COMMITTEE ON RULES
OF
PRACTICE AND PROCEDURE

Scottsdale, Arizona
January 15-16, 2004

AGENDA
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
JANUARY 15-16, 2004

1. Opening Remarks of the Chair

   A. Report on the September 2003 Judicial Conference session
   B. Transmission of Judicial Conference-approved proposed rules amendments to Supreme Court

2. **ACTION** — Approving Minutes of June 2003 Committee Meeting

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. **ACTION** — Approving publishing for public comment proposed amendments to Rules 5005(c) and 9036
   B. Minutes and other informational items

7 Report of the Advisory Committee on Civil Rules

   A. **ACTION** — Approving publishing for public comment proposed amendments to Rules 16-37 & 45
   B. Minutes and other informational items

8 Report of the Advisory Committee on Criminal Rules

9. Report of the Advisory Committee on Evidence Rules

10. **ACTION** — Approving revised local rules project report

11 Status Report of Subcommittee on Attorney Conduct Rules (oral report)

12. Report of Technology Subcommittee (oral report)

13. Long-Range Planning report

14. Law-reform projects undertaken by major bar or other legal organizations (oral presentations)

15. Next Meeting: June 17-18, 2004

JUDICIAL CONFERENCE RULES COMMITTEES
December 2003

Chairs	Reporters
Honorable David F. Levi Chief Judge, United States District Court United States Courthouse 501 I Street, 14th Floor Sacramento, CA 95814	Prof. Daniel R. Coquillette Boston College Law School 885 Centre Street Newton Centre, MA 02159
Honorable Samuel A. Alito, Jr. United States Circuit Judge 357 United States Post Office and Courthouse 50 Walnut Street Newark, NJ 07101	Prof. Patrick J Schiltz University of St. Thomas School of Law 1000 La Salle Avenue, MSL 400 Minneapolis, MN 55403-2015
Honorable A. Thomas Small United States Bankruptcy Judge United States Bankruptcy Court Post Office Drawer 2747 Raleigh, NC 27602	Prof Jeffrey W. Morris University of Dayton School of Law 300 College Park Dayton, OH 45469-2772
Honorable Lee H. Rosenthal United States District Judge United States District Court 11535 Bob Casey U.S. Courthouse 515 Rusk Avenue Houston, TX 77002-2698	Prof. Edward H. Cooper University of Michigan Law School 312 Hutchins Hall Ann Arbor, MI 48109-1215
Honorable Edward E. Carnes United States Circuit Judge United States Court of Appeals United States Courthouse, Suite 500D One Church Street Montgomery, AL 36104	Prof. David A. Schlueter St. Mary's University School of Law One Camino Santa Maria San Antonio, TX 78228-8602
Honorable Jerry E. Smith United States Circuit Judge United States Court of Appeals 12621 Bob Casey U.S. Courthouse 515 Rusk Avenue Houston, TX 77002-2698	Prof. Daniel J. Capra Fordham University School of Law 140 West 62nd Street New York, NY 10023

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

(Standing Committee)

Chair:

Honorable David F. Levi
Chief Judge, United States District Court
United States Courthouse
501 I Street, 14th Floor
Sacramento, CA 95814

Members:

Honorable Harris L. Hartz
United States Court of Appeals
710 United States Courthouse
333 Lomas Boulevard, N.W.
Albuquerque, NM 87102

Honorable J Garvan Murtha
United States District Judge
United States District Court
204 Main Street
Brattleboro, VT 05301

Honorable Sidney A Fitzwater
United States District Judge
United States District Court
15A3 Earle Cabell Federal Building
and United States Courthouse
1100 Commerce Street
Dallas, TX 75242-1003

Honorable Thomas W Thrash, Jr.
United States District Judge
United States District Court
2188 Richard B. Russell Federal Building
and United States Courthouse
75 Spring Street, S W
Atlanta, GA 30303-3361

Honorable Mark R. Kravitz
United States District Judge
United States District Court
Richard C. Lee United States Courthouse
141 Church Street
New Haven, CT 06510

Honorable Charles Talley Wells
Justice, Supreme Court of Florida
500 South Duval Street
Tallahassee, FL 32399-1925

Dean Mary Kay Kane
University of California
Hastings College of Law
200 McAllister Street
San Francisco, CA 94102-4978

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

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

David M Bernick, Esquire
Kirkland & Ellis LLP
200 East Randolph Drive, 59th Floor
Chicago, IL 60601

David J. Beck, Esquire
Beck, Redden & Secrest, L L.P.
One Houston Center
1221 McKinney Street, Suite 4500
Houston, TX 77010

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE (CONTD.)

Deputy Attorney General (ex officio)
Honorable James B. Comey
U.S. Department of Justice
950 Pennsylvania Avenue, N.W., Room 4111
Washington, DC 20530

Reporter:

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

Advisors and Consultants:

Professor Geoffrey C. Hazard, Jr.
University of Pennsylvania Law School
3400 Chestnut Street
Philadelphia, PA 19104

Professor Mary P. Squiers
55 Linden Street
Needham, MA 02492

Professor R. Joseph Kimble
Thomas M. Cooley Law School
300 South Capitol Avenue
Lansing, MI 48933

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

Secretary:

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

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United States Court of Appeals
357 United States Post Office
and Courthouse
50 Walnut Street
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United States Court of Appeals
2299 United States Court House
300 Fannin Street
Shreveport, LA 71101-3074

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United States Circuit Judge
United States Court of Appeals
333 Constitution Avenue, N.W.
Washington, DC 20001

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United States District Court
Albert V. Bryan United States Courthouse
401 Courthouse Square
Alexandria, VA 22314-5799

Professor Carol Ann Mooney
Vice President and Associate Provost
University of Notre Dame
237 Hayes-Healy Center
Notre Dame, IN 46556

W. Thomas McGough, Jr., Esquire
Reed Smith LLP
435 Sixth Avenue
Pittsburgh, PA 15219

Sanford Svetcov, Esquire
Milberg Weiss Bershad Hynes & Lerach LLP
100 Pine Street, Suite 2600
San Francisco, CA 94111

Mark I Levy, Esquire
Howrey Simon Arnold & White, LLP
1299 Pennsylvania Avenue, N.W.
Washington, DC 20004-2402

Solicitor General (ex officio)
Honorable Theodore B. Olson
U.S. Department of Justice
950 Pennsylvania Avenue, N.W., Room 5143
Washington, DC 20530

Douglas Letter, Appellate Litigation Counsel
Civil Division, U.S. Department of Justice
601 D Street, N.W., Room 9106
Washington, DC 20530

Reporter:

Professor Patrick J. Schiltz
University of St. Thomas School of Law
1000 La Salle Avenue, MSL 400
Minneapolis, MN 55403-2015

Advisors and Consultants:

Marcia M. Waldron
Circuit Clerk
United States Court of Appeals
601 Market Street
Philadelphia, PA 19106

ADVISORY COMMITTEE ON APPELLATE RULES (CONTD.)

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United States District Court
204 Main Street
Brattleboro, VT 05301

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Peter G. McCabe
Secretary, Committee on Rules of
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Washington, DC 20544

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United States Bankruptcy Court
Post Office Drawer 2747
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127 Joseph P. Kinneary
United States Courthouse
85 Marconi Boulevard
Columbus, OH 43215

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United States District Court
United States Courthouse
One Exchange Terrace
Providence, RI 02903-1779

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United States District Court
500 West Pike Street, 2nd Floor
Clarksburg, WV 26301

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United States District Court
410 United States Courthouse
1010 Fifth Avenue
Seattle, WA 48104-1130

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United States District Judge
United States District Court
426 Thurgood Marshall
United States Courthouse
40 Centre Street
New York, NY 10007

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United States District Judge
United States District Court
United States Courthouse Annex
Bank One Building
200 North Travis Street
Sherman, TX 75090

Honorable James D. Walker, Jr.
United States Bankruptcy Judge
United States Bankruptcy Court
433 Cherry Street
Macon, GA 31201-7957

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United States Bankruptcy Judge
United States Bankruptcy Court
3-200 United States Courthouse
501 I Street
Sacramento, CA 95814-2322

Honorable Mark B. McFeeley
United States Bankruptcy Judge
United States Bankruptcy Court
421 Gold Street, S W., 6th Floor
Albuquerque, NM 87102

Professor Mary Jo Wiggins
University of San Diego
School of Law
5998 Alcala Park
San Diego, CA 92110

ADVISORY COMMITTEE ON BANKRUPTCY RULES (CONTD.)

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

Eric L. Frank, Esquire
Miller Frank & Miller
21 South 12th Street, Suite 640
Philadelphia, PA 19107

Howard L. Adelman, Esquire
Adelman, Gettleman, Merens, Berish
& Carter, Ltd.
Suite 1050, 53 West Jackson Boulevard
Chicago, IL 60604

K. John Shaffer, Esquire
Stutman, Treister & Glatt, P.C.
1901 Avenue of the Stars, 12th Floor
Los Angeles, CA 90067

Director, Commercial Litigation Branch,
Civil Division, U.S. Dept. of Justice (ex officio)
J. Christopher Kohn, Esquire
1100 L Street, N W., 10th Floor, Room 10036
Washington, DC 20005

Reporter:

Professor Jeffrey W Morris
University of Dayton
School of Law
300 College Park
Dayton, OH 45469-2772

Advisors and Consultants:

James J. Waldron
Clerk, United States Bankruptcy Court
Martin Luther King, Jr. Federal Building
and United States Courthouse
Third Floor, 50 Walnut Street
Newark, NJ 07102-3550

Lawrence A Friedman
Director, Executive Office for
United States Trustees
20 Massachusetts Avenue, N.W., Suite 8000
Washington, DC 20530

Professor Bruce A. Markell
University of Nevada Las Vegas
William S. Boyd School of Law
4505 Maryland Parkway, Box 451003
Las Vegas, NV 89154-1003

Melissa B. Jacoby, Assistant Professor
Temple University
James E. Beasley School of Law
1719 N. Broad Street
Philadelphia, PA 19122

Liaison Member:

Honorable Harris L Hartz
United States Circuit Judge
United States Court of Appeals
710 United States Courthouse
333 Lomas Boulevard, N W
Albuquerque, NM 87102

Liaison from Committee on the Administration of the Bankruptcy System:

Honorable Dennis Montali
United States Bankruptcy Judge
United States Bankruptcy Court
235 Pine Street
San Francisco, CA 94104

Secretary:

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

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Honorable Lee H. Rosenthal
United States District Judge
United States District Court
11535 Bob Casey United States Courthouse
Houston, TX 77002

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Honorable Paul J. Kelly, Jr
United States Circuit Judge
United States Court of Appeals
120 South Federal Place
Santa Fe, NM 87501

Honorable Richard H. Kyle
United States District Judge
United States District Court
764 Warren E. Burger Federal Building
316 North Robert Street
St. Paul, MN 55101

Honorable Shira Ann Scheindlin
United States District Judge
United States District Court
1050 United States Courthouse
500 Pearl Street
New York, NY 10007-1312

Honorable Thomas B. Russell
United States District Judge
United States District Court
307 Federal Building
501 Broadway Street
Paducah, KY 42001

Honorable H. Brent McKnight
United States District Judge
United States District Court
168 Charles R. Jonas Federal Building
401 West Trade Street
Charlotte, NC 28202

Honorable C. Christopher Hagy
United States Magistrate Judge
United States District Court
1756 Richard B. Russell Federal Building
and United States Courthouse
75 Spring Street, S.W.
Atlanta, GA 30303-3361

Honorable Nathan L. Hecht
Justice, Supreme Court of Texas
201 West 14th Street
Austin, TX 78701

Dean John C. Jeffries, Jr.
University of Virginia School of Law
580 Massie Road
Charlottesville, VA 22903-1789

Professor Myles V. Lynk
Arizona State University College of Law
John S. Armstrong Hall
Orange/McAllister
Tempe, AZ 85287

Andrew M. Scherffius, Esquire
Scherffius, Ballard, Still & Ayres, L L P.
1201 Peachtree Street, N.E.
400 Colony Square, Suite 1018
Atlanta, GA 30361

ADVISORY COMMITTEE ON CIVIL RULES (CONTD.)

Robert C. Heim, Esquire
Dechert LLP
4000 Bell Atlantic Tower
1717 Arch Street
Philadelphia, PA 19103-2793

Frank Cicero, Jr., Esquire
Kirkland & Ellis LLP
200 East Randolph Drive
Chicago, IL 60601

Assistant Attorney General
Civil Division (ex officio)
Honorable Peter D. Keisler
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, DC 20530

Ted Hirt, Assistant Director
Federal Programs Branch
Civil Division
U.S. Department of Justice
20 Massachusetts Avenue, N.W.
Room 7106
Washington, DC 20530

Liaison Members:

Honorable Sidney A Fitzwater
United States District Judge
United States District Court
15A3 Earle Cabell Federal Building
and United States Courthouse
1100 Commerce Street
Dallas, TX 75242-1003

Honorable James D. Walker, Jr.
United States Bankruptcy Judge
United States Bankruptcy Court
433 Cherry Street
Macon, GA 31201-7957

Reporter:

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

Advisors and Consultants:

Professor Richard L. Marcus
University of California
Hastings College of Law
200 McAllister Street
San Francisco, CA 94102-4978

Professor Thomas D. Rowe, Jr.
Duke Law School
(813 Howard Street
Marina del Rey, CA 90292-5516)

Secretary:

Peter G McCabe
Secretary, Committee on Rules of
Practice and Procedure
Washington, DC 20544

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Honorable Edward E Carnes
United States Circuit Judge
United States Court of Appeals
United States Courthouse, Suite 500D
One Church Street
Montgomery, AL 36104

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Honorable Susan C. Bucklew
United States District Judge
United States District Court
109 United States Courthouse
611 North Florida Avenue
Tampa, FL 33602

Honorable Paul L. Friedman
United States District Judge
United States District Court
6321 E. Barrett Prettyman
United States Courthouse
333 Constitution Avenue, N.W.
Washington, DC 20001-2802

Honorable David G. Trager
United States District Judge
United States District Court
225 Cadman Plaza, East
Room 224
Brooklyn, NY 11201

Honorable Harvey Bartle III
United States District Judge
United States District Court
16614 James A. Byrne United States
Courthouse
601 Market Street
Philadelphia, PA 19106-1714

Honorable James P Jones
United States District Judge
United States District Court
180 West Main Street
Abingdon, VA 24210

Honorable Anthony J Battaglia
United States Magistrate Judge
United States District Court
1145 Edward J. Schwartz United States
Courthouse
940 Front Street
San Diego, CA 92101-8927

Honorable Reta M. Strubhar
Judge
Court of Criminal Appeals of Oklahoma
State Capitol Building, Room 230
2300 North Lincoln Boulevard
Oklahoma City, OK 73105

Professor Nancy J King
Vanderbilt University Law School
131 21st Avenue South, Room 248
Nashville, TN 37203-1181

Robert B Fiske, Jr., Esquire
Davis Polk & Wardwell
450 Lexington Avenue
New York, NY 10017

Donald J. Goldberg, Esquire
Ballard Spahr Andrews & Ingersoll, LLP
1735 Market Street, 51st Floor
Philadelphia, PA 19103-7599

Lucien B. Campbell
Federal Public Defender
Western District of Texas
727 E. Durango Boulevard, B-207
San Antonio, TX 78206-1278

ADVISORY COMMITTEE ON CRIMINAL RULES (CONTD.)

Assistant Attorney General
Criminal Division (ex officio)
Honorable Christopher A. Wray
U.S. Department of Justice
950 Pennsylvania Avenue, N W
Room 2107
Washington, DC 20530-0001

Jonathan J. Wroblewski, Counsel
Criminal Division
U.S. Department of Justice
1331 F Street, N W., Room 346
Washington, DC 20530

Reporter:

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

Liaison Member:

Honorable Mark R. Kravitz
United States District Judge
United States District Court
Richard C. Lee United States Courthouse
141 Church Street
New Haven, CT 06510

Secretary:

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

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United States Circuit Judge
United States Court of Appeals
12621 Bob Casey United States Courthouse
515 Rusk Avenue
Houston, TX 77002-2698

Members:

Honorable Ronald L. Buckwalter
United States District Judge
United States District Court
14614 James A. Byrne
United States Courthouse
601 Market Street
Philadelphia, PA 19106-1714

Honorable Robert L Hinkle
United States District Judge
United States District Court
United States Courthouse
111 North Adams Street
Tallahassee, FL 32301-7717

Honorable Jeffrey L. Amestoy
Chief Justice, Vermont Supreme Court
109 State Street
Montpelier, VT 05609-0801

David S. Maring, Esquire
Maring Williams Law Office P C
400 E. Broadway, Suite 307
Bismarck, ND 58501

Patricia Lee Refo, Esquire
Snell & Wilmer L.L.P
One Arizona Center
Phoenix, AZ 85004-2202

Thomas W. Hillier II
Federal Public Defender
Suite 1100
1111 Third Avenue
Seattle, WA 98101-3203

Stuart A Levey
Principal Associate Deputy Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, N.W., Room 4208
Washington, DC 20530

ADVISORY COMMITTEE ON EVIDENCE RULES (CONTD.)

Liaison Members:

Honorable Thomas W. Thrash, Jr.
United States District Judge
United States District Court
2188 Richard B. Russell Federal Building
and United States Courthouse
75 Spring Street, S.W.
Atlanta, GA 30303-3361

Honorable Christopher M. Klein
United States Bankruptcy Judge
United States Bankruptcy Court
3-200 United States Courthouse
501 I Street
Sacramento, CA 95814-2322

Honorable Richard H. Kyle
United States District Judge
United States District Court
764 Warren E. Burger Federal Building
316 North Robert Street
St Paul, MN 55101

Honorable David G. Trager
United States District Judge
United States District Court
225 Cadman Plaza, East
Room 224
Brooklyn, NY 11201

Reporter:

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

Advisors and Consultants:

Honorable C. Arlen Beam
United States Court of Appeals
435 Robert V. Denney United States Courthouse
100 Centennial Mall North
Lincoln, NE 68508

Professor Leo H. Whinery
University of Oklahoma
College of Law
300 Timberdell Road
Norman, OK 73019

Professor Kenneth S. Broun
University of North Carolina
School of Law
CB #3380, Van Hecke-Wettach Hall
Chapel Hill, NC 27599

Secretary:

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

LIAISON MEMBERS

Appellate:

Judge J. Garvan Murtha (Standing Comm.)

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ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

Staff:

John K. Rabiej
Chief, Rules Committee Support Office
Administrative Office of the
United States Courts
Washington, DC 20544
Phone 202-502-1820
Fax 202-502-1755

James N Ishida
Attorney-Advisor
Office of Judges Programs
Administrative Office of the
United States Courts
Washington, DC 20544
Phone 202-502-1820
Fax 202-502-1755

Judith W. Krivit
Administrative Specialist
Rules Committee Support Office
Administrative Office of the
United States Courts
Washington, DC 20544
Phone 202-502-1820
Fax 202-502-1755

Anne Rustin
Secretary, Rules Committee
Support Office
Administrative Office of the
United States Courts
Washington, DC 20544
Phone 202-502-1820
Fax 202-502-1755

Robert P Deyling
Senior Attorney
Office of Judges Programs
Administrative Office of the
United States Courts
Washington, DC 20544
Phone 202-502-1820
Fax 202-502-1755

James H. Wannamaker
Senior Attorney
Bankruptcy Judges Division
Administrative Office of the
United States Courts
Washington, DC 20544
Phone 202-502-1900
Fax 202-502-1988

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

SUBCOMMITTEES
December 2003

Subcommittee on Attorney Conduct
Professor Daniel R. Coquillette (Standing)
Judge Thomas W. Thrash, Jr. (Standing)
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Committee Reporters, Consultants
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December 15, 2003
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Professor Richard L. Marcus, Consultant

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Subcommittee on Rule 15 and Rule 50
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Judge C. Christopher Hagy
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Subcommittee A
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Judge C. Christopher Hagy
Dean John C Jeffries, Jr.
Andrew M. Scherffius, Esquire
Frank Cicero, Esquire
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DOJ representative

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December 15, 2003
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PRELIMINARY REPORT
JUDICIAL CONFERENCE ACTIONS
September 23, 2003

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

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Executive Committee

Approved a resolution in recognition of the substantial contributions made by the Judicial Conference committee chairs whose terms of service end in 2003

Committee on the Administration of the Bankruptcy System

Agreed to seek legislation to permit bankruptcy judges to hold court outside their districts in the event of an emergency

Agreed to amend the *Guide to Judiciary Policies and Procedures*, Vol. III, section B, ch VII, ¶ 11, to make this section consistent with the corresponding provisions in the Travel Regulations for United States Justices and Judges, *Guide to Judiciary Policies and Procedures*, Vol. III-A, ch. C-V, dealing with senior judge travel.

Committee on the Budget

Approved the Budget Committee's budget request for fiscal year 2005, subject to amendments necessary as a result of (a) new legislation, (b) actions of the Judicial Conference, or (c) any other reason the Executive Committee considers necessary and appropriate.

Committee on Codes of Conduct

Adopted revised gift regulations and agreed to publish them in Volume II of the *Guide to Judiciary Policies and Procedures*.

Committee on Rules of Practice and Procedure

Approved proposed amendments to Bankruptcy Rules 1011, 2002, and 9014 and agreed to transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law, and approved a new Official Bankruptcy Form 21 to take effect on December 1, 2003.

Approved proposed amendments to Criminal Rule 35 and the Rules Governing § 2254 Cases and § 2255 Proceedings and accompanying forms and agreed to transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Approved a proposed amendment to Evidence Rule 804(b)(3) and agreed to transmit it to the Supreme Court for its consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law.

1-B

JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

LEONIDAS RALPH MECHAM
Secretary

November 17, 2003

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

By direction of the Judicial Conference of the United States, pursuant to the authority conferred by 28 U.S.C. § 331, I have the honor to transmit herewith for consideration of the Court proposed amendments to Rules 1011, 2002, and 9014 of the Federal Rules of Bankruptcy Procedure. The Judicial Conference recommends that these amendments be approved by the Court and transmitted to the Congress pursuant to law.

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

Leonidas Ralph Mecham
Secretary

Attachments

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

By direction of the Judicial Conference of the United States, pursuant to the authority conferred by 28 U.S.C. § 331, I have the honor to transmit herewith for consideration of the Court proposed amendments to Rule 35 of the Federal Rules of Criminal Procedure; and Rules 1 through 11 of the Rules Governing Section 2254 Cases in the United States District Courts, Rules 1 through 12 of the Rules Governing Section 2255 Cases in the United States District Courts, and the forms accompanying the Section 2254 and Section 2255 Rules. The Judicial Conference recommends that these amendments be approved by the Court and transmitted to the Congress pursuant to law.

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

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

By direction of the Judicial Conference of the United States, pursuant to the authority conferred by 28 U.S.C. § 331, I have the honor to transmit herewith for consideration of the Court proposed amendment to Rule 804(b)(3) of the Federal Rules of Evidence. The Judicial Conference recommends that this amendment be approved by the Court and transmitted to the Congress pursuant to law.

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

Leonidas Ralph Mecham
Secretary

Attachments

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COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of June 9-10, 2003
Philadelphia, Pennsylvania
Draft Minutes

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ATTENDANCE

The mid-year meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Philadelphia, Pennsylvania, on Monday and Tuesday, June 9 and 10, 2003. The following members were present:

Judge Anthony J. Scirica, Chair
David M. Bernick, Esquire
Charles J. Cooper, Esquire
Judge Sidney A. Fitzwater
Dean Mary Kay Kane
Mark R. Kravitz, Esquire
Patrick F. McCartan, Esquire
Judge J. Garvan Murtha
Judge A. Wallace Tashima
Deputy Attorney General Larry D. Thompson
Judge Thomas W. Thrash, Jr.
Chief Justice Charles Talley Wells

Providing support to the committee were: Professor Daniel R. Coquillette, reporter to the committee; Jeffrey A. Hennemuth, Deputy Assistant Director for Judges Programs, Administrative Office of the U.S. Courts; John K. Rabiej, chief of the Rules Committee Support Office of the Administrative Office; James N. Ishida and Kathryn Marrone, senior attorneys in Office of Judges Programs of the Administrative Office; Ned Diver, law clerk to Judge Scirica; Joe Cecil of the Research Division of the Federal Judicial Center; Professor Mary P. Squiers, Director of the Local Rules Project; and Joseph F. Spaniol, Jr., consultant to the committee.

Representing the advisory committees were:

Advisory Committee on Appellate Rules —
Judge Samuel A. Alito, Jr , Chair
Professor Patrick J. Schiltz, Reporter
Advisory Committee on Bankruptcy Rules —
Judge A. Thomas Small, Chair
Professor Jeffrey W. Morris, Reporter
Advisory Committee on Civil Rules —
Judge David F. Levi, Chair
Professor Edward H. Cooper, Reporter
Advisory Committee on Criminal Rules —
Judge Edward E. Carnes, Chair
Judge David G. Trager
Professor David A. Schlueter, Reporter
Advisory Committee on Evidence Rules —
Judge Jerry E. Smith, Chair
Professor Daniel J. Capra, Reporter

Also taking part in the meeting were E. Norman Veasey, Chief Justice of Delaware, Howard Bashman, Esq., and Professor Francis E McGovern of Duke University Law School.

INTRODUCTORY REMARKS

Judge Scirica congratulated Mark Kravitz on his pending appointment as a United States district judge for the District of Connecticut. He also noted, with regret, that Judge Tashima's term on the committee was about to expire. He thanked Judge Tashima for six years of invaluable service and emphasized that Judge Tashima is one of the outstanding appellate judges in the country.

Judge Scirica also mentioned the impending completion of his own term as chairman of the committee. He thanked the members for their great support and for honoring him with a dinner. He emphasized the great professional and personal enrichment that he had received from his work with the committee. In particular, he pointed to the astonishing work of the reporters to the rules committees and noted that they are the best in their respective fields. Judge Scirica observed that the reporters approach their work as a labor of love and enjoy the gratitude of everyone involved in the rules process.

Judge Scirica explained that Peter McCabe, the committee's secretary, was unable to attend the meeting because he was undergoing back surgery. He expressed the committee's best wishes for a speedy recovery.

Judge Scirica reported that the Supreme Court in March 2003 had adopted all the proposed rule amendments recommended by the Judicial Conference in September 2002. He added that the Court had transmitted the amendments to Congress, and — unless Congress acts on them — they will take effect on December 1, 2003.

Judge Scirica pointed out that the revisions include three important changes in the Federal Rules of Civil Procedure. The amendments to Rule 51 (jury instructions) would explicitly recognize the authority of a judge to require submission of proposed jury instructions before trial. They also make it clear that to preserve a claim for error on appeal the proposing party must both: (1) request the proposed jury instruction; and (2) object to the court's failure to give the instruction.

He said that the extensive revision of Rule 53 (special masters) would modernize the rule and recognize the current practices of the district courts in using masters, including performance by masters of pretrial and post-trial functions. He noted that the rule, as amended, would establish a framework for the appointment of masters, the conduct of proceedings before masters, and the review of masters' decisions by the district court.

Judge Scirica pointed out that some concern had been expressed that masters have been used by some courts in inappropriate cases. The revised rule, he said, specifies that a master may be appointed only to "address matters that cannot be addressed timely and effectively by an available district judge or magistrate judge of the district." In addition, he noted, the revised rule strengthens the control of the Article III court and departs from the "clearly erroneous" standard of review in the current rule. In the future, a court will have to decide "de novo" all objections to a master's findings of fact — unless the parties stipulate, and the court consents, that the master's findings will be reviewed only for "clear error" (or in some cases that the findings will be final).

He said that the proposed amendments to Rule 23 (class actions) focus on class-action procedures, rather than class action certification standards. The amendments, he noted, are designed to give district judges the tools, authority, and discretion to supervise class-action litigation closely. He explained that the amendments concentrate on five areas: (1) judicial oversight of settlements; (2) timing of the certification decision; (3) notice, (4) attorney appointments; and (5) attorney compensation. The most significant amendment, he noted, would — in appropriate cases at the discretion of the trial judge — give class-action members an opportunity for a second "opt-out" once the terms of a settlement are known.

Judge Scirica noted that the proposed amendments to the Federal Rules of Bankruptcy Procedure include provisions dealing with financial disclosure, privacy of social security numbers, and multilateral clearing organizations. The proposed amendment to Rule 608(b) of the Federal Rules of Evidence, he said, would codify the Supreme Court's decision in *United States v. Abel,* 469 U.S. 45 (1984), and restore the rule to the original intent of the drafters. The amendment limits the scope of the rule's ban on the use of extrinsic evidence by substituting the term "character for truthfulness" for the overbroad term "credibility."

Judge Scirica added that important legislative developments had occurred recently regarding class actions. He noted that the Advisory Committee on Civil Rules had been studying class-action issues in depth for a decade and had concluded that overlapping and competing class actions in federal and state courts raised serious problems that need to be addressed. But, he explained, the problems do not appear to be susceptible to rules-based solutions. Instead, they will require corrective legislation.

Judge Scirica reported that minimal-diversity class action legislation was likely to receive serious consideration in the current Congress. He noted, though, that the Judicial Conference had traditionally opposed minimal-diversity legislation because of concerns over: (1) principles of federalism; and (2) the potential impact on federal court workloads. He added that the Committee on Federal-State Jurisdiction, which has primary responsibility over the issue, had asked the Conference at its March 2003 session to oppose the "Class Action Fairness Act of 2003" recently introduced in the 108th Congress.

On the other hand, Judge Scirica said, the rules committee — which is responsible for Federal Rule of Civil Procedure 23 and has been considering class actions intensely for more than a decade — has recommended that the Conference not oppose the legislation. Rather, he said, it has recommended that the Conference endorse the general concept of minimal diversity, but leave to Congress the specifics of any legislation

He added that the chairs of the two committees had consulted with each other and had produced an appropriate reconciliation of the competing positions, which the Conference adopted in March 2003 Nevertheless, a difference of opinion resurfaced shortly after the Conference session in preparing a response to a request from a member of the Senate Judiciary Committee seeking specific proposed statutory language. The Executive Committee of the Conference considered the different approaches suggested by the two committees and decided to adopt the proposed response of the rules committee with some modifications. Thus, Judge Scirica said, the Judicial Conference is now on record as supporting minimal-diversity legislation in concept, but without endorsing any specific language.

Judge Scirica reported that the comprehensive project to restyle the Federal Rules of Civil Procedure is off to a great start, and he complimented the efforts and sound advice of the Style Subcommittee (Judge Murtha, Judge Thrash, and Dean Kane) and the style consultants (Professor Kimble and Mr. Spaniol). He explained that the Style Subcommittee will have the final word on issues of style, and the Advisory Committee on Civil Rules will have the final word on issues of substance, including deciding whether an issue is one of style or substance. Judge Scirica added that the project will take a cautious approach and avoid all changes that could be perceived as substantive and possibly lead to litigation.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee voted without objection to approve the minutes of the last meeting, held on January 16-17, 2003.

REPORT OF THE ADMINISTRATIVE OFFICE

Legislative Report

Mr Rabiej reported that the Administrative Office was monitoring several pieces of legislation that may impact the federal rules. He stated that the House version of the Class Action Fairness Act raised rules-related issues regarding interlocutory appeals and notice of proposed settlements. The Senate, he added, was focusing its deliberations on the appropriate threshold levels for minimal-diversity jurisdiction.

Mr. Rabiej reported that the recently enacted "E-Government Act" was designed to promote public access to government information in electronic form. He explained that the Act, among other things, requires the Judicial Conference to develop rules under the Rules Enabling Act to protect privacy and security concerns relating to electronic

filing of documents with the courts and public availability of those documents He added that there is a controversial provision in the Act, sponsored by the Department of Justice but opposed by the Judicial Conference, that requires courts to accept unredacted filings from the parties.

Mr. Rabiej reported that section 610 of the "PROTECT Act of 2003," which took effect on April 30, 2003, directly amended FED. R. CRIM. P 7(c)(1) to permit an unknown defendant to be named in an indictment if the defendant has a particular DNA profile, as defined in 18 U.S.C. § 3282.

Mr. Rabiej stated that the "Bail Bond Fairness Act of 2003" (H R. 2134) would amend FED. R. CRIM. P. 46(f)(1) to eliminate a judge's authority to forfeit bail bonds for violations of any conditions of release other than failure of the defendant to appear before the court as ordered. He explained that the bail-bond industry has promoted the statutory change, but the judiciary had provided statistics requested by Congress showing that the number of forfeitures for conditions other than failure to appear is minimal. The chair of the Advisory Committee on Criminal Rules suggested that the bail bondsmen were really more concerned with state court practice, and they were likely seeking to change the federal practice to serve as a model for the states. Judge Scirica noted that the judiciary may need the support of the Department of Justice on this issue.

Mr. Rabiej reported that the proposed "Sunshine in Litigation Act of 2003," introduced by Senator Kohl, included restrictions on sealing settlement orders. He noted that the Federal Judicial Center had been asked to conduct an empirical study of court practices regarding the sealing of settlements, and the judiciary will respond to the legislation once the study has been completed. The chair of the Advisory Committee on Civil Rules added that the issue had received a great deal of recent attention because of a new local rule on the subject in the District of South Carolina.

Administrative Report

Mr. Rabiej reported that the rules committee support staff continues to enhance its use of a commercial electronic document-management system that maintains and manages the records of the federal rulemaking process. He stated that it is a very powerful and effective system, and future enhancements will allow Committee reporters to directly interface with the database. He noted that the vendor of the principal software used in the system (Documentum) had just issued a new release of the software, and he asked the Committee to support efforts to obtain funding for conversion to the latest release. Several participants emphasized the importance of the electronic document system to the rules process, and one added that Documentum was indispensable to the civil rules restyling project. The committee, accordingly, expressed strong support for the funding request.

REPORT OF THE FEDERAL JUDICIAL CENTER

Mr. Cecil pointed out that the agenda book for the committee meeting contained a status report on the educational and research projects of the Federal Judicial Center. (Agenda Item 4) He added that the Center is studying sealed court settlements and focusing on cases and documents that might be seen to affect matters of "public health and safety." He also noted that a new edition of the Center's *Manual for Complex Litigation* is due for release this summer. Finally, he pointed out that Judge Fern Smith's term as Director of the Center would end shortly and that Judge Barbara Rothstein would assume the position of Director.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Alito presented the report of the advisory committee, as set forth in his memorandum and attachments of May 22, 2003. (Agenda Item 5)

Amendments for Publication

FED. R. APP. P. 4(a)(6)

Judge Alito reported that the proposed amendment to Rule 4 (appeal as of right – when taken) would clarify the language of subdivision (a)(6) as to what type of "notice" precludes a litigant from moving to reopen the time to file an appeal on the grounds that it did not receive "notice" of the entry of judgment. Under the rule, as amended, only receipt of formal notice of judgment from the clerk of the district court under FED. R. CIV. P. 77(b) would preclude the litigant's motion to reopen. In addition, the amended rule provides that the motion to reopen must be filed within 7 days after the litigant receives "written" notice of the entry of judgment from any source. The committee note defines "written" broadly.

FED. R. APP. P. 26(a)(4) and 45(a)(2)

Judge Alito explained that Rules 26(a)(4) (computing time) and 45(a)(2) (when the clerk's office is open) would be amended to replace "President's Day" with "Washington's Birthday," the correct statutory name for the holiday.

FED. R. APP. P. 27(d)(1)(E)

Judge Alito explained that Rule 27 (motions) would be amended to provide that the typeface and type-style requirements that govern briefs under Rule 32(a)(5) and (6)

apply also to motion papers. The amendment, he noted, would prevent abuses that could occur if there were no restrictions on using small typeface to cram too many words onto a page.

FED. R. APP. P. 28(c) & (h), 28.1, 32(a)(7)(C), and 34(d)

Judge Alito pointed out that the appellate rules currently provide little guidance regarding briefing in cases that involve cross-appeals. The gaps in the rules have caused problems for bench and bar and have led to the development of inconsistent local court rules. The proposed new Rule 28.1, he said, would consolidate in one place the few existing cross-appeal provisions and add several new provisions.

Judge Alito noted that the advisory committee was in complete agreement on the proposed changes except for the provision in subdivision (e) that prescribes page limits on the "second brief," *i.e.,* the appellee's response brief. He explained that most appellate courts currently set the limit on the second brief at 30 pages. But, he said, the advisory committee had decided by a 5-4 vote to enlarge the length of the second brief to a maximum of 35 pages. Judge Alito added that several judges had opposed this choice, but it was preferred by the practitioners.

FED. R. APP. P. 32.1

Judge Alito stated that proposed new Rule 32.1 (citation of judicial dispositions) is very controversial. It would require courts to permit the citation of "unpublished" or "non-precedential" opinions. He emphasized the narrowness of the rule, explaining that it does not address the propriety or constitutionality of issuing opinions that lack precedential value, nor does it establish standards for determining whether opinions should be published or be made otherwise publicly available. But, he noted, most opinions, as a practical matter, are already available to the public. He also pointed out that the proposed rule does not address the effect that a court must give to one of its own unpublished or non-precedential opinions or to the unpublished or non-precedential opinions of another court.

Judge Alito stated that the proposed rule represented sound public policy and was intended to improve the perception of fairness and openness in appellate decision-making He stated that the major opposition to the proposal, which he described as reasonable, is that permitting the citation of unpublished opinions will lead judges to spend more time in crafting them, defeating the very purpose of non-publication. Nevertheless, he said, the advisory committee was not ultimately persuaded by this argument, because the rule does not require a court to treat its unpublished opinions as binding precedent.

Professor Schiltz pointed out that the advisory committee had struggled with the language in the new rule prohibiting or restricting citation to unpublished opinions "unless that prohibition or restriction is generally imposed upon the citation of all judicial opinions, orders, judgements, or other written dispositions." He explained that it is intended to prohibit a court from singling out unpublished opinions for non-citation if the court allows citation of a wide variety of other sources solely for their persuasive value, such as opinions of other courts, treatises, law review articles, and the like. He suggested that the public comments could be very helpful in improving the language of this provision. Judge Scirica recommended that the proposed amendment be approved for publication with the understanding that the advisory committee will add further explanation in the committee note regarding the restrictions imposed on citation of unpublished opinions Judge Alito responded that he would be pleased to draft an additional explanation for the note.

