several years of work that relied on the close involvement of the Maritime Law Association and the Department of Justice. The major purpose

was to reflect the growing use of the Admiralty Rules in civil forfeiture proceedings, making changes that make desirable distinctions between forfeiture practice and true admiralty practice. In April, Congress adopted the Civil Asset Forfeiture Reform Act of 2000. The Act contains several provisions that are inconsistent with the amended admiralty rules. Because the admiralty rules will take effect after the statute took effect, the inconsistent provisions seem to supersede the new statute.

Working closely with the Department of Justice, and with the help of the Maritime Law Association, four sets of changes are proposed to bring the Admiralty Rules into line with the new statute. The Department of Justice supports all of the proposed changes as a means of eliminating the confusion that otherwise will result as courts attempt to work their way through the process of reducing apparent inconsistencies to a workable system.

The first proposed change is the simplest. Admiralty Rule C(6)(a)(i)(A) provides that a statement of interest must be filed within a period 20 days; new 18 U.S.C. § 983(a)(4)(A) sets the period at 30 days. The 20-day period was initially chosen because of a belief that it coincided with pending legislative proposals. Had it been known at the time that the new statute would adopt a 30-day period, the same 30-day period would have been proposed for Rule C. The Committee approved the recommendation that Rule C be amended to adopt the 30-day period; the Committee Note will state simply that the change is made to conform to the statute. This change is so far technical that the Committee also recommends that it be sent by the Standing Committee to the Judicial Conference for approval without publication.

The second proposed change is more complicated. The statute departs from Rule C(6)(a)(i)(A) in describing the events that trigger the 30-day period for filing a statement of interest. Rule C(6) sets the period to run from "the earlier of (1) receiving actual notice of execution of process, or (2) completed publication of notice under Rule C(4)." New § 983(a)(4)(A) sets the period as "not later than 30 days after the date of service of the Government's complaint or, as applicable, not later than 30 days after the date of final publication of notice of the filing of the complaint." The differences in wording the reference to publication of notice do not seem troubling. The difference between "receiving actual notice of execution of process" and "service of the Government's complaint" is more troubling. There may be some occasional differences between "execution of process" and "service of the * * * complaint," but they are likely to be rare. There is, however, a difference between actual notice and service. The difference is most apparent when the person filing a statement of claim is not a person served. These differences are likely to be resolved in most forfeiture proceedings by the alternative reliance on the 30-day period that begins on completion of publication, but it has seemed better to resolve them. The Committee approved a recommendation to amend Rule C(6)(a)(i)(A) to conform to the statute, to read:

> (A) within ~~20~~ 30 days after the earlier of (1) ~~receiving actual notice of execution of process~~ the date of service of the Government's complaint or (2) completed publication of notice under Rule C(4), * * *.

Again, the Committee Note would state simply that the change is made to conform to the new statute. The Committee concluded that this change is sufficiently significant to require publication for comment.

The third proposed change goes to the procedure for answering in a forfeiture proceeding. New Rule C(6)(a)(iii) provides that a person who files a statement of interest must "serve" an answer within 20 days after filing the statement. New 18 U.S.C. § 983(a)(4)(B) provides that the person must "file" an answer within 20 days. There is no necessary inconsistency between these provisions: It is easily possible both to serve and file within the 20-day period. If there is any inconsistency, it is between the statute and Civil Rule 5(d), which requires filing within a reasonable time after service. The different requirements, however, may prove a trap for the unwary. The better response seems to be to amend Rule C(6)(1)(iii) to require both service and filing within 20 days. The ordinary rule requirement is that a pleading be served; there is no apparent reason to abandon that requirement in forfeiture proceedings. The statutory requirement of filing within 20 days, however, can be added to Rule C(6) to draw attention.

Exploration of this proposal included consideration of an inadvertent drafting slip in new Rule C(6)(b)(iv). This rule is the admiralty practice analogue of the forfeiture proceeding. It was drafted to require that the answer be filed within 20 days of filing the statement of interest, without referring to service. The reference should have been to service. There is no apparent need to retain a filing requirement in this provision; it is recommended for Rule C(6)(a)(iii) only to conform to the new forfeiture statute.

The Committee recommended that Rule C(6) be amended as follows:

(6) Responsive Pleading; Interrogatories.

(a) Civil Forfeiture. In an in rem forfeiture action for violation of a federal statute: * * *

(iii) a person who files a statement of interest in or right against the property must serve and file an answer within 20 days after filing the statement. * * *

(b) Maritime Arrests and Other Proceedings. In an in rem action not governed by Rule C(6)(a): * * *

(iv) a person who asserts a right of possession or any ownership interest must ~~file~~ serve an answer within 20 days after filing the statement of interest or right.

The Committee Note will state that the "filing" requirement is added to Rule C(6)(a) to parallel the statute, and that the filing requirement is changed to service in C(6)(b) to correct an inadvertent drafting slip. This change is recommended for publication, in part because other changes are recommended for publication.

The fourth and final proposed change involves Rule C(3)(a)(i). The rule requires the clerk to issue a summons and warrant for the arrest of the property involved in a forfeiture proceeding. New 18 U.S.C. § 985 provides that in most circumstances, real property involved in a forfeiture proceeding is not to be seized before entry of an order of forfeiture. It is no longer appropriate to require issue of a warrant for arrest. To meet this new statute, the Committee voted to recommend to amend Rule C(3)(a)(i) to read:

(3) Juridical Authorization and Process.

(a) Arrest Warrant.

> **(i)** When the United States files a complaint demanding a forfeiture for violation of a federal statute, the clerk must promptly issue a summons and a warrant for the arrest of the vessel or other property without requiring a certification of exigent circumstances, but if the property is real property the United States must proceed under applicable statutory procedures. * * *

The Committee Note would direct attention to the new statute.

It was decided to recommend this change for publication, primarily because other proposed amendments also are being proposed for publication.

The question whether to recommend any of the changes for publication was viewed as relatively close. The proposed changes are intended to bring the rules into line with the new statute, apart from the change from filing to service in Rule C(6)(b)(iv). In some ways it would be convenient to have the changes take effect as soon as possible — the fastest possible timetable would be to urge the Standing Committee to recommend adoption without publication in time for action by the Judicial Conference in March 2001, with transmission by the Supreme Court to Congress by the end of April, to take effect on December 1, 2001. Publication of the proposals, however, should go a long way toward ensuring that litigants and courts are able to act in conformance with the statute. And publication will help to ensure that nothing has been overlooked.

Rule 53: Special Masters

Judge Scheindlin presented the report of the Rule 53 Subcommittee. The time has come to determine whether the Subcommittee should bring a final proposed Rule 53 revision to the Committee at the April 2001 meeting.

Rule 53 now addresses only trial masters. Masters in fact are used extensively for pretrial and post-trial purposes. Before trial, masters are used extensively for such purposes as supervising discovery and mediating settlement. After trial, masters are used to help in formulating equitable decrees and to monitor decree enforcement. The present rule is outdated and provides no guidance for current practices.

The current draft revision has been circulated for comment to lawyers, law professors, and the Rule 53 Subcommittee. The Federal Judicial Center responded to the Committee's request by conducting a study of special master practices that Thomas Willging headed; a report on the study was provided at the April meeting. The study confirmed the prevalence of pre- and post-trial master appointments. It also showed that courts appointing masters are as inclined to cite no authority for the appointment as to cite Rule 53. Judges and attorneys consulted during the second phase of the study showed some interest in Rule 53 amendments, but stressed the need for breadth and flexibility while avoiding inappropriate stimulus to the use of special masters.

After describing the several subdivisions of the draft rule, key issues were identified: should a revised rule eliminate the use of trial masters whose report is read to a jury? Although the draft continues this practice, the Subcommittee and Reporter believe that the practice is inappropriate. It overlaps use of a court-appointed expert under Evidence Rule 706, but without the safeguards and advantages that surround a court-appointed expert trial witness.

Draft Rule 53(a)(1)(B) carries forward the "exceptional condition" requirement in present Rule 53. It is meant to refer to the trial-master practice embodied in Rule 53. A different standard is used for pretrial and post-trial appointments under draft Rule 53(a)(1)(D).

Draft Rule 53(b) is a "laundry list" of duties that may be assigned to a special master. There are roughly three groups: pretrial duties, in paragraphs 1-7; trial duties, in paragraphs 8-9; post-trial duties, in paragraphs 10-14. Paragraph 15 provides a final "other duties" category. These lengthy provisions could be reduced to more general provisions for pretrial, trial, and post-trial uses, or to other broader and more general terms.

It is fair to ask whether all uses of trial masters should be abolished, for judge-tried cases as well as jury-tried cases. The Supreme Court has dramatically reduced the occasions for this practice, and the time may have come to end it entirely.

Draft Rule 53(c)(1) provides opportunity for hearing before any appointment of a master. This is new, but seems a good idea.

Draft Rule 53(c)(2)(D) provides for detailed specification of the dates for action by a master. It is not clear whether this much detail is appropriate.

Draft Rule 53(c)(2)(E) requires the court to specify whether ex parte communications are appropriate between the master and the parties, or between the master and the court. The Federal Judicial Center study found substantial concern about these questions. This provision should not be controversial.

Draft Rule 53(c)(2)(F) opens the question of standards for reviewing special master orders. The question is addressed also in subdivision (i). Perhaps these provisions should be further clarified or simplified.

Draft Rule 53(c)(2)(G) may well be deleted. It provides that the order appointing a master may require a bond. This provision responds to concern about the potential liability of a master. A Civil Rule probably cannot address the substantive question whether a special master is entitled to absolute judicial immunity. A bond requirement, however, could provide protection and might be taken as the sole basis for liability. There is no known present practice in this dimension, and it may be better to put the question aside.

Draft Rule 53(h) provides that a master may submit a draft report to counsel before reporting to the court. Perhaps this permission should be changed to a requirement.

Draft Rule 53(i)(5) provides de novo review by the court of a master's recommendations with respect to questions of law, unless the parties stipulate that the master's disposition will be final. Is this appropriate?

Draft Rule 53(j)(3) addresses allocation of the master's compensation among the parties, including potentially controversial provisions for considering "the means of the parties and the extent to which any party is more responsible than other parties for the reference to a master." These provisions deserve further consideration.

Draft Rule 53(k), finally, limits use of magistrate judges as special masters. This provision opens up much more general questions about the proper relationships between appointment of special masters and magistrate judges. These questions too deserve further attention.

The first question asked in the general discussion was whether courts continue to use special masters at all for trial purposes. The Federal Judicial Center study in fact found that this practice continues. A case involving complex documentary evidence would be an example. There is no provision for cross-examination of the master; the practice continues to be separate and distinct from the use of court-appointed expert witnesses. And there continue to be occasional uses of a trial master whose report is read to a jury without any cross-examination of the master.

The next question asked what percentage of masters are appointed by consent. The Federal Judicial Center study found that 70% of appointments were made "without opposition." A large fraction of those cases involved true consent. In some of the cases, however, lawyers who would have preferred not to consent refrained from objecting because they feared antagonizing the judge. It was noted that if there is true consent, the parties will frame the appointing order, defining the master duties that they truly want.

It was observed that judicial power is very broad, extending apparently to the limits of judicial creativity. It would be a mistake to draft a rule "backward from what we see." If we could survey state-court practice we likely would find great use of special masters, and judges will continue to think of still newer uses. Perhaps we should abandon both the draft subdivision (a) statement of standards for appointment and the draft subdivision (b) list of appropriate master duties. The rule could begin with the draft subdivision (c) provisions for the order appointing a master, including the requirement that the order state the master's duties. We could delete the general "powers" provision in subdivision (d). It may be better not to speak to the use of special masters in jury trials; perhaps Article III requires that a court be permitted to appoint a special master to assist in a jury trial. The resulting rule would accept and regularize the present open-ended approach.

A response was that limits in the rule help to prevent an impatient judge from evading the limits of the magistrate-judge statute by appointing a magistrate judge to do otherwise unauthorized acts as a master. Although the 1968 magistrate-judge statute specifically authorizes appointment of a magistrate judge as master, that provision has been largely overtaken by subsequent expansions of magistrate-judge powers.

It was urged that much of the material in the draft rule would be better covered in a Federal Judicial Center pamphlet. The draft includes a level of detail that most rules do not approach. We should be reluctant to freeze so much detail in the text of a rule. A very short list would be better.

A more sweeping approach was suggested — it would be better to abolish Rule 53 entirely. It is wrong to use lawyers, or nonlawyers, to discharge judicial duties. The draft, by expanding the descriptions in the rule, will further encourage the inappropriate use — that it to say, any use — of masters.

It was argued from the other side that we need to adapt Rule 53 to accommodate what is happening. Masters can be valuable judicial adjuncts, particularly in litigation that involves technical matters. A new rule should state broad standards for appointment; provide a hearing for

the appointment decision; define standards of review; and consider the condition, found in draft Rule 53(a)(1)(D), that no district judge or magistrate judge of the district is available to discharge the responsibilities to be assigned to the master. Agreement was expressed, but with a question whether the draft Rule 53(b)(1) reference to masters who mediate or facilitate settlement will lead to appointment of ADR participants as masters. This question was met with the observation that some courts apparently do appoint ADR facilitators as masters, hoping that the appointment will establish a basis of judicial immunity that otherwise might not attach.

Returning to the broader question, it was noted that present Rule 53 "is complicated, and mostly irrelevant to present practice." But there does not seem to be an overwhelming need for change, given the frequent use of consent-acquiescence to arrange master appointments. On the other hand, it may be desirable to bring the rule into conformity with present practice, leaving flexibility that will support further developments. Although no final decision need be made now whether to recommend revisions, the gap between Rule 53 and practice is a strong reason to clean up the rule. Clarification and guidance of the process are important. The level of detail is less important, and indeed too much detail may prove to be a problem. The ways in which further flexibility may be needed can be illustrated by the increasingly familiar questions that surround discovery of computer-based information, and the enhanced level of judicial discovery supervision contemplated by the December 1, 2000 discovery amendments.

A different suggestion was that although there is a mismatch between Rule 53 and practice, it may be better to leave bad enough alone. But if revision is undertaken, the better approach is to be more general and permissive, less directive. The details should be left to some form other than the text of the rule. The new rule could identify appropriate processes, perhaps designate some things that are forbidden, but not designate too much.

It was asked whether there are variations in practice across the country, and whether it is appropriate to interfere if master practice is more developed in some sections than in others. Should we be encouraging all courts, or courts that do not use masters as extensively as other courts, to increase the frequency of references? It was responded that there is no particular sense whether local practices vary, although it might be guessed that particularly busy districts have more incentive to rely on masters. The Federal Judicial Center survey did not identify any local differences.

It was noted that Texas does not favor use of masters, partly because of the expense to the parties. California courts, on the other hand, seem to rely extensively on masters.

It was suggested that federal practice varies more among individual judges than among districts. Masters are used, and will be used more frequently. It would be very helpful to have a set of rules on how to appoint masters, and on how a master's report is reviewed. But it would be a mistake to provide extensive detail on the responsibilities and duties that can be assigned to a master.

Topics that might profitably be addressed in the rule were suggested. One is conflicts of interest, a matter touched by draft Rule 53(a)(2). Another is ex parte communications — the Federal Judicial Center study found that this is one of the topics that most troubles courts, lawyers, and masters; the draft simply provides that the order of appointment must address this topic, and it was agreed that the appropriateness of ex parte communications depends on the purposes of the

appointment. A settlement master, for example, may be unable to operate without ex parte communications with the parties. Other issues that should be addressed, at least in the order of appointment, are the standard of review by the court (which helps substitute for the lack of cross-examination), and compensation. On these and perhaps other matters, masters are used for so many different purposes that it may be better to list issues that must be addressed in the order of appointment than to attempt to resolve the issues in a more general way by specific rule provisions.

It was observed, in response to a question, that there seems to be general agreement among magistrate judges that there are appropriate occasions for using special masters.

It also was observed that the Standing Committee is more likely to be receptive to a proposed rule that simplifies present Rule 53, even as it expands the rule to reflect current practices. As with the current efforts of the Rule 23 Subcommittee, it may be useful to focus more on the process of appointing special masters than on the substantive standards for appointment.

It was agreed that the Rule 53 Subcommittee would work at paring the initial draft down to a "core" draft, to be presented at the April 2001 meeting. It is not clear whether there will be opportunity to take the final steps toward recommending publication or abandoning the project in April, but it would be good to have a well-developed draft.

Rule 51

Civil Rule 51 has been on the agenda for some time, but consideration has been deferred in the press of more urgent matters.

Consideration of Rule 51 began with a suggestion from the Ninth Circuit Judicial Council that something should be done to legitimate the numerous local district rules that provide for submission of requested jury instructions before the start of trial. These rules seem inconsistent with the text of Rule 51, which provides for filing requests "[a]t the close of the evidence or at such earlier time during the trial as the court reasonably directs * * *." The Committee has determined in earlier discussions that there is no apparent reason to leave this question to local rules. If, as seems to be agreed, it makes sense to allow a court to direct that requests be filed before trial begins, Rule 51 should be amended to permit the practice on a uniform basis. The Criminal Rules Committee has already published, and in August 2000 republished, a proposal to amend Criminal Rule 30 to provide for instruction requests "at the close of the evidence or at any earlier time that the court reasonably directs."

The question that remains on the agenda is whether Rule 51 should be revised in other ways. The present text of the rule does not give clear guidance to the interpretations that have grown up; an acerbic description is that "Rule 51 does not say what it means, and does not mean what it says." A draft has been provided to bring into the rule a clear statement that a failure to instruct is ordinarily reviewable only if a party has both requested an instruction and separately objected to the failure to give an instruction, but at the same time to make it clear that the request need not be repeated as an objection if the court had made clear that it had considered and rejected the request. The draft also would express the "plain error" rule that has been adopted in most of the circuits, but explicitly rejected in the Seventh Circuit.

Beyond clarification of matters now addressed by Rule 51, a revised draft considered at the meeting would address matters not now covered by Rule 51. It would require the court to inform the parties of all proposed instructions, not only its action on party requests. It would make it clear that instructions may be given at any time after trial begins, and would provide for supplemental instructions. In addition, the draft would allow any party to rely on the requests or objections of another party, so long as the request or objection directly addresses the same issue and position.

The first comment in the discussion observed that the practice of informing the parties of all proposed instructions before jury arguments makes it possible to take objections before the instructions and arguments, enabling the court to direct the jury to begin deliberations as soon as arguments and instructions have been completed. The alternative of providing a gap for objections between the concluding presentations to the jury and actual submission is undesirable.

But it may be useful to provide one final chance to object to deviations from the proposed instructions as provided to the parties. Appellate judges report that a substantial number of district judges appear to compose important parts of their jury instructions as they are delivering the instructions. And at times a judge who says that one instruction will be given actually gives a different instruction.

As a matter of drafting detail, it was suggested that care must be taken to fit the required time for objecting to the provision for supplemental instructions. An objection to a supplemental instruction, as contemplated by draft Rule 51(b)(4), usually cannot be made "before closing arguments" as draft Rule 51(c) would require. This problem might be cured by deleting the reference to closing arguments, but it is important that closing arguments be made with full knowledge of the instructions — an objection before the instructions will not serve that goal if the court delivers the instructions after closing arguments. Work is needed on the timing of objections: they should be required before instructions are given, but opportunity also must be afforded to object to the way the instructions were actually given.

Another question is whether an objection that was not timely made as to the original instruction can be salvaged by making it when the instruction is repeated. It was concluded that it is proper to object to a decision to reread only part of an instruction when more should be given, but that it is too late to object to the substance of the original instruction.

It was noted that many judges submit written instructions to the jury, but it was not recommended that this practice be required by Rule 51.

It was noted that to the extent that Civil Rule 51 overlaps Criminal Rule 30, vigorous efforts should be made to conform to the style of Rule 30 without doing violence to the traditions that have grown up around the language of present Rule 51.

The question was raised whether it is necessary to address the sensible and ongoing practice of giving supplemental instructions, in light of the difficulty of relating this practice to the proper timing of objections. It was responded that it is useful to provide for supplemental instructions because they can be tricky; there is a risk that in the desire to facilitate continued jury deliberations with minimum disruption, the court may forget the need to ask the lawyers for their input. One judge observed that when the jury sends in a note or request, it is good practice to draft a proposed

response and then request the parties to respond to the proposal. The request and response should be in open court, although the failure to get party input should not lead to reversal if the supplemental instructions were correct or harmless.

Discussion of the plain error standard asked whether stating it in the text of Rule 51 will create mischief. It was responded that the draft provision is useful. It reflects what most, but not all, appellate courts do now. It gives great flexibility. The plain error test applies to allow review of errors not properly preserved in the trial court across a vast range of mistakes in civil proceedings. Jury instructions properly fall within its sweep. And the ongoing standard, incorporated in the simple reference to "plain error," makes it very difficult to win reversal.

Another question was addressed to the provisions that would allow a party to take advantage of requests and objections made by another party who had presented the self-same issue. There are many cases with coparties. It was urged that each party should be required to do something explicit, if only to state adoption of the requests or objections of another party. But it was urged in response that all the purposes of Rule 51 have been served if the court has had a clear opportunity to consider an issue and, with appropriate request and objection, has consciously chosen the instruction actually given. There is no need to punish a party whose lawyer may have been inept or may have decided unwisely that there was no need to reiterate points already clearly made and clearly considered. It was the sense of the Committee members that because objections to instructions are so often related to the particular evidence admitted as to a particular party, the district judge needs to know which of the parties objects to the instruction in evaluating the cogency of the objection. It was tentatively concluded, however, that the draft should be revised by changing "a" party to "that" party.

Rule 43(a)

Magistrate Judge Morton Denlow wrote to the Committee to suggest that the rules reflect the practice of holding a trial on summary-judgment papers. This practice has gained increasing recognition for situations in which summary judgment is not appropriate, but the parties have agreed that the court should decide the case on the summary judgment papers without hearing live witnesses. The procedure depends on the consent of all parties, on the agreement of each party that it does not wish to present any live witness. The result of the procedure is far different from summary judgment. Rather than decide the question of law whether there is sufficient evidence to pass beyond the threshold for judgment as a matter of law, a question that is reviewed de novo on appeal, the trial court actually decides the case. The Rule 52 requirements for findings of fact and separate conclusions of law must be honored. Appellate review of the fact findings is for clear error, not as a matter of law.

The draft Rule 43(a)(3) prepared to illustrate the proposal was more general than the transformation-of-summary-judgment cases that inspired it. It would allow part or all of the testimony of a witness to be presented in written or recorded form, with the consent of all parties and in the court's discretion. Some courts are experimenting already with such devices as presentation of the direct testimony of expert witnesses by written reports, followed by in-court testimony that begins with cross-examination. More generally, parties who recognize that a case is not suitable for summary judgment still may prefer trial on a written record. The unavailability of witnesses, the difficulty and cost of producing witnesses, the cost of a live trial in relation to the matters at stake,

or even a sense that a written record provides a fully satisfactory basis for decision may prompt consent.

General discussion concluded that there is no need to pursue these issues at present. At most, there is a small problem. The Committee's general reluctance to proliferate rules changes during a period that has seen many rules changes should control.

Next Meeting

The next meeting was tentatively scheduled for April 23 and 24, 2001. The site may be in Washington, D.C., or at Stanford Law School.

Respectfully submitted,

Edward H. Cooper
Reporter

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

Item 8A

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: **December 1, 2000**

I. Introduction

The Advisory Committee on the Rules of Criminal Procedure met on October 19-20, 2000 in San Diego, California and considered pending amendments to the Rules of Criminal Procedure. The Minutes of those meetings are included as an Appendix.

II. Action Items: Approval of Restyling of Habeas Rules

In addition to the publication of proposed amendments to the Rules of Criminal Procedure, discussed *infra*, the Committee is awaiting public comments on the publication of selected rules in the Rules Governing §§ 2254 and 2255 Proceedings. As discussed at the Standing Committee meeting in June 2000, those proposed changes resulted from a review to determine if changes were required as a result of the passage of the Antiterrorism and Effective Death Penalty Act, which amended a number of applicable federal statutes.

In the process of reviewing those rules, the Committee concluded that it would be beneficial to consider global style changes to the rules. For example, as observed at the June Standing Committee meeting, the current rules are not gender neutral. At its October 2000, meeting the Committee discussed the possibility of planning and implementing a restyling of the habeas rules. The Committee has concluded that the rules should be restyled and recommends that the Standing Committee approve that project. Any restyled rules would not be presented to the Standing Committee until at least January 2002.

Recommendation: The Advisory Committee recommends that the Standing Committee approve a restyling of the Rules Governing § 2254 Proceedings and the Rules Governing § 2255 Proceedings.

III. Information Items.

A. Publication of Restyled Criminal Rules 1-60—Pending Comments

1. In General

In May 2000, the Committee completed drafting restyled Rules of Criminal Procedure, a project begun in 1999. The Standing Committee's Style Subcommittee working with Mr. Bryan Garner prepared the first draft. That draft was reviewed and edited by one of two subcommittees who met several times in Washington, D.C. and during several conference calls of groups within each subcommittee. A block of rules was assigned to a subcommittee and within that group individual members were asked to take the lead on editing or researching any special problems. The work of the subcommittees was then presented to the full Committee for its consideration. Discussions on those proposed revisions occurred at five full Committee meetings (including one specially called "style" meeting). Each rule was reviewed several times in the process.

In January 2000, the Standing Committee approved the publication of Criminal Rules 1 to 31, subject to some suggested editing and revisions. At its meeting in June 2000, the Standing Committee approved publication of the remainder of the rules, Rules 32 to 60.

During the restyling project the Criminal Rules Committee identified rules that it believed required significant (and potentially controversial) substantive amendments. In addition several rules had been under active consideration before the Committee began its style project. During discussions about the best way to publish all of the rules for comment, the Advisory Committee believed that it would be appropriate to segregate those rules from the rest of the style package.

At its June 2000 meeting, the Standing Committee approved the Criminal Rules Committee proposal to publish a separate package of substantive amendments for public comment. That "substantive" package consists of proposed amendments to Rules 5, 5.1, 10, 12.2, 26, 30, 32, 35, 41, and 43.

The "style" package consists of all of the rules, minus the substantive changes that the Committee believes might draw some controversy. Thus, if after the comment period ends, the Committee decides that some amendments in the substantive package should not be forwarded at this time to the Judicial Conference, we will nonetheless have a proposed restyled version of that same rule that can be forwarded.

Both packages contain "Reporter's Notes" for the ten rules that have been published, both in the style package and in the substantive package. Those notes explain that another published version of the rule exists so that the reader will clearly understand that the style version does not contain substantive changes that may require additional attention and comment.

2. Further Review by the Style Subcommittee

During the process outlined, supra, the Committee consulted with members of the style subcommittee and consultants but the style subcommittee had not completed a review of the final work product. That was accomplished following the Standing Committee's June 2000 meeting. Professor Kimble and Mr. Joseph Spaniol, working with the style subcommittee conducted a comprehensive review of the style package and submitted their suggested changes to the Advisory Committee in September 2000. The suggested changes were fairly comprehensive. In addition to observing a number of potential inconsistencies in style, the subcommittee also raised a number of questions about the rules and in several places suggested a complete redrafting of several provisions.

3. Review of the Style Subcommittee's Recommendations.

At its October 2000 meeting in San Diego, the Advisory Committee considered the proposed changes submitted by the style subcommittee. During the review and discussions of those proposals, the Committee focused on several global issues:

First, the Advisory Committee had decided on a method for using Arabic numerals for any number less than 10 (ten) unless the number was "1." The Committee's view was that it seemed awkward to write the number 1 in those instances. The Style Subcommittee proposed a different system.

Second, the style subcommittee noted that throughout the rules there apparently was some inconsistency in identifying cross-references to other provisions within each rule. In some instances the cross-reference was to a particular subdivision or paragraph and in others the cross-reference was simply to "this rule."

Third, the style subcommittee recommended that the rules use the word "attorney" rather than "counsel."

Fourth, the Style Subcommittee recommended a number of additions and changes to the titles of subdivisions and paragraphs. They noted the preference for using the "ing" form of the word.

Fifth, the style subcommittee recommended that for any deleted or transferred rules, that a notation be added that those rules are "reserved."

The Advisory Committee considered these issues and referred them to the two subcommittees for consideration and recommendations. The subcommittees are scheduled to meet in March 2000 to consider the proposed style changes, the written public comments and any testimony heard at the three scheduled public hearings on the proposed rules.

B. Continuing Consideration of Other Revisions to the Published Rules.

At its October 2000 meeting, the Committee also considered several proposals to modify provisions included in the both the style and substantive package. Final action on those proposals will be taken, if at all, at the Committee's April 2001 meeting in Washington, D.C.

1. Rule 1. Restoring Reference to 28 U.S.C. § 1784.

In reviewing the proposed style changes, one of the members of the Committee concluded that a reference to 28 U.S.C. § 1784 may have been inadvertently omitted from Rule 1(a)(5), which lists proceedings that are not governed by the rules of criminal procedure. That statute is a special contempt provision that applies to persons residing abroad who fail to respond to a subpoena. The Committee agreed to restore the reference.

2. Rule 32. Sentencing; Requirement that Court Rule on Unresolved Objections.

In its proposals to amend Rule 32, the Advisory Committee included a provision that will probably generate some controversy. As noted at the June meeting, the Committee discussed whether to retain revised Rule 32(h)(3)(A) (portions of current Rule 32(c)(1)). Some members of the Committee were of the view that the provision, which requires the court to rule on all unresolved objections to the presentence report, would be an unnecessary burden on the court. Other members argued that the Bureau of Prisons regularly relies upon the presentence report to make important decisions about post-sentencing disposition of defendants, for example, designating them for a particular confinement facility. In the end, the Committee adopted language that would require the sentencing judge to rule on all unresolved objections to a "material" matter in the report. For all other unresolved

objections the judge may either rule on them or conclude that the objections affect matters that will not be considered in imposing an appropriate sentence. The Committee envisions that a "material" matter would include those matters that would typically impact on treatment of the defendant in the prison system.

To date there has not been any significant comment on the proposal. The Criminal Law Committee is apparently considering whether to offer its views on the proposal.

3. Rule 35. Correcting or Reducing a Sentence.

The Advisory Committee has given additional consideration to both provisions in Rule 35, following the Standing Committee's June 2000 meeting. First, Rule 35(a) permits the trial court to correct clear errors within seven days of "sentencing." At the Standing Committee's meeting, the Appellate Rules Committee suggested that it might be helpful to address, in the rule, the question whether the term "sentencing" referred to the oral announcement of the sentence or entry of the judgment, reflecting the sentence. The Criminal Rules Committee considered that issue at its October meeting, and decided that the rule should be changed to state explicitly that the time runs from the oral announcement of the sentence. That is the view of the majority of the federal courts that have addressed the issue.

Second, at the Standing Committee's meeting in June, several members had questioned the purpose and meaning of the proposed change in Rule 35(b) (motion to reduce sentence) and whether the amended language would actually adopt the decision in *United States v. Orozco*, 160 F.3d 1309 (11th Cir. 1998), as reflected in the Committee Note. Current Rule 35(b) permits the government to move for reduction of a defendant's sentence if the defendant has provided substantial assistance in investigating or prosecuting another person. The rule includes a one-year limitation; however, the government may file its motion for relief more than one year after sentencing if the defendant provides information that was not known to be helpful to the government until more than one year has elapsed.

In *Orozco*, the defendant provided the information to the government within one year of sentencing. But the government did not realize the helpfulness of the information until more than one year had elapsed. The Eleventh Circuit concluded that under a strict reading of Rule 35(b) no relief could be granted to the defendant. *United States v. Orozco*, 160 F.3d 1309 (11th Cir. 1998) (denying relief and citing cases). *Compare United States v. Morales*, 52 F.3d 7 (1st Cir. 1995) (permitting filing and granting of motion). The court in *Orozco* urged an amendment to Rule 35(b) to:

> address the apparent unforeseen situation presented in this case where a convicted defendant provides information to the government prior to the expiration of the jurisdictional, one-year period from sentence imposition, but that information does

not become useful to the government until more than one year after sentence imposition. *Id.* at 1316, n. 13.

Several members of the Standing Committee questioned whether the proposed amendment was limited to the holding in *Orozco*. In particular, Judge Kravitch (who was on the panel that decided *Orozco*) believed that the amendment was broader than the court's decision. As a result of post-meeting discussions with Judge Kravitch and other members of the Advisory Committee, it was decided that the draft should be clarified and conformed to *Orozco* before publication, but that the Advisory Committee might want to revist the issue.

At its meeting in October 2000, the Advisory Committee discussed the issue and tentatively decided to consider restoring the broader language in the original draft of the rule—thus potentially going one step beyond the *Orozco* decision.

4. Rule 41. Covert Entries.

Included in the substantive publication package is an amendment to Rule 41 (Search and Seizure) that would address the issue of procedures for conducting covert searches, pursuan to a warrant; the Rule includes specific timing and notice requirements for such searches. Although the Committee expects this provision to be controversial, no significant comment has been yet made on this proposal. As reported at the June 2000 meeting, the Advisory Committee discussed this proposed change at length, and approved the final version of the rule by a very close vote. The topic was a subject of recent legislation. Proposed legislation, which would have removed the notice requirement in current Rule 41 for covert searches, failed.

5. Rules 45 and 56. Presidents' Day.

In restyling Rules 45 and 56, the Style Subcommittee used the Appellate Rules 26 and 45 as a model and recommended changing the designation of Washington's Birthday to "Presidents' Day," the more commonly used designation for the federal holiday in February. The Committee followed that recommendation and made the change in Criminal Rules 45 and 56. The Committee, however, has received correspondence from Mr. W. Thomas McGough, Jr., a member of the Appellate Rules Committee, who researched — at the request of the Appellate Rules Committee — and made the case that the correct statutory designation remains listed as "Washington's Birthday" and that it should remain as such in the federal rules of procedure. The Committee has unanimously agreed to restore the original designation of "Washington's Birthday."

C. Consideration of Question on How to Present Packages to Judicial Conference.

Although the Advisory Committee has considered the issue of the most appropriate way to present any approved rules to the Judicial Conference, it has not yet prepared any formal recommendations. The reason for the two separate packages of amendments, explained supra, was to highlight for public comment those changes that had been under consideration prior to the style project and also those amendments that the Committee would generate some controvsey.

The Committee believed that if any proposed changes were highly controversial, rather than potentially jeopardize the style changes in any particular rule, the so called "substantive" change could be deferred or dropped. At this point, the Advisory Committee is deferring any recommendation until it has had an opportunity to review carefully the public comments, consider possible changes to the rules, and submit its reports to the Standing Committee in June 2001.

Attachments:

Appendix A. Minutes of Meeting, October 2000.

Item 8B

MINUTES [DRAFT]
of
THE ADVISORY COMMITTEE
on
FEDERAL RULES OF CRIMINAL PROCEDURE

October 19-20, 2000
San Diego, California

The Advisory Committee on the Federal Rules of Criminal Procedure met at San Diego, California on October 10 and 20, 2000. 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 October 19, 2000. The following persons were present for all or a part of the Committee's meeting:

Hon. W. Eugene Davis, Chair
Hon. David D. Dowd, Jr.
Hon. Edward E. Carnes
Hon. John M. Roll
Hon. Susan C. Bucklew
Hon. Tommy E. Miller
Prof. Kate Stith
Mr. Darryl W. Jackson, Esq.
Mr. Donald J. Goldberg, Esq.
Mr. Lucien B. Campbell
Mr. Laird Kirkpatrick, designate of the Asst. Attorney General for the Criminal Division, Department of Justice
Prof. David A. Schlueter, Reporter

Also present at the meeting were: Hon. Anthony J. Scirica, Chair of the Standing Committee, Hon. A. Wallace Tashima, member of the Standing Committee and liaison to the Criminal Rules Committee; Mr. Roger Pauley of the Department of Justice; Mr. Peter McCabe of the Administrative Office of the United States Courts, Mr. John Rabiej Chief of the Rules Committee Support Office of the Administrative Office of the United States Courts; Professor Joseph Kimble and Mr. Joseph Spaniol, consultants to the Standing Committee.

Judge Davis, the Chair, welcomed the attendees and noted the presence of a new member of the Committee, Mr. Donald Goldberg.

[Later in the meeting, Judge Davis acknowledged the dedicated efforts and contributions of Judge Dowd and Mr. Jackson as members of the Committee. He noted, with gratitude their service to the Committee and that they would be missed.]

II. APPROVAL OF MINUTES

Mr. Jackson moved that the minutes of the Committee's meeting in New York City in April 2000 be approved. The motion was seconded by Judge Miller and carried by a unanimous vote.

III. STATUS OF PENDING AMENDMENTS BEFORE THE SUPREME COURT

Professor Schlueter informed the Committee that amendments to Rules 6, 7, 11, 24(c), 32.2, and 54 (approved by the Supreme Court on April 17, 2000) had been forwarded to Congress. Barring any additional action by Congress, those changes will go into effect on December 1, 2000.

IV. CRIMINAL RULES UNDER CONSIDERATION

A. Report on Status of Restyling Project—Rules Approved for Publication

Professor Schlueter reported that the Standing Committee at its June 2000 meeting in Washington had approved the Committee's recommendation to publish two separate packages of rules for public comment. The first package, known as the "style" package contains the proposed style changes to the criminal rules. The second package contains ten rules, and is known as the substantive package. Those amendments include not only the style changes proposed but also major changes in practice. Both packages contain "Reporters Notes" that explain that the reader should be aware that there are two separate packages.

He also noted that dates and places had been set for public hearings on the proposed amendments.

B. Review of Suggested Changes from the Style Subcommittee

Judge Davis noted that the Standing Committee's Style Subcommittee had reviewed the style package and had made a number of suggested changes to the published rules. He also noted that Professor Schlueter had prepared a memorandum addressing the proposed changes, with a view toward assisting the Committee in deciding whether to

make the changes. Judge Davis continued by stating that the plan was for the two subcommittees to review the proposed changes and report their recommendations to the full Committee for action.

Professor Schlueter indicated that he had reviewed the proposed changes and had identified a number of proposals that seemed to be global in nature and that it might be helpful to resolve some of those questions before each subcommittee reviewed its assigned rules.

Judge Dowd, the out-going chair of Subcommittee A indicated that the subcommittee had met briefly in an attempt to determine the best way to proceed with reviewing the Style Subcommittee's proposed changes. He noted, for example, that the Subcommittee had proposed a complete redraft of Rule 11(f), which created a potential problem because the current language tracks the language selected by Congress in amending Federal Rule of Evidence 410. He noted that some of the proposed changes might result in a substantive change.

The Committee engaged in a lengthy discussion regarding whether the changes were necessary. Several members expressed concern that the proposed changes reflected a question of preference and were not critical to producing a good work product. Others noted that if the language could be improved, and time permitted, it would be appropriate to give full consideration to the proposed changes. Others noted that several proposed changes might result in substantive changes to the rules.

Judge Davis noted that as a starting point, the Committee could consider Professor Schlueter's list of potential global changes. The two subcommittees could then focus on the proposed changes for their particular rules, at specially called meetings in the spring.

The first proposed change centered on whether to use the word "attorney" or "counsel" or both terms throughout the rules. The style subcommittee had recommended that one or the other, but not both, should be used. Following additional discussion, Judge Davis called for a straw poll that indicated that the Committee was not inclined to accept the subcommittee's suggestion that the term "attorney" be substituted for "counsel" in all of the rules. The subcommittees will review each rule for possible changes in using those terms. Mr. Pauley suggested the Subcommittees be sensitive to using the terms "*an* attorney for the government" and "*the* attorney for the government." He observed that in several rules, the original intent was to avoid limiting operation of the rule to only one assigned attorney who might be representing the government.

Mr. Pauley also raised the issue of whether a proposed change in Rule 32.1(a)(3)(D) concerning whether a probationer should be advised of the right to remain silent during his or her initial appearance. The discussion focused on whether the privilege against self-incrimination applies at revocation proceedings, and whether the

proposed provision might result in a change of a probationer's substantive rights. This issue will be researched for the next Committee meeting.

Professor Schlueter noted that another potential global change was whether internal cross-references to another provision within a rule should specifically cite the cross-referenced section, subsection, or paragraph. He noted that the style subcommittee had identified inconsistent use of that practice. The Committee decided to address that issue on a rule-by-rule basis.

He also noted that the Style Subcommittee had recommended changes in a number of titles and subtitles of rules in an effort to use gerunds. Several members noted that the titles and subtitles adopted by the Committee in the published rules often reflected deliberate of particular terms to capture, as one member noted, a bundle of ideas. Following additional discussion, the Committee agreed that proposed changes in titles should be considered on a rule-by-rule basis.

Professor Schlueter indicated that the Subcommittee had recommended deleting any use of the term "abrogated" in those rules that had been deleted and instead using the word "reserved" in all instances. The Committee discussed use of those terms and settled on use of the terms "deleted" or "transferred" to more accurately indicate (at least for now) what had happened to rules that once existed. It recognized that there may be other terms that could be used in a particular rule.

Several members questioned whether em-dashes should be used in the rules, rather than commas. Other members pointed out that in the original draft submitted by the Style Subcommittee, em-dashes had been inserted for purposes of emphasis.

Professor Schlueter suggested that with regard to the Subcommittee's suggestion that Rule 11(f) (admissibility of statements during plea discussions) it might be prudent to simply cross-reference Federal Rule of Evidence 410, rather than attempt to restyle language that had been initially approved by Congress. The subcommittee responsible for that rule will address that recommendation.

Mr. Rabiej raised the question about possible meeting dates for Subcommittee A and Subcommittee B. Following additional discussion, the Committee agreed that it would be best to hold those meetings in March. That would permit some time to compile and organize any public comments on a particular rule (after the public comment period closes on February 15, 2001) and yet provide ample time to circulate work of the two subcommittees to the full Committee in preparation for the Spring meeting.

C. Other Rules Pending Before the Committee

1. Rule 1. Restoring Reference to 28 USC 1784 to Rule 1(a)(5).

Mr. Pauley noted that in the style project, a reference to 28 U.S.C. § 1784, may have been inadvertently omitted from Rule 1(a)(5), which lists proceedings that are not governed by the rules of criminal procedure. He explained that that statute is a special contempt provision that applies to persons residing abroad who fail to respond to a subpoena. He noted that although there is some question about whether Rule 43 (contempt proceedings) actually applies to contempts under § 1784, he believed that the most prudent course would be to retain the reference to § 1784 in Rule 1. Without taking a formal vote, the Committee agreed with that recommendation.

2. Rules 29, 33 and 34. Whether Rules Should be Amended to Change Time for Filing Motions.

Professor Schlueter informed the Committee that Judge Friedman had written a memo to the Committee raising the question whether additional consideration should be given to the 7-day deadlines set out in Rules 29, 33, and 34. He was concerned that a defendant might be prejudiced where the judge is absent or dilatory. Because Judge Friedman was not able to attend the meeting and present his views, Judge Davis deferred the matter to the next Committee meeting.