FED. R. APP. P. 35(a)

Judge Alito explained that both Rule 35(a) (en banc determination) and 28 U.S.C. § 46(c) state that a hearing or rehearing en banc may be ordered by "a majority of the circuit judges who are in regular active service." The rule, however, is interpreted in three different ways by the circuits when judges in regular active service are disqualified in a case. Judge Alito stated that the goal of the proposed amendment is to provide a uniform, national interpretation through amendment of the rule. He said that the advisory committee had, by a 5-3 vote, chosen the "case majority" approach. Under that interpretation, disqualified judges do not count in the base in considering whether a "majority" of judges have voted for hearing or rehearing en banc.

A member asked whether the revised rule might create a possible inconsistency with 28 U.S.C. § 46(c) and whether the proposed change should be pursued through legislation, rather than by rule. Judge Alito responded that the advisory committee had considered the matter and believes that the language of the proposed amendment is a reasonable interpretation of the statute. He added that there was no intent to supersede the statute, but merely to adopt a uniform, national interpretation. Judge Scirica agreed that the three-way split among the circuits needed to be resolved, and he asked the staff to notify the chairs of the congressional judiciary committees at the time of publication to alert them to the interplay between the rule and the statute.

The committee without objection approved all the proposed amendments to the appellate rules for publication by voice vote.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Small and Professor Morris presented the report of the advisory committee, as set forth in Judge Small's memorandum and attachments of May 27, 2003. (Agenda Item 9).

Amendments for Judicial Conference Approval

FED. R. BANKR. P. 1011 and 2002(j)

Judge Small stated that the amendments to Rules 1011 (response in an involuntary or ancillary case) and 2002 (notices to the United States) were purely technical in nature, and they were being submitted to the Judicial Conference without the need for publication and public comment. The proposed amendment to Rule 1011 would eliminate an outdated cross-reference to a recently amended rule. The proposed amendment to Rule 2002(j) would reflect restructuring of the Internal Revenue Service and elimination of the position of District Director.

The committee without objection approved the proposed amendments by voice vote.

FED. R. BANKR. P. 9014

Judge Small reported that the proposed amendment to Rule 9014 (contested matters) would exempt contested matters from the mandatory disclosure and meeting provisions of FED. R. CIV. P. 26. He noted that contested matters generally are less formal and handled much more quickly than adversary proceedings, making the Rule 26 provisions largely ineffective in contested matters. The amended rule, he said, provides that the following provisions in FED. R. CIV. P. 26, as incorporated by FED. R. BANKR. P. 7026, would not apply in a contested matter unless the bankruptcy judge specifically directs otherwise: (1) mandatory disclosure (Rule 26(a)(1)); (2) disclosures regarding expert testimony (Rule 26(a)(2)); (3) additional pretrial disclosure (Rule 26(a)(3)); and (4) the mandatory initial meeting of counsel (Rule 26(f)) Judge Small, however, emphasized that these provisions of FED R. CIV. P. 26 will still apply in adversary proceedings.

The committee without objection approved the proposed amendment by voice vote.

OFFICIAL FORM 21

Judge Small explained that the advisory committee had prepared a new Official Form 21 (statement of social security number) implementing the requirement that debtors submit to the bankruptcy clerk a verified statement setting forth their full social security number. The form works in conjunction with an amendment to FED. R. BANKR. P. 1007(f), taking effect on December 1, 2003, that implements the privacy policy of the Judicial Conference limiting disclosure of social security numbers to the general public.

The form, which would not be part of the official case file, would give the bankruptcy clerk the full social security number, which must be set forth in the notices sent to creditors. Judge Small added that the advisory committee was recommending that the Standing Committee ask the Judicial Conference to approve Official Form 21 effective December 1, 2003, the same day that the amendment to Rule 1007(f) is scheduled to take effect.

The committee without objection approved the proposed new Official Form 21 by voice vote with the recommendation that the Judicial Conference make it effective on December 1, 2003.

Amendments for Publication

FED. R. BANKR. P. 1007

Judge Small stated that the proposed amendments to Rule 1007 (lists, schedules, and statements) would nationalize the widespread local requirement that debtors file a "mailing matrix" with the court setting forth the names and addresses of the entities to whom notices must be sent. It would also ensure that codebtors and parties to executory contracts or unexpired leases of the debtor receive notice of the filing of the bankruptcy case.

The committee without objection approved the proposed amendments for publication by voice vote.

FED. R. BANKR. P. 3004 and 3005

Judge Small explained that Rules 3004 (filing of claim by debtor or trustee) and 3005 (filing of claim, acceptance, or rejection by co-debtor) were being amended to make them fully consistent with § 501(c) of the Bankruptcy Code. The statute authorizes the debtor or trustee to file a proof of claim if the creditor fails to do so in a "timely" fashion. Under the amended rule, the debtor and trustee would have to wait until the creditor's opportunity to file a claim has expired.

The committee without objection approved the proposed amendments for publication by voice vote.

FED. R. BANKR. P. 4008

Judge Small stated that Rule 4008 (reaffirmation agreement) was being amended to establish a deadline for filing reaffirmation agreements with the court. Under the amendment, the agreement must be filed not later than 30 days after entry of an order granting a discharge, or confirming a plan in the case of a chapter 11 reorganization of an individual debtor. The rule would leave to the discretion of the court the scheduling of any reaffirmation hearing.

The committee without objection approved the proposed amendment for publication by voice vote.

FED. R. BANKR. P. 7004

Judge Small stated that Rule 7004 (process and service) was being amended to allow the clerk of court to sign, seal, and issue a summons electronically, which would then be printed and served with the complaint in the conventional manner. The suggestion for the rule change came from a bankruptcy court that is in the process of implementing the Case Management/Electronic Case Files system.

The committee without objection approved the proposed amendment for publication by voice vote.

FED R. BANKR. P. 9006

Judge Small explained that the amendment to Rule 9006 (time computation) was being proposed in tandem with a proposed amendment to FED. R. CIV. P. 6(e). Both would clarify the method for counting the number of additional days a party is given to respond when service is made by mail, by leaving it with the clerk, by electronic means, or by other means consented to by the party served.

The committee without objection approved the proposed amendment for publication by voice vote.

Informational Item

Judge Small reported on the status of the comprehensive bankruptcy legislation pending in Congress and on the advisory committee's efforts to be prepared to move quickly with proposed amendments to the rules and forms if the legislation passes.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Levi and Professor Cooper presented the report of the advisory committee, as set forth in Judge Levi's memorandum and attachments of May 21, 2003. (Agenda Item 7)

Amendments for Publication

FED. R. CIV. P. 5.1 and 24(c)

Judge Levi explained that the genesis for the proposed new Rule 5.1 (notice of constitutional challenge to a statute) had been a public comment in response to the proposed amendment to FED R. APP. P. 44, which took effect in 2002. The amendment to the appellate rules added a new subdivision (b) specifying a procedure for notifying a court of appeals when a party questions the constitutionality of a state statute. The public comment suggested that the counterpart provision in the civil rules — set forth in FED. R. CIV. P. 24(c) — is inadequate and should be redrafted to emulate the change in FED. R. APP. P. 44.

Judge Levi explained that the Department of Justice had taken up the suggestion and sponsored the proposed changes in the civil rules. He noted that the Department reports that it often fails to receive notice when the constitutionality of a statute is questioned in a district-court action. Judge Levi added that the new rule requires dual notification to the Department — both by the district court and by the party drawing into question the constitutionality of a statute. Nevertheless, he said, the duplication is not wasteful.

Participants pointed to some differences between the proposed new civil rule and FED. R. APP. P. 44. They expressed concern over having two rules that implement — somewhat differently — the same statute, 28 U.S.C § 2403 Judge Alito and Professor Schiltz agreed to consider this issue at the next meeting of the Advisory Committee on Appellate Rules. Judge Small added that the proposed rule also has potential implications in the bankruptcy courts.

The committee without objection approved the proposed new rule and deletion of language in Rule 24 for publication by voice vote.

FED. R. CIV. P 6(e)

Professor Cooper stated that the proposed amendment to Rule 6 (computation of time) would clear up an ambiguity in the rule as to the correct way of calculating the three days added to prescribed time periods after service is made by mail, by leaving it with the clerk, by electronic means, or by other means consented to by the party served The

amendment specifies that counting of the three days begins after the prescribed period to respond expires.

One of the members commented that the committee note accompanying the proposed amendment was a model of brevity and clarity on a confusing issue. Judge Small observed that although FED. R. CIV. P. 6(e) does not directly apply in bankruptcy proceedings, FED. R. BANKR. P. 9006 contains a parallel provision to Rule 6(e), and the two should conform

The committee without objection approved the proposed amendment for publication by voice vote.

FED. R CIV. P. 27(a)(2)

Professor Cooper noted that Rule 27(a)(2) governs notice and service of a petition for a deposition to perpetuate testimony before an action is filed. He pointed out that the amendment was necessary to correct an outdated cross-reference to former Rule 4(d) regarding service on expected adverse parties. He explained that the 1993 amendments to Rule 4 had scattered the service provisions of former Rule 4(d) among several different subdivisions of Rule 4. Accordingly, the cross-reference needed to be revised to apply to all of Rule 4. In addition, the proposed amendments makes it clear that Rule 4 service is effective service as to all classes of adverse parties.

The committee without objection approved the proposed amendment for publication by voice vote.

FED. R. CIV. P. 45(a)(2)

Professor Cooper stated that the proposed amendment to Rule 45 (subpoenas) would close a gap in the rule by giving notice of the means of recording a deposition to the deponent. He explained it is helpful for the deponent, as well as the parties, to know in advance the means proposed for recording the deposition because it gives them a reasonable opportunity to object to the means or to seek a protective order.

The committee without objection approved the proposed amendment for publication by voice vote.

Amendments for Deferred Publication

STYLE REVISION PROJECT
FED. R. CIV. P. 1-15

Judge Levi reported that the goal of the restyling project is to improve the style, readability, and consistency of the Federal Rules of Civil Procedure, while at the same time avoiding inadvertent changes in substance. He noted that a significant number of small substantive improvements could be made, but consideration of these changes could complicate and slow down the restyling project and make it very difficult to proceed in a timely or efficient manner. He explained that the advisory committee had followed the sound advice of the Advisory Committee on Criminal Rules and had formed two subcommittees, each with primary responsibility over half the civil rules. In addition, each individual member had been assigned to take the lead on designated rules. Judge Levi reported that the procedure is working very well, and several other participants agreed with this assessment.

Judge Levi and Professor Cooper provided a number of specific examples of the types of issues that had arisen during the initial phases of the restyling project. They also pointed out some of the ground rules being followed on the project, such as eliminating obsolete and redundant cross-references, keeping language simple and short, using the active voice, and having more "white space."

Judge Scirica thanked the Style Subcommittee of the Standing Committee, which he noted had been working very closely with the advisory committee and had completed a great deal of high-quality work in a very short time. He also thanked Mr. Hennemuth for his dedication and enormous output in staffing the restyling project. He noted with regret, however, that Mr. Hennemuth would be leaving the restyling project to assume the position of Deputy Chief of the Administrative Office's Article III Judges Division.

The participants discussed the appropriate time-frame for publishing the body of restyled civil rules. Judge Scirica suggested that the Standing Committee approve the rules for publication, but delay actual publication until August 2004.

The committee without objection approved the proposed restyled rules for deferred publication by voice vote.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Carnes, Judge Trager, and Professor Schlueter presented the report of the advisory committee, as set forth in Judge Carnes's memorandum and attachments of May 15, 2003. (Agenda Item 6)

Amendments for Judicial Conference Approval

FED. R. CRIM. P. 35(c)

Judge Carnes reported that the proposed amendment to Rule 35 (correcting or reducing a sentence) would add a new a subdivision (c) defining "sentencing" as the oral announcement of the sentence by the court. He explained, however, that the proposal, in the form published for public comment, had defined sentencing as the entry of judgment. The public comments, he noted, had been mixed, and the Department of Justice was among the opponents of the proposed change. He reported that the advisory committee had found the objections persuasive and had decided to recast the amendment to define sentencing as the oral announcement of sentence. The amendment, he added, reflects the majority view of the courts of appeals addressing the issue.

The committee without objection approved the proposed amendment by voice vote.

FED. R. CRIM. P. 41

Judge Carnes reported that several changes were being proposed in Rule 41 (search and seizure) to address tracking-device warrants. The proposed amendments, he noted would: (1) provide procedural guidance to judges in issuing tracking-device warrants; and (2) add a provision for delaying any notice required by the rule. Professor Schlueter added that magistrate judges favor the proposed amendments, and there is general public support for them.

Judge Carnes explained that the amendments would not require a warrant for a tracking device in every instance. And they would not resolve the issue of whether a tracking-device warrant may issue only upon a showing of probable cause. They provide merely that the magistrate judge must issue the warrant if probable cause is shown.

The committee approved the proposed amendments, with Deputy Attorney General Thompson abstaining.

Following the meeting, the deputy attorney general expressed some concerns about the proposed changes to Rule 41, and he asked the committee to defer transmitting

them to the Judicial Conference for final approval. In light of his concerns — and because the Department of Justice itself originally had proposed the rule changes — the committee decided to defer transmitting the amendments in order to give the Department additional time to consider the proposal.

REVISION OF THE RULES GOVERNING § 2254 CASES AND § 2255 PROCEEDINGS

Judge Carnes reported that following the successful restyling of the Federal Rules of Criminal Procedure, the committee obtained approval from the Standing Committee to proceed with a review of the § 2254 and § 2255 Rules. He asked Judge Trager, who had chaired the subcommittee that had taken the lead in restyling the rules, to describe the proposed changes.

Judge Trager noted that there had not been any significant changes to the habeas rules for nearly 25 years He stated that there were relatively few differences between the § 2254 Rules and the § 2255 Rules, and the advisory committee was recommending similar changes to both sets of rules. One necessary difference between the two, he noted, is in Rule 5(b) (addressing the allegations) because there is no requirement in § 2255 cases that a movant exhaust remedies. Professor Schlueter added that the district court in a § 2255 case already has the file and knows what has already happened.

Judge Trager reviewed each rule in turn and focused on the most significant changes. First, he pointed out that Rule 1(b) (scope) will continue to specify that any or all of the rules may be applied in a case brought under 28 U.S C § 2241. He also pointed to a significant substantive change in Rule 3 (filing the petition) of the § 2254 and § 2255 Rules. Under the current rules, he said, the clerk may reject a petition that does not comply with the rules. The advisory committee, however, was of the view that this approach is too punitive given enactment of the short one-year statute of limitations for § 2254 petitions in the Antiterrorism and Effective Death Penalty Act of 1996 The revised rules, instead, require the clerk to accept a defective petition and enter it on the docket. This approach, moreover, is consistent with FED. R. CIV. P. 5(e), which provides that the clerk may not refuse to accept a civil filing solely for the reason that it fails to comply with the federal rules or with local rules of court.

Judge Trager pointed out that a change was being made in Rule 4 (preliminary review by the court) in the § 2254 and § 2255 Rules to substitute "motion or other response" for the current term "pleading." This reflects the common practice for responses in habeas corpus cases to be made by way of motion. A related change was being made in Rule 5 (answer and reply) of the § 2254 Rules. In addition, a reference to "affirmative defenses" in the published draft had been deleted, and the committee note points out a potential substantive change in the rule in that it requires that the answer address procedural bars and any statute of limitations. Judge Trager noted that the

advisory committee had also made a substantive change in Rule 9 (second or successive petition) of the § 2254 Rules to reflect provisions in the Antiterrorism and Effective Death Penalty Act of 1996 requiring a petitioner to obtain approval from the appropriate court of appeals before filing a second or successive petition.

Some specific language changes were suggested by the members, and one participant suggested that the Style Subcommittee should take another look at the proposed changes before they are submitted to the Judicial Conference. Another suggested that a general protocol might be established for the future under which the Style Subcommittee is given a final opportunity to comment on all proposed changes before advisory committee reports are sent to the Standing Committee. But it was pointed out that there is generally not enough time between the meetings of the advisory committee and the Standing Committee for a final, formal review by the Style Subcommittee. Judge Scirica stated that he was pleased that the advisory committee had received input from the Style Subcommittee throughout the restyling process.

The committee without objection approved the proposed revision of the Rules Governing § 2254 Cases by voice vote.

REVISION OF THE FORMS FOR §§ 2254 AND 2255 CASES AND PROCEEDINGS

Judge Trager explained that the forms used for filing petitions and motions under §§ 2254 and 2255 need to be updated to comport with the Antiterrorism and Effective Death Penalty Act of 1996. In addition, he pointed out that the advisory committee had debated whether it would be helpful for Question 12 on the two forms to include a current list of all possible grounds for relief that a prisoner might claim. Judge Trager said that a majority of the advisory committee did not believe that maintaining such a list would be helpful, and he added that district courts are free to modify the forms to suit local practices.

The committee without objection approved the proposed amendments to the forms by voice vote.

It was also noted, historically, that the habeas corpus forms — unlike the Official Bankruptcy Forms — have been presented to Congress as part of the rules amendments package, although this procedure is probably not required.

Amendments for Publication

FED R. CRIM. P. 12.2(d)

Judge Carnes reported that the proposed amendments to Rule 12.2(d) (notice of insanity defense) would fill a gap in the rule by adding a sanctions provision for failure to comply with Rule 12(c)(3), which requires the defendant to disclose to the government the results and reports of the defendant's expert examination.

The committee without objection approved the proposed amendments for publication by voice vote.

FED. R. CRIM. P. 29(c)(1), 33(b)(2), 34(b), and 45(b)(2)
Rulings on Motions for Extension of Time

Judge Carnes explained that under the current rules a court must actually rule on a defendant's motion for an extension of time within the 7-day period specified for filing the underlying motion itself under Rule 29 (motion for a judgment of acquittal), Rule 33 (motion for a new trial), and Rule 34 (motion to arrest judgment). If the court does not act on the motion to extend within the 7 days — even if the defendant actually filed the motion to extend within the 7-day period — the court may lack jurisdiction to act on the underlying substantive motion.

He explained that the current rules do not represent sound policy and may trap the court by requiring it to act within 7 days or lose jurisdiction to consider the underlying motion. The proposed amendments, he added, are consistent with all the other timing requirements in the rules, which do not force the court to act on a motion to extend the time for filing within a particular period of time or lose jurisdiction.

The committee without objection approved the proposed amendments for publication by voice vote.

FED. R. CRIM. P. 32(i)(4)

Judge Carnes reported that Rule 32(i)(4) (sentencing and judgment) currently provides an opportunity for allocution at sentencing for victims of crimes of violence and sexual abuse. He said that the Advisory Committee had determined to extend the same opportunity to victims of felonies that do not involve violence or sexual abuse.

Deputy Attorney General Thompson suggested adding a statement in the committee note to the effect that the amendment does not prohibit a judge from hearing from a representative on behalf of the victim of a non-violent crime. Professor Schlueter

explained, though, that there is considerable concern as to who is an appropriate spokesperson for the victim. He agreed that public comments would be very helpful, and he stated that the committee was aware of the interest of Congress in victims' rights.

The committee without objection approved the proposed amendment for publication by voice vote.

FED. R. CRIM. P. 32.1(b) and (c)

Judge Carnes explained that an opinion from the Eleventh Circuit had noted that there is no explicit provision in Rule 32.1 (revoking or modifying probation or supervised release) giving a defendant a right to allocution upon resentencing at a revocation proceeding. The proposed amendment recognizes the importance of allocution and would explicitly extend it to hearings involving revocation or modification of probation or supervised release.

The committee without objection approved the proposed amendments for publication by voice vote.

FED. R. CRIM. P. 59

Judge Carnes explained that the proposed new Rule 59 (matters before a magistrate judge) would specify procedures for district judges to review nondispositive and dispositive decisions by magistrate judges. He noted that the rule had been drafted following the decision of the Ninth Circuit in *United States v. Abonce-Barerra*, 257 F. 3d 959 (9th Cir. 2001), holding that the rules currently do not require that an appeal to a district judge from a nondispositive decision by a magistrate judge be taken as a prerequisite for review by the court of appeals In its decision, the court suggested that FED. R. CIV. P. 72 might serve as a model for a counterpart rule in the Federal Rules of Criminal Procedure. Under the new rule, a party must file timely objections to a magistrate judge's decision. Failure to object waives the party's right to review.

Judge Carnes reported that the advisory committee originally had drafted a rule addressing not only appeals from magistrate judges' decisions but also the taking of guilty pleas by magistrate judges in felony cases The latter provision, he said, had been dropped because of concerns raised by the Magistrate Judges Committee of the Judicial Conference and because the case that had provided the impetus for including a reference to guilty pleas had been vacated. *See United States v Reyna-Tapia,* 294 F. 3rd 1192 (9th Cir. 2001), *vacated,* 315 F. 3rd 1107 (9th Cir. 2002).

Judge Carnes and Professor Schlueter agreed to consider adding to the committee note language: (1) to explain that the requirement that a "record" be made of the proceedings before the magistrate judge is satisfied by recording by mechanical means, especially when no objection is filed to the action of the magistrate judge; and (2) to state that the rule does not purport to define "dispositive" and "non-dispositive."

The committee without objection approved the proposed new rule for publication by voice vote.

Informational Item

Judge Carnes reported that the advisory committee was considering very controversial amendments offered by the Department of Justice that would prohibit a district judge from granting a motion for judgment of acquittal under Rule 29 until after the jury returns a verdict of guilty. He stated that the advisory committee would consider the proposal at its next meeting and had asked the Federal Judicial Center to conduct a survey of state-court practices on the issue.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Smith and Professor Capra presented the report of the advisory committee, as set forth in Judge Smith's memorandum and attachment of May 5, 2003. (Agenda Item 8)

Amendment for Judicial Conference Approval

FED. R. EVID. 804(b)(3)

Professor Capra pointed out that Supreme Court decisions addressing the relationship between the Confrontation Clause and the hearsay exception for declarations against interest had rendered Rule 804(b)(3) (hearsay exception for a statement against interest) inconsistent with constitutional standards in cases where declarations against penal interest are offered against a criminal defendant. He explained that the proposed amendment specifies that a declaration is admissible against the defendant only if supported by "particular guarantees of trustworthiness." This usage, he said, tracks the language used by the Supreme Court in its Confrontation Clause jurisprudence. Professor Capra explained that the amendment also addresses some meritorious comments submitted by the Department of Justice.

The committee without objection approved the proposed amendment by voice vote.

Informational Items

Judge Smith explained that the advisory committee, as part of its ongoing, comprehensive review of problem areas and possible changes in the evidence rules, had decided to reject proposed changes to Rule 106 (to expand the rule of completeness to cover oral as well as written statements), Rule 404(a)(1) (to explicitly authorize admission of character evidence to prove a trait of character when essential to a claim or defense), and Rule 803(6) (to codify the "business duty" requirement). He reported that the advisory committee was continuing to consider suggested changes in other rules, particularly Rule 408 regarding compromise and offers to compromise.

LOCAL RULES PROJECT

Judge Scirica commended Professor Mary Squiers for her work in conducting a comprehensive study of local court rules and filing a detailed report. He noted that final committee action on the project would be deferred until the January 2004 meeting. He added that Professor Squiers would add some material to the report, and Professors Capra and Cooper and Judge Fitzwater will participate in this effort.

Judge Scirica added that the committee was under a statutory and rules mandate to eliminate inconsistencies in the local rules vis a vis the national rules. Professor Coquillette explained that following the January meeting, the committee would send a relatively narrow letter to each chief district judge identifying any local rules that may be problematic and providing information about the committee's mandate. Several participants suggested the potential value of the report as an educational resource for the judiciary.

MASS CLAIMS

Judge Scirica introduced Professor McGovern as an old friend and great resource to the committee who has been deeply involved in mass-claims issues for several years, both as a scholar and a mediator. Judge Scirica asked Professor McGovern for his thoughts on whether: (1) bankruptcy is the preferred vehicle for resolving mass claims; and (2) the Advisory Committee on Civil Rules should continue to consider amending FED. R. CIV. P. 23 to provide for settlement-only classes.

Professor McGovern pointed to the significance of the pending Fairness in Asbestos Injury Resolution Act of 2003, which would establish a no-fault scheme for claims resolution and review by an Article I court He predicted that if that legislation fails to pass, it is likely that other legislation will be introduced to enact a "hybrid" claims

resolution mechanism — akin to the asbestos provisions in § 524(g) of the Bankruptcy Code, but not actually incorporated in the Bankruptcy Code. Finally, he said, if that alternative approach fails, the rules committees should expect to become the focus of attention through various proposals for rules amendments that combine aspects of both bankruptcy and class-action practice.

Currently, he said, the only procedural vehicle available for companies facing asbestos exposure and seeking global peace is § 524(g). It requires a 75% vote of claimants to approve a plan of reorganization, authorizes appointment of a representative for future claimants, requires that future claimants be treated equivalently to current claimants, and specifies that 51% of the equity in the reorganized company be placed in a trust fund for current and future claimants. A debtor who is able to meet all these requirements can discharge its asbestos liability. But, he added, § 524 is simply not appropriate for all companies, especially since it requires a company to go into bankruptcy Moreover, § 524(g) applies only to asbestos, and not to other types of mass-tort claims.

Professor McGovern emphasized that the asbestos problem will not go away, and other types of mass torts are likely to experience the same phenomena as asbestos. He suggested that if both the pending asbestos legislation and potential hybrid bankruptcy legislation fail, the Advisory Committee on Civil Rules should expect to receive proposals to establish a mechanism under FED. R. CIV. P. 23 that would enable a company facing mass tort liability to obtain finality without going into bankruptcy. The shape of a potential proposal, for example, might authorize an opt-in class, and it might authorize an Article III judge to certify a mandatory class binding all claimants — if, for example, a threshold number of claimants with a threshold value of claims opt in, and if the claims have reached a certain stage of litigation maturity.

He added that it would be very helpful to have a statutory provision authorizing the appointment of a representative for future claimants And he concluded that, whatever the particular approach may be, there is a great demand both by defendant corporations and plaintiffs' lawyers for a procedural mechanism that provides both for the reasonable resolution of competing claims and for an end to a company's liability exposure.

Professor McGovern suggested that the Advisory Committee on Civil Rules might wish to sponsor a conference on this topic, since it calls out for serious academic attention and input from bench and bar. Judge Levi stated that the advisory committee would be interested in a conference, but it would necessarily proceed cautiously in light of the fiercely competing private interests, as well as the prerogatives and current interests of Congress in the area.

TECHNOLOGY

Judge Fitzwater and Professor Capra presented the report of the Technology Subcommittee. Professor Capra pointed out that the subcommittee had been working cooperatively with the Court Administration and Case Management Committee on the model court rules for electronic filing in civil, bankruptcy, and criminal cases.

Professor Capra added that discovery of materials in electronic format has emerged as an important focus for potential amendments to the civil rules. He said that the subcommittee would assist the Advisory Committee on Civil Rules regarding potential amendments to the discovery rules. Judge Fitzwater added that the subcommittee had received valuable assistance from Mr. Rabiej and Nancy Miller of the Office of Judges Programs in the Administrative Office.

ATTORNEY CONDUCT

Professor Coquillette explained that a task force appointed by the committee had developed potential national rules addressing attorney conduct. He noted, though, that the project was currently on hold, and no further action would be taken until Congress, the Department of Justice, or the Conference of Chief Justices requests it. Judge Scirica added that there has been a difference of opinion between the Senate and the House of Representatives on how to address attorney conduct on the part of federal-government attorneys. He advised that it is sound advice for the rules committees to defer further action until the interested parties reach some sort of agreement on the key issues.

Professor Coquillette explained that attorney conduct in the federal courts is governed by local court rules. He said that there are substantial differences among the local rules, causing problems for attorneys generally and for Department of Justice prosecutors particularly. He added that the preference of the committee has been to adopt a single national rule of "dynamic conformity" specifying that attorney conduct in the federal courts is governed by the current rules of the highest court of the state in which the federal court sits. Limited exceptions, however, could be carved out from the rule of dynamic conformity to address on a national basis certain unique problems facing federal-government attorneys.

Chief Justice Veasey reported that every state supreme court is reviewing model rules flowing from the American Bar Association's Ethics 2000 project. He said that the Conference of Chief Justices favors greater national uniformity with only minor variations from state to state.

Deputy Attorney General Thompson pointed out that Rule 4.2 of the ABA's Model Rules of Professional Conduct, governing contacts with represented parties, is of special concern to Department of Justice lawyers, especially in light of the recent corporate scandals. He added that the Department needs to reach a consensus internally before it negotiates attorney conduct proposals further with the American Bar Association and the Conference of Chief Justices.

LONG-RANGE PLANNING AND BUDGETING

Judge Scirica and Mr. Rabiej reported that the March 2003 long-range planning meeting of Judicial Conference committee chairs had focused mostly on issues of concern to the program committees of the Conference, rather than the rules committees.

NEXT COMMITTEE MEETING

The next meeting of the committee is scheduled for January 15-16, 2004, in Scottsdale, Arizona.

The secretary would like to thank Kathryn Marrone very much for her invaluable assistance in preparing a draft of the minutes of the meeting.

Respectfully submitted,

Peter G. McCabe,
Secretary

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 16, 2003

MEMORANDUM TO THE STANDING COMMITTEE

SUBJECT: *Legislative Report*

Thirty-three bills were introduced in the 108th Congress that affect the Federal Rules of Practice and Procedure. A list of the relevant pending legislation is attached. Since the last Committee meeting, we have been focusing on the following bills.

Class Actions

On October 17, 2003, Senator Grassley introduced the "Class Action Fairness Act of 2003" (S. 1751, 108th Cong., 1st Sess.). The bill is substantially similar to earlier class-action legislation, notably S. 274 (108th Cong., 1st Sess.). Shortly after S. 1751 was introduced, proponents of the bill pushed for a vote by the full Senate, but a petition to invoke cloture, or limit debate, to consider the legislation was defeated by a single vote — 59-39.

Supporters of the bill worked hard to secure the 60th vote to bring the measure to the Senate floor. Numerous draft amendments were proposed and circulated. In late November 2003, a compromise agreement was reached between the Senate Republican leadership and three prominent Democrats, who had opposed cloture. The compromise agreement, as set forth in the *Congressional Record* dated December 15, 2003 (149 CONG. REC. S16217) (daily ed. Dec. 15, 2003) (see attached), includes the following amendments to S. 1751:

- **"Plain-English" Settlement Notice Provisions are Dropped.** As introduced, S. 1751 added a new § 1716 to title 28 of the United States Code prescribing detailed requirements governing the contents of proposed class-action settlement notices. In May 2003, Judge Scirica wrote to Senator Hatch, objecting to an identical provision contained in S. 274 (108th Cong., 1st Sess.), the predecessor class-action bill. Judge Scirica explained that § 1716 would, among other things, overlap proposed amendments to Civil Rule 23 that had been approved by the Supreme Court and were scheduled to take effect on December 1, 2003. The compromise agreement dropped the § 1716 provision from S. 1751.

• **Additional Considerations for Declining Federal Jurisdiction.** S. 1751 provides that a federal court may decline to exercise jurisdiction over a class action if more than 1/3 but less than 2/3 of the members of the plaintiff classes in the aggregate and the primary defendants are citizens of the same state in which the action was originally filed. As introduced, the bill stated that the court may decline to exercise jurisdiction based on five factors. The compromise agreement expands this list by adding several new factors: (1) whether the class action was brought in a forum with sufficient nexus with the plaintiff class members, the alleged harm, or the defendants; and (2) whether during the three-year period preceding the filing of the class action, one or more class actions asserting the same or similar factual allegations were filed on behalf of the same or other persons against any of the defendants.

• **Expanded Grounds When Federal Jurisdiction Cannot be Exercised.** As introduced, S. 1751 prescribed three grounds when a federal court could not exercise jurisdiction over a class action: (1) when more than 2/3 of the plaintiff classes and the primary defendants are citizens of the State where the action was originally filed; (2) when the primary defendants are States, state officials, or other government entities; or (3) when the aggregate number of the plaintiff classes is less than 100. The compromise agreement retained these grounds and also excluded from federal jurisdiction class actions in which: (1) more than 2/3 of the members of all proposed plaintiff classes in the aggregate are citizens of the State in which the action was filed; (2) at least one defendant is a party from whom plaintiffs seek "significant relief," whose conduct forms a "significant basis" for plaintiffs' claims, and who is a citizen of the State where the action was originally filed; (3) the principal injuries resulting from the alleged conduct occurred in the State where the action was originally filed, and (4) a class action "asserting the same or similar factual allegations against any of the defendants on behalf of the same or other persons" was filed during the three-year period preceding the filing of the class action.

• **MDL Provisions.** As introduced, S. 1751 provided, among other things, that any mass action removed to federal court could not be transferred to any other court pursuant to 28 U.S.C. § 1407, unless a majority of plaintiffs requested the transfer. Judge Wm. Terrell Hodges, Chairman of the Judicial Panel on Multidistrict Litigation, wrote to Congress objecting to the provision. The compromise bill retained the MDL language.

• **Appeal of Remand Orders.** As introduced, S. 1751 provided that a district court's order remanding a class action "shall be reviewable by appeal or otherwise." The clean version of the bill amends S. 1751 by providing that the court of appeals may consider an appeal from a district court's remand order. The clean version also prescribes that if the court of appeals accepts the appeal, the court must render a decision within 60 days after the appeal was filed, unless an extension of time is granted. (An extension of time may be granted for no more than 10 days.)

• **Amendments to Civil Rule 23**. The compromise agreement states that the amendments to Civil Rule 23, which were approved by the Supreme Court on March 27, 2003, would take effect on the date of enactment or December 1, 2003, whichever occurred first.

The compromise agreement raises a number of complicated issues as to how the legislation will work, particularly with the jurisdictional provisions. The legislation is also extremely fluid and fast-moving. It is expected that the Senate will vote on S. 1751 when Congress reconvenes in January 2004.

On June 12, 2003, the House passed H.R. 1115 (108th Cong., 1st Sess.), with one amendment, by a vote of 253-170. Section 6 of the legislation amends 28 U.S.C. § 1292(a) by allowing a party to file an interlocutory appeal of a court's decision to grant or deny class-action certification if the notice of appeal is filed within 10 days. Section 6 also stays all discovery and other proceedings during the pendency of the appeal. In May 2003, Judge Scirica wrote to Chairman Sensenbrenner requesting that the provision be withdrawn. (Although the Senate class action bills did not contain similar interlocutory-appeal provisions, Judge Scirica also wrote to Chairman Hatch, advising him of the Standing Committee's opposition to the provision. Neither the Senate class action bills nor the Senate compromise agreement contains mandatory interlocutory-appeal provisions.)

Truncated Social Security Numbers

In September 2001, the Judicial Conference adopted a policy on privacy and public access to court records (JCUS - SEP/OCT 01, pp. 48-50), protecting the privacy interests of the debtor by requiring that only the last four digits of the debtor's social security number be disclosed. To implement this policy, the Advisory Committee on Bankruptcy Rules published proposed amendments to Bankruptcy Rule 1005 and various Official Bankruptcy Forms in January 2002.

On April 12, 2002, the Bankruptcy Rules Committee's Subcommittee on Privacy, Public Access, and Appeals held a focus-group meeting and invited selected individuals representing private creditors, credit reporting companies, taxing authorities, law enforcement, and the Federal Trade Commission. After considering the testimony and the written comments submitted, the Subcommittee recommended that Bankruptcy Rules 1007 and 2002 also be amended to supplement the proposed amendment to Bankruptcy Rule 1005. Specifically, the Subcommittee recommended amending Bankruptcy Rules 1007 and 2002 to require the debtor to submit, but not file, a statement containing the debtor's full social security number. The Advisory Committee approved the Subcommittee's recommendations by mail ballot. The proposed amendments were in turn approved by the Standing Committee in June 2002, the Judicial Conference at its September 2002 session, and the Supreme Court on March 27, 2003. The rule amendments took effect on December 1, 2003.

In November 2003, representatives from a credit-reporting association lobbied Congress to enact legislation that would have delayed the effective date of the Bankruptcy Rules amendments. The association forcefully argued that truncated social security numbers will significantly increase the probability of credit-reporting businesses misidentifying individual debtors. On November 19, 2003, Judicial Conference Secretary Mecham sent a letter to Representative Chris Cannon, a member of the House Judiciary Committee and Chairman of the Committee's Subcommittee on Commercial and Administrative Law, urging him to oppose legislation delaying the effective date of the bankruptcy rule amendments. (See attached.) Representative Cannon agreed to defer action on the legislation and allowed the Bankruptcy Rule amendments to take effect on December 1, 2003. Representative Cannon indicated that his subcommittee will hold hearings on the matter in April 2004.

Bail Bond Forfeitures

On May 15, 2003, Representative Keller introduced the "Bail Bond Fairness Act of 2003." (H.R. 2134, 108th Cong., 1st Sess.) The bill, which is similar to legislation introduced in previous Congresses, would amend Criminal Rule 46 to permit a judge to forfeit a bail bond only when the defendant fails to appear before the court as ordered. (The existing rule permits a judge to forfeit a bail bond if a defendant fails to abide by any release condition.) Senator Graham introduced a similar measure, "Bail Bond Fairness Act of 2003" (S. 1795, 108th Cong., 1st Sess.), on October 29, 2003.

On June 13, 2003, Judges Scirica and Carnes wrote to Chairman Sensenbrenner and Representative Conyers, asking that they both decline to support H.R. 2134. (See attached.) Judges Scirica and Carnes argued that (1) the legislation would impair the federal judiciary's ability to enforce bail bonds, (2) the number of bonds actually forfeited as a result of a defendant violating a condition of release other than for failing to appear at a court-ordered proceeding is minuscule, (3) the number of corporate bonds issued in federal court has been increasing since 1995, and (4) the vast majority of defendants appear at scheduled proceedings. The Department of Justice also sent a letter to the House Judiciary Committee expressing its strong opposition to the bill.

The House Judiciary Committee favorably reported H.R. 2134 by acclamation on September 10, 2003. There has been no further action on H.R. 2134 or S. 1795.

Last year, Judge Carnes testified before the House Judiciary Committee's Subcommittee on Crime, Terrorism, and Homeland Security opposing H.R. 2929 (107th Cong., 1st Sess.), a predecessor of H.R. 2134. Judge Carnes subsequently wrote to Chairman Coble, providing him with additional statistics showing that it is relatively rare for a federal judge to order a corporate surety bond forfeited for any reason, including failure to appear. Judges forfeited a much smaller number of corporate surety bonds for failing to abide by a condition of release, other than the failure to appear. Moreover, the statistics also indicate that the posting of corporate surety bonds,

though relatively modest, is increasing. As such, Judge Carnes pointed out that the minuscule number of corporate bonds forfeited as a result of the defendant violating a condition of release other than for failure to appear belies the contention that corporate surety bonds posted in federal court are subject to substantially enhanced risks of forfeiture because of conditions other than failure to appear.

E-Government Act

Section 205(c) of the E-Government Act of 2002 (Pub. L. No. 107-347) requires, among other things, the Supreme Court to promulgate rules under the Rules Enabling Act to protect the privacy and security of documents filed electronically. Section 205(c) also authorizes the Judicial Conference to issue interim rules and "interpretive statements" relating to the application of such rules.

The Department of Justice raised concerns that under the legislation, courts were not accepting unredacted documents for filing. On October 7, 2003, the House of Representatives passed a bill, "To Amend the E-Government Act of 2002 with respect to Rulemaking Authority of the Judicial Conference." (H.R. 1303, 108th Cong., 1st Sess.) The bill authorizes a party to file, under seal, an unredacted version of the document (with the redacted version available for public use) or a reference list that identifies redacted information for the court.

In accordance with the E-Government Act, Judge Levi established the Subcommittee on E-Government — chaired by Judge Sidney A. Fitzwater and comprised of representatives from the five advisory rules committees and the Committee on Court Administration and Case Management — to develop proposed rule amendments.

Sealed Settlement Agreements

On April 8, 2003, Senator Kohl reintroduced the "Sunshine in Litigation Act of 2003." (S. 817, 108th Cong., 1st Sess.) The bill provides that a court may not enter an order that would, among other things, approve a settlement agreement that limits the disclosure of the agreement unless the court makes specific findings concluding that the litigants' privacy interests outweigh the public's interest in safety and public health. Although Senator Kohl requested a hearing on the bill, no further action has been taken.

On October 3, 2002, Secretary Mecham wrote a letter to Senator Kohl, advising him that the Civil Rules Committee is considering confidentiality provisions in settlement agreements as part of its ongoing study of issues arising from sealed settlement agreements. In December 2003, Secretary Mecham provided Senator Kohl with an interim report on the status of the empirical study of court orders sealing settlement agreements undertaken by the Federal Judicial Center. (See attached.)

Crime Victim Allocution

On January 7, 2003, Senator Kyl introduced S.J. Res. 1, a proposal to amend the United States Constitution to protect the rights of crime victims. (108th Cong., 1st Sess.) The resolution would, among other things, give victims of violent crimes the constitutional right to appear and be heard at proceedings involving the defendant's release, plea, sentencing, reprieve, or pardon. Representatives Royce and Chabot introduced substantially similar measures in the House — H.J. Res. 10 and H.J. Res. 48 — on January 7, 2003, and April 10, 2003, respectively. (On May 5, 2003, the House Judiciary Committee referred H.J. Res. 48 to its Subcommittee on the Constitution. The subcommittee held a hearing on September 30, 2003. No further action has been taken on that legislation.)

The Senate Judiciary Committee held a hearing on S.J. Res. 1 on April 8, 2003. The legislation was subsequently referred to the Committee's Subcommittee on Constitution, Civil Rights, and Property Rights on June 10, 2003. The subcommittee narrowly reported the bill without amendment on June 12, 2003. Following markup hearings in July 2003, the Senate Judiciary Committee favorably reported the bill by a vote of 10-8 on September 4, 2003. No further action has been taken on the bill.

James N. Ishida

Attachments

United States of America

Congressional Record

PROCEEDINGS AND DEBATES OF THE 108th CONGRESS, FIRST SESSION

Vol. 149 WASHINGTON, MONDAY, DECEMBER 15, 2003 No. 177

Senate

ENROLLED BILLS PRESENTED

The Secretary of the Senate reported that on December 11, 2003, she had presented to the President of the United States the following enrolled bills:

S 686 An act to provide assistance for poison prevention and to stabilize the funding of regional poison control centers

S 811. An act to support certain housing proposals in the fiscal year 2003 budget for the Federal Government, including the downpayment assistance initiative under the HOME Investment Partnership Act, and for other purposes

S. 877. An act to regulate interstate commerce by imposing limitations and penalties on the transmission of unsolicited commercial electronic mail via the Internet.

S 1680. An act to reauthorize the Defense Production Act of 1950, and for other purposes.

S 1683. An act to provide for a report on the parity of pay and benefits among Federal law enforcement officers and to establish an exchange program between Federal law enforcement employees and State and local law enforcement employees.

S 1929. An act to amend the Employee Retirement Income Security Act of 1974 and the Public Health Service Act to extend the mental health benefits parity provisions for an additional year

S. 1947 An act to prohibit the offer of credit by a financial institution to a financial institution examiner, and for other purposes.

CLASS ACTION REFORM

Mr. DODD. Mr. President, in October of this year, the majority leader sought to proceed to the Class Action Fairness Act, S. 1751.

I joined 40 of my colleagues in opposing the motion to proceed I said at the time that while I supported some reform of class action procedures, I could not support S 1751 in its current form. I also expressed concern about whether there would be any meaningful opportunity for interested Senators to negotiate changes to the bill in a bipartisan fashion.

Subsequent to the vote in October, I joined with three of my colleagues in sending a letter to the majority leader on November 14, 2003. In that letter, we reiterated our interest in class action reform and we outlined several areas where we believed revisions to S. 1751 were in order.

In November, Senators LANDRIEU, SCHUMER, and I entered into discussions with Senators FRIST, HATCH, GRASSLEY, KOHL, and CARPER. Those discussions have resulted in a compromise agreed to by our eight offices that I believe significantly improves upon S. 1751 I ask that the text of that compromise to printed in the RECORD immediately following my statement. I also ask that a summary of the compromise produced by my office be printed following my statement.

Lastly, Mr. President, I want to point out that in my view this is a delicate compromise, which addresses the shortcomings of current class action practice while at the same time protecting the right of citizens to join with fellow citizens to seek the redress of grievances in the courts of our Nation As I and my colleagues said in our letter of November 14, it is "critical" that this agreement "be honored as the bill moves forward—both in and beyond the Senate "

The material follows.

S 1751

Strike all after the enacting clause and insert the following.

SECTION 1. SHORT TITLE; REFERENCE; TABLE OF CONTENTS.

(a) SHORT TITLE.—This Act may be cited as the "Class Action Fairness Act of 2003"

(b) REFERENCE.—Whenever in this Act reference is made to an amendment to, or repeal of, a section or other provision, the reference shall be considered to be made to a section or other provision of title 28, United States Code.

(c) TABLE OF CONTENTS.—The table of contents for this Act is as follows.

NOTICE

Effective January 1, 2004, the subscription price of the Congressional Record will be $503 per year or $252 for six months. Individual issues may be purchased at the following costs: Less than 200 pages, $10.50; Between 200 and 400 pages, $21.00; Greater than 400 pages, $31.50. Subscriptions in microfiche format will be $146 per year with single copies priced at $3.00. This price increase is necessary based upon the cost of printing and distribution.

BRUCE R. JAMES, *Public Printer.*

● This "bullet" symbol identifies statements or insertions which are not spoken by a Member of the Senate on the floor.

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SEC. 2. FINDINGS AND PURPOSES.

(a) FINDINGS - Congress finds the following

(1) Class action lawsuits are an important and valuable part of the legal system when they permit the fair and efficient resolution of legitimate claims of numerous parties by allowing the claims to be aggregated into a single action against a defendant that has allegedly caused harm

(2) Over the past decade, there have been abuses of the class action device that have-

(A) harmed class members with legitimate claims and defendants that have acted responsibly,

(B) adversely affected interstate commerce, and

(C) undermined public respect for our judicial system.

(3) Class members often receive little or no benefit from class actions, and are sometimes harmed, such as where-

(A) counsel are awarded large fees, while leaving class members with coupons or other awards of little or no value;

(B) unjustified awards are made to certain plaintiffs at the expense of other class members, and

(C) confusing notices are published that prevent class members from being able to fully understand and effectively exercise their rights.

(4) Abuses in class actions undermine the national judicial system, the free flow of interstate commerce, and the concept of diversity jurisdiction as intended by the framers of the United States Constitution, in that State and local courts are-

(A) keeping cases of national importance out of Federal court;

(B) sometimes acting in ways that demonstrate bias against out-of-State defendants, and

(C) making judgments that impose their view of the law on other States and bind the rights of the residents of those States.

(b) PURPOSES - The purposes of this Act are to-

(1) assure fair and prompt recoveries for class members with legitimate claims;

(2) restore the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction, and

(3) benefit society by encouraging innovation and lowering consumer prices.

SEC. 3 CONSUMER CLASS ACTION BILL OF RIGHTS AND IMPROVED PROCEDURES FOR INTERSTATE CLASS ACTIONS.

(a) IN GENERAL.- Part V is amended by inserting after chapter 113 the following:

"CHAPTER 114—CLASS ACTIONS

"§ 1711. Definitions

"In this chapter:

"(1) CLASS.- The term 'class' means all of the class members in a class action.

"(2) CLASS ACTION.- The term 'class action' means any civil action filed in a district court of the United States under rule 23 of the Federal Rules of Civil Procedure or any civil action that is removed to a district court of the United States that was originally filed under a State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representatives as a class action.

"(3) CLASS COUNSEL.- The term 'class counsel' means the persons who serve as the attorneys for the class members in a proposed or certified class action

"(4) CLASS MEMBERS - The term 'class members' means the persons (named or unnamed) who fall within the definition of the proposed or certified class in a class action.

"(5) PLAINTIFF CLASS ACTION.- The term 'plaintiff class action' means a class action in which class members are plaintiffs

"(6) PROPOSED SETTLEMENT.- The term 'proposed settlement' means an agreement regarding a class action that is subject to court approval and that, if approved, would be binding on some or all class members.

"§ 1712. Coupon Settlements.

"(a) CONTINGENT FEES IN COUPON SETTLEMENTS.- If a proposed settlement in a class action provides for a recovery of coupons to a class member, the portion of any attorney's fee award to class counsel that is attributable to the award of the coupons shall be based on the value to class members of the coupons that are redeemed.

"(b) OTHER ATTORNEY'S FEE AWARDS IN COUPON SETTLEMENTS.-

"(1) IN GENERAL - If a proposed settlement in a class action provides for a recovery of coupons to class members, and a portion of the recovery of the coupons is not used to determine the attorney's fee to be paid to class counsel, any attorney's fee award shall be based upon the amount of time class counsel reasonably expended working on the action.

"(2) COURT APPROVAL - Any attorney's fee under this subsection shall be subject to approval by the court and shall include an appropriate attorney's fee, if any, for obtaining equitable relief, including an injunction, if applicable Nothing in this subsection shall be construed to prohibit application of a lodestar with a multiplier method of determining attorney's fees.

"(c) ATTORNEY'S FEE AWARDS CALCULATED ON A MIXED BASIS IN COUPON SETTLEMENTS - If a proposed settlement in a class action provides for an award of coupons to class members and also provides for equitable relief, including injunctive relief-

"(1) that portion of the attorney's fee to be paid to class counsel that is based upon a portion of the recovery of the coupons shall be calculated in accordance with subsection (a); and

"(2) that portion of the attorney's fee to be paid to class counsel that is not based upon a portion of the recovery of the coupons shall be calculated in accordance with subsection (b)

"(d) SETTLEMENT VALUATION EXPERTISE.- In a class action involving the awarding of coupons, the court may, in its discretion upon the motion of a party, receive expert testimony from a witness qualified to provide information on the actual value to the class members of the coupons that are redeemed.

"(e) JUDICIAL SCRUTINY OF COUPON SETTLEMENTS - In a proposed settlement under which class members would be awarded coupons, the court may approve the proposed settlement only after a hearing to determine whether, and making a written finding that, the settlement is fair, reasonable, and adequate for class members The court, in its discretion, may also require that a proposed settlement agreement provide for the distribution of a portion of the value of unclaimed coupons to 1 or more charitable or governmental organizations, as agreed to by the parties. The distribution and redemption of any proceeds under this subsection shall not be used to calculate attorneys' fees under this section.

"§ 1713. Protection against loss by class members

"The court may approve a proposed settlement under which any class member is obligated to pay sums to class counsel that would result in a net loss to the class member only if the court makes a written finding that nonmonetary benefits to the class member substantially outweigh the monetary loss

"§ 1714. Protection against discrimination based on geographic location

"The court may not approve a proposed settlement that provides for the payment of greater sums to some class members than to others solely on the basis that the class members to whom the greater sums are to be paid are located in closer geographic proximity to the court.

"§ 1715. Notifications to appropriate Federal and State officials

"(a) DEFINITIONS.-

"(1) APPROPRIATE FEDERAL OFFICIAL - In this section, the term 'appropriate Federal official' means-

"(A) the Attorney General of the United States, or

"(B) in any case in which the defendant is a Federal depository institution, a State depository institution, a depository institution holding company, a foreign bank, or a nondepository institution subsidiary of the foregoing (as such terms are defined in section 3 of the Federal Deposit Insurance Act (12 U S.C 1813)), the person who has the primary Federal regulatory or supervisory responsibility with respect to the defendant, if some or all of the matters alleged in the class action are subject to regulation or supervision by that person.

"(2) APPROPRIATE STATE OFFICIAL - In this section, the term 'appropriate State official' means the person in the State who has the primary regulatory or supervisory responsibility with respect to the defendant, or who licenses or otherwise authorizes the defendant to conduct business in the State, if some or all of the matters alleged in the class action are subject to regulation by that person If there is no primary regulator, supervisor, or licensing authority, or the matters alleged in the class action are not subject to regulation or supervision by that person, then the appropriate State official shall be the State attorney general.

"(b) IN GENERAL.- Not later than 10 days after a proposed settlement of a class action is filed in court, each defendant that is participating in the proposed settlement shall serve upon the appropriate State official of each State in which a class member resides and the appropriate Federal official, a notice of the proposed settlement consisting of-

"(1) a copy of the complaint and any materials filed with the complaint and any amended complaints (except such materials shall not be required to be served if such materials are made electronically available through the Internet and such service includes notice of how to electronically access such material);

"(2) notice of any scheduled judicial hearing in the class action;

"(3) any proposed or final notification to class members of-

"(A)(i) the members' rights to request exclusion from the class action, or

"(ii) if no right to request exclusion exists, a statement that no such right exists, and

"(B) a proposed settlement of a class action;

"(4) any proposed or final class action settlement,

"(5) any settlement or other agreement contemporaneously made between class counsel and counsel for the defendants.

"(6) any final judgment or notice of dismissal.

"(7)(A) if feasible, the names of class members who reside in each State and the estimated proportionate share of the claims of such members to the entire settlement to that State's appropriate State official; or

"(B) if the provision of information under subparagraph (A) is not feasible, a reasonable estimate of the number of class members residing in each State and the estimated proportionate share of the claims of such members to the entire settlement; and

"(8) any written judicial opinion relating to the materials described under subparagraphs (3) through (6)

"(c) DEPOSITORY INSTITUTIONS NOTIFICATION.—

"(1) FEDERAL AND OTHER DEPOSITORY INSTITUTIONS —In any case in which the defendant is a Federal depository institution, a depository institution holding company, a foreign bank, or a non-depository institution subsidiary of the foregoing, the notice requirements of this section are satisfied by serving the notice required under subsection (b) upon the person who has the primary Federal regulatory or supervisory responsibility with respect to the defendant, if some or all of the matters alleged in the class action are subject to regulation or supervision by that person.

"(2) STATE DEPOSITORY INSTITUTIONS —In any case in which the defendant is a State depository institution (as that term is defined in section 3 of the Federal Deposit Insurance Act (12 U S.C. 1813)), the notice requirements of this section are satisfied by serving the notice required under subsection (b) upon the State bank supervisor (as that term is defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C 1813)) of the State in which the defendant is incorporated or chartered, if some or all of the matters alleged in the class action are subject to regulation or supervision by that person, and upon the appropriate Federal official.

"(d) FINAL APPROVAL.—An order giving final approval of a proposed settlement may not be issued earlier than 90 days after the later of the dates on which the appropriate Federal official and the appropriate State official are served with the notice required under subsection (b)

"(e) NONCOMPLIANCE IF NOTICE NOT PROVIDED —

"(1) IN GENERAL.—A class member may refuse to comply with and may choose not to be bound by a settlement agreement or consent decree in a class action if the class member demonstrates that the notice required under subsection (b) has not been provided.

"(2) LIMITATION.—A class member may not refuse to comply with or to be bound by a settlement agreement or consent decree under paragraph (1) if the notice required under subsection (b) was directed to the appropriate Federal official and to either the State attorney general or the person that has primary regulatory, supervisory, or licensing authority over the defendant

"(3) APPLICATION OF RIGHTS.—The rights created by this subsection shall apply only to class members or any person acting on a class member's behalf, and shall not be construed to limit any other rights affecting a class member's participation in the settlement.

"(f) RULE OF CONSTRUCTION.—Nothing in this section shall be construed to expand the authority of, or impose any obligations, duties, or responsibilities upon, Federal or State officials "

(b) TECHNICAL AND CONFORMING AMENDMENT —The table of chapters for part V is amended by inserting after the item relating to chapter 113 the following

"114. Class Actions . .. . 1711".

SEC. 4. FEDERAL DISTRICT COURT JURISDICTION FOR INTERSTATE CLASS ACTIONS.

(a) APPLICATION OF FEDERAL DIVERSITY JURISDICTION —Section 1332 is amended—

(1) by redesignating subsection (d) as subsection (e), and

(2) by inserting after subsection (c) the following:

"(d)(1) In this subsection—

"(A) the term 'class' means all of the class members in a class action;

"(B) the term 'class action' means any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action,

"(C) the term 'class certification order' means an order issued by a court approving the treatment of some or all aspects of a civil action as a class action, and

"(D) the term 'class members' means the persons (named or unnamed) who fall within the definition of the proposed or certified class in a class action

"(2) The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs, and is a class action in which—

"(A) any member of a class of plaintiffs is a citizen of a State different from any defendant;

"(B) any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a State, or

"(C) any member of a class of plaintiffs is a citizen of a State and any defendant is a foreign state or a citizen or subject of a foreign state

"(3) A district court may, in the interests of justice and looking at the totality of the circumstances, decline to exercise jurisdiction under paragraph (2) over a class action in which greater than one-third but less than two-thirds of the members of all proposed plaintiff classes in the aggregate and the primary defendants are citizens of the State in which the action was originally filed based on consideration of—

"(A) whether the claims asserted involve matters of national or interstate interest;

"(B) whether the claims asserted will be governed by laws of the State in which the action was originally filed or by the laws of other States,

"(C) whether the class action has been pleaded in a manner that seeks to avoid Federal jurisdiction;

"(D) whether the action was brought in a forum with a distinct nexus with the class members, the alleged harm, or the defendants;

"(E) whether the number of citizens of the State in which the action was originally filed in all proposed plaintiff classes in the aggregate is substantially larger than the number of citizens from any other State, and the citizenship of the other members of the proposed class is dispersed among a substantial number of States; and

"(F) whether, during the 3-year period preceding the filing of that class action, 1 or more other class actions asserting the same or similar claims on behalf of the same or other persons have been filed.

"(4) A district court shall decline to exercise jurisdiction under paragraph (2)—

"(A)(i) over a class action in which—

"(I) greater than two-thirds of the members of all proposed plaintiff classes in the aggregate are citizens of the State in which the action was originally filed,

"(II) at least 1 defendant is a defendant—

"(aa) from whom significant relief is sought by members of the plaintiff class,

"(bb) whose alleged conduct forms a significant basis for the claims asserted by the proposed plaintiff class, and

"(cc) who is a citizen of the State in which the action was originally filed, and

"(III) principal injuries resulting from the alleged conduct or any related conduct of each defendant were incurred in the State in which the action was originally filed, and

"(ii) during the 3-year period preceding the filing of that class action, no other class action has been filed asserting the same or similar factual allegations against any of the defendants on behalf of the same or other persons; or

"(B) two-thirds or more of the members of all proposed plaintiff classes in the aggregate, and the primary defendants, are citizens of the State in which the action was originally filed

"(5) Paragraphs (2) through (4) shall not apply to any class action in which—

"(A) the primary defendants are States, State officials, or other governmental entities against whom the district court may be foreclosed from ordering relief, or

"(B) the number of members of all proposed plaintiff classes in the aggregate is less than 100.

"(6) In any class action, the claims of the individual class members shall be aggregated to determine whether the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs

"(7) Citizenship of the members of the proposed plaintiff classes shall be determined for purposes of paragraphs (2) through (6) as of the date of filing of the complaint or amended complaint, or, if the case stated by the initial pleading is not subject to Federal jurisdiction, as of the date of service by plaintiffs of an amended pleading, motion, or other paper, indicating the existence of Federal jurisdiction

"(8) This subsection shall apply to any class action before or after the entry of a class certification order by the court with respect to that action.

"(9) Paragraph (2) shall not apply to any class action that solely involves a claim—

"(A) concerning a covered security as defined under 16(f)(3) of the Securities Act of 1933 and section 28(f)(5)(E) of the Securities Exchange Act of 1934;

"(B) that relates to the internal affairs or governance of a corporation or other form of business enterprise and that arises under or by virtue of the laws of the State in which such corporation or business enterprise is incorporated or organized, or

"(C) that relates to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security (as defined under section 2(a)(1) of the Securities Act of 1933 and the regulations issued thereunder).

"(10) For purposes of this subsection and section 1453, an unincorporated association shall be deemed to be a citizen of the State where it has its principal place of business and the State under whose laws it is organized

"(11)(A) For purposes of this subsection and section 1453, a mass action shall be deemed to be a class action removable under paragraphs (2) through (10) if it otherwise meets the provisions of those paragraphs

"(B)(i) As used in subparagraph (A), the term 'mass action' means any civil action (except a civil action within the scope of section 1711(2)) in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact, except that jurisdiction shall

exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under subsection (a)

"(ii) As used in subparagraph (A), the term 'mass action' shall not include any civil action in which-

"(I) all of the claims in the action arise from an event or occurrence in the State in which the action was filed, and that allegedly resulted in injuries in that State or in States contiguous to that State,

"(II) the claims are joined upon motion of a defendant,

"(III) all of the claims in the action are asserted on behalf of the general public (and not on behalf of individual claimants or members of a purported class) pursuant to a State statute specifically authorizing such action; or

"(IV) the claims have been consolidated or coordinated solely for pretrial proceedings.

"(C)(i) Any action(s) removed to Federal court pursuant to this subsection shall not thereafter be transferred to any other court pursuant to section 1407, or the rules promulgated thereunder, unless a majority of the plaintiffs in the action request transfer pursuant to section 1407.

"(ii) This subparagraph will not apply-

"(I) to cases certified pursuant to rule 23 of the Federal Rules of Civil Procedure; or

"(II) if plaintiffs propose that the action proceed as a class action pursuant to rule 23 of the Federal Rules of Civil Procedure.

"(D) The limitations periods on any claims asserted in a mass action that is removed to Federal court pursuant to this subsection shall be deemed tolled during the period that the action is pending in Federal court.".

(b) CONFORMING AMENDMENTS -

(1) Section 1335(a)(1) is amended by inserting "(a) or (d)" after "1332".

(2) Section 1603(b)(3) is amended by striking "(d)" and inserting "(e)"

SEC. 5. REMOVAL OF INTERSTATE CLASS ACTIONS TO FEDERAL DISTRICT COURT.

(a) IN GENERAL.- Chapter 89 is amended by adding after section 1452 the following'

"§ 1453. Removal of class actions

"(a) DEFINITIONS - In this section, the terms 'class', 'class action', 'class certification order', and 'class member' shall have the meanings given such terms under section 1332(d)(1)

"(b) IN GENERAL - A class action may be removed to a district court of the United States in accordance with section 1446 (except that the 1-year limitation under section 1446(b) shall not apply), without regard to whether any defendant is a citizen of the State in which the action is brought, except that such action may be removed by any defendant without the consent of all defendants.

"(c) REVIEW OF REMAND ORDERS.-

"(1) IN GENERAL.- Section 1447 shall apply to any removal of a case under this section, except that notwithstanding section 1447(d), a court of appeals may accept an appeal from an order of a district court granting or denying a motion to remand a class action to the State court from which it was removed if application is made to the court of appeals not less than 7 days after entry of the order.

"(2) TIME PERIOD FOR JUDGMENT - If the court of appeals accepts an appeal under paragraph (1), the court shall complete all action on such appeal, including rendering judgment, not later than 60 days after the date on which such appeal was filed, unless an extension in granted under paragraph (3).

"(3) EXTENSION OF TIME PERIOD - The court of appeals may grant an extension of the 60-day period described in paragraph (2) if-

"(A) all parties to the proceeding agree to such extension, for any period of time, or

"(B) such extension is for good cause shown and in the interests of justice, for a period not exceed 10 days

"(4) DENIAL OF APPEAL - If a final judgment on the appeal under paragraph (1) is not issued before the end of the period described in paragraph (2), including any extension under paragraph (3), the appeal shall be denied

"(d) EXCEPTION - This section shall not apply to any class action that solely involves-

"(1) a claim concerning a covered security as defined under section 16(f)(3) of the Securities Act of 1933 and section 28(f)(5)(E) of the Securities Exchange Act of 1934,

"(2) a claim that relates to the internal affairs or governance of a corporation or other form of business enterprise and arises under or by virtue of the laws of the State in which such corporation or business enterprise is incorporated or organized, or

"(3) a claim that relates to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security (as defined under section 2(a)(1) of the Securities Act of 1933 and the regulations issued thereunder)."

(b) TECHNICAL AND CONFORMING AMENDMENTS - The table of sections for chapter 89 is amended by adding after the item relating to section 1452 the following

"1453 Removal of class actions "

SEC. 6. REPORT ON CLASS ACTION SETTLEMENTS.

(a) IN GENERAL.- Not later than 12 months after the date of enactment of this Act, the Judicial Conference of the United States, with the assistance of the Director of the Federal Judicial Center and the Director of the Administrative Office of the United States Courts, shall prepare and transmit to the Committees on the Judiciary of the Senate and the House of Representatives a report on class action settlements.

(b) CONTENT.- The report under subsection (a) shall contain-

(1) recommendations on the best practices that courts can use to ensure that proposed class action settlements are fair to the class members that the settlements are supposed to benefit,

(2) recommendations on the best practices that courts can use to ensure that-

(A) the fees and expenses awarded to counsel in connection with a class action settlement appropriately reflect the extent to which counsel succeeded in obtaining full redress for the injuries alleged and the time, expense, and risk that counsel devoted to the litigation, and

(B) the class members on whose behalf the settlement is proposed are the primary beneficiaries of the settlement, and

(3) the actions that the Judicial Conference of the United States has taken and intends to take toward having the Federal judiciary implement any or all of the recommendations contained in the report.

(c) AUTHORITY OF FEDERAL COURTS.- Nothing in this section shall be construed to alter the authority of the Federal courts to supervise attorneys' fees.

SEC. 7. ENACTMENT OF JUDICIAL CONFERENCE RECOMMENDATIONS.

Notwithstanding any other provision of law, the amendments to rule 23 of the Federal Rules of Civil Procedure, which are set forth in the order entered by the Supreme Court of the United States on March 27, 2003, shall take effect on the date of enactment of this Act or on December 1, 2003 (as specified in that order), whichever occurs first.

SEC. 8. RULEMAKING AUTHORITY OF SUPREME COURT AND JUDICIAL CONFERENCE.

Nothing in this Act shall restrict in any way the authority of the Judicial Conference and the Supreme Court to propose and prescribe general rules of practice and procedure under chapter 131 of title 28, United States Code.

SEC. 9. EFFECTIVE DATE.

The amendments made by this Act shall apply to any civil action commenced on or after the date of enactment of this Act

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SUMMARY OF CHANGES TO S 1751 AS AGREED TO BY SENATORS FRIST, GRASSLEY, HATCH, KOHL, CARPER, DODD, LANDRIEU, AND SCHUMER

THE COMPROMISE IMPROVES COUPON SETTLEMENT PROCEDURES

S. 1751 would have continued to allow coupon settlements even though only a small percentage of coupons are actually redeemed by class members in many cases.

The compromise proposal requires that attorneys fees be based either on (a) the proportionate value of coupons actually redeemed by class members or (b) the hours actually billed in prosecuting the class action. The compromise proposal also adds a provision permitting federal courts to require that settlement agreements provide for charitable distribution of unclaimed coupon values

THE COMPROMISE ELIMINATES THE SO-CALLED BOUNTY PROHIBITION IN S 1751

S 1751 would have prevented civil rights and consumer plaintiffs from being compensated for the particular hardships they endure as a result of initiating and pursuing litigation

The compromise deletes the so-called "bounty provision" in S. 1751, thereby allowing plaintiffs to receive special relief for enduring special hardships as class members

THIE COMPROMISE ELIMINATES THE POTENTIAL FOR NOTIFICATION BURDEN AND CONFUSION

S 1751 would have created a complicated set of unnecessarily burdensome notice requirements for notice to potential class members. The compromise eliminates this unnecessary burden and preserves current federal law related to class notification.

THE COMPROMISE PROVIDES FOR GREATER JUDICIAL DISCRETION

S. 1751 included several factors to be considered by district courts in deciding whether to exercise jurisdiction over class action in which between one-third and two-thirds of the proposed class members and all primary defendants are citizens of the same state

The compromise provides for broader discretion by authorizing federal courts to consider any "distinct" nexus between (a) the forum where the action was brought and (b) the class members, the alleged harm, or the defendants. The proposal also limits a court's authority to base federal jurisdiction on the existence of similar class actions filed in other states by disallowing consideration of other cases that are more than three years old.

THE COMPROMISE EXPANDS THE LOCAL CLASS ACTION EXCEPTION

S. 1751 established an exception to prevent removal of a class action to federal court when 2/3 of the plaintiffs are from the state where the action was brought and the "primary defendants" are also from that state (the Feinstein formula) The compromise retains the Feinstein formula and creates a second exception that allows case to remain in state court if, (1) more than 2/3 of class members are citizens of the forum state, (2) there is at least one in-state defendant from whom significant relief is caught and who contributed significantly to the alleged harm; (3) the principal injuries happened within the state where the action was filed, and (4) no other class action asserting the

same or similar factual allegations against any of the defendants on behalf of the same or other persons has been filed during the preceding three years.

THE COMPROMISE CREATES A BRIGHT LINE FOR DETERMINING CLASS COMPOSITION

S. 1751 was silent on when class composition could be measured and arguable would have allowed class composition to be challenged at any time during the life of the case The compromise clarifies that citizenship of proposed class members is to be determined on the date plaintiffs filed the original complaint, or if there is no federal jurisdiction over the first complaint, when plaintiffs serve an amended complaint or other paper indicating the existence of federal jurisdiction.

THE COMPROMISE ELIMINATES THE "MERRY-GO-ROUND" PROBLEM

S 1751 would have required federal courts to dismiss class actions if the court determined that the case did not meet Rule 23 requirements. The compromise eliminates the dismissal requirement, giving federal courts discretion to handle Rule 23-ineligible cases appropriately Potentially meritorious suits will thus not be automatically dismissed simply because they fail to comply with the class certification requirements of Rule 23.

THE COMPROMISE IMPROVEMENTS TREATMENT OF MASS ACTIONS

S 1751 would have treated all mass actions involving over 100 claimants as if they were class actions The compromise makes several changes to treat mass actions more like individual cases than like class actions when appropriate.

The compromise changes the jurisdictional amount requirement Federal jurisdiction shall only exist over these persons whose claims satisfy the normal diversity jurisdictional amount requirement for individual actions under current law (presently $75,000).

The compromise expands the "single sudden accident" exception so that federal jurisdiction shall not exist over mass actions in which all claims arise from any "event or occurrence" that happened in the state where the action was filed and that allegedly resulted in injuries in that state or in a contiguous state. The proposal also added a provision clarifying that there is no federal jurisdiction under the mass action provision for claims that have been consolidated solely for pretrial purposes.

THE COMPROMISE ELIMINATES THE POTENTIAL FOR ABUSIVE PLAINTIFF CLASS REMOVALS

S 1751 would have changed current law by allowing any plaintiff class member to remove a case to federal court even if all other class members wanted the case to remain in state court. The compromise retains current law- allowing individual plaintiffs to opt out of class actions, but not allowing them to force entire classes into federal court.

THE COMPROMISE ELIMINATES THE POTENTIAL FOR ABUSIVE APPEALS OF REMAND ORDERS

S 1751 would have allowed defendants to seek unlimited appellate review of federal court orders remanding cases to state courts If a defendant requested an appeal, the federal courts would have been required to hear the appeal and the appeals could have taken months or even years to complete

The compromise makes two improvements (1) grants the federal courts discretion to refuse to hear an appeal if the appeal is not in the interest of justice. (2) Establishes tight deadlines for completion of any appeals so that no case can be delayed more than 77 days, unless all parties agree to a longer period

THE COMPROMISE PRESERVES THE RULEMAKING AUTHORITY OF SUPREME COURT AND JUDICIAL CONFERENCE

The compromise clarifies that nothing in the bill restricts the authority of the Judicial Conference and Supreme Court to implement new rules relating to class actions

THE COMPROMISE IS NOT RETROACTIVE

Unlike the House Bill, the compromise will not retroactively change the rules governing jurisdiction over class actions.

FINANCIAL DISCLOSURES

Following is the federal campaign contribution report for David C. Mulford, of Illinois, to be Ambassador Extraordinary and Plenipotentiary of the United States of America to India who was discharged from the Committee on Foreign Relations and confirmed by the Senate on December 9, 2003.

Nominee, David C Mulford
Post, U.S. Ambassador to India.

The following is a list of all members of my immediate family and their spouses I have asked each of these person to inform me of the pertinent contributions made by them To the best of my knowledge, the information contained in this report is complete and accurate.

Contributions, amount, date, and donee

1. Self (David C. Mulford): $1,000, 5/1/99, George W Bush, Presidential Campaign; $20,000, 6/27/00, RNC Presidential Trust, $4,000, 6/27/00, Illinois Republican Party, $152,000, 6/27/00, Victory 2000, $1,000, 7/26/00, Friends of Schummer; $5,00, 12/21/02, Bush/Cheney Presidential Transition Foundation, and $12,500, 10/08/02, Republican National Committee.

2. Spouse (Jeannie S Mulford) $1,000, 5/1/99, George W Bush, Presidential Campaign; $20,000, 6/27/00, RNC Presidential Trust, $4,000, 6/27/00; Illinois Republican Party, $5,000, 12/21/02, Bush/Cheney Presidential Transition Foundation, and $12,500, 10/08/02, Republican National Committee.

3. Children and Spouses. Ian Mulford (son) Kathy Mulford (spouse), no contributions. Edward Mulford (son) Melanie Mulford (spouse), no contributions

4. Parents Theodore Mollenhauer Countryman Mulford (mother) Deceased. No contributions; Robert Lewis Mulford (father) Deceased. no contributions.

5 Grandparents All grandparents deceased, no contributions.

6 Brothers and Spouses: William Mulford (brother) Tony Mulford (spouse), no contributions. Edward Mulford (brother) Philippa Mulford (spouse), no contributions

7 Sisters and Spouses· No sisters/no spouses, no contributions

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Following is the federal campaign contribution report for James C Oberwetter, of Texas, to be Ambassador Extraordinary and Plenipotentiary of the United States of America to the Kingdom of Saudi Arabia, who was discharged from the Committee on Foreign Relations and confirmed by the Senate on December 9, 2003.

Nominee James C Oberwetter
Post. U.S Ambassador to Saudi Arabia

The following is a list of all members of my immediate family and their spouses. I have asked each of these persons to inform me of the pertinent contributions made by them. To the best of my knowledge, the information contained in this report is complete and accurate.

Contributions, amount, date, and donee:

1 Self- James C. Oberwetter· $2000, 6/25/2003, Bush-Cheney 04 Inc ; $500, 8/21/2002, John Cornyn for Senate; $1000, 3/12/2002, John Cornyn for Senate, $500, 2/20/2002, Friends of Jeb Hensarling, $35, 8/18/2000, Lazio 2000, $100, 7/5/2000, Republican National Committee (NFC), $100, 2/5/2000, John Culberson for Congress, $1000, 5/17/1999, George Allen for Senate, $1000, 3/15/1999, George Bush Presidential Exploratory Committee, and $504 annually, 1999-2003, Hunt Oil Company Political Action Committee

2 Spouse- Anita Johnson Oberwetter. $2000, 6/25/2003, Bush-Cheney 04 Inc , $1000, 3/12/2002, John Cornyn for Senate; and $500, 8/21/2002, John Cornyn for Senate.

3. Children and Spouses: Ellen Oberwetter: $250, 2002, Ron Kirk for Senate; $25, 2003, Blair Hull for Senate, Rea Oberwetter, none, Brooke Oberwetter, none

4. Parents: Albert Oscar Oberwetter & Hilda Curtis Oberwetter, both deceased, none, Ernest H. & Lena Dennison (spouse's parents), both deceased, none

5. Grandparents Deceased, none

6 Brothers and Spouses: Albert R & Marie Oberwetter, none, Randle & Ginny Dennison (spouse's brother), Dates unknown-Henry Waxman, for Congress, Bernie Sanders for Congress, each less than $100, Larry & LuAnne Dennison (spouse's brother), none

7 Sisters and Spouses· None.

JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D C 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

LEONIDAS RALPH MECHAM
Secretary

November 19, 2003

Honorable Chris Cannon
Chairman, Subcommittee on Commercial
and Administrative Law
Committee on the Judiciary
United States House of Representatives
B-353 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Cannon:

On March 27, 2003, the Supreme Court of the United States promulgated amendments to Federal Rules of Bankruptcy Procedure 1005, 1007, and 2002, which will take effect on December 1, 2003, unless Congress acts otherwise. Under the amendments, only the last four digits of a debtor's social security number will be made available to any person or entity other than parties to the bankruptcy proceeding. The amendments are intended to protect the privacy of individuals and to minimize the opportunity for identity theft, a risk that has been greatly increased by providing the public with Internet access to court records.