3. Rule 35. Whether the Term "Sentencing" Should be Defined and Whether Rule 35(b) Should be Amended.

Judge Davis presented an overview of the Standing Committee's concerns about the proposed amendments to Rule 35. First, he noted that several members had questioned the purpose and meaning of the proposed change in Rule 35(b) (motion to reduce sentence) and whether the amended language would actually adopt the decision in *United States v. Orozco*, 160 F.3d 1309 (11th Cir. 1998). In particular, Judge Kravitch (who was on the panel that decided *Orozco*) believed that the amendment was broader than the court's decision. Judge Davis added that he and Professor Schlueter had consulted with Judge Kravitch after the meeting and that as a result of that meeting, Judge Carnes, Mr. Pauley, and Mr. Campbell had conferred on modifying the language for publication and had drafted a change to the rule before it was published in August. Thus, the version currently before the public is narrower than the version originally presented to the Standing Committee.

Mr. Pauley argued for a broader application of the rule. That is, a defendant who knows about information that is helpful to the government but does not realize its importance until more than one year has elapsed, should be able to move for sentence relief. The Committee engaged in an extended discussion on this point. Several members indicated that there were good reasons for requiring the defendant to provide the helpful information within one year and the need for finality. A broader reading, they argued, would potentially leave the door open indefinitely for a defendant to come forward several years later, arguing that he had known about the helpful information but had not provided it earlier because he had only recently realized its importance to the

government. Others believed that there were other safeguards in place for assessing the credibility of a defendant's averments and integrity of the process

Following additional discussion, the Committee informally agreed to consider broader language in the rule. Mr. Pauley agreed to work on that draft.

Turning to Rule 35(a), concerning the time for correcting technical errors, etc. in announcing the sentence, Judge Davis reported that the Appellate Rules Committee had questioned whether the Committee might wish to amend the rule to state with more particularity what constitutes "sentencing" for purposes of triggering the 7-day period in that rule. He noted that an argument could be made that in the interests of consistency that time should commence with the entry of the written judgment, and not the oral announcement of the sentence.

Professor Schlueter recounted the genesis of the rule in 1991 and that the Committee at that time was concerned about correcting incorrectly announced sentences within the 10-day period for filing a notice of appeal. He noted, however, that the Appellate Rule 4 had been subsequently amended to avoid any potential jurisdictional problem with making such corrections.

Mr. Pauley stated that of the courts that addressed the rule, the majority position was that the 7-day period for correcting a sentence runs from the oral announcement of the sentence. Following additional discussion, the Committee voted by a margin of 6 to 2 to amend the rule to read "oral announcement of the sentence."

4. Rule 41. Proposed Amendments on Installation and Monitoring of Tracking Devices.

Judge Davis opened the discussion on the topic of issuing warrants for tracking devices by noting that the Committee had briefly discussed the issue at its Spring 2000 meeting in New York and that he had asked the Rule 41 subcommittee to determine if any amendment should be made to address that issue. In particular, he had asked Judge Miller to poll the magistrate judges to learn whether this is an issue that posed any special problems beyond the normal warrant requirements in Rule 41.

Judge Miller reported that he had polled other magistrate judges and that there was a wide variety of sample warrants—because there were not uniform standards or procedures to issuing tracking device warrants. He identified three issues that ought to be addressed. First, he recommended that there should be a uniform procedure for such warrants? Second, he believed that the current language in the published version of Rule 41 provided a good starting point for drafting the appropriate language. Third, he noted that he and other members of the subcommittee had drafted proposed language to effect the changes. And finally, the subcommittee had incorporated language from the wiretap

statute to permit (or require) private persons to be involved in executing the tracking device warrant.

He continued by noting that the proposed draft would permit only federal judges to issue tracking device warrants. Mr. Pauley provided additional comments on the subcommittee's draft. He noted, for example, that he thought more time should be provided in a warrant for tracking the object of the search and that the Committee would eventually have to address that issue.

Other members of the Committee questioned why it would be necessary to address the issue in Rule 41 and that perhaps the issue should be left to the courts. Still other members noted that a void exists in this area and that there is no guidance from the courts, or the rules, as to what standard or procedure should apply for tracking device warrants. Mr. Pauley noted in particular that the Supreme Court has left open the question of what standards and timing requirements should apply.

Following additional discussion, there was a consensus that the Committee might gain additional insights from the public comments on the proposed changes to Rule 41 and that the subcommittee should continue its work on the tracking device warrants.

5. Rules 45 and 56. Proposed Amendment to Change Designation of Presidents' Day to Washington's Birthday.

Professor Schlueter pointed out that in restyling Rules 45 and 56, the Style Subcommittee had proposed changing the designation from "Washington's Birthday" to Presidents' Day, the more commonly used designation for the federal holiday in February. He noted that that was the term used by the Appellate Rules Committee when they restyled the Appellate Rules several years ago. He noted, however, that the Committee had received correspondence from Mr. W. Thomas McGough, Jr. concerning the issue. Mr. McGough, he said, made the case that the correct statutory designation remains listed as "Washington's Birthday" and that it should remain as such in the federal rules of procedure.

Following additional discussion, Judge Carnes moved that Rules 45 and 56 be changed to read "Washington's Birthday." The motion was seconded by Judge Miller and passed by a unanimous vote.

6. Rules Governing § 2254 and § 2255 Proceedings.

Judge Tashima (a member of the Standing Committee and liaison to the Committee) indicated that he had sent a letter to the Committee raising the question whether the Rules Governing § 2254 Proceedings and the Rules Governing § 2255 Proceedings should conform to the new statute of limitations for seeking collateral relief.

He also noted that perhaps the issue could be addressed in modifying the forms used for seeking relief.

Judge Carnes, chair of the habeas subcommittee, responded that the subcommittee had not focused on the standard forms and that they had discussed the issue of laches vis a vis the statute of limitations and that he knew of no case where Rule 9 had been applied to a case involving less than a ten-year delay. Judge Miller indicated that he had polled his fellow magistrate judges and that there was a consensus that there would probably be no need to amend the rule. Judge Davis noted that if any change would be made, it could be made in later amendments to the rules.

Judge Miller raised the issue whether the Committee should give some consideration to "restyling" the Habeas Rules. Judge Scirica indicated that the Standing Committee would probably defer to the Advisory Committee on any decision to do so; he agreed that based on comments at the Standing Committee meeting regarding the absence of gender neutral language, and other issues, it might be prudent to consider consideration of style change. He also indicated that it would probably be wise to begin work on the standard forms. Finally, Professor Kimble agreed to start work on restyling the Habeas Rules.

III. OTHER RULES AND ISSUES PENDING BEFORE OTHER ADVISORY COMMITTEES, THE STANDING COMMITTEE, AND THE JUDICIAL CONFERENCE

A. Financial Disclosure Rules.

Professor Schlueter reported that the Standing Committee had approved the Committee's proposed new Rule 12.4 (Disclosure Statement) for publication and comment. He indicated that at the suggestion of the Standing Committee, an effort had been made by the Reporters of the Advisory Committees to use uniform language, where possible, for similarly proposed amendments in the Civil and Appellate Rules. Professor Coquillette added that Appellate Rule 26.1 had been previously adopted and that that rule had provided the general outline for the proposed civil and criminal rules.

B. Rules Governing Attorney Conduct.

Professor Coquillette provided a brief report on the status of the move to adopt standard rules governing attorney conduct. He indicated that the interest persons and organizations were continuing to work on the matter.

C. Status Reports on Pending Legislation Potentially Affecting the Criminal Rules.

Mr. Rabiej reported that attempts by Congress to enact changes in grand jury procedures at this point lacked any real momentum. But, he added, given Congress' continuing interest in grand jury matters, the Criminal Rules Committee would probably become involved in the debate over whether any amendments should be made to the rules.

He also informed the Committee that congressional attempts to amend Rule 41 (HR 2987) had failed. A provision in that bill would have deleted the notice provisions in Rule 41(d) regarding covert entries.

D. Technology Subcommittee of the Standing Committee.

Mr. Rabiej stated that within five years, all federal courts would have the capability of receiving electronic filings and that eventually the Committee might have to address the issue in greater detail. Mr. McCabe added that there is some concern in criminal cases about public access and that currently there is sentiment not to make criminal case files accessible to the general public. At this point, he added, no significant policy decisions have been made on this particular point.

IV. DESIGNATION OF TIME AND PLACE OF NEXT MEETING

The Committee agreed to hold its next regularly scheduled meeting in Washington D.C. on April 26 and 27. [At the suggestion of Judge Davis, the Committee subsequently agreed to add an additional day for that meeting, April 25th.]

Respectfully submitted,

David A. Schlueter
Reporter, Criminal Rules Committee

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
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A. THOMAS SMALL
BANKRUPTCY RULES

DAVID F. LEVI
CIVIL RULES

W. EUGENE DAVIS
CRIMINAL RULES

MILTON I. SHADUR
EVIDENCE RULES

Item 9

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

FROM: **Honorable Milton I. Shadur, Chair**
Advisory Committee on Evidence Rules

DATE: **December 1, 2000**

RE: **Report of the Advisory Committee on Evidence Rules**

I. Introduction

The Advisory Committee on Evidence Rules did not hold a Fall 2000 meeting. The Advisory Committee is working on a number of long-term projects, but none of them required immediate consideration by the Committee. This memorandum reports on the status of those long-term projects.

II. Action Items

No Action Items

III. Information Items

A. Consideration of Evidence Rules

At its April 2001 meeting the Committee will consider the possibility of proposing amendments to two Evidence Rules–Rules 608(b) and 804(b)(3).

1. Rule 608(b) — Evidence Rule 608(b) prohibits the admission of extrinsic evidence when used to impeach a witness' "credibility". Read literally, this would mean that extrinsic evidence could never be offered to prove any aspect of a witness' credibility. But the Supreme Court made clear in *United States v. Abel* that the term "credibility" really means "character for truthfulness." Impeachment on non-character grounds, such as for bias, is not covered by the extrinsic evidence limitation of Rule 608(b). *Abel* basically distinguishes a character attack (as to

which extrinsic evidence is absolutely inadmissible) from all other forms of impeachment (as to which extrinsic evidence can be admitted subject to Rule 403).

After an extensive review of the case law, the Committee determined that a fair number of reported cases misapply current Rule 608(b) by invoking it to preclude extrinsic evidence offered for non-character forms of impeachment. Litigants also appear to be misinterpreting the Rule at the trial level, and many litigants apparently do not proffer extrinsic evidence for non-character impeachment because they believe that the Rule on its face prohibits it.

After discussion and deliberation at its April 2000 meeting, the Evidence Rules Committee directed the Reporter to prepare a draft amendment that would: 1) substitute the term "character for truthfulness" for the word "credibility" in Rule 608(b); 2) add language to the Rule to provide that where extrinsic evidence is prohibited, it cannot be referred to directly or indirectly (in order to prevent an abusive practice by which a party impeaching a witness' character will try to smuggle in extrinsic evidence by referring to consequences suffered by the witness for his alleged misconduct); and 3) include language in the Committee Note specifying that the admissibility of extrinsic evidence offered to impeach the witness on grounds of contradiction, prior inconsistent statement, bias or lack of capacity is governed by Rules 402 and 403, not by Rule 608(b).

The proposed amendment to Evidence Rule 608(b) will be considered at the April 2001 meeting of the Evidence Rules Committee, with a view to proposing to the Standing Committee its release for public comment in 2001.

2. Rule 804(b)(3) — Evidence Rule 804(b)(3) provides a hearsay exception for declarations against penal interest. The Rule as written states that in criminal cases an accused must provide corroborating circumstances clearly indicating the trustworthiness of the statement before it can be admitted as a declaration against penal interest in the accused's favor. This corroborating-circumstances requirement does not, by the terms of the Rule, apply to government-proffered declarations against penal interest. Nor does the corroborating-circumstances requirement apply on its face to civil cases. The Evidence Rules Committee has considered whether Rule 804(b)(3) should be amended to extend the corroborating-circumstances requirement to government-proffered hearsay and to civil cases. The Committee noted that the current one-way corroboration requirement has never been justified; that it resulted from an oversight during the legislative process; and that it has been criticized and rejected by many courts. The Committee has unanimously agreed that a unitary approach to the admissibility of declarations against penal interest would result in both fairness and efficiency in the administration of the Rule.

The Committee also determined that there is some dispute in the courts over the meaning of "corroborating circumstances." The Rule leaves the term undefined, and the term is not used anywhere else in the Evidence Rules. The Committee therefore unanimously agreed that it would

be useful to provide some guidance on the meaning of "corroborating circumstances" in a Committee Note.

After substantial discussion at the April 2000 meeting, the Reporter was directed to draft a proposed amendment and Committee Note to Rule 804(b)(3). That proposed amendment would: 1) apply the corroborating-circumstances requirement to all proffered declarations against penal interest, and 2) include in the Committee Note a non-exclusive list of factors that courts should take into account in determining whether the corroborating-circumstances requirement is met. The proposed amendment will be considered at the April 2001 meeting of the Evidence Rules Committee, with a view to proposing to the Standing Committee its release for public comment in 2001.

3. Rule 902 — The Committee has reviewed a Justice Department proposal to amend Rule 902 to provide for self-authentication of public documents by way of certification (to provide an alternative to the requirement of a seal). The Committee has made a preliminary determination that the costs of an amendment would not be justified unless the Justice Department can show that the requirement of a seal imposes a substantial problem in practice. Any hardship imposed by a sealing requirement is minimized by the current Rule 902(2), which provides for self-authentication of unsealed documents if an official affixes a seal to a certification that the document is genuine. The Rule 902(2) certification sealing requirement does not mandate a government seal; a certification would be sufficient if it bore a notary seal or the like. Therefore the Committee did not find a substantial need to proceed with an amendment to Rule 902 at this time. The Committee agreed to reconsider the proposed amendment if a survey conducted by the Department of Justice indicates that DOJ attorneys are having substantial problems in authenticating public records due to the sealing requirements of Rule 902.

B. Committee Report on Case Law Divergence From Rules or Notes

I am pleased to report that the Reporter's article on Case Law Divergence from the Federal Rules of Evidence has been published by the Federal Judicial Center and is being widely distributed to judges and lawyers. The article was prepared by the Reporter at the direction of the Evidence Rules Committee, and was reviewed by the Committee before it was submitted for publication. The article highlights for lawyers and judges the existence of case law under the Evidence Rules that diverges materially from the text of a particular Rule, or from the accompanying Committee Note, or both. The article will be published in West's Federal Rules Decisions, and West has also included the article as a special appendix to all of its statutory publications of the Federal Rules of Evidence.

C. Privileges

The Evidence Rules Committee continues to work on a long-term project to prepare provisions that would state, in rule form, the federal common law of privileges. This project will not necessarily result in proposed amendments, however. The Subcommittee on Privileges is working on draft rules for consideration by the Committee at the April, 2001 meeting. Those rules would codify: 1) the lawyer-client privilege; 2) rules on waiver; and 3) a catch-all provision similar to current Rule 501, that would permit further development of privileges. The Committee is aware that the Civil Rules Committee is also working on the subject of privilege waiver, and it looks forward to conferring with the Civil Rules Committee on this important project.

Item 10

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

December 5, 2000

MEMORANDUM TO STANDING RULES COMMITTEE

SUBJECT: *Attorney Conduct Rules*

I have attached a sample invitation sent to about 40 lawyers and academics to attend a conference on attorney conduct rules on January 16, 2001. The letter includes two attachments: (1) alternative versions of FRAC 1 prepared by Professor Cooper; and (2) draft legislation introduced by Senator Leahy requiring the Judicial Conference to make two reports on attorney conduct rules.

John K. Rabiej

Attachments

" SAMPLE "

November 8, 2000

Re: *Ad Hoc* Subcommittee on Attorney Conduct
January 2001 Invitational

Dear:

Since our last meeting in February, we have considered the views raised by the participants and refined draft FRAC 1 (enclosed is a copy of Ed Cooper's most recent version). I write to update you on recent developments and to set a date for a January 2001 Invitational Meeting.

Several months ago, Senator Leahy proposed a new version of a "Professional Standards for Government Attorneys Act." We understand that Senator Hatch supports this approach. As you will see, it would require the Judicial Conference to recommend uniform rules for the conduct of United States attorneys that would supersede state ethics rules. Specifically, the proposal would require the Judicial Conference to submit two reports. The first report, to be submitted to the Chief Justice within one year, would include recommendations with respect to amending the procedural rules to include a uniform national rule governing federal governmental attorneys' communications with represented persons. The second report, to be submitted to the House and Senate Judiciary Committees within two years, would include recommendations with respect to amending the procedural rules to address any existing conflicts between governmental attorneys' investigative and prosecutorial duties and their regulation under existing professional responsibility standards. Senator Hatch announced in September his support for Senator Leahy's bill. We continue to monitor this and other legislative activity.

We have set January 16, 2001, for our meeting in Washington, D.C. As we discussed at our last meeting, we will invite additional outside experts, including practitioners, so we can learn more about the day-to-day issues arising from the current state of rules governing attorney conduct. At the meeting, we plan to focus on: (1) the extent of the problem as described by representatives of the state bar disciplinary boards and law firms; and (2) the alternative versions of FRAC 1 drafted by Ed Cooper. As before, we will host a dinner the night before for all participants.

I would be delighted to see you in Washington, D.C. Please let John Rabiej of the Administrative Office of the U. S. Courts know by **Friday, November 17**, whether you plan to attend the meeting (202/502-1820 or <John_Rabiej@ao.uscourts.gov>.

Sincerely,

Anthony J. Scirica

Enclosures

cc: Professor Daniel R. Coquillette
John K. Rabiej

FRAC Models: Introduction

The years of work and discussion on the proposal to create a uniform Federal Rule of Attorney Conduct have progressed through the February 2000 invitational meeting. Two basic alternatives have come to the fore through this process. One is to do nothing. The other is to adopt, for the moment, a single Federal Rule of Attorney Conduct. Several variations of this FRAC 1 are set out below. The theme common to all of these variations is that all district courts and courts of appeals should look to state law for rules of professional responsibility. At the same time, these federal courts must retain control over their own practice and procedure, and similarly must retain the control that 28 U.S.C. § 1654 recognizes over the right to appear as an attorney. These principles are expressed in more or less detail in the several drafts.

The reasons for considering adoption of a national rule have become familiar. Federal courts now regulate professional responsibility in two different ways. The more visible regulation stems from local rules. The local-rule pattern in the district courts is more random noise than pattern. Almost every conceivable approach has been adopted somewhere. Some districts simply incorporate the local state rules of professional responsibility. Some districts adopt the ABA Model Rules of Professional Responsibility, or the ABA Model Code of Professional Responsibility, or — in one district — the ABA Canons of Ethics. The version adopted by the federal court may or may not coincide in written text with the version adopted by the local state, and interpretations of even the same written text may differ. Some districts have adopted their own stand-alone systems, different not only from the local state rules but different also from any other system anywhere. In multidistrict states, different districts may take different approaches. The result often is not only a complete lack of national uniformity but also disuniformity, and — often far more disruptive — uncertainty.

Beyond the local rules, federal courts also address matters of professional responsibility through their decisions. The common-law process that generates these decisions does seem to be working toward uniformity among federal courts on the issues that arise most frequently. The decisional uniformity, however, is reached by treating decisions based on one set of local rules as precedent in courts that have quite different local rules, and often by ignoring all of the local rules.

Confronting all of this mess, the Local Rules Project for many years concentrated its attention on other local rules problems. It is now able to return to the local rules aspect of professional responsibility, in part because resolution of many of the other problems releases energy for the task. In addition, the mess or local rules appears to be the source of increasing concern both for present practice and for the future. More and more lawyers and law firms are engaging in multiforum practice, and feel threatened by the frequent inscrutability of local federal rules and the prospect that conflicts will emerge between the federal rules and state rules. Some observers have suggested that these fears have been stirred in part by the very fact that the Local Rules Project has brought attention to the problem. Even if the Project has played some role, the problems are now recognized. Doing nothing will not, of itself, erase awakened consciousness.

Some support remains for the "do nothing" approach. The central argument is that none of the theoretical problems are real. Federal courts do not in fact undertake to impose professional discipline apart from sanctions designed to regulate practice in federal court — even if the sanction

calls for payment to the court, censure, or suspension or revocation of the right to practice in federal court, there is no direct effect on the attorney's state license to practice or standing in the state bar. State authorities do not in fact undertake to impose professional discipline for actions undertaken under the authority of federal procedure or under order of a federal court. Although the Department of Justice believes that it encounters serious problems with the eccentric interpretations that a few states place on local rules of professional responsibility, most of the Department's problems relate to investigative behavior that in any event is not a proper subject for regulation under the Rules Enabling Act. We are getting along perfectly well as matters stand now, and there is no reason to adopt remedies that may have undesirable consequences.

The alternatives to doing nothing have been explored in depth. There is no support for adopting a complete and nationally uniform set of rules of professional responsibility for the federal courts, even if the rules were to be taken directly from the rules adopted and occasionally revised by the American Bar Association. There has been little more enthusiasm for relying generally on local state rules, while carving out for uniform federal treatment a discrete set of rules addressed to the problems that have most frequently appeared in federal decisions. Those alternatives have been put aside, at least for the foreseeable future. All that remains of them is the prospect that if FRAC 1 is adopted, it may some day prove useful to adopt another Rule for bankruptcy practice, which has distinctive problems and already is regulated in part by the Bankruptcy Code, and perhaps another Rule to address specific needs of the Department of Justice.

The surviving alternative to doing nothing is to adopt some form of "dynamic conformity" to state practice. The starting point is simple: each federal court conforms to the professional responsibility rules that would be applied by the local state. This conformity is dynamic in the sense that it continually adapts to state rules as the text may be changed from time to time and as the meaning of the text is fleshed out by authoritative state interpretations.

The models built out of this starting point can be more or less elaborate. The most elaborate approach spells out the need to rely on local state choice-of-law rules, expressly defers professional responsibility enforcement proceedings to state authorities, spells out the primacy of federal procedure in federal courts and the right of federal courts to control the right to practice in federal court, and expressly forbids imposition of state sanctions for conduct that conforms to the requirements or opportunities of federal procedure. This approach is set out first in the models that follow because it identifies the issues that should be addressed. Successive models simplify the expression. The first relies for attorney protection on specific federal court order, not an abstract statement of the primacy of federal procedure. This model might be changed to allow retroactive protection by federal court order after state disciplinary proceedings are launched; a sketch is provided for that approach. Still simpler models pare off the statement of federal protection, relying on development by decision and on the common sense of state disciplinary authorities. The choice-of-law problem that confronts the courts of appeals also can be simplified, or perhaps put aside entirely. All that remains at the end is a very simple rule that, by mandating dynamic conformity to local state rules, preempts local federal rules and does nothing more. This rule is presented with an alternative that excludes the courts of appeals. Professor Coquillette's research shows that there is no problem in the courts of appeals; it may be better to leave Appellate Rule 46 as it stands.

FEDERAL RULES OF ATTORNEY CONDUCT

Rule 1. Applicable Rules.

(a) Rules of Professional Responsibility.

(1) District Court. ~~Except as provided in these rules, t~~The professional responsibility of an attorney for conduct in connection with any action or proceeding in a United States District Court is governed by the rules [that apply to an attorney admitted to practice in the state where the district court sits]{that would be applied by the courts of the state in which the district court sits}.

(2) Court of Appeals. ~~Except as provided in these rules, t~~The professional responsibility of an attorney for conduct in connection with any appeal or proceeding in a United States Court of Appeals is governed:

(A) With respect to any appeal from a district court, and any other proceeding directed to a district court, by the rules that apply [to an attorney admitted to practice in the state where the district court sits]{in the district court under Rule 1(a)(1)}.

[**(B)** With respect to any other action or proceeding:

(i) if the attorney is admitted to practice only in one state, by the rules of that state, or

(ii) if the attorney is admitted to practice in more than one state, by the rules of the state in which the attorney principally practices, but the rules of another state in which the attorney is licensed to practice govern conduct that has its predominant effect in that state.]

{**(B)** With respect to any other action or proceeding, by the law of the state where the court of appeals has its administrative headquarters.}

(b) Enforcing Professional Responsibility. The rules of professional responsibility that govern under Rule 1(a) are enforced by the proper state authority. A United States District Court or Court of Appeals may initiate an investigation of an alleged infraction of a rule of

professional responsibility, and — with or without an investigation — may refer any question of professional responsibility to the proper state authority.

(c) Procedure. Federal law governs all matters of procedure in the United States District Courts and Courts of Appeals[, whether addressed by the Federal Rules of *Attorney Conduct*, Appellate Procedure, Bankruptcy Procedure, Civil Procedure, Criminal Procedure, or Evidence; by judicially developed rules; by local court rules; or by the court in its inherent power]. The court may, after notice and opportunity to be heard, enforce the procedural rules and its orders by all appropriate sanctions, including forfeiture of fees, reprimand, censure, or suspension or revocation of the privilege to appear before the court.

(d) Practice in United States Court. A court of the United States may establish and enforce rules governing the right to appear as counsel in that court.

(e) State Sanctions Preempted. No state authority may impose any sanction, civil liability, or other consequence on an attorney for conduct in connection with an action or proceeding in a United States District Court or Court of Appeals if the conduct is authorized by order of the United States court or by the federal law of procedure that applies under Rule 1(c).

Committee Note

The purpose of these rules is to separate issues of professional responsibility from control of the procedure in the United States District Courts and Courts of Appeals. Matters of professional responsibility are allocated to state law. Matters of procedure are controlled by federal law.

Attorneys are licensed by state authorities, not by the United States nor by United States courts. By continuing tradition, rules of professional responsibility have been a matter of state responsibility, not federal responsibility. This tradition has become threatened, however, by the adoption of hundreds of local rules in the district courts and courts of appeals. These rules provide a crazy-quilt pattern that defeats any possibility of national uniformity and that often defeats uniformity within a state. See the extensive studies by the Reporter of the Standing Committee and the Federal Judicial Center published as: *The Working Papers of the Committee on Rules of Practice & Procedure: Special Studies of Federal Rules Governing Attorney Conduct*, September, 1997. [Hereafter *"Working Papers."*] Some local rules are drafted in opaque terms that defy understanding and — if enforcement is attempted — threaten to deny due-process principles of fair notice. See *Working Papers* 3-121. When the time comes for enforcement, moreover, some courts invoke authority outside their local rules and on occasion simply ignore the local rules. See *Working Papers* 3-44, 99-121, 187-193, 235-244. This rule preempts all of these local rules by occupying the field of professional responsibility in the district courts and courts of appeals.

Subdivision (a). The rules that apply with respect to a district court are the rules that would be applied by the state in which it sits. This approach means that ordinarily all attorneys involved in any proceeding are governed by the same rules; there is no risk that an attorney for one party may win an advantage over an attorney for another party by exploiting differences in the rules of the different states by which the attorneys are licensed. Different rules will apply only if local state choice-of-law rules would, because of different circumstances affecting the attorneys' conduct and client relationships, apply different rules to the different attorneys.

This rule does not address all choice-of-law questions. An attorney's involvement with the issues that eventually appear in litigation commonly begins before litigation. This rule does not choose the law that governs before an action comes to the federal court. Local state rules apply from the moment an action or proceeding comes before the district court. The local rules include local choice-of-law rules. If the local state would choose the rules of a different state to govern a particular situation, those are the rules that govern. Removal from a state court presents no difficulty — the same rules as would be applied by the state court carry over. If a case is transferred to a district court from another federal court, the rules that would be applied by the receiving court's state apply after the transfer becomes effective. If actions are consolidated in a single district for pretrial purposes under 28 U.S.C. § 1407, the rules of the multidistrict court's state apply to all proceedings in the multidistrict court. Other situations must be addressed as they arise.

The rules that apply with respect to a court of appeals depend on the nature of the proceeding in the court of appeals. If the proceeding is an appeal or is otherwise directed to a district court, as on petition for an extraordinary writ, the rules are those that apply in the district court. This approach prevents the confusions that might arise when there is a change of counsel or when the parties choose attorneys from different states. Some proceedings in a court of appeals, however, are not directed to a district court. Review of an administrative agency is the most common example, but there are other examples such as contempt proceedings arising from an order entered by the court of appeals. [A three-part test applies to these proceedings. If the attorney is admitted to practice in only one state, that state's rules apply. If the attorney is admitted to practice in more than one state, the rules that apply are those of the state where the attorney principally practices, unless the attorney's conduct has its principal effect in another state where the attorney is also licensed.]{In order to ensure that a single body of law applies to all attorneys in a single proceeding, the rules of professional responsibility for these situations are taken from the state where the court of appeals has its administrative headquarters.}

Subdivision (b). Enforcement of state rules of professional responsibility remains with the proper state authority. Ordinarily the state will be the state whose rules apply under subdivision (a). Only that state can provide an expert and authentic interpretation and application of the controlling rules. If the attorney is licensed in that state, other states should defer to its enforcement decisions to the same extent as they would defer if the attorney's conduct had been undertaken in connection with a court of that state. If another state initiates disciplinary proceedings because the attorney is not admitted to practice in the state of the district court, or does so even though the attorney is admitted to practice in the district court's state, the enforcing state is bound by the choice-of-law rule in subdivision (a).

In considering whether to investigate or refer a professional responsibility question, a district court must be sensitive to the consequences that flow even from an investigation or referral. The court should make its investigation as discreet as possible, and should seize every opportunity for confidentiality in state referral procedures.

Subdivision (c). Subdivision (c) recognizes the fundamental imperative that the federal government must be able to control the procedure in federal courts. A state may not regulate federal procedure through the guise of state rules of professional responsibility. The distinction between matters of procedure and matters of professional responsibility is as clear at the core, and as uncertain at the edges, as the familiar distinctions that draw lines between procedure and substance. The distinction between procedure and substance reflects different policies, and may yield different results, in such separate contexts as state-state choice of law, federal-state choice of law, and determining the retroactivity of legislation. The policies that separate federal control of federal procedure from state regulation of professional responsibility also are different, although quite similar to the policies that distinguish "substance" from "procedure" under the doctrine of *Erie R.R. v. Tompkins*, 1938, 304 U.S. 64.

Although a federal court is free to regulate its procedure in ways that require departure from the state rules of professional responsibility that govern under subdivision (a), the state rules should be considered in making procedural rulings. Needless affront to state principles should be avoided.

A federal court may enforce procedural requirements by all appropriate sanctions. The sanctions may be those expressly provided in a rule of procedure, such as Appellate Rule 38, or Civil Rules 11, 26(g), and 37. The sanctions also may be contempt sanctions or other sanctions supported by inherent power. These sanctions may include those that often are invoked for professional-responsibility violations, including disqualification, fee forfeiture, reprimand, censure, or suspension or revocation of the privilege to appear before the federal court. These sanctions are appropriate remedies for procedural violations, necessary to deter such violations and to protect the court against recidivism by attorneys whose conduct has threatened to disrupt or subvert proper procedure.

Requirements of notice and opportunity to be heard apply to the imposition of procedural sanctions. Such requirements are already familiar through the developed procedures used to adjudicate contempt issues or to impose procedural sanctions.

Subdivision (d). 28 U.S.C. § 1654 establishes the right of parties in the courts of the United States to plead and conduct their cases "by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein." Subdivision (d) recognizes that the power to establish these rules includes the power to provide for enforcement. Enforcement may include such measures as limitation, suspension, or revocation of the right to appear as counsel in the court, or before a particular judge of the court. Enforcement by suspension or revocation may be based on acts that do not relate directly to the attorney's conduct in the proceedings. Examples include disbarment by state authorities or criminal prosecution or conviction. Such steps are designed to protect the court's interest in regulating the right to practice before the court, not to impose professional discipline as such.

Subdivision (e). The principle that federal law must control federal procedure must not be defeated

by imposition of state standards for attorney conduct authorized or required by federal procedure. This preemption of state sanctions includes conduct undertaken to comply with a specific federal court order.

The need to preempt state sanctions can be illustrated by one example. Thirty months into a complex litigation, a motion is made to disqualify opposing counsel for violations of professional responsibility rules relating to confidential client information and conflicts of interest. The federal court determines that there is no violation, or that a violation does not warrant disqualification in light of the costs that disqualification would entail. The federal court's interest in regulating its own proceedings supersedes the interest of any state in imposing sanctions for the conduct approved by the federal court.

The law governing lawyers may impose civil liability for conduct that also violates the disciplinary rules of professional conduct. The federal interest in enforcing federal procedure requires that a lawyer who complies with federal procedure in federal-court proceedings be protected against civil liability as well as against disciplinary sanctions.

Alternative (c), (e) Court-order Provisions

(c) Exemption. A United States District Court or Court of Appeals may, on motion or on its own, enter an order that exempts an attorney from an otherwise applicable rule of professional responsibility with respect to conduct in connection with an action or proceeding in that court. In determining whether to enter the order the court should consider whether the conduct violates any rule of professional responsibility and should weigh any violation against the procedural interests served by the conduct.

* * *

(e) State Sanctions Preempted. No state authority may invoke any standard of professional responsibility to impose any sanction, civil liability, or other consequence on an attorney for conduct in connection with an action or proceeding in a United States District Court or Court of Appeals that was protected by an exemption ordered under Rule 1(c).

Committee Note

Subdivision (c). Subdivision (c) recognizes the fundamental imperative that the federal government must be able to control the procedure in federal courts. The sources of federal procedure include court rules, both national and local; judicially developed doctrines; and inherent power. Federal procedure drawn from these sources serves not only the interests of the federal courts but also the substantive principles of federal law that account for much federal judicial business. A state may not control federal procedure under the guise of state rules of professional responsibility. At the same time, it is appropriate to accommodate the interests of federal procedure to the interests that underlie state regulation of attorney responsibility.

Accommodation of these competing interests might be left to a general provision that exempts from state responsibility rules any conduct undertaken in compliance with federal procedure. This general approach would encounter at least two major difficulties. The first difficulty is that there are many broad areas in which the same conduct involves both judicial procedure and professional responsibility. When procedure interests collide with responsibility interests, each interest may be important, trivial, or significant. One interest may be trivial while the other is important. It is important to achieve a case-specific accommodation of the competing interests in a way that would not be served by a broad principle that federal procedural interests always supersede state responsibility interests. The accommodation is too sensitive and too difficult to be left to the unguided judgment of individual attorneys. Explicit judicial review and disposition is required.

The second difficulty with a mere general principle is that enforcement ordinarily would occur in state professional discipline proceedings. State-created institutions would be required to make determinations of federal procedure divorced from the underlying federal proceeding,

commonly after the proceeding has concluded, and almost always after the challenged conduct has been completed. There would be few opportunities for review of the state determination by any federal court.

Together, these difficulties justify the burdensome requirement that an exemption order be sought by an attorney who recognizes a potential conflict between the interests of federal procedure and state professional responsibility rules. In some circumstances it may be possible to seek an advisory ruling from a state agency before acting. Often, however, only the federal court will be in a position to act in time to support continued efficient development of the federal proceeding.

The variety of potential conflicts between procedure and professional responsibility is too great to support any explicit standard for weighing the competing interests. Violation of a rule of responsibility may lie at the extended margin of application that involves little if any significant interest, or may lie at the core of a vitally important state policy. A slight change in procedural course might avoid any conflict in some circumstances, while other circumstances may pit a vital procedural need against the requirements of professional responsibility. All that can be said is that the federal court should be sympathetically sensitive to the interests embodied in the state rules of professional responsibility, and should take care to be sure that federal interests weigh so heavily as to overcome the state interests involved in the specific conflict.

A determination that proposed conduct does not violate the rules of professional responsibility should not always preclude consideration of the federal procedural interests involved. The question of professional responsibility may be close and may involve interests that are significantly more important than the potential federal procedure interest. A court may decline to enter an exemption order in such circumstances.

* * *

Subdivision (e). Subdivision (e) is the necessary complement of subdivision (c). The subdivision (c) power to serve the needs of federal procedure by exempting attorney conduct from state rules of professional responsibility requires that state tribunals recognize the exemption. The exemption includes an absolute immunity against civil liability for the exempted conduct.

The absence or even explicit refusal of a Rule 1(c) exemption order does not prevent a state disciplinary authority from considering federal procedural interests in determining whether there has been a violation of professional responsibility requirements or in deciding on a sanction after finding a violation.

Reporter's Note

This draft avoids at least one important question: when may the federal court enter an exemption order? Only before the relevant conduct? Also after, but before any state disciplinary inquiry is launched? After a state disciplinary inquiry is launched, but before final disposition? The answer may be complicated by the residual ambiguities of the concept that addresses conduct in connection with a federal action or proceeding. It may be difficult to insist that an exemption order be obtained before prefiling conduct is undertaken.

Alternative: Retroactive Federal Protection By Order

This version would discard the subdivision (e) preemption provision entirely, and replace subdivision (c) by the following provision:

(c) Protective Order.

(1) A United States District Court or Court of Appeals may enter an order that protects an attorney from any sanction, civil liability, or other consequence under a state rule of professional responsibility for conduct in connection with any action or proceeding in that court.

(2) An application for a protective order under Rule 1(c)(1) may be made only after a standard of professional responsibility is invoked against the applicant in state proceedings.

(3) In determining whether to grant a protective order under Rule 1(c)(1), the court should consider:

(A) whether the attorney's conduct violated any applicable rule of professional responsibility, and the nature and severity of any possible violation;

(B) whether the attorney's conduct was required or authorized by order of the federal court, by federal procedure, or by other federal interests derived from federal substantive law; and

(C) whether the federal interests served by the attorney's conduct outweigh the interests served by completion of the state proceedings in which the rule of professional responsibility is invoked.

Committee Note

Subdivision (c) recognizes the conflicts that may arise between federal interests and state rules of professional responsibility. If a federal court orders an attorney to engage in specified conduct, the interests both of the court and of the attorney forbid imposition of sanctions or liability under inconsistent state rules. Federal courts also must be able to develop and apply their own procedure free from indirect control by state rules of professional responsibility. An attorney who complies with federal procedural requirements, or who seizes opportunities made available by

federal procedure, must be protected against state-imposed sanctions unless the attorney could have achieved the same procedural ends by other means consistent with federal procedure and also consistent with important state rules of professional conduct. Overriding federal interests also may derive from substantive federal principles.

These abstract principles are difficult to translate into practice. It is particularly difficult to ask state disciplinary bodies and state courts to interpret and vicariously apply the federal rules of procedure and the interests that may derive from federal substantive law. It is better that the balancing of federal interests against state interests be made by the federal court connected to the attorney conduct that has been called into question in state proceedings. A protective order issued by the federal court provides the means to effectuate this balancing. At the same time, there is little point in submitting federal courts to a continuing barrage of anticipatory applications by attorneys who fear that their conduct may some day be called into question in state proceedings. State authorities in fact have shown no general inclination to pursue professional responsibility sanctions for conduct in connection with federal proceedings that arguably serves federal interests. The need to protect federal interests is best served by allowing an application for a protective order only after a state rule of professional responsibility is actually invoked in state proceedings.

The federal court's decision whether to issue a protective order is a matter of discretion that requires balancing federal interests against state interests. The strength of the federal interest is direct and overwhelming when the attorney's conduct was directed or authorized by order of a federal court. If at the time of making the order the federal court was aware of the facts that give rise to the issue of professional responsibility, it is difficult to imagine the extraordinary circumstances that should allow imposition of state sanctions for conduct that complies with the order. Absent a directly applicable order, the nature of the federal interest will, standing alone, be important in some circumstances and less important in others. One very important dimension of the federal interest is interdependent with the potentially prohibiting rule of professional responsibility. There is, for example, little federal interest in protecting against a rule of professional responsibility if at the time of the attorney's conduct there was good reason to fear violation of the rule, the professional responsibility interest is important, and the federal purposes could be well served by alternative conduct that would not violate the rule.

In balancing federal and state interests, the federal court need not reach its own final conclusion whether the attorney's conduct violated a state rule of professional responsibility. If there is reasonable doubt on this question, it is enough to take account of the probability — high or low — that there was a violation.

A protective order, once issued, commands the res judicata effects of any federal judgment. State tribunals are obliged to honor the effect of the order according to its terms.

Reporter's Note

This approach emerged for the first time during discussions at the February 2000 invitational conference. It attracted substantial support during the open discussion. At least some participants have had second thoughts. Two particular doubts have been expressed. The first is that this ex-post opportunity for protection will do little or nothing to reassure attorneys who see a potential conflict

between federal procedural opportunities and state professional responsibility rules, and who do not know how to resolve the conflict. Many are likely to seek protection by seeking an order authorizing the desired conduct, so as to enhance the identifiable federal interest and to dissuade state authorities from pursuing possible discipline. Otherwise the opportunity for intervention by a federal court may assure a more sympathetic and better-informed understanding of federal law, but provides scant protection. The whole purpose of this approach is to avoid this kind of anticipatory request to the federal court; the purpose may in practice be difficult to achieve. The second doubt is whether state authorities really would find this approach more congenial. This approach forces a direct confrontation between the federal court and state authorities in every case — although the federal court is considering a "protective order" rather than an "injunction," the effect on state proceedings is the same as an injunction.

Simplified Rule: No Conflict-of-Law, No Federal Interests

This version would adopt a rule of dynamic conformity, confirm the § 1654 power of a federal court to control admission to practice before it, and provide a few details about the distinction between sanctions imposed by state authorities for professional responsibility violations and sanctions imposed by federal courts to protect their own needs. It would not expressly state the primacy of federal procedure interests, nor would it provide any vehicle for federal-court protection against state disregard of federal interests. This approach rests on a combination of concerns. In part, it reflects the belief that there are no real problems. State authorities do not seek to impose professional responsibility sanctions for conduct pursued in reliance on federal procedure or in service of federal substantive interests. There is no need to state a principle that is honored in practice. And in part, this approach reflects the concern that open statement of the principles of federal primacy has generated substantial opposition, even though the principles are followed in practice. Some of these questions might be addressed in the Committee Note.

FRAC 1 in this form would be:

(a) Admission to Practice. A court of the United States may establish and enforce rules governing the right to appear as counsel in and practice before that court.

(b) Professional Responsibility. The professional responsibility of an attorney for conduct in connection with any action or proceeding in a United States court is governed by the rules that apply to an attorney admitted to practice in the state where the court sits. A United States court may conduct an investigation of an infraction of a rule of professional responsibility and — with or without an investigation — may refer any question of professional responsibility to the proper state authority. Whether or not an infraction is so referred, the court may independently impose appropriate sanctions, including forfeiture of fees, reprimand, censure, or revocation of the privilege to appear before the court.

Committee Note

Most federal courts have undertaken to regulate matters of professional responsibility by adopting local rules. These local rules have not been successful. There are wide variations of approach among federal courts, even among different federal districts within a single state. Many of the local rules adopt models that are inconsistent with local state rules; even if local state rules appear to be adopted, the federal court may assert the right to interpret the same text at odds with the state interpretation. There seems to be a growing tendency in some federal courts to disregard even their own local rules, looking toward development of a federal common law of attorney conduct that is cut free from any authoritative text. This tendency toward decisional principles is fed by the context in which federal courts face issues of attorney conduct — almost invariably, the question is not one of professional discipline, but instead is a procedural question affecting conduct of the

federal court's own proceedings. The result has been that an attorney appearing in federal court often cannot know what rules of professional responsibility apply to conduct in connection with the federal proceeding. The problem is exacerbated in some federal courts by the opacity of the local federal rules. The problem is further exacerbated for the growing number of attorneys who appear in federal courts away from their home states.

The time has come to replace the confusing welter of local federal rules with a uniform national rule. This rule adopts the rules that apply to an attorney admitted to practice in the state where the federal court sits. For a federal court of appeals, this state is the state where the court has its administrative headquarters. *[Reporter's Query: What do we do about the Federal Circuit? It refers many matters of procedure and substance to regional circuit law. How about this one? Everything according to D.C. rules?]* For all courts, the rules that apply to an attorney admitted to practice in the state mean the rules that would be applied by the courts of that state. If the local state would undertake to apply the professional responsibility rules of a different state — most likely the state in which an out-of-state attorney is licensed — the federal court makes the same choice. Adoption of the state rules means more than mere adoption of the current printed text of the state rules. It means also adoption of the interpretation placed on the state rules by state courts, adhering to the general rules that govern a federal court when it seeks to ascertain the content of state law.

Adoption for federal courts of local rules of professional responsibility leads to an inevitable interplay between federal interests and enforcement of the local rules. Federal courts never have undertaken to impose professional discipline in a form that affects an attorney's license to practice in state courts or standing in a state bar. But federal courts regularly consider issues of professional responsibility in ruling on matters that come before them in the course of litigation, and will continue to do so. In choosing procedural alternatives, for example, the federal court may be influenced by the prospect that one alternative is nearly as satisfactory as another for procedural purposes and should be preferred because it avoids significant issues of professional responsibility. And federal courts also consider matters of professional discipline for their own purposes. 28 U.S.C. § 1654 establishes the authority of a federal court to adopt rules that permit an attorney "to manage and conduct causes therein." By statute, court rule, and inherent power, federal courts can impose sanctions for procedural violations and the unreasonable and vexatious multiplication of proceedings. Considerations of professional responsibility may inform the exercise of these powers. Federal courts also share the interest of the entire legal profession in ensuring proper professional behavior by all attorneys. A federal court that learns of conduct connected to its own proceedings that may violate the applicable rules of professional responsibility is interested — and at times has the responsibility — to refer the question to state authorities. Under Attorney Conduct Rule 1, the federal court may make such a reference after conducting its own investigation or without conducting an investigation. A confidential federal investigation may protect an innocent attorney against the burdens that go with a formal referral, but often the federal court will prefer that responsible state authorities undertake any appropriate investigation.

Simple Dynamic Conformity

This model avoids all of the complications:

The professional responsibility of an attorney for conduct in connection with an action or proceeding in a United States District Court or Court of Appeals is governed by the rules that apply to an attorney admitted to practice in the state where the court sits.

Committee Note

(The Committee Note would include at least the first two paragraphs of the Note for the preceding rule. It might venture to adopt the whole of that Note, addressing some of the issues that are omitted from the text of the rule. The rule might add a subdivision recognizing the authority to "establish and enforce rules governing the right to appear as counsel.")

Simple Dynamic Conformity Without the Courts of Appeals

The professional responsibility of an attorney for conduct in connection with an action or proceeding in a United States District Court is governed by the rules that apply to an attorney admitted to practice in the state where the court sits.

Committee Note

(The Committee Note would be similar to the Note for the Simple Dynamic Conformity Rule, but would point out that the courts of appeals are governed by Appellate Rule 46. It might include a suggestion that a court of appeals should recognize the importance of continuity between district court proceedings and appellate proceedings, particularly with respect to the question whether a possible conflict of interest that was permissible in the district court should disqualify an attorney from participating in the appeal.)

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LEAHY AMENDMENT NO. 4218 (Senate - September 28, 2000)

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(Ordered referred to the Committee on the Judiciary)

Mr. LEAHY submitted an amendment intended to be proposed by him to the bill (S. 855) to clarify the applicable standards of professional conduct for attorneys for the Government, and other purposes; as follows:
Strike all after the enacting clause and insert the following:

SECTION. 1. SHORT TITLE.
This Act may be cited as the `Professional Standards for Government Attorneys Act of 2000'.

SEC. 2. PROFESSIONAL STANDARDS FOR GOVERNMENT ATTORNEYS.
Section 530B of title 28, United States Code, is amended to read as follows:

`SEC. 530B. PROFESSIONAL STANDARDS FOR GOVERNMENT ATTORNEYS.
`(a) **Definition**: In this section, the term `Government attorney'--

(1) means the Attorney General; the Deputy Attorney General; the Solicitor General; the Assistant Attorneys General for, and any attorney employed in, the Antitrust Division, Civil Division, Civil Rights Division, Criminal Division, Environment and Natural Resources Division, and Tax Division; the Chief Counsel for the Drug Enforcement Administration and any attorney employed in the DEA Office of Chief Counsel; the General Counsel of the Federal Bureau of Investigation and any attorney employed in the FBI Office of General Counsel; any attorney employed in, or head of, any other legal office in a Department of Justice agency; any United States Attorney; any Assistant United States Attorney; any Special Assistant to the Attorney General or Special Attorney appointed under section 515; any Special Assistant United States Attorney appointed under section 543 who is authorized to conduct criminal or civil law enforcement investigations or proceedings on behalf of the United States; any other attorney employed by the Department of Justice who is authorized to conduct criminal or civil law enforcement proceedings on behalf of the United States; any independent counsel, or employee of such counsel, appointed under chapter 40; and any outside special counsel, or employee of such counsel, as may be duly appointed by the Attorney General; and

(2) does not include any attorney employed as an investigator or other law enforcement agent by the Department of Justice who is not authorized to represent the United States in criminal or civil law enforcement litigation or to supervise such proceedings.
`(b) **Choice of Law**: Subject to any uniform national rule prescribed by the Supreme Court under chapter

131, the standards of professional responsibility that apply to a Government attorney with respect to the attorney's work for the Government shall be--

`(1) for conduct in connection with a proceeding in or before a court, the standards of professional responsibility established by the rules and decisions of that court;

`(2) for conduct in connection with a grand jury proceeding, the standards of professional responsibility established by the rules and decisions of the court under whose authority the grand jury was impanelled; and

`(3) for all other conduct, the standards of professional responsibility established by the rules and decisions of the Federal district court for the judicial district in which the attorney principally performs his official duties.

`(c) **Disciplinary Authority**:

`(1) **In general**: With respect to conduct that is governed by the standards of professional responsibility of a Federal court pursuant to subsection (b)--

`(A) a Government attorney is not subject to the disciplinary authority of any disciplinary body other than a Federal court or the Department of Justice's Office of Professional Responsibility unless the attorney is referred by a Federal court;

`(B) a Federal court shall not refer a Government attorney to any disciplinary body except upon finding reasonable grounds to believe that the attorney may have violated the applicable standards of professional responsibility; and

`(C) in any exercise of disciplinary authority by any disciplinary body under this subsection--

`(i) the standards of professional responsibility to be applied shall be the standards applicable pursuant to subsection (b); and

`(ii) the disciplinary body shall, whenever possible, seek to promote Federal uniformity in the application of such standards.

`(2) **Rule of construction**: Nothing in this subsection shall be construed to abridge, enlarge, or modify the disciplinary authority of the Federal courts or the Office of Professional Responsibility of the Department of Justice.

`(d) **Licensure**: A Government attorney (except foreign counsel employed in special cases)--

(1) shall be duly licensed and authorized to practice as an attorney under the laws of a State; and

(2) shall not be required to be a member of the bar of any particular State.

`(e) **Rulemaking Authority**: The Attorney General shall make and amend rules of the Department of Justice to assure compliance with this section.'.

(b) **Technical and Conforming Amendment**: The analysis for chapter 31 of title 28, United States Code, is amended, in the item relating to section 530B, by striking `Ethical standards for attorneys for the Government' and inserting `Professional standards for Government attorneys'.

(c) **Reports:**

(1) **Uniform rule**: In order to encourage the Supreme Court to prescribe, under chapter 131 of title 28,

United States Code, a uniform national rule for Government attorneys with respect to communications with represented persons and parties, not later than 1 year after the date of enactment of this Act, the Judicial Conference of the United States shall submit to the Chief Justice of the United States a report, which shall include recommendations with respect to amending the Federal Rules of Practice and Procedure to provide for such a uniform national rule.

(2) **Actual or potential conflicts**: Not later than 2 years after the date of enactment of this Act, the Judicial Conference of the United States shall submit to the Chairmen and Ranking Members of the Committees on the Judiciary of the House of Representatives and the Senate a report, which shall include--

(A) a review of any areas of actual or potential conflict between specific Federal duties related to the investigation and prosecution of violations of Federal law and the regulation of Government attorneys (as that term is defined in section 530B of title 28, United States Code, as amended by this Act) by existing standards of professional responsibility; and

(B) recommendations with respect to amending the Federal Rules of Practice and Procedure to provide for additional rules governing attorney conduct to address any areas of actual or potential conflict identified pursuant to the review under subparagraph (A).

(3) **Report Considerations**: In carrying out paragraphs (1) and (2), the Judicial Conference of the United States shall take into consideration--

(A) the needs and circumstances of multiforum and multijurisdictional litigation;

(B) the special needs and interests of the United States in investigating and prosecuting violations of Federal criminal and civil law; and

(C) practices that are approved under Federal statutory or case law or that are otherwise consistent with traditional Federal law enforcement techniques.

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Item 11

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

Memorandum

November 29, 2000

To: The Honorable Anthony J. Scirica

From: Gene W. Lafitte and Daniel J. Capra

Re: July 13, 2000, Telephone Conference of
CACM Subcommittee on Privacy and Electronic Access to Case Files

The CACM Subcommittee on Privacy and Electronic Access to Case Files had a 90-minute conference call to determine its future agenda, in light of the consideration of privacy issues at the spring meetings of the Rules Committee and other Judicial Conference Committees. As you know, Gene serves as a liaison from the Rules Committee to the CACM subcommittee, and Dan is assisting Gene in this project. This memorandum summarizes the subcommittee's discussion and preliminary resolutions.

The goal of the meeting was to narrow down, if possible, the options set forth in the chart prepared by the Administrative Office for dealing with the problem of public electronic access to case files. That chart was summarized by Dan Capra in a memorandum submitted to the Rules Committee for its June meeting.

Global Solutions

The first options considered by the Subcommittee were global – policies that would cover all cases. These **global options**, and their resolution by the subcommittee, can be summarized as follows:

1. **"Do nothing"** — There was no support for this option. The threat to privacy created by internet access to case files was considered too serious to leave to the current practice of motions to seal and a case-by-case approach.

2. **"Public is public"** — Under this option, information that is currently accessible at the courthouse would be equally accessible online. (This option is really not much different from option one, though it might entail an affirmative statement of policy.) There was no support for this option on the subcommittee. It was noted, however, that there is a group in the bankruptcy

bar who think there is no problem in having full internet access to all case file information–in other words, that there is no problem for the subcommittee to address.

3. **Redefine the contents of the "Public file" to better accommodate privacy interests** — There was some disagreement about what this option would entail. One possibility is that there would be two files–a pared-down "public file" and a more expansive "shadow file" accessible only to courts and parties. Most committee members expressed reservations about this solution. The "shadow file" solution would mean that information that is currently considered part of the public file, fully accessible at the courthouse, would now be accessible only to the parties and the courts. Such a solution is certain to draw complaints from news organizations and others interested in the justice system. Another possibility, however, is to establish standards, probably through rulemaking, for which information must be filed with the court. Whatever that information is, it would be accessible to any interested person online, but privacy interests would be taken into account in determining just what information must be filed to become part of the public file.

Opinion on the subcommittee was divided about both of these versions of the "public file" option, but neither was absolutely rejected at this point. Subcommittee members recognized, however, that it would be a considerable challenge to define, with any kind of precision, a "public file" in such a way as would take account of privacy interests.

4. **Online access more limited than courthouse access** — This proposal would make no change to the current system of open access to case files, *when the access occurs at the courthouse.* However, online access would be limited to take account of privacy interests. This option recognizes that the information in case files is *de facto* private when it can only be accessed at the courthouse (a concept the Supreme Court has referred to as "practical obscurity"). Some members of the subcommittee objected to this option on the ground that it would lead to inequality of access–those with greater resources would have a greater opportunity to access what is currently public information, by undertaking the time and expense of going to the courthouse. Others objected that such a dichotomy of access is likely to lead to a cottage industry of companies obtaining information at the courthouse and then disclosing that information on the internet, at a profit. Still, there was limited support expressed for this two-tier system of access, on the ground that it does not constrict the traditionally-granted access to case files at the courthouse, and yet protects private information from "easy" access through the internet. Thus, this option is still on the table for future discussion.

5. **Implement a "waiting period" between electronic filing and internet posting to allow objections to electronic filing to be resolved on a case-by-case basis** — This option is simply a lesser variation of Option 4. Its premise is that online access should be more limited than courthouse access. So, similarly with Option 4, this option was kept "in play", though a number of subcommittee members had reservations.

6. **Archiving** — Under this proposal, the Judicial Conference would develop an archiving policy that addresses privacy interests. Thus, case file information would be readily available online *for a period of time*, after which it would be inaccessible to members of the public. Developing an archiving policy requires resolving some difficult questions, such as whether all or only some information should be archived, and how long the case file information should remain in the public realm until it is archived. The subcommittee recognized that it had not yet focused on any of these questions. Nor had any of the Judicial Conference Committees. The question of archiving will be treated in further discussions within the subcommittee.

Options for Civil Cases

The Subcommittee next considered whether specific solutions might be appropriate for treating privacy problems resulting from electronic case filing and imaging in civil cases. Most of these options tracked the global options set forth above, and the Subcommittee reacted similarly toward them. For example, the first option considered was to presumptively exclude specific case or document types from remote access. This option is simply a variation of Option 4, above, which would differentiate between local and remote access. Accordingly, this option is still on the table, subject to the concerns previously expressed.

Another option considered was a rule change or policy statement that would explicitly permit the trial judge to issue an order sealing a document from remote access. Considerable concern was expressed about this option. Some members thought that it would result in burdens on trial judges–so much so that judges might be hesitant to adopt an electronic case filing system in the first place. Still, this option was not considered so objectionable as to mandate outright rejection at this point. There seemed to be a sense that "sealing" orders are valuable tools to protect privacy interests, but to be used as ancillary to a broader procedure designed to protect privacy.

A final option considered (again simply a derivation of one of the global options), would maintain the presumption of public access, including electronic access, for all unsealed documents. (In other words, "public is public"). Judge Lungstrum argued that this option ignores the previously assumed practical obscurity of case files. It would mean, for example, that all of the allegations in a Title VII case, as well as medical reports in a personal injury case, would be readily available on the internet. Judge Lungstrum is a proponent of a two-tiered system, allowing full access to unsealed documents at the courthouse, while prohibiting electronic access to anyone other than the parties and the court. Others disagreed. The option of presumptive public access remains open for future discussion by the subcommittee.

Criminal Case Options

The subcommittee believes that privacy concerns surrounding electronic case filing and imaging are heightened in criminal cases. Criminal cases generally trigger a greater public interest (thus heightening the incentive to access the information), and information in case files

c. An evidentiary privilege protecting a litigant's privacy interests.

We pointed out to the subcommittee members that an amendment to Civil Rule 26 might be problematic given the fact that Rule 26 has just been amended. We also pointed to the difficulty of adding privilege rules to the Evidence Rules, given the fact that Congress must specifically enact them. We noted that the Judicial Conference has expressed an interest that the Evidence Rules Committee enter a period of "quiescence." Finally, we noted that the scope of a substantive privacy protection would be extremely difficult to define and maintain. Despite all these expressed concerns, the Subcommittee seems resolved, at least at this point, to include the above Rules-related recommendations as part of its final package. We expect to have continued dialogue with the subcommittee on these Rules-related questions, and we would appreciate your views on the subject.

3. Social Security Cases. The subcommittee briefly considered, and preliminarily accepted, a suggestion that social security cases be completely excluded from electronic case filing and internet disclosure.

4. Delaying ECF? The subcommittee is well aware that electronic case filing and imaging creates a threat to privacy, and raises thorny problems of how to protect sensitive information from electronic disclosure. The subcommittee unanimously agreed, however, that these difficult privacy issues do not justify any delay in the implementation of ECF throughout the country.

Conclusion

The conference call had to be terminated before the subcommittee could discuss its next step. The AO staff will prepare a summary of the views of the subcommittee at this point on the options discussed. Another conference call will be scheduled so that the subcommittee can consider a timetable, and narrowing down the options that are still on the table. Public hearings will probably be held at some point, and more input will be sought from the Judicial Conference Committees.

At this point, it is fair to state that the subcommittee is still at the beginning stages of its work. It has decided some important questions, the most important being that something must be done to address the privacy concerns arising from electronic case filing and imaging. As the subcommittee recognizes, however, "the devil is in the details." In the coming months, the subcommittee, with the assistance of AO staff, will begin to hammer out some of those details. We welcome your input on these matters, and we will keep you apprised of further developments.





































Federal Register Notice:

JUDICIAL CONFERENCE OF THE UNITED STATES

Committee on Court Administration and Case Management, Subcommittee on Privacy and Electronic Access to Court Files; Notice of Request for Public Comment

AGENCY: Judicial Conference of the United States, Committee on Court Administration and Case Management, Subcommittee on Privacy and Electronic Access to Court Files.

ACTION: Notice of request for public comment.

-SUMMARY: The Court Administration and Case Management Committee of the Judicial Conference of the United States, through its Subcommittee on Privacy and Electronic Access to Case Files, is seeking comment on the attached document outlining policies under consideration to address issues of privacy and security concerns related to the electronic

availability of court case files.

DATES: Comments will be accepted from November 13, 2000 through January 26, 2001.1

ADDRESSES: All comments should be received by 5 p.m., January 26, 2001. The electronic submission of comments is highly encouraged. Electronic comments may be submitted at www.privacy.uscourts.gov or via e-mail at Privacy__Policy__Comments@ ao.uscourts.gov. Comments may be submitted by regular mail to The Administrative Office of the United States Courts, Court Administration Policy Staff, Attn: Privacy Comments, Suite 4-560, One Columbus Circle, NE., Washington, DC 20544.

FOR FURTHER INFORMATION CONTACT: Abel J. Mattos, Chief, Court Administration Policy Staff, Administrative Office of the United States Courts, One Columbus Circle, NE., Washington, DC 20544, telephone (202) 502-1560, fax (202) 502-1022.

Dated: November 1, 2000.
Abel J. Mattos,
Chief, Court Administration Policy Staff.

Request for Comment on Privacy and Public Access to Electronic Case Files

The federal judiciary is seeking comment on the privacy and security implications of providing electronic public access to court case files. The Judicial Conference of the United States is studying these issues in order to provide policy guidance to the federal courts. This request for public comment addresses several related issues: The judiciary's plans to provide electronic access to case files through the Internet; The privacy and security implications of public access to electronic case files; Potential policy alternatives and the appropriate scope of judicial branch action in this area. The judiciary is interested in comments that address any of the issues raised in this document, including whether it is appropriate for the judiciary to establish policy in this area. All comments should be received by 5 p.m. January 26, 2001 and must include the name, mailing address and phone number of the commentator. All comments should also include an e-mail address and a fax number, where available, as well as an indication of whether the commentator is interested in participating in a public hearing, if one is held. The public should be advised that it may not be possible to honor all requests to speak at any such hearing. The electronic submission of comments is highly encouraged.

Electronic comments may be submitted at www.privacy.uscourts.gov or via e-mail to Privacy__Policy__Comments@ ao.uscourts.gov. Comments may be submitted by regular mail to The Administrative Office of the United States Courts, Court Administration Policy Staff, Attn: Privacy Comments, Suite 4-560, One Columbus Circle, NE., Washington, DC 20544.

Electronic Public Access to Federal Court Case Files

The federal courts are moving swiftly to create electronic case files and to provide public access to those files through the Internet.

This transition from paper files to electronic files is quickly transforming the way case file documents may be used by attorneys, litigants, courts, and the public. The creation of electronic case files means that the ability to obtain documents from a court case file will no longer depend on physical presence in the courthouse where a file is maintained. Increasingly, case files may be viewed, printed, or downloaded by anyone, at any time, through the Internet. Electronic files are being created in two ways. Many courts are creating electronic images of all paper documents that are filed, in effect converting paper files to electronic files. Other courts are receiving court filings over the Internet directly from attorneys, so that the ``original'' file is no longer a paper file but rather a collection of the electronic documents filed by the attorneys and the court. Over the next few years, electronic filing, as opposed to making images of paper documents, will become more common as most federal courts begin to implement a new case management system, called Case Management/Electronic Case Files (or ``CM/ECF''). That system gives

each court the option to create electronic case files by allowing lawyers and parties to file their documents over the Internet. The courts plan to provide public access to electronic files, both at the courthouse and beyond the courthouse, through the Internet. The primary method to obtain access will be through Public Access to Court Electronic Records (or ``PACER''), which is a web- based system that will contain both the dockets (a list of the documents filed in the case) and the actual case file documents. Individuals who seek a particular document or case file will need to open a PACER account and obtain a login and password. After obtaining these, an individual may access case files--whether those files were created by imaging paper files or through CM/ECF--over the Internet. Public access through PACER will involve a fee of $.07 per page of a case file document or docket viewed, downloaded or printed. This compares favorably to the current $.50 per page photocopy charge. Electronic case files also will be available at public computer terminals at courthouses free of charge.

Potential Privacy and Security Implications of Electronic Case Files

Electronic case files promise significant benefits for the courts, litigants, attorneys, and the public. There is increasing awareness, however, of the personal privacy implications of unlimited Internet access to court case files. In the court community, some have begun to suggest 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 maintain that electronic case files should be treated the same as paper files in terms of public access and that existing court practices are adequate to protect privacy interests. Federal court case files contain personal and sensitive information that litigants and third parties often are compelled by law to disclose 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. Civil case files may contain medical records, personnel files, proprietary information, tax returns, and other sensitive information. Criminal files may contain arrest warrants, plea agreements, and other information that raise law enforcement and security concerns.

Recognizing the need to review judiciary public access policies in the context of new technology, the Judicial Conference is considering privacy and access issues in order to provide guidance to the courts.

The Judicial Conference has not reached any conclusions on these issues, and this request for public comment is intended as part of the Conference's ongoing study. The judiciary has a long tradition-- rooted in both constitutional and common law principles--of open access to public court records. Accordingly, all case file documents, unless sealed or otherwise subject to restricted access by statute or federal rule, have traditionally been available for public inspection and copying. The Supreme Court has recognized, however, that access rights are not absolute, and that technology may affect the balance between access rights and privacy and security interests. See Nixon v. Warner Communications, Inc., 435 U.S. 589 (1978), and United States Department of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749 (1989). These issues are discussed in more detail in an Administrative Office staff paper, ``Privacy and Access to Electronic Case Files in the Federal Courts,'' available on the Internet at www.uscourts.gov/privacyn.pdf.

[[Page 67018]]

The Role of the Federal Judiciary

The judiciary recognizes that concern about privacy and access to public records is not limited to the judicial branch. There is a broader public debate about the privacy and security implications of information technology. Congress has already responded to some of these concerns by passing laws that are designed to shield sensitive personal information from unwarranted disclosure. These laws, and numerous pending legislative proposals, address information such as banking records and other personal financial information, medical records, tax returns, and Social Security numbers. The executive branch is also concerned about implications of electronic public

access to private information. Most recently, the President directed the Office of Management and Budget, the Department of Justice, and the Department of Treasury to conduct a study on privacy and security issues associated with consumer bankruptcy filings. Accordingly, the judiciary is interested in receiving comment on the appropriate scope of judicial branch action, if any, on the broad issue of access to public court records, and the corresponding need to balance access issues against competing concerns such as personal privacy and security.

Policy Alternatives on Electronic Public Access to Federal Court Case Files

Regardless of what entity addresses the issues of privacy and electronic access to case files, the effort must be made to balance access and privacy interests in making decisions about the public disclosure and dissemination of case files. The policy options outlined below are intended to promote consistent policies and practices in the federal courts and to ensure that similar protections and electronic access presumptions apply, regardless of which federal court is the custodian of a particular case file. One or more of the policy options for each type of case file may be recommended to the Judicial Conference for its consideration. Some, but not all of the options are mutually exclusive.

Civil Case Files

1. Maintain the presumption that all filed documents that are not sealed are available both at the courthouse and electronically. This approach would rely upon counsel and pro se litigants to protect their interests on a case-by-case basis through motions to seal specific documents or motions to exclude specific documents from electronic availability. It would also rely on judges' discretion to protect privacy and security interests on a case-by-case basis through orders to seal or to exclude certain information from remote electronic public access.

2. Define what documents should be included in the ``public file'' and, thereby, available to the public either at the courthouse or electronically. This option would treat paper and electronic access equally and assumes that specific sensitive information would be excluded from public review or presumptively sealed. It assumes that the entire public file would be available electronically without restriction and would promote uniformity among district courts as to case file content. The challenge of this alternative is to define what information should be included in the public file and what information does not need to be in the file because it is not necessary to an understanding of the determination of the case or because it implicates privacy and security interests.

3. Establish ``levels of access'' to certain electronic case file information. This contemplates use of software with features to restrict electronic access to certain documents either by the identity of the individual seeking access or the nature of the document to which access is sought, or both. Judges, court staff, parties and counsel would have unlimited remote access to all electronic case files. This approach assumes that the complete electronic case file would be available for public review at the courthouse, just as the entire paper file is available for inspection in person. It is important to recognize that this approach would not limit how case files may be copied or disseminated once obtained at the courthouse.

4. Seek an amendment to one or more of the Federal Rules of Civil Procedure to account for privacy and security interests.

Criminal Case Files

1. Do not provide electronic public access to criminal case files. This approach advocates the position that the ECF component of the new CM/ECF system should not be expanded to include criminal case files. Due to the very different nature of criminal case files, there may be much less of a legitimate need to provide electronic access to these files. The files are usually not that extensive and do not present the type of storage problems presented by civil files. Prosecution and defense attorneys are usually located near the courthouse. Those with

a true need for the information can still access it at the courthouse. Further, any legitimate need for electronic access to criminal case information is outweighed by safety and security concerns. The electronic availability of criminal information would allow co-defendants to have easy access to information regarding cooperation and other activities of defendants. This information could then be used to intimidate and harass the defendant and the defendant's family. Additionally, the availability of certain preliminary criminal information, such as warrants and indictments, could severely hamper law enforcement and prosecution efforts.

2. Provide limited electronic public access to criminal case files. This alternative would allow the general public access to some, but not all, documents routinely contained in criminal files. Access to documents such as plea agreements, unexecuted warrants, certain pre-indictment information and presentence reports would be restricted to parties, counsel, essential court employees, and the judge.

Bankruptcy Case Files

1. Seek an amendment to section 107 of the Bankruptcy Code. Section 107 currently requires public access to all material filed with bankruptcy courts and gives judges limited sealing authority. Recognized issues in this area would be addressed by amending this provision as follows: (1) Specifying that only ``parties in interest'' may obtain access to certain types of information; and (2) enhancing the 107(b) sealing provisions to clarify that judges may provide protection from disclosures based upon privacy and security concerns.

2. Require less information on petitions or schedules and statements filed in bankruptcy cases. 3. Restrict use of Social Security, credit card, and other account numbers to only the last four digits to protect privacy and security interests. 4. Segregate certain sensitive information from the public file by collecting it on separate forms that will be protected from unlimited
public access and made available only to the courts, the U.S. Trustee, and to parties in interest.

Appellate Cases

1. Apply the same access rules to appellate courts that apply at the trial court level.

2. Treat any document that is sealed or subject to public access restrictions at the trial court level with the same [[Page 67019]] protections at the appellate level unless and until a party challenges the restriction in the appellate court.

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Memorandum To: Judge Scirica, Gene Lafitte
From: Dan Capra
Re: Summary of Telephone Conference, Subcommittee on Electronic Filing Rules
Date: November 7, 2000

This memorandum summarizes the meeting by telephone conference of the Subcommittee on Electronic Filing Rules.

Judge Koeltl, the Chair of the Subcommittee, opened the meeting by remarking on the wealth of information on ECF rules that has already been prepared. The AO is sending a large packet of helpful information to courts that are about to implement electronic case filing. This information includes a discussion of questions and problems that rulemakers must consider, and a table that sets forth the text of the rules currently used by prototype courts, broken down by subject matter.

Judge Koeltl noted that the ultimate goal of the Subcommittee is to prepare model local rules for electronic case filing. This would include some form of commentary, containing a discussion of why some alternatives were adopted and others rejected. It is also contemplated that the Subcommittee should determine whether to recommend to the Rules Committee that it consider the adoption of national rules for electronic case filing.

Nancy Miller then gave a background report on the status of electronic case filing in the federal courts. Currently, there are nine prototype courts; a tenth court (the District of New Mexico) employs its own ecf filing system. All but one of these courts (the District of Oregon) have promulgated combinations of local rules, standing orders, and user manuals to establish the procedures for electronic case filing. The rules are identical on some subjects and differ on others. The plan for the immediate future is to implement electronic case filing in bankruptcy courts, beginning in early 2001, in waves of six bankruptcy courts at a time. On the district court side, the AO is working on software that will be functional in both civil and criminal cases. Implementation of ecf in the district courts will probably begin in 2002.

Nancy reported on anecdotal information received by the AO about issues encountered by the prototype courts. The problem areas seem to be: 1) how to deal with signatures, especially those of third parties; 2) how to deal with pro se filers; 3) paper retention requirements;

4) whether ecf should be mandatory; and 5) whether ecf procedures should be promulgated by local rule, standing order, user manual, or a combination of those methods.

Members unanimously agreed that the next step for the Subcommittee should be to obtain information from the prototype courts on how the rules are working, and what problems if any have arisen with the current rules implemented by each respective court. I was assigned to coordinate this factfinding project. The goal is to complete this factfinding project by January 2001. The Subcommittee agreed on the following steps for implementing factfinding on the local ecf rules.

1. I will develop a list of questions and a list of possible sources of information, based on a list already prepared by Nancy Miller. That list of sources and questions has now been prepared in a separate memorandum, sent to the Subcommittee members and to you under separate cover.

2. Judge Koeltl will send a letter to the Chief Judge of each prototype court, notifying them of the factfinding project and requesting their assistance.

3. Designated Subcommittee members will assist me in obtaining information from the various sources, by interviewing these sources using the "script" of questions. I will synthesize all of the information. The allocation of courts among the members is as follows:

Judge Koeltl--Southern (Bankruptcy) and Eastern Districts of New York
Judge Strand–District of Arizona, Bankruptcy
Judge Leonard–Virginia Eastern, Bankruptcy and Georgia Northern, Bankruptcy
Judge Carroll–Missouri Western
Judge Sigmund–California Southern, Bankruptcy
Gene Lafitte–Ohio Northern (I will also call Judge Dowd for his help)

As to the District of New Mexico, I mentioned to Judge Koeltl that Judge Parker has been very helpful in informing the Rules Committee on New Mexico's ecf rules. He agreed that I should call Judge Parker for assistance on factfinding in New Mexico.

The Subcommittee agreed that interested Judicial Conference Committees (CACM, CAT and Rules) should be informed of the work of the Subcommittee at the winter meetings of those respective Committees.

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Memorandum To: Subcommittee on ECF Rules
From: Dan Capra
Re: Sources of information and questions for prototype courts
Date: November 7, 2000

In accordance with our telephone conference today, I set forth below the possible sources of information for how rules on the electronic case filing rules are working in the prototype courts. I also set forth below the general "script" for questions that might be usefully asked. These sources and questions have been prepared by Nancy Miller, and have been edited slightly by me.

Sources of Information:

1. A judge on the local rules committee.
2. A judge with a relatively large ECF caseload.
3. An attorney on the local rules committee.
4. An attorney with a relatively large ECF caseload..
5. A representative from the local U.S. Attorney's Office.
6. A court clerk involved with electronic case filing.
7. A Local United States Trustee in Bankruptcy.
8. A representative from a local bar association–especially one involved in technology.

Note: The above list is not intended to suggest that each of the sources must be interviewed for each of the prototype courts.

Possible questions for information gathering:

Rules-related questions:

1. What rules have worked well?
2. What rules, if any, have resulted in difficulty of application or interpretation?
3. Are any existing rules in need of amendment and if so, why?
4. Are there any "gaps" in your rules that should be addressed by rulemaking and if so, what are they?
5. Have your rules been modified? If so, why?
6. How often do rules-related issues arise in individual cases?

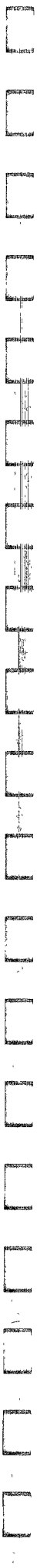
Process-related questions:

1. What process was used to develop local rules?
2. Why did you (the court) use the combination of rules, orders and other documents that you did?
3. What were the most complicated (or controversial) issues in developing the rules?
4. What topics, if any, could be usefully addressed at the national level?

Concluding question:

What advice would you give to others in courts that are about to implement electronic filing?

Note: This list is not written in stone. If there are other questions that should be added, or any questions that should be dropped, please feel free to give me your opinions so that the list can be modified.



Committee on Rules of Practice and Procedure
January 2001

CASE MANAGEMENT/ELECTRONIC CASE FILES PROJECT (CM/ECF)

- **PROJECT GOALS**
  - Provide a new Case Management system (CM) for the federal courts
  - Offer Electronic Case Files (ECF) capability
  - Provide courts flexibility in implementing the electronic case files capability

- **WHY WE ARE REPLACING THE EXISTING CASE MANAGEMENT SYSTEM (ICMS)**
  - It is an outdated system, developed more than 15 years ago.
  - The commercial database used in ICMS is no longer being supported by the manufacturers, and the AO's ability to support it is nearing an end.
  - It is increasingly expensive to maintain.
  - It is not easy to retrieve information and reports from ICMS.

- **WHAT THE NEW CASE MANAGEMENT (CM) SYSTEM PROVIDES**
  - It retains and expands the existing capabilities of ICMS.
  - It continues to provide an electronic docket sheet.
  - It is easier to learn and use.
  - It provides easier information retrieval, including case management reports.
  - Local modifications are easier to make.

- **WHAT IS ECF**
  - Electronic case files are court litigation documents (including pleadings, motions, and orders) in electronic form.
  - ECF includes the ability to store, retrieve, send and use documents in electronic form.
  - Courts can choose the extent to which they use the ECF capabilities in CM/ECF.
  - ECF does not preclude the use of paper.
  - It is a reliable and secure system.

- **CM/ECF IS A FLEXIBLE SYSTEM**
  - It offers courts considerable flexibility in how and when they implement it.
  - Courts can choose to permit attorneys to file documents electronically over the Internet; the system automatically dockets them, or

- Courts can opt to use the CM portion, and have documents put into electronic form by court staff (using a scanner), or
- Courts can opt to use only the CM portion, which provides electronic docket entries but continues to rely on paper documents.
- Courts are encouraged to make full use of the system (both CM and ECF) to get the largest benefits.
- Judges (and others) can continue to use paper to the extent they choose to do so, by having the particular documents they need printed.
- The system is designed to allow considerable court customization.

- **WHAT ELECTRONIC CASE FILES CAN PROVIDE FOR YOU**
  - Documents in electronic form are available immediately upon filing.
  - They can be accessible from anywhere (chambers, bench, home, divisional offices) at any time over the DCN or the Internet.
  - More than one person at a time can use or see a document.
  - Documents and files will not be lost or difficult to track down.
  - Storing documents in electronic form reduces the need for storage space.
  - Text of documents in electronic form can be searched.
  - Judges using the ECF capability have found it useful; those who use it the most like it the best.

- **SOME OF THE SYSTEM'S FEATURES**
  - The CM/ECF system's security design and implementation have been verified by independent security experts.
  - The system allows a court to regulate who has access to electronic documents.
  - The system will incorporate the capability to generate improved statistical reports, including CJRA and magistrate judge activity (MJSTAR).

- **COURT EXPERIENCE WITH CM/ECF**
  - There are four district prototype courts using CM/ECF in civil cases
    - Missouri Western
    - New York Eastern
    - Ohio Northern
    - Oregon
  - There are also five bankruptcy prototype courts
    - Arizona
    - California Southern
    - Georgia Northern
    - New York Southern
    - Virginia Eastern
  - The prototype courts have used both the CM and ECF capabilities.
  - More than 100,000 cases and 1,000,000 documents are in CM/ECF systems, and more than 4000 attorneys have filed documents electronically.

- **CURRENT PROJECT ACTIVITIES**
  - Version One of the bankruptcy software has been completed and is being tested.
  - Version One of the district court software (civil and criminal) is being developed.
  - Appellate software is being developed.
  - A "wave test" is currently ongoing to test the ability of the courts and the Administrative Office to implement the CM/ECF bankruptcy system in multiple bankruptcy courts simultaneously.
    - The "wave test" courts are Georgia Middle, Louisiana Middle, Missouri Western, New York Eastern, Tennessee Middle, Washington Western.
  - Outreach and education is underway for courts, the bar and the public.
  - Training and implementation materials for the courts are being developed.
  - Rules, privacy and other policy issues are being addressed.
    - Amendments to the national rules relating to electronic service are in the process of being approved.
    - A subcommittee of the Court Administration and Case Management Committee is considering ways to provide assistance with local electronic filing rules to courts implementing CM/ECF.
    - A subcommittee of the Court Administration and Case Management Committee is considering privacy issues arising from the potential public availability of court documents over the Internet.

- **WHAT ARE THE NEXT STEPS**
  - National rollout of the CM/ECF system for bankruptcy courts is scheduled to begin in the next few months.
    - Last summer, bankruptcy courts were asked to indicate preferences on when they wanted to implement CM/ECF. That information is being used to develop the rollout schedule for the CM/ECF bankruptcy system.
    - A similar process will be used in advance of rollout for other court types.
  - Three additional district courts are scheduled to test implementation within the next few months
    - California Northern, District of Columbia, Michigan Western
  - CM/ECF will be rolled out over approximately a four-year period.
    - The bankruptcy court rollout will start early in 2001.
    - The district court rollout is planned to start early in 2002.
    - Appellate court rollout is planned to start in 2002.

- **WHAT CM/ECF WILL MEAN FOR YOUR COURT**
  - The impact will depend on how your court chooses to implement the system.
  - The level of preparation required will vary, depending on the extent to which a court opts to use the ECF capabilities or whether it opts to implement initially only the CM (case management) portion.
    - For example, ECF use may involve developing some new local rules, and working with the bar.

- Information will be provided to courts about advance preparation and other implementation activities associated with the project.
- The Administrative Office will be providing assistance and guidance to courts throughout the implementation process.
- Current estimates are that each court's implementation will take approximately six months.

- **WHAT ARE THE IMPLICATIONS FOR THE BAR**
  - For courts that fully implement the ECF capability, attorneys can file their documents with the court via the Internet.
  - This allows the bar immediate access to court documents from their offices or elsewhere.
  - The system generates automatic electronic (e-mail) notices of documents filed in their cases.
  - It reduces mail and courier costs.
  - Attorneys have been trained to use the system by the prototype courts, either by bringing attorneys to the court for short sessions, or by going out to law firms.
    - Education and training materials have been developed that other courts can use or adapt.
  - Most lawyers already have the hardware and software required.
  - Feedback from attorneys suggests that they generally find the system quite easy to use.