By Judicial Conference policy, papers filed in civil cases that are electronically available to the public must include only truncated social security numbers to safeguard the privacy interests of litigants in these cases. But the full social security number must be filed and made available to the public in bankruptcy cases until the revised rules take effect, exposing debtors to widespread dissemination of private information and unnecessary and unfair risks of identity theft. On behalf of the Judicial Conference of the United States, I urge you to oppose legislation delaying the effective date of the bankruptcy rule changes.

Bankruptcy Case-File Information Available to Public Through the Internet

Case-file information in virtually all bankruptcy cases is available to the public through the Internet. The federal courts are rapidly deploying a new Internet-based case management system (Case Management/Electronic Case Files system — CM/ECF) to replace an aging statistical and case management system. More than two-thirds of the bankruptcy courts are using CM/ECF, with the remaining courts on schedule to deploy the new system within the next twelve months. The new system provides the public with instant access to court records through

the Internet. Almost all of the other courts continue to "image" their court papers and post them on the Internet.

Judicial Conference Decision-Making Process

In June 1999, the Judicial Conference's Committee on Court Administration and Case Management began its study of privacy and security concerns to address the increased risk of identity theft arising from public electronic access to case-file information. After holding numerous meetings with experts and academics in the privacy field and court users, including judges, court clerks and administrators, and government agency representatives, the Committee on Court Administration and Case Management narrowed the number of available policy options and published them for public comment. Two hundred forty-two comments were received from private citizens, privacy rights groups, journalists, private investigators, attorneys, data re-sellers, and representatives of the financial services industry. Based on the testimony, comments, and statements, the Committee recommended that the public be provided access to electronic case information, with the exception of certain personal identification numbers, including social security numbers. In September 2001, the Judicial Conference adopted the privacy policy requiring filers to include only the last four digits of the social security number on all documents filed with the court.

Unlike civil cases, an amendment to the Federal Rules of Bankruptcy Procedure is required to implement the Judicial Conference's privacy policy in bankruptcy cases, because existing rules require the full social security number. In accordance with the Rules Enabling Act (28 U.S.C. §§ 2071-2077), the Judicial Conference's Committee on Rules of Practice and Procedure and the Advisory Committee on Bankruptcy Rules initiated the rulemaking process to make the necessary rule changes to implement the privacy policy. The Advisory Committee published proposed amendments to Rules 1005, 1007, and 2002 in January 2002.

In a special outreach effort, the Advisory Committee held a separate focus-group meeting in April 2002, inviting selected persons and groups, including representatives from the credit-reporting industry. Several groups expressed a strong preference for receiving the full social security number (e.g., private investigators, journalists, and credit-reporting companies); however, after careful and lengthy deliberation, the Advisory Committee determined that only parties in interest to a bankruptcy case, including creditors, were entitled to it under the Bankruptcy Code. Instead, the Advisory Committee recommended that Rules 1005, 1007, and 2002 be amended to require that only the last four digits of the social security number be included on papers filed with the court. In accordance with a separate rule amendment, the full social security number would be provided to the court and the full number would later be sent to the creditors as part of the notice of the bankruptcy filing. The proposed amendments were approved by the Committee on Rules of Practice and Procedure in June 2002. They were approved by the Judicial Conference at its September 2002 session.

No Increase in Misidentification Error Rate

During the development of the rules amendments, the Consumer Data Industry Association provided results from a large empirical study that showed that the possibility of an identification error based solely on a truncated social security number and the same last name was about 11.3% (April 22, 2002, letter from Stuart K. Pratt, Vice President, State Government Relations, to Peter McCabe, Secretary, Committee on Rules of Practice and Procedure). But the 11.3% error rate can be reduced substantially, perhaps to near zero, by cross-checking other electronically available information in the courts records.

Under the rules amendments, the public will have electronic access to the name, address, and four-digit social security number of debtors filing in bankruptcy. When a credit-reporting agency updates its database with this information on new bankruptcies, it may find multiple matches with individuals in its database bearing the same information. In these instances, the court records electronically available in the Public Access to Court Electronic Records (PACER) system can be cross checked to provide a virtually fool-proof method to accurately identify a debtor in bankruptcy. PACER provides a national index of all party names in bankruptcy that is searchable by the full social security number. A credit-reporting agency need only search PACER using the full social security numbers already in its database of the individuals involved in the multiple matches. This cross-checking process requires some manual data inputting to search for the information in PACER. It is a temporary expedient, ending once the credit-reporting companies develop suitable software to perform the same step.

The Committee on Court Administration and Case Management and the Rules Committees carefully weighed the individual citizens' interests in limiting access to full social security numbers against the possibility of increased credit-reporting misidentification error rates. The committees ultimately rejected claims that truncated social security numbers would significantly increase the probability of credit-reporting businesses misidentifying individual debtors. The comments and testimony convinced the committees that the revised rule could be implemented without increasing the risk of misidentification.

Costs Incurred by Private-Sector Businesses Adjusting to Revised Rule

Various private-sector businesses have invested time and money to make changes to their products and services to comply with the revised rules by December 1, 2003. For example, companies that provide electronic versions of the Bankruptcy Official Forms have spent months revising eleven amended forms to include the truncated social security number in accordance with the requirements of the revised rules. Moreover some, but not all, individual credit-reporting businesses and businesses that provide data to them have taken concrete steps in anticipation of the December 1, 2003, effective date. These companies have made a good faith effort to comply with the revised rule and stand ready to do so on December 1, 2003. If the

effective date of the amendments is delayed at this late date, however, these companies will incur added new costs to readjust their products or services to return to the current system.

Serious Disruptions in Court Administration Caused by Delay in Effective Date of Amendments

Delaying the rules amendments at this late date will require a massive undertaking and will represent an abrupt about-face causing significant disruptions in the courts. For the past seven months the bankruptcy courts in the 94 federal districts have been involved in an intensive effort to implement the requirements of amended Rules 1005, 1007, and 2002 by December 1, 2003, including revising existing software programs, developing new software programs, and undertaking extensive training of staff, attorneys, and the public. The task in implementing software changes on a nationwide basis is enormous and can be achieved only after a tremendous educational and administrative effort.

Specific software programs to handle the revised rules in time for December 1, 2003, have been developed and incorporated into general case-management software programs that have been provided to the bankruptcy courts. These programs include other enhancements, which will improve the efficiency of the courts generally. They will also allow the Executive Office for the United States Trustee to instantly download and use docket data from the courts' computer system.

Many bankruptcy courts have already deployed the updated system and others will soon deploy it within the next few weeks. After effecting all software and procedural changes in anticipation of the amended rules, these bankruptcy courts may be unable to quickly undo months of work, to notify the bar, and to revert to prior procedures. Moreover, the enhancements to the current system included in the general software program would be delayed.

Frustrating Rules Enabling Act

All interested persons and organizations have had an ample opportunity to express their concerns with the Judicial Conference privacy policy and the amendments to Bankruptcy Rules 1005, 1007, and 2002 implementing that policy during the various public hearings and public comment periods over a three-year period. The Conference's committees carefully considered all points of view. The amended rules represent the best judgment of the judiciary after an exhaustive and comprehensive study of the privacy and public interests arising from public electronic access to court records.

The judiciary recognizes that although the Congress has the prerogative to modify or reject rules promulgated by the Supreme Court under the rulemaking process, Congress usually has decided to accept the rule amendments. The judiciary is grateful for the deference traditionally accorded by the Congress to procedural rules prescribed under the exacting Rules Enabling Act process. Delaying amended Bankruptcy Rules 1005, 1007, and 2002 at this late

date would be especially unfortunate and would establish a bad precedent. I urge you to reject any attempt to delay the effective date of these amended rules.

Sincerely,

Leonidas Ralph Mecham
Secretary

cc: Honorable F. James Sensenbrenner
Honorable John Conyers
Honorable Melvin L. Watt

JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D C 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

LEONIDAS RALPH MECHAM
Secretary

December 16, 2003

Honorable Herb Kohl
United States Senate
380 Hart Senate Office Building
Washington, DC 20510

Dear Senator Kohl:

On October 3, 2002, I responded on behalf of the Judicial Conference of the United States to your September 18, 2002, letter, which proposed imposing conditions on court orders that restrict disclosure of information obtained through discovery or that approve settlements containing confidentiality provisions. In my October 3 letter, I noted that the Judicial Conference's Advisory Committee on Civil Rules opposes restricting a court's authority to issue a protective order governing discovery. The Advisory Committee, however, has taken no position on regulating confidentiality provisions in settlement agreements. Accordingly, I promptly sent your proposal, as set out in the "Sunshine in Litigation Act of 2003" (S. 817, 108th Cong., 1st Sess.), to the Advisory Committee (copies enclosed). At its October 2002 meeting, the Advisory Committee addressed your proposal as part of its ongoing study of issues arising from sealed settlement agreements.

The concerns raised in your letter about confidentiality provisions in settlement agreements implicate important public interests. To give you a fully informed response, the Advisory Committee asked the Federal Judicial Center to collect and analyze data on the practice and frequency of sealing orders limiting disclosure of settlement agreements in the federal courts. The Federal Judicial Center is surveying all civil cases terminated in half the federal district courts during the two-year period ending December 31, 2002. The Federal Judicial Center study is scheduled to be completed in the spring of 2004, but substantial amounts of information have already been collected. I am pleased to enclose a copy of the Center's report of the data already gathered and examined.

The Center's survey results confirm that most settlement agreements are neither filed with the court nor require court approval. Most settlement agreements are private contractual obligations that would not be affected by prohibitions against a court entering an order "approving a settlement agreement that would restrict disclosure" of its contents.

When a settlement agreement does contain private confidentiality provisions, the enforceability of such provisions is generally a matter of state substantive law, not federal procedural rule. Such questions of contract enforcement are principally governed by state standards and often litigated in state court.[1] On rare occasion, however, a party files a settlement agreement and requests a court to seal its contents. In many of these cases, the settlement agreement is not filed for the court's approval, but only to ensure the court's continuing jurisdiction to enforce the agreement's terms if the agreement is later breached.[2]

The Center's study has enabled the Advisory Committee to identify the frequency of court orders sealing settlement agreements and the kinds of cases in which they appear.

Scope of Study

State laws, state court rules, and federal district court rules were surveyed to determine the extent to which existing statutes and rules regulate sealed settlement agreements filed with the courts. Next, the federal district courts' docket sheets, which record all actions in proceedings in every civil case filed in federal court, were electronically searched to locate and identify by name each case that included a sealed settlement agreement. The docket sheets of civil cases terminated during a two-year period in 29 districts have been reviewed and cases were identified involving a sealed settlement agreement. A summary of the claim in each of the cases was prepared. The cases in which the claim might possibly implicate public health or safety, broadly defined, were tagged. In a follow-up study, the plaintiffs' complaints, which are available to the public, were manually reviewed and analyzed to determine whether they contained information sufficient to alert the public of a possible health or safety hazard.[3]

Highlights of Preliminary Findings

The Federal Judicial Center found a total of 379 cases out of 128,288 civil cases in 29 district courts in which a sealed settlement agreement was filed, or about one-third of one percent (0.30%). In only five of the 29 districts surveyed did the rate of sealed settlement agreements exceed 0.5% of all terminated cases: North Dakota (0.87%), Virginia Western (0.78%), Guam (0.77%), Florida Southern (0.67%), and Northern Iowa (0.55%).

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[1] *Kokkonen v. Guardian Life Ins. Co.*, 5111 U.S. 375, 281-382 (1994). *See also, Union Oil Co. of California v. Leavell*, 220 F. 3d 562, 567-568 (7th Cir. 2000) (sealed case-file records are presumptively open to public in later litigation seeking to enforce settlement terms, unless court agrees to continue confidentiality).

[2] Approximately 31% of the sealed settlement cases involve one of three discrete types of cases that typically require court approval: (a) class actions; (b) Fair Labor Standards Act actions; and (c) minors or others requiring special protection.

[3] Complaints in about 20 cases had been archived in government record warehouses and were not available to be included in the follow-up study.

The Federal Judicial Center study analyzed the 379 cases to determine how many of them involved matters of public interest. The Center coded the cases for the following characteristics, which might implicate public health or safety interests: (1) environmental; (2) product liability; (3) professional malpractice; (4) public-party defendant; (5) death or very serious injury; and (6) sexual abuse. A total of 109 cases (0.08% of all cases) bore one or more of the public-interest features. Conversely, the remaining 270 of the 379 cases with sealed settlement agreements had none of the public-interest characteristics. The largest category of these 270 cases was suits under the Fair Labor Standards Act. Most of the other suits involved contract, intellectual property, and employment litigation among private parties. All these cases were very unlikely to raise public health or safety concerns.

One of the other significant findings of the Federal Judicial Center study is that the plaintiff's complaint initiating the suit was available to the public in all but four of the 379 cases that had sealed settlement agreements. Only one of the 109 "public interest" cases had a sealed complaint. In light of these findings, the Advisory Committee directed further study to determine whether the availability of the complaint offset the loss of access to the sealed settlement agreement.

The follow-up study was based on the data compiled by the Federal Judicial Center and was conducted by a law professor currently serving as a judicial fellow in the Administrative Office. The follow-up study supports the conclusions that sealed settlement agreements do not substantially affect public awareness of possible health and safety hazards. Principally, the plaintiffs' complaints in the sealed settlement cases already provide significant notice to the public. Although the complaints vary in level of detail, all of them identify the three most critical pieces of information regarding the possible public health or safety risks: (1) the risk itself; (2) the source of that risk; and (3) the harm that allegedly ensued. The product liability suits, for example, specifically identify the product at issue, describe the accident or event, and describe the harm or injury alleged to have resulted. In many cases, the complaints go further and identify a particular feature of the product that is defective, or describe a particular way in which the product fails. In the cases alleging harm caused by a specific person, e.g., civil rights violations, sexual abuse, or negligence, the complaints consistently identify the alleged wrongdoer and describe in detail the incident alleged to have caused harm.

Thus, although in these few cases the contents of the sealed settlement agreements is unavailable, the publicly available complaints generally contain details about the basis for the suit, such as the defective nature of a harmful product, the dangerous characteristics of a person, or the lasting effects of a particular harmful event. Anecdotal evidence strongly suggests that the primary purpose of the sealing is to limit disclosure of the amount of the settlement, and not to limit the underlying basis for the suit.

The Federal Judicial Center's report also includes a survey of state laws and rules governing settlement agreements. The report found that two federal district courts have a local

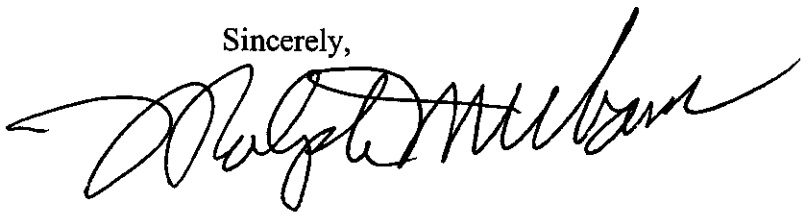
rule that applies specifically to the sealing of a settlement agreement.[4] And about one-third of the federal district courts have a general local rule, applicable to all documents filed with the court, governing either the grounds for sealing or the duration of the sealing. Eleven district courts require a finding of "good cause" before sealing a document. Twenty-nine districts limit how long a document may be sealed, absent a specific court order. Most of these rules limit the duration of the sealing to less than one year after the case has been terminated.

Twenty-two states have laws or rules governing the sealing of court records. Eight states proscribe filing sealed settlement agreements with public parties. Fourteen states permit sealing only when the court makes specific findings, e.g., good cause finding, when no other less restrictive means are available. Time limits on the duration of the sealing are imposed by law or rule in only three states.

Next Steps

The Federal Judicial Center plans to complete its survey in spring 2004. The Advisory Committee will review the final report, assess whether the empirical data demonstrate a need for a rule change, and determine the extent to which regulation of settlement agreements by federal procedural rulemaking is limited by state-court jurisdiction. I will promptly advise you of the Advisory Committee's actions.

Sincerely,



Leonidas Ralph Mecham
Secretary

Enclosures

cc: Honorable Orrin G. Hatch
Honorable Patrick Leahy
Honorable Jeff Sessions
Honorable Charles E. Schumer

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[4] The South Carolina local rule proscribes the sealing of a settlement agreement filed with the court, but the rule does not apply if the court finds good cause to suspend its application; the Eastern Michigan local rule limits the time a settlement agreement can remain sealed.

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

ANTHONY J. SCIRICA
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CRIMINAL RULES

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EVIDENCE RULES

June 13, 2003

Honorable F. James Sensenbrenner, Jr.
Chairman, Committee on the Judiciary
United States House of Representatives
2138 Rayburn House Office Building
Washington, D.C. 20515

Honorable John Conyers, Jr.
Ranking Democrat
Committee on the Judiciary
United States House of Representatives
B351C Rayburn House Office Building
Washington, D.C. 20515

Dear Mr. Chairman and Representative Conyers:

We write to respectfully urge you and the Judiciary Committee to decline to support the Bail Bond Fairness Act of 2003 (H.R. 2134) introduced on May 15, 2003. The bill would amend Rule 46(e) of the Federal Rules of Criminal Procedure to eliminate the authority of a judge to forfeit a bail bond for breach of a condition of release other than for failing to appear physically before the court. The Judicial Conference of the United States opposes the legislation.

The Judicial Conference acted on the recommendation of the Committee on Rules of Practice and Procedure and the Advisory Committee on Criminal Rules, which began its study of this issue in 1998 in response to the introduction in 1997 of a bill similar to H.R. 2134. The same legislation was reintroduced in succeeding congressional sessions. The Judicial Conference has consistently opposed the legislation. Most recently Judge Ed Carnes testified on October 8, 2002, before the Subcommittee on Crime, Terrorism, and Homeland Security on the Bail Bond Fairness Act of 2001. A copy of Judge Carnes's statement, which sets out in detail the reasons for the Judicial Conference's opposition to the legislation, is enclosed.

Bail Bond Fairness Act of 2003 Would Impair
Federal Judiciary's Ability to Enforce Bail Bonds

Bail bonds in a large majority of districts are forfeited only if the defendant fails to appear at a scheduled proceeding. In some districts, however, courts incorporate conditions of release as part of the bail bond and may forfeit bonds for violations of those release conditions. In these districts, judges strongly believe that holding the assets of the defendant or a friend or a relative

at risk significantly increases the probability that the defendant will comply with all the release conditions. Absent this guarantee, these judges would be more reluctant to release a particular defendant and might well decide to retain a defendant in custody rather than expose the court to the risk that the defendant will violate a significant release condition, e.g., refrain from stalking a victim or witness. In fact, some defendants themselves propose that their bail bond be subject to forfeiture if they fail to abide by the release conditions as a means of persuading a judge to release them.

The federal courts infrequently release a defendant on a bond executed by a professional bondsman (sometimes referred to as a "corporate surety bond") because it is the least desired condition of release under the Bail Reform Act (18 U.S.C. § 3142 et seq.), and because other conditions of release are better suited to ensure the defendant's appearance at court proceedings and to protect the public safety. Instead of bail bonds executed by a professional bondsman, most bail bonds in federal court are executed by the defendant or are co-signed by a family member. Rule 46(e) provides judges with the valuable flexibility to impose added safeguards as part of the bail bond to ensure a defendant's compliance with conditions of release. The Bail Bond Fairness Act of 2003 would restrict the judge's authority and remove the federal judiciary's ability to enforce this type of bail bond.

Proponents of the bill essentially make three arguments in support of the bill. First, they contend that the number of bail bonds forfeited by federal judges solely for failing to comply with a release condition, other than for failing to appear, is too high. Second, they contend that the bail bond industry is effectively prevented from doing business in federal courts because of the added risks associated with guaranteeing that a defendant abides by release conditions other than failing to appear. Third, they contend that "thousands of defendants in the Federal system fail to show up for court appearances every year" because of an asserted "absence of a meaningful bail bond option." None of the contentions has merit.

Minuscule Number of Corporate Bonds Forfeited as a Result of a Defendant Violating a Condition of Release Other than for Failing to Appear

The Administrative Office does not maintain statistics on the number of corporate surety bonds forfeited as a result of a violation of a condition of release other than for failure to appear. On request, however, the Administrative Office asked district court personnel to manually compile the numbers from the docket records in ten district courts that handle a substantial number of criminal cases, representing about a quarter of defendants released on bond nationally.

The resulting statistics from those ten district courts, presented in Tables Two, Three, and Four, show that there were few occasions on which a corporate surety bond was even subject to forfeiture because a defendant violated a condition of release other than for failing to appear.

The number of occasions on which a surety bond *was actually forfeited* as a result of a defendant violating a condition of release other than failing to appear was fewer still.

For example, Table Two shows that during fiscal year 2002, in those ten districts a total of 1,128 defendants were released on corporate surety bonds, 269 were found to have violated conditions of release other than appearance, and only 19 corporate surety bonds were forfeited for violations of release conditions other than appearance. In other words, the percentage of corporate surety bonds forfeited in those ten districts during fiscal year 2002 because of violation of a condition of release other than appearance is only about 2 percent of the total number of corporate surety bonds issued during that year in those districts.

The minuscule number of corporate bonds forfeited as a result of a defendant violating a condition of release other than for failing to appear belies the contention that corporate surety bonds posted in federal courts are subject to substantially enhanced risks of forfeiture because of conditions other than failure to appear. On the contrary, the statistics show that it is relatively rare for a federal court to forfeit a corporate surety bond as a result of violation of a condition of release other than for failing to appear. Moreover, the posting of corporate surety bonds in federal courts, though relatively modest, is trending upward.

Corporate Surety Bonds Issued in Federal Courts Trending Upward

The statistics show conclusively that corporate surety bonds are used in federal courts and that very few of them are forfeited as a result of a defendant violating any condition of release other than failing to appear. The statistics also show that the number of corporate surety bonds posted in federal court has increased consistently since 1995.

The data in the enclosed Table One is drawn from records maintained by the Administrative Office of the United States Courts. That table shows the total number of criminal defendants released on bond by a federal court during each of the ten fiscal years from 1993 through 2002, and it breaks those numbers down by type of bond, including recognizance, unsecured, cash, collateral, and corporate surety bonds.

The findings in § 2(a)(4) of H.R. 2134 state that "the underwriting of bonds for Federal defendants has become virtually impossible," since the *Vacarro*[1] decision. The assertion is contradicted by the facts. Not only has the use of corporate surety bonds not decreased, as indicated, but the number of corporate surety bonds posted in the federal courts has actually gone up significantly since the *Vacarro* decision was released in 1995. As Table One shows, the

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[1] *United States v. Vacarro*, 51 F.3d 189 (9th Cir. 1995) (upholding a judge's authority to forfeit a bail bond as a result of a defendant's violation of a release condition that does not involve failing to appear).

number of corporate surety bonds posted in federal courts has climbed from 812 in fiscal year 1995 to 2,275 in fiscal year 2002, an increase of 180 percent. That compares with an increase of only 33 percent in the total number of defendants released on bond over the same period. So, not only has the number of corporate surety bonds used in federal court not decreased since the year the *Vacarro* decision was issued, it has increased substantially and the rate at which the use of corporate surely bonds has increased has outstripped the growth in the total number of defendants released on bond.

Vast Majority of Released Defendants Appear at Scheduled Proceedings

The findings of H.R. 2134 includes a statement that "thousands of defendants in the Federal system fail to show up for court appearances every year" because of an asserted "absence of a meaningful bail bond option." As noted in Judge Carnes's enclosed testimony before the Crime, Terrorism, and Homeland Security Subcommittee, "[t]his statement has no basis in fact. It is contrary to fact." Instead of thousands of defendants failing to show up, only 878 of 38,050 defendants in cases closed by the federal pretrial services failed to appear as ordered in 2001. A similar low rate occurred in 2000, when only 893 defendants out of 37,607 defendants (or 2.5 percent) failed to appear as ordered. The low percentage rate of defendants failing to appear as ordered at a scheduled proceeding is a credit to our federal pretrial services system.

Conclusion

We continue to encourage you and the committee to oppose legislation amending Rule 46(e) and continue to provide "the courts adequate authority to make release decisions that give appropriate recognition to the danger a person may pose to others if released." Rule 46(e) should not be amended.

Sincerely,

Anthony J. Scirica
United States Court of Appeals
for the Third Circuit

Ed Carnes
United States Court of Appeals
for the Eleventh Circuit

Enclosures

cc: Members of the House Judiciary Committee

TABLE 1
Types of Bonds Set for Defendants Released
For the Twelve Month Period Ending September 30th

Fiscal Year	Cases Closed*	Defendants Released**	Total Def. Released on Bond	Def. Released on Personal Recognizance Bond	Def. Released on Unsecured Bond	Defendants Released on Cash Bond	Defendants Released on Collateral Bond	Defendants Released on Corporate Surety Bond	Defendants Released with No Bond Set***
1993	50,284	29,694	19,584	6,964	6,509	2,895	2,478	1,149	10,110
1994	52,357	30,835	27,472	8,322	13,639	3,102	2,281	956	3,363
1995	52,108	29,522	27,403	8,793	13,894	2,893	2,172	812	2,119
1996	57,184	31,008	29,549	9,658	15,201	2,926	2,013	1,030	1,459
1997	63,599	33,909	32,197	9,947	16,817	3,161	2,098	1,391	1,712
1998	69,693	35,698	33,353	11,007	16,832	3,141	2,064	1,538	2,345
1999	75,348	37,850	34,999	11,254	18,148	3,311	2,053	1,715	2,851
2000	77,675	38,096	34,948	11,034	17,846	3,396	1,933	1,929	3,148
2001	79,129	38,588	34,879	10,879	17,708	3,195	1,989	1,985	3,709
2002	83,553	40,060	36,419	11,375	18,354	3,325	1,997	2,275	3,641

* Includes cases dismissed

** Includes defendants released at any time before a case is closed, including cases that have been dismissed. A defendant may have more than one type of release before disposition.

*** Includes defendants who may have had a bond set at a prior hearing, but were not released until a subsequent hearing; includes cases dismissed.

TABLE 2
Number of Corporate Surety Bonds Forfeited as a Result of a Violation of Condition of Release in Criminal Cases (Other than Failure to Appear)
Fiscal Year 2002

District	Pretrial Services Cases Closed in Fiscal Year 2002*	Criminal Defendants Released in a Case Closed In Fiscal Year 2002**	Defendants Released on Bond	Defendants Released on Corporate Surety Bond***	Defendants Found to Have Violated Conditions on Corporate Surety Bond Other than Appearance	Corporate Surety Bonds Forfeited for Violation of Conditions Other than Appearance
California Southern	5,475	1,821	771	72	30	1
Florida Southern	2,297	974	932	210	44	2
Geogia Northern	984	476	472	178	34	0
Massachusetts	737	366	365	5	2	0
Missouri Eastern	849	438	419	34	11	0
New Mexico	2,738	851	849	121	47	7
New York Eastern	2,095	1,039	1,039	221	13	0
South Carolina	1,306	804	782	130	35	0
Texas Northern	1,661	741	575	41	12	0
Texas Western	5,092	2,278	2,172	116	41	9
Total	23,234	9,788	8,376	1,128	269	19

* Includes cases dismissed.

** Includes defendants released at any time before the case is closed, including cases that have been dismissed.

*** Available data does not reflect whether these bonds included only an appearance release condition or whether they also included release conditions other than appearance.

TABLE 3
Number of Corporate Surety Bonds Forfeited as a Result of a Violation of Condition of Release (Other than Failure to Appear)
Fiscal Year 2001

District	Pretrial Services Cases Closed in Fiscal Year 2001*	Criminal Defendants Released in a Case Closed in Fiscal Year 2001**	Defendants Released on Bond	Defendants Released on Corporate Surety Bond***	Defendants Found to Have Violated Conditions on Corporate Surety Bond Other than Appearance	Corporate Surety Bonds Forfeited for Violation of Conditions Other than Appearance
California Southern	6,001	2,109	840	63	13	0
Florida Southern	2,179	1,030	990	183	41	0
Geogia Northern	1,014	495	488	162	31	0
Massachusetts	628	345	342	3	0	0
Missouri Eastern	647	323	314	20	5	0
New Mexico	2,111	725	723	107	32	10
New York Eastern	1,797	955	952	174	21	0
South Carolina	1,106	734	724	98	25	0
Texas Northern	1,704	802	650	66	21	1
Texas Western	5,105	2,234	2,173	79	33	3
Total	22,292	9,752	8,196	955	222	14

* Includes cases dismissed.

** Includes defendants released at any time before the case is closed, including cases that have been dismissed.

*** Available data does not reflect whether these bonds included only an appearance release condition or whether they also included release conditions other than appearance.

TABLE 4
Number of Corporate Surety Bonds Forfeited as a Result of a Violation of Condition of Release
(Other than Failure to Appear)
Fiscal Year 2000

District	Pretrial Services Cases Closed in Fiscal Year 2000*	Criminal Defendants Released in a Case Closed in Fiscal Year 2000**	Defendants Released on Bond	Defendants Released on Corporate Surety Bond***	Defendants Found to Have Violated Conditions on Corporate Surety Bond Other than Appearance	Corporate Surety Bonds Forfeited for Violation of Conditions Other than Appearance
California Southern	4,787	1,591	772	58	11	0
Florida Southern	2,435	1,032	988	202	56	3
Geogia Northern	944	435	430	136	33	0
Massachusetts	722	398	398	7	0	0
Missouri Eastern	845	450	439	25	15	0
New Mexico	2,369	845	844	89	30	7
New York Eastern	1,951	1,031	1,025	161	20	0
South Carolina	1,129	739	718	134	30	0
Texas Northern	1,572	764	611	55	7	0
Texas Western	4,848	2,162	2,058	104	40	13
Total	21,602	9,447	8,283	971	242	23

* Includes cases dismissed.

** Includes defendants released at any time before the case is closed, including cases that have been dismissed.

*** Available data does not reflect whether these bonds included only an appearance release condition or whether they also included release conditions other than appearance.

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

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

LEONIDAS RALPH MECHAM
Secretary

November 12, 2003

Honorable Patrick J. Leahy
Ranking Member
Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington, DC 20510-6275

Dear Senator Leahy:

Thank you for your October 21, 2003, letter requesting the Judicial Conference to provide you with a report on the "best practices" that courts can adopt to administer class actions fairly. In particular, you ask that the Conference scrutinize attorney fee awards and fairness of settlements in class actions, as would be required under the various pending class action bills, e.g., "Class Action Fairness Act" (S. 1751, § 6, 108th Cong., 1st Sess.).

The Judicial Conference's Committee on Rules of Practice and Procedure and the Advisory Committee on Civil Rules have been engaged in an ongoing, intensive study of class actions that began more than twelve years ago. During the past four years, the committees focused attention on the troubling problems associated with attorney fee awards and settlements. Significant progress has been achieved in developing and providing rules-based guidance to federal courts to address these difficult issues. We appreciate the opportunity to report the results of our efforts.

In March 2003, the Supreme Court approved amendments to Federal Rule of Civil Procedure 23. The amendments include additional requirements in Rule 23(b)(3) governing settlement review, and new rule provisions, Rule 23(g) and (h), governing the standards and criteria for appointing class counsel and approving attorney fee awards. The amendments provide the courts with rules-based tools, discretion, and guidance to scrutinize class action settlements and fee awards more rigorously. The Committee Notes accompanying the amendments provide expansive guidance to the bench and bar in addressing these issues. The amendments were transmitted to Congress in March 2003 and will take effect on December 1, 2003, unless Congress acts otherwise. Copies of the amendments and the Committee Notes are enclosed. The rules committees will continue to examine class action settlements and determine whether additional changes would be useful.

Class Action Settlements

Rule 23(e) has been substantially revised to strengthen the process governing the court's review of proposed class action settlements to assure fairness. The amendment makes the standard for approving a settlement explicit: the settlement must be "fair, reasonable, and adequate." Specific factors to be considered by the court in its determination are referenced in cited case law and the recently revised *Manual for Complex Litigation*. Before a court can approve a settlement, it must hold a hearing and it must make specific findings explaining why the settlement is fair, reasonable, and adequate. Class members must be notified in a reasonable manner of the terms of the proposed settlement, which may involve individual notices. Another amendment, to subdivision (c), requires that a certification notice, which often includes notice of a proposed settlement, must be in "plain, easily understood language." [1] Any class member may object to the proposed settlement. "Side agreements" made in connection with the settlement must be disclosed to the court so that it can fully understand the terms of the settlement. Once a class member has objected to the fairness of the settlement, the member may not withdraw that objection without the court's approval, allowing the court to review any "side agreements" made with objectors.

In many class actions, a member has no opportunity to reject a settlement (when, for example, the member becomes aware for the first time that only coupons or small awards are being offered) after the initial opportunity to opt out of the class has expired. Amended Rule 23(e) authorizes a court to refuse to approve a settlement unless the settlement affords class members a new opportunity to be excluded from the class action at a time when class members can make an informed decision based on the actual proposed settlement terms. Class members in a Rule 23(b)(3) action (class actions involving money damages) have always been given an opportunity to opt out of a class action at the time the class action has been certified. But when a class action is certified before settlement has been reached, the decision whether to opt out may be made well before the nature and scope of liability and damages are understood. A great many changes in class members' circumstances and other aspects of the litigation may have occurred after certification but before the terms of the settlement were sent to the class members. The second opt-out opportunity provides added assurances that the settlement terms are fair by giving class members an opportunity to examine them and decide for themselves whether to accept them. The number of rejections may offer the reviewing court a useful assessment of whether the proposed settlement is indeed fair.

Attorney Fee Awards

New Rule 23(g) and (h) provide guidance to judges in appointing class counsel and setting attorney fee awards in class actions. The new provisions emphasize counsel's duty to represent the class's interests and the court's duty to attend to the relationship between the fee award and the actual value of the benefit in fact received by class members. Rule 23(h) for the first time sets out specific criteria to be considered by the court in determining the amount of the fee award. The

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[1] The Advisory Committee on Civil Rules worked with the Federal Judicial Center on developing model clear-notice forms, which can be found at the Center's web site <www.fjc.gov>.

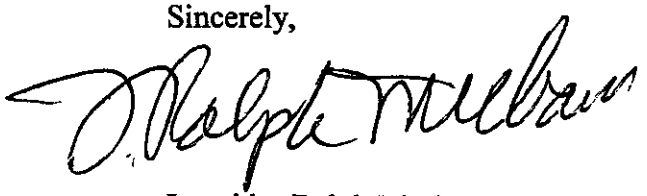
Committee Notes set out the analytical framework for fee award determinations, recognizing that the case law will continue to develop and will have subtle variations from circuit to circuit. The Notes provide extensive guidance on the "best practices" used by courts in setting fee awards, including details on the factors that courts have recently, and consistently, found important to consider in determining whether the fees sought are justified and "reasonable." The Notes emphasize the importance of the reviewing court's focus on realistically assessing the value of what class members actually receive in the settlement in setting the fee award for class counsel. The Notes suggest that in some cases the court should consider fees paid counsel by individual class members in accordance with retainer agreements.

Rule 23(h) works in tandem with new Rule 23(g), which requires the court to select and appoint class counsel. In selecting class counsel when there are multiple applicants, the court may request applicants to propose terms of attorney fees, which can be considered among other factors in the court's selection decision. Rule 23(g) also authorizes the court to appoint interim counsel during the period before class certification, and the Notes point out that counsel then must represent the class's best interests, in particular in connection with pre-certification efforts to settle the case.

To further ensure the fairness of the fee award, new Rule 23(h) requires that the class members be notified of an attorney fee motion and be given an opportunity to object to it. If anyone objects, the court may authorize the objector to investigate the proposed fee award through discovery — although broad discovery is not ordinarily appropriate in regard to fee motions because it may lead to abuse. The amendments also require a court to make findings supporting its fee award, holding a hearing if appropriate.

The amendments to Rule 23 that take effect in December 2003 represent the collaborative product of a comprehensive rulemaking process that relied on extensive input from experienced judges, plaintiff and defense lawyers, corporate counsel, public interest lawyers, government lawyers, and leading law professors. The amendments are intended in many respects to codify the "best practices" that courts have developed effectively and fairly to supervise class action litigation. The amendments reflect the judiciary's best judgment on the standards to be used in awarding attorney fees and evaluating the fairness of settlements in class actions.

Sincerely,



Leonidas Ralph Mecham
Secretary

Enclosure

cc: Honorable Orrin Hatch
Members, Committee on the Judiciary

LEGISLATION AFFECTING THE FEDERAL RULES OF PRACTICE AND PROCEDURE[1]
108th Congress

SENATE BILLS

- S. 151 - *Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003*
  - Introduced by: Hatch
  - Date Introduced: 1/13/03
  - Status: Read twice and referred to the Senate Committee on the Judiciary (1/13/03). Senate Judiciary Committee reported favorably with amendments (1/30/03) Report No. 108-2 filed (2/11/03). Passed Senate by a vote of 84-0 (2/24/03). Referred to House Judiciary Committee (2/25/03). Referred to House Judiciary Committee's Subcommittee on Crime, Terrorism, and Homeland Security (3/6/03). House inserted own version of bill. Chairman Sensenbrenner requested conference (3/27/03). Conferees appointed (3/27/03, 3/31/03, 4/3/03). Conference report 108-66 filed (4/9/03). House agreed to conference report by a vote of 400-25 (4/10/03). Senate agreed to conference report by a vote of 98-0 (4/10/03). Signed by President (4/30/03) (Pub. L. 108-21).
  - Related Bills: S. 885, H.R. 1046
  - Key Provisions:
    — Section 610 amends **Criminal Rule 7(c)(1)** to permit the naming of an unknown defendant in an indictment so long as that defendant has a particular DNA profile as defined in 18 U.S.C. § 3282.