For further information:

Project Managers

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Nancy Miller – Associate Project Director – (202)502-1815

J-Net webpage for CM/ECF Project:

http://jnet.ao.dcn/it/ecf/index.html

Prototype court websites:

District courts:

http://ecf.mowd.uscourts.gov/ (Missouri Western)
http://www.nyed.uscourts.gov/ (New York Eastern)
http://www.ohnd.uscourts.gov/ (Ohio Northern)
http://www.ord.uscourts.gov/ (Oregon)

Bankruptcy courts:

http://www.azb.uscourts.gov/ (Arizona)
http://www.casb.uscourts.gov/html/frontcounter.htm (California Southern)
http://www.ganb.uscourts.gov/ (Georgia Northern)
http://www.nysb.uscourts.gov/ (New York Southern)
http://www.vaeb.uscourts.gov/ (Virginia Eastern)

COMPENDIUM OF CURRENT LOCAL RULES ON ELECTRONIC CASE FILING AND CASE MANAGEMENT

PREPARED BY
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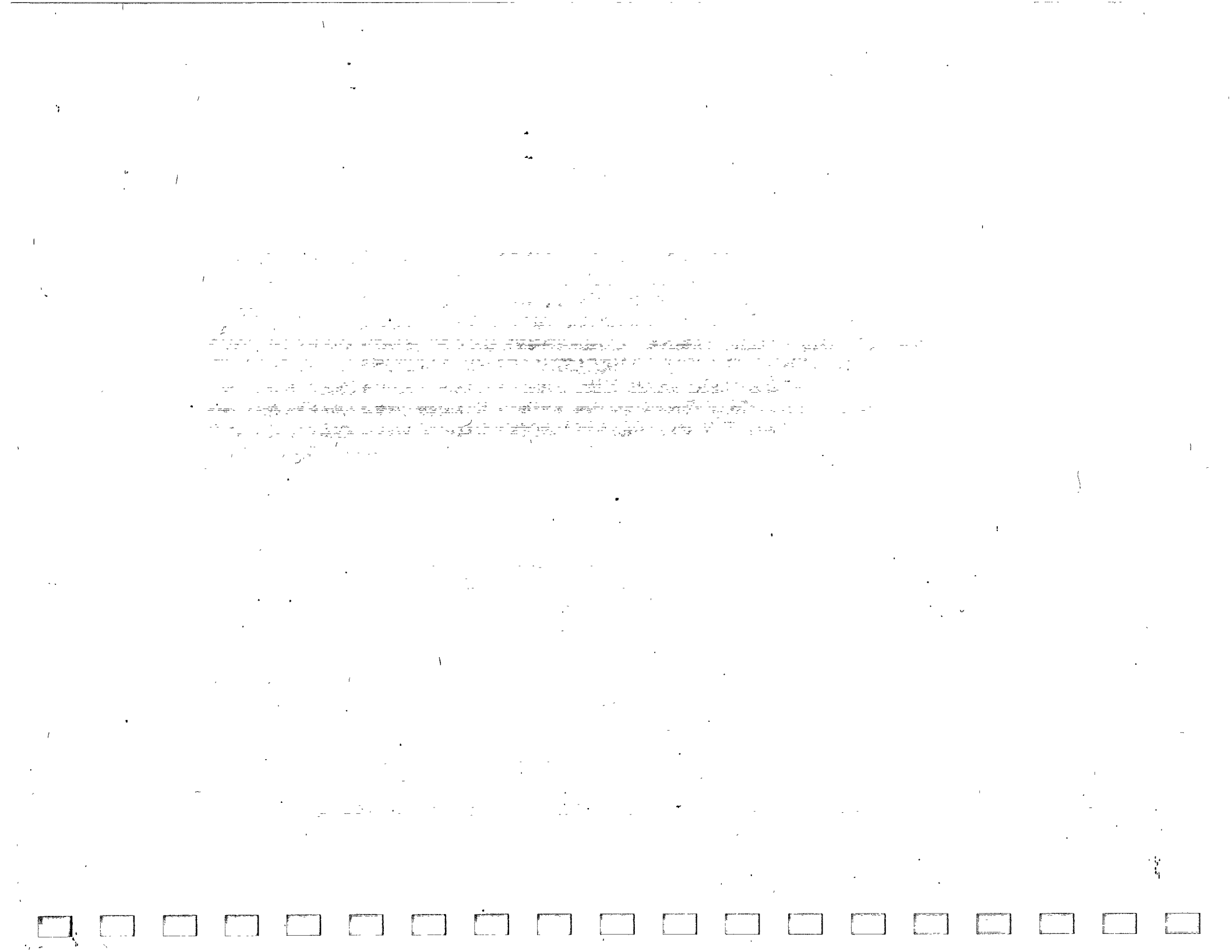
LOCAL RULES OF:
UNITED STATES BANKRUPTCY COURT, DISTRICT OF ARIZONA
UNITED STATES BANKRUPTCY COURT, SOUTHERN DISTRICT OF CALIFORNIA
UNITED STATES BANKRUPTCY COURT, NORTHERN DISTRICT OF GEORGIA
UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF MISSOURI
UNITED STATES DISTRICT AND BANKRUPTCY COURTS, DISTRICT OF NEW MEXICO
UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK
UNITED STATES BANKRUPTCY COURT, SOUTHERN DISTRICT OF NEW YORK
UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF OHIO
UNITED STATES BANKRUPTCY COURT, EASTERN DISTRICT OF VIRGINIA

October 10, 2000



TOPICS/ISSUES: SOURCE OF ECF PROCEDURES

BANKRUPTCY COURTS	
ARIZONA (www.azb.uscourts.gov)	• Gen. Order No. 69 (Oct. 2, 1997) • Gen. Order No. 74 (Aug. 11, 1998) • Gen. Order No. 75 (Mar. 26, 1999) • Gen. Order No. 76 (July 22, 1999) • Interim Oper. Order No. 3 (Aug. 16, 1999; authorized by Gen Order No. 69) • Exhibit 2 to Interim Oper. Order No. 3, Administrative Procedures for Electronically Filed Cases, Version 1.0 ("Admin. Proc.") (Aug. 16, 1999) • Exhibit 3 to Interim Oper. Order No. 3, Electronic Filing System User's Manual ("User's Manual") (Aug. 16, 1999)
CALIFORNIA—SOUTHERN (www.casb.uscourts.gov)	• Bankr. Gen. Order No. 162 (June 17, 1998) • Administrative Procedures for Filing, Signing, and Verifying Pleadings and Papers by Electronic Means ("Admin. Proc."), adopted by Bankr. Gen. Order No. 162 ¶ 1 (June 17, 1998) • Local Bankr. Rules 1006-1, 1007-2(a)(13) (April 28, 1996; rev'd 3/26/99) • Bankr. Gen. Order No. 163, amending Local Bankr. Rule 1007-2(a)(13) and 1007-4(d)(July 18, 2000; effective Sept. 1, 2000) • Southern Dist. of Calif. Web-site http://www.casb.uscourts.gov/html/frontcounter.htm (Aug. 21, 2000) • Southern Dist. of Calif. Web-site http://www.casb.uscourts.gov/html/fileroom.htm (Aug. 21, 2000)
GEORGIA—NORTHERN (www.ganb.uscourts.gov)	• Bankr. Local Rule 5005-5 (Aug. 31, 1998, adopted as a temporary emergency rule) • Gen. Order No. 5 (January 26, 2000; superseding Gen. Order 1 (99-1), Gen. Order 2 (99-2), and Gen. Order 3) • Electronic Case Filing Procedures ("ECFP"), Exhibit A to Gen. Order No. 5 (Jan. 26, 2000)
NEW YORK—SOUTHERN (www.nysb.uscourts.gov)	• Local Bankr. Rules (July 28, 1998; rev'd Oct. 25, 1999) • First Amend. to Gen. Order M-182 • Second Amend. to Gen. Order M-182 • Gen. Order #97-421 • Exhibit to Gen. Order #97-421, Electronic Filing Procedures ("EFP") (June 26, 1997; rev'd July 21, 1998) • Procedural Guidelines for Prepackaged Chapter 11 Cases ("Guidelines "), adopted by Gen. Order 203 (Feb. 24, 1999 (amending Gen. Order 201 Feb. 2, 1999)) • Electronic Filing System Attorney User's Manual ("User Manual") (rev'd July 21, 1998)
VIRGINIA—EASTERN (www.vaeb.uscourts.gov)	• Standing Order No. 99-1 (July 29, 1999; effective Aug. 1, 1999) • Exhibit to Standing Order No. 99-1, Administrative Procedures for Filing, Signing, Maintaining and Verifying

BANKRUPTCY COURTS	
	Pleadings and Papers in the Electronic Case Filing (ECF) System ("Admin. Proc.") (July, 1999) • Local Bankruptcy Rules (LBR) 5005-1, 1007-1(I)(1)

DISTRICT COURTS	
MISSOURI WESTERN (ecf.mowd.uscourts.gov)	• Court En Banc Order (Electronic Filing Procedures), dated Nov. 5, 1998. • ECF Administrative Procedures Manual, dated November 18,1997, updated September, 1999.
NEW MEXICO (also bankruptcy court) (www.nmcourt.fed.us) (Using locally developed electronic filing system)	• Local Civil Rules 5.5, 5.6 (Jan. 1, 1999) • Local Bankr. Rules 5005-4, 7005-1 (Oct. 1, 1996) • Admin. Order No. 97-26 (Feb. 11, 1997) • Admin. Order No. 97-83 (June 9, 1997) • Advanced Court Engineering (A.C.E.) Attorney Training Manual ("Training Manual") (Dec. 1999) • Miscellaneous Order No. 99-359 (Aug. 18, 1999)
NEW YORK—EASTERN (www.nyed.uscourts.gov)	• Admin. Order 97-12 (Oct. 23, 1997) • Admin. Order 99-2 (June 9, 1999) • User's Manual for ECF [Electronic Case Filing] (Jan. 4, 1999)
OHIO—NORTHERN (www.ohnd.uscourts.gov)	• Local Civil Rules (Jan. 1, 1992; rev'd Jan. 1, 2000) • Gen. Order No. 97-38, (Oct. 6, 1997) • Gen. Order No. 2000-48, (Aug. 8, 2000) • Electronic Filing Policies and Procedures Manual (Feb. 2, 1998) • Electronic Case Files (ECF) User Manual (rev'd Sept. 17, 1999)

TOPICS/ISSUES: CASES ACCEPTED FOR ELECTRONIC FILING

BANKRUPTCY COURTS	
ARIZONA	• "[B]ankruptcy cases filed under any chapter [are] included in the electronic filing pilot program." (Gen. Order No. 74)
CALIFORNIA—SOUTHERN	• "The court shall designate which cases shall be assigned to the Electronic Filing System ('System')." (Admin. Proc. ¶ I.A) • "We've begun filing Chapter 7 and Chapter 13 petitions, motions and related pleadings over the Internet." (http://www.casb.uscourts.gov/html/frontcounter.htm) • "All cases and pleadings with case numbers in the 30000 series (e.g., 99-30001) and all cases filed after January 1, 2000 [have been filed electronically]. You may also search on social security number, party or attorney name for cases within this range." (http://www.casb.uscourts.gov/html/fileroom.htm)
GEORGIA—NORTHERN	• "The Clerk of the Bankruptcy Court may accept for filing documents submitted, signed, verified or served by electronic means that are consistent with technical standards, if any, that the Judicial Conference of the United States establishes and that comply with the administrative procedures established by the Bankruptcy Court." (Local Bankr. Rule 5005-5) • "The court has no plans to enable persons who are not attorneys to file documents electronically, so that *pro se* litigants must continue to file pleadings in paper form in all cases." (Gen. Order No. 5) • "The Court shall designate which cases or types of cases shall be assigned to the Electronic Case Filing System." (ECFP ¶ I.A)
NEW YORK—SOUTHERN	• "The Court shall designate which cases shall be assigned to the Electronic Filing System." (EFP ¶ I.A.) • "A petition commencing a case under the Bankruptcy Code may be filed in any office of the Clerk or by electronic means established by the Court." (Local Rule 1002-1) • "In cases in which electronic filing is required, documents shall be filed, signed, or verified by means that are consistent with any standing orders issued by the Court." (Local Rule 5005-2)
VIRGINIA—EASTERN	• "The Court shall designate which cases shall be assigned to the Electronic Case Filing System (hereafter System)." (Admin. Proc. ¶ I.A)

DISTRICT COURTS	
MISSOURI—WESTERN	• "The Court shall select those cases to be designated for ECF and shall notify the parties." (Court En Banc Order ¶ 1) • "Beginning October 1, 1999 all cases shall be assigned to the Electronic Filing System." (ECF Admin. Proc.

DISTRICT COURTS	
	Manual ¶ I.A.)
NEW MEXICO (also bankruptcy court)	• "[Y]ou may initiate electronic filing in any civil case in the district court. At this time, the District of New Mexico is not accepting criminal cases for electronic filing." (Training Manual p. 29) • BANKRUPTCY: "A party may file any paper using electronic transmission in accordance with guidelines when established by the court." (Local Bankr. Rule 5005-4(b))
NEW YORK—EASTERN	• "The Clerk shall maintain and post on the E.D.N.Y. Public Web Site a list of the Judges of this Court who permit use of EFP [Electronic Filing Procedures] in actions assigned to them ('Participating Judicial Officers'). A magistrate judge assigned to an action in which the assigned judge is a Participating Judicial Officer shall be deemed a Participating Judicial Officer for the purposes of that Action. Upon the filing of the complaint in any action in which the Judge initially assigned is a Participating Judicial Officer, the Clerk shall provide the plaintiff(s)with a copy of a Notice Regarding Availability of Electronic Filing in a form approved by the Chief Judge. Such Notice shall be served upon the defendant(s) in the action together with the summons and complaint." (Admin. Order 97-12 ¶ 2(a)) • "In any action subject to EFP, upon application of any party or sua sponte, the assigned Judge may terminate or modify application of EFP to the action." (Admin. Order 97-12 ¶ 2(d))
OHIO—NORTHERN	• "The determination as to whether documents will be filed electronically will be made at the initial Case Management Conference or at any other time if stipulated by the parties and approved by the presiding judicial officer." (Gen. Order No. 97-38, ¶ 5) • "Electronic filing may be beneficial for a wide variety of cases. Cases best suited for electronic filing may include those in which: • Parties filing or requiring service are reasonably identifiable; • Parties filing or requiring service have or can acquire access to a computer, the world wide web and, where necessary, a scanner; and • The number and/or size of documents that are likely to be scanned before they are electronically filed is not unreasonable. While scanned documents can be electronically filed, numerous or voluminous documents that need to be imaged may be cumbersome to create, transmit or retrieve. Computerized textual documents, however, may be nearly unlimited in size, subject to Local Rules or Orders regarding page limitations." (Pol. & Proc. Manual, ¶ 5) • "Beginning July 1, 2001, all new civil cases filed in the United States District Court for the Northern District of Ohio will be placed in the Case Management/Electronic Case Filing CM/ECF system." (http://www.ohnd.uscourts.gov/Electronic_Filing/electronic_filing.html) • "[A]bsent a showing of good cause, all documents, notices and orders in all social security reviews filed in this district on or after January 1, 2001 shall be filed and noticed electronically, rather than on paper, except as noted below." (General Order No. 2000-48 ¶ 1)

TOPICS/ISSUES: VOLUNTARY OR MANDATORY PARTICIPATION

BANKRUPTCY COURTS	
ARIZONA	
CALIFORNIA—SOUTHERN	• "[A]n attorney/participant may withdraw from participation in the System by providing the Clerk of Court, Chief Deputy Clerk or Systems Department with notice of such withdrawal." (Admin. Proc. ¶ I.C.4) • "[P]arties and attorneys who are not participants in the System are not required to electronically file pleadings and other papers in a case assigned to the System." (Admin. Proc. ¶ II.A.1)
GEORGIA—NORTHERN	• "Attorneys are not required at present to file pleadings electronically and may file pleadings in paper form, even in ECF cases." (Gen. Order No. 5)
NEW YORK—SOUTHERN	• CHAPTER 11: "The Court has established and requires electronic filing of all Chapter 11 cases on the Internet." (Guidelines ¶ V.A.) • "Participants in the Electronic Filing System by receiving a password from the Court waive the right to receive notice and service conventionally in accordance with FRBP 7004 and FRBP 2002(a) and agree to receive notice and service by electronic means." (Gen. Order 97-421 ¶ 10)
VIRGINIA—EASTERN	• "Except as expressly provided for in paragraph III.A. below and in exceptional circumstances which prevent an attorney from filing electronically, all petitions, motions, memoranda of law, or other pleadings and documents required to be filed with the Court in connection with a case assigned to the System shall be electronically filed on the System." (Admin. Proc. ¶ II.A.1) [paragraph III.A. provides for conventional filing for documents to be filed under seal, trial exhibits, and transcripts] • "Parties without legal representation are not required to electronically file pleadings and other papers in a case, but must adhere to the requirements set forth in the notice dealing with conventional filings." (Admin. Proc. ¶ II.A.1) • "A petition seeking relief under the Bankruptcy Code shall be filed (or submitted by electronic means established by the Court) in the division in which the debtor's domicile, residence, principal place of business or principal assets were located for the greater part of the one hundred-eighty days immediately preceding the filing of the petition." (Local Bankr. Rule 5005-1(A)(1))

DISTRICT COURTS	
MISSOURI—WESTERN	• "Beginning October 1, 1999 all cases shall be assigned to the Electronic Filing System." (ECF Admin. Proc. Manual ¶ I.A.) • "Except as expressly provided for in ¶ III.A., below, all documents required to be filed with the Court in connection with a case assigned to the System shall be electronically filed on the System." (ECF Admin. Proc. Manual ¶ II.A.) [paragraph III.A. provides for conventional filing of transcripts, documents to be filed under seal, and "exhibits to filed documents, such as leases, notes and the like, which are not available in electronic form"] • "Except as expressly provided in paragraph 6a below, or as ordered by the Court, all motions, pleadings, legal memoranda or other documents required to be filed with the Court shall be electronically filed." (Court En Banc Order ¶ 3.a) [paragraph 6a provides for conventional filing of complaints, attachments to a motion or pleading which are not available in an electronic format, and documents to be filed under seal]
NEW MEXICO (also bankruptcy court)	• "There are two ways to initiate electronic filing in a civil case: 1. At the initial scheduling conference; or 2. By manually filing a Motion to Initiate Electronic Filing, after a case is already in progress." (Training Manual p. 29)
NEW YORK—EASTERN	• "At the initial scheduling conference in the action, if the assigned judicial officer consents to use of EFP, and if all parties appearing also consent to use of EFP, then the parties shall sign at the initial conference a Joint Consent to EFP satisfying the requirements of paragraph 3; otherwise the assigned judicial officer shall note on the initial Scheduling Order that the action shall not be subject to EFP." (Admin. Order 97-12 ¶ 2(a))
OHIO—NORTHERN	• "In the early stages of the electronic filing program, the Court will seek the cooperation of the attorneys and their clients in volunteering to participate in the program." (Gen. Order No. 97-38, ¶ 1) • "[A]bsent a showing of good cause, the Court hereby orders that all social security cases filed on or after January 1, 2001 be electronically filed." (General Order No. 2000-48 ¶ 11)

TOPICS/ISSUES: OUTSIDE USERS (ELIGIBILITY AND REGISTRATION, PASSWORDS, ETC.)

BANKRUPTCY COURTS	
ARIZONA	• "Passwords will only be issued to specified individuals and not to entities, such as law firms." (Interim Oper. Order No. 3 ¶ 6) • "Attorneys may find it desirable to change their court assigned passwords periodically. This can be done by contacting the Office of the Clerk, Systems Department. In the event that an attorney believes that the security of an existing password has been compromised and that a threat to the System exists, the attorney shall give immediate notice by telephonic means to the Clerk of Court, Chief Deputy Clerk or Systems Department Manager and confirm by facsimile in order to prevent access to the System by use of that password)." ((Admin. Proc. ¶ I.C.4)
CALIFORNIA—SOUTHERN	• "Each attorney admitted to practice in this court shall be entitled to one System password to permit the attorney to participate in the electronic retrieval and filing of pleadings and other papers in accordance with the System." (Admin. Proc. ¶ I.B) • "Out of state attorneys applying for registration may communicate with the Office of the Clerk to arrange for delivery of the system password." (Admin. Proc. ¶ I.C.3)
GEORGIA—NORTHERN	• "B. Registration. 1. The ability to file documents electronically in ECF cases requires a password issued by the Clerk. To register as a participant and apply for a password, an attorney should complete and submit the registration form . . . The court may require attorneys to resubmit an executed registration form from time to time as terms and conditions for using the Electronic Case Filing System change. 2. Each attorney approved by the Clerk as a participant in the ECF system ('Approved Participant') will receive a notice from the Clerk to retrieve from the Clerk's office an envelope containing an assigned password. Only the applicant or a representative authorized in writing by the applicant on the letterhead of the applicant's firm may retrieve the envelope. The Clerk will mail the password to the applicant on request. 3. Attorneys may find it desirable to change their court-assigned passwords periodically, which they may do by mailing a request to the Clerk. Any attorney having reason to believe that the security of an existing password has been compromised or that a threat to the court's computer system may exist shall immediately notify the Clerk of Court, Chief Deputy Clerk or Systems Department Manager by telephone and confirm the notice in writing, so as to prevent possible unauthorized access to the court's computer system." (ECFP ¶ I.B.)
NEW YORK—SOUTHERN	• "Each attorney admitted to practice in this Court shall be entitled to one System password to permit the attorney to participate in the electronic retrieval and filing of pleadings and other documents in accordance with the System." (EFP ¶ I.B) • "Each attorney registering in the System will receive telephonic notice from the Office of the Clerk indicating that an envelope containing the attorney's assigned System password is available for pick-up at the Office of the Clerk.

BANKRUPTCY COURTS	
	Only the attorney of an authorized representative may pick up the envelope. Out of state attorneys applying for registration may communicated with the Office of the Clerk to arrange for delivery of the system password." (EFP ¶ I.C.3) • "Attorneys may find it desirable to change their passwords periodically. This can be done by contacting the Office of the Clerk, Systems Department. In the event that an attorney believes that the security of an existing password has been compromised and that a threat to the System exists, the attorney shall give immediate notice by telephonic means to the Clerk of Court, Chief Deputy Clerk or Systems Department Manager and confirm by facsimile in order to prevent access to the System by use of that password." (EFP ¶ I.C.4)
VIRGINIA—EASTERN	• "Each attorney admitted to practice in this Court shall be entitled to one System password to permit the attorney to participate in the electronic retrieval and filing of pleadings and other papers in accordance with the System." (Admin. Proc. ¶ I.B) • "Once registered, an attorney may withdraw from participation in the System by providing the ECF Help Desk with written notice of such withdrawal." Admin. Proc. ¶ I.C.5)

DISTRICT COURTS	
MISSOURI—WESTERN	• "Each attorney in good standing in this Court shall be entitled to one ECF system login and password . . ." (Court En Banc Order ¶ 2; ECF Admin. Proc. Manual ¶ I.B.)) • "Each attorney registering for the System will receive an Internet e-mail message after their password has been assigned. This is to assure that the attorney's Internet e-mail address has been entered correctly in the CM/ECF system. The password information will then either be mailed to the attorney by regular, first-class mail; or the attorney may arrange to pick up their password at the Office of the Clerk. "(ECF Admin. Proc. Manual ¶I.C.3) • Attorneys may find it desirable to change their court assigned passwords periodically. This can be done by contacting the Office of the Clerk, Systems Department. In the event that the attorney believes that the security of an existing password has been compromised and that a threat to the System exists, the attorney shall give immediate notice by telephonic means to the Clerk of Court, Chief Deputy Clerk or Systems Department Manager and confirm by facsimile in order to prevent access to the System by use of that password." (ECF Admin. Proc. Manual ¶I.C.3)
NEW MEXICO (also bankruptcy court)	• "In order to obtain the necessary user identification number and user password, an attorney must be admitted to practice in Federal Court and in good standing." (Admin. Order No. 97-26 ¶ 2) • "Any attorney seeking access to the Court's electronic filing must meet the minimum requirements set by the Court for participant/users . . ." (Admin. Order No. 97-26 ¶ 3) • BANKRUPTCY: "Any log-in name and password required for electronic filing shall be used only by the attorney to whom the log-in name and password are assigned and by such agents, members and employees of that attorney's firm as that attorney shall authorize. The attorney must immediately notify the court upon learning that the security

DISTRICT COURTS	
	of the log-in has been compromised." (Misc. Order No. 99-359, ¶ 2).
NEW YORK—EASTERN	• "Any attorney admitted to the Bar of this Court may register as a Filing User of the E.D.N.Y. Public Web Site. Registration shall be by paper on a form prescribed by the Clerk which shall require identification of the action as well as the name, address, telephone number and Internet e-mail address of the attorney, together with a declaration that the attorney is admitted to the Bar of this Court." (Admin. Order 97-12 ¶ 12(a)) • "Any party to a pending civil action who is not represented by an attorney may register as a Filing User of the E.D.N.Y. Public Web Site solely for purposes of the action. Registration shall be by paper on a form prescribed by the Clerk which shall require identification of the action as well as the name, address, telephone number and Internet e-mail address of the party. If, during the course of the action, the party retains an attorney who appears on the party's behalf, the appearing attorney shall advise the Clerk to terminate the party's registration as a Filing User upon the attorney's appearance." (Admin. Order 97-12 ¶ 12(b)) • "The filing of a Consent to EFP constitutes consent to service of all papers as provided herein as a full, adequate and timely substitute for service pursuant to Federal Rules of Civil Procedure." (Admin. Order 97-12 ¶ 6(c))
OHIO—NORTHERN	• "To utilize the electronic filing system, attorneys must have a completed Attorney Registration Form on file with the Clerk of Court." (Gen. Order No. 97-38, ¶ 8) • "A party seeking to file documents electronically must submit a completed Electronic Filing System Registration form (Appendix B) prior to being assigned a user identification name and password that will serve as that party's signature for Fed. R. Civ. P. 11 purposes. Additionally, attorneys seeking to file electronically must be admitted to practice in the U.S. District Court for the Northern District of Ohio. . . Once registration is completed, the party will receive notification by U.S. mail as to his/her user identification name and password. Once registration is completed, the party will receive notification by U.S. mail as to his/her user identification name and password. Parties agree to protect the security of their passwords and immediately notify the clerk of court if they learn that their password has been compromised. Parties may be subject to sanctions for failure to comply with this provision." (Pol. & Proc. Manual, ¶ 12 & App. B)

TOPICS/ISSUES: FILING/SERVICE OF INITIAL CASE PAPERS

BANKRUPTCY COURTS	
ARIZONA	• "Delivery of paper copies of pleadings and other documents for chambers as set forth in the user manual will continue to be required unless otherwise ordered by the court." (Interim Oper. Order No. 3 ¶ 7) • "The following documents shall be filed conventionally and not electronically unless specifically authorized by the Court: . . . Petitions to commence a case under the Bankruptcy Code;" (Admin. Proc. ¶ III.A.1)
CALIFORNIA—SOUTHERN	• "Except as expressly provided in Paragraph III.A below and in exceptional circumstances which prevent an attorney/participant from filing electronically, all petitions, motions, pleadings, memoranda of law, or other documents required to be filed with the court in connection with a case assigned to the System shall be electronically filed on the System."(Admin. Proc. ¶ II.A.1) [paragraph III.A provides for conventional filing of documents to be filed under seal, "exhibits, including but not limited to leases, notes and the like, which are not available in electronic form", and proofs of claim]
GEORGIA—NORTHERN	• "A case or adversary proceeding is deemed to be a fully electronic case only if the initial pleading in that case is filed electronically or otherwise ordered by the court. The Clerk shall continue to maintain paper files in any case or adversary proceeding that is not a fully electronic case." (Gen. Order No. 5 ¶ (5)) • "Attorneys may file pleadings electronically in conventional cases filed on or after January 1, 2000, subject to the same the terms and conditions set forth in General Orders dealing with electronic filing, as if the case were a fully electronic case. An attorney filing a pleading electronically in a conventional case shall not file a paper copy of that pleading with the Clerk. If an attorney files a document electronically in a conventional case or adversary proceeding filed on or after January 1, 2000, the Clerk shall print a copy of the electronically filed pleading and place it in the paper file. For cases filed prior to January 1, 2000, in which pleadings and other documents filed with the clerk have been filed in paper form only, the official docket maintained by the Clerk pursuant to Fed. R. Bank. P. 5003(a) shall continue to be the docket maintained on the system known as 'BANCAP.' At such time as the information comprising BANCAP dockets for pending cases is extracted and inserted into the electronic dockets maintained in the ECF System, however, the ECF electronic docket for each pending case filed prior to January 1, 2000 shall thereafter be the official docket." (Gen. Order No. 5 ¶ (5)) • "An attorney filing a Verified Pleading electronically in a text format shall conform the copy filed electronically to the original Verified Pleading. Each signature shall be indicated with the notation '/s' above the name of the person signing, and hand-written or stamped text or notations, including without limitation dates and stamps concerning the commissions of notaries public, shall be typed on the filed copy. Seals may be noted by such expressions as 'Legal Seal ,''L.S.,' 'Notary Seal,' etc., as appropriate. An attorney filing a Verified Pleading, whether in text or image format, shall thereafter maintain in his or her files the original Verified Pleading in its entirety for a period ending four (4) years after the case or proceeding in which the Verified Pleading is filed is closed. The filing of a Verified Pleading constitute s a representation by the attorney w ho files it that the attorney has in his or her possession at the time of filing the fully executed original

BANKRUPTCY COURTS	
	Verified Pleading. "(Gen. Order No. 5 ¶ (7)) • "Pleadings or other documents that are filed conventionally rather than electronically shall be served in the manner provided for in, and on those parties entitled to notice in accordance with, the Federal Rules of Bankruptcy Procedure and the Local Rules of Bankruptcy Procedures except as otherwise provided by order of the Court." (ECFP ¶ III.B)
NEW YORK—SOUTHERN	• "Except as provided in Local Bankruptcy Rule 1002-1 [set forth above], unless filed by electronic means, all papers shall be filed in the office of the Clerk that is located where the Judge assigned to the case or proceeding sits." (Local Rule 5005-1) • "Ordinarily, a petition should be filed conventionally. . . . When a petition is filed electronically, the court will designate the bankruptcy judge to whom the case is assigned and advise you. Electronic filing of a petition requires that the filer: submit a creditor disk to the court for noticing purposes immediately after electronically filing a petition, provide paper copies with the case number and the name of the judge assigned . . ." (User's Manual ¶ II.D.1) • "[P]aper copies of notices mandated by FRBP 2002 (a)(1)(4)(5)(7) and (8) and (b)(1) and (2) will be required unless and until notice is requested by the recipient to be given electronically pursuant to FRBP 9036. Notice pursuant to FRBP 2002 (a)(2)(3) and (6) may be served in accordance with paragraph II.B.1 hereof. [¶ II.B.1 is set forth below in the section on "Filing of Court Orders"]. If the recipient requests electronic notice pursuant to FRBP 9036, it may be served in accordance with paragraph II.B.1." (EFP ¶ II.A.3) • "Except as provided in ¶ III.B, below, for paper documents or documents filed on 3.5 inch floppy disk, the filing party shall not be required to serve any pleading or other documents (other than the "Notice of Electronic Filing" generated by the System) on any party entitled to electronic notice." (EFP ¶ II.B.2) [¶III.B provides: Pleadings or other documents which are filed conventionally or on 3.5 inch floppy disk rather than electronically shall be served in the manner provided for in, and on those parties entitled to notice in accordance with, the Federal Rules of Bankruptcy Procedure and the Local Rules of Bankruptcy Procedures except as otherwise provided by order of the court."]. • "The following documents shall be filed conventionally and not electronically unless specifically authorized by the Court: 1. Petitions to commence a case under the Bankruptcy Code; 2. Complaints initiating adversary proceedings; 3. Document(s) to be filed under seal." (EFP ¶¶ III.A.1-3) • CHAPTER 11: "As soon as practicable following filing of a prepackaged Chapter 11 case, the Debtor shall furnish to the judge assigned to the case a paper copy of the plan, the disclosure statement (or other solicitation document), 'First Day Motions' (with proposed orders attached as exhibits), any other filed motion and any Order To Show Cause on which the Court's signature is requested. Proposed Orders should be presented on a 3.5 inch disk in WordPerfect or other Windows-based format." (Guidelines ¶ V.C.)

BANKRUPTCY COURTS	
VIRGINIA—EASTERN	• "The filing party shall serve the pleading or other paper upon all persons entitled to notice or service in accordance with the applicable rules, or, if service by first class mail is permitted under the rules, the filing party may make service in accordance with subparagraph II.B.3. below." (Admin Proc. ¶ II.B.2) • "If the recipient of notice or service is a registered attorney in the System, service of the Notice of Electronic Filing shall be the equivalent of service of the pleading or other paper by first class mail, postage prepaid." (Admin. Proc. ¶ II.B.3) • "The debtor shall file with the petition a list containing the name and address of each creditor which shall serve as a mailing matrix. The mailing matrix shall be submitted on a computer diskette in the format specified by the Clerk's Office. The mailing matrix shall suffice for the list of creditors referred to in FRBP 1007(a)." (Local Bankr. Rule 1007-1(I)(1))

DISTRICT COURTS	
MISSOURI—WESTERN	• "The following documents shall only be filed conventionally and not electronically unless specifically authorized by the Court. (1) Complaints. . . ." (Court En Banc Order ¶ 6.a..(1)) • "If you file your complaint before 2:00 p.m., present the Clerk's office with a Civil Cover Sheet (JS-44c) and that portion of the complaint which lists the case party information . . . " (ECF Admin. Proc. Manual ¶ II.B.1) OR "You may present us with a Civil Cover Sheet . . . and your complaint in adobe.pdf format on a disk. This is an option always available to you, BUT IS MANDATORY AFTER 2:00 P.M." (ECF Admin. Proc. Manual ¶ II.B.2)
NEW MEXICO (also bankruptcy court)	• "At this time, the District Court does not allow cases to be opened electronically. Therefore, all initial complaints must be filed manually at the Federal Court and fees paid at the intake counter. Once a case has been opened, the complaint is then scanned and filed electronically by a court employee so that it is available on-line." (Training Manual p. 29) • "[T]he judges in the District of New Mexico will file an order allowing electronic filing in a case. When this order is filed, the case is "activated" and is ready to accept electronically filed pleadings." (Training Manual p. 29)
NEW YORK—EASTERN	• "Nothing in the EFP shall affect the manner of filing and service of complaints (including third-party complaints) and the issuance and service of summonses, which in all civil actions shall continue to be filed, issued and served in paper form and in conformance with the Federal Rules of Civil Procedure and the Local Rules of this Court." (Admin. Order 97-12 ¶ 1) • "Within ten days after an action becomes subject to EFP, each party shall refile electronically . . . every paper in the action that the party previously filed." (Admin. Order 97-12 ¶ 2(c))
OHIO—NORTHERN	• "The filing of the initial papers, issuance and service of the summons, . . . will be accomplished in the traditional manner on paper (not electronically)." (Gen. Order No. 97-38, ¶ 4)

DISTRICT COURTS	
	• "Complaints shall be filed, fees paid, and summons issued and served in the traditional manner on paper rather than electronically. Parties who participate in electronic filing may be required to provide electronic copies of such documents for later entry into the electronic system." (Pol. & Proc. Manual, ¶ 7) • "Parties will provide to the Clerk of Court electronic copies of all previous paper filings." (Gen. Order No. 97-38, ¶ 6.b)

TOPICS/ISSUES: FEES

BANKRUPTCY COURTS	
ARIZONA	• "For filings that require a fee, application for authorization of credit card payment may be made with the financial officer of the Office of the Clerk. Fees are payable as set forth in the Electronic Filing System User's Manual." (Admin. Proc. ¶ II.D)
CALIFORNIA—SOUTHERN	• "The filing fee tendered by or on behalf of the debtor shall be in the form of a cashier's check, money order, or check of the attorney for the debtor, or may be in cash, if the petition is presented in person. Personal checks of the debtor shall not be accepted. The clerk's office shall not be responsible for cash sent through the mail." (Local Bankr. Rule 1006-1) • "For filings that require a fee, application for authorization of credit card payment shall be made with the Financial Administrator of the Office of the Clerk." (Admin. Proc. ¶ II.D)
GEORGIA—NORTHERN	• "For filings that require a fee, application for authorization of credit card payment shall be made with the financial officer of the Office of the Clerk." (ECFP ¶ II.D)
NEW YORK—SOUTHERN	• "For filings that require a fee, application for authorization of credit card payment may be made with the financial officer of the Office of the Clerk." (EFP ¶ II.D) [See Credit Card Collection Authorization Form, in PDF forma at the Court's website.]
VIRGINIA—EASTERN	• "Registered Users. For filings that require a fee, application for authorization of credit card payment must have been mailed or delivered to the divisional office where the attorney most frequently practices. That divisional office will retain the original credit card application form and provide copies to the other applicable divisions." (Admin. Proc. ¶ II.D.1) • "Non-Registered Users. For filings that require a fee, current rules for methods of payments must be followed." (Admin. Proc. ¶ II.D.2)

DISTRICT COURTS	
MISSOURI—WESTERN	• "For filings that require a fee, application for authorization of credit card payment may be made with the financial officer of the Office of the Clerk." (ECF Admin. Proc. Manual ¶ II.E; Court En Banc Order ¶ 3.e)
NEW MEXICO (also bankruptcy court)	• "At this time, the District Court does not allow cases to be opened electronically. Therefore, all initial complaints must be filed manually at the Federal Court and fees paid at the intake counter. Once a case has been opened, the complaint is then scanned and filed electronically by a court employee so that it is available on-line." (Training Manual p. 29) • "We anticipate having case opening available towards the end of 1999. At that time, the District Court will establish a credit card account policy for attorneys similar to that which is being used by the Bankruptcy Court." (Training Manual p. 29)

DISTRICT COURTS	
NEW YORK—EASTERN	
OHIO—NORTHERN	• "[P]ayment of initial filing fees will be accomplished in the traditional manner on paper (not electronically)." (Gen. Order No. 97-38, ¶ 4)

TOPICS/ISSUES: FILING OF OTHER PAPERS/RECEIPT FROM COURT

BANKRUPTCY COURTS	
ARIZONA	• "Except as expressly provided for in paragraph III.A., below, all motions, pleadings, memoranda of law, or other documents required to be filed with the Court in connection with a case assigned to the System shall be electronically filed on the System." (Admin. Proc. ¶ II.A.1) [paragraph III.A exempts petitions to commence a case under the Bankruptcy Code, complaints initiating adversary proceedings, documents to be filed under seal, trial or hearing exhibits, and transcripts]. • "All documents which form part of a pleading and which are being filed at the same time and by the same party may be electronically filed together under one docket number, e.g., the motion, memorandum of points and authorities and exhibits thereto." (Admin. Proc. ¶ II.A.2) • "The following documents shall be filed conventionally and not electronically unless specifically authorized by the Court: 1. Petitions to commence a case under the Bankruptcy Code; 2. Complaints initiating adversary proceedings; 3. Document(s) to be filed under seal. . . 4. Trial or Hearing Exhibits; and 5. Transcripts of court hearings."
CALIFORNIA—SOUTHERN	• "Except as expressly provided in Paragraph III.A below and in exceptional circumstances which prevent an attorney/participant from filing electronically, all petitions, motions, pleadings, memoranda of law, or other documents required to be filed with the court in connection with a case assigned to the System shall be electronically filed on the System."(Admin. Proc. ¶ II.A.1) • "The following documents shall be filed conventionally and not electronically unless specifically authorized by the court: 1. Documents to be Filed under Seal. . . . 2. Exhibits, including but not limited to leases, notes and the like, which are not available in electronic form, shall be filed conventionally with a copy of the Notice of Electronic Filing to indicate the referenced document. Wherever possible, however, such documents, or the relevant portions thereof, should be electronically imaged (i.e., 'scanned') and filed using the Portable Document Format (PDF). 3. Proofs of Claim." (Admin. Proc. ¶ III.A.1-3) • "All documents which form part of a pleading and which are being filed at the same time and by the same party may be electronically filed together under one docket number; e.g., the motion and a supporting affidavit, with the exception of a memorandum of law. A memorandum of law shall be filed separately and shown as a related document to the motion." (Admin. Proc. ¶ II.A.2) • "Emergency motions, supporting pleadings and objections shall be filed electronically as provided in these *Administrative Procedures*. The party filing the motion shall advise the judge's law clerk of the filing by phone." (Admin. Proc. ¶ II.A.3)

BANKRUPTCY COURTS	
GEORGIA—NORTHERN	• "Approved Participants should endeavor to file all pleadings and documents electronically in ECF cases, except as expressly provided in section III.A. below." (ECFP ¶ II.A.1) [section III.A. provides for conventional filing of documents to be filed under seal]. • "All documents that form part of a pleading and are being filed at the same time and by the same party may be electronically filed together under one docket number, e.g., a motion with a supporting affidavit and memorandum of law." (ECFP ¶ II.A.2)
NEW YORK—SOUTHERN	• "Except as expressly provided for in paragraph III.A. below, all motions, pleadings, memoranda of law, or other documents required to be filed with the Court in connection with a case assigned to the system shall be electronically filed on the System." (EFP ¶ II.A.1) • "The following documents shall be filed conventionally and not electronically unless specifically authorized by the Court: 1. Petitions to commence a case under the Bankruptcy Code; 2. Complaints initiating adversary proceedings; 3. Document(s) to be filed under seal." (EFP ¶¶ III.A.1-3) • "All documents which form part of a pleading and which are being filed at the same time and by the same party may be electronically filed together under one docket number, e.g., the motion and a supporting affidavit, with the exception of a memorandum of law. A memorandum of law should be filed separately and shown as a related document to the motion." (EFP ¶ II.A.2)
VIRGINIA—EASTERN	• "Except as expressly provided for in paragraph III.A. below and in exceptional circumstances which prevent an attorney from filing electronically, all petitions, motions, memoranda of law, or other pleadings and documents required to be filed with the Court in connection with a case assigned to the System shall be electronically filed on the System." (Admin. Proc. ¶ II.A.1) • "The following documents shall be filed conventionally and not electronically unless specifically authorized by the Court: . . . A motion to file document(s) under seal shall be filed electronically; however, the actual document(s) to be filed under seal shall be filed conventionally. . . . Trial Exhibits shall be filed conventionally. . . . Transcripts shall be filed conventionally." (Admin. Proc. ¶ III.A.1-3)

DISTRICT COURTS	
MISSOURI—WESTERN	• "Except as expressly provided for in paragraph III.A., below, all documents required to be filed with the Court in connection with a case assigned to the System shall be electronically filed on the System." (ECF Admin. Proc. Manual ¶ II.A.) [paragraph III.A. provides for conventional filing of transcripts, documents to be filed under seal, and "exhibits to filed documents, such as leases, notes and the like, which are not available in electronic form"]

DISTRICT COURTS	
	• "Except as expressly provided in paragraph 6a below, or as ordered by the Court, all motions, pleadings, legal memoranda or other documents required to be filed with the Court shall be electronically filed." (Court En Banc Order ¶ 3.a) [paragraph 6a provides for conventional filing of complaints, attachments to a motion or pleading which are not available in an electronic format, and documents to be filed under seal] • "If you bring us paper you will be asked to scan your document onto a disk." (ECF Admin. Proc. Manual ¶ IV.B) • "The electronic filing of a pleading or other document in accordance with these procedures shall constitute filing of the document for all purposes under the Federal Rules of Civil Procedure and the Local Rules of this Court and shall constitute entry of that pleading or other document on the docket kept by the Clerk under FRCP 79(a)." (Court En Banc Order 3.b)
NEW MEXICO (also bankruptcy court)	• "A printed copy of the Court's ACE electronic file stamp shall serve as the equivalent of the Court's mechanical file stamp." (Admin. Order No. 97-26 ¶ 5) • "Electronic submission to the Ace Server of a motion, supporting brief, responsive pleadings, exhibits, affidavits and other documents relating to the motion constitutes filing of these documents with the Court Clerk's Office." (Admin. Order No. 97-26 ¶ 7.A) • "Upon electronic filing of any document, a notice of such filing is immediately placed in the electronic mailbox of all attorney/users/participants in the relevant case who have agreed to the use of electronic filing. Arrival in the electronic mailbox shall constitute service of the document on those parties. Additional time for response time, such as the 3 days mailing, will not be given unless otherwise provided by federal or local rules." (Admin. Order No. 97-26 ¶ 7.B) • "Filing by Electronic Transmission. A party may file any paper using electronic transmission in accordance with guidelines when established by the Court." (Local Civil Rule 5.5)
NEW YORK—EASTERN	• "Notwithstanding the provisions of Local Civil Rule 5.1(a), in any action subject to EFP, the assigned Judge may enter an order authorizing the filing of discovery requests, discovery responses, discovery materials or other matter subject to Local Civil Rule 5.1(a), but only to the degree and upon terms and conditions to which all of the parties (or non-parties producing such materials) have previously agreed in a stipulation submitted to the Court. In the absence of such an order, no party shall file any such materials except in the form of excerpts, quotations, or selected exhibits from such materials as part of motion papers, pleading or other filings with the Court which must refer to such excerpts, quotations, etc." (Admin. Order 97-12 ¶ 11) • "ORDERED that a standing protective order is hereby entered limited to prohibiting the electronic filing of the administrative hearing transcripts and the litigants' briefs in Social Security cases, and it is further ORDERED that any material not filed electronically pursuant to this Order shall be filed with the Clerk and served as if the action were not subject to the Electronic Filing Procedures." (Admin. Order 99-2) • "In any case designated as subject to EFP, all papers required to be filed with the Clerk shall be filed electronically on the E.D.N.Y. Public Web Site pursuant to EFP, except as expressly provided herein." (Admin. Order 97-12 ¶ 4(a))

DISTRICT COURTS	
	• "Electronic transmission of a paper to the E.D.N.Y. Public Web Site consistent with EFP, together with the receipt of a Notice of Electronic Filing from the Court in the form shown in the Users' Manual, shall constitute filing of the paper for all purposes of the Federal Rules of Civil Procedure and the Local Rules of this Court, and shall constitute entry of that paper on the docket kept by the Clerk pursuant to Rules 58 and 79 of the Federal Rules of Civil Procedure. Only upon receipt of such Notice of Electronic Filing from the Court will the paper be deemed filed and entered." (Admin. Order 97-12 ¶ 4(c)) • "When a paper has been filed electronically, the official paper of record is the electronic recording of the paper as stored by the Court, and the filing party shall be bound by the paper as filed. Except in the case of papers first filed in paper form and subsequently submitted electronically, a paper filed electronically shall be deemed filed at the date and time stated on the Notice of Electronic Filing from the Court." (Admin. Order 97-12 ¶ 4(d))
OHIO—NORTHERN	• "Unless otherwise ordered by the presiding judicial officer, all subsequent papers will be filed electronically except for papers filed under seal pursuant to LR 5.2 and trial exhibits lodged with the Court pursuant to LR 39.1;" (Gen. Order No. 97-38, ¶ 6.a) • "Parties will provide to the Clerk of Court electronic copies of all previous paper filings." (Gen. Order No. 97-38, ¶ 6.b) • "The parties are encouraged to take advantage of electronic servicing and noticing, including notices from the Court, consenting to all service and other notices by electronic means." (Gen. Order No. 97-38, ¶ 6.c) • "The filing of discovery depositions, interrogatories, requests for production of ducuments, requests for admissions, and answers and responses thereto shall be governed by the Case Management Plan defined in Local Rule 16.1(b)(4), and the determination of whether such materials shall be filed electronically or manually will be made by the judicial officer after consulting with the parties." (Pol. & Proc. Manual, ¶ 20) • "Electronic transmission of a document consistent with the procedures adopted by the Court shall, upon the complete receipt of the same by the clerk of the court, constitute filing of the document for all purposes of the Federal Rules of Civil Procedure and the Local Rules of this Court, and shall constitute entry of that document onto the docket maintained by the Clerk pursuant to Fed. R. Civ. P. 58 and 79. A receipt acknowledging that the document has been filed will immediately appear on the filer's screen. Parties can also verify the filing of documents by inspecting the Court's electronic docket sheet. The Court may, upon the motion of a party or upon its own motion, strike any inappropriately filed document. Documents filed electronically must be submitted in the Adobe Acrobat PDF format. Filing documents electronically does not alter any filing deadlines. All electronic transmissions of documents must be completed (i.e., received completely by the Clerk's Office) prior to midnight in order to be considered timely filed that day. Although parties can file documents electronically 24 hours a day, attorneys and parties are strongly encouraged to file all documents during normal working hours of the Clerk's Office (8:00 a.m. to 4:45 p.m.) when assistance is available." (Pol. & Proc. Manual, ¶ 9)

TOPICS/ISSUES: FILING OF COURT ORDERS AND JUDGMENTS

BANKRUPTCY COURTS	
ARIZONA	• "The proponent of the order, decree, judgment or other court document shall serve a copy, as set forth above, on all parties entitled to receive a copy." (Interim Oper. Order No. 3 ¶ 10) • "In order to facilitate such filing, the party presenting the proposed order shall provide the assigned judge with a paper copy of the proposed order, and if the order is more than five pages, a 3.5 inch disk containing the proposed order, together with paper copies of any related pleading or document electronically filed and the Electronic Filing Receipt. Alternatively, the proposed order and copies of the Electronic Filing Receipt and of the related pleading or document (in PDF format) may be submitted by E-Mail as set forth in the User Manual. The Office of the Clerk will make the appropriate entry on the System to facilitate the docketing of an order." (Admin. Proc. ¶ II.E)
CALIFORNIA—SOUTHERN	• "All orders will be submitted to the court conventionally at this time. It is anticipated that orders will be submitted through the System in the future. At that time, these procedures will be amended to reflect the change." (Admin. Proc. ¶ II.E)
GEORGIA—NORTHERN	• "A party shall present a proposed order, including a consent order, by e-mail or on diskette . . . as well as in paper form if required by the judge. As it would in a paper form, a proposed order submitted electronically must state the identity of the attorney who prepared it and, if appropriate, must indicate consents or 'no opposition' by attorneys for other parties. For each attorney identified, the following information should be stated: the state bar number, the name of the client represented, the mailing address, the e-mail address, if any, the voice telephone number, and an indication of whether the attorney authorized the person presenting the proposed order to state that the attorney has consented to or has no opposition to the proposed order. Alternatively, attorneys submitting proposed consent or no-opposition orders may attach to the text version an image file of the signature page reflecting the consent or lack of opposition of attorneys. Any order filed electronically by a judge shall have the same force and effect as if the judge had affixed his or her signature to a paper copy." (ECFP ¶ II.E)
NEW YORK—SOUTHERN	• "Each person electronically filing a pleading, order, decree, judgment or other document shall serve the 'Notice of Electronic Filing' generated by the System on those parties entitled to electronic notice, by hand, facsimile or e-mail in the first instance, or by overnight mail if (i) delivered, by hand or overnight mail, to the chambers of the presiding judge in the case, together with a copy of the 'Notice of Electronic Filing' unless and until the judge assigned to the case orders otherwise, and (ii) served on those parties not designated or able to receive electronic notice but nevertheless entitled to notice of said pleading or other document in accordance with the Federal Rules of Bankruptcy Procedure and the Local Rules of Bankruptcy Procedures except as otherwise provided by order of the Court." (EFP ¶ II.B.1)

BANKRUPTCY COURTS	
VIRGINIA—EASTERN	• "In order to facilitate the entry of the order, the party presenting the proposed order shall provide the presiding judge with a 3.5 inch floppy disk containing the proposed order in either Microsoft Word or WordPerfect format (Microsoft Word is preferred), together with any attachment, exhibit or related document to be electronically entered in connection therewith." (Admin. Proc. ¶ II.E) • "Parties without legal representation will be handled on a case by case basis." (Admin. Proc. ¶ II.E)

DISTRICT COURTS	
MISSOURI—WESTERN	• "All orders, decrees, judgments, and proceedings of the Court will be entered in accordance with these procedures and shall constitute entry of the order, decree, judgment or proceeding on the docket kept by the Clerk under FRCP 79(a)." (Court En Banc Order ¶ 3.c) • "All signed orders shall be filed electronically by either the presiding judge in the case or the office of the Clerk." (ECF Admin. Proc. Manual ¶ II.F) • "[A]ll proposed orders must be e-mailed to the courtroom deputy for the presiding judge in your case IN WORDPERFECT FORMAT . . . Please attach your proposed order to an internet e-mail sent to the appropriate courtroom deputy as listed . . ." (ECF Admin. Proc. Manual ¶ II.F)
NEW MEXICO (also bankruptcy court)	• "Chambers staff are currently able to file court generated documents (notices, orders, opinion, etc.) electronically through the ACE system . . . After someone in chambers files a document electronically, it is submitted to the ACE automated noticing system. Notices filed before 4:30 are sent out the same day. Notices submitted after 4:30 are filed immediately but are not sent until the next business day. The system faxes notices to parties who have opted to receive their notice via fax, then prints out notices and lables for parties who will receive notice by mail. Parties also have the option of receiving notice electronically. These notices are sent instantly when the document is electronically filed." (Training Manual, p. 32)
NEW YORK—EASTERN	• "In any case designated as subject to EFP, all papers required to be filed with the Clerk shall be filed electronically on the E.D.N.Y. Public Web Site pursuant to EFP, except as expressly provided herein." (Admin. Order 97-12 ¶ 4(a)) • "A Filing User filing any paper electronically that requires a judicial officer's signature shall also promptly deliver such document in paper form to the judicial officer by U.S. mail or other means." (Admin. Order 97-12 ¶ 4(h))
OHIO—NORTHERN	• "When submitting a motion or application electronically, the proposed order must be submitted on paper to the judge's chambers either prior to or at the time of a hearing or before the date and time of presentment. The order should reference the motion, application or notice of presentment number obtained when the document was filed electronically. A disk containing the proposed order in a WordPerfect compatible format should be submitted to chambers together with the paper copy of the proposed order. Write directly on a label on the disk, the case number

DISTRICT COURTS	
	and the document number of the motion or application to which the order on the disk relates." (ECF User Manual, p. 31)

TOPICS/ISSUES: ATTACHMENTS, EXHIBITS, OTHER DIFFICULT-TO HANDLE ITEMS

BANKRUPTCY COURTS	
ARIZONA	• "The following . . . shall be filed conventionally and not electronically unless specifically authorized by the Court: . . . Trial or Hearing Exhibits; and, Transcripts of court hearings." (Admin. Proc. ¶ III.A.4-5)
CALIFORNIA—SOUTHERN	• "Exhibits, including but not limited to leases, notes, and the like, which are not available in electronic form, shall be filed conventionally with a copy of the Notice of Electronic Filing to indicate the referenced document. Wherever possible, however, such documents, or the relevant portions thereof, should be electronically imaged (i.e., 'scanned') and filed using the Portable Document Format (PDF)." (Admin. Proc. III.A.2)
GEORGIA—NORTHERN	• "Any document to be filed electronically as an exhibit to an electronically Filed Pleading shall be redacted so as to include in the exhibit only those portions of the document germane to the matter under consideration by the court, unless the entire exhibit was converted to PDF format from a text file, as contrasted to an image file. An excerpted exhibit must be clearly and prominently identified as an excerpt, and the attorney filing the excerpted exhibit must make available the complete exhibit immediately upon re quest by a party or the court. Whenever possible, the relevant portions of exhibits, whether filed conventionally or in electronic form as image files, should be included as text in the Pleading to which exhibits are attached. Persons filing excerpts of exhibits pursuant to this order do so without prejudice to the right to file with the court at any time additional exhibits or complete exhibits. Opposing parties may file additional excerpts that they believe are germane." (Gen. Order No. 5 ¶ (8))
NEW YORK—SOUTHERN	• "The following documents shall be filed conventionally and not electronically unless specifically authorized by the court: . . . Exhibits to filed documents, such as leases, notes and the like, which are not available in electronic form. However, exhibits to filed documents can be electronically imaged and filed using Portable Document Format (PDF). Whenever possible, the attorney should extract and file electronically the relevant portions of conventionally produced documents." (EFP ¶III.A.4). • "Persons filing documents that reference exhibits not submitted in electronically produced text format shall only annex excerpts of the exhibits that are directly germane to the matter under consideration by the Court. Such exhibits must be clearly and prominently identified as excerpts, and the complete exhibit must be made available forthwith to counsel and the Court on request (and must be available in the Courtroom at any hearing pertaining to the matter). Persons filing excerpts of exhibits pursuant to this Order do so without prejudice to their right to file additional excerpts or the complete exhibit with the Court at any time. Opposing parties may file additional excerpts if they believe that they are germane." (First Amend. to Gen. Order M-182 ¶ 1)
VIRGINIA—EASTERN	• "Exhibits/Attachments to documents – including but not limited to leases, notes and the like, which are not available in electronic form, shall be electronically imaged (i.e., scanned) and filed . . ." (Admin. Proc. ¶ II.A.3)

BANKRUPTCY COURTS	
	• "All documents should be separately filed and shown and related to the pleading to which they refer, with the exception that exhibits may be electronically filed together under one docket number." Admin. Proc. ¶ II. A.2)

DISTRICT COURTS	
MISSOURI—WESTERN	• "The following documents shall be filed conventionally and not electronically unless specifically authorized by the Court: 1. Transcripts; 2. Document(s) to be filed under seal . . . 3. Exhibits to filed documents, such as leases, notes and the like, which are not available in electronic form. However exhibits to filed documents can be electronically imaged and filed using Portable Document Format (PDF). Whenever possible, the attorney should extract and file electronically the relevant portions of conventionally produced documents." (ECF Admin. Proc. Manual ¶ III.A.1-3) • "The following documents shall only be filed conventionally . . . unless specifically authorized by the Court. . . . (1) Complaints. (2) Attachments to a motion or pleading which are not available in an electronic format. The filer should also file and extract electronically any part of the attachment which the filer has in an electronic format. . . . (3) Transcripts. (4) Records from state court proceedings. . . . (5) Proposed Orders." (Court En Banc Order ¶ 6.a.(1), (5), and (6))
NEW MEXICO (also bankruptcy court)	
NEW YORK—EASTERN	• "Papers or sets of papers that are too bulky to permit electronic filing conveniently via the Filing User's Internet connection may be filed by bringing EFP-compliant copies on electronic media approved by the Clerk and filed electronically by the Filing User using a high-bandwidth Internet connection and equipment to be provided by the Clerk in the Clerk's Office . . ." (Admin. Order 97-12 ¶ 4(g))
OHIO—NORTHERN	• "Unless otherwise ordered by the presiding judicial officer, all subsequent papers will be filed electronically except for papers filed under seal pursuant to LR 5.2 and trial exhibits lodged with the Court pursuant to LR 39.1;" (Gen. Order No. 97-38, ¶ 6.a) • "Exhibits 'lodged' with the clerk of court pursuant to LR 39.1 will not be filed electronically. Such documents will not be placed into the electronic filing system unless and until they are admitted as part of the official public record. The party submitting the 'lodged' exhibits may be required to resubmit the documents in electronic format once

DISTRICT COURTS	
	they are admitted into the public record." (Pol. & Proc. Manual, ¶ 19) • "Parties otherwise participating in the electronic filing system may be excused from filing a particular component electronically under certain limited circumstances, such as when the component cannot be reduced to an electronic format or exceeds [1.5 megabytes]. Such component shall not be filed electronically, but instead shall be manually filed with the clerk of the court and served upon the parties in accordance with the applicable Federal Rules of Civil Procedure and the Local Rules for filing and service of non-electronic documents. Parties making a manual filing of a component shall file electronically a Notice of Manual Filing setting forth the reason(s) why the component cannot be filed electronically. A party may seek to have a component excluded from electronic filing pursuant to Fed. R. Civ. P. 26(c). A model form is provided as Appendix C." (Pol. & Proc. Manual, ¶ 15)

TOPICS/ISSUES: SEALED DOCUMENTS

BANKRUPTCY COURTS	
ARIZONA	• "[Documents to be filed under seal shall] be filed conventionally and not electronically unless specifically authorized by the Court . . . However, a motion to file documents under seal shall be filed electronically. The order of the Court authorizing the filing of such document(s) under seal shall be filed electronically by the court and shall indicate that the motion to file documents under seal has been granted. A paper copy of the order shall be attached to the document(s) under seal and be delivered to the Clerk of Court or Chief Deputy Clerk of the Court." (Admin. Proc. III.A.3)
CALIFORNIA—SOUTHERN	• "A motion to file document(s) under seal shall be filed electronically; however, the actual document(s) to be filed under seal shall be filed conventionally. A paper copy of the order shall be attached to the document(s) under seal and be delivered to the Office of the Clerk." (Admin. Proc. ¶ III.A.1)
GEORGIA—NORTHERN	• "Any document to be filed under seal shall be filed conventionally and not electronically unless specifically authorized by the Court. A motion to file documents under seal, however, may be filed electronically. The order of the Court authorizing the filing of such document(s) under seal may also be filed electronically. The party filing sealed documents shall attach a paper copy of the order directing the documents to be sealed and shall deliver them by hand to the Clerk of Court." (ECFP ¶ III.A.)
NEW YORK—SOUTHERN	• "The following documents shall be filed conventionally and not electronically unless specifically authorized by the Court: . . . Document(s) to be filed under seal. However, a motion to file documents under seal shall be filed electronically. The order of the Court authorizing the filing of such document(s) under seal shall be filed electronically by the presiding judge and shall indicate that the motion to file documents under seal has been "so ordered" . . . . A paper copy of the order shall be attached to the document(s) under seal and be delivered to the Clerk of Court or Chief Deputy Clerk of the Court; . . ." (EFP ¶¶ III.A.3)
VIRGINIA—EASTERN	• "A motion to file document(s) under seal shall be filed electronically; however, the actual document(s) to be filed under seal shall be filed conventionally The order of the Court authorizing the filing of such document(s) under seal shall be entered electronically by the Clerk's Office or the presiding judge and shall indicate that the motion to file documents under seal has been 'so ordered' . . . A 3.5 inch floppy disk containing the order only shall be attached to the document(s) under seal and be delivered to the Clerk of Court." (Admin. Proc. ¶ III.A.1)

DISTRICT COURTS	
MISSOURI—WESTERN	• "Documents to be filed under seal. . . . shall only be filed conventionally and not electronically unless specifically authorized by the Court. . . . However, the motion to file documents under seal shall be filed electronically unless prohibited by law." (Court En Banc Order ¶ 6.a.(3)) • "The Order of the Court authorizing the filing of documents under seal shall be filed electronically by the assigned judge unless prohibited by law. A paper copy of the Order shall be attached to the documents under seal and be delivered to the Office of the Clerk. . . ." (Court En Banc Order ¶ 6.a.(3)(a))
NEW MEXICO (also bankruptcy court)	• BANKRUPTCY: "A motion to file a document under seal shall be filed electronically. The order of the Court authorizing the filing of such document under seal shall be filed electronically by the Court. A paper copy of the order shall be attached to the document under seal and the document and the copy of the order shall be delivered to the clerk of the Bankruptcy Court." (Misc. Order No. 99-359 ¶ 8)
NEW YORK—EASTERN	• "Nothing in the EFP shall be interpreted to permit material prohibited by order from filing except under seal to be filed by any means except under physical seal." (Admin. Order 97-12 ¶ 4(i))
OHIO—NORTHERN	• "Unless otherwise ordered by the presiding judicial officer, all subsequent papers will be filed electronically except for papers filed under seal pursuant to LR 5.2 and trial exhibits lodged with the Court pursuant to LR 39.1;" (Gen. Order No. 97-38, ¶ 6.a)

TOPICS/ISSUES: STATUS OF PAPERS FILED ELECTRONICALLY

BANKRUPTCY COURTS	
ARIZONA	• "The electronic filing of a pleading or other document in accordance with the Electronic Filing Procedures by a party, shall constitute entry of that pleading or other document on the docket." (Interim Oper. Order No. 3 ¶ 8)
CALIFORNIA—SOUTHERN	• "The electronic filing of a pleading or other paper in accordance with the Electronic Filing Procedures shall constitute entry of that pleading or other paper on the docket kept by the clerk under Fed. R. Bankr. P. 5003." (Bankr. Gen. Order No. 162 ¶ 5)
GEORGIA—NORTHERN	• "In all cases that have been designated as electronically filed cases that were filed prior to January 1, 2000, and in all cases filed on or after January 1, 2000, including those having paper files, the official docket maintained by the Clerk pursuant to Fed. R. Bank. P. 5003(a) shall be the electronic docket . . ." (Gen. Order No. 5 ¶ (5))
NEW YORK—SOUTHERN	• CHAPTER 11: "Notice of the filing of the plan and disclosure statement (or other solicitation document) and of the hearing to consider compliance with disclosure requirements and confirmation of the plan must be given to all parties-in-interest. Paper copy of a notice must be mailed; service of a notice of electronic filing will not suffice. No further distribution of the plan and disclosure statement (or other solicitation document) beyond that which occurred prepetition is required unless requested by a party-in-interest. Parties are advised to check General Order M-182 because paper copies of other notices may be required." (Guidelines ¶ X.A) • "[P]aper copies of notices mandated by FRBP 2002 (a)(1)(4)(5)(7) and (8) and (b)(1) and (2) will be required unless and until notice is requested by the recipient to be given electronically pursuant to FRBP 9036. Notice pursuant to FRBP 2002 (a)(2)(3) and (6) may be served in accordance with paragraph II.B.1 hereof. If the recipient requests electronic notice pursuant to FRBP 9036, it may be served in accordance with paragraph II.B.1." (EFP ¶ II.A.3) [For ¶II.B.1, see the Section on "Filing of Court Orders and Judgments", above).
VIRGINIA—EASTERN	• "The electronic filing of a pleading or other paper in accordance with the Procedures shall constitute entry of that pleading or other paper on the docket kept by the Clerk of Court under FRBP 5003." (Standing Order 99-1 ¶ 5)

DISTRICT COURTS	
MISSOURI—WESTERN	• "The electronic filing of a pleading or other document in accordance with these procedures shall constitute filing of the document for all purposes under the Federal Rules of Civil Procedure and the Local Rules of this Court and shall constitute entry of that pleading or other document on the docket kept by the Clerk under FRCP 79(a)." (Court En Banc Order ¶ 3.b)

DISTRICT COURTS	
NEW MEXICO (also bankruptcy court)	• "When filed electronically by the user/participant attorney or Court, the official document of record is the electronic document stored in the Court's data base." (Admin. Order No. 97-26 ¶ 5) • BANKRUPTCY: "When a document is filed electronically, the official document of record is the electronic document stored in the court's database. A printed copy of the court's digital file stamp is the equivalent of the court's mechanical file stamp." (Misc. Order No. 99-359 ¶ 3)
NEW YORK—EASTERN	• "Electronic transmission of a paper to the E.D.N.Y. Public Web Site consistent with EFP, together with the receipt of a Notice of Electronic Filing from the Court in the form shown in the Users' Manual, shall constitute filing of the paper for all purposes of the Federal Rules of Civil Procedure and the Local Rules of this Court, and shall constitute entry of that paper on the docket kept by the Clerk pursuant to Rules 58 and 79 of the Federal Rules of Civil Procedure. Only upon receipt of such Notice of Electronic Filing from the Court will the paper be deemed filed and entered." (Admin. Order 97-12 ¶ 4(c)) • "When a paper has been filed electronically, the official paper of record is the electronic recording of the paper as stored by the Court, and the filing party shall be bound by the paper as filed. Except in the case of papers first filed in paper form and subsequently submitted electronically, a paper filed electronically shall be deemed filed at the date and time stated on the Notice of Electronic Filing from the Court." (Admin. Order 97-12 ¶ 4(d)) • "Individual rules of a Participating Judicial Officer requiring delivery of courtesy copies of any paper filed shall remain in force until rescinded by the Participating Judicial Officer, but the provisions of any such rule requiring equivalent service of the paper upon all parties shall be satisfied by compliance with the electronic filing and service provisions of the EFP." (Admin. Order 97-12 ¶ 4(j))
OHIO—NORTHERN	• "Pursuant to Fed. R. Civ. P. 5(e), the Clerk's Office will accept papers filed, signed or verified by electronic means that are consistent with technical standards, if any, that the Judicial Conference of the United States establishes, if ordered by the Court. A paper filed by electronic means in compliance with this Rule constitutes a written paper for the purposes of applying these Rules and the Federal Rules of Civil Procedure." (Local Civil Rule 5.1(b)) • "Electronic transmission of a document consistent with the procedures adopted by the Court shall, upon the complete receipt of the same by the clerk of the court, constitute filing of the document for all purposes of the Federal Rules of Civil Procedure and the Local Rules of this Court, and shall constitute entry of that document onto the docket maintained by the Clerk pursuant to Fed. R. Civ. P. 58 and 79. A receipt acknowledging that the document has been filed will immediately appear on the filer's screen. Parties can also verify the filing of documents by inspecting the Court's electronic docket sheet. The Court may, upon the motion of a party or upon its own motion, strike any inappropriately filed document. . . . Filing documents electronically does not alter any filing deadlines. All electronic transmissions of documents must be completed (i.e., received completely by the Clerk's Office) prior to midnight in order to be considered timely filed that day. Although parties can file documents electronically 24 hours a day, attorneys and parties are strongly encouraged to file all documents during normal working hours of the Clerk's Office (8:00 a.m. to 4:45 p.m.) when assistance is available." (Pol. & Proc. Manual, ¶ 9)

TOPICS/ISSUES: RETENTION OF DOCUMENTS IN PAPER FORM

BANKRUPTCY COURTS	
ARIZONA	• "An original signed copy of the filing shall be maintained in the attorney's files." (Interim Oper. Order No. 3 ¶ 1)
CALIFORNIA—SOUTHERN	• "The original signed document shall be maintained by the attorney of record or the party originating the document for a period not less than the maximum allowable time to complete the appellate process. Upon request, the original document must be provided to other parties or the court for review." (Admin. Proc. ¶ II.C.2)
GEORGIA—NORTHERN	• "An attorney filing a Verified Pleading, whether in text or image format, shall thereafter maintain in his or her files the original Verified Pleading in its entirety for a period ending four (4) years after the case or proceeding in which the Verified Pleading is filed is closed." (ECFP ¶ II.C.1)
NEW YORK—SOUTHERN	
VIRGINIA—EASTERN	• "Originally executed copies must be maintained by the filer until five (5) years after the closing of the case, and upon request of the Court, the filer must provide original documents for review." (Admin. Proc. ¶ II.C.1)

DISTRICT COURTS	
MISSOURI—WESTERN	• "Any pleading, affidavit or other document containing original signatures shall indicate on the electronically filed document a signature, e.g., 's/Jane Doe'. The originally executed copy must be maintained by the filer for two (2) years after final resolution of the action, including final disposition of all appeals." (Court En Banc Order ¶ 4.b)
NEW MEXICO (also bankruptcy court)	• "The original paper documents requiring verified signatures (such as affidavits) of other than the user/participant must be retained by the attorney/user for retrieval if so ordered by the Court. Such documents may be scanned by scanner and/or by fax machine by the filing attorney and then filed electronically as a separate document." (Admin. Order No. 97-26 ¶ 6)
NEW YORK—EASTERN	• "Any Filing User filing a paper electronically shall make and keep copies of the paper in both paper and electronic form for subsequent production to the Court if so ordered or for inspection upon request by a party until one year after final resolution of the action (including appeal, if any) in the case of the copy in paper form, and until ten years after final resolution of the action (including appeal, if any) in the case of the copy in electronic form." (Admin. Order 97-12 ¶ 4(f))
OHIO—NORTHERN	• "Originals of documents requiring scanning to be filed electronically must be retained by the filing party and made available, upon request, to the Court and other parties for a period of one year following the expiration of all time periods for appeals." (Pol. & Proc. Manual, ¶ 16)

TOPICS/ISSUES: SIGNATURE

BANKRUPTCY COURTS	
ARIZONA	• "The initials of an attorney's first and last name, followed by the state bar identification number or the last four digits of the social security number of the attorney making an electronic filing shall constitute the signature of the attorney for purposes of federal law." (Interim Oper. Order No. 3 ¶ 1) • "Every petition, pleading, and other paper served or filed in accordance with the Electronic Filing Procedures, except a list, schedule or statement, shall indicate a signature using the initials and either the state bar identification number or the last four digits of the social security number of the attorney signing such pleading or other document, e.g. 'J.D. 1234.'" (Interim Oper. Order No. 3 ¶ 5) • "Petitions, lists, schedules, statements, amendments, pleadings, affidavits, and other documents which must contain original signatures or which require verification under FRBP 1008 or an unsworn declaration as provided in 28 USC section 1746, shall be filed electronically with originally executed copies maintained by the filer, except that the original executed verification of the schedules and statement of affairs required by paragraph 2 of the Interim Operating Order Number 3 shall be filed with the Clerk. A pleading or other document electronically filed shall indicate a signature, e.g., '/s/ J. D. 1234.'" (Admin. Proc. ¶ II.C.1)
CALIFORNIA—SOUTHERN	• "The electronic filing of a petition, pleading, motion or other paper by an attorney who is a registered participant in the Electronic Filing System shall constitute the signature of that attorney under Fed. R. Bankr. P. 9011 and Local Bankruptcy Rule 9004-3(b). The signature of the debtor(s) authorizing the electronic filing of the bankruptcy case shall be accomplished by filing an executed *DECLARATION RE: ELECTRONIC FILING, Local Form CSD 1801,* within15 days of the electronic filing of the petition." (Bankr. Gen. Order No. 162 ¶ 2; Admin. Proc. ¶ II.C.1) • "Amendments, pleadings, affidavits, and other documents which must contain original signatures or which require verification under Fed. R. Bankr. P. 1008 or an unsworn declaration as provided in 28 U.S.C. § 1746, shall be filed electronically. . . . The pleading or other document electronically filed shall indicate a signature; e.g., '/s/ Jane Doe.'" (Admin. Proc. ¶ II.C.2)
GEORGIA—NORTHERN	• "Every petition, pleading, motion and other document filed in accordance with the Electronic Case Filing Procedures shall state the name and state bar registration or identification number of each attorney filing such pleading or other document, which shall constitute a signature of each such attorney under Fed. R. Bank. P. 9011; the attorney whose password is used to file a petition, pleading, motion, or other document thereby certifies that the attorney and the attorney's law firm have authorized the filing." (Gen. Order No. 5 ¶ (2))
NEW YORK—SOUTHERN	• "Petitions, lists, schedules, statements, amendments, pleadings, affidavits, and other documents which must contain original signatures or which require verification under FRBP 1008 or an unsworn declaration as provided in 28 USC section 1746, shall be filed electronically with originally executed copies maintained by the filer. The pleading or

BANKRUPTCY COURTS	
	other document electronically filed shall indicate a signature, e.g., 's/Jane Doe.'" (EFP ¶ II.C.1) • "The initials of the attorney's first and last name followed by the last four digits of the social security number of the attorney making an electronic filing shall constitute the signature of the attorney for purposes of Bankruptcy Rule 9011. An original signed copy of the filing shall be maintained in the attorney's files." (Rule 9011-1(b)) • "Every petition, pleading, motion and other paper served or filed in accordance with the Electronic Filing Procedures, except a list, schedule, or statement, or amendments thereto, shall identify the initials and last four digits of the social security number of the attorney signing such pleading or other document, which shall constitute a signature of the responsible attorney under FRBP 9011 and LRBP 9011-1(b) and 9011-1(c)." (Gen. Order ¶ 2)
VIRGINIA—EASTERN	• "The electronic filing of a petition, pleading, motion or other paper by an attorney who is a registered participant in the Electronic Case Filing System shall constitute the signature of that attorney under FRBP 9011 and LBR 5005-1(C)(4)." (Standing Order 99-1 ¶ 2) • "Registered Attorneys and Parties with Legal Representation: Petitions, lists, schedules, statements, amendments, pleadings, affidavits, and other documents which must contain original signatures, or which require verification under FRBP 1008, or an unsworn declaration as provided in 28 U.S.C. section 1746, shall be filed electronically or in accordance with the Notice of Electronic Filing Procedure. . . . The pleading or other document electronically filed shall indicate a signature with the party's name typed in full, e.g. /s/ Jane Doe." (Admin. Proc. ¶ II.C.1) • "Pro Se Filers: Petitions, lists, schedules, statements, amendments, pleadings, affidavits, and other documents which must contain original signatures, or which require verification under FRBP 1008, or an unsworn declaration as provided in 28 U.S.C. section 1746, must be submitted with full signature. These documents will be scanned by the Clerk's Office, and shall be maintained in the Clerk's Office after scanning." (Admin. Proc. ¶ II.C.2)

DISTRICT COURTS	
MISSOURI	• "Use of the attorney's password/login to electronically file a pleading, affidavit or other document constitutes the attorney's signature for all purposes." (Court En Banc Order ¶ 4.a) • "Any pleading, affidavit or other document containing original signatures shall indicate on the electronically filed document a signature, e.g., 's/Jane Doe'." (Court En Banc Order ¶ 4.b) • "Documents which must contain original signatures or which require either verification or an unsworn declaration under any rule or [statute], shall be filed electronically with originally executed copies maintained by the filer. The pleading or other document electronically filed shall indicate a signature, e.g., 's/Jane Doe'." (ECF Admin. Proc. Manual ¶ II.D.1) • "In the case of a stipulation or other document to be signed by two or more persons, the following procedure should be used:

DISTRICT COURTS	
	(a) The filing party or attorney shall initially confirm that the content of the document is acceptable to all persons required to sign the document and shall obtain the physical signatures of all parties on the document. (b) The filing party or attorney then shall file the document electronically, indicating the signatories, e.g., 's/Jane Doe,' 's/John Doe,' etc. (c) The filing party or attorney shall retain the hard copy of the document containing the original signatures . . . (d) No later than the first business day after the document has been electronically filed, each person required to sign the document shall file a Notice of Endorsement of the document. The document shall be deemed fully executed upon the filing of all Notices of Endorsement that are due." (ECF Admin. Proc. Manual ¶ 2.D.2.(a)—(d))
NEW MEXICO (also bankruptcy court)	• BANKRUPTCY: "Use of the log-in name and password required to submit documents electronically constitutes an attorney's signature for purposes of Fed. R. Bankr. P. 9011." (Misc. Order No. 99-359 ¶ 1) • BANKRUPTCY: "Documents which require the verified signature of a person other than the electronically filing attorney may be electronically filed, utilizing scanning technology." (Misc. Order No. 99-359 ¶ 6) • "The use of identification number and the password required to submit documents over the system shall constitute the attorney's signature under Rule 11 of the Federal Rules of Civil Procedure on all electronic documents filed with the Court." (Admin. Order No. 97-26 ¶ 1) • "Court generated documents: Use of an authorized login and password and attachment of a graphical signature block to any orders initiated within chambers or in the Clerk's Office serves as the equivalent of a written signature within this electronic environment." (Admin. Order No. 97-83 ¶ 3)
NEWYORK—EASTERN	• "A paper filed with the Court electronically shall be deemed to be signed by a person (the 'Signatory') when the paper identifies the person as a Signatory and the filing complies with either subparagraph (a), (b) or (c). When the paper is filed with the Court in accordance with any of these methods, the filing shall bind the Signatory as if the paper (or the paper to which the filing refers, in the case of a Notice of Endorsement filed pursuant to subparagraph (c)) were physically signed and filed, and shall function as the Signatory's signature, whether for purposes of Rule 11 of the Federal Rules of Civil Procedure, to attest to the truthfulness of an affidavit or declaration, or for any other purpose. (a) In the case of a Signatory who is a Filing User (as that term is defined in paragraph 12), such paper shall be deemed signed, regardless of the existence of a physical signature on the paper, provided that such paper is filed using the User ID and Password of the Signatory. The page on which the physical signature would appear if filed in paper form must be filed electronically, but need not be filed in an optically scanned format displaying the signature of the Signatory. (b) In the case of a Signatory who is not a Filing User, or who is a Filing User but whose User ID and Password will not be utilized in the electronic filing of the paper, such paper shall be deemed signed and filed when the paper

DISTRICT COURTS	
	is physically signed by the Signatory, the paper is filed electronically, and the signature page is filed in optically scanned form pursuant to and consistent with the EFP. The Filing User who files such paper shall retain the executed original of the paper as the copy in paper form required pursuant to paragraph 4(f). (c) In the case of a paper that has already been filed electronically with the Court, the paper shall be deemed signed and filed by the Signatory when a Notice of Endorsement of the paper is signed and filed by the Signatory pursuant to either subparagraph (a) or (b). Such Notice must provide the title, electronic docket number, and date and time filed of the paper being so signed. (d) In the case of a stipulation or other paper to be signed by two or more persons, the paper may be filed and signatures may be provided in a single electronic filing in which all signatures are authorized either (i) pursuant to subparagraph (b) alone, or (ii) pursuant to subparagraph (a) in the case of one Signatory who is a Filing User and pursuant to subparagraph (b) in the case of all other Signatories. (e) In the case of a stipulation or other paper to be filed and signed by two or more persons, the paper may be filed and signatures may be provided in two or more electronic filings as follows: One Filing User shall initially confirm that the content of the paper is acceptable to all persons due to sign the paper and shall obtain the physical signatures on the paper of the Signatories who do not intend independently to transmit their signatures electronically to the Court. Such Filing User shall then file the paper and submit all such signatures electronically in a single electronic filing in which the signatures are authorized by subparagraphs (a) or both. The paper shall also list all persons whose signatures are due to be transmitted independently to the Court. Not later than the first business day after such filing, all other persons due to sign the paper shall file one or more Notices of Endorsement of the paper pursuant to subparagraph (c). The paper shall be deemed fully executed upon the filing of all Notices of Endorsement that are due." (Admin. Order 97-12 ¶¶ 5(a)-(e))
OHIO—NORTHERN	• "The user identification number and the user password required to submit documents over the system shall serve as the attorney's signature on all electronic documents filed with the Court, and will also serve as a signature for purposes of Fed. R. Civ. P. 11 and for all other purposes under the Federal Rules of Civil Procedure and the Local Rules of this Court." (Gen. Order 97-38, ¶ 7) • "The party identification name and password shall constitute the party's signature for Fed. R. Civ. P. 11 puposes pursuant to General order 97-38. All documents filed electronically shall include a signature block in compliance with LR 10.1 and include the typewritten anem, address, telephone number and the attorney's Ohio Bar Registration Number, if applicable. In addition, the name of the password registrant under whose password the document is submitted should be preceded by a "s/" and typed in the space where the signature would otherwise appear. S/ [Name of Password Registrant] Name of Password Registrant

DISTRICT COURTS	
	Address **City, State, Zip Code** **(xxx) xxx-xxxx [telephone number]** **[attorney bar number, if applicable]** **Documents requiring signatures of more than one party shall be filed either by submitting a scanned document containing all necessary signatures; by representing the consent of the other parties on the document; or by filing the document identifying the parties whose signatures are required and by the submission of a notice of endorsement by the other parties no later than three business days after filing." (Pol. & Proc. Manual, ¶ 17)**

TOPICS/ISSUES: SERVICE OF PAPERS FILED ELECTRONICALLY

BANKRUPTCY COURTS	
ARIZONA	• "Anyone electronically filing a pleading or other document, when required to serve a copy on those parties entitled to service in accordance with applicable law or court order, may make service of the pleading or document on any attorney, or other party who is a registered Electronic Case Filing participant, by serving a copy of the 'Notice of Electronic Filing' in place of service of a paper copy of the pleading or document. Service is made by serving a copy of the 'Notice of Electronic Filing,' generated by the Electronic Filing System, by electronic mail, hand delivery or facsimile. Overnight mail may be used if hand delivery, facsimile service or electronic mail is impracticable. Service of the 'Notice of Electronic Filing' constitutes service of the pleading, decree, order, judgment or other document. If service of the notice is made by electronic mail, service shall be deemed to have been made the next business day." (Interim Oper. Order No. 3 ¶ 10) • "Each person electronically filing a pleading or other document shall serve, as provided in paragraphs 10 and 11 of Interim Operating Order No. 2, the filed pleading or document on those parties entitled by the Federal Rules of Bankruptcy Procedure (FRBP) or the Local Rules of Bankruptcy Procedure (LRBP) to receive a copy of the pleading or document electronically filed. When required, service of a paper copy is to be done in the manner provided in the FRBP and the LRBP. Paper copies of the "Notice of Electronic Filing" and of the electronically filed pleading or document are to be delivered by hand or mail to the judge assigned in the case as set forth in the User Manual by delivering the copies to the Clerk's Office clearly marked 'ECF CASE, COPY FOR JUDGE,' unless and until the judge assigned to the case directs otherwise." (Admin. Proc. ¶ II.B.1) • "A party filing electronically is not required to serve the pleading or other document (other than the Electronic Filing Receipt generated by the System) on any party who is a registered Electronic Case Filing participant and has been issued a live system filing password. If a party filing electronically fails to SAVE or PRINT the Electronic Filing Receipt, the filing party is required to make [conventional] service . . . ." (Admin. Proc. ¶ II.B.2) • "Paper copies of pleadings or other documents which are filed conventionally or on 3.5 inch disk rather than electronically shall be served in the manner provided for in, and on those parties entitled to notice in accordance with, the FRBP and the LRBP except as otherwise provided by order of the Court." (Admin. Proc. ¶ III.B)
CALIFORNIA—SOUTHERN	• "Whenever a pleading or other paper is filed electronically in accordance with the Electronic Filing Procedures, the Office of the Clerk shall serve the filing party with a "Notice of Electronic Filing" by electronic means at the time of docketing. "(Bankr. Gen. Order No. 162 ¶ 7.c; Admin. Proc. ¶ II.B.1) • "The filing party shall serve the pleading or other paper upon all persons entitled to notice or service in accordance with the applicable rules, or, if service by first class mail is permitted under the rules, the filing party may make service in accordance with sub-paragraph (c) below." (Bankr. Gen. Order No. 162 ¶ 7.b; Admin. Proc. ¶ II.B.2) [subparagraph (c) provides that if the recipient of notice is a registered participant in the Electronic Filing System,

BANKRUPTCY COURTS	
	then "service of the Notice of Electronic Filing by electronic means shall be the equivalent of notice of the pleading or other paper by first class mail, postage prepaid"] • "If the recipient of notice or service is a registered participant in the Electronic Filing System, service by electronic means of the Notice of Electronic Filing shall be the equivalent of service of the pleadings or other paper by first class mail, postage prepaid." (Bankr. Gen. Order No. 162 ¶ 7.c; Admin. Proc. ¶ II.B.3) • "Participation in the Electronic Filing System by receipt of a password from the Court shall constitute a request for service and notice electronically pursuant to Fed. R. Bankr. P. 9036. Participants in the Electronic Filing System, by receiving a password from the court, agree to receive notice and service by electronic means." (Bankr. Gen. Order No. 162 ¶ 8)
GEORGIA—NORTHERN	• "Each person electronically filing a Pleading or other document in accordance with the Electronic Case Filing Procedures shall serve that Pleading or document in accordance with the Federal Rules of Bankruptcy Procedure and the Local Rules of Bankruptcy Procedure, except as follows. A person may electronically serve on any Approved Participant, as defined in the Electronic Case Filing Procedures, a "Notice of Electronic Filing" in the form set forth in section II.B.1 of those Procedures. Such Electronic service of the Notice of Electronic Filing of a Pleading, order, decree, judgment or other document shall constitute service of that pleading, order, decree, judgment or other document, so that the filing party shall not be required to serve conventionally the filed document to which the Notice of Electronic Filing refers. A certificate of service may be filed electronically and may be appended to the Pleading to which it refers." (Gen. Order No. 5 ¶ (9)) • "Notwithstanding the foregoing, notices mandated by Fed. R. Bank. P. 2002 (a)(1), (4), (5), (7) and (8) and (b)(1) and (2) shall be served in an ECF case by paper copies in accordance with those rules, unless a party in interest requests pursuant to Fed. R. Bank. P. 9036 that such notice be given electronically. Notice given pursuant to Fed. R. Bank. P. 2002(a)(2), (3) and (6) may be served in accordance with paragraph 9 above of this Order. [paragraph 9 is set forth immediately above]. In accepting passwords from the Court, participants in the ECF System waive the right to receive notice and service by mail , facsimile transmission or by hand delivery, including notices described in Fed. R. Bank. P. 2002(a)(2), (3) and (6). If a recipient requests Electronic notice pursuant to Fed. R. Bank. P. 9036, that notice may be served in accordance with paragraph 9 above of this Order." (Gen. Order No. 5 ¶ (10)) • "[N]otices mandated by Fed. R. Bankr. P. 2002 (a)(1), (4), (5), (7) and (8) and (b)(1) and (2) must be prepared in paper form and served in accordance with those rules, provided that service may be made electronically on a person who has requested electronic notice pursuant to Fed. R. Bankr. P. 9036. Notice pursuant to Fed. R. Bankr. P. 2002 (a)(2), (3) and (6) may be served in accordance with section II.B.1 hereof. If the recipient requests electronic notice pursuant to Fed. R. Bankr. P.9036, it may be served in accordance with section II.B.1." (ECFP ¶ II.A.3) [section II.B.1 is set forth immediately below]. • "Immediately after filing a pleading or other document electronically, an attorney shall serve a 'Notice of Electronic Filing' on each Approved Participant entitled to service by hand, facsimile or e-mail in the first instance, or by