- S. 274 - *Class Action Fairness Act of 2003*
  - Introduced by: Grassley
  - Date Introduced. 2/4/03
  - Status: Read twice and referred to the Senate Committee on the Judiciary (2/4/03). Judiciary Committee approved the bill with two amendments by a vote of 12-7 and ordered it reported out of committee (4/11/03). Placed on Senate Legislative Calendar (6/2/03). Report No. 108-123 filed (7/31/03).
  - Related Bills: S. 1751, S. 1769, H.R. 1115
  - Key Provisions:
    — Section 3 amends **Part V of title 28, U.S.C.**, to include a new chapter on Consumer Class Action Bill of Rights and Improved Procedures for Interstate Class Actions. The new chapter includes provisions on judicial review and

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[1]The Congress has authorized the federal judiciary to prescribe the rules of practice, procedure, and evidence for the federal courts, subject to the ultimate legislative right of the Congress to reject, modify, or defer any of the rules. The authority and procedures for promulgating rules are set forth in the Rules Enabling Act. 28 U.S.C. §§ 2071-2077.

approval of noncash settlements, prohibition on the payment of bounties, review and approval of proposed settlements (protection against loss by class members and prohibition against discrimination based on geographic location), publication of settlement information in plain English, and notification of proposed settlement to appropriate state and federal officials.

— Section 4 amends **section 1332 of title 28, U.S.C.**, to give district courts original jurisdiction of any civil action in which the amount in controversy exceeds $2 million, exclusive of interest and costs, and is a class action in which (1) any plaintiff class member is a citizen of a state different from any defendant, (2) any plaintiff class member is a foreign state or subject of a foreign state and any defendant is a citizen of a state, or (3) any plaintiff class member is a citizen of a state and any defendant is a foreign state or a subject of a foreign state. The above provisions do not apply in any civil action where (a) the substantial majority of the plaintiff class and the primary defendants are citizens of the state where the action was originally filed, and the claims asserted will be governed primarily by the laws of the state where the action was originally filed; (b) the primary defendants are states, state officials, or other governmental entities; or (c) the number of all members of all proposed plaintiff classes in the aggregate is less than 100.

— Section 5 provides for removal of interstate class actions to a United States district court and for review of orders remanding class actions to State courts.

— Section 6 directs the Judicial Conference of the United States to submit reports to the Senate and House Judiciary Committees on class action settlements. In these reports, the Judicial Conference shall include the following: (1) recommendations on the "best practices" that courts can use to ensure that settlements are fair; (2) recommendations to ensure that the fees and expenses awarded to counsel in connection with a settlement appropriately reflect the time, risk, expense, and risk that counsel devoted to the litigation, (3) recommendations to ensure that class members are the primary beneficiaries of settlement; (4) the actions that the Judicial Conference will take to implement its recommendations.

[As amended, only class actions involving at least $5 million would be eligible for federal court. Further, in class actions where more than two-thirds of the plaintiffs are from the same state, the case would remain in state court automatically. In class actions where between one-third and two-thirds of the plaintiffs are from the same state as the defendant, the court has the discretion to accept removal or remand the case back to state court based on five specified factors. The second amendment deleted language from Section 4 that classified "private attorney general" as class actions.]

- S. 413 - *Asbestos Claims Criteria and Compensation Act of 2003*
  - Introduced by: Nickles
  - Date Introduced: 2/13/03

- Status: Read twice and referred to the Senate Committee on the Judiciary (2/13/03).
- Related Bills H.R. 1586
- Key Provisions:

  — Section 4 states that no person shall file a civil action alleging a nonmalignant asbestos claim unless the person makes a prima facie showing that he or she suffers from a medical condition to which exposure to asbestos was a substantial contributing factor.

  — Section 5 provides that a court may consolidate for trial any number and type of asbestos claims with the consent of all parties. Without such consent, the court may consolidate for trial only those claims relating to the same exposed person and that person's household.

  — Section 5 also provides that a plaintiff may file a civil action in the state of his or her domicile or in the state where the plaintiff was exposed to asbestos, such exposure being a substantial contributing factor to the physical impairment upon which plaintiff bases his or her claim.

  — Section 5 further directs that any party may remove the action to federal court if the state court fails to comply with the procedural requirements in section 5. The federal court shall have jurisdiction of all civil actions removed, without regard to the amount in controversy and without regard to the citizenship or residence of the parties.

- S 554 - *A bill to allow media coverage of court proceedings*
  - Introduced by: Grassley
  - Date Introduced: 3/6/03
  - Status: Referred to the Senate Judiciary Committee (3/6/03). Senate Judiciary Committee reported bill without amendment favorably (5/22/03).
  - Related Bills: None
  - Key Provisions:

    — Section 2 states that the presiding judge of an appellate or district court has the discretionary authority to allow the photographing, electronic recording, broadcasting, or televising to the public of any court proceedings over which that judge presides.

    — Section 2 also directs the presiding district court judge to inform each non-party witness that the witness has the right to request that his or her image and voice be obscured during the witness's testimony.

    — Section 2 specifies that the Judicial Conference may promulgate advisory guidelines on the management and administration of media access to court proceedings.

    — Section 3 contains a "sunset" provision that terminates the authority of district court judges to allow media access three years after the date the Act is enacted.

- S. 578 - *Tribal Government Amendments to the Homeland Security Act of 2002*
  - Introduced by: Inouye

- Date Introduced: 3/7/03
- Status: Referred to the Senate Committee on Governmental Affairs (3/7/03). Senate Indian Affairs Committee held hearing (7/30/03).
- Related Bills: H.R. 2242
- Key Provisions:

  — Section 12 amends, inter alia, **Criminal Rule 6(e)(3)(C)** by replacing "federal, state . . . " with "Federal, State, tribal . . .."

- S. 644 - *Comprehensive Child Protection Act of 2003*
  - Introduced by: Hatch
  - Date Introduced: 3/18/03
  - Status: Referred to the Senate Judiciary Committee (3/18/03)
  - Related Bills: None
  - Key Provisions:

    — Section 6 amends **Evidence Rule 414(a).** The amendment would allow the admission of evidence, in a child molestation case, that the defendant had committed the offense of possessing sexually explicit materials involving a minor. Section 6 also amends the definition of a "child" to include those persons below the age of 18 (instead of the current age of 14).

    — Section 7 amends **28 U.S.C. chapter 119** by adding a new section 1826A that would make the marital communication privilege and the adverse spousal privilege inapplicable in any federal proceeding in which one spouse is charged with a crime against (a) a child of either spouse, or (b) a child under the custody or control of either spouse.

- S. 805 - *Crime Victims Assistance Act of 2003*
  - Introduced by: Leahy
  - Date Introduced: 4/7/03
  - Status: Read twice and referred to the Senate Judiciary Committee (4/7/03).
  - Related Bills: None
  - Key Provisions:

    — Section 103 amends **Criminal Rule 11** by inserting a new subdivision that requires the court, before entering judgment following a guilty plea from the defendant, to ask whether the victim has been consulted on the guilty plea and whether the victim has any views on the plea. Section 103 also directs the Judicial Conference to submit a report to Congress, within 180 days after enactment, recommending amendments to the **Criminal Rules** that give victims the opportunity to be heard on whether the court should accept the defendant's guilty or no contest plea.

    — Section 105 amends **Criminal Rule 32 of the Federal Rules of Criminal Procedure** by affording victims an "enhanced" opportunity to be heard at sentencing. Section 105 also directs the Judicial Conference to submit a report to Congress, within 180 days after enactment, recommending amendments to the

Criminal Rules that give victims enhanced opportunities to participate "during the pre-sentencing and sentencing phase of the criminal process."

- S. 817 - *Sunshine in Litigation Act of 2003*
  - Introduced by: Kohl
  - Date Introduced: 4/8/03
  - Status: Read twice and referred to the Senate Judiciary Committee (4/8/03)
  - Related Bills. None
  - Key Provisions:

    — Section 2 amends **28 U.S.C. chapter 111** by inserting a new section 1660. New section 1660 states that a court shall not enter an order pursuant to **Civil Rule 26(c)** that (1) restricts the disclosure of information through discovery, (2) approves a settlement agreement that would limit the disclosure of such agreement, or (3) restricting access to court records in a civil case unless the court conducts a balancing test that weighs the litigants' privacy interests against the public's interest in health and safety.

    — Section 3 provides that the amendments shall take effect (1) 30 days after the date of enactment, and (2) apply only to orders entered in civil actions or agreements entered into after the effective date.

- S. 885 - *Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003*
  - Introduced by Kennedy
  - Date Introduced: 4/10/03
  - Status: Read twice and referred to the Senate Committee on the Judiciary (4/10/03).
  - Related Bills: S 151
  - Key Provisions:

    — Section 610 amends **Criminal Rule 7(c)(1)** to permit the naming of an unknown defendant in an indictment so long as that defendant has a particular DNA profile as defined in 18 U.S.C. § 3282.

- S. 1023 - *To increase the annual salaries of justices and judges of the United States*
  - Introduced by Hatch
  - Date Introduced: 5/7/03
  - Status: Read twice and referred to the Senate Committee on the Judiciary (5/7/03). Ordered to be reported with amendments favorably (5/22/03). Placed on Senate Legislative Calendar (6/18/03).
  - Related Bills: S. 554

    — Section 3 authorizes the presiding judge of an appellate or district court to allow the photographing, electronic recording, broadcasting, or televising to the public of any court proceedings over which that judge presides Section 3 also directs the presiding district judge to inform each non-party witness that the witness has the right to request that his or her image and voice be obscured during

the witness's testimony. Section 3 provides that the Judicial Conference may promulgate advisory guidelines on the management and administration of the above photographing, televising, broadcasting, or recording of court proceedings. The authority of a district judge under this act shall terminate 3 years after the date of enactment of the act.

- S. 1125 - *Fairness in Asbestos Injury Resolution Act of 2003*
  - Introduced by: Hatch
  - Date Introduced: 5/22/03
  - Status: Read twice and referred to the Senate Committee on the Judiciary (5/22/03). Senate Judiciary Committee held hearing (6/4/03). Markup session held (6/19/03, 6/24/03, 6/26/03). Senate Judiciary Committee reported favorably with amendments (7/10/03). Report No. 108-118 filed (7/30/03). Placed on Senate Calendar (7/30/03).
  - Related Bills: None
  - Key Provisions:

    — Section 101 amends **Part I of title 28, U.S.C.**, to create a new five-judge Article I court called the United States Court of Asbestos Claims The Act also sets forth procedures governing filing of claims, medical criteria, awards, funding allocation, and judicial review.

    — Section 402 states the Act's effect on bankruptcy laws.

    — Section 403 provides that the Act supersedes federal and state law insofar as these laws may relate to any asbestos claim filed under the Act. Section 403 also makes clear that the Act's remedies shall be the exclusive remedy for any asbestos claim filed under any federal or state law.

- S. 1700 - *Advancing Justice Through DNA Technology Act of 2003*
  - Introduced by: Hatch
  - Date Introduced: 10/1/03
  - Status: Read twice and referred to the Senate Committee on the Judiciary (10/1/03).
  - Related Bills: H.R. 3214
  - Key Provisions:

    — Section 311 amends **Part II of Title 18, U.S.C.,** by adding a new chapter 228A regarding post-conviction DNA testing Under new section 3600(g)(1), the statute would provide that an inmate whose DNA test results excludes him or her "as the source of the DNA evidence," may file a motion for new trial or resentencing notwithstanding any rule or law that would bar such a motion as untimely.

- S. 1701 - *Reasonable Notice and Search Act*
  - Introduced by: Feingold
  - Date Introduced: 10/2/03
  - Status: Read twice and referred to the Senate Committee on the Judiciary (10/2/03)
  - Related Bills: S. 1709
  - Key Provisions:

—Section 2 of the bill amends, inter alia, **18 U.S.C. section 3103a(b)** by setting a specific time limit in which the government may delay giving notice that a search warrant has been issued. Under section 2, the giving of such notice may be delayed by no more than 7 calendar days This 7-day period may be extended for additional periods of up to 7 calendar days if a court finds on each application: (1) reasonable cause to believe that notice of the execution of the warrant will endanger the life or physical safety of an individual, (2) result in flight from prosecution, or (3) result in the destruction or tampering of evidence sought under the warrant. [Presently, the statute allows the government to delay giving notice for an unspecified period if the search warrant states that notice will be given "within a reasonable period of its execution."]

—Section 2 also provides that Attorney General shall report to the Congress semiannually (a) all requests for delays of notice, and (b) all requests for extensions of notice under section 3103a(b).

—Section 3 states that the provisions of this act shall sunset on December 31, 2005.

- S. 1709 - *Security Freedom Ensured Act of 2003 or the SAFE Act*
  - Introduced by: Craig
  - Date Introduced: 10/2/03
  - Status: Read twice and referred to the Senate Committee on the Judiciary (10/2/03).
  - Related Bills: S. 1701
  - Key Provisions:

    —Section 3 of the bill amends, inter alia, **18 U.S.C. section 3103a(b)** by setting a specific time limit in which the government may delay giving notice that a search warrant has been issued. Under section 3, the giving of such notice may be delayed by no more than 7 days after execution of the warrant. This 7-day period may be extended for additional periods of up to 7 days if a court finds on each application: (1) reasonable cause to believe that notice of the execution of the warrant will endanger the life or physical safety of an individual, (2) result in flight from prosecution, or (3) result in the destruction or tampering of evidence sought under the warrant. [Presently, the statute allows the government to delay giving notice for an unspecified period if the search warrant states that notice will be given "within a reasonable period of its execution."]

    —Section 3 also provides that Attorney General shall report to the Congress semiannually (a) all requests for delays of notice, and (b) all requests for extensions of notice under section 3103a(b)

    —Section 3 states that the provisions of this act shall sunset on December 31, 2005.

- S. 1751 - *Class Action Fairness Act of 2003*
  - Introduced by: Grassley
  - Date Introduced: 10/17/03

• Status: Read twice and placed on Senate Legislative Calendar (10/17/03). Motions to proceed to consideration (10/17/03 and 10/20/03). Cloture motion presented in Senate (10/20/03). Cloture on the motion to proceed not invoked by a vote of 59-39 (10/22/03).
• Related Bills: S. 274, S. 1769, H.R. 1115
• Key Provisions:

— Section 3 amends **Part V of title 28, U.S.C.**, to include a new chapter on Consumer Class Action Bill of Rights and Improved Procedures for Interstate Class Actions. The new chapter includes provisions on judicial review and approval of noncash settlements, prohibition on the payment of bounties, review and approval of proposed settlements (protection against loss by class members and prohibition against discrimination based on geographic location), publication of settlement information in plain English, and notification of proposed settlement to appropriate state and federal officials.

— Section 4 amends **section 1332 of title 28, U.S.C.**, to give district courts original jurisdiction of any civil action in which the amount in controversy exceeds $5 million, exclusive of interest and costs, and is a class action in which (1) any plaintiff class member is a citizen of a state different from any defendant, (2) any plaintiff class member is a foreign state or subject of a foreign state and any defendant is a citizen of a state, or (3) any plaintiff class member is a citizen of a state and any defendant is a foreign state or a subject of a foreign state.
A district court may decline to exercise jurisdiction as provided above in a class action case where more than 1/3 but less than 2/3 of the plaintiff class members and the primary defendants are citizens of the state in which the action was originally filed. In reaching its decision, the district court may rely on the following considerations: (a) whether the claims asserted involve matters of national or interstate interest, (b) whether the claims asserted will be governed by laws other than those of the state where the action was originally filed, (c) in the case of a state class action, whether the case was pleaded in such a manner so as to avoid federal jurisdiction, (d) whether the number of citizens in the plaintiff class who are citizens of the state where the action was filed is substantially larger than the number of citizens from any other state, and the citizenship of the other members is dispersed among a substantial number of states, and (e) whether one or more class actions asserting the same or similar claims on behalf of the same or other persons have been or may be filed.

— Section also contains a provision governing mass tort cases ("For purposes of this section and section 1453 of this title, a mass action shall be deemed to be a class action." This language is not included in the related bill, S. 274.)

A district court may not exercise jurisdiction over any class action as provided above where (a) 2/3 or more of the plaintiff class and the primary defendants are citizens of the state in which the action was filed, (b) the primary defendants are states, state officials, or other governmental entities; or (c) the number of all

members of all proposed plaintiff classes in the aggregate is less than 100.
— Section 5 provides for removal of interstate class actions to a United States district court and for review of orders remanding class actions to State courts.
— Section 6 directs the Judicial Conference of the United States to submit reports to the Senate and House Judiciary Committees on class action settlements. In these reports, the Judicial Conference shall include the following. (1) recommendations on the "best practices" that courts can use to ensure that settlements are fair; (2) recommendations to ensure that the fees and expenses awarded to counsel in connection with a settlement appropriately reflect the time, risk, expense, and risk that counsel devoted to the litigation, (3) recommendations to ensure that class members are the primary beneficiaries of settlement; (4) the actions that the Judicial Conference will take to implement its recommendations.

- S. 1769 - *National Class Action Act of 2003*
  - Introduced by: Breaux
  - Date Introduced: 10/21/03
  - Status: Read twice and referred to the Committee on the Judiciary (10/21/03).
  - Related Bills: S. 274, S. 1751, H.R. 1115
  - Key Provisions:

— Section 2 amends **Part V of title 28, U.S.C.**, to include a new chapter on the review and approval of proposed coupon settlements in class action cases.
— Section 3 amends **Chapter 85 of title 28, U.S.C.**, to add a new provision titled "National class actions." Under the new provision, (1) a district court shall have jurisdiction over a class action in which 1/3 or fewer of the plaintiff class are citizens of the state where the action was originally filed; (2) a district court may decline to exercise jurisdiction over a class action in which greater than 1/3 but less than 2/3 of the plaintiff class are citizens of the state where the action was originally filed. In making its decision, the district court may rely on the following considerations: (a) whether the claims asserted involve matters of state or local interest, (b) whether the claims asserted will be governed by the laws other than those of the state where the action was originally filed, (c) whether the forum was chosen in bad faith or frivolously, (d) whether the number of citizens in the plaintiff class who are citizens of the state where the action was filed is substantially larger than the number of citizens from any other state, and the citizenship of the other members is dispersed among a substantial number of states, and (e) whether the state claims asserted by class members of the state in which the action was filed would be preempted by a federal class action; (3) a district court may not exercise jurisdiction over a class action where (a) 2/3 or more of the plaintiff class are citizens of the state where the action was originally filed, (b) the primary defendants are states, state officials, or other governmental entities, or (c) the number of all members of all proposed plaintiff classes in the aggregate is less than 100, and (4) the new provision does not apply to any class action that involves only claims (a) concerning a covered security, (b) that relates

to the internal affairs or governance of a corporation or other business enterprise, or (c) that relates to the rights, duties, and obligations relating to or created by any security.

- S. 1795 - *Bail Bond Fairness Act of 2003*
  - Introduced by: Graham
  - Date Introduced: 10/29/03
  - Status: Referred to the Senate Committee on the Judiciary (10/29/03).
  - Related Bills H R. 2134
  - Key Provisions.

    — Section 3 amends, among other things, **Criminal Rule 46(f)(1)** by providing that the district court declare bail forfeited only when the defendant fails to physically appear before the court. (The existing rule provides that the court declare bail forfeited if a condition of the bond is breached.)

HOUSE BILLS

- H.R 538 - *Parent-Child Privilege Act of 2003*
  - Introduced by: Andrews
  - Date Introduced 2/5/03
  - Status: Referred to the House Committee on the Judiciary (2/5/03). Referred to the Subcommittee on Courts, the Internet, and Intellectual Property (5/5/2003).
  - Related Bills None
  - Key Provisions:

    — Section 2 amends **Article V of the Federal Rules of Evidence** by establishing a parent-child privilege. Under proposed **new Evidence Rule 502(b)**, neither a parent or a child shall be compelled to give adverse testimony against the other in a civil or criminal proceeding Section 2 also provides that neither a parent nor a child shall be compelled to disclose any confidential communication made between that parent and that child.

- H.R. 637 - *Social Security Number Misuse Prevention Act*
  - Introduced by: Sweeney
  - Date Introduced· 2/5/03
  - Status: Referred to the House Committees on the Judiciary and Ways and Means (2/5/03) Referred to the House Ways and Means' Subcommittee on Social Security (2/19/03). Referred to the House Judiciary Committee's Subcommittee on Crime, Terrorism, and Homeland Security (3/6/03).
  - Related Bills: None
  - Key Provisions:

    — Section 3 amends **chapter 47 of title 18, U.S.C.**, to prohibit the sale, public display, or purchase of a person's social security number without that person's affirmatively expressed consent.

    — Section 4 states that the above prohibition does not apply to a "public record."

Section 4 defines "public record" to mean "any governmental record that is made available to the public." (One exception to section 4 is public records posted on the Internet: "Section 1028A shall apply to any public record first posted onto the Internet or provided in an electronic medium by, or on behalf of a government entity after the date of enactment of this section, except as limited by the Attorney General[.]")

— Section 4 also provides that the Comptroller of the United States, in consultation with the Administrative Office of the U.S. Courts, shall conduct a study and prepare a report on the use of social security numbers in public records.

- H.R. 700 - *Openness in Justice Act*
  - Introduced by: Paul
  - Date Introduced: 2/11/03
  - Status: Referred to the House Committee on the Judiciary (2/11/03) Referred to the House Judiciary's Subcommittee on Courts, the Internet, and Intellectual Property (3/6/03).
  - Related Bills: None
  - Key Provisions

    — Section 2 inserts a new Rule 49 in the Federal Rules of Appellate Procedure. Proposed Rule 49(a) would require the courts to issue a written opinion in the following cases. (1) a civil action removed from state court, (2) a diversity jurisdiction case in which the amount in controversy exceeds $100,000, and (3) any appeal involving the use of the court's inherent powers. In addition, any party on direct appeal may request a written opinion under proposed Rule 49(b).

- H.R. 781 - *Privacy Protection Clarification Act*
  - Introduced by: Biggert
  - Date Introduced: 2/13/03
  - Status: Referred to the House Committee on Financial Services (2/13/03) Referred to the House Financial Services' Subcommittee on Financial Institutions and Consumer Credit (3/10/03).
  - Related Bills: None
  - Key Provisions:

    — Section 2 amends the Gramm-Leach-Bliley Financial Modernization Act (Pub L. No. 106-102) to exempt attorneys from the privacy provisions of the Act. Specifically, section 2 defines "financial institution" to exclude attorneys who are subject to, and are in compliance with, client-confidentiality provisions under their state, district, or territory's professional code of conduct.

- H R. 975 - *Bankruptcy Abuse Prevention and Consumer Protection Act of 2003*
  - Introduced by: Sensenbrenner
  - Date Introduced: 2/27/03
  - Status: Referred to the House Committees on the Judiciary and Financial Services

(2/27/03). Referred to the House Judiciary Committee Subcommittee on Commercial and Administrative Law (2/28/03). Subcommittee hearings held (3/4/03). Subcommittee discharged (3/7/03). Committee consideration and mark-up session held. Committee ordered bill to be reported by a vote of 18-11 (3/12/03). House Report 108-40 filed (3/18/03). Passed the House with several amendments by a vote of 315-113 (3/19/03). Received in the Senate, read the first time, and placed on Senate Legislative Calendar (3/20/03). Read the second time and placed on Senate Legislative Calendar (3/21/03).

• Related Bills. None

• Key Provisions:

— Section 221 amends **11 U.S.C. § 110** by inserting a new provision that allows the Supreme Court to promulgate rules under the Rules Enabling Act or the Judicial Conference to prescribe guidelines that establish a maximum allowable fee chargeable by a bankruptcy petition preparer.

— Section 315 states that within 180 days after the bill is enacted, the Director of the Administrative Office of the U.S. Courts shall establish procedures for safeguarding the confidentiality of any tax information required to be provided under this section. Section 315 also directs the Director to prepare and submit a report to Congress on, among other things, the effectiveness of said procedures.

— Section 319 expresses the sense of Congress that **Bankruptcy Rule 9011** should be amended to require the debtor or debtor's attorney to verify that information contained in all documents submitted to the court or trustee be (a) well grounded in law and (b) warranted by existing law or a good-faith argument for extension, modification, or reversal of existing law.

— Section 419 directs the Advisory Committee on Bankruptcy Rules to propose amendments to the **Bankruptcy Rules** and **Bankruptcy Forms** that require Chapter 11 debtors to disclose certain information by filing and serving periodic financial reports. The required information shall include the value, operations, and profitability of any closely held corporation, partnership, or any other entity in which the debtor holds a substantial or controlling interest.

— Section 433 directs the Advisory Committee on Bankruptcy Rules to, within a reasonable time after the date of enactment, propose new **Bankruptcy Forms** on disclosure statements and plans of reorganization for small businesses.

— Section 434 adds **new section 308 to 11 U.S.C. chapter 3** (debtor reporting requirements). Section 434 also stipulates that the effective date "shall take effect 60 days after the date on which rules are prescribed under section 2075 of title 28, United States Code, to establish forms to be used to comply with section 308 of title 11, United States Code, as added by subsection (a)."

— Section 435 directs the Advisory Committee on Bankruptcy Rules to propose amendments to the **Bankruptcy Rules** and **Bankruptcy Forms** to assist small business debtors in complying with the new uniform national reporting requirements.

— Section 601 amends **chapter 6 of 28 U.S.C.,** to direct: (1) the clerk of each district court (or clerk of the bankruptcy court if certified pursuant to section

156(b) of this title) to compile bankruptcy statistics pertaining to consumer credit debtors seeking relief under Chapters 7, 11, and 13; (2) the Director of the Administrative Office of the U.S. Courts to make such statistics available to the public; and (3) the Director of the Administrative Office of the U S. Courts to prepare and submit to Congress an annual report concerning the statistics collected. This report is due no later than June 1, 2005.

— Section 604 expresses the sense of Congress that. (1) it should be the national policy of the United States that all public data maintained by the bankruptcy clerks in electronic form should be available to the public and released in usable electronic form subject to privacy concerns and safeguards as developed by Congress and the Judicial Conference.

— Section 716 expresses the sense of Congress that the Advisory Committee on Bankruptcy Rules should, as soon as practicable after the bill is enacted, propose amendments to the **Bankruptcy Rules** regarding an objection to the confirmation plan filed by a governmental unit and objections to a claim for a tax filed under Chapter 13.

— Section 1232 amends **28 U.S.C. § 2075** to insert: "The bankruptcy rules promulgated under this section shall prescribe a form for the statement required under section 707(b)(2)(C) of title 11 and may provide general rules on the content of such statement."

— Section 1233 amends **28 U.S.C. § 158** to provide for direct appeals of certain bankruptcy matters to the circuit courts of appeals.

- H.R. 1115 - *Class Action Fairness Act of 2003*
  - Introduced by Goodlatte
  - Date Introduced: 3/6/03
  - Status: Referred to the House Committee on the Judiciary (3/6/03). House Judiciary Committee held hearing (5/15/03) House Judiciary Committee held markup and ordered bill reported, with two amendments, favorably by a vote of 20-14 (5/21/03). House Report No. 108-144 filed (6/9/03). H. Amdt. 167 approved (6/12/03) Passed the House by a vote of 253-170 (6/12/03) Received in Senate and referred to Judiciary Committee (6/12/03).
  - Related Bills: S. 274, S. 1751, S. 1769
  - Key Provisions:

— Section 3 amends **Part V of title 28, U.S.C.**, to include a new chapter on Consumer Class Action Bill of Rights and Improved Procedures for Interstate Class Actions. The new chapter includes provisions on judicial review and approval of noncash settlements, prohibition on the payment of bounties, review and approval of proposed settlements (protection against loss by class members and against discrimination based on geographic location), and the publication of settlement information in plain English.

— Section 4 amends **section 1332 of title 28, U.S.C.**, to give district courts original jurisdiction of any civil action in which the amount in controversy

exceeds $2 million, exclusive of interest and costs, and is a class action in which (1) any plaintiff class member is a citizen of a state different from any defendant, (2) any plaintiff class member is a foreign state or subject of a foreign state and any defendant is a citizen of a state, or (3) any plaintiff class member is a citizen of a state and any defendant is a foreign state or a citizen or subject of a foreign state. These provisions do not apply in any civil action where (a) the substantial majority of the plaintiff class and the primary defendants are citizens of the state where the action was originally filed, and the claims asserted will be governed primarily by the laws of the state where the action was originally filed, (b) the primary defendants are states, state officials, or other governmental entities; or (c) the number of proposed plaintiff class members is less than 100.
— Section 5 provides for removal of interstate class actions to a federal district court and for review of orders remanding class actions to state courts
— Section 6 amends **section 1292(a) of title 28, U.S.C.**, to allow appellate review of orders granting or denying class certification under Civil Rule 23 Section 6 also provides that discovery will be stayed pending the outcome of the appeal.

[As amended on May 21, 2003, the first amendment accelerates the Civil Rule 23 amendments that were approved by the Supreme Court on March 27, 2003, to the date of enactment or December 1, 2003, whichever is earlier. The second amendment revised the effective date of the legislation The legislation will apply to all pending cases in which the class certification decision has not yet been made.]

[House Amdt. 167 raises the aggregate amount in controversy required for federal court jurisdiction from $2 million to $5 million. The amendment also gives federal courts discretion to return intrastate class actions to state courts after weighing five factors to determine if the case is of a local character. This discretion would come into play when between one-third and two-thirds of the plaintiffs are citizens of the same state as the primary defendants. If more than two-thirds are citizens of the same state, the case would remain in state court.]

● H.R. 1303 - *To amend the E-Government Act of 2002 with respect to rulemaking authority of the Judicial Conference.*

• Introduced by. Smith
• Date Introduced: 3/18/03
• Status: Referred to the House Committee on the Judiciary (3/18/03). Referred to the House Subcommittee on Courts, the Internet, and Intellectual Property (3/19/03). Subcommittee held mark-up session and subsequently voted to forward the bill to the full committee (3/20/03). House Judiciary Committee held mark-up session, approved amendments, and ordered to be reported (7/16/03). House Report 108-239 filed (7/25/03). House passed by voice vote (10/7/03). Received in the Senate, read twice, and referred to the Committee on Governmental Affairs (10/14/03)

- Related Bills: None
- Key Provisions:

  — As amended, Section 1 amends Section 205(c) of the E-Government Act of 2002 (Pub. L. 107-347) by requiring the Judicial Conference to promulgate rules that protect privacy and security interests pertaining to the filing and public availability of electronic documents [The bill, as introduced, would have amended Section 205(c) of the E-Government Act of 2002 by providing that the Judicial Conference *may* promulgate rules to protect privacy and security interests pertaining to documents filed electronically with the courts.] Section 1 also amends the E-Government Act of 2002 by allowing a party to file an unredacted document under seal that will be part of the court record. In the court's discretion, this unredacted document will either be in lieu of, or in addition to, a redacted copy in the public file.

- H.R. 1586 - *Asbestos Compensation Fairness Act of 2003*
  - Introduced by: Cannon
  - Date Introduced: 4/3/03
  - Status. Referred to the House Committee on the Judiciary (4/3/03).
  - Related Bills: S. 413
  - Key Provisions:

    — Section 3 states that no person shall file a civil action alleging a nonmalignant asbestos claim unless the person makes a prima facie showing of physical impairment resulting from a medical condition to which exposure to asbestos was a substantial contributing factor.

    — Section 4 provides that a court may consolidate for trial any number and type of asbestos claims with the consent of all parties. Without such consent, the court may consolidate for trial only those claims relating to the same exposed person and that person's household.

    — Section 4 also provides that a plaintiff must file a civil action in the state of his or her domicile or in the state where the plaintiff was exposed to asbestos, such exposure being a substantial contributing factor to the physical impairment upon which plaintiff bases his or her claim.

    — Section 4 further directs that any party may remove the action to federal court if the state court fails to comply with the procedural requirements in section 4. The federal court shall have jurisdiction of all civil actions removed, without regard to the amount in controversy and without regard to the citizenship or residence of the parties.

- H.R. 1768 - *Multidistrict Litigation Restoration Act of 2003*
  - Introduced by Sensenbrenner
  - Date Introduced: 4/11/03
  - Status: Referred to the House Committee on the Judiciary (4/11/03). Referred to the Subcommittee on Courts, the Internet, and Intellectual Property (5/5/2003).

Subcommittee held mark-up session and forwarded to full committee (7/22/03).
• Related Bills: None.
• Key Provisions:

— Section 2 amends **28 U.S.C. § 1407** to permit the transferee court in a multidistrict-litigation case to retain jurisdiction over the case for trial. The transferee court may also retain jurisdiction to determine compensatory and punitive damages.

- H.R. 2134 - *Bail Bond Fairness Act of 2003*
  - Introduced by: Keller
  - Date Introduced: 5/15/03
  - Status: Referred to the House Committee on the Judiciary (5/15/03). Referred to the Subcommittee on Crime, Terrorism, and Homeland Security (6/25/03). House Judiciary Committee favorably reported by acclamation (9/10/03) (Committee also voted to delete finding 5 in Section 2(a)(5) by a voice vote. That finding iterated that "[i]n the absence of a meaningful bail bond option, thousands of defendants in the Federal system fail to show up for court appearances every year"). Reported by the House Judiciary Committee H. Rept. 108-316 (10/15/03). Placed on Union Calendar (10/15/03).
  - Related Bills: None.
  - Key Provisions.

    — Section 3 ostensibly amends, among other things, **Criminal Rule 46(f)(1)** by providing that the district court declare bail forfeited only when the defendant fails to physically appear before the court. (The existing rule provides that the court declare bail forfeited if a condition of the bond is breached.)

- H.R. 2242 - *Tribal Government Amendments to the Homeland Security Act*
  - Introduced by. Kennedy
  - Date Introduced: 5/22/03
  - Status: Referred to the House Committees on Resources, Judiciary, Budget, Intelligence, Homeland Security (5/22/03). Referred to House Judiciary Committee's Subcommittee on Crime, Terrorism, and Homeland Security (6/25/03).
  - Related Bills. S.578
  - Key Provisions:

    — Section 12 amends, inter alia, **Criminal Rule 6(e)(3)(C)** by replacing "federal, state . . " with "Federal, State, tribal . . .."

- H R. 3037 - *Antiterrorism Tools Enhancement Act of 2003*
  - Introduced by: Feeney
  - Date Introduced: 9/9/03
  - Status: Referred to the House Committee on the Judiciary (9/9/03). Referred to the House Judiciary Committee's Subcommittee on Crime, Terrorism, and Homeland Security (10/22/03).
  - Related Bills: None

- Key Provisions:

  — Section 2 amends **Criminal Rule 41(b)(3)** by providing that a magistrate judge in a district where an act of terrorism has occurred may issue a warrant for a person or property within or without that district.

- H.R. 3214 - *Advancing Justice Through DNA Technology Act of 2003*
  - Introduced by: Sensenbrenner
  - Date Introduced: 10/1/03
  - Status: Referred to the House Committees on the Judiciary and Armed Services (10/1/03). Referred to the House Judiciary's Subcommittee on Crime, Terrorism, and Homeland Security (10/2/03). Subcommittee on Crime, Terrorism, and Homeland Security discharged (10/6/03). Judiciary Committee held mark-up session and ordered reported by a vote of 28-1 (10/8/03). House Report 108-321 filed (10/16/03). House Committee on Armed Services discharged (10/16/03). Placed on Union Calendar (10/16/03). House voted to suspend the rules and pass bill by a vote of 357-67 (11/5/03). Received in the Senate (11/6/03).
  - Related Bills: S. 1700.
  - Key Provisions.

    — Section 311 amends **Part II of Title 18, U.S.C.,** by adding a new chapter 228A regarding post-conviction DNA testing. Under new section 3600(g)(1), the statute would provide that an inmate whose DNA test results excludes him or her "as the source of the DNA evidence," may file a motion for new trial or resentencing notwithstanding any rule or law that would bar such a motion as untimely.

- H R 3381 - *Crime Victims Assistance Act of 2003*
  - Introduced by: Norton
  - Date Introduced: 10/28/03
  - Status: Referred to the House Committees on the Judiciary, Budget, and Rules (10/28/03).
  - Related Bills: S J. Res. 1, H.J. Res. 10, H.J. Res. 48.
  - Key Provisions:

    — Section 103 amends **Criminal Rule 11** by adding a new subdivision that provides that the court should not enter judgment on a defendant's guilty plea before asking the prosecutor whether the victim (or any other person whose safety, by relationship to the victim, may be reasonably threatened) has been consulted on the defendant's plea. Section 103 also directs the Judicial Conference to report to the Congress, within 180 days after enactment of the act, recommending amendments to the Federal Rules of Criminal Procedure to provide enhanced opportunities for victims and others to be heard on whether or not the court should accept a guilty or nolo contendere plea from the defendant.

    — Section 105 amends **Criminal Rule 32** by eliminating the restriction that only victims of violent crimes or sexual abuse at sentencing may be heard at

sentencing. Section 105 also directs the Judicial Conference to report to the Congress, within 180 days after enactment of the act, recommending amendments to the Federal Rules of Criminal Procedure to provide enhanced opportunities for victims to participate during the presentencing and sentencing phases.

SENATE RESOLUTIONS

● S.J. Res. 1 - *Proposing an Amendment to the Constitution of the United States to Protect the Rights of Crime Victims*

- Introduced by: Kyl
- Date Introduced: 1/7/03.
- Status: Referred to the Senate Committee on the Judiciary (1/7/03). Judiciary Committee held hearing (4/8/03). Referred to House Judiciary Committee's Subcommittee on Constitution, Civil Rights, and Property Rights (6/10/03). Subcommittee on Constitution approved without amendment by a vote of 5-4 (6/12/03). Markup sessions held (7/24/03 and 7/31/03). Senate Judiciary Committee reported favorably without amendment and written report (9/4/03). Placed on Senate Calendar (9/4/03). Report No. 108-191 filed (11/7/03).
- Related Bills: H.J. Res. 10, H.J. Res. 48
- Key Provisions:

— Section 2 provides that a victim of a violent crime shall have the constitutional right to (1) reasonable and timely notice of any public proceeding involving the crime and any release or escape of the accused, (2) appear at such proceedings and to be heard on matters such as the release, plea, sentencing, reprieve, and pardon of the accused; and (3) adjudicative decisions that consider the victim's safety, interest in avoiding unnecessary delay, and interest in fair and timely claims to restitution from the accused. These rights shall not be restricted except as dictated by public safety, compelling necessity, or the administration of justice.