BANKRUPTCY COURTS	
	overnight mail, if hand, facsimile or e-mail service is impracticable, in addition to serving conventionally paper copies of the document on all parties in interest entitled to service not represented by an Approved Participant. A Notice of Electronic Filing shall include the name of the case in which the document has been filed, the case number, a description of the type of document (e.g., ABC Corp.'s motion for stay relief), the docket number and the date and time that the document was filed." (ECFB ¶ II.B.1) • "[F]or paper documents, the filing party shall not be required to serve any pleading or other documents (other than a 'Notice of Electronic Filing') on any party entitled to electronic notice." (ECFP ¶ II.B.2)
SOUTHERN DISTRICT OF NEW YORK	• "Each person electronically filing a pleading, order, decree, judgment or other document shall serve the 'Notice of Electronic Filing' generated by the System on those parties entitled to electronic notice, by hand, facsimile or e-mail in the first instance, or by overnight mail if (i) delivered, by hand or overnight mail, to the chambers of the presiding judge in the case, together with a copy of the "Notice of Electronic Filing" unless and until the judge assigned to the case orders otherwise, and (ii) served on those parties not designated or able to receive electronic notice but nevertheless entitled to notice of said pleading or other document in accordance with the Federal Rules of Bankruptcy Procedure and the Local Rules of Bankruptcy Procedures except as otherwise provided by order of the Court. If such service of a paper copy is to be made, it shall be done in the manner provided in the Federal Rules of Bankruptcy Procedures and the Local Rules of Bankruptcy Procedure." (EFP ¶ II.B.1) • "Pursuant to LRBP 9070(1), delivery of paper copies of pleadings and other documents will continue to be required unless and until such time as the individual judge assigned to case deems delivery of paper copies to be unnecessary." (Gen. Order 97-421 ¶ 5)
EASTERN DISTRICT OF VIRGINIA	• "Whenever a pleading or other paper is filed electronically, a Notice of Electronic Filing will be automatically generated by the Electronic Case Filing System at the time of docketing." (Standing Order 99-1 ¶ 7.a; Admin. Proc. II.B.1.) • "The filing party shall serve the pleading or other paper upon all persons entitled to notice or service in accordance with the applicable rules, or, if service by first class mail is permitted under the rules, the filing party may make service in accordance with subparagraph (c) below." (Standing Order 99-1 ¶ 7.b) • "If the recipient of notice or service is a registered participant in the Electronic Case Filing System, service of the Notice of Electronic Filing shall be the equivalent of service of the pleading or other paper by first class mail, postage prepaid." (Standing Order 99-1 ¶ 7.c; Admin. Proc. II.B.3)

DISTRICT COURTS	
MISSOURI—WESTERN	• "Each person, including the Office of the Clerk, electronically filing a pleading, order, decree, judgment or other document shall, on the same day, serve a 'Notice of Electronic Filing' on parties entitled to service under

DISTRICT COURTS	
	the Federal Rules of Civil Procedure and the Local Rules. The 'Notice . . .' shall be served by hand, facsimile, e-mail or by first-class mail postage prepaid. In addition, paper copy of the electronically filed pleading or other document shall be (i) delivered to the . . . judge assigned to the case, together with a copy of the 'Notice . . .' until the judge assigned to the case orders otherwise, and (ii) served on those parties not designated to receive or not able to receive electronic notice. If such service of a paper copy is to be made, it shall be made pursuant to the Federal Rules of Civil Procedure and the Local Rules." (Court En Banc Order ¶ 5.a) • "Participants in the ECF pilot project agree to receive notice and service as provided herein." (Court En Banc Order ¶ 5.b) • "Pleadings or other documents which are not filed electronically shall be served in accordance with the Federal Rules of Civil Procedure and the Local Rules except as otherwise provided by Order of the Court." (Court En Banc Order ¶ 5.c) • "The electronic Case File system will generate a 'Notice of Electronic Filing' when any document is filed. The filing party is obligated to serve this 'Notice . . .' upon all other parties at that time. This service can be accomplished by e-mail. In addition, a paper copy of the electronically filed pleading or other document shall be (I) sent to the chambers of the presiding judge in the case, together with a copy of the "Notice . . .' unless and until the judge assigned to the case orders otherwise, and (II) served on those parties not designated or able to receive electronic notice, but nevertheless entitled to notice of said pleading or other document in accordance with the Federal Rules of Civil Procedure and the Local Rules of the Western District of Missouri except as otherwise provided by order of the Court. If such service of a paper copy is to be made, it shall be made pursuant to the Federal Rules of Civil Procedure and the Local Rules of the Western District of Missouri." (ECF Admin. Proc. Manual ¶ II.C.1) • "[F]or paper documents of documents filed on 3.5 inch floppy disk, the filing party shall not be required to serve any pleading or other documents (other than the 'Notice . . .' generated by the System) on any party entitled to electronic notice." (ECF Admin. Proc. Manual ¶ II.C.2) • "Pleadings or other documents which are filed conventionally or on 3.5 inch floppy disk rather than electronically shall be served in the manner provided for in, and those parties entitled to notice in accordance with, the Federal Rules of Civil Procedure and the Local Rules of the Western District of Missouri except as otherwise provided by order of the Court." (ECF Admin. Proc. Manual ¶ III.B)
NEW MEXICO (also bankruptcy court)	• "The Clerk or any other person may serve and give notice by electronic transmission, in lieu of service and notice by mail, to any person who has a written request, on file with the Clerk, to receive service and notice by electronic transmission. The request remains effective in all subsequent litigation in this District involving the person who filed the request; however, any person may withdraw his or her request by sending written notice to the Clerk. Service and notice are complete when the sender obtains electronic confirmation of receipt of the transmission." (Local Civil Rule 5.6; Local Bankr. Rule 7005-1) • "Electronic transmission to any person who has a written request on file with the Clerk to receive service and notice

DISTRICT COURTS	
	by electronic transmission on the ACE system is the equivalent of service by U.S. Mail in accordance with Fed. R. Civ. P. 5(b) and 77(d). The filing date is that date on which an electronic document is received on the ACE server." (Admin. Order 97-83 ¶ 2(a)) • "Upon electronic filing of any document on the Court's ACE server, a notice of such filing is immediately placed in an electronic mailbox of all attorney/users/participants in the relevant case who have agreed to the use of electronic filing. Arrival in the electronic mailbox shall constitute service of the document on those parties. Such service shall be considered the equivalent of U.S. Mail for purposes of applying the three day mailing rule of Fed. Rule of Civ. P. 6(e)." (Admin. Order No. 97-83 ¶ 2(b)) • "An attorney/user/participant is required to notify the Court of conventional service of non-electronic participants in a case." (Admin. Order No. 97-26 ¶ 7.C) • BANKRUPTCY "Names of attorneys who have agreed to receive service and notice from other attorneys via ACE electronic mailbox or by facsimile transmission shall be listed on the Court's website . . . Service upon and notice to attorneys whose names do not appear on the Court's website listing is to be accomplished by other means." (Misc. Order No. 99-359 ¶ 5)
NEW YORK—EASTERN	• "An attorney or unrepresented party filing a paper pursuant to EFP shall, within one hour following filing, send by e-mail a Notice of Filing of the paper to all E-Mail Addresses of Record. Such Notice shall provide, at a minimum, the electronic docket number and the title of the paper filed, and shall provide the date and time filed, as set forth in the Notice of Electronic Filing received from the Court. Such e-mail transmission(s) shall constitute service on the attorney or unrepresented party or other persons who have consented to EFP. Proof of such service shall be filed with the Court pursuant to the EFP, but such proof of service need not itself be served." (Admin. Order 97-12 ¶ 6(a)) • "Upon the filing of a third-party complaint pursuant to paragraph 1 in an action which is subject to EFP, the third-party plaintiff(s) shall serve notice that the action is subject to EFP upon the third-party defendant together with the third-party complaint. Concurrent with the filing of the third-party answer or other papers responsive to the third-party complaint, the third-party defendant shall either (i) file a Consent to EFP for purposes of the action, or (ii) move for exemption from EFP pursuant to subparagraph 2(d)." (Admin. Order 97-12 ¶ 7(a)) • "In an action subject to EFP, when service of a paper other than a third-party complaint is required to be made upon a person who has not filed a Consent to EFP, a paper copy of the document shall be served on the person as otherwise required by the Federal Rules of Civil Procedure or the Local Rules of this Court. If the person so served is permitted or required to respond to the paper, such time to respond shall be computed without regard to the EFP. Such person may file a Consent to EFP conforming to the requirements of paragraph 3 and thereby become subject to the EFP for the purposes of the action." (Admin. Order 97-12 ¶ 7(b)) • "A Filing User filing any paper electronically that requires a judicial officer's signature shall also promptly deliver such document in paper form to the judicial officer by U.S. mail or other means." (Admin. Order 97-12 ¶ 4(h)) • "Individual rules of a Participating Judicial Officer requiring delivery of courtesy copies of any paper filed shall remain in force until rescinded by the Participating Judicial Officer, but the provisions of any such rule requiring

DISTRICT COURTS	
	equivalent service of the paper upon all parties shall be satisfied by compliance with the electronic filing and service provisions of the EFP." (Admin. Order 97-12 ¶ 4(j))
OHIO—NORTHERN	• "The parties are encouraged to take advantage of electronic servicing and noticing, including notices from the Court, consenting to all service and other notices by electronic means." (Gen. Order No. 97-38, ¶ 6.c) • "By participating in the electronic filing process, the parties consent to the electronic service of all documents, and shall make available electronic mail addresses for service. Upon filing of a document by a party, an e-mail message will be automatically generated by the electronic filing system and sent via electronic mail to the e-mail address of all parties in the case. In addition to receiving e-mail notifications of filing activity, the parties are strongly encouraged to sign on to the electronic filing system at regular intervals to check the docket in their case. A certificate of service must be included with all documents filed electronically. Such certificate shall indicate that service was accomplished pursuant to the Court's electronic filing procedures. The party effectuates service on all parties by filing electronically. Service by electronic mail does not constitute service by mail pursuant to Fed. R. Civ. P. 6(e)." (Pol. & Proc. Manual, ¶ 13)

TOPICS/ISSUES: NOTICE OF COURT ORDERS AND JUDGMENTS

BANKRUPTCY COURTS	
ARIZONA	• "The Clerk shall enter all orders, decrees, and judgments in the electronic filing system, which shall constitute docketing of the order, decree or judgment for all purposes. The Clerk's notation in the appropriate docket of an order, judgment, or decree shall constitute the entry of the order, judgment, or decree." (Interim Oper. Order No. 3 ¶ 9) • "Service of the 'Notice of Electronic Filing' constitutes service of the pleading, decree, order, judgment or other document. If service of the notice is made by electronic mail, service shall be deemed to have been made the next business day. When service is required, the Clerk shall serve the proponent of an order, decree, judgment or other court document with either a copy of the signed order or a copy of the 'Notice of Electronic Filing' by electronic mail, facsimile, or first class mail at the time of docketing the order, decree, judgment or other court document." (Interim Oper. Order No. 3 ¶ 10)
CALIFORNIA—SOUTHERN	• "The Office of the Clerk shall enter all orders, decrees, judgments, and proceedings of the court in accordance with the Electronic Filing Procedures, which shall constitute entry of the order, decree, judgment, or proceeding on the docket kept by the clerk under Fed. R. Bankr. P.9021." (Bankr. Gen. Order No. 162 ¶ 6) • "Participation in the Electronic Filing System by receipt of a password from the Court shall constitute a request for service and notice electronically pursuant to Fed. R. Bankr. P. 9036. Participants in the Electronic Filing System, by receiving a password from the court, agree to receive notice and service by electronic means." (Bankr. Gen. Order No. 162 ¶ 8)
GEORGIA—NORTHERN	• "Any order filed electronically and hence without the original signature of a judge shall have the same force and effect as if the judge had affixed his or her signature to a paper copy of the order and it had been entered on the docket in a conventional manner." (Gen. Order No. 5 ¶ (11))
NEW YORK—SOUTHERN	• "All signed orders (including, without limitation, orders to show cause) shall be filed electronically by the presiding judge in the case. In order to facilitate such filing, the party presenting the proposed order shall provide the presiding judge with a 3.5 inch floppy disk containing the proposed order, together with any document to be electronically filed in connection therewith. Said party shall also provide the presiding judge with a paper copy of all such documents. The office of the Clerk will make the appropriate entry on the System to facilitate the docketing of an order." (EFP ¶ II.E) • "The Clerk shall enter all orders, decrees, and judgments of the Court in the electronic filing system, which shall constitute docketing of the order, decree, or judgment for all purposes. The Clerk's notation on the appropriate docket of an order, judgment, or decree shall constitute the entry of the order, judgment, or decree." (Local Rule 9021-1)

BANKRUPTCY COURTS	
VIRGINIA—EASTERN	• "All signed orders (including, without limitation, orders to show cause) shall be entered electronically by the Clerk's Office or presiding judge in the case. All requirements under LBR 9022-1(B) with regard to the list of parties, copies of orders, and envelopes must be followed, unless the party to be served is a registered user of the System. For registered users of the System, no envelope is required as electronic notice will constitute service." (Admin. Proc. ¶ II.E) • "Participation in the Electronic Case Filing System by receipt of a password from the Court, shall constitute a request for service and notice electronically pursuant to FRBP 9036. Participants in the Electronic Case Filing System, by receiving a password from the Court, agree to receive notice and service by electronic means." (Standing Order 99-1 ¶ 8)

DISTRICT COURTS	
MISSOURI—WESTERN	• "All signed orders shall be filed electronically by either the presiding judge in the case or the office of the Clerk." (ECF Admin. Proc. Manual ¶ II.F) • SEE "SERVICE OF PAPERS FILED ELECTRONICALLY" SECTION.
NEW MEXICO (also bankruptcy court)	• "Chambers staff are currently able to file court generated documents (notices, orders, opinions, etc.) electronically through the ACE system . . . . After someone in chambers files a document electronically, it is submitted to the ACE automated noticing system. Notices filed before 4:30 are sent out the same day. Notices submitted after 4:30 are filed immediately but are not sent until the next business day. The system faxes notices to parties who have opted to receive their notice via fax, then prints out notices and labels for parties who will receive notice by mail. Parties also have the option of receiving notice electronically. These notices are sent instantly when the document is electronically filed." (Training Manual p. 32) • "Court generated documents: Use of an authorized login and password and attachment of a graphical signature block to any orders initiated within chambers or in the Clerk's Office serves as the equivalent of a written signature within this electronic environment." (Admin. Order No. 97-83 ¶ 3)
NEW YORK—EASTERN	• "The Clerk shall file electronically all orders, decrees, judgments, and proceedings of the Court in accordance with the EFP, which shall constitute entry of the order, decree, judgment or proceeding on the docket kept by the Clerk pursuant to Rules 58 and 79 of the Federal Rules of Civil Procedure. Immediately upon the entry of an order or judgment in an action subject to EFP, the Clerk shall transmit by e-mail to the E-Mail Addresses of Record a notice of the entry of the order or judgment and shall make a note in the docket of the transmission. Transmission of the notice of entry shall constitute notice as required by Rule 77(d) of the Federal Rules of Civil Procedure. When notice of the order or judgment is due to be provided to a person who has not consented to EFP, the Clerk shall give such notice in paper form pursuant to the Federal Rules of Civil Procedure." (Admin. Order 97-12 ¶ 9)

DISTRICT COURTS	
OHIO—NORTHERN	• "The parties are encouraged to take advantage of electronic servicing and noticing, including notices from the Court, consenting to all service and other notices by electronic means." (Gen. Order No. 97-38, ¶ 6.c)

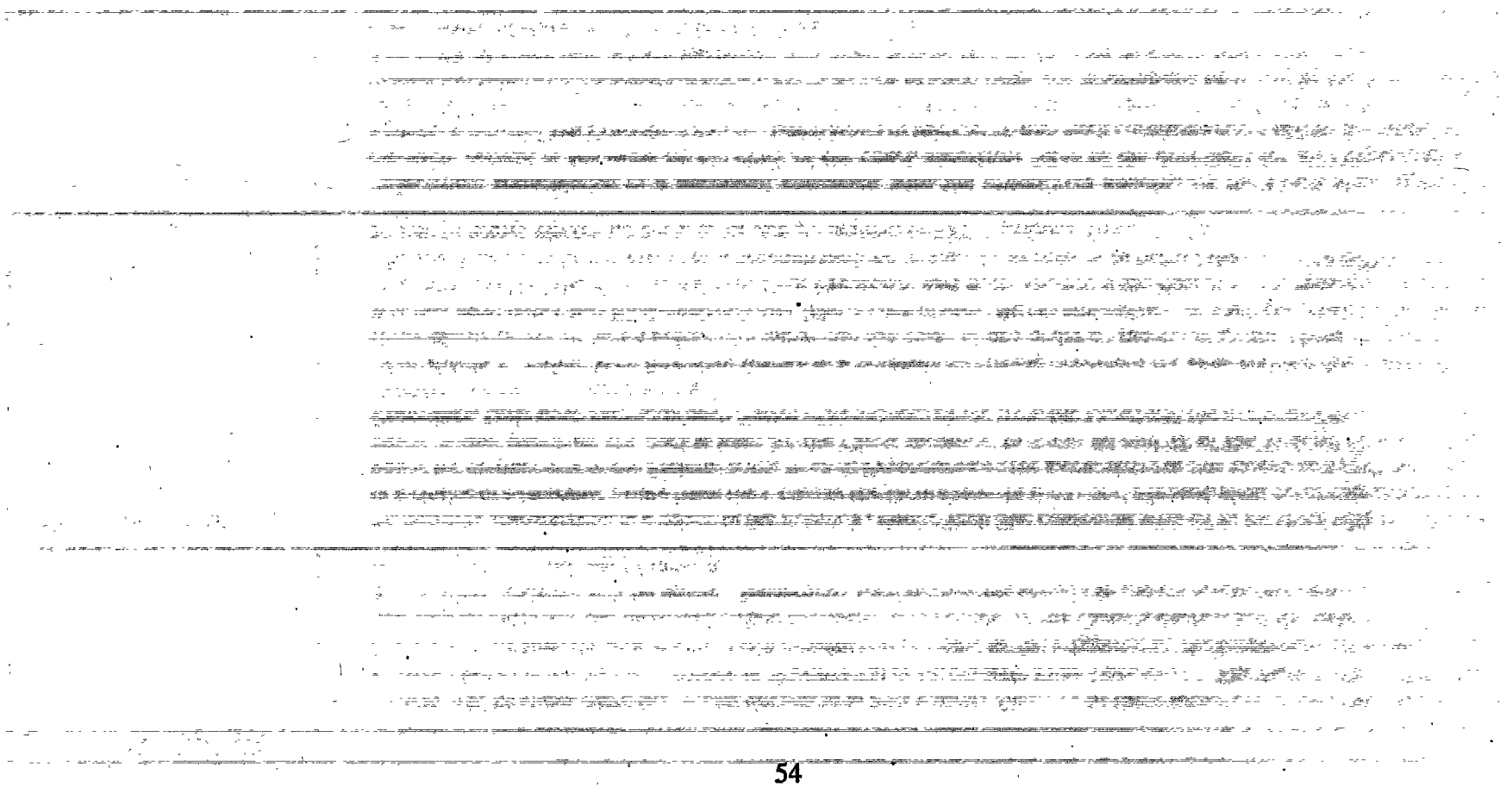
TOPICS/ISSUES: DOCKET ENTRIES

BANKRUPTCY COURTS	
ARIZONA	• "The electronic filing of a pleading or other document in accordance with the Electronic Filing Procedures by a party, shall constitute entry of that pleading or other document on the docket." (Interim Oper. Order No. 3 ¶ 8) • "The Clerk shall enter all orders, decrees, and judgments in the electronic filing system, which shall constitute docketing of the order, decree or judgment for all purposes. The Clerk's notation in the appropriate docket of an order, judgment, or decree shall constitute the entry of the order, judgment, or decree." (Interim Oper. Order No. 3 ¶ 9) • "The person electronically filing a pleading or other document will be responsible for designating a title for the document by using one of the entries contained in the Glossary of Events attached to the User's Manual." (Admin. Proc. ¶ II.G)
CALIFORNIA—SOUTHERN	• "The electronic filing of a pleading or other paper in accordance with the Electronic Filing Procedures shall constitute entry of that pleading or other paper on the docket kept by the clerk under Fed. R. Bankr. P. 5003." (Bankr. Gen. Order No. 162 ¶ 5) • "The Office of the Clerk shall enter all orders, decrees, judgments, and proceedings of the court in accordance with the Electronic Filing Procedures, which shall constitute entry of the order, decree, judgment, or proceeding on the docket kept by the clerk under Fed. R. Bankr. P.9021." (Bankr. Gen. Order No. 162 ¶ 6) • "The person electronically filing a pleading or other document will be responsible for designating a title for the document by using one of the categories contained in the *Electronic Filing Participant Guide*." (Admin. Proc. ¶ II.F)
GEORGIA—NORTHERN	• "All documents that form part of a pleading and are being filed at the same time and by the same party may be electronically filed together under one docket number, e.g., a motion with a supporting affidavit and memorandum of law." (ECFP ¶ II.A.2) • "In all cases that have been designated as electronically filed cases that were filed prior to January 1, 2000, and in all cases filed on or after January 1, 2000, including those having paper files, the official docket maintained by the Clerk pursuant to Fed. R. Bank. P. 5003(a) shall be the electronic docket . . ." (Gen. Order No. 5 ¶ (5)) • "The person electronically filing a pleading or other document shall be responsible for designating the appropriate title or titles for the document using one of the categories shown in the Electronic Filing System Users Manual." (ECFP ¶ II.G)
NEW YORK—SOUTHERN	• "The person electronically filing a pleading or other document will be responsible for designating a title for the document by using one of the categories contained in Schedule D hereto." (EFP ¶ II.F) • "The electronic filing of a pleading or other document in accordance with the Electronic Filing Procedures shall constitute entry of that pleading or other document on the docket kept by the clerk under FRBP 5003." (Gen.

BANKRUPTCY COURTS	
	Order 97-421 ¶ 6) • "The Office of the Clerk will enter all orders, decrees, judgments, and proceedings of the court in accordance with the Electronic Filing Procedures, which shall constitute entry of the order, decree, judgment or proceeding on the docket kept by clerk under FRBP 5003 and for purposes of FRBP 9021." (Gen. Order 97-421 ¶ 7)
VIRGINIA—EASTERN	• "The electronic filing of a pleading or other paper in accordance with the Procedures shall constitute entry of that pleading or other paper on the docket kept by the Clerk of Court under FRBP 5003." (Standing Order 99-1 ¶ 5) • "The Office of the Clerk will enter all orders, decrees, judgments, and proceedings of the Court in accordance with the Procedures, which shall constitute entry on the docket record kept by the Clerk under FRBP 5003 and for purposes of FRBP 9021." (Standing Order 99-1 ¶ 6) • "The person electronically filing a pleading or other document will be responsible for docketing the pleading or document by selecting the appropriate event from the categories contained in the System." (Admin. Proc. II.F)

DISTRICT COURTS	
MISSOURI—WESTERN	• "The electronic filing of a pleading or other document in accordance with these procedures shall constitute filing of the document for all purposes under the Federal Rules of Civil Procedure and the Local Rules of this Court and shall constitute entry of that pleading or other document on the docket kept by the Clerk under FRCP 79(a)." (Court En Banc Order 3.b) • "All orders, decrees, judgments, and proceedings of the Court will be entered in accordance with these procedures and shall constitute entry of the order, decree, judgment or proceeding on the docket kept by the Clerk under FRCP 79(a)." (Court En Banc Order ¶ 3.c) • "The person electronically filing a pleading or other document must title the document using one of the categories contained in the ECF Procedures Manual . . ." (Court En Banc Order ¶ 3.e; ECF Admin. Proc. Manual ¶ II.G) • "All documents which form part of a pleading and which are being filed at the same time and by the same party may be electronically filed together under one docket number, e.g., the motion and a supporting affidavit, with the exception of suggestions in support. Suggestions in support should be electronically filed separately and shown as a related document to the motion." (ECF Admin. Proc. Manual ¶ II.A.2)
NEW MEXICO (also bankruptcy court)	• "When something is electronically filed, the attorney's proposed entry will appear on the docket sheeet immediately. The document then prints out on a printer in the court house and is docketed manually into our Integrated Case Management System (ICMS). When the case manager dockets the entry in ICMS, it overwrites the attorney's docket entry." (Training Manual p. 15)

DISTRICT COURTS	
	• "There will be times when the wrong document is accidentally filed . . . In these instances, at this time, the court requires the attorney to file a 'Notice of Withdrawal of Incorrectly Filed Document.' The Notice will be linked to the incorrectly filed document which will terminate any Court action triggered by the incorrectly filed document. The docket entry for the incorrectly filed document will remain on the Court's docket, but the notation 'Filed in Error, Filer Notified' will be added. Incorrectly filed documents remain in the record unless removal is ordered by the court." (Training Manual p. 31)
NEW YORK—EASTERN	• "Electronic transmission of a paper to the E.D.N.Y. Public Web Site consistent with EFP, together with the receipt of a Notice of Electronic Filing from the Court in the form shown in the Users' Manual, shall constitute filing of the paper for all purposes of the Federal Rules of Civil Procedure and the Local Rules of this Court, and shall constitute entry of that paper on the docket kept by the Clerk pursuant to Rules 58 and 79 of the Federal Rules of Civil Procedure. Only upon receipt of such Notice of Electronic Filing from the Court will the paper be Deemed filed and entered." (Admin. Order 97-12 ¶ 4(c)) • "The E.D.N.Y. Public Web Site shall denote in a separate electronic document for each action subject to EFP the filing of any paper by or on behalf of a party and the entry of any order or judgment by the Court, regardless of whether such paper was filed electronically. The record of those filings and entries for each case shall be consistent with Rule 79(a) of the Federal Rules of Civil Procedure and shall constitute the docket for purposes of that Rule. The Clerk shall make such technical accommodations as may be necessary to permit the Court's existing PACER system to access electronic dockets for actions subject to EFP." (Admin. Order 97-12 ¶ 8)
OHIO—NORTHERN	• "Electronic transmission of a document consistent with the procedures adopted by the Court shall, upon the complete receipt of the same by the clerk of the court, constitute filing of the document for all purposes of the Federal Rules of Civil Procedure and the Local Rules of this Court, and shall constitute entry of that document onto the docket maintained by the Clerk pursuant to Fed. R. Civ. P. 58 and 79." (Pol. & Proc. Manual, ¶ 9) • "Upon the filing of a document, a docket entry will be created using the information provided by the filing party. The clerk of court will, where necessary and appropriate, modify the docket entry description to comply with quality control standards." (Pol. & Proc. Manual, ¶ 10)



TOPICS/ISSUES: TECHNICAL FAILURES

BANKRUPTCY COURTS	
ARIZONA	
CALIFORNIA—SOUTHERN	
GEORGIA—NORTHERN	
NEW YORK—SOUTHERN	
VIRGINIA—EASTERN	

DISTRICT COURTS	
MISSOURI—WESTERN	• "The Clerk shall deem the W.D.M.O. Public Web site to be subject to a technical failure on a given day if the Site is unable to accept filings continuously or intermittently over the course of any period of time greater than one hour after 12:00 noon that day, in which case filings due that day which were not filed due solely to such technical failures shall become due the next business day. Such delayed filings shall be rejected unless accompanied by a declaration or affidavit attesting to the filing person's failed attempts to file electronically at least two times after 12:00 p.m. separated by at least one hour on each day of delay due to such technical failure." (ECF Admin. Proc. Manual ¶ V)
NEW MEXICO (also bankruptcy court)	• "If you are unable to electronically file a pleading due to the system being down . . . Fax your completed document and exhibits . . . Your fax machine should confirm transmission. The clerk's office fax machine will indicate the date and time the fax was sent on the document. . . . As soon as you are able to make a connection to the server, submit the same document electronically, then call the clerk's office and let them know that the faxed document is now available on the system. The clerk's office will back date your electronic document to reflect the date and time on the fax transmission." (Training Manual p. 30-31) • "If your phone lines are down and you are unable to . . . fax your documents, YOU MUST BRING THEM TO THE CLERK'S OFFICE FOR FILING." (Training Manual p. 30)
NEW YORK—EASTERN	• "The Clerk shall deem the E.D.N.Y. Public Web Site to be subject to a technical failure on a given day if the Site is unable to accept filings continuously or intermittently over the course of any period of time greater than one hour after 12:00 noon that day, in which case filings due that day which were not filed due solely to such technical failures shall become due the next business day. Such delayed filings shall be rejected unless accompanied by a declaration

DISTRICT COURTS	
	or affidavit attesting to the filing person's failed attempts to file electronically at least two times after 12:00 p.m. separated by at least one hour on each day of delay due to such technical failure. The Clerk shall provide notice of all such technical failures on the E.D.N.Y. Public Web Site, and by means of an E.D.N.Y. Public Web Site status line which persons may telephone in order to learn the current status of the Site." (Admin. Order 97-12 ¶ 10(a)) • "If, within 24 hours after filing a paper electronically, the filing party discovers that the version of the paper available for viewing on the E.D.N.Y. Public Web site does not conform to the paper as transmitted upon filing, the filing party may file of right a retransmitted copy of the paper. This provision (and the designation 'Retransmitted') shall not be used for the filing of corrections of typographical errors or other changes or variations from the paper as transmitted upon filing." (Admin. Order 97-12 ¶ 10(c))
OHIO—NORTHERN	• "If a party is unable to file electronically and, as a result, may miss a filing deadline, the party must contact the Help Desk to inform the clerk or court of the difficulty. If a party misses a filing deadline due to an inability to file electronically, the party may submit the untimely filed document, accompanied by a declaration stating that the reason(s) for missing the deadline. The document and declaration must be filed no later than 12:00 noon of the first day on which the Court is open for business following the original filing deadline." (Pol. & Proc. Manual, ¶ 11)

TOPICS/ISSUES: PUBLIC ACCESS

BANKRUPTCY COURTS	
ARIZONA	• "Any person or organization other than those referred to in paragraph I.B. may access the System at the Court's Internet site . . . by obtaining a "read-only" password. A password will be issued to anyone who has a current PACER password for this court. Such access to the System through the Internet site will allow retrieval of the docket sheet and documents." (Admin. Proc. ¶ IV.A) [paragraph I.B. provides System passwords for attorneys admitted to practice in the Court].
CALIFORNIA—SOUTHERN	• "Any person or organization other than those referred to in Paragraph I.B may access the System at the court's Internet site at *www.casb.uscourts.gov* to review documents. Such access to the System through the Internet site will allow retrieval of the docket sheet and documents on a time delayed basis." (Admin. Proc. ¶ IV.A) [paragraph I.B refers to attorneys who have received passwords]
GEORGIA—NORTHERN	• "Any person or organization other than those referred to in section I.B.1. may access the ECF database at the Court's Internet site . . . to view, copy and print docket sheets and filed documents in ECF cases." (ECFP ¶ IV.A) [section I.B.1 refers to participants with a password].
NEW YORK—SOUTHERN	• *"Internet Access without a Password*: Any person or organization . . . may access the System at the Court's Internet site at www.nysb.uscourts.gov. Such access to the System through the Internet site will allow retrieval of the docket sheet and documents on a time delayed basis. Unless a user has a password, access to the System will be on a 'read only' basis." (EFP IV.C)
VIRGINIA—EASTERN	• "Any person or organization other than those referred to in paragraph I.B. may access the System at the Court's Internet site at: http://www.vaeb.uscourts.gov or http://ecf.vaeb.uscourts.gov Such access to the System through the Internet site will allow retrieval of the docket sheet and documents. Access to the System will be on a 'read only' basis." (Admin Proc.¶ IV.A) [paragraph I.B. refers to participants with passwords]

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MISSOURI—WESTERN	• "Any person or organization other than those referred to in paragraph I.B.1. may access the System at the Court's Internet site at http://ecf.mowd.uscourts.gov. Such access to the System through the Internet site will allow retrieval of the docket sheet and documents on a time delayed basis. Unless a user has a Password, access to the System will be on a 'read only' basis." (ECF Admin. Proc. Manual ¶ IV.A.) [paragraph I.B.1. refers to attorneys with passwords]

DISTRICT COURTS	
NEW MEXICO (also bankruptcy court)	
NEW YORK—EASTERN	• "The Clerk's Office shall provide sufficient equipment and facilities, including high-bandwidth Internet access, to allow for public electronic filing of papers and for public access to all Court records. The use of such facilities and equipment for any purpose other than accessing the E.D.N.Y. Public Web Site is prohibited." (Admin. Order 97-12 ¶ 16(a)) • "Until such time as the United States Court of Appeals for the Second Circuit provides notice to the Chief Judge that public access to the E.D.N.Y. Public Web Site obviates or modifies any need for transmittal of the record on appeal of any action subject to EFP as to which a notice of appeal to that Court of Appeals has been filed, when required, the Clerk shall deliver to the Court of Appeals, at that Court's election, either a complete paper copy of the record on appeal or an electronic reproduction of that record on appeal as such record is reflected in the E.D.N.Y. Public Web Site." (Admin. Order 97-12 ¶ 16(b)) • "The E.D.N.Y. Public Web Site shall include for each action subject to EFP a current list of the E-Mail Addresses of Record maintained by the Clerk. Each attorney of record and each unrepresented party shall promptly serve notice upon all parties of any change in such person's E-Mail Addresses of Record for the purposes of the action, and shall promptly notify the Clerk of such change, including identifying to the Clerk each action subject to EFP in which such e-mail address must be updated and confirming that such person has received test e-mail messages successfully from all persons who have consented to EFP in each such action." (Admin. Order 97-12 ¶ 3(c))
OHIO—NORTHERN	• "You may view the Public Case Information, which will allow you to view docket sheets whether or not you have a login and password." (ECF User Manual p. 10)

TOPICS/ISSUES: OTHER SPECIAL PROVISIONS FOR ELECTRONIC FILING

BANKRUPTCY COURTS	
ARIZONA	• "An original declaration containing a verification of the schedules and statement of affairs, attached as Exhibit 1, shall be filed with the Clerk as a separate document. Failure to timely file this signed original declaration within 5 calendar days of the filing of the schedules and statements shall result in dismissal of the case without further notice." (Interim Oper. Order No. 3 ¶ 2) • "An attorney filing a pleading or other document in a case on the Electronic Filing System shall include, if such exists, the attorney's fax number and Internet E-Mail address." (Interim Oper. Order No. 3 ¶ 12) • "Amendments to these rules may be made as required. Final rules will be adopted by vote of all Arizona Bankruptcy Judges and ultimately enacted into this Court's local rules." (Interim Oper. Order No. 3 ¶ 13) • "If the motion or other document electronically filed is to be set for hearing, the filing party is to obtain a hearing date and time from the judge's courtroom deputy after electronically filing the motion or other document." (Admin. Proc. ¶ II.F) • "[A]nyone electronically filing a pleading or document, when required to serve a copy on those parties entitled to service in accordance with applicable law or court order, shall serve paper copies of the pleading or document on the following parties: (a) Debtor, when service on both debtor and debtor's attorney is required. (b) Schedules, statements, plan and any amendment on the Chapter 13 trustee (c) Chapter 7 trustees who are not registered Electronic Case Filing participants (d) United States Trustee except as the United States Trustee directs otherwise. (e) Notices required by applicable law or court order to be served on all creditors (f) All parties entitled to service who are not registered Electronic Case Filing participants." (Interim Oper. Order No. 3 ¶ 11.a-f)
CALIFORNIA—SOUTHERN	• "Pleadings or other documents which are filed conventionally or on a 3.5 inch floppy disk rather than electronically shall be served in the manner provided for in, and on those parties entitled to notice in accordance with, the Federal Rules of Bankruptcy Procedure and Local Bankruptcy Rules except as otherwise provided by order of the court." (Admin. Proc. ¶ III.B) • "[Proper assembly of papers for filing includes] [o]ne computer diskette containing the names and addresses of creditors and other parties in interest submitted pursuant to Local Bankruptcy Rule 1007-1. If financial constraints and/or the inability to access the equipment necessary to produce the diskette would cause an undue hardship on the debtor, a scannable creditor matrix must be submitted accompanied by an executed *REQUEST FOR WAIVER OF CREDITOR MATRIXDISKETTE* [CSD 1010]." (Bankr. Gen. Order No. 163)
GEORGIA—NORTHERN	• "A trustee may file a report of no distribution by making a docket entry without filing a Pleading containing the

BANKRUPTCY COURTS	
	report. Such a docket entry constitutes a Verified Pleading . . ., provided that a trustee filing a report of no distribution through a docket entry without filing an accompanying document is not required to maintain a physical original of the report for the obvious reason that none would exist." (Gen. Order No. 5 ¶ (12)) • "The Office of the Clerk has prepared training materials, including an Electronic Filing System Users Manual, which may be updated from time to time. Interested persons may obtain copies of the latest materials from the Clerk's Office or on the court's web site." (ECFP ¶ II.F)
NEW YORK—SOUTHERN	
VIRGINIA—EASTERN	

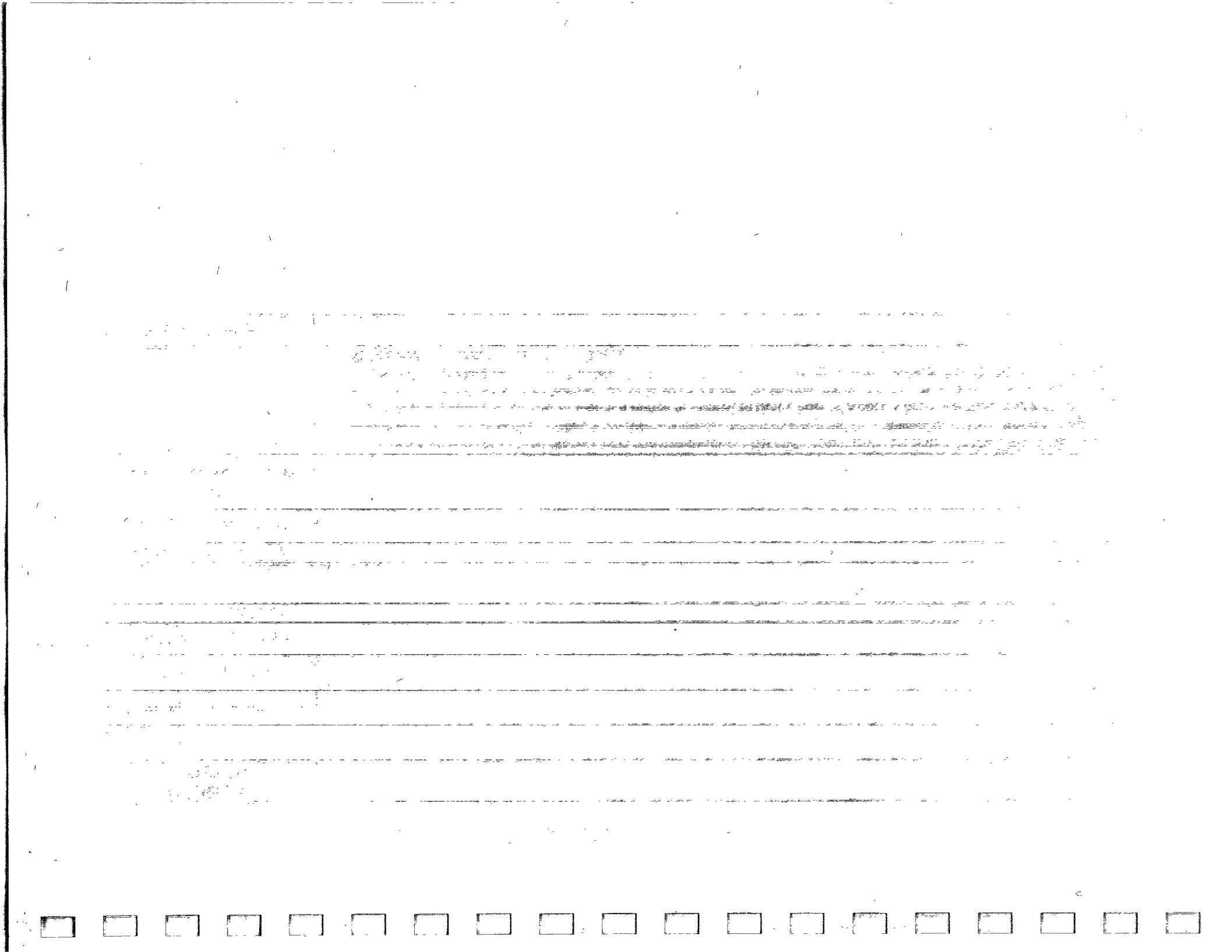
DISTRICT COURTS	
MISSOURI—WESTERN	
NEW MEXICO (also bankruptcy court)	• "Attorney/user/participant in ACE are required to check their electronic mailbox as they would their traditional mailbox." (Admin. Order No. 97-26 ¶ 8) • "Attorney/user/participant must maintain a back-up copy of any transmissions made to the Court." (Admin. Order No. 97-26 ¶ 9) • BANKRUPTCY: "The clerk's copy submission requirements do not apply to electronically filed documents." (Misc. Order No. 99-359 ¶ 9) • BANKRUPTCY: "Any document filed electronically will be electronically file stamped with the actual time and date of filing. However, the 'drop box rule' for the filing of pleadings and other documents, . . . is applicable; that is, any pleadings or other documents filed by a party after the close of business, but before 8:00 a.m. the following business day will be deemed filed at midnight the previous business day. . . . [T]he 'drop box rule' does not apply when an order or notice specifies a time and date by which to file a document." (Misc. Order No. 99-359 ¶ 7) • "[T]he judges in the District of New Mexico have agreed to a standard order to waive packet submission requirements imposed by Local Rule 7.3(a)." (Training Manual p. 29)
NEW YORK—EASTERN	• "Whenever a person 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 person, and such paper is filed and served electronically pursuant to EFP, one day shall be added to the prescribed period. Service pursuant to subparagraph (a) shall not constitute service by mail to which Rule 6(e) of the Federal Rule of Civil Procedure applies. Service shall be deemed complete on the date of e-mail transmission pursuant to subparagraph (a)." (Admin. Order 97-12 ¶ 6(b))

DISTRICT COURTS	
	• "Notwithstanding the provisions of Local Civil Rule 5.1(a), in any action subject to EFP, the assigned Judge may enter an order authorizing the filing of discovery requests, discovery responses, discovery materials or other matter subject to Local Civil Rule 5.1(a), but only to the degree and upon terms and conditions to which all of the parties (or non-parties producing such materials) have previously agreed in a stipulation submitted to the Court. In the absence of such an order, no party shall file any such materials except in the form of excerpts, quotations, or selected exhibits from such materials as part of motion papers, pleading or other filings with the Court which must refer to such excerpts, quotations, etc." (Admin. Order 97-12 ¶ 11) • "In connection with discovery or the filing of any material in an action subject to EFP, any person may apply by motion for an order prohibiting the electronic filing in the action of certain specifically-identified materials on the grounds that such materials are subject to copyright or other proprietary rights and that, notwithstanding the existence of such rights and the notice for which subparagraph 13(a) provides, electronic filing in the action is likely to result in substantial prejudice to those proprietary rights." (Admin. Order 97-12 ¶ 14) • "In connection with discovery or the filing of any material in an action subject to EFP, any person may apply by motion for an order prohibiting the electronic filing in the action of certain specifically-identified materials on the grounds that the electronic filing of such materials is subject to privacy interests and that electronic filing in the action is likely to prejudice those privacy interests." (Admin. Order 97-12 ¶ 15)
OHIO—NORTHERN	• "Documents to be filed electronically are to be reasonably broken into their separate component parts. By way of example, most filings include a foundation document (*e.g.*, motion) and other supporting items (*e.g.*, memorandum and exhibits). The foundation document as well as the supporting items will each be deemed a separate component of the filing, and each component shall be uploaded separately in the filing process. Any component having an electronic file size that exceeds 1.5 megabytes shall not be filed electronically. Where an individual component is not included in the electronic filing, the filer shall electronically file the prescribed Notice of Manual Filing in place of that component." (Pol. & Proc. Manual, ¶ 14) • "Electronically filed documents must meet the requirements of Fed. R. Civ. P. 10 (Form of Pleadings), LR 10.1 (General Format of Papers Presented for Filing), and LR 10.2 (Designation of District Judge and/or Magistrate Judge) as if they had been submitted on paper. Documents filed electronically are also subject to any page limitations set forth by Court order or by LR 7.1(g) (Length of Memoranda)." (Pol. & Proc. Manual, ¶ 8)

TOPICS/ISSUES: RECORD ON APPEAL

BANKRUPTCY COURTS	
ARIZONA	
CALIFORNIA—SOUTHERN	
GEORGIA—NORTHERN	
NEW YORK—SOUTHERN	
VIRGINIA—EASTERN	

DISTRICT COURTS	
MISSOURI—WESTERN	
NEW MEXICO (also bankruptcy court)	
NEW YORK—EASTERN	• **"Until such time as the United States Court of Appeals for the Second Circuit provides notice to the Chief Judge that public access to the E.D.N.Y. Public Web Site obviates or modifies any need for transmittal of the record on appeal of any action subject to EFP as to which a notice of appeal to that Court of Appeals has been filed, when required, the Clerk shall deliver to the Court of Appeals, at that Court's election, either a complete paper copy of the record on appeal or an electronic reproduction of that record on appeal as such record is reflected in the E.D.N.Y. Public Web Site." (Admin. Order 97-12 ¶ 16(b))**
OHIO—NORTHERN	



Item 12

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

Memorandum

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

FROM: Mary P. Squiers

RE: Progress Report on the Local Rules Project

DATE: December 5, 2000

This document is intended to update you on my progress to date with the Local Rules Project. As you may be aware, I began working on the Project July 1, 1999. I spent some time during the summer organizing my activities, generally, including my office space and computer, and also organizing my thoughts on how to proceed most effectively. What follows is a general background of the Local Rules Project, some of which may be familiar to you because I have provided it to you in earlier documentation. There is then a discussion of what I am currently doing.

I am very interested in any thoughts or comments you may have on how to proceed, particularly with respect to the actual content and format of the written report. I will be at the Standing Committee meeting in January. I can also be reached at my office by telephone (781.444.2876) or by email (marysquiers@mediaone.net).

General Background of the Local Rules Project

In 1986, the United States Judicial Conference authorized the Committee on Rules of Practice and Procedure to undertake a study of federal district court local rules regulating civil practice. The Local Rules Project became operational at Boston College Law School in the fall of 1986.

The study was intended to attempt: 1) a complete review of the local civil rules for legal errors or internal inconsistencies; 2) a study of the rules and rulemaking procedures to see how they work in practice; and 3) an examination of the relationship of local rules to the overall scheme of uniform federal rules. The results of this study were sent to the chief judges of the district courts in April 1989 from the Chairman of the Standing Committee, Joseph F. Weis, Jr., and entitled: "The Report of the Local Rules Project: Local Rules on Civil Practice." That Report consisted of several documents:

1. History and methodology.
2. Uniform numbering system.
3. Three different documents discussing the content of the local rules.
4. List of local rules for each court.

The Committee on Rules of Practice and Procedure then authorized a study of the local rules on appellate practice. The "Report on the Local Rules of Appellate Practice" was distributed to the chief judges of the circuit courts by the Chairman of the Advisory Committee on Appellate Rules, Kenneth F. Ripple, in April of 1991. The Committee on Rules of Practice and Procedure authorized a review of the local rules on criminal practice at its June 1994 meeting in Washington, D.C., which was completed and distributed to the district courts June 6, 1995. Both of these reports contained documents similar to those in the Report on Civil Practice.

The methodology for each of these Reports was similar. The first step was to collect each court's local rules and any other directives having the same function. After collection of the material, the next step was to enter each rule into a computerized database. The rules of each court were individually placed on an outline based on the respective Federal Rules. This resulted in a retrieval system organized by topic. It was then possible to sort and count the local rules according to each of the topics on the outline.

The rules were then analyzed. The analysis focused on an examination of the rules covering each particular topic on the outline. The rules were studied singly and in the aggregate to determine if they were appropriate subjects for local district court rulemaking. Specifically, the rules were analyzed using five broad questions:

5. Do the local rules repeat existing law?
6. Do the local rules conflict with existing law?
7. Should the local rules form the basis of a Model Local Rule for all jurisdictions to consider adopting?
8. Should the local rules remain subject to local variation?
9. Should the subject addressed by the local rules be considered by the Advisory Committee to become part of the Federal Rules?

This analysis formed the content of the treatises discussing the rules.

Each court was provided a list indicating where, in these treatises, each of the court's rules was discussed.

Methodology for the New Local Rules Project

The Local Rules Project will, again, evaluate the existing local rules of civil, criminal, and appellate practice with the goal of determining whether these rules comply with the Rules Enabling Act (28 U.S.C. §§2071 *et seq.*), whether the local rules highlight areas which may more appropriately be covered through the Federal Rules, and whether the local rules have successfully operated in particular fields which other courts may want to emulate. That process is underway. In addition, there was planned to be an examination of whether and how the circuit councils review existing and proposed local district court rules. This activity is complete. Lastly, there will be an examination of how the Civil Justice Reform Act has impacted local rule proliferation.

As I discussed at the last meeting of the Standing Committee in Washington, D.C., in June 2000, I communicated last spring with each of the Circuit Executives to determine the extent of their respective circuits' involvement in reviewing local rules. A brief discussion of the information I gathered follows. I discovered that all of the Circuit Councils have a review process to examine new local rules and amendments to existing rules. These procedures are generally the same among the circuits. The review begins in the Circuit Executive's office where the rule or amendment is originally provided by the district court. A staff person from that office makes an initial review of the rule, usually writing a memorandum explaining how the rule is or is not problematic. The rule and memorandum are then forwarded to another body for review. In some circuits, this material is provided to a committee of the Council (Third Circuit, Fifth Circuit, Eighth Circuit) and, in several other circuits, the material is provided to another body for its review (Fourth Circuit: Chief Judge of Circuit; Seventh Circuit: Original District Court; Ninth Circuit: Conference of District Judges). Either the reviewer's recommendation or the actual documentation concerning the rule or amendment is then transmitted to the Circuit Council for final action. This final action may be by paper ballot (*e.g.*, Second Circuit, Third Circuit) or vote at the actual meeting (*e.g.*, First Circuit, Seventh Circuit, Eighth Circuit). At any stage in this process, the reviewing person or entity may be communicating with the particular court to reach an accommodation of any rule or rule amendment that appears problematic. As one of the Circuit Executives stated: "The last thing we want to do is abrogate one of these rules forcefully." (Ninth Circuit.)

None of the circuit courts has any written standards for determining whether a local rule is inconsistent with, or duplicative of, existing law. Instead, each of the reviewing entities makes a judgment call on a case-by-case basis. When there may be disagreement over a particular rule, deference is given to the district court. (*E.g.*, Second Circuit, Third Circuit.) One Circuit Executive indicated that a rule would be upheld unless it was clearly inconsistent with a federal rule. (Seventh Circuit.)

There is significant opportunity to discuss potential problems during the review process. Such discussion may avert a negative vote at the Circuit Council. Each of the Circuit Executives was asked how frequently the Circuit Council abrogates local rules. Abrogation was clearly a rare event in all of the circuits.

The Circuit Executives were also asked whether the rules had been reviewed to determine if they were in compliance with the uniform numbering system prescribed by the Judicial Conference. (*See* Fed.R.Civ.P 83(a). Approximately seven courts had specifically reviewed the rules to determine compliance. *See e.g.,* First Circuit, Third Circuit, Tenth Circuit).

Current Activities

I am in the process of writing the report following the outline of the Federal Rules of Civil Procedure. I expect most, if not all, of the writing to be completed and provided to you at the next meeting of the Standing Committee. During the first study of local rules, this Committee noted that there was no uniform numbering system for federal district court local rules relating to civil practice. Writing the discussion in this order will help to refine the numbering system for all of the districts. Each court can see where the particular rule was discussed and why it was placed there.

As before, repetitious rules are being highlighted since such repetition is superfluous and may be counterproductive. Similarly, rules that are inconsistent with existing law are noted since the relevant Federal Rules and provisions in Title 28 mandate that there be no inconsistency in the local rules with existing law.

Any local rules that may more appropriately be incorporated into the Federal Rules rather than remain as local rules are also highlighted. Incorporation into the Federal Rules may be advisable for one of several reasons: 1) the particular topic covered by the local rule is critical to the procedural scheme of the Federal Rules; 2) the local rule affects the substantive outcome of a class of cases; 3) the local rule affects litigation costs; 4) the local rule affects the operation of the federal courts generally; or 5) the local rule relates in a significant way to the integrity of the Federal Rules as a unified, integrated set of rules.

There are many local rules that are useful in delineating certain procedures and practices in particular courts. These are being discussed so that other courts can consider whether they would be helpful in their respective jurisdictions. Lastly, model local rules that may be useful for all courts to consider adopting are being developed.

The local rules relating to a particular topic are set forth in endnotes corresponding to the place in the text where the rule is discussed. This is different from what was done previously; increased computer capability allows this to be possible. Incorporating the actual rule citations has the advantage of not only helping a district court find where its own rules are discussed in the text but also helping all district courts in reviewing the actual text of rules in other jurisdictions for possible incorporation into their own rules.

Item 13-14

AGENDA # _____
Winter 2000

Long-Range Planning (Action)

Committees are asked to take the following steps at the Winter 2000 meetings:

1. **Review and update, as needed, the key strategic issues identified by the committee in the report, *Strategic Planning Issues of the Committees of the Judicial Conference of the United States*** (February 2000). The report lists crosscutting strategic issues followed by the individual committee lists of planning issues and courses of action for dealing with them. Determine whether there are new issues of importance or any issues needed. Also, determine if coordination with other committees is needed to achieve successful results.

   The committee's strategic planning issues are included as Attachment 1.

   Revisions to the strategic issues list should be forwarded to the Office of Management Coordination and Planning by February 1, 2001 for incorporation in a revised report of committee strategic issues.

2. **Discuss the September 2000 long-range planning meeting report (see Attachment 2).**

Attachment 1

Committee Strategic Issues and Goals from *Strategic Planning Issues of the Committees of the Judicial Conference of the United States* (February 2000)

Committee on Rules of Practice and Procedure

Honorable Anthony J. Scirica, Chair

Strategic Issues

1. **Making Effective Use of Technology and Information**
2. **Monitoring, Analyzing, and Addressing the Proliferation of Local Rules**
3. **Uphold the Integrity of the Rules Process**

Strategic Issue: Making Effective Use of Technology and Information

The courts are moving rapidly to expand the use of technology by the bench and bar.

Strategic Objectives

- Ensure that the rules of practice and procedure do not unintentionally impede the increased use of technology by the courts.

Initiatives or Course of Action

- Formed a technology subcommittee with representatives from each advisory committee.
- Published for public comment proposed amendments that would allow electronic service with consent of the parties.
- Participate in the Committee on Court Administration and Case Management' s ad hoc committee discussions and meetings on privacy.
- Closely monitor the CM/ECF project.

Strategic Issue: Monitoring, Analyzing, and Addressing the Proliferation of Local Rules

A comprehensive review of the local rules of court was last made in 1986 in accordance with a Congressional mandate. The local rules were reviewed for legal error, internal inconsistency, and consistency with federal law and national rules. The report identified particular local rules that made sense for national adoption. The project resulted in many changes to the national rules and the implementation of a uniform numbering system for local rules.

The Standing Committee believes it is time for another comprehensive review of local rules to assess their consistency with national rules and statutes and to suggest changes to the courts, when appropriate. Many amendments have been made to local rules since the last review. Moreover, case law on local rules has substantially increased. In addition, local rules have been revised to account for changes prompted by the Civil Justice Reform Act. As courts struggle to develop alternative dispute resolution programs and incorporate increased reliance on electronic filing, more and more local rules and internal operating procedures are being promulgated. Finally, the uniform numbering system authorized by the Judicial Conference has been in place for approximately two years. A review of local rules would show the extent of its adoption in the courts. It would also provide hard data on the overall increase in the number of local rules since 1990.

The bar routinely complains about the growing number of local rules. Local rule proliferation has now become a primary concern of the Litigation Section of the ABA. In the past, Congress has listened to the bar's complaints and called for reform — including the 1986 local rules project initiated by Congress. The rules committees are statutorily responsible for monitoring the operation and effect of the rules. The proposed project is consistent with the committees' statutory obligations. It will provide the courts with a useful service and may dissuade any direct Congressional interference.

Strategic Objectives

- The Rules Committee will review all local rules and identify possible new national rules.

Initiatives or Course of Action

- A law professor has been selected to gather and study all local rules.
- The project is expected to be completed in 2 or 3 years.

Strategic Issue: Uphold the Integrity of the Rules Process

The current rulemaking process carefully balances the authority and responsibility of courts to enact procedures to govern cases it must decide with the authority and responsibility of Congress to enact substantive law. In recent years Congress has become increasingly involved in the rulemaking process.

Strategic Objective

- Ensure the rulemaking process remains within the Third Branch.

Initiatives or Course of Action

- Work closely with the Office of Legislative Affairs to educate members and staff of Congress about the rulemaking process.
- Diligently monitor legislation to quickly identify any attempts to directly or indirectly amend the Federal Rules of Practice and Procedure.
- Respond to specific bills that would amend the rules.

Attachment 2

Report of the Chairs' Long-Range Planning Meeting September 18, 2000

Judicial Conference Committee Chairs Long-Range Planning Meeting

September 18, 2000

Report

Administrative Office of the United States Courts
Office of Management Coordination and Planning

SUMMARY REPORT
SEPTEMBER 2000 LONG-RANGE PLANNING MEETING

Judicial Conference committee chairs representing 13 committees met on September 18, 2000 in Washington, D.C. The meeting was led by Judge Ralph G. Thompson, a member of the Judicial Conference's Executive Committee who is coordinating the long-range planning process for the Executive Committee. Also in attendance were Administrative Office Associate Director Clarence A. Lee, and Deputy Associate Director, 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 Appendix A.

Adoption of the Statement of Purpose

After the last meeting, a draft statement of purpose of the planning meetings was developed and circulated to the committee chairs for comment. The revised draft was reported to the Executive Committee by Judge Thompson in advance of the planning meeting. Earlier in the day, the Executive Committee gave its tentative approval to the statement pending final changes by the chairs.

The chairs unanimously approved the draft statement of purpose, which is included as Appendix B.

Consideration of the Growth of Non-Article III Judgeships in the District Courts

Judge Harvey E. Schlesinger, chair of the Committee on the Administration of the Magistrate Judges System, briefed the group on workload trends and growth in the number of full-time magistrate judges. In the last ten years, as the caseload in the district courts grew, and the number of district judgeships remained the same, full-time magistrate judge positions have increased 35%. The Committee continues to receive and consider requests from districts for additional magistrate judge positions. Magistrate judges are handling more criminal pretrial matters, and the number of civil cases disposed by magistrate judges is growing (although it remains a small portion of

total civil cases). Judge Schlesinger illustrated his discussion with several charts depicting the work of magistrate judges, included as Appendix C.

The chairs discussed various aspects of this change and its implications for the present and the future. The group determined that a statement of issues would be referred to the Executive Committee. The group will ask the Executive Committee to consider whether to assign this issue to an appropriate committee (or committees) for further exploration. Cathy McCarthy was asked to develop an issue statement in coordination with Judge Schlesinger and other committee chairs concerned with the topic.

Discussion of the Decline in the Number of Trials

Deputy Associate Director Cathy McCarthy presented several charts illustrating historical trends and percentages in the decline of the numbers of civil and criminal trials in the district courts (see Appendix D). In 1999, the U.S. District Courts completed the fewest number of trials in 30 years, while filings were two and one-half times higher than in 1970. Civil trials have been decreasing since 1982, and criminal trials have been decreasing since 1992. Declines in trials have occurred in all categories of cases and in both jury and nonjury trials. Most importantly, the proportion of cases terminated by trial has been declining.

The participants agreed this is a significant strategic issue for the judiciary. They identified and discussed possible contributing factors to the decline of trials. Sentencing Guidelines were seen as the major factor bringing about more guilty pleas and, as a consequence, fewer trials. For civil cases, increases in alternative dispute resolution mechanisms and summary judgments were discussed as contributing factors.

The chairs suggested further research and exploration of this topic, including examining the trends regionally and at the state court level. The chairs will bring this topic to their respective committees for discussion, and the planning group will discuss this issue in more depth at a future meeting.

Study of Library Services and Computer Assisted Legal Research

Judge Edward W. Nottingham, chair of the Committee on Automation and Technology, discussed activities of the committee over the past six years to assess and improve the management of the lawbooks and libraries program with an eye toward determining future needs and projected costs. Committee deliberations have raised questions about whether lawbooks and computer assisted legal research (CALR) provide duplicate information in some respects and, therefore, whether lawbooks spending should be decreasing as more extensive CALR services become common in the judiciary. One of the committee's major initiatives to encourage the use of electronic libraries was achieved with the development and implementation of the Virtual Law Library, which allows every judge and employee desktop access to many legal and general research sites (including Westlaw and Lexis-Nexis) via the J-Net.

As directed by the Executive Committee, a coordinated effort by the Committees on Automation and Technology and Security and Facilities is currently underway to study the use of lawbooks and libraries. As part of this study, a survey was sent to all judges, law clerks, staff attorneys and pro se law clerks. A system that tracks lawbooks purchases, the Integrated Library System, is now providing detailed expenditure and inventory information that will be compared with the survey results in developing recommendations. A report will be available by June 2001.

Strategic Planning Issues of the Committee on Court Administration and Case Management

Judge D. Brock Hornby, the outgoing chair of the Court Administration and Case Management Committee, reported on several long-range planning items for the committee:

1. Videoconferencing and the consequences on trials, justice, and administration of justice.
2. Security and privacy of electronic case files (ECF).
3. Rules-related issues of ECF (in coordination with the Rules Committee).
4. Impact of ECF in clerks offices.
5. Continuing review of data collection in accordance with Recommendation 73 of the *Long Range Plan for the Federal Courts* and the additional data needs brought about by ECF.

Report on Strategic Studies by the Committee on Security and Facilities

Judge Jane R. Roth, chair of the Security and Facilities Committee, discussed the comprehensive studies on the judiciary's space and facilities and court security programs.

The space and facilities study, completed in May 2000, contained recommendations in four primary areas: planning for courthouses; sharing of courtrooms; funding courthouses; and designing, constructing, and managing court facilities. The committee is currently reviewing the recommendations. Judge Roth noted that staffing and technological changes can affect space. Input from other committees on future staffing and work process changes can be useful in developing long-range facilities planning assumptions.

Judge Roth asked the chairs if they had any suggestions regarding the comprehensive assessment of the judiciary's court security program, which is underway. The study involves a review and assessment of the effectiveness and efficiency of the current security program standards, policies, and procedures. The study's recommendations are expected to address contractual arrangements for building security guards and to explore other possible contractual security arrangements.

Change in Executive Committee Coordinator

Judge Thompson is leaving the Executive Committee and a new planning coordinator will be named in the near future. The group expressed its appreciation to Judge Thompson for his efforts in coordinating the planning process.

Appendix A: Participants in the September 2000 Long-Range Planning Meeting

Committee Representatives	Administrative Office Staff
Planning Coordinator Hon. Ralph G. Thompson	Clarence A. Lee, Jr. Cathy A. McCarthy William M. Lucianovic
Executive Committee Hon. Ralph G. Thompson	Helen Bornstein
Committee on the Administrative Office Hon. Lourdes G. Baird, Chair	Cathy McCarthy
Committee on Automation and Technology Hon. Edward W. Nottingham, Chair Hon. Edwin L. Nelson	Mel Bryson Terry Cain
Committee on the Administration of the Bankruptcy System Hon. Michael J. Melloy, Chair	Francis F. Szczebak
Committee on the Budget Hon. John G. Heyburn II, Chair Hon. William G. Young	George H. Schafer Bruce Johnson
Committee on Court Administration and Case Management Hon. D. Brock Hornby, Chair	Noel J. Augustyn Abel J. Mattos Mark S. Miskovsky
Committee on Criminal Law Hon. Emmet G. Sullivan	John M. Hughes Kim Whatley

Committee on Defender Services Hon. Robin J. Cauthron, Chair	Theodore J. Lidz Steven G. Asin Robert Burke
Committee on Federal-State Jurisdiction Hon. Walter K. Stapleton, Chair	Mark W. Braswell
Committee on the Judicial Branch Hon. David R. Hansen, Chair	Steven M. Tevlowitz
Committee on Judicial Resources Hon. Dennis G. Jacobs, Chair	Alton C. Ressler Charlotte G. Peddicord H. Allen Brown David L. Cook
Committee on the Administration of the Magistrate Judges System Hon. Harvey E. Schlesinger, Chair	Thomas Hnatowski Charles E. Six
Committee on Rules of Practice and Procedure Hon. Anthony J. Scirica, Chair	Peter G. McCabe John K. Rabiej
Committee on Security and Facilities Hon. Jane R. Roth, Chair	Ross Eisenman Linda Holz
	Other Administrative Office Staff: John Hehman Robert Lowney David Williams Steven R. Schlesinger Jeffrey A. Hennemuth Karl Branting

Long-Range Planning Meeting

The purpose of the meetings of the chairs of Judicial Conference committees involved in long-range planning is to (a) assist in promoting long-range planning by committees and (b) provide a forum for information exchange and cross-committee communication on strategic issues facing the judiciary. The group will:

- Identify and discuss strategic issues and trends affecting the judiciary's mission, core values, programs, and resources.
- Share information about the respective committees' substantive planning efforts, long-range budget estimates, and strategic initiatives. (Chairs will brief their committees on the discussions of the planning group.)
- Confer on the likely effects of major issues and initiatives and perform a consultative role on judiciary-wide and cross-committee issues, concerns, priorities, and needs.
- Develop guidelines and approaches for committee planning activities.
- Identify topics for research, study, and analysis.
- Respond to requests from the Executive Committee on planning matters.

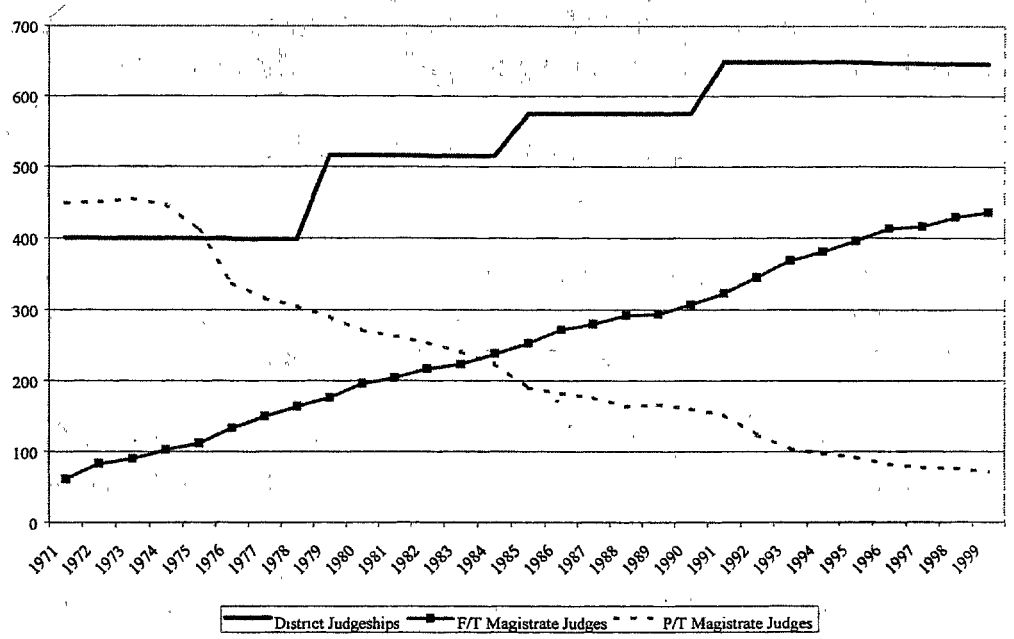
The chairs will meet semiannually in connection with their attendance at the Judicial Conference.

Approved September 2000

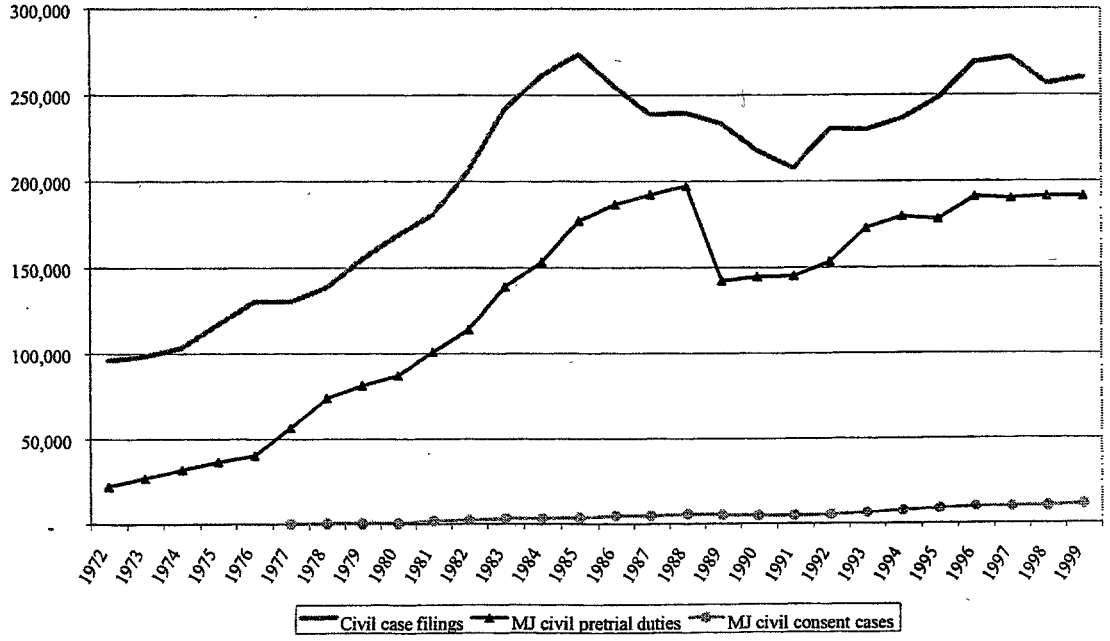
Appendix C: Growth of Non-Article III Judgeships in the District Courts

Judge Harvey E. Schlesinger, Chair
Committee on the Administration of the Magistrate Judges System

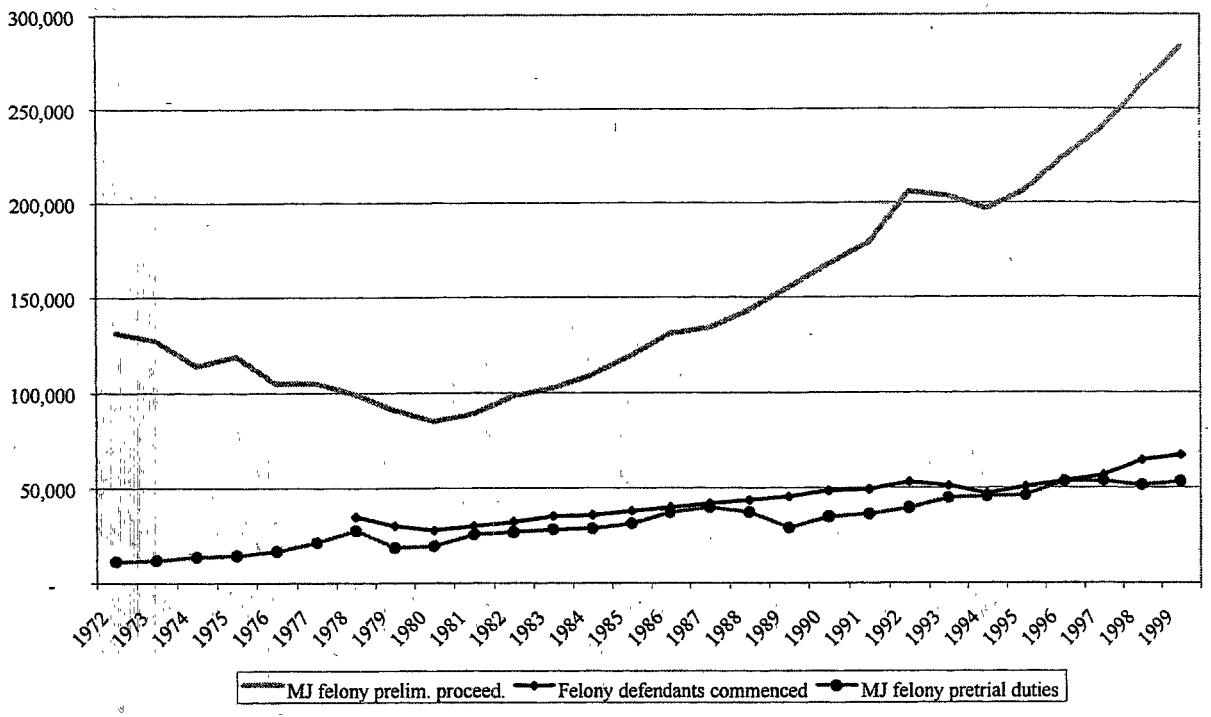
Growth in District Judgeships and Magistrate Judgeships



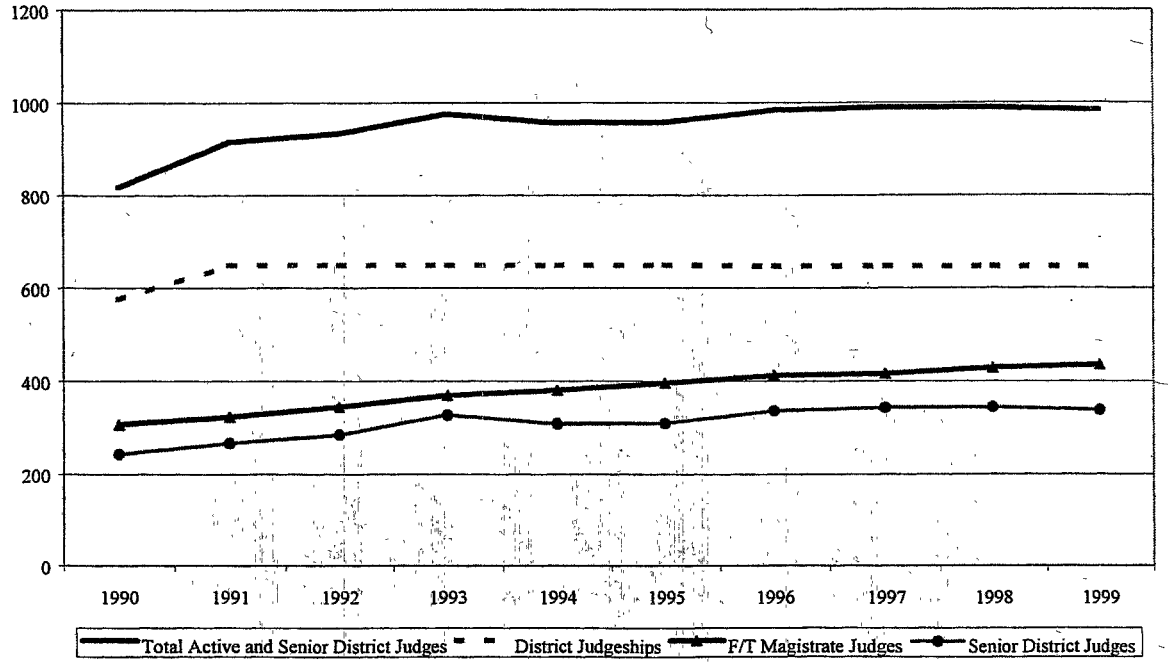
Civil Filings and Magistrate Judge Duties in Civil Cases
1972-1999



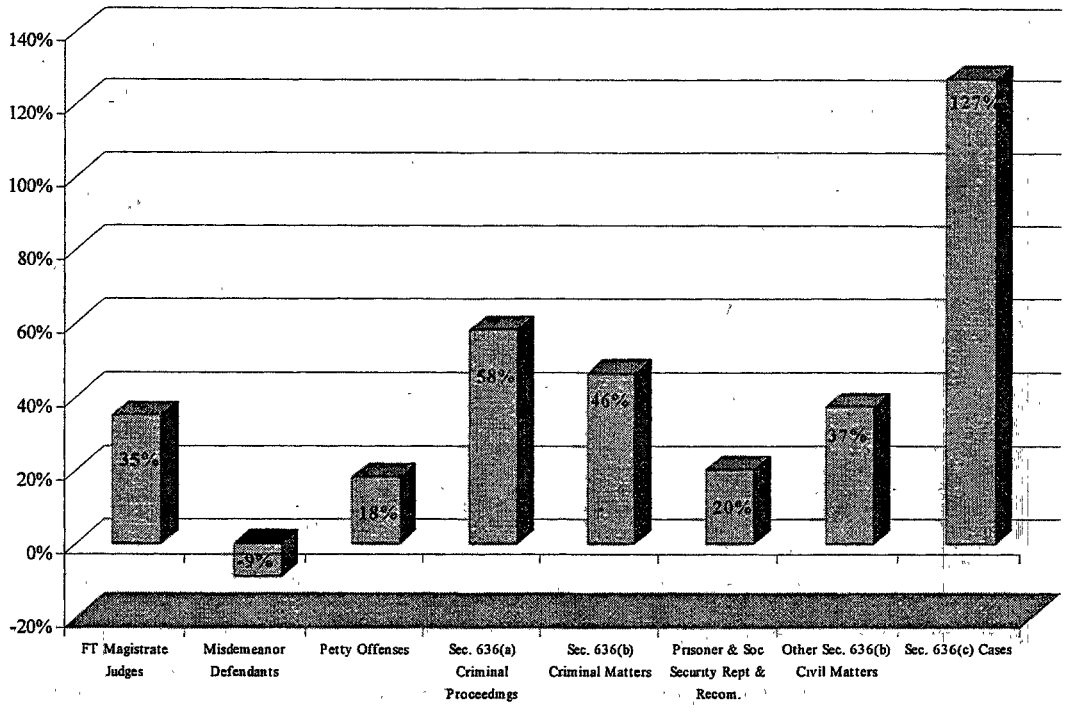
Felony Filings and Magistrate Judge Duties in Felony Cases
1972-1999



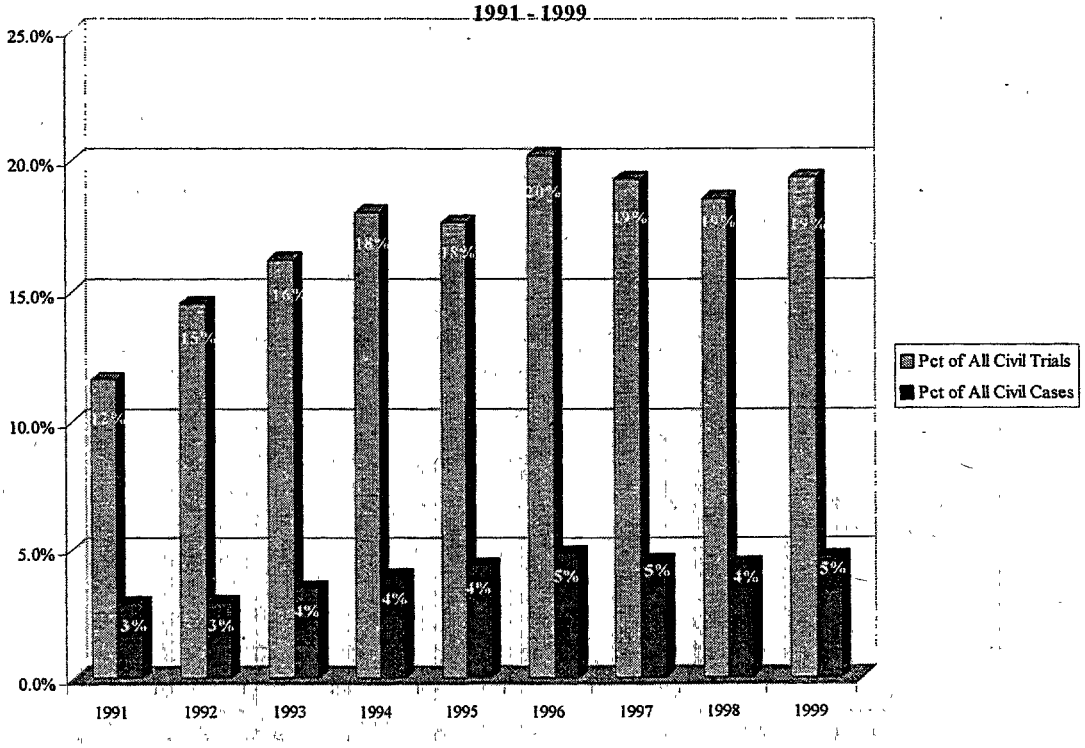
District Court Judge Resources
1990 - 1999



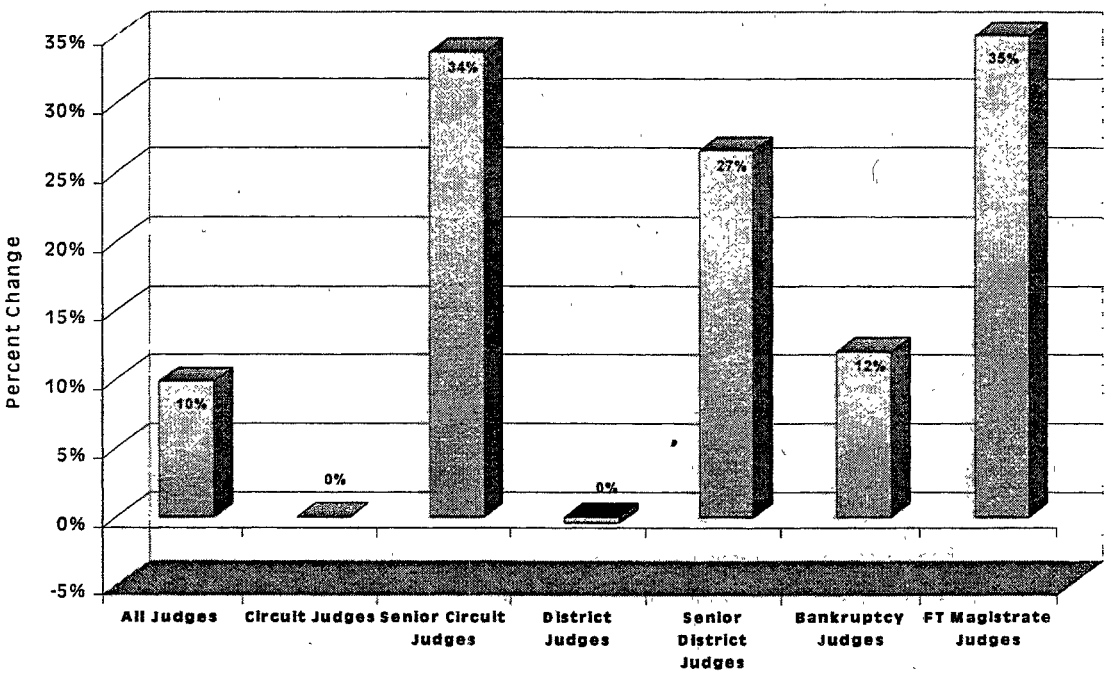
Change in Magistrate Judge Workload
FY 1991-1999



Magistrate Judge Consensual Cases
as Percent of All District Court Civil Cases and Trials
1991 - 1999



Change in Total Authorized Judgeships and Senior Judges
1991-1999



Appendix D: Discussion Materials on the Decline in the Number of Trials

Contents:

Office of Management Coordination and Planning

September 2000 Long-Range Planning Meeting

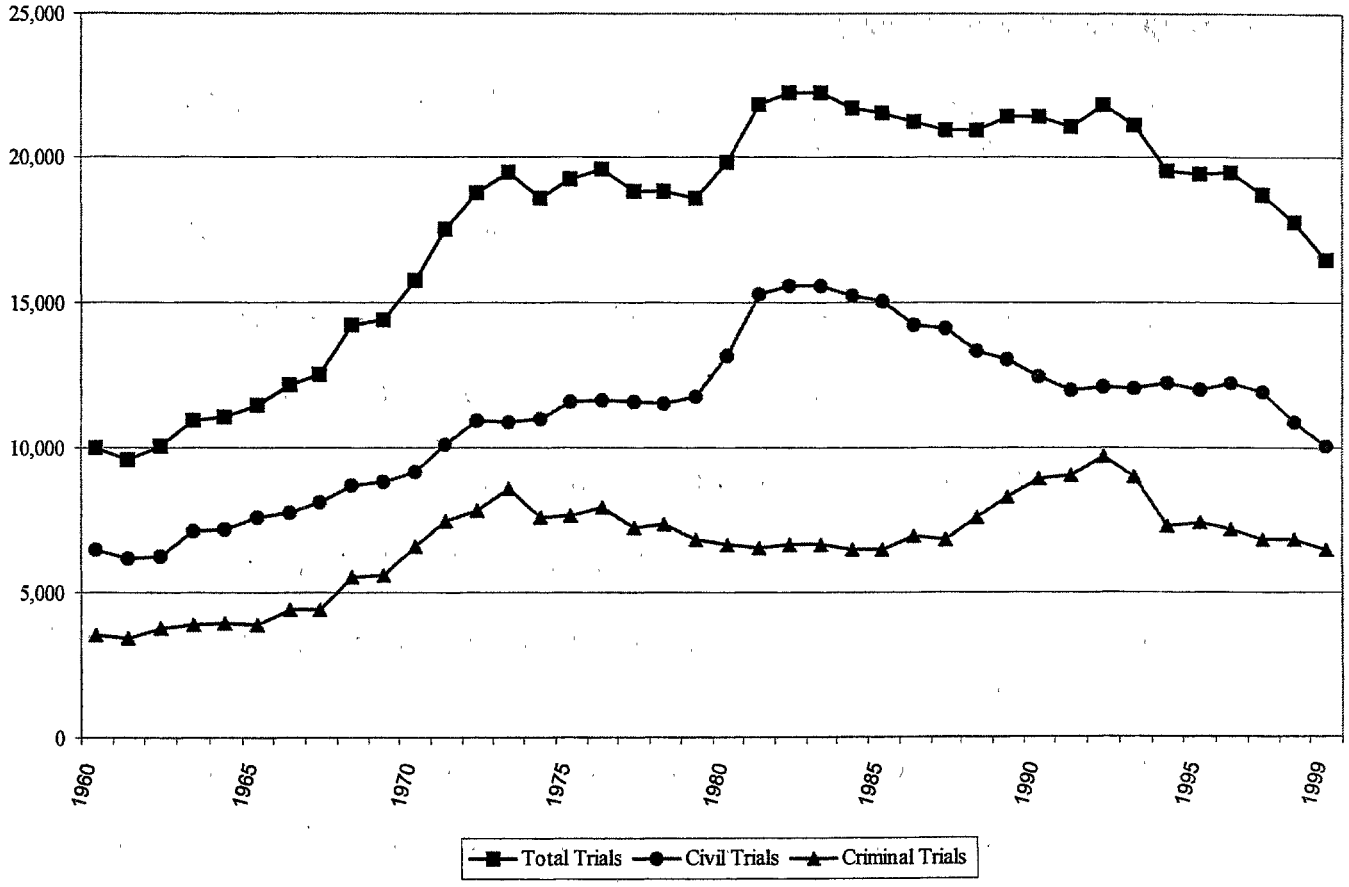
Strategic Issue: Decline in District Court Trials

The numbers of trials conducted by the U.S. District Courts have been declining for many years. The following pages present an analysis of this issue. The decline may have strategic implications for the judiciary.