HOUSE RESOLUTIONS

● H J Res. 10 - *Proposing an Amendment to the Constitution of the United States to Protect the Rights of Crime Victims*

- Introduced by: Royce
- Date Introduced: 1/7/03.
- Status: Referred to the House Committee on the Judiciary (1/7/03).
- Related Bills: S.J. Res 1, H.J. Res. 48
- Key Provisions.

— Section 2 provides that a victim of a violent crime shall have the constitutional right to (1) reasonable and timely notice of any public proceeding involving the crime and any release or escape of the accused, (2) appear at such proceedings and to be heard on matters such as the release, plea, sentencing, reprieve, and pardon of the accused, and (3) adjudicative decisions that consider the victim's safety,

interest in avoiding unnecessary delay, and interest in fair and timely claims to restitution from the accused. These rights shall not be restricted except as dictated by public safety, compelling necessity, or the administration of justice.

● H.J. Res 48 - *Proposing an Amendment to the Constitution of the United States to Protect the Rights of Crime Victims*

- Introduced by: Chabot
- Date Introduced: 4/10/03.
- Status: Referred to the House Committee on the Judiciary (4/10/03). Referred to the Subcommittee on the Constitution (5/5/2003). Subcommittee held hearing (9/30/03).
- Related Bills: S.J. Res. 1, H.J Res. 10
- Key Provisions:

— Section 2 provides that a victim of a violent crime shall have the constitutional right to (1) reasonable and timely notice of any public proceeding involving the crime and any release or escape of the accused; (2) appear at such proceedings and to be heard on matters such as the release, plea, sentencing, reprieve, and pardon of the accused; and (3) adjudicative decisions that consider the victim's safety, interest in avoiding unnecessary delay, and interest in fair and timely claims to restitution from the accused. These rights shall not be restricted except as dictated by public safety, compelling necessity, or the administration of justice

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 12, 2003

MEMORANDUM TO THE STANDING COMMITTEE

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

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

Automation Project (Documentum)

Our new web-based electronic document-management system (Documentum 4i) continues to work well. We are using Documentum 4i to file, review, and edit all rules documents, process comments and suggestions, prepare acknowledgment letters, organize and search for documents using enhanced indexing and search capabilities, expedite intake and processing of e-mails and attachments, and track different versions of documents to ensure the quality and accuracy of work products. Other soon-to-come improvements include distributing agenda books in electronic form and installing "redlining" software.

Next year, we plan to upgrade to the latest version of the software — Documentum 5. Potential enhancements include the following: committee members, reporters, and staff will have remote access to the database; we will have improved search capability; and the data will be easier to retrieve and read. Funding for the upgrade may be an issue because of budget shortfalls.

Internet

We continue to update, modify, and expand the Judiciary's Federal Rulemaking Internet web site (http://www.uscourts gov). We are also working to make the web site easier for a user to find, research, and track proposed rules amendments as they proceed through the rulemaking process.

As part of a long-range project to build a reference collection of primary rules-related materials on the web site, we have begun posting the reports of the rules committees to our web site. In addition, to make searching the contents of the web site easier and faster, we have added a new search engine to the web site.

A new web site (www.regulations.gov) that allows the public to review and comment on proposed new rules from all federal executive-branch agencies has been established in accordance with the E-Government Act. We have successfully negotiated to have links to our web site placed on this national web site. We are exploring whether we can place our rule proposals directly on the national web site. (We have also succeeded in placing links to our web site on other legal web sites such as Findlaw.com.)

Finally, we continue to receive comments on the proposed rule amendments through the web site. The number of comments submitted via the Internet remains modest.

Committee and Subcommittee Meetings

For the period from May 10, 2003, through December 9, 2003, the office staffed nine meetings, including one Standing Committee meeting, five advisory rules committee meetings, two subcommittee meetings, and one meeting of the Informal Working Group on Mass Torts. The office has also arranged and participated in numerous conference calls involving rules subcommittees.

The docket sheets of all suggested amendments for Bankruptcy, Civil, Criminal, and Evidence Rules have been updated to reflect the committees' recent respective actions. Every suggested amendment along with its source, status, and disposition is listed. The docket sheets are updated after each committee meeting, and they are included in each agenda book The docket sheets are also posted on our web site.

The office continues to research our historical records for information regarding any past relevant committee action on every new proposed amendment submitted to an advisory committee. 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 records from 1935 through 1996 have been entered on microfiche and indexed. The records from 1997 to the present will eventually also be stored on microfiche. The microfiche collection continues to prove useful to us and the public in researching prior committee positions. In addition, many of these records are already filed in Documentum. With the use of a high-capacity scanner, staff is now inputting rules-related records timely into Documentum.

Manual Tracking

Our manual system of tracking comments continues to work well. For the recent public-comment period, the office has received, acknowledged, forwarded, and followed up on approximately 45 comments. 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, with a follow-up mailing of a complete hardcopy set of all comments received. We found that this process allows 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. The Standing Committee outreach to the organized bar has resulted in 53 state bars designating a point-of-contact.

The points-of-contact list was updated in time to include the new names in *The Request for Comment* pamphlet on proposed amendments published in August 2003. 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.

Mailing List

The Administrative Office's new automated mailing list system – called DIRECT EXPRESS – continues to work well. The rules office maintains a large mailing list exclusively for rules-related mailings. Maintaining the list requires frequent and extensive updating, which in the past has been particularly tedious and time consuming. DIRECT EXPRESS is operated by an AO administrator and allows for immediate changes to the mailing list, which has facilitated our updating. Information on DIRECT EXPRESS can be obtained through the agency's internal AOWeb site.

Miscellaneous

In August 2003, we prepared and published the *Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure* seeking public comment on proposed amendments to Appellate Rules 4, 26, 27, 28, 28.1, 32, 32.1, 34, 35, and 45; Bankruptcy Rules 1007, 3004, 3005, 4008, 7004, and 9006; Civil Rules 5.1, 6, 24, 27, and 45, and Admiralty Rules "B" and "C"; and Criminal Rules 12.2, 29, 32, 32.1, 33, 34, 45, and 59. We sent the pamphlet to legal publishers and the court family and we posted it on the federal rulemaking web site.

In November 2003, the courts were advised that the amendments to the Federal Rules of Appellate, Bankruptcy, and Civil Procedure, and the Federal Rules of Evidence, approved by the Supreme Court on March 27, 2003, would take effect on December 1, 2003.

In December 2003, we delivered to the Supreme Court proposed amendments to the Federal Rules of Bankruptcy and Criminal Procedure (including amendments to the Rules Governing Section 2254 Cases in the United States District Court and accompanying form, and the Rules Governing Section 2255 Cases in the United States District Court and accompanying form), and the Federal Rules of Evidence that were approved by the Judicial Conference at its September 2003 session.

James N. Ishida

Attachments

BANKRUPTCY RULES SUGGESTIONS DOCKET

(By Rule Number)

ADVISORY COMMITTEE ON BANKRUPTCY RULES

The docket sets forth suggested changes to the Federal Rules of Bankruptcy Procedure considered by the Advisory Committee since 1997. The suggestions are set forth in order by: (1) bankruptcy rule number, (2) form number, and where there is no rule or form number (or several rules or forms are affected), (3) alphabetically by subject matter

Suggestion	Docket No., Source & Date	Status
	BANKRUPTCY RULES	
Rule 2002(g) Allow entity to designate address for purpose of receiving notices.	02-BK-A Bankruptcy Clerk Joseph P. Hurley, for the BK Noticing Working Group 2/4/02 00-BK-A Raymond P. Bell, Esq., Fleet Credit Card Services, L.P 1/18/00	2/02 - Referred to chair and reporter 3/02 - Committee considered 4/03 - Committee considered 9/03 - Committee considered and approved in principle **PENDING FURTHER ACTION**
Rule 2003 Clarify debtor's obligation to provide substantiating documents	03-BK-D Lawrence A. Friedman 8/1/03	8/03 - Sent to chair and reporter 9/03 - Committee considered and referred to Consumer Subcommittee **PENDING FURTHER ACTION**
Rule 2016 Require debtor's attorney to disclose details of professional relationship with debtor	03-BK-D Lawrence A. Friedman 8/1/03	8/03 - Sent to chair and reporter 9/03 - Committee considered and referred to Consumer Subcommittee **PENDING FURTHER ACTION**

Rule 3002(c) Provide exception for Chapters 7 and 13 corporate cases where debtor not an individual.	01-BK-F Judge Paul Mannes 6/23/00	6/00 - Referred to chair, reporter, and committee **PENDING FURTHER ACTION**
Rule 3017.1 Eliminate rule extension number.	00-BK-013 01-BK-C Patricia Meravi 1/22/01	2/01 - Referred to chair and reporter **PENDING FURTHER ACTION**
Rule 4002 Clarify debtor's obligation to provide substantiating documents	03-BK-D Lawrence A. Friedman 8/1/03	8/03 - Sent to chair and reporter 9/03 - Committee considered and referred to Consumer Subcommittee **PENDING FURTHER ACTION**
Rule 4003 Impose burden of proof upon the debtor	01-BK-D Judge Barry Russell 4/4/01	4/01 - Referred to chair and reporter 3/02 - Committee considered and deferred decision 9/03 - Committee considered **PENDING FURTHER ACTION**
Rule 4004 Dispense with requirement of filing adversarial complaint in certain circumstances	03-BK-D Lawrence A. Friedman 8/1/03	8/03 - Sent to chair and reporter **PENDING FURTHER ACTION**

Rule 4008 Provide a deadline for filing reaffirmation agreement.	01-BK-E Francis F. Szczebak, Esq , for the BK Judges Advisory Group 11/30/01	1/02 - Referred to chair and reporter 3/02 - Committee considered and deferred decision. Referred to subcommittee. 10/02 - Committee approved for publication 1/03 - Standing Committee approved for publication 8/03 - Published for public comment **PENDING FURTHER ACTION**
Rule 5005(c) Add Clerk of the Bankruptcy Appellate Panel to entities already listed.	03-BK-B Judge Robert J. Kressel 7/2/03	7/03 - Referred to chair and reporter 9/03 - Committee considered and approved for publication **PENDING FURTHER ACTION**
Rule 6007(a) Require the trustee to give notice of specific property he intends to abandon	99-BK-I Physa Griffith South, Esq. 10/13/99	12/99 - Referred to chair, reporter, and committee **PENDING FURTHER ACTION**
Rule 7001 Dispense with requirement of filing adversarial complaint in certain circumstances	03-BK-D Lawrence A. Friedman 8/1/03	8/03 - Sent to chair and reporter 9/03 - Committee considered and referred to Consumer Subcommittee **PENDING FURTHER ACTION**
Rule 7023.1 Eliminate rule extension number.	00-BK-013 01-BK-C Patricia Meravi 1/22/01	2/01 - Referred to chair and reporter **PENDING FURTHER ACTION**

Rule 7026 Eliminate mandatory disclosure of information in adversary proceedings	00-BK-008 01-BK-A Jay L Welford, Esq.and Judith G. Miller, Esq., for the Commercial Law League of America 1/26/01 00-BK-009 01-BK-B Judy B. Calton, Esq. 1/12/01	2/01 - Referred to chair and reporter **PENDING FURTHER ACTION**
Rule 9011 Make grammatical correction.	97-BK-D John J. Dilenschneider, Esq. 5/30/97	6/97 - Referred to chair, reporter, and committee **PENDING FURTHER ACTION**
Rule 9014 Allow local districts the option of amending rule.	02-BK-E Thomas J. Yerbich, Esq 2/22/02	5/02 - Referred to chair and reporter 8/02 - Draft excepting provisions of Civil Rule 26 in contested matters published for comment 4/03 - Committee approved 6/03 - Standing Committee approved for publication 8/03 - Published for public comment **PENDING FURTHER ACTION**
Rule 9036 State that notice by electronic means is complete upon transmission.	02-BK-A Bankruptcy Clerk Joseph P. Hurley, for the BK Noticing Working Group 2/1/02	2/02 - Referred to reporter, chair and committee 9/03 - Committee considered and approved in principle **PENDING FURTHER ACTION**
	BANKRUPTCY FORMS	
Official Form 1 Amend Exhibit C to the Voluntary Petition	02-BK-D Gregory B. Jones, Esq. 2/7/02	2/02 - Referred to reporter, chair, and committee **PENDING FURTHER ACTION**

Schedule I Amend to make applicable in Chapter 7 and 11 proceedings	03-BK-D Lawrence A Friedman 8/1/03	8/03 - Sent to chair and reporter 9/03 - Committee considered and approved for publication **PENDING FURTHER ACTION**
Official Form 9 Direct that information regarding bankruptcy fraud and abuse be sent to the United States trustee.	97-BK-B US Trustee Marcy J.K. Tiffany 3/6/97	3/97 - Referred to reporter, chair, and committee **PENDING FURTHER ACTION**
Official Form B9C Provide less confusing notice of commencement of bankruptcy form to debtors and creditors.	00-BK-E Ali Elahinejad 2/23/00	5/00 - Referred to reporter, chair, and committee **PENDING FURTHER ACTION**
	SUBJECT MATTER	
Fraud Amend the rules to protect creditors from fraudulent bankruptcy claims and the mishandling of cases by trustees.	02-BK-B Dr. & Mrs. Glen Dupree 2/4/02	2/02 - Referred to chair and reporter **PENDING FURTHER ACTION**
New Rule Incorporate proposed Civil Rule 5.1 in the bankruptcy rules.	03-BK-F Judge Geraldine Mund 10/14/03	10/03 - Referred to reporter and chair **PENDING FURTHER ACTION**
Small Claims Procedure Establish a "small claims" procedure.	00-BK-D Judge Paul Mannes 3/13/00 (see also 98-BK-A)	5/00 - Referred to reporter, chair, and committee **PENDING FURTHER ACTION**
Social Security Number Allow credit reporting agencies to have access to debtor's full social security number.	03-BK-E Experian (Janet Slane, Director, Product Infrastructure) 10/07/03	10/03 - Referred to reporter and chair **PENDING FURTHER ACTION**

CIVIL RULES SUGGESTIONS DOCKET

ADVISORY COMMITTEE ON CIVIL RULES

The docket sets forth suggested changes to the Federal Rules of Civil Procedure considered by the Advisory Committee since 1992. The suggestions are set forth in order by (1) civil rule number, (2) form number, and where there is no rule or form number (or several rules or forms are affected), (3) alphabetically by subject matter.

[illegible]	[illegible]	[illegible]
Rule 4(c)(1) Accelerating 120-day service provision	Joseph W Skupniewitz	4/94 - Committee deferred as premature **DEFERRED INDEFINITELY**
Rule 4(d) To clarify waiver-of-service provision	97-CV-R John J McCarthy 11/21/97	12/97 - Referred to reporter, chair, and Agenda Subcommittee 3/99 - Agenda Subcommittee to accumulate for periodic revision **PENDING FURTHER ACTION**
Rule 4(m) Extends time to serve pleading after initial 120 days expires	Judge Edward Becker	4/95 - Committee considered **DEFERRED INDEFINITELY**
Rule 4 Permit electronic service of process on persons/entities located in the US	03-CV-F Jeremy A Colby 8/26/03	9/03 - Sent to chair, reporter, and committee **PENDING FURTHER ACTION**
Rule 4 To provide for sanctions against the willful evasion of service	97-CV-K Judge Joan Humphrey Lefkow 8/12/97	10/97 - Referred to chair, reporter, and Agenda Subcommittee 3/99 - Agenda Subcommittee recommended accumulation for periodic revision **PENDING FURTHER ACTION**
Rule 5 Clarifies that a document is deemed filed upon delivery to an established courier	00-CV-C Lawrence A Salibra, Senior Counsel 6/5/00	6/00 - Referred to chair, reporter, and agenda subcommittee **PENDING FURTHER ACTION**
Rule 5(d) Does non-filing of discovery material affect privilege	Standing Committee 6/99	10/99 - Committee considered **PENDING FURTHER ACTION**

Suggestion	Docket Number, Source, and Date	Status
New Rule 5.1 Requires litigant to notify U S Attorney when the constitutionality of a federal statute is challenged and when United States is not a party to the action	00-CV-G Judge Barbara B Crabb 10/5/00	10/00 - Referred to reporter and chair 1/02 - Committee considered 10/02 - Committee considered 5/03 - Committee considered and approved 6/03 - Standing Committee approved for publication 8/03 - Published for public comment **PENDING FURTHER ACTION**
Rule 6 Clarifies when three calendar days are added to deadline when service is by mail	00-CV-H Roy H Wepner, Esq. (via Appellate Rules Committee) 11/27/00	12/00 - Referred to reporter and chair 5/02 - Committee considered 10/02 - Committee considered 5/03 - Committee considered and approved for publication 6/03 - Standing Committee approved for publication 8/03 - Published for public comment **PENDING FURTHER ACTION**
Rule 6 Time Issues	03-CV-C Irwin H Warren, Esquire 6/26/03	6/03 - Referred to reporter and chair **PENDING FURTHER ACTION**
Rule 6(e) Clarify the method for extending time to respond after service	Appellate Rules Committee 4/02	4/02 - Referred to Committee 10/02 - Committee considered 5/03 - Committee considered and approved for publication 6/03 - Standing Committee approved for publication 8/03 - Published for public comment **PENDING FURTHER ACTION**
Rule 8(a)(2) Require "short and plain statement of the claim" that allege facts sufficient to establish a *prima* facie case in employment discrimination	02-CV-E Nancy J. Smith, Esq 6/17/02	6/02 - Referred to reporter and chair **PENDING FURTHER ACTION**
Rule 12 To conform to *Prison Litigation Act of 1996* that allows a defendant sued by a prisoner to waive right to reply	97-CV-R John J McCarthy 11/21/97	12/97 - Referred to chair, reporter, and Agenda Subcommittee 3/99 - Agenda Subcommittee considered 4/99 - Committee considered and deferred action **DEFERRED INDEFINITELY**

Suggestion	Docket Number, Source, and Date	Status
Rule 12(f) Provide guidance for the clerk when the court strikes a pleading	02-CV-J Judge D Brock Hornby 10/02	10/02 - Referred to chair and reporter **PENDING FURTHER ACTION**
Rule 15(a) Amendment may not add new parties or raise events occurring after responsive pleading	Judge John Martin 10/20/94 & Judge Judith Guthrie 10/27/94	4/95 - Committee considered 11/95 - Committee considered and deferred **DEFERRED INDEFINITELY**
Rule 15(c)(3)(B) Clarifying extent of knowledge required in identifying a party	98-CV-E Charles E. Frayer, Law student 9/27/98	9/98 - Referred to chair, reporter, and Agenda Subcommittee 3/99 - Agenda Subcommittee rec accumulate for periodic revision (1) 4/99 - Committee considered and retained for future study 5/02 - Committee considered along with J Becker suggestion in 266 F 3d 186 (3rd Cir. 2001) 10/02 - Committee referred to subcommittee for further consideration 10/03 - Committee considered **PENDING FURTHER ACTION**
Rule 15(c)(3)(B) Amendment to allow relation back	Judge Edward Becker, 266 F 3d 186 (3rd Cir 2001)	10/01 - Referred to chair and reporter 1/02 - Committee considered 5/02 - Committee considered 10/02 - Committee referred to subcommittee for further consideration 10/03 - Committee considered **PENDING FURTHER ACTION**
Rule 19 Clarify language regarding dismissal of actions	02-CV-F Prof Bradley Scott Shannon 5/30/02	7/02 - Referred to chair and reporter 10/02 - Referred to Style Consultant **PENDING FURTHER ACTION**
Rule 23 Revise to protect the status of the small defendant	03-CV-D William S Karn 7/31/03	8/03 - Referred to chair and reporter **PENDING FURTHER ACTION**
Rule 26 Interviewing former employees of a party	John Goetz	4/94 - Declined to act **DEFERRED INDEFINITELY**
Rule 26 Does inadvertent disclosure during discovery waive privilege	Discovery Subcommittee	10/99 - Discussed **PENDING FURTHER ACTION**

Suggestion	Docket Number, Source, and Date	Status
Rule 26 Electronic discovery		10/99 - Referred to Discovery Subcommittee 3/00 - Discovery Subcommittee considered 4/00 - Committee considered 10/00 - Committee considered 4/01 - Committee considered 5/02 - Committee considered 10/02 - Committee and Discovery Subcommittee considered 5/03 - Committee considered Discovery Subcommittee's report **PENDING FURTHER ACTION**
Rule 26 Interplay between work-product doctrine under Rule 26(b)(3) and the disclosures required of experts under Rules 26(a)(2) and 26 (b)(4)	00-CV-E Gregory K. Arenson, Chair, NY State Bar Association Committee on Federal Procedure 8/7/00	8/00 - Referred to reporter, chair, and Agenda Subcommittee **PENDING FURTHER ACTION**
Rule 26(a) To clarify and expand the scope of disclosure regarding expert witnesses	00-CV-I Prof Stephen D Easton 11/29/00	12/00 - Referred to reporter and chair **PENDING FURTHER ACTION**
Rule 30(b) Give notice to deponent that deposition will be videotaped	99-CV-J Judge Janice M Stewart 12/8/99	12/99 - Referred to reporter, chair, Agenda Subcommittee, and Discovery Subcommittee 4/00 - Referred to Discovery Subcommittee **PENDING FURTHER ACTION**

Suggestion	Docket Number, Source, and Date	Status
Rule 32 Use of expert witness testimony at subsequent trials without cross examination in mass torts	Honorable Jack Weinstein 7/31/96	7/31/96 Referred to chair and reporter 10/96 - Committee considered Federal Judicial Center to conduct study 5/97 - Reporter recommended that it be considered part of discovery project 3/99 - Agenda Subcommittee recommended referral to other committee **PENDING FURTHER ACTION**
Rules 33 & 34 Require submission of a floppy disc version of document	99-CV-E Jeffrey K Yencho 7/22/99	7/99 - Referred to Agenda Subcommittee 8/99 - Agenda Subcommittee recommended referral to other Subcommittee **PENDING FURTHER ACTION**
Rule 40 Precedence given elderly in trial setting	00-CV-A Michael Schaefer 1/19/00	2/00 - Referred to chair, reporter, and Agenda Subcommittee **PENDING FURTHER ACTION**
Rule 41(a) Makes it explicit that actions *and* claims may be dismissed	02-CV-F Bradley Scott Shannon 5/30/02	7/02 - Referred to chair and reporter 10/02 - Referred to Style Consultant **PENDING FURTHER ACTION**
Rule 50(b) Eliminate the requirement that a motion for judgment be made "at the close of all the evidence" as a prerequisite for making a post-verdict motion, if a motion for judgment had been made earlier	03-CV-A New York State Bar Association Committee on Federal Procedure of the Commercial and Federal Litigation Section 2/25/03	3/03 - Referred to chair and reporter 5/03 - Committee considered 10/03 - Committee considered **PENDING FURTHER ACTION**
Rule 50(b) When a motion is timely after a mistrial has been declared	97-CV-M Judge Alicemarie Stotler 8/26/97	8 /97 - Referred to chair and reporter 10/97 - Referred to Agenda Subcommittee 3/99 - Agenda Subcommittee to accumulate for periodic revision **PENDING FURTHER ACTION**
Rule 54(b) Define "interlocutory order"	03-CV-E Craig C Reilly, Esq 8/6/03	8/03 - Referred to chair and reporter **PENDING FURTHER ACTION**
Rule 55(a) Amend rule to provide that a default may also be entered against a defending party "for failure to comply with these rules or any order of court "	Prof Bradley Scott Shannon 1/14/03 (02-CV-F Addendum)	1/03 - Referred to reporter and chair **PENDING FURTHER ACTION**

Suggestion	Docket Number, Source, and Date	Status
Rule 56 To clarify cross-motion for summary judgment	John J McCarthy 11/21/97	12/97 - Referred to reporter, chair, and Agenda Subcommittee **PENDING FURTHER ACTION**
Rule 56(a) Clarification of timing	97-CV-B Scott Cagan 2/27/97	3/97 - Referred to reporter, chair, and Agenda Subcommittee 5/97 - Reporter recommended no action 3/99 - Agenda Subcommittee to accumulate for periodic revision **PENDING FURTHER ACTION**
Rule 56(c) Time for service and grounds for summary adjudication	Judge Judith N. Keep 11/21/94	4/95 - Committee considered 11/95 - Committee considered 3/99 - Agenda Subcommittee to accumulate for periodic revision 1/02 - Committee considered and set for further discussion **PENDING FURTHER ACTION**
Rule 62.1 Proposed new rule governing "Indicative Rulings"	Appellate Rules Committee 4/01	1/02 - Committee considered 5/03 - Committee considered 10/03 - Committee considered **PENDING FURTHER ACTION**

Suggestion	Docket Number, Source, and Date	Status
Rule 68 Party may make a settlement offer that raises the stakes of the offeree who would continue the litigation	96-CV-C Agenda book for 11/92 meeting, Judge Swearingen 10/30/96 S 79 Civil Justice Fairness Act of 1997 and § 3 of H R 903 02-CV-D Gregory K Arenson 4/19/02	1/93 - Unofficial solicitation of public comment 5/93 - Committee considered 10/93 - Committee considered 4/94 - Committee considered Federal Judicial Center to study rule 10/94 - Committee deferred for further study 1995 - Federal Judicial Center completes its study **DEFERRED INDEFINITELY** 10/96 - Referred to reporter, chair, and Agenda Subcommittee (Advised of past comprehensive study of proposal) 1/97 - S 79 introduced. § 303 would amend the rule 4/97 - Stotler letter to Hatch 5/97 - Reporter recommended continued monitoring 3/99 - Agenda Subcommittee recommended removal from agenda 10/99 - Consent calendar removed from agenda **COMPLETED** 5/02 - Referred to reporter and chair 10/02 - Committee considered and agreed to carry forward suggestion **PENDING FURTHER ACTION**
Rule 72(a) State more clearly the authority for reconsidering an interlocutory order	03-CV-E Craig C Reilly, Esq 8/6/03	8/03 - Referred to chair and reporter **PENDING FURTHER ACTION**
Rule 81 To add injunctions to the rule	John J McCarthy 11/21/97	12/97 - Referred to reporter, chair, and Agenda Subcommittee **PENDING FURTHER ACTION**
Rule 81(c) Removal of an action from state courts — technical conforming change deleting "petition"	Joseph D Cohen 8/31/94	4/95 - Accumulate other technical changes and submit eventually to Congress 11/95 - Reiterated April 1995 decision 5/97 - Reporter recommended that it be included in next technical amendment package 3/99 - Agenda Subcommittee to accumulate for periodic revision 4/99 - Committee considered **PENDING FURTHER ACTION**

Suggestion	Docket Number, Source, and Date	Status
Rule 83(a)(1) Uniform effective date for local rules and transmission to AO		3/98 - Committee considered 11/98 - Committee considered 3/99 - Agenda Subcommittee recommends referral to other Committee (3) 4/00 - Committee considered **DEFERRED INDEFINITELY**
Rule 83 Have a uniform rule making Federal Rules of Civil Procedure consistent with Federal Rules of Appellate Procedure with respect to attorney admission	02-CV-H Frank Amador, Esq 9/19/02	9/02 - Referred to reporter and chair **PENDING FURTHER ACTION**
FORMS		
CV Form 1 Standard form AO 440 should be consistent with summons Form 1	98-CV-F Joseph W Skupniewitz, Clerk 10/2/98	10/98 - Referred to chair, reporter, and Agenda Subcommittee 3/99 - Agenda Subcommittee recommended full Committee consideration **PENDING FURTHER ACTION**
CV Form 17 Complaint form for copyright infringement	Professor Edward Cooper 10/27/97	10/97 - Referred to Committee 3/99 - Agenda Subcommittee recommends full Committee consideration 4/99 - Committee deferred for further study **PENDING FURTHER ACTION**
CV Forms 31 and 32 Delete the phrase, "that the action be dismissed on the merits" as erroneous and confusing	02-CV-F Prof Bradley Scott Shannon 5/30/02	7/02 - Referred to chair and reporter 10/02 - Referred to Style Consultant **PENDING FURTHER ACTION**
AO Forms 241 and 242 Amend to conform to changes under the Antiterrorism and Effective Death Penalty Act of 1997	98-CV-D Judge Harvey E Schlesinger 8/10/98	8/98 - Referred to reporter, chair, and Agenda Subcommittee 3/99 - Agenda Subcommittee recommends referral to other Committee **PENDING FURTHER ACTION**
SUBJECT MATTER		

Suggestion	Docket Number, Source, and Date	Status
Admiralty Rule B Clarify Rule B by establishing the time for determining when the defendant is found in the district	01-CV-B William R Dorsey, III, Esq , President, The Maritime Law Association	6/00 - Referred to reporter, chair, and Mark Kasanin 11/01 - Committee considered 10/02 - Committee approved for publication 1/03 - Standing Committee approved for publication 8/03 - Published for public comment **PENDING FURTHER ACTION**
New Admiralty Rule Authorize immediate posting of preemptive bond to prevent vessel seizure	96-CV-D Magistrate Judge Roberts 9/30/96 #1450	12/96 - Referred to Admiralty and Agenda Subcommittee 3/99 - Agenda Subcommittee deferred action until more information available 5/02 - Committee discussed new rule governing civil forfeiture practice 5/03 - Committee considered new Admiralty Rule G **PENDING FURTHER ACTION**
Admiralty Rule C(4) Amend to satisfy constitutional concerns regarding default in actions *in rem*	97-CV-V Gregory B Walters, Cir Exec , for Jud Council of Ninth Cir 12/4/97	1/98 - Referred to reporter, chair, and Agenda Subcommittee 3/99 - Agenda Subcommittee recommended deferral until more information available **PENDING FURTHER ACTION**
Court filing fee AO regulations on court filing fees should not be effective until adoption in the FRCP or Local Rules of Court	02-CV-C James A Andrews 4/1/02, 5/13/02	4/02 - Referred to reporter and chair 6/02 - Referred second letter to reporter and chair **PENDING FURTHER ACTION**
***De Bene Esse* Depositions** Provide specifically for *de bene esse* depositions	02-CV-G Judge Joseph E Irenas 6/7/02	7/02 - Referred to reporter and chair 10/02 - Solicited input from Evidence Rules Committee **PENDING FURTHER ACTION**
Electronic Filing To require clerk's office to date stamp and return papers filed with the court	99-CV-I John Edward Schomaker, prisoner 11/25/99	12/99 - Referred to reporter, chair, Agenda Subcommittee, and Technology Subcommittee **PENDING FURTHER ACTION**
Interrogatories on Disk	98-CV-C Michelle Ritz 5/13/98 See also 99-CV-E Jeffrey Yencho suggestion re Rules 3 and 34	5/98 - Referred to reporter, chair, and Agenda Subcommittee 3/99 - Agenda Subcommittee received and referred to other Committee **PENDING FURTHER ACTION**

Suggestion	Docket Number, Source, and Date	Status
Plain English Make the language understandable to all	02-CV-I Conan L Hom, law student 10/2/02	10/02 - Referred to reporter and chair 5/03 - Committee considered and approved restyled Civil Rules 1-15 6/03 - Standing Committee approved for publication Publication to be deferred 10/03 - Committee considered and approved for publication restyle Civil Rules 16-25 and 26-37 and 45 **PENDING FURTHER ACTION**
Postal Bar Codes Prevent manipulation of bar codes in mailings, as in zip plus 4 bar codes	00-CV-D Tom Scherer 3/2/00	7/00 - Referred to reporter, chair, and incoming chair **PENDING FURTHER ACTION**
Pro Se Litigants To create a committee to consider the promulgation of a specific set of rules governing cases filed by pro se litigants	97-CV-I Judge Anthony J Battaglia, on behalf of the Federal Magistrate Judge Assn Rules Committee, to support proposal by Judge David Piester 7/17/97	7/97 - Referred to reporter and chair 10/97 - Referred to Agenda Subcommittee 3/99 - Agenda Subcommittee received schedule for further study **PENDING FURTHER ACTION**
Simplified Procedures Establish federal small claims procedures	Judge Niemeyer 10/00	10/99 - Committee considered, Subcommittee appointed 4/00 - Committee considered 10/00 - Committee considered **PENDING FURTHER ACTION**
Word Substitution Substitute term "action" for "case" and other similar words, substitute term "averment" for "allegation" and other similar words	02-CV-F Prof Bradley Scott Shannon 5/30/02	7/02 - Referred to reporter and chair 10/02 - Referred to Style Consultant **PENDING FURTHER ACTION**

CRIMINAL RULES DOCKET

ADVISORY COMMITTEE ON CRIMINAL RULES

The docket sets forth suggested changes to the Federal Rules of Criminal Procedure considered by the Advisory Committee since 1991. The suggestions are set forth in order by (1) criminal rule number, or (2) where there is no rule number, or several rules may be affected — alphabetically by subject matter.

Rule No.	Docket number, source, and date	Status
PENDING RULES		
Rule 4 Clarify the ability of judges to issue warrants via facsimile transmission	01-CR-A Magistrate Judge Bernard Zimmerman 1/29/01	1/01 - Referred to chair and reporter 10/03 - Committee considered **PENDING FURTHER ACTION**
Rule 11 To direct a random number of plea-bargained cases be tried	03-CR-C Carl E Person, Esq 4/1/03	4/03 - Referred to reporter and chair **PENDING FURTHER ACTION**
Rule 11(c)(1) Allow the court to question whether the defendant has been advised of any government-proposed plea agreement	03-CR-G Judge David D Dowd, Jr 11/20/03	12/03 - Referred to reporter and chair **PENDING FURTHER ACTION**
Rule 12.2(d) Sanction for defendant's failure to disclose results of mental examination	Roger Pauley 7/5/01	4/02 - Committee considered 9/02 - Committee considered 4/03 - Committee considered and approved for publication 6/03 - Standing Committee approved for publication 8/03 - Published for public comment **PENDING FURTHER ACTION**
Rule 29 Extension of time for filing motion	02-CR-B Judge Paul L Friedman 3/02	4/02 - Sent directly to chair and reporter 4/02 - Committee considered 9/02 - Committee deferred consideration until 4/03 meeting 4/03 - Committee considered and approved, with amendments, for publication 6/03 - Standing Committee approved for publication 8/03 - Published for public comment **PENDING FURTHER ACTION**
Rule 29 Preserve the government's right to appeal a trial court's decision to grant a motion for judgment of acquittal	Department of Justice 3/31/03	3/03 - Sent directly to chair and reporter 4/03 - Committee considered and deferred consideration pending additional research by the FJC 10/03 - Committee considered and approved in principle for publication **PENDING FURTHER ACTION**

Suggestion	Docket Number, Source, and Date	Status
Rule 32 Require the sentencing judge to determine the accuracy of contested information by a preponderance of the evidence	03-CR-E Judge Gregory W Carman 10/10/03	10/03 - Referred to chair and reporter **PENDING FURTHER ACTION**
Rule 32(c)(3)(E) Provide for victim allocution in all felony cases	Professor Jayne Barnard	8/02 - Referred to chair and reporter 9/02 - Committee considered 4/03 - Committee considered and approved, with amendments, for publication 6/03 - Standing Committee approved for publication 8/03 - Published for public comment **PENDING FURTHER ACTION**
Rule 32.1(a)(5)(B)(i) Eliminate requirement that the government produce *certified* copies of the judgment, warrant, and warrant application	03-CR-B Judge Wm F Sanderson, Jr 2/24/03	3/03 - Referred to reporter and chair 4/03 - Committee considered **PENDING FURTHER ACTION**
Rule 32.1 Right of allocution before sentencing at revocation hearing	02-CR-D U S v Frazier 2/25/02	3/02 - Referred to chair and reporter 4/02 - Committee considered 9/02 - Committee considered 4/03 - Committee considered and approved, with amendments, for publication 6/03 - Standing Committee approved for publication 8/03 - Published for public comment **PENDING FURTHER ACTION**
Rule 33 Extension of time to file motion for new trial	02-CR-B Judge Paul L Friedman 3/02	4/02 - Sent directly to chair and reporter 4/02 - Committee considered 9/02 - Committee deferred consideration until 4/03 meeting 4/03 - Committee considered and approved, with amendments, for publication 6/03 - Standing Committee approved for publication 8/03 - Published for public comment **PENDING FURTHER ACTION**
Rule 34 Extension of time to file motion	02-CR-B Judge Paul L Friedman 3/02	4/02 - Sent directly to chair and reporter 4/02 - Committee considered 9/02 - Committee deferred consideration until 4/03 meeting 4/03 - Committee considered and approved, with amendments, for publication 6/03 - Standing Committee approved for publication 8/03 - Published for public comment **PENDING FURTHER ACTION**
Rule 40(a) Authorize magistrate judge to set new conditions of release	03-CR-A Magistrate Judge Robert B Collings 1/03	1/03 - Referred to chair and reporter 10/03 - Committee considered **PENDING FURTHER ACTION**

Suggestion	Docket Number, Source, and Date	Status
New Rule 59 To provide counterpart to Civil Rule 72	U S v Abonce-Barerra 7/20/01	4/02 - Committee considered 9/02 - Committee approved proposed amendment in principle 4/03 - Committee considered and approved, with amendments, for publication 6/03 - Standing Committee approved for publication 8/03 - Published for public comment **PENDING FURTHER ACTION**
SUBJECT MATTER		
28 U.S.C. § 2254 Rule 9(a) Revise rule so that it refers to a *claim* and not to the *petition* *See Walker v Crosby*, 341 F 3d 1240 (11th Cir 2003)	03-CR-F Steven W Allen 11/5/03	11/03 - Referred to chair and reporter **PENDING FURTHER ACTION**
Habeas Corpus Rule 8(c) Correct apparent mistakes in Rules Governing Section 2254 Cases and Section 2255 Proceedings	97-CR-F Judge Peter Dorsey 7/9/97	8/97 - Referred to chair and reporter 10/97 - Referred to Subcommittee 4/98 - Committee considered 10/98 - Committee considered 4/00 - Committee considered and approved for publication 6/00 - Standing Committee approved for publication 8/00 - Published for public comment 4/01 - Committee deferred pending further study 4/02 - Committee considered and approved for publication 6/02 - Standing Committee approved for publication 8/02 - Published for public comment 4/03 - Committee considered and approved, with amendments 6/03 - Standing Committee approved 9/03 - Judicial Conference approved **PENDING FURTHER ACTION**
Model form for motions under 28 U.S.C. § 2255	00-CR-C Robert L. Byer, Esq & David R Fine, Esq 8/11/00	8/00 - Referred to chair and reporter 4/02 - Committee approved 6/02 - Standing Committee approved for publication 8/02 - Published for public comment 4/03 - Committee considered and approved, with amendments 6/03 - Standing Committee approved 9/03 - Judicial Conference approved **PENDING FURTHER ACTION**

Suggestion	Docket Number, Source, and Date	Status
Restyle Habeas Corpus Rules		10/00 - Committee considered 1/01 - Standing Committee authorizes restyle project to proceed 4/02 - Committee approved for publication 6/02 - Standing Committee approved for publication 8/02 - Published for public comment 4/03 - Committee considered and approved, with amendments 6/03 - Standing Committee approved 9/03 - Judicial Conference approved **PENDING FURTHER ACTION**

EVIDENCE RULES DOCKET

ADVISORY COMMITTEE ON EVIDENCE RULES

The docket sets forth suggested changes to the Federal Rules of Evidence considered by the Advisory Committee since 1992. The suggestions are set forth in order by (1) evidence rule number, or (2) where there is no rule number, or several rules may be affected — alphabetically by subject matter.