- Does the judiciary or the public need to be concerned about the decline in numbers of trials?
- Will the public's trust in the judicial system erode as trials decline?
- Does an emphasis on settlements threaten Article III independence?
- Will decline of trials lead to a decline in the development of the law?
- Is the role of a federal judge changing?
- What are the new demands on a district judge's time?
- Are the various forms of alternative dispute resolution changing the judicial branch's mission?
- If trials continue to decline, will the judiciary need fewer courtrooms?
- Are there staffing, space, or other resource implications of fewer trials?
- What are the effects on the defender services program?
- Others?

Analysis of the Decline in District Court Trials

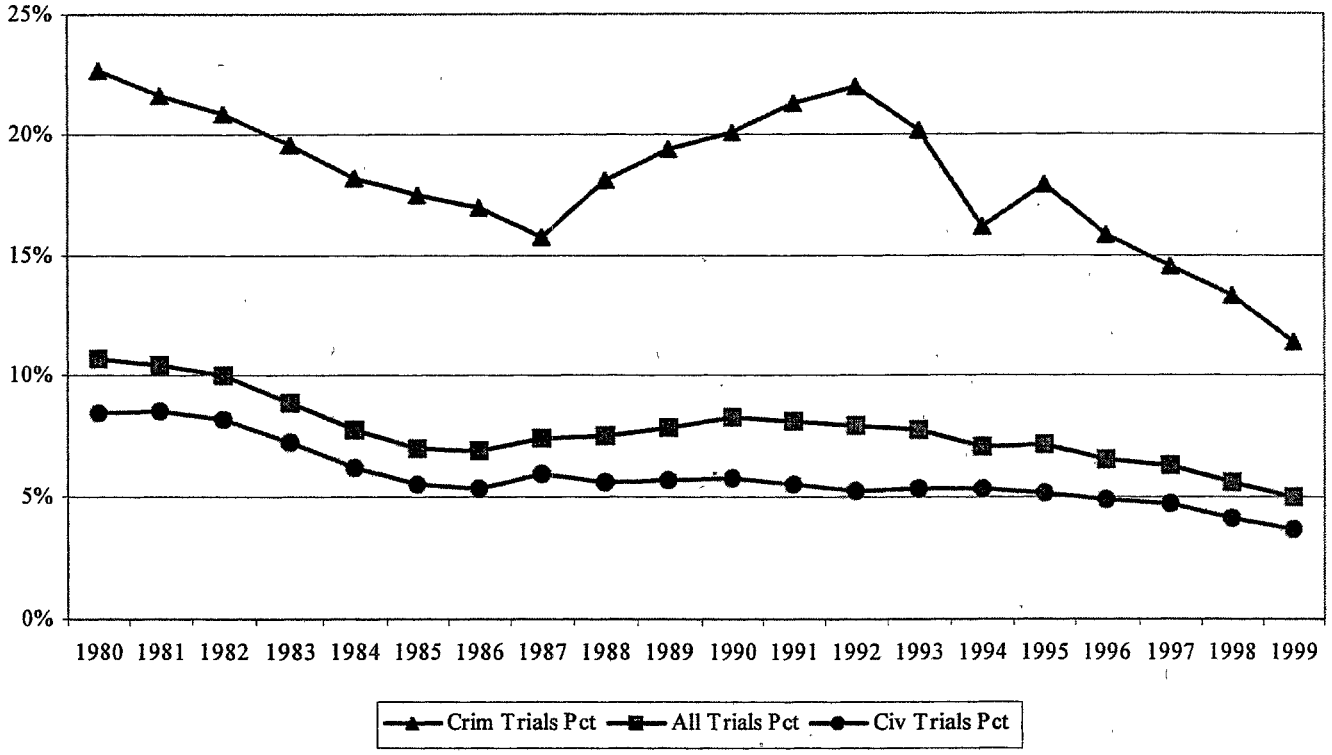
In 1999, the U.S. District Courts completed the fewest number of trials in 30 years, while filings were two and one-half times higher than in 1970.



Civil trials have been decreasing since 1982, and criminal trials have been decreasing since 1992.

- Jury and nonjury trials are declining.
- Declines in trials have occurred in all categories of cases.
- Declines in trials are national in scope, reflected in an overwhelming number of districts, although there are some exceptions.

The proportion of cases terminated by trial has been declining. The graph below illustrates the decline.



In 1980, the percentage of all cases terminated by trial was 11%. By 1999, this percentage had shrunk to 5%.

- The proportion of civil cases terminated by trial has been declining for many years. In 1980, this proportion was 9%, but it had declined to about 4% by 1999.

- The proportion of criminal cases terminated by trial was 22% in 1992, but it has plummeted to 11% over the last seven years.

Decline in Civil Trials

While civil caseloads have increased, the actual number of civil trials and the percentage of civil cases going to trial have been decreasing for the past 18 years.

Civil Cases	1999	1982	1982 to 1999
Total Filings	260,271	206,193	+ 26%
Total Trials by District Judges	8,532	10,074	- 15%
Total Jury Trials by District Judges	3,795	4,679	- 19%
Total Trials by Magistrate Judges	1,498	825	+ 67
Total Jury Trials by Magistrate Judges	850	262	+ 224%
Percentage of Cases Terminated by Trial	4%	8%	- 50%
Average Terminations per Judgeship*	422	368	+ 15%
Average Trials per Judgeship**	13	29	- 55%
Average Trials per FT Magistrate Judge Position	3.4	3.8	- 10%
Average District Judge Jury Trial Length (Hours)	23	19	+ 21%

What Factors May Have Contributed to the Decline in Civil Trials?

- Civil Rules of Practice and Procedure
- Views on Settlement as a Preferred Outcome
- Judicial Education Programs
- Case Management Practices
- ADR Programs
- Twice as Many Magistrate Judges
- Growing Workloads
- Effects of Speedy Trial Act
- Interest in Keeping Number of Article III Judgeships Down
- Delays
- Financial Incentives for Litigants
- Financial Incentives for Attorneys
- Attitudes Toward and Misconceptions About Juries
- Possibly More Summary Judgments Rendered
- Are There Others?

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* "Terminations per judgeship" counts cases terminated by all Article III and magistrate judges divided by the number of authorized Article III judgeships only.

** "Average trials per judgeship" numbers include work done by active and senior Article III judges. They do not include work by magistrate judges.

Decline in Criminal Trials

While criminal filings have increased, both the number and percentage of criminal trials have declined since 1992. While trials have decreased, hours spent in sentencing hearings have increased.

Criminal Cases	1999	1992	1992 to 1999
Total Filings	59,923	48,366	+ 24%
Total Defendants	73,481	59,644	+ 23%
Total Trials	6,461	9,704	- 33%
Total Jury Trials	3,686	5,740	- 36%
Percentage of All Defendants Pleading Guilty	83%	74%	+ 12%
Percentage of Defendants Completing Trial	6%	12%	- 51%
Conviction Rate – All Defendants	88%	84%	+ 5%
Average Defendants per Case	1.4	1.4	no change
Percentage of Cases Terminated by Trial	11%	22%	- 50%
Average Terminations per Judgeship	88	68	+ 29%
Average Trials per Judgeship***	10	15	- 33%
Average Jury Trial Length (Hours)	23	22	+ 5%

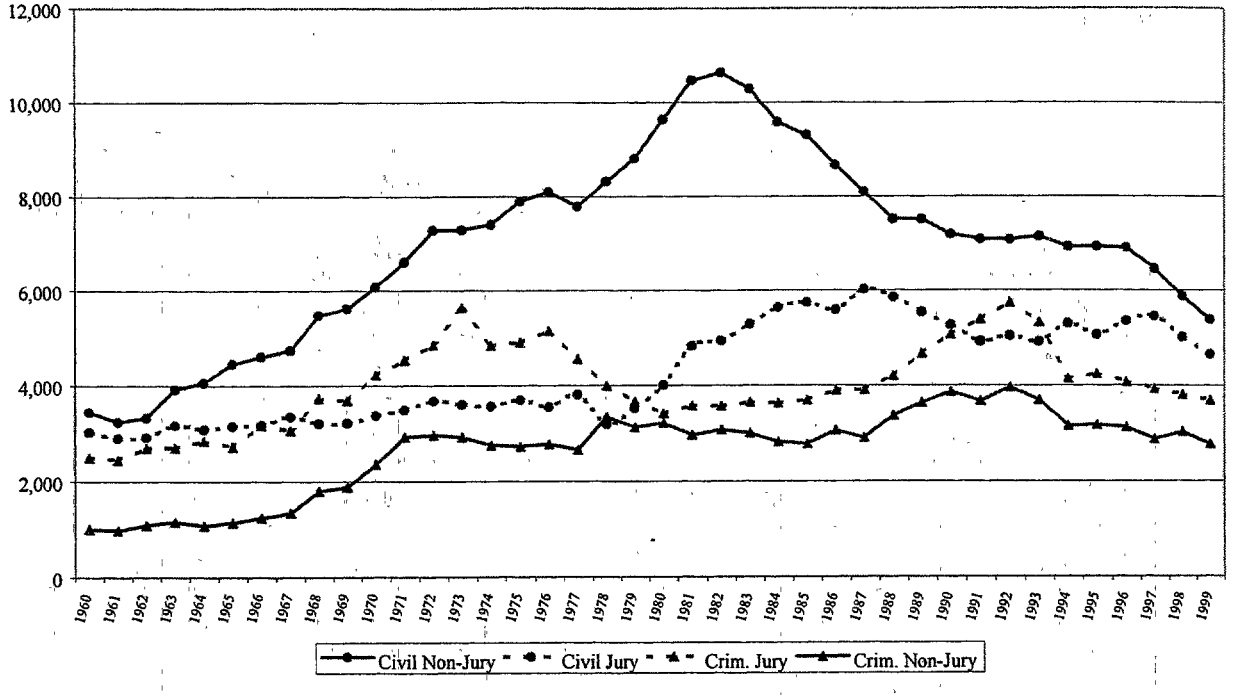
What Factors May Have Contributed to the Decline in Criminal Trials?

- Sentencing Guidelines
- Rise in Guilty Pleas
- Mandatory Minimum Sentences
- Growing Workloads
- Prosecutorial Strategies
- Are There Others?

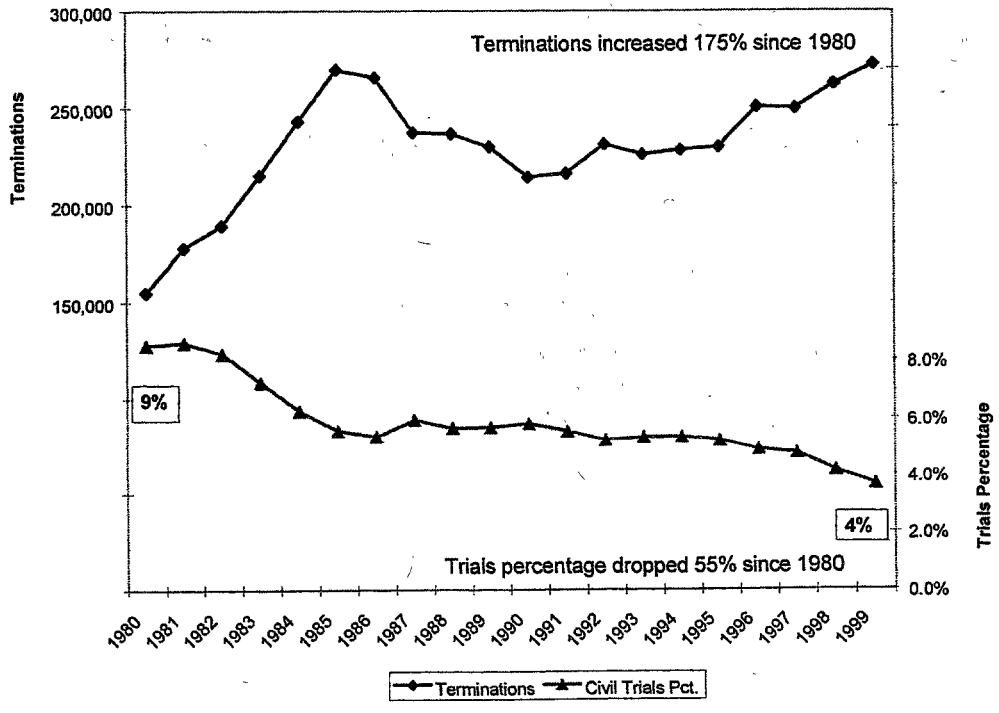
Office of Management Coordination and Planning
September 2000

*** "Average trials per judgeship" numbers include work done by active and senior Article III judges.

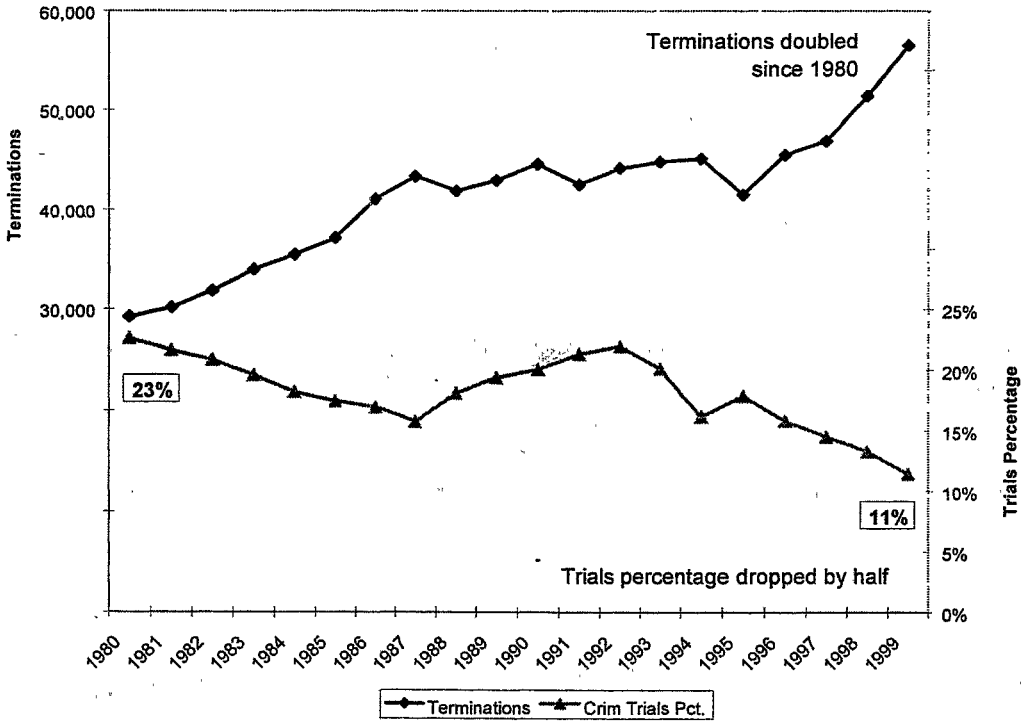
U.S. District Courts
Jury and Non-Jury Trials



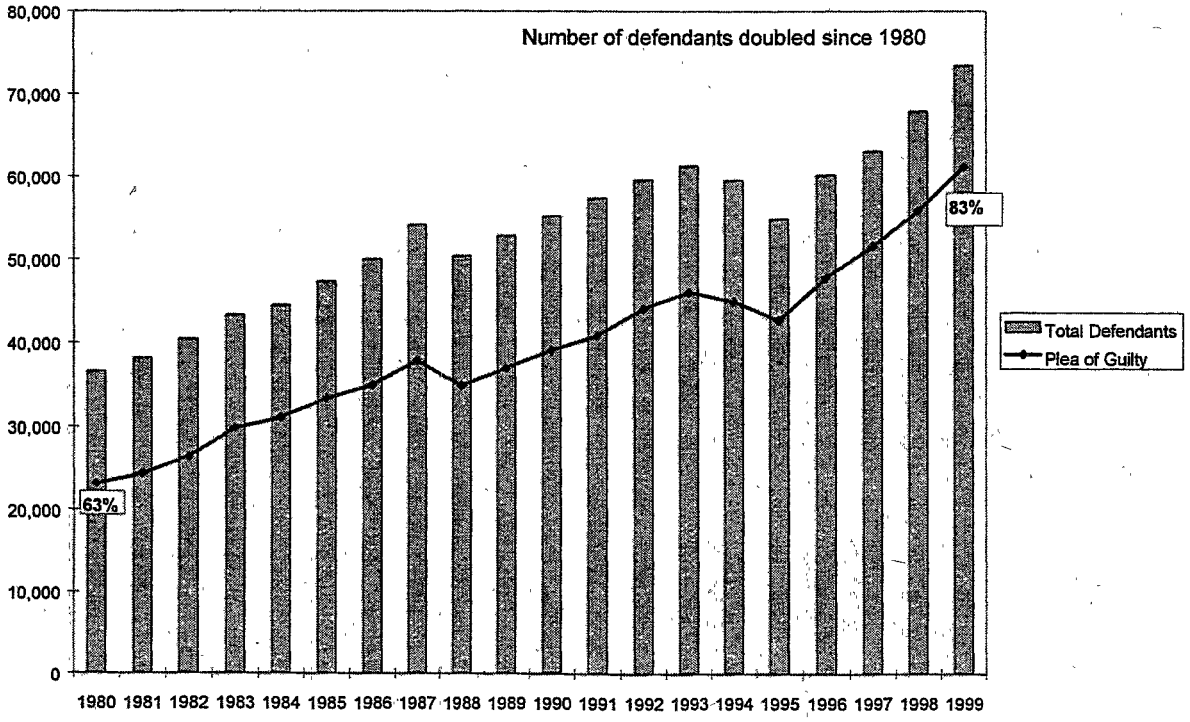
Civil Workload Increased While the Percentage Terminated by Trial Decreased



Criminal Workload Doubled While the Percentage Terminated by Trial Decreased



Increasing Number of Defendants and Rate of Guilty Pleas



Strategic Issue: Decline in the Number of Trials

Selections From the Literature

Federal Rules of Civil Procedure

16(a): In any action, the court may in its discretion direct the attorney for the parties and any unrepresented parties to appear before it for a conference or conferences before trial for such purposes as ...(5) facilitating the settlement of the case.

16(c): At any conference under this rule consideration may be given, and the court may take appropriate action, with respect to ...(9) settlement and the use of special procedures to assist in resolving the dispute when authorized by statute or local rule....

Jonathan T. Molot, **How Changes in the Legal Profession Reflect Changes in Civil Procedure**, 84 Va. L. Rev. 955 (September 1998)

While twenty percent of federal cases were tried when Federal Rules were first adopted in 1938, fifteen percent were tried just two years later in 1940, and only four percent were tried in 1990 after decades of experience under the Federal Rules and subsequent amendments that liberalized discovery. True, the dramatic rise in settlements and corresponding decline in civil trials, though not intended by the Rules drafters, is not inherently a problem.... But the Federal Rules lead parties to settle not simply because opposing counsel more often agree on the likely outcome of trial, but because litigation is unduly expensive.

Kent D. Syverud, **ADR and the Decline of the American Civil Jury**, 44UCLA L. Rev. 1935 (August 1997)

There are three main causes for the decline in the civil jury trial, and these operate incidentally to promote ADR. First and foremost is the inordinate expense and delay of the American civil process. Our civil process before and during trial, in state and federal courts, is a masterpiece of complexity....

The second cause...is the commodification of civil claims through the twin institutions of liability insurance and contingent fee. In a time when the personal injury case predominates among jury trials, it is insurance companies and plaintiff's attorneys who largely call the shots in decisions to try the case....

Third and finally, the civil jury's decline is characterized by the almost universal selection of businesses and governments to opt out of fact finding by a civil jury when they are civil plaintiffs....[T]here is a perception...that there is less predictability, and greater variance, in the results...than by other method. (at 1942 to 1943)

Marc Galanter and Mia Cahill, **"Most Cases Settle": Judicial Promotion and Regulation of Settlements**, 46 Stan. L. Rev. 1339 (July 1994)

There has been a tremendous push in recent years to encourage settlement with an eye to lowering the demands on courts. (at 1364)

[S]ettlement is not an "alternative" process, separate from adjudication, but is intimately and inseparably entwined with it. They are two faces of a single process of strategic maneuvering and bargaining in the (actual or threatened) presence of the adjudicative forum. (at 1389)

Patricia M. Wald, **ADR and the Courts: An Update**, 46 Duke L. J. 1445 (April 1997)

The lines between ADR programs – even court-annexed ones – and traditional court procedures are growing ever more blurred, as courts themselves incorporate ADR techniques into their operations in furtherance of what increasingly seems to be our preeminent goal: letting parties settle their disputes for themselves. (at 1451)

William G. Young, **Ciulla v. Rigny**, No. 98-10141-WGY, (D. Mass. March 8, 2000)

Levels of civil and criminal litigation in the federal courts continue to rise....The simple fact is that, with ever more work to do in the federal courts, jury trials today are marginalized in both significance and frequency. (at 14)

It is not too much to say that the greatest threat to America's vaunted judicial independence comes – not from any external force – but internally, from the judiciary's willingness to allow or jury system to melt away. (at 16)

Patricia M. Wald, **Summary Judgement at Sixty**, 76 Tex. L. Rev. 1897 (June 1998)

Federal jurisprudence is largely the product of summary judgement in civil cases. This probably comes as no surprise the most practitioners and judges, but in truth this state of affairs has crept up on us. (at 1897)

...[T]he isolated and contained case-ending mechanism of the 1940s has become a dominant force in all areas of our civil law in the 1990s. (at 1941)

While judges appear to be requiring plaintiffs to plead facts with ever greater detail to survive motions to dismiss, they also seem reluctant to find genuine issues of material fact requiring a trial...or requiring a higher standard of proof...that a fact is in dispute than had been traditionally thought necessary....In short, summary judgement seems to have become a sort of early neutral evaluator – the major difference being that judgement is not advisory, but for real. (at 1942)

Judith Resnick, **Trial as Error, Jurisdiction as Inquiry: Transforming the Meaning of Article III**, 113 Harv. L. Rev. 924 (February 2000)

[With regard to trials.]

In the fall of 1994, the Los Angeles Federal Bar Association held a meeting for some hundred lawyers to discuss then-recent changes to the rules that govern the process of litigation in the federal court system. At that time, of one hundred civil cases commenced in federal court, about eight started trial; the remaining ninety-two percent ended in other ways. Introducing the program, a federal district judge stated that he regarded the eight percent trial rate as evidence of "lawyers' failure." (at 925)

Today's rule [of civil procedure] brims with details about what judges are supposed to do, including establishing "early and continuing control," organizing discovery, "facilitating the settlement of the case," and referring parties in appropriate instances to "special procedures" (such as arbitration of mediation) "to assist in resolving the dispute." (at 937)

Federal judges may press for settlement because they themselves doubt their own capacities to find information sufficient to call "fact" and are painfully aware of the plasticity of the "law."...Judges have, through their practices and doctrine, not only made plain the many facets of the role of a judge (judge as settler, judge as negotiator, judge as manager, judge as dealmaker) but also have so deconstructed judging that it is at risk of being undermined as a politically or legally viable concept. (at 1003)

Steven Flanders, **Case Management and Court Management in the United States District Courts**, Federal Judicial Center, 1977

Judicial participation in settlement produces mixed results. A limited role may be valuable, but data suggest that a large expenditure of judicial time is fruitless. (at 37)

If a [judge] can raise the possibility of settlement early, before much money has been spent, he may encourage negotiation that would not take place otherwise....The danger...is that judges may be consumed by participation in the work of lawyers in *every* [original emphasis] case, spending unnecessary time on cases that ultimately settle and would settle without their intervention. (at 39)

James R. Allison, **A Rebuttal: 'Federal Guidelines Sentencing'**, 26-May Colo. Law. 71 (May 1997)

Sentencing predictability, coupled with the fact that criminal cases are thoroughly screened prior to indictments, is just as likely to result in fewer trials as any perceived 'rigidity and harshness" of the sentencing guidelines.

Changes in the Percentage of Defendants Convicted in U.S. District Courts

Background

During the course of compiling data for *Judicial Facts and Figures*, a compilation of summary statistics on the caseload of federal courts, staff of ASO noted what appeared to be a significant change in the percentage of defendants convicted in the U.S. district courts in the past ten years. As shown in Table 1, the percentage of defendants convicted rose from 81 percent to 88 percent between 1988 and 1997. The most significant change occurred over the last four years when the percentage of defendants convicted rose from 83 to 88 percent, moving at a much faster rate than prior years. By comparison, during the previous 10-year period from 1978-1988, the percentage of defendants convicted rose only three percentage points, from 78 to 81 percent. There may be many reasons why this change occurred, particularly in the last several years. In this brief paper, we attempt to provide a summary of the caseload changes and changes in the nature of the disposition of charges that may have had an impact on this percentage. There are

Table 1
Percentage of Criminal Defendants Not Convicted and Convicted

Fiscal Year	Total Defendants	Not Convicted		Convicted & Sentenced	
		Total	Percent of Total	Total	Percent of Total
1988	50,440	9,509	19%	40,931	81%
1989	52,955	9,476	18%	43,479	82%
1990	55,267	9,747	18%	45,520	82%
1991	57,410	10,318	18%	47,092	82%
1992	59,644	9,384	16%	50,260	84%
1993	61,309	9,586	16%	51,723	84%
1994	59,625	9,908	17%	49,717	83%
1995	54,980	8,207	15%	46,773	85%
1996	60,255	7,985	13%	52,270	87%
1997	63,148	7,500	12%	55,648	88%

certainly some underlying factors that may have caused these changes, but we have not attempted to associate changes in the percentage of defendants convicted with the underlying factors, such as prosecutorial policy, impact of sentencing guidelines, or political pressures. If the changes in the conviction rate are not concentrated in a specific offense category or if the changes are

permanent, there may be implications for the weighting system used for identifying the need for additional judgeships, for staffing formulas, or for other factors related to workload and resources.

Conviction Rates

Significant changes in the rate of conviction generally occur because of either a change in the composition of the overall caseload or a change in the rate at which defendants plead guilty. If a larger portion of the overall caseload is made up of offense types more likely to result in a conviction, then the overall conviction rate will increase. Likewise, if some factors cause an increase in the rate of guilty pleas (a change in case composition may also have an impact here), a similar change is likely to occur in the conviction rate. Over the last several years, it appears that both factors have contributed to the increase in the conviction rate.

Between 1988 and 1997, the total number of defendants processed through the district courts rose by 25 percent. During the same time, the number of defendants convicted increased at a faster pace, rising 36 percent. Both increases occurred primarily because of increases in the number of defendants charged with drugs, weapons and firearms, fraud, and immigration offenses. These offenses account for approximately 70 of the total criminal caseload. The most significant increase, and the one most likely to have an impact on the conviction rate, occurred with the number of immigration defendants. Between 1988 and 1997, the number of defendants disposed of on immigration charges increased almost 200 percent, with most of that rise occurring since 1994. The conviction rate for immigration defendants is substantially higher (by 5-8 percentage points over the last ten years) than the percentage for all defendants, ranging from 86 to 96 over the last ten years. But, this increase in immigration alone has not caused the overall growth in the conviction rate. It had some impact on the level of the conviction rate, but little impact on the trend. When immigration defendants are removed from the statistics, the conviction rate for all other offenses drops slightly, but the trend in the conviction rate remains the same. Exclusive of immigration defendants, the conviction rate has grown from 80 to 87 percent over the last ten years, and from 82 to 87 percent in just the last four years. (See Chart 1)

Another offense type having an enormous impact on conviction rates is drugs. Since 1988, the number of defendants convicted of drug offenses has increased 76 percent. The percentage of drug defendants convicted rose from 84 percent in 1988 to 89 in 1997. The increase is not as large as for immigration offenses, but drug defendants account for a much larger portion of the total, approximately one-third of all defendants convicted. Because drug defendants account for such a large portion of the criminal caseload, the trend in the conviction rate for drugs is virtually the same as the overall rate. However, as shown in Chart 1, even if this large group of defendants were removed from the data, the trend in the conviction rate is essentially the same. In just the last four years, the rate has grown from 82 percent to 87 percent.

While immigration and drug cases had some impact on the level of the conviction rate as previously stated, they had little impact on the trend in conviction rates. If these offenses were collectively removed from the data, the conviction rate for all other offenses would be slightly reduced. Yet the trend in the conviction rate is essentially the same as the overall rate, rising from 79 to 84 percent over the last four years. This suggests then that the change in the conviction rate has not resulted from an influx of specific case types, but instead has occurred across the board.

Rates of Guilty Plea

As noted at the beginning of this paper, a change in the percentage of defendants convicted may also be due to the change in the rate of guilty pleas. That seems to be the factor having the greatest impact on the overall conviction rate. Over the last ten years, the number of defendants disposed of by guilty plea increased 48 percent while total criminal disposition rose only 25 percent. Similarly, the percentage of defendants pleading guilty rose from 69 percent of all defendants in 1988 to 81 percent in 1997. (See Chart 2) This trend over the last ten years, and perhaps more pronounced over the last 4-5 years, is not caused by specific offense categories. The four categories noted earlier that account for 70 percent of the criminal docket all show similar patterns, although to varying degrees. In 1988, approximately 68 percent of all drug defendants pled guilty; by 1997, that had grown to 82 percent. Although the percentage of immigration defendants pleading guilty is much higher, the change in this percentage shows a similar pattern to that for drug defendants growing from 82 percent in 1988 to 95 percent in 1997. The plea rate for fraud grew from 76 percent to 87 percent, while the rate for weapons offenses showed the smallest growth going from 71 to 76 percent over the 10-year period.

Impact on Trials

An increase in the percentage of defendants pleading guilty usually means that there is a similar decrease in percentage of defendants disposed of through the trial process. This would not always mean that the *number* of defendants going to trial decreases, but that the number decreases in relation to the total number of defendants. Over the last 10 years, however, there have been dramatic changes in both the number and the percentage of defendants going to trial. The number of defendants going to trial decreased 34 percent (see Chart 3) and the percentage going to trial dropped from 14 percent to only 7 percent. This reduction was not a gradual one over the 10-year period, but instead was concentrated in just the last few years. From 1988 to 1992 the number of defendants going to trial actually rose 3 percent. The real decrease began in 1993 and has continued through 1997. In just that five-year period, the number of defendants whose cases were concluded through the trial process has fallen 36 percent.

Conclusion

Over the last ten years, there have been major changes in the nature of the criminal caseload, primarily in the number and percentage of defendants charged with immigration offenses. This change has had an impact on the overall conviction rate, but it is not the primary

factor in the increasing conviction rate. The more significant factor is the change in the rate of guilty pleas. With the offenses that make up a large majority of the criminal docket, the plea rate has increased significantly. The result is that judges are now trying fewer defendants. At the same time, there are substantially more defendants convicted, so judges are sentencing a much larger number of defendants. These changes, if permanent in nature, have potential implications for a number of programs in the judiciary. Staff and committees involved in resource issues should be aware of the changing nature of the criminal business and begin to consider any potential implications of the changes on their programs.

Analytical Services Office
April 1999

Chart 1. Conviction Rates in the U.S. District Courts

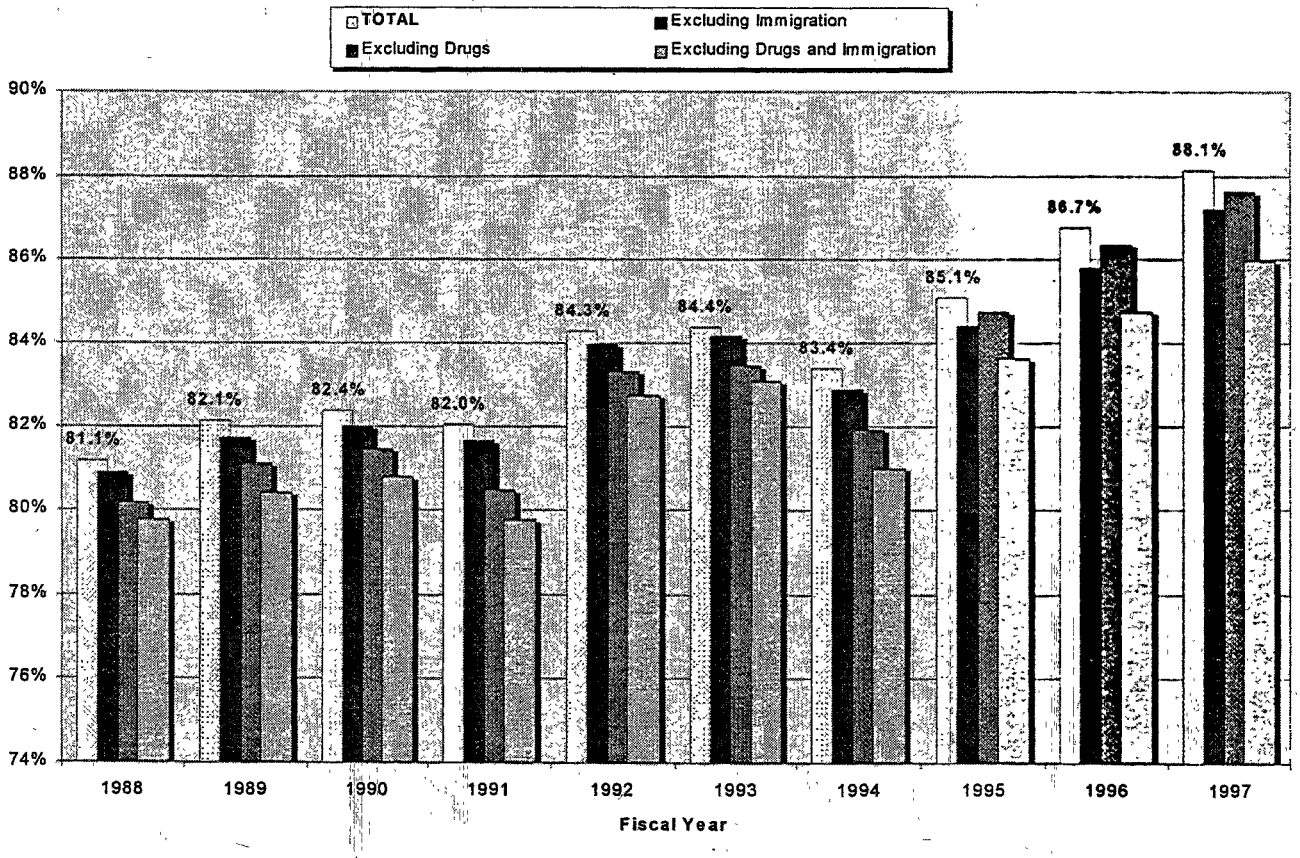


Chart 2. Guilty Pleas as Percentage of Total Dispositions

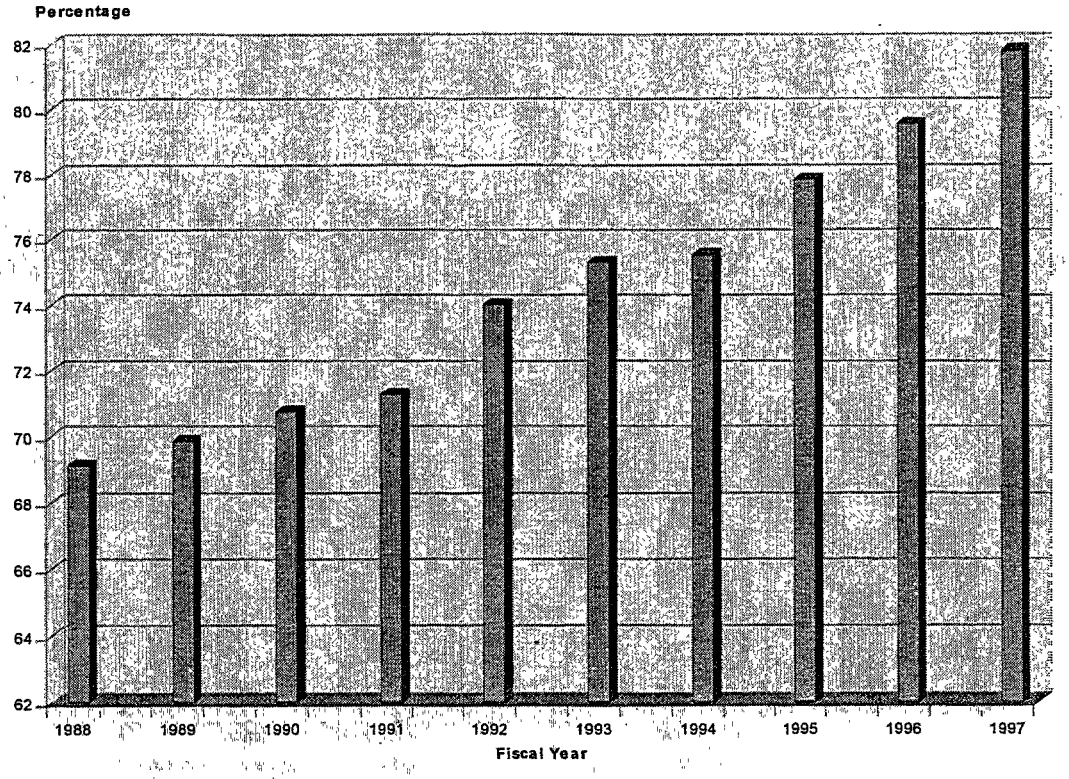
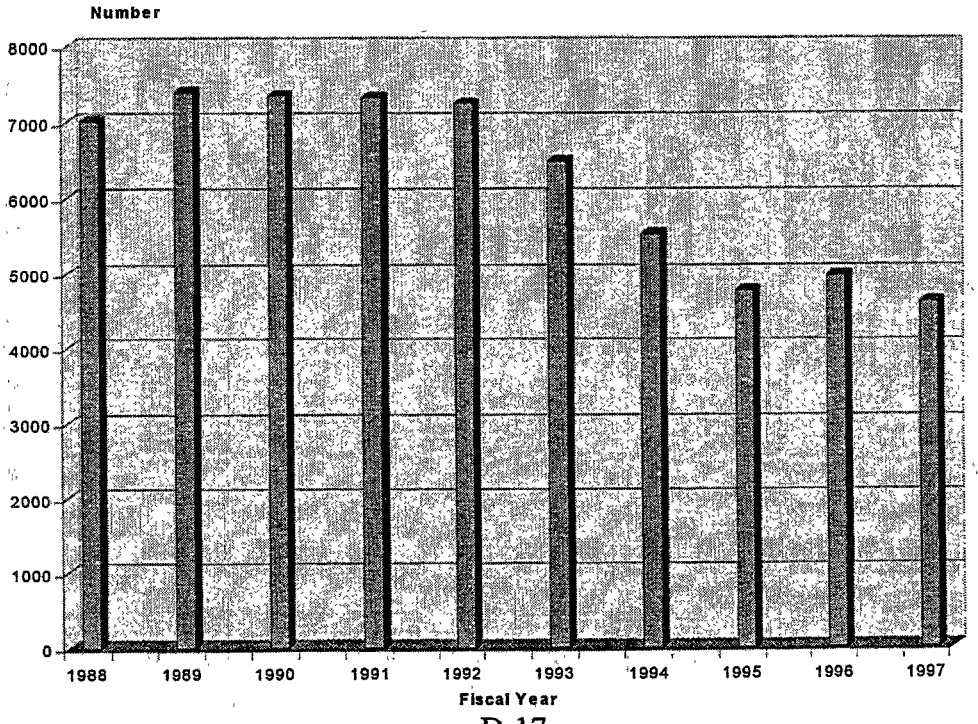


Chart 3. Total Criminal Defendants Going to Trial



Number of Jury Trials Down Sharply

After peaking in Fiscal Year 1992, the number of completed jury trials has declined steadily over the past seven years. In Fiscal Year 1992, the number of completed jury trials was 10,118. In Fiscal Year 1999, that number was 7,481 a decline of 2,637 trials, or 26.1 percent. During this period, the number of criminal jury trials declined at a higher percentage than civil jury trials-35.8 percent vs. 13.3 percent. The chart below reflects the number of civil and criminal trials completed since Fiscal Year 1992, and the percentage decrease in the number of total trials completed from the previous year.

Civil and Criminal Trials Completed

Fiscal Year	Civil Jury	Criminal Jury	Total	Percent Decrease From Previous FY
1992	4,378	5,740	10,118	
1993	4,245	5,324	9,569	5.4 percent
1994	4,380	4,140	8,520	11.0 percent
1995	4,249	4,245	8,494	0.3 percent
1996	4,401	4,076	8,477	0.2 percent
1997	4,491	3,932	8,423	0.6 percent
1998	4,125	3,811	7,936	5.8 percent
1999	3,795	3,686	7,481	5.7 percent
Change FY 99/FY 92	-583	-2,054	-2,637	
Percent Change	-13.3	-35.8 -26.1		

There has been a corresponding decrease in the number of petit juror days. A petit juror day means that each juror is counted for each day serving, waiting at the courthouse to serve (i.e., reporting for juror orientation or voir dire), or in travel. In Fiscal Year 1992, the number of petit juror days was 887,234. In Fiscal Year 1999, that number was 690,981, a decline of 196,253 petit juror days, or 22.1 percent. The chart below reflects the number of petit juror days for each year since Fiscal Year 1992 and the percentage decrease or increase in subsequent years:

Fiscal Year	Number of Petit Juror Days	Percent Decrease from Previous FY
1992	887,234	
1993	861,160	2.9 percent
1994	788,066	8.5 percent
1995	774,978	1.7 percent
1996	778,170	0.4 percent (increase)
1997	749,613	3.7 percent
1998	718,778	4.1 percent
1999	690,981	3.9 percent
Change FY 99/FY92	-196,253	
Percent Change	-22.1	

The percentage of criminal defendant dispositions by jury trial dropped from10.2 percent in Fiscal Year 1992 to 4.3 percent in Fiscal Year 1999. The percentage of plea dispositions, however, went from 74 percent in 1992 to over 83 percent in 1999. On the civil side, the percentage of civil dispositions by or during jury trial dropped from a high of 2.0 percent in Fiscal Year 1994 to 1.5 percent in Fiscal Year 1999. Trial duration has had a negligible impact on the decline in jury trials. The average civil jury trial in 1999 was 4.6 days, which was the same in 1992. The average criminal jury trial increased slightly from 4.4 days in 1992 to 4.6 days in 1999.

Among the factors contributing to the decline in jury trials and petit juror days are increases in the number and the percentage of dispositions by guilty pleas in criminal cases. This trend is likely due to the mandatory/minimum sentencing provisions of the Sentencing Guidelines which may influence more defendants to enter a plea. In addition, the use of alternative dispute resolution processes, an increase in the number of settlements in civil cases, improved juror management, and the number of judicial vacancies may have contributed to the decline in jury trials and petit juror days.

District Court Administration Division
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