Suggestion	Docket Number, Source, and Date	Status
EVIDENCE RULES		
Rule 301 Presumptions in General Civil Actions and Proceedings (applies to evidentiary presumptions but not substantive presumption)		5/94 - Committee decided not to amend (comprehensive review) 6/94 - Standing Committee approved for publication 9/94 - Published for public comment 11/96 - Committee deferred until completion of project by Uniform Rules Committee **PENDING FURTHER ACTION**
Rule 404(a) Prohibit the circumstantial use of character evidence in civil cases		4/02 - Committee referred to reporter 10/02 - Committee considered 4/03 - Committee considered 11/03 - Committee considered and approved amendment in principle **PENDING FURTHER ACTION**
Rule 408 Compromise and Offers to Compromise		4/02 - Committee referred to reporter 10/02 - Committee considered 4/03 - Committee considered 11/03 - Committee considered and approved amendment in principle **PENDING FURTHER ACTION**
Rule 410 To protect statements and offers by the prosecution		4/02 - Committee referred to reporter 10/02 - Committee considered 4/03 - Committee considered 11/03 - Committee considered and approved amendment in principle **PENDING FURTHER ACTION**

Suggestion	Docket Number, Source, and Date	Status
Rule 501 Privileges (codifies the federal law of privileges)		11/96 - Committee declined to take action 10/98 - Committee reconsidered and appointed a subcommittee to study the issue 4/99 - Committee deferred consideration pending further study 10/99 - Subcommittee appointed 4/00 - Committee considered subcommittee's proposals 4/01 - Committee considered subcommittee's proposals 4/02 - Committee considered consultant's "Survey of Privileges" 10/02 - Committee considered survey 4/03 - Committee considered survey 11/03 - Committee considered survey **PENDING FURTHER ACTION**
Rule 606(b) To provide an exception for correcting errors in the rendering of the verdict		4/02 - Committee referred to reporter 10/02 - Committee considered 4/03 - Committee considered 11/03 - Committee considered and approved amendment in principle **PENDING FURTHER ACTION**
Rule 609(a) Clarify types of crimes that qualify for mandatory admission under the rule		4/02 - Committee referred to reporter 11/03 - Committee considered and approved amendment in principle **PENDING FURTHER ACTION**
Rule 706 Establish procedures regulating the appointment of an expert	Judge Robert Gettleman	4/03 - Committee referred to reporter 11/03 - Committee considered **PENDING FURTHER ACTION**
Rule 706 Court Appointed Experts (to accommodate some of the concerns expressed by the judges involved in the breast implant litigation, and to determine whether the rule should be amended to permit funding by the government in civil cases)		2/91 - Civil Rules Committee considered and deferred action 11/96 - Committee considered 4/97 - Committee considered and deferred action until CACM completes its study **PENDING FURTHER ACTION**
Rule 803(3) Clarify whether statements can be admitted to prove the conduct of someone other than the declarant		4/03 - Committee referred to reporter 11/03 - Committee considered **PENDING FURTHER ACTION**

Suggestion	Docket Number, Source, and Date	Status
Rule 803(8) Clarify whether a public report is admissible unless the court finds it to be untrustworthy under the circumstances		4/03 - Committee referred to reporter 11/03 - Committee considered **PENDING FURTHER ACTION**
Rule 804(b)(3) Degree of corroboration regarding declaration against penal interest		10/99 - Committee considered 4/00 - Committee directed reporter to prepare draft amendment 4/01 - Committee approved 6/01 - Standing Committee approved for publication 8/01 - Published for public comment 4/02 - Committee approved with substantive revisions Committee requested re-publication for public comment 6/02 - Standing Committee approved re-publication 8/02 - Published for public comment 4/03 - Committee approved with amendments 6/03 - Standing Committee approved 9/03 - Judicial Conference approved **PENDING FURTHER ACTION**
Rule 902(6) Extending applicability to news wire reports		10/98 - Committee considered 4/00 - Committee considered **PENDING FURTHER ACTION**
Rule 1001 Definitions (Cross references to automation changes)		10/97 - Committee considered **PENDING FURTHER ACTION**
SUBJECT MATTER		
[Admissibility of Videotaped Expert Testimony]		11/96 - Committee declined to take action but will continue to monitor rule 1/97 - Standing Committee considered **PENDING FURTHER ACTION**
[Automation] — To investigate whether the Evidence Rules should be amended to accommodate changes in automation and technology		11/96 - Committee considered 4/97 - Committee considered 4/98 - Committee considered 10/02 - Committee considered **PENDING FURTHER ACTION**

Agenda Item 4
Committee on Rules of Practice and Procedure
January 2004
Information Item

FEDERAL JUDICIAL CENTER UPDATE

The Federal Judicial Center provides this update on projects that may be related to Committee interests. The research projects described below are a few of the projects undertaken by the Center, many in support of Judicial Conference committees. The educational programs also make up a small number of the seminars and in-court programs offered in person or electronically for judges and federal court staff.

Civil Research Projects and Publications

1. **Discovery of Electronic Documents/Evidence.** We continue to assemble materials on electronic discovery and evidence on our web site (jnet.fjc.dcn). At the request of the Discovery Subcommittee of the Civil Rules Advisory Committee, we continue to monitor developments in this area by maintaining and updating a web-based, password-accessible database of information and materials from more than 250 continuing legal education courses on electronic discovery. We also assist federal judges who are making public presentations, writing articles, or teaching courses on various aspects of electronic discovery and evidence. Recently, the Discovery Subcommittee asked the Center to assist with drafting a proposed amendment to FRCP Rule 34 regarding what constitutes "data" under the definition of documents to which the rule applies. We are also assisting the Subcommittee in planning and publicizing a February 2004 conference on electronic discovery to be held at Fordham University in New York.

2. **Class Actions.** The Advisory Committee on Civil Rules has asked the Center to conduct a follow-up to our earlier report analyzing the rate at which class actions were filed in federal district courts. The Center has surveyed a national sample of plaintiff and defense attorneys who have been involved in recently concluded class action cases to determine whether there is any discernible effect of recent U.S. Supreme Court decisions on attorney decisions to file class actions in federal district court rather than state court. Also in the area of class actions, we have posted on the Center's Internet site (jnet fjc.dcn) new class action notices in Spanish for securities and asbestos actions, as well as illustrative employment class action notices. Like the other notices that are available at the site, those notices were developed at the request of the Advisory Committee on Civil Rules to illustrate how lawyers and judges might comply with a proposed change to Rule 23(c)(2)(B) of the Federal Rules of Civil Procedure requiring that a notice to the class "must concisely and clearly state [certain information] in plain, easily understood language." The change in the rule was scheduled to take effect on December 1, 2003, unless rejected by Congress.

3. Study of Sealed Settlement Agreements and Protective Orders. At the request of the Civil Forfeiture/Settlement Sealing Subcommittee of the Civil Rules Advisory Committee, the Center is examining the incidence of sealed settlement agreements and the circumstances surrounding the sealing of settlement agreements. At the October meeting of the Advisory Civil Rules Committee we presented a progress report of the 128,288 civil cases filed in the 29 districts that we had examined at that time As of November 20, 2003, we had completed our review of cases in forty districts. We expect to complete the final report on this project by the Committee's Spring 2004 meeting.

Criminal Research Projects

1. Analysis of Trends in National Treatment Data Base. As the Criminal Law Committee considers the costs and effectiveness of the federal courts' post-conviction substance abuse treatment program, the Center and the Administrative Office have been asked to examine the program and to possibly make recommendations Following discussions with staff of the Office of Probation and Pretrial Services, the Center has begun to analyze information about the program that is contained in the AO's National Treatment Data Base. Our analysis will help the Committee and the Office of Probation and Pretrial Services as they consider how to handle the projected growth in the number of persons under post-sentence supervision who require substance abuse treatment services.

2. State Procedures that Allow Entry of Pre-Verdict Judgments of Acquittals. We completed our study of state court procedures that permit judges to enter pre-verdict judgments of acquittals in criminal matters. The Advisory Committee on Criminal Rules had requested the study as it considers a Department of Justice proposal to amend Rule 29 of the Federal Rules of Criminal Procedure to provide the government with an opportunity to appeal a directed acquittal ordered by a judge before the jury's verdict. Under present law, if a judge enters judgment of acquittal before the jury returns its verdict, the judgment cannot be appealed. Our report focused on identifying the states that permit judgments of acquittals and determining whether the judgments can be appealed.

Appellate Research

Study of Local Rules and Practices of the Courts of Appeals Regarding Briefing. Following a recent request from the Chair of the Advisory Committee on Appellate Rules, the Center has commenced a study that will identify and analyze local rules and practices that impose brief requirements that are not found in Rule 28 of the Federal Rules of Appellate Procedure.

Case Weight Studies

1. District Court Case Weight Study. The Center's project to update the district court case weights, which is being conducted at the request of the Committee on Judicial Resources, continues and is on schedule. District judge representatives from each of the twelve circuits met in a series of meetings held from August through November. At these meetings the judges arrived at consensus estimates for the time required to process various

case events in their circuit. Two representatives from each of the circuit meetings will also participate in a national meeting, scheduled for San Antonio, Texas in late January 2004, where the participants will discuss the results of the circuit meetings and develop national consensus estimates that will be used in the district court case weight computations. The Center will shortly begin the next phase of data collection, which will be to extract case event data from the courts' dockets. New district court case weights are scheduled to be ready by June 2004.

2. Bankruptcy Court Case Weight Study. We are working closely with the Committee on the Administration of the Bankruptcy System to revise the current bankruptcy case weights. We conducted a survey of all bankruptcy judges to seek their input about various aspects of the current bankruptcy case weights and submitted a report to the Committee earlier this year. Since then we have been incorporating information from the survey and other docket information to develop a proposal for identifying bankruptcy case types and events. Our design calls for us to commence the collection of actual judge time in a sample of bankruptcy cases in 2004.

Educational Programs and Publications for Chief Judges and Court Managers

1. Conference for Chief Circuit Judges. A conference for chief circuit judges and circuit executives will be held March 17-18, 2004 in Washington, DC, immediately following the Judicial Conference.

2. Conference for Chief District Judges. The annual Conference for Chief District Judges will be held March 29-31, 2004 in Washington, DC. The conference provides information and education about leadership and management issues for chief district judges.

3. Executive Team Building for New Chief District Judges. From March 31–April 2, 2004 immediately following the Conference for Chief District Judges, we will conduct an executive team-building program for new chief district judges and their clerks of court or other unit executives.

4. Conference for Chief Bankruptcy Judges. A conference for chief bankruptcy judges will be held June 28-30, 2004 in Washington, DC. The conference provides information and education about leadership and management issues for chief bankruptcy judges.

5. Executive Team Building for New Chief Bankruptcy Judges. From June 30-July 2, 2004 following the Conference for Chief Bankruptcy Judges, we will conduct an executive team building program for new chief bankruptcy judges and their clerks of court.

6. Strategic Planning Workshops for District and Bankruptcy Court Executive Teams. Participants from previous Executive Team Development Workshops, as well as additional judges and court management staff, will discuss and use the tenets of strategic

planning as they develop plans for their individual districts during workshops on January 12-13, 2004 and March 22-23, 2004 (district courts) or February 9-10, 2004 (bankruptcy courts).

7. Juror Management and Utilization Workshop. In May, district court teams comprising judges, clerks of court, and jury administrators will meet to discuss strategies, current issues, and future trends and to develop local action plans to improve juror management and utilization.

8. Biennial National Conference for Bankruptcy Clerks, Chief Deputies, Bankruptcy Administrators, and BAP Clerks. Approximately 180 participants will meet December 8-10, 2004 to discuss legal perspectives on fiscal responsibilities, leadership challenges in times of uncertainty, and new technologies and management strategies that have been successfully implemented in some court units.

9. Staff Reduction Resources for Managers. To meet the courts' concerns about the impact of tight budgets on staff, the Center recently announced a new video-audio-print package, *Managing the Human Impact of Downsizing*. The Center will also facilitate eight one-hour audio conferences on the topic from December through February.

10. Executive Leadership Institutes. In March, chief deputy clerks and deputy chief probation officers will be invited to apply for their first leadership institute. The court unit executives' institute will feature a new curriculum starting in April.

11. Multi-Year Leadership Development Programs. In June, the Center will conduct a mid-program workshop for class VII of the Leadership Development Program for Probation and Pretrial Services Officers. A new Federal Court Leadership Program class will commence its course requirements in the spring by participating in a four-part videoconference on problem solving and other topics

12. National Sentencing Policy Institute. In June, the Center will conduct a National Sentencing Policy Institute, in cooperation with the Criminal Law Committee, the Federal Bureau of Prisons, the U.S. Sentencing Commission, and the Office of Probation and Pretrial Services of the Administrative Office in Atlanta, Georgia.

Educational Programs and Publications for Judges and Law Clerks

1. *Manual for Complex Litigation 4th Ed* The Center's *Manual for Complex Litigation 4th* has been completed. In November and December, ALI-ABA, in cooperation with the Center, conducted special programs in Washington, DC and San Diego that focused exclusively on the new manual.

2. Mediation Workshops for District and Magistrate Judges. In March the Center will conduct a mediation skills workshop for district and magistrate judges.

3. FJTN Programs

- In September, the Center broadcast its annual review of the Supreme Court's term. The primary audience for this program is judges and court attorneys, including law clerks.
- In September, the Center broadcast its annual orientation series for new law clerks; the series includes segments on ethics, writing, federal court jurisdiction, bankruptcy court jurisdiction, and employment law.

4. Monographs. An update of the Center's 1993 monograph on federal securities law has been published, and an update of its 1996 monograph on employment discrimination litigation is in production. Also in development are new monographs on ERISA and admiralty law and an update of the 1994 Center monograph on awarding attorneys' fees and managing fee litigation.

5. Managing State Habeas Cases. We have completed our project to collect materials on management of state habeas cases. The materials discuss special considerations and issues in capital cases and describe systems or procedures courts have developed to deal with some of these issues. The materials will be available soon in electronic form on the Center's Intranet and Internet web sites, as a companion resource to the Center's compilation and summary of procedures used in handling federal death penalty cases. Both will be revised as the courts' experiences warrant.

Educational Programs for Probation and Pretrial Services Officers

1. Leadership Lessons for New Chief Probation and Pretrial Services Officers. During a two-session audio conference, two experienced chiefs provide leadership guidance to up to four new chiefs during their first year in the position. Nine new chiefs have participated in conferences since the program's inception in 2003, eight have enrolled for sessions in 2004.

2. Biennial National Conference for Chief Probation and Pretrial Services Officers. Approximately 160 participants will convene June 28-July 1 in Atlanta to discuss such topics as dealing with budget shortfalls, maximizing return on technology investments, and keeping staff motivated.

3. Workshops for New Officers. Three five-day national orientation seminars for probation and pretrial services officers will be conducted by the Center from January through June for approximately 180 new officers. Six seminars were held in calendar 2003 for 372 new officers

4. Adapting to New Roles Required by Monographs 109 and 111. Anticipating Judicial Conference approval of Monographs 109 and 111 (supervision of federal offenders and defendants, respectively), the Center planned a series of calendar year 2003-2004 programs for probation and pretrial services officers. Two FJTN programs aired in 2003, two are scheduled in 2004: supervising substance abusers (January) and

implementation updates (May). The circuit-wide supervisors seminar on Monograph 109 and 111 topics was delivered on request to all circuits in calendar 2003

5. Additional FJTN Programs for Officers. In addition to programs pertaining to Monographs 109 and 111, the Center will produce new broadcasts on domestic violence awareness, sentencing and the sentencing guidelines (with the U.S. Sentencing Commission), officer safety, and professional responsibility during post-sentence supervision

Educational Programs for Court Staff Generally

1. New Curriculum Packaged Programs. Center curriculum packaged programs include instructor and participant guides, overhead slides, and in some instances, video components. The programs are designed to be delivered by court staff who are trained by the Center or who have training experience. The following programs are scheduled for release during the first half of 2004: Customer Service in a CM/ECF Environment; probation or pretrial services-specific programs on writing skills, mock court testifying, structuring defendant and offender interviews, and organizing work.

2. Training Court Staff in Curriculum Development. For some years, the Center has developed packaged programs to expand training for court staff. In 2003, we enhanced our efforts in this area by piloting a program to teach court staff who are subject-matter experts how to develop curricula. The participants' training products, some of which are supplemented with Center-produced videos, will be completed during the first half of 2004 and are included in the packaged program listing above.

3. Book Reviews for Court Leaders. Several book reviews written by court and Center staff are now posted on the Center's web site (jnet.fjc.dcn); additional reviews will be announced throughout the year. An editorial board of court unit executives helps us select books that are relevant, though not always obviously applicable, to the federal courts

4. Videoconference for New Court Trainers. A four-part orientation program will be offered in March and April for new court trainers.

5. FJTN Programs on the Center's January–June Program Schedule. *Understanding the PROTECT Act's Revised Statement of Reasons* is designed for judges and court staff. (The PROTECT Act was also addressed in a December 11, 2003 broadcast in the Sentencing Guidelines series.) Programs targeted to managers and supervisors range from presidential leadership communication lessons to managing oral history projects. Programs developed for all court staff will include staff safety and two new editions of the *Court to Court* television magazine.

Other Education and Training

1. On-Site Consultations in Dispute Resolution. In July, the Center announced its Program for Consultations in Dispute Resolution, which provides on-site consultations to district and bankruptcy courts seeking assistance with ADR programs. The consultations,

which are supported by a grant from the Hewlett Foundation, are provided by judges and court staff who have substantial ADR expertise. We have received seventeen inquiries to date, have completed two consultations, and are actively planning and scheduling about a dozen more.

2. Non-Prisoner Pro Se Litigation: Identifying Education and Training Opportunities. Non-prisoner pro se litigation constitutes a significant portion of the district courts' caseloads. We are completing a project to collect and organize information about how federal courts deal with non-prisoner pro se litigation and thus to identify education and training opportunities to further assist the courts

Federal-State Judicial Education Activities Web Site

The Federal-State Jurisdiction Committee asked for assistance with its efforts to maintain information on educational programs and activities for federal and state court judges. In September of 2002, the Center developed an Internet web site where information we receive about recently conducted educational programs and activities that involve federal and state court judges can be posted. We have posted information on programs that involved the following subject matter: class action and mass torts, state-federal relationships, bankruptcy, criminal practice, and habeas corpus.

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

DAVID F. LEVI
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

SAMUEL A. ALITO, JR.
APPELLATE RULES

A. THOMAS SMALL
BANKRUPTCY RULES

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CRIMINAL RULES

JERRY E. SMITH
EVIDENCE RULES

MEMORANDUM

DATE: December 2, 2003

TO: Judge David F Levi, Chair
Standing Committee on Rules of Practice and Procedure

FROM: Judge Samuel A Alito, Jr , Chair
Advisory Committee on Appellate Rules

RE: Report of Advisory Committee on Appellate Rules

I. Introduction

The Advisory Committee on Appellate Rules met on November 7, 2003, in San Diego, California At its meeting, the Advisory Committee approved two proposed amendments, removed four items from its study agenda, and agreed to give further study to six items Detailed information about the Advisory Committee's activities can be found in the minutes of the November 7 meeting and in the Advisory Committee's study agenda, both of which are attached to this report

II. Action Items

The Advisory Committee will not be seeking Standing Committee action on any items in January.

III. Information Items

A. Amendments Approved for Later Submission to the Standing Committee

The Advisory Committee is continuing to consider and approve proposed amendments to the Appellate Rules, although, pursuant to the directive of the Standing Committee, the Advisory Committee will not forward these amendments in piecemeal fashion, but will instead present a package of amendments at a later date. At its November meeting, the Advisory Committee approved the following proposed amendments for publication:

- An amendment to Rule 26(c) that would clarify precisely how deadlines are to be calculated when parties are given 3 additional calendar days to respond to a paper that was not delivered on the date that it was served (e.g , a paper served by mail) Like the pending amendment to Civil Rule 6(e), the amendment to Rule 26(c) would direct that a party should first calculate the "prescribed period," without reference to the 3-day extension. After the party has identified the date on which the prescribed period would expire but for the operation of Rule 26(c), the party should add 3 calendar days The party must act by the third day of the extension, unless that day is a Saturday, Sunday, or legal holiday, in which case the party must act by the next day that is not a Saturday, Sunday, or legal holiday.

  Although the amendment to Rule 26(c) is identical in substance to the pending amendment to Civil Rule 6(e), it uses a slightly different formulation. The amendment to Civil Rule 6(e) simply directs that the 3 days be added "after the period " The amendment to Rule 26(c) directs that the 3 days be added "after the prescribed period would otherwise expire under Rule 26(a) " The Appellate Rules Committee believes that its formulation is clearer and that clarity and ease of use are particularly important with respect to time-calculation rules

- An amendment to Rule 7 that would resolve a circuit split over whether attorney's fees are included among the "costs on appeal" that may be secured by a Rule 7 bond when those fees are defined as "costs" under a fee-shifting statue The amendment provides that such attorney's fees may not be secured by a cost bond.

B. Long-Term Projects

As noted, the Advisory Committee is continuing to study several proposed changes to the Appellate Rules I wish to bring three of those proposals to your attention:

- The bench and bar too often run into difficulty in trying to determine whether an appeal from a particular order is an "appeal in a civil case" governed by the deadlines of Rule 4(a) or an "appeal in a criminal case" governed by the deadlines of Rule 4(b). At least two circuit splits have resulted from this confusion, one of which (involving appeals from orders disposing of applications for a writ of error *coram nobis*) was resolved by the 2002 addition of subdivision (C) to Rule 4(a)(1), and another of which (involving appeals from orders disposing of requests for attorney's fees under the Hyde Amendment) is the subject of a proposal now pending before the Advisory Committee. Rather than continuing to address these problems on a case-by-case basis, the Advisory Committee is exploring whether

Rule 4 might be amended to provide a global solution For example, the Advisory Committee is considering whether Rule 4 might be amended to provide that every appeal is "civil" except a direct appeal from a judgment of conviction entered under Criminal Rule 32(k) (and perhaps a couple of additional precisely defined appeals).

- The Advisory Committee is considering whether the Appellate Rules might be amended to make it easier for clerks and parties to identify who are the parties to an appeal and whether each party is an "appellant" or "appellee " Unlike the Supreme Court Rules, nothing in the Appellate Rules defines "parties " This omission leads to extra work for clerks and occasional confusion for parties The Advisory Committee is studying the possibility of implementing a national "notice of appearance" system, under which all parties to the case before the district court would initially be deemed parties to the case on appeal, but those who did not file a notice of appearance within 10 days would be deemed to have withdrawn. Such a system is in use in several circuits and seems to work well in producing a definitive identification of all parties before briefs or other papers have to be served

- The Advisory Committee continues to receive complaints from the bar about variations in local rules regarding briefs. Rule 32(e) mandates that every court of appeals must accept briefs that meet the requirements of Rule 32 — regarding such matters as binding, paper size, typeface, type styles, and length But no such "local variation" provision exists with respect to the requirements of Rule 28 — regarding such matters as the contents of briefs, references to the record, and the reproduction of statutes and rules As a result, every circuit imposes different requirements upon briefs, and parties have no alternative but to comply with those requirements The situation is aggravated by the fact that some clerks' offices reportedly ignore the dictate of Rule 25(a)(4) that "[t]he clerk must not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required . . by any local rule or practice " Before giving further consideration to this matter, the Advisory Committee wishes to be better informed about precisely how many variations are in existence, the history of those variances, and the degree to which those variances are enforced in practice. The Federal Judicial Center will be assisting the Advisory Committee in gathering this information

DRAFT

Minutes of Fall 2003 Meeting of
Advisory Committee on Appellate Rules
November 7, 2003
San Diego, California

I. Introductions

Judge Samuel A. Alito, Jr., called the meeting of the Advisory Committee on Appellate Rules to order on Friday, November 7, 2003, at 8:25 a.m. at the Loews Coronado Bay Resort near San Diego, California. The following Advisory Committee members were present: Judge Carl E Stewart, Judge John G. Roberts, Jr. (by phone), Justice Richard C. Howe, Prof. Carol Ann Mooney, Mr. W. Thomas McGough, Jr., Mr. Sanford Svetcov, and Mr. Mark I. Levy Mr. Douglas Letter, Appellate Litigation Counsel, Civil Division, U.S. Department of Justice, was present representing the Solicitor General. Also present were Judge David F. Levi, chair of the Standing Committee, and his assistant, Ms. Brook Coleman; Ms. Marcia M. Waldron, the liaison from the appellate clerks; Mr. Peter G. McCabe, Mr. John K. Rabiej, and Mr. James N. Ishida from the Administrative Office; and Ms. Marie C. Leary from the Federal Judicial Center.

Judge Alito announced that Judge Levi had replaced Judge Anthony J. Scirica as chair of the Standing Committee. Judge Alito also announced that several changes had been made to the membership of the Advisory Committee. Judge Roberts, who formerly served on the Committee as a representative of the bar, was appointed to replace Judge Diana Gribbon Motz as a representative of the bench. Judge T.S. Ellis III was appointed to replace Judge Stanwood R. Duval, Jr. And Mr. Mark I. Levy was appointed to fill the vacancy created by the elevation of Judge Roberts. Judge Alito welcomed Mr. Levy to the Committee and said that he looked forward to welcoming Judge Ellis, who was unable to attend today's meeting.

Judge Alito said that Judge Motz and Judge Duval were also unable to attend today's meeting, but he hoped that they would be able to join the Committee at its spring meeting so that Committee members could express appreciation for their service.

Finally, Judge Alito announced that Justice Howe would be leaving the Committee following today's meeting. Judge Alito thanked Justice Howe for his service and presented Justice Howe with a certificate of appreciation.

II. Approval of Minutes of May 2003 Meeting

The minutes of the May 2003 meeting were approved.

III. Report on June 2003 Meeting of Standing Committee

The Reporter stated that, at its June 2003 meeting, the Standing Committee had approved for publication all of the amendments proposed by this Advisory Committee. The Reporter described some of the comments that members of the Standing Committee made regarding the proposed rules. The Reporter said that he would remind the Advisory Committee of those comments when the Committee reconsiders the proposed rules following the formal notice-and-comment period.

IV. Action Items

A. Item No. 00-07 (FRAP 4 — time for Hyde Amendment appeals)

At Judge Alito's request, Mr. Letter introduced this item. Mr. Letter reminded the Committee that this item arose out of a suggestion by Judge Duval that Rule 4 be amended to resolve a circuit split over whether appeals of orders granting or denying applications for attorney's fees under the Hyde Amendment (Pub. L. No. 105-119, Title VI, § 617, reprinted in 18 U.S.C. § 3006A (historical and statutory notes)) are governed by the time limitations of Rule 4(a) (which apply in civil cases) or by the time limitations of Rule 4(b) (which apply in criminal cases).

In the course of the first Committee discussion of Judge Duval's proposal, several members pointed out that the circuit split over the Hyde Amendment closely resembled the circuit split over whether appeals of orders granting or denying applications for a writ of error *coram nobis* were "civil" or "criminal" — a circuit split that was resolved by the amendment of Rule 4(a)(1) in 2002. The Department of Justice agreed to study the general question of whether Rule 4 should be amended to make it easier to distinguish "civil" appeals from "criminal" appeals.

At the Committee's November 2002 meeting, Mr. Letter presented a draft amendment that would have taken a "laundry list" approach to distinguishing "civil" from "criminal" appeals. The draft amendment would have defined several specific appeals as "appeals in a civil case" and other specific appeals as "appeals in a criminal case." Committee members expressed a number of objections to the "laundry list" approach and, by consensus, agreed not to pursue it further. But members ask the Department to consider whether Rule 4 could instead be amended to implement a global solution to the problem of distinguishing "civil" appeals from "criminal" appeals. A couple of Committee members specifically suggested amending Rule 4 so that, in all cases — civil and criminal — private parties would get 30 days and the government 60 days to appeal.

Mr. Letter said that the Department had studied this suggestion and decided to recommend against it for three reasons First, now that Rule 4 has been amended to solve the

coram nobis problem, only one circuit split remains over whether a particular type of appeal is "civil" or "criminal" — and that is the split over the Hyde Amendment. That split is not serious enough to justify a fundamental reworking of Rule 4. Second, expanding the time to appeal in criminal cases from 10 to 30 days for defendants and from 30 to 60 days for the government would unduly delay criminal appeals, contrary to the oft-stated public interest in expediting such appeals. Finally, a rule that gave private parties 30 days and the government 60 days to appeal in all cases would conflict with 18 U.S.C. § 3731 and perhaps other statutes. Although the supersession clause of the Rules Enabling Act (28 U.S.C. § 2072(b)) gives the Committee authority to propose rules that vitiate existing statutes, such authority should be exercised sparingly. The circuit split over the Hyde Amendment is not important enough to justify the exercise of such authority.

Mr. Letter added that, although one public defender told him that criminal defense attorneys would welcome the extension of the time to appeal from 10 to 30 days, other criminal defense attorneys expressed no objection to the current 10-day period. Mr. Letter pointed out that the 10-day period has existed for over 70 years and has been internalized by the bench and bar. Moreover, as a result of the 2002 amendment to the time computation provisions of Rule 26, criminal defendants now effectively have 14 to 17 days to file an appeal. This is ample time, especially as, in the vast majority of cases, a notice of appeal is filed almost immediately after a judgment of conviction is entered.

The Committee discussed the Department's recommendation at length Most members agreed that the particular proposal that the Department had studied should not go forward. Members were concerned about slowing down the criminal appeals process and about approving a rule that would directly conflict with a statute.

At the same time, members expressed interest in continuing to try to find a solution to the problem of having to distinguish "civil" from "criminal" appeals. One member noted that, although there may be no circuit splits (other than the split over the Hyde Amendment), it is still far too difficult for attorneys and pro se litigants to figure out whether some appeals — such as appeals from various post-judgment orders — are "civil" or "criminal."

A couple of members suggested that Rule 4 be amended to provide, in essence, that the time limitations of Rule 4(b) apply to direct appeals of criminal convictions, and the time limitations of Rule 4(a) apply to all other appeals. The Reporter reminded the Committee that, at a previous meeting, a member had proposed that Rule 4 be amended to provide something like the following: "As used in this rule, 'appeal in a civil case' means every appeal except a direct appeal from a judgment of conviction entered under Fed. R. Crim. P. 32(k)."

After additional discussion — during which members questioned how many 10-day appeal deadlines might be changed to 30-day deadlines under such a rule — Mr. Letter agreed that the Department will study the proposal and make a recommendation to the Committee at a future meeting

B. Item No. 01-03 (FRAP 26(a) — interaction with "3-day rule" of FRAP 26(c))

The Reporter introduced the following proposed amendment and Committee Note:

Rule 26. Computing and Extending Time

* * * * *

(c) Additional Time after Service. When a party is required or permitted to act within a prescribed period after a paper is served on that party, 3 calendar days are added ~~to~~ after the prescribed period [would otherwise expire] unless the paper is delivered on the date of service stated in the proof of service. For purposes of this Rule 26(c), a paper that is served electronically is not treated as delivered on the date of service stated in the proof of service.

Committee Note

Subdivision (c). Rule 26(c) has been amended to eliminate uncertainty about application of the 3-day extension. Civil Rule 6(e) was amended in 2004 to eliminate similar uncertainty in the Civil Rules, uncertainty that was described at length in 4B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 1171, at 595-601 (2002).

Under the amendment, a party that is required or permitted to act within a prescribed period should first calculate that period, without reference to the 3-day extension provided by Rule 26(c), but with reference to the other time computation provisions of the Appellate Rules. (For example, if the prescribed period is less than 11 days, the party should exclude intermediate Saturdays, Sundays, and legal holidays, as instructed by Rule 26(a)(2).) After the party has identified the date on which the prescribed period would expire but for the operation of Rule 26(c), the party should add 3 calendar days. The party must act by the third day of the extension, unless that day is a Saturday, Sunday, or legal holiday, in which case the party must act by the next day that is not a Saturday, Sunday, or legal holiday.

To illustrate: A paper is served by mail on Wednesday, June 1, 2005. The prescribed time to respond is 10 days. Assuming there are no intervening legal holidays, the prescribed period ends on Wednesday, June 15, 2005. (See Rules 26(a)(1) and (2).) Under Rule 26(c), three calendar days are added — Thursday, Friday, and Saturday. Because the last day is a Saturday, the time to act extends to the next day that is not a Saturday, Sunday, or legal holiday. Thus, the response is due on Monday, June 20, 2005.

To illustrate further: A paper is served by mail on Thursday, August 11, 2005. The prescribed time to respond is 30 days. Whether or not there are intervening legal holidays, the prescribed period ends on Monday, September 12 (because the 30th day falls on a Saturday, the prescribed period extends to the following Monday). Under Rule 26(c), three calendar days are added — Tuesday, Wednesday, and Thursday — and thus the response is due on Thursday, September 15, 2005.

The Reporter reminded the Committee that it had referred to the Advisory Committee on Civil Rules the proposal of attorney Roy H. Wepner that Appellate Rule 26(c) be amended to clarify precisely how deadlines that are extended under its "3-day rule" should be calculated. The proposal was referred to the Civil Rules Committee because the same ambiguity has long existed under Civil Rule 6(e).

In August, the Civil Rules Committee published for comment an amendment to Rule 6(e) that would resolve the uncertainty. Under the proposal, a party would first have to calculate the "prescribed period" without reference to the 3-day extension. After the party identified the day on which the "prescribed period" would otherwise expire, the party would add three days. The paper would be due on the third day, unless the third day was a Saturday, Sunday, or legal holiday, in which case the paper would be due on the next day that was not a Saturday, Sunday, or legal holiday.

The Reporter said that the proposal of the Civil Rules Committee seems sound. It comports with the understanding of most practitioners, and it adopts the most generous of the various counting options — thereby ensuring that no attorneys will be trapped into missing deadlines. The Reporter said that he had patterned the draft amendment to Appellate Rule 26(c) after the proposed amendment to Civil Rule 6(e), with two exceptions:

First, the Reporter asked the Committee to consider whether the words "would otherwise expire" should be added after "prescribed period." The Reporter said that, although the proposed amendment to Civil Rule 6(e) does not use "would otherwise expire," he thought that the amendment would be clearer if it did. Second, the Reporter pointed out that he had added language to the Committee Note to clarify how deadlines should be calculated when the "prescribed period" ends on a Saturday, Sunday, or legal holiday. The Reporter said that he did

not think that either the proposed amendment to Civil Rule 6(e) or the accompanying Committee Note was sufficiently clear on this point.

After a brief discussion, the Committee agreed that the clarifying phrase "would otherwise expire" should be added to the amendment. One member expressed concern about creating an inconsistency with the proposed amendment to Civil Rule 6(e). Judge Levi (who formerly chaired the Civil Rules Committee) said that the Civil Rules Committee did not feel strongly about the precise wording of the proposed amendment to Civil Rule 6(e) and would be open to suggestions for improvement. If differences remain, the Standing Committee can examine the two proposals, approve the proposal that it prefers, and make conforming changes to the other proposal.

A member moved that the proposed amendment to Rule 26(c) — including the phrase "would otherwise expire" — be approved. The motion was seconded. The motion carried (unanimously).

Later in the meeting, a member asked to revisit the amendment to Rule 26(c). He suggested that the amendment would be even clearer if the phrase "under Rule 26(a)" was added after "would otherwise expire." The additional language would point practitioners directly to the time calculation rules of Rule 26(a) and underscore that those rules should be used in calculating the "prescribed period."

A member moved that the proposed amendment to Rule 26(c) be further amended by adding the words "under Rule 26(a)" after "would otherwise expire." The motion was seconded. The motion carried (unanimously).

C. Item No. 03-02 (FRAP 7 — clarify whether limited to only FRAP 39 costs)

The Reporter introduced the following proposed amendment and Committee Note:

Rule 7. Bond for Costs on Appeal in a Civil Case

In a civil case, the district court may require an appellant to file a bond or provide other security in any form and amount necessary to ensure payment of costs on appeal. As used in this rule, "costs on appeal" means the costs that may be taxed under 28 U.S.C. § 1920 and the cost of premiums paid for a supersedeas

bond or other bond to preserve rights pending appeal. Rule 8(b) applies to a surety on a bond given under this rule.

Committee Note

Rule 7 has been amended to resolve a circuit split over whether attorney's fees are included among the "costs on appeal" that may be secured by a Rule 7 bond when those fees are defined as "costs" under a fee-shifting statute. The Second and Eleventh Circuits hold that a Rule 7 bond can secure such attorney's fees; the D.C. and Third Circuits hold that it cannot. *Compare Pedraza v. United Guar. Corp.*, 313 F.3d 1323, 1328-33 (11th Cir. 2002), *and Adsani v. Miller*, 139 F.3d 67, 71-76 (2d Cir. 1998), *with Hirschensohn v Lawyers Title Ins. Corp.*, No. 96-7312, 1997 WL 307777, at *1 (3d Cir. Apr. 7, 1997), *and In re American President Lines, Inc.*, 779 F.2d 714, 716 (D.C. Cir. 1985).

The amendment adopts the views of the D.C. and Third Circuits. To require parties to secure attorney's fees with a Rule 7 bond would "expand[] Rule 7 beyond its traditional scope, create[] administrative difficulties for district court judges, burden[] the right to appeal for litigants of limited means, and attach[] significant consequences to minor and quite possibly unintentional differences in the wording of fee-shifting statutes." 16A CHARLES ALAN WRIGHT, ARTHUR R. MILLER, EDWARD H. COOPER & PATRICK J. SCHILTZ, FEDERAL PRACTICE AND PROCEDURE § 3953 (3d ed. Supp. 2004). Moreover, it seems likely that in many, if not most, of the cases in which a fee-shifting statute requires an appellant to pay the attorney's fees incurred on appeal by its opponent, the appellant is a governmental or corporate entity whose ability to pay is not seriously in question.

Under amended Rule 7, an appellant may be required to post a bond to secure only two types of costs. First, a Rule 7 bond may ensure payment of the costs that may be taxed under 28 U.S.C. § 1920; attorney's fees are not among those costs. *See Roadway Express, Inc. v. Piper*, 447 U.S. 752, 757-58 (1980). Second, a Rule 7 bond may ensure payment of the cost of premiums paid for a supersedeas bond or other bond to preserve rights pending appeal. Although this cost is not mentioned by § 1920, it has long been recoverable under the common law and the local rules of district courts, and it is explicitly mentioned in Rule 39(e).

The Reporter said that, pursuant to the Committee's instructions, he had drafted an amendment to Rule 7 to resolve the circuit split over whether the "costs" secured by a Rule 7 bond are limited to the "costs" that are identified in Rule 39 or instead also include attorney's

fees that are defined as "costs" in a fee-shifting statute. At its May 2003 meeting, the Committee decided that Rule 7 bonds should not be used to secure attorney's fees and asked the Reporter to draft an implementing amendment.

The Reporter said that drafting the amendment proved to be more difficult than he had anticipated. The amendment cannot simply cross-reference the "costs" mentioned in Rule 39, as Rule 39 does not contain a definition of "costs." The amendment also cannot simply cross-reference the "costs" mentioned in 28 U.S.C. § 1920; although the statute does define "costs," it omits the cost of "premiums paid for a supersedeas bond or other bond to preserve rights pending appeal," which cost is specifically mentioned in Rule 39. The Reporter considered drafting an amendment that would provide, in effect, that "costs" do not include attorney's fees, but a rule that defines a word in terms of what it does *not* include may open the door to litigation about what it *does* include. The Reporter said that, in the end, he decided that "costs on appeal" should be defined to mean "the costs that may be taxed under 28 U.S.C. § 1920 and the cost of premiums paid for a supersedeas bond or other bond to preserve rights pending appeal."

After a brief discussion, a member moved that the proposed amendment to Rule 7 be approved. The motion was seconded. The motion carried (unanimously)

D. Item No. 03-03 (FRAP 11 & 12 — forbid returning exhibits to parties)

At its May 2003 meeting, the Committee asked the Department of Justice to study and make a recommendation regarding a proposal by Judge John M. Roll that Rule 11 or 12 be amended to require district courts to retain possession of the exhibits that were introduced into evidence in a case when that case is on appeal. Judge Roll expressed two concerns about the practice of many district courts of returning trial exhibits to the parties while their cases are pending on appeal. First, Judge Roll is concerned about the ability of appellate courts to quickly retrieve exhibits from parties. Second, Judge Roll is concerned about the possibility that exhibits will be destroyed, misplaced, or altered by the parties while the case is on appeal.

Mr. Letter said that the Department recommends that the Committee not pursue Judge Roll's proposal. Mr. Letter said that the Department agreed with Judge Roll that the practice of returning exhibits to the parties was problematic for exactly the reasons that Judge Roll gave. But an amendment to Rule 11 or 12 forcing all district courts to retain exhibits in all cases would not be practical. The district courts are simply not equipped with the facilities, personnel, or funds to retain trial exhibits — exhibits that could be dangerous (such as a gun introduced in a criminal case) or large (such as a diesel engine introduced in a patent case). Moreover, conditions vary dramatically from district-to-district in light of such factors as the geographical scope of the district, the size and subject matter of the caseload handled by the district, and the physical facilities available to the district. In light of those realities, a uniform national rule was not workable. Instead, the courts should continue to deal with the concerns raised by Judge Roll on a case-by-case basis.

A member asked whether the Department was aware of cases in which exhibits had been lost after being returned to the parties. Mr. Letter said that such cases existed, but they were rare. He also pointed out that, even if clerks were required to retain all exhibits, exhibits would still be misplaced.

A member asked whether it was common for appellate judges to have difficulty retrieving exhibits from the parties. The appellate judges and Ms. Waldron responded that such problems are rare and almost never cause the court to delay a decision. In the vast majority of cases, the appellate court does not need to examine the exhibits introduced at trial — for example, the gun found in the defendant's car or the drugs purchased by the undercover agent. Judges are usually able to make a decision based upon the briefs and paper record. When the court needs to examine an exhibit, a phone call to one of the attorneys almost always results in the exhibit being promptly delivered.

A member moved that Item No. 03-03 be removed from the study agenda. The motion was seconded. The motion carried (unanimously).

E. Item No. 03-04 (FRAP 44 — differences with proposed Civil Rule 5.1)

Under Rule 44, a party who challenges the constitutionality of a federal statute in a case in which the federal government is not a party is required to notify the clerk of the challenge, and the clerk is then required to notify the Attorney General. Rule 44 is derived from 28 U.S C. § 2403.

Civil Rule 24(c) contains a similar provision, but it has largely escaped the notice of district judges and trial attorneys, most likely because it is buried in a rule regarding intervention. As a result, the federal government often has not received timely notice — or, indeed, *any* notice — of constitutional challenges to federal statutes. The Civil Rules Committee has proposed to remedy this problem by adopting a new Civil Rule 5.1. That rule would differ in several respects from current Rule 44 — most significantly, in requiring *both* the parties *and* the clerk to notify the government.

At its May 2003 meeting, the Committee asked the Department of Justice to make a recommendation regarding whether Appellate Rule 44 should be amended to conform to proposed Civil Rule 5.1. Mr. Letter said that the Department has studied the matter and concluded that no changes in Rule 44 are warranted. Mr. Letter said that, unlike current Civil Rule 24(c), Rule 44 has been working well, and there is no reason to amend the rule to impose the "double notice" obligation that would be imposed under proposed Civil Rule 5.1.

A member moved that Item No. 03-04 be removed from the study agenda. The motion was seconded The motion carried (unanimously).

F. Item No. 03-06 (FRAP 3 — defining parties)

The Department of Justice has proposed an amendment to Rule 3. Under the amendment, all parties to a case before a district court would be deemed parties to the case on appeal, and all parties to the case on appeal — save those who actually file a notice of appeal — would be deemed appellees. Parties who had no interest in the outcome of the appeal could "opt out" of the case by filing a notice of withdrawal with the clerk. An "appellee" who supported the position of an appellant would have to file its brief within 7 days after the brief of that appellant was due. And an appellee who supported the position of an appellant would not be permitted to file a reply brief.

The Committee first discussed the proposed amendment at its May 2003 meeting. In the course of that discussion, Prof. Mooney said that the Committee had considered a similar proposal about 10 years ago, but she did not have a good memory of the details of the proposal or the reasons for its rejection. The Committee tabled further discussion to give the Administrative Office an opportunity to research the records of the Committee.

Professor Mooney's recollection proved correct. Records discovered by Mr. Rabiej and Mr. Ishida indicate that a proposal by Judge Frank Easterbrook to pattern Rule 3 after what is now Supreme Court Rule 12.6 (and what was then Supreme Court Rule 12.4) — a proposal that was similar to the current proposal by the Solicitor General — was considered by the Committee in 1992 but eventually rejected, in part because it was unanimously opposed by the clerks and the chief deputy clerks of the circuits. The nub of the clerks' opposition — and the main reason for the Committee's rejection — was the belief that the Supreme Court's rule might work for a court that decides fewer than 200 cases on the merits every year, but would not work for a circuit that must annually dispose of several thousand appeals. The Committee concluded that whatever benefits the rule would provide were outweighed by the administrative burden that the rule would impose on the parties and clerks.

Mr. Letter said that the Department continues to believe that its proposal should be approved. Mr. Letter said that, in his view, the Department's proposal would actually help the clerks. Under the proposal, the clerks would have to ask only two questions in determining who were parties to an appeal and whether each party was an appellant or an appellee: (1) Was the person or entity a party to the district court action? If "yes," the person or entity is a party to the appeal (unless the person or entity affirmatively notifies the clerk's office that it has no interest in the case). If "no," the person or entity is not a party to the appeal (unless it successfully moves to intervene). (2) Did the person or entity file a notice of appeal? If "yes," the person or entity is an appellant. If "no," the person or entity is an appellee

The Committee discussed the Department's proposal at considerable length. (Judge Roberts joined the meeting by phone during the discussion.) Members of the Committee expressed two major concerns:

First, some members expressed skepticism about the seriousness of the problem that the proposed amendment addresses. Mr. Letter said that the government had experienced ambiguity about its status in about five appeals over the past five years. Some members do not believe that five cases in five years reflects a serious problem. These members also pointed out that, even in these rare cases, the government can easily ask the court for clarification. Other members thought the problem worth solving and pointed out that it arises on occasion in litigation in which the government is not a party.

Second, members expressed a great deal of concern about the administrative burden that the proposed rule would impose upon clerks and parties. These members believe that few parties are likely to take the trouble to "opt out" of a case — even a case in which they have little interest. Rather, parties are likely to remain in the appeal so that they can receive the briefs and other papers and keep an eye on the case. As a result, there will be cases in which hundreds of parties in the district court will be deemed parties in the court of appeals — and every one of those hundreds of parties will have to be served with the briefs and other papers — even though very few of those parties will have a real stake in the appeal. Mr. Letter argued in response that, because a party who does not opt out risks being negatively affected by the appellate decision, parties may opt out more frequently than members seem to assume. Moreover, Mr. Letter said that he did not think it unreasonable to ask parties to serve all other parties — even those who are "inactive."

Members agreed that, while the Department's proposal made sense as a starting point, what was needed was a more efficient way of identifying the "real" parties to the appeal before briefs and other papers must be served. Ms. Waldron said that, in the Third Circuit, all parties to the district court action are initially presumed to be parties to the appeal — as would be true under the Department's proposed rule. However, parties who are interested in *remaining* parties must file a notice of appearance. Those who do not are dropped from the appeal. Thus, the onus is on a party to take affirmative action to participate in the appeal. As a result, the Third Circuit does not experience cases in which dozens of litigants who are not really interested in an appeal are defined as "parties" and need to be served.

The Reporter pointed out that the Third Circuit system would not work nationally under the current rules, as nothing in FRAP requires the filing of a notice of appearance. A member suggested that the Committee consider whether to amend FRAP to implement the Third Circuit system nationally. In other words, the rules would provide that all parties to a case before a district court would *initially* be deemed parties to the case on appeal — but a party who did not file a notice of appearance within 10 days or so would be deemed to have withdrawn. Other members agreed that such a proposal would be worth considering.

At the request of Judge Alito, Mr. Letter agreed to ask the Department to give further thought to its proposal and to consider in particular the implementation of a "notice-of-appearance" system similar to the Third Circuit's. Judge Alito also asked Ms. Waldron to survey

her fellow clerks to assess the seriousness of the problem of defining parties to an appeal and to assess whether a national notice-of-appearance system was likely to work.

By consensus, the Committee agreed to table further discussion of Item No. 03-06.

The Committee took a 15-minute break.

V. Discussion Items

A. Item No. 02-08 (FRAP 10, 11 & 30 — transmitting records and filing appendices); Item No. 02-16 (FRAP 28 — contents of briefs); and Item No. 02-17 (FRAP 32 — contents of covers of briefs)

Judge Alito reminded the Committee that Item Nos. 02-08, 02-16, and 02-17 arose out of complaints by the ABA Council of Appellate Lawyers about variations in local circuit rules regarding appendices, briefs, and the covers of briefs. At the Committee's request, the Department of Justice agreed to study these variations and make a recommendation to the Committee. Judge Alito asked Mr. Letter to describe the Department's conclusions.

Mr. Letter said that the Department recommended that no action be taken with respect to appendices. There is enormous variation among local circuit rules regarding appendices; indeed, no two circuits have the same rules. As a result, it is not possible simply to tweak a national rule and thereby eliminate minor variations in circuit practice. Rather, imposing national uniformity would require just about every circuit to make significant changes to its local practices. These local practices are deeply rooted, and judges feel strongly about them. Although there is no logical reason for the local variations — and although a national rule would be welcomed by the Department and most practitioners — the Department recognizes that there is almost no chance that a rule wiping out all local variations would be approved by the Standing Committee or the Judicial Conference.

Mr. Letter said that the Department also recommended no action with respect to the covers of briefs. All circuits seem to follow the same rules, with two minor exceptions: The Second Circuit requires the docket number to be set forth on the cover in very large typeface, and the Tenth Circuit requires the name of the lower court judge to appear on the cover. Moreover, those two exceptions cannot be enforced against practitioners under Rule 32(e), which requires the courts of appeals to accept briefs that comply with Rule 32.

Mr. Letter said that the Department does recommend that Rule 28 be amended to bring about more uniformity in the rules governing briefs and to require circuits to accept briefs that comply with Rule 28. Mr. Letter explained that there are more than a dozen differences in the local rules regarding briefs — and, because there is nothing like Rule 32(e) in Rule 28, practitioners have no choice but to follow each circuit's local rules. The Department

recommends that Rule 28 be amended to incorporate the most popular of the local variations and to add a provision similar to Rule 32(e) that would force every circuit to accept briefs that comply with Rule 28, even if those briefs do not comply with the circuit's local rules. Specifically, the Department recommends that Rule 28 be amended as follows:

(1) A new provision would require briefs to begin with an "introductory statement." The statement would include the identity of the judge or agency whose decision was being appealed, a citation to the decision being appealed if it was included in a federal reporter, a description of related cases, and, at the option of the party submitting the brief, a statement about whether oral argument is appropriate.

(2) The statement of the case — now required by Rule 28(a)(6) — would no longer include a description of "the course of proceedings."

(3) The statement of facts — now required by Rule 28(a)(7) — would include a description of the "prior proceedings."

(4) Copies of all unpublished decisions cited in the brief would have to be attached to the brief or included in an addendum that accompanies the brief.

The Committee gave extended consideration to the Department's recommendations.

Most members agreed with the Department's recommendation regarding appendices. Although members shared the frustration of the ABA with the variations — and although members agreed that the variations cannot be justified by local conditions — members reluctantly conceded that there was no chance that a uniform national rule could be imposed on every circuit. Judges feel very strongly about their local rules regarding appendices The circuit judges on the Judicial Conference would almost certainly oppose a uniform rule, and the district judges on the Conference would almost certainly defer to the circuit judges. Moreover, members feared that even surveying the chief judges about their local rules could create a backlash that would reduce the chances of getting approved more modest changes to the rules regarding briefs. By consensus, the Committee agreed to remove Item No. 02-08 from its study agenda.

There was considerable disagreement among members of the Committee regarding the Department's proposal on briefs. Some members argued that the Committee was going too far in "micro-managing" appellate practice — in trying to make every brief look the same. Other members warned that judges feel as strongly about their local rules regarding briefs as they do about their local rules regarding appendices — and judges are likely to oppose attempts to impose different rules on them or to force them to accept briefs that do not comply with their local rules. Two of the appellate judges on the Committee said that their colleagues would surely oppose the Department's proposal.

Other members disagreed. They pointed out that the changes being proposed by the Department to the rules regarding briefs were much more modest than the kind of changes that would have to be made to the rules regarding appendices. They also pointed out that circuits might welcome some of the changes. The fact that a local variation has been adopted by, say, two-thirds of the circuits is strong evidence that the variation is a good idea. A circuit that does not follow the variation may never have considered it and might not object if a national rule imposed it

One member asked whether a middle road was possible. He said that, as far as he was concerned, the most serious problem was that clerks reject briefs that do not comply with local rules, rather than filing them and asking the parties to make corrections. Perhaps the rules could be amended so that circuits could still apply their local rules, but clerks could not reject briefs that do not comply with them. The Reporter pointed out that this is precisely what the rules provide; under Rule 25(a)(4), clerks are already barred from rejecting a brief "solely because it is not presented in proper form as required by . . . any local rule." Ms. Waldron said that, in the Third Circuit, noncompliant briefs are filed and attorneys are asked to correct the deficiencies. The member responded that, in his experience, not all clerks are honoring Rule 25(a)(4).

One member asked whether Rule 28 could be amended to incorporate all of the local variations identified by the Department. In that way, a uniform national rule could be imposed, and every circuit would be happy because briefs would include everything that it wants. Mr. Letter and the Reporter responded that such an approach would require at least a dozen amendments to Rule 28, which amendments would likely make Rule 28 ungainly. The Reporter also pointed out that, just as judges might object to a rule that omits from briefs information that they want, so too judges might object to a rule that requires briefs to include information that they do not want.

In the course of the Committee's discussion, several members commented on some of the specific changes that the Department had proposed to Rule 28.

Regarding the proposed "introductory statement": No member expressed opposition to amending Rule 28 to require the information identified by the Department However, some members suggested that, rather than create a new category of information, it would be better to amend the descriptions of the existing categories to include the new information. For example, rather than requiring a new "introductory statement" to identify the judge or agency whose order is being reviewed, that information could be included in the statement of the case (which already requires a description of "the disposition below").

Regarding the requirement that all unpublished decisions cited in the brief be attached to the brief: The Reporter pointed out that this requirement would be much broader than proposed Rule 32.1, which requires that copies of unpublished opinions be served and filed only when those opinions are "not available in a publicly accessible electronic database." The Reporter also questioned whether judges would really want copies of unpublished opinions attached to the

briefs. This could substantially increase the size of briefs — briefs that many judges carry while traveling or take home at night — while not providing much useful information. Members agreed with the concerns raised by the Reporter.

Regarding the proposal to strike "the course of proceedings" from the statement of the case: Members disagreed over the merits of the Department's proposal. Some members favored the proposal. They argued that there is widespread confusion among practicing attorneys about what is supposed to be included in the statement of the case. That confusion gives rise to two problems. The first is that many attorneys file statements that are much too long and that include a great deal of irrelevant information about the proceedings below. The second is that many attorneys include in their statements of facts the same information about the proceedings below that they include in their statements of the case. One member said that the D.C. Circuit expects parties to include a very brief description of the proceedings below in their statements of the case and then to expand upon that description in their statements of the facts.

Other members opposed the proposed change. They argued that the rule was clear as written. In the statement of the case, a party should describe the proceedings before the district court or agency whose decision is being reviewed. In the statement of facts, a party should describe the facts that gave rise to the legal dispute. As the variations in practice, these members argued that the variations were harmless; if a party wants to devote several pages to the proceedings below, then the only one being harmed is that party. Members also argued against using Rule 28 to "micro-manage" briefs — to essentially write the briefs of attorneys for them.

One member said that, in his state, the Supreme Court merely requires a "statement of facts and proceedings below" and gives attorneys the freedom to decide how much to say about the facts giving rise to the litigation and how much to say about the proceeding below. Attorneys sometimes use that freedom unwisely, but attorneys are going to make mistakes no matter how specifically the rules dictate the contents of briefs. The member urged that Rule 28 be amended to condense the "statement of the case" and the "statement of facts" into a similarly straightforward directive. Other members expressed support for the suggestion.

Judge Levi agreed that any proposed changes to Rule 28 were likely to be resisted by members of the Judicial Conference. He said that the Conference was unlikely to be persuaded simply by arguments that national uniformity is important or that a particular change is thought by a majority of the Advisory Committee to be a good idea. Rather, if proposed changes to Rule 28 are to stand a chance of gaining Conference approval, the Committee will have to present solid empirical support for the changes. For example, the Judicial Conference is likely to be impressed by evidence that, say, two-thirds of the circuits have adopted a particular practice that the Committee seeks to make uniform — or, alternatively, that only one circuit has adopted a practice that the Committee seeks to preclude. The Conference is also likely to be impressed if members of the bar get behind a proposal. In short, before the Committee proposes any changes to Rule 28, it needs to do some empirical work.

Several members concurred with Judge Levi. By consensus, the Committee agreed to table further discussion of Item Nos. 02-16 and 02-17 and to request the Federal Judicial Center to collect further information for the Committee. Specifically, the Committee would like the FJC to identify every local circuit rule regarding the contents of briefs that varies from Rule 28. The Committee would also like to get some sense of the reason for each variation. Does the variation reflect a recent decision by the circuit's judges or is it a longstanding rule whose purpose can no longer be recalled by any member of the court? Does the variation address a serious problem that the circuit was experiencing or does it exist because of a request made by a long-retired member of the court? Is the variation rigorously enforced by the clerk's office or does the office look the other way? Judge Alito said that he would draft a formal request to the FJC.

B. Item No. 03-07 (FRAP 35 — disclose judges' votes on rehearing petitions)

The Reporter introduced the following proposed amendment and Committee Note:

Rule 35. En Banc Determination

* * * * *

(g) Disclosure of Vote.

(a) **Petition Granted.** If a petition for hearing or rehearing en banc is granted, the court must identify the judges who participated in the consideration of the petition.

(b) **Petition Denied.**

(A) If a petition that an appeal be heard initially en banc is denied, the court must identify the judges who participated in the consideration of the petition.

(B) If a petition that an appeal be reheard en banc is denied, the court must:

(i) identify the judges who participated in the consideration of the petition;

(b) disclose whether a vote was taken; and

(c) if a vote was taken, disclose how each participating judge voted.

Committee Note

Subdivision (g). The courts of appeals follow inconsistent practices when it comes to disclosing information about the consideration of petitions for hearing and rehearing en banc. For example, some circuits always identify judges who are disqualified, while other circuits never do — or do so only when a disqualified judge requests. Similarly, if a petition is denied after a judge calls for a vote, some circuits always disclose how each judge voted, while other circuits never do — or do so only when a judge writes or joins an opinion dissenting from denial of the petition.

New subdivision (g) has been added to ensure that, in every case in which a court considers a petition for hearing or rehearing en banc, the court will identify the judges who participated (and, by implication, those who did not participate) in the consideration of the petition. There is a strong public interest in ensuring that "[a] judge . . . disqualif[ies] himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned." Code of Conduct for United States Judges, Canon 3C(1). The need for vigilance has been underscored in recent years by media reports regarding the inadvertent failure of judges to disqualify themselves in cases in which they had "a financial interest in the subject matter in controversy." Canon 3C(1)(c). At the same time, no important public interest appears to be furthered by keeping secret the identities of the judges who determined whether a case should be heard or reheard en banc.

New subdivision (g) also requires that, when a court denies a petition for rehearing en banc, the court must disclose whether a vote was taken. (Under Rule 35(f), a vote need not be taken unless a judge calls for a vote.) If a vote was taken, subdivision (g) requires that the vote of each participating judge be disclosed. The parties and the general public have a legitimate interest in knowing how judges exercised the authority entrusted to them, and, after a rehearing petition is denied, keeping the vote secret does not appear to further any important public interest.

Subdivision (g) does not require the disclosure of any information about the decision to grant a petition for hearing or rehearing en banc (except, as noted, the identity of the judges who participated in the decision). The public interest in disclosure is diminished, because when such a petition is granted, every judge will

likely write or join an opinion on the merits of the case. At the same time, non-disclosure serves a legitimate interest. Revealing how judges voted on the petition before those same judges consider the merits of the case would lead to speculation and assumptions about the views of particular judges and arguably give rise to the appearance of unfairness.

For similar reasons, subdivision (g) does not require disclosure of any information about the decision to deny a request that an appeal be heard en banc as an initial matter (except the identity of the judges who participated in the decision). Such a denial begins rather than concludes the court's consideration of the case; the case will typically be decided by a panel on the merits and will often be the subject of a petition for rehearing en banc. Thus, concern about the appearance of unfairness is present. At the same time, disclosing how judges voted on a petition that an appeal be heard initially en banc does not further an important public interest. The votes of the members of the panel on the merits of the case will be disclosed. If a petition for rehearing en banc is filed and denied, the votes of the entire court on that petition will be disclosed. And if such a petition is filed and granted, the votes of the entire court on the merits of the case will be disclosed.

The Reporter reminded the Committee that Judge A. Wallace Tashima — a member of the Standing Committee — had suggested that the Committee consider amending Rule 35 to require judges to disclose how they vote on rehearing petitions. The Reporter said that he had drafted an amendment to Rule 35 that would implement Judge Tashima's suggestion. Under the draft amendment, disqualifications would have to be disclosed in every case in which a party petitioned for hearing or rehearing en banc. Votes would be disclosed only when petitions for rehearing en banc were *denied*. Votes would not be disclosed when rehearing petitions were *granted*, nor would votes be disclosed when petitions to hear a case initially en banc were either granted or denied. In these latter situations, the court would be giving further consideration to the case, raising the appearance of unfairness if votes were disclosed. Morever, in these latter situations, judges would later cast a vote — either on the merits of the case or on a petition to rehear a panel decision en banc — that would be disclosed.

The Committee first discussed the question of disclosing votes. Every Committee member who spoke expressed opposition to the proposal. In the vast majority of cases, no vote is taken, so there is nothing to disclose to parties. In the few cases in which a vote on a rehearing petition is called for, judges cast "no" votes for such a wide variety of reasons that disclosing such votes would give the parties little useful information. And even judges who cast "yes" votes often do not want those votes disclosed for fear of needlessly embarrassing a colleague The consensus of the Committee was that, given that the vast majority of circuits do not "involuntarily" disclose votes, and given that most Committee members think that disclosing

votes would be a bad idea, and given that this issue does not directly affect practitioners, the Committee should go no further with the proposal.

Regarding disclosing disqualifications, a couple of Committee members argued that there was a legitimate public interest in making certain that judges disqualify themselves when they should. Others disagreed. Judges must review hundreds of rehearing petitions every year. Most are plainly meritless — and most do not attract a single vote to rehear. For that reason, judges do not screen rehearing petitions for disqualifications nearly as carefully as they screen cases that they hear on the merits. Undoubtedly, judges who should technically disqualify themselves from considering a rehearing petition often fail to do so, but those failures virtually never make a difference because so few rehearing petitions even attract a single vote — much less the votes of enough judges to make the question close.

If all disqualifications had to be publicly disclosed, then judges would have to spend much more time screening rehearing petitions so as not to get mentioned in articles about the failure of judges to recuse themselves (similar to those articles published by the *Kansas City Star* and *Washington Post*). At a time when judges are already overwhelmed, forcing judges to shift their time away from deciding cases on the merits and toward screening rehearing petitions for disqualifications would be unwise.

A member moved that Item No. 03-07 be removed from the Committee's study agenda. The motion was seconded. The motion carried (unanimously).

C. Items Awaiting Initial Discussion

1. Item No. 03-08 (FRAP 4(c)(1) — mandate simultaneous affidavit)

Prof. Philip A. Pucillo, Assistant Professor of Law at Ave Maria School of Law, has directed the Committee's attention to inconsistencies in the way that the "prison mailbox rule" of Rule 4(c)(1) is applied by the circuits. Under the prison mailbox rule, a paper is considered timely filed if it is deposited by an inmate in his prison's internal mail system on or before the last day for filing. The rule provides that "[t]imely filing may be shown by a declaration in compliance with 28 U.S.C. § 1746 or by a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid."

The circuits have divided over the question what should happen when an issue arises about whether a paper was timely filed and the inmate has not filed the affidavit described in the rule. Some circuits dismiss such cases outright, holding that the appellate court lacks jurisdiction in the absence of evidence of timely filing. Other circuits remand to the district court and order the district court to take evidence on the issue of whether the filing was timely. And still other circuits essentially do their own factfinding — holding, for example, that a postmark on an envelope received by a clerk's office is sufficient evidence of timely filing. Prof. Pucillo has proposed that Rule 4(c)(1) be amended to clarify this issue

In a brief discussion, Committee members agreed that the issue was worth considering. Committee members seemed to agree both that dismissal was too harsh a consequence for the failure to file an affidavit and that district courts should not be required to hold hearings on whether a paper was timely filed. Rather, the tentative consensus of the Committee appeared to be that the failure to file an affidavit should be called to the inmate's attention and the inmate given a chance to correct the omission before his appeal is dismissed or other action taken against him.

Mr. Letter said that he would like an opportunity to ask the U.S. Attorneys about their experience with this issue and get some sense of whether and how federal prosecutors believe that Rule 4(c)(1) should be amended. By consensus, the Committee agreed to table further discussion of Item No. 03-08.

2. Item No. 03-09 (FRAP 4(a)(1)(B) & 40(a)(1) — U.S. officer sued in individual capacity)

Mr. Letter introduced Item No. 03-09, a recent proposal of the Department of Justice.

Under Rule 4(a)(1), the 30-day deadline to bring an appeal in a civil case is extended to 60 days "[w]hen the United States or its officer or agency is a party." Similarly, under Rule 40(a)(1), the 14-day deadline to petition for panel rehearing is extended to 45 days in a civil case in which "the United States or its officer or agency is a party "[1] (By virtue of Rule 35(c), the extended deadline of Rule 40(a)(1) also applies to petitions for rehearing en banc).

Mr. Letter said that it is unclear whether the extended deadlines provided in Rule 4(a)(1) and Rule 40(a)(1) apply when an "officer" of the United States is sued in her *individual* capacity. Mr. Letter said that this ambiguity does not exist in the Civil Rules. Civil Rule 12(a)(3)(A) extends the deadline for responding to a summons and complaint from 20 to 60 days for "[t]he United States, an agency of the United States, or an officer or employee of the United States sued in an official capacity," and Civil Rule 12(a)(3)(B) goes on specifically to provide that:

> An officer or employee of the United States sued in an individual capacity for acts or omissions occurring in connection with the performance of duties on behalf of the United States shall serve an answer to the complaint . . . within 60 days after service on the officer or employee, or service on the United States attorney, whichever is later.

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[1]The identical phrase — "the United States or its officer or agency" — is also used in Rule 29(a) (regarding amicus curiae briefs), while the phrase "the United States, its agency, or officer" is used in Rule 39(b) (regarding assessment of costs) and the phrase "the United States or its agency, officer, or employee" is used in Rule 44(a) (regarding notice of constitutional challenges).

Mr. Letter said that the Department would like to see Appellate Rule 4(a)(1) (and Appellate Rule 40(a)(1)) amended so that the Appellate Rules are as clear as the Civil Rules about the deadlines that apply when an officer of the United States is sued in an individual capacity. Specifically, the Department proposes that Rule 4(a)(1)(B) be amended as follows:

Rule 4. Appeal as of Right — When Taken

(a) Appeal in a Civil Case.

(1) **Time for Filing a Notice of Appeal.**

* * * * *

(B) When the United States or its officer, employee, or agency is a party, including an officer or employee of the United States sued in an individual capacity for acts or omissions occurring in connection with the performance of duties on behalf of the United States, the notice of appeal may be filed by any party within 60 days after the judgment or order appealed from is entered.

The Department proposed that similar language be added to Rule 40(a)(1).

Members asked a number of questions about how the rule would work in practice. How would it apply to a case in which the Department decided not to represent the officer or employee in the district court after determining that the officer's or employee's alleged actions were not connected to duties performed on behalf of the United States? What if the officer or employee was challenging that determination? How would the rule apply in a case in which the Department represented the officer or employee in the district court — after determining that the officer's or employee's alleged actions were indeed connected to duties performed on behalf of the United States — but the district court later disagreed and held that the actions were not so connected?

Members also pointed out that the proposed amendment to Appellate Rule 4(a)(1)(B) was far broader than the corresponding provisions of the Civil Rules. Civil Rule 12(a)(3) provides an

extension only when an officer or employee is sued "in an official capacity" or "in an individual capacity for acts or omissions occurring in connection with the performance of duties on behalf of the United States." An officer or employee who is sued in an individual capacity for acts or omissions that did *not* occur in connection with duties performed on behalf of the United States is not entitled to the extension.

By contrast, the draft amendment to Appellate Rule 4(a)(1)(B) provides an extension in any case in which an "officer" or "employee" of the United States is sued. The amendment makes clear that these cases "*includ[e]*" cases in which "an officer or employee of the United States [is] sued in an individual capacity for acts or omissions occurring in connection with the performance of duties on behalf of the United States." But the amendment does not *limit* the extension to such cases. Thus, a secretary for a federal agency who has a car accident while driving to church on a Sunday morning and is sued in federal court could take advantage of the extension.

By consensus, the Committee agreed to table further discussion of Item No. 03-09 to give the Department time to consider the questions raised by Committee members and to redraft the proposed amendment so as to narrow its scope.

VI. Additional Old Business and New Business

There was no additional old business or new business.

VII. Dates and Location of Spring 2004 Meeting

The Committee will next meet on April 13 and 14 in Washington, D.C.

VIII. Adjournment

By consensus, the Committee adjourned at 12:30 p.m.

Respectfully submitted,

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Patrick J. Schiltz
Reporter

Advisory Committee on Appellate Rules
Table of Agenda Items — December 2003

FRAP Item	Proposal	Source	Current Status
97-14	Amend FRAP 46(b)(1)(B) to replace the general "conduct unbecoming" standard with a more specific standard	Standing Committee	Awaiting initial discussion Discussed and retained on agenda 04/98 Discussed and retained on agenda 10/99 Discussed and retained on agenda 04/00 Discussed and retained on agenda 04/01
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
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 Discussed and retained on agenda 04/01 Draft approved 04/02 for submission to Standing Committee Approved for publication by Standing Committee 06/03
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 Discussed and retained on agenda 04/01, awaiting proposal from Department of Justice Discussed and retained on agenda 04/02 Discussed and retained on agenda 11/02, awaiting revised proposal from Department of Justice Discussed and retained on agenda 11/03, awaiting further revised proposal from Department of Justice
00-08	Amend FRAP 4(a)(6) 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 Discussed and retained on agenda 04/01 Discussed and retained on agenda 04/02 Discussed and retained on agenda 11/02 Draft approved 05/03 for submission to Standing Committee Approved for publication by Standing Committee 06/03

FRAP Item	Proposal	Source	Current Status
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 Discussed and retained on agenda 04/01, awaiting report from Federal Judicial Center Discussed and retained on agenda 04/02 Discussed and retained on agenda 11/02 Draft approved 05/03 for submission to Standing Committee **Approved for publication** by Standing Committee 06/03
00-12	Amend FRAP 28, 31 & 32 to specify the length, timing, and cover colors of briefs in cases involving cross-appeals	Solicitor General	Awaiting initial discussion Discussed and retained on agenda 04/01, awaiting revised proposal from Department of Justice Discussed and retained on agenda 04/02 Draft approved 11/02 for submission to Standing Committee Approved for publication by Standing Committee 06/03
01-01	Add rule to regulate the citation of unpublished and non-precedential decisions	Solicitor General	Awaiting initial discussion Discussed and retained on agenda 04/01 Discussed and retained on agenda 04/02 Discussed and retained on agenda 11/02 Draft approved 05/03 for submission to Standing Committee Approved for publication by Standing Committee 06/03
01-03	Amend FRAP 26(a)(2) to clarify interaction with "3-day rule" of FRAP 26(c)	Roy H Wepner, Esq	Awaiting initial discussion Discussed and retained on agenda 04/01 Referred to Civil Rules Committee 04/02 Draft approved 11/03 for submission to Standing Committee
02-01	Amend FRAP 27(d) to apply typeface and type-style limits of FRAP 32(a)(5)&(6) to motions.	Charles R. Fulbruge III (CA5 Clerk)	Awaiting initial discussion **Discussed and retained** on agenda 04/02 **Draft approved 11/02** for submission to Standing Committee Approved for publication by Standing Committee 06/03
02-16	Amend FRAP 28 to eliminate local rule variations regarding contents of briefs	ABA Council of Appellate Lawyers	Awaiting initial discussion Discussed and retained on agenda 11/02, awaiting proposal from Department of Justice Discussed and retained on agenda 11/03, referred to Federal Judicial Center for study

FRAP Item	Proposal	Source	Current Status
02-17	Amend FRAP 32 to eliminate local rule variations regarding contents of covers of briefs.	ABA Council of Appellate Lawyers	Awaiting initial discussion Discussed and retained on agenda 11/02, awaiting proposal from Department of Justice Discussed and retained on agenda 11/03, referred to Federal Judicial Center for study
03-02	Amend FRAP 7 to clarify whether reference to "costs" includes only FRAP 39 costs.	Advisory Committee	Awaiting initial discussion Discussed and retained on agenda 05/03 Draft approved 11/03 for submission to Standing Committee
03-06	Adopt new FRAP 3(f) to define parties	Solicitor General	Awaiting initial discussion Discussed and retained on agenda 05/03, awaiting revised proposal from Department of Justice Discussed and retained on agenda 11/03, awaiting further revised proposal from Department of Justice
03-08	Amend FRAP 4(c)(1) to mandate simultaneous filing of 28 U S C § 1746 declaration to take advantage of prison mailbox rule	Prof Philip A Pucillo	Awaiting initial discussion Discussed and retained on agenda 11/03, referred to Department of Justice for study
03-09	Amend FRAP 4(a)(1)(B) & 40(a)(1) to clarify treatment of U S. officer or employee sued in individual capacity	Solicitor General	Awaiting initial discussion Discussed and retained on agenda 11/03, awaiting revised proposal from Department of Justice

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

DAVID F LEVI
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

SAMUEL A. ALITO, JR.
APPELLATE RULES

A. THOMAS SMALL
BANKRUPTCY RULES

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CIVIL RULES

EDWARD E. CARNES
CRIMINAL RULES

JERRY E. SMITH
EVIDENCE RULES

TO: **Hon. David F. Levi, Chair**
Standing Committee on Rules of Practice and Procedure

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

DATE: **December 15, 2003**

RE: **Report of the Advisory Committee on Bankruptcy Rules**

I. Introduction

The Advisory Committee on Bankruptcy Rules met on September 18-19, 2003, in Stevenson, Washington. The Committee considered a number of issues and will continue discussion of several matters at its next meeting. The Committee also adopted several proposed amendments to the Bankruptcy Rules and Forms for recommendation to the Standing Committee.

II. Action Items

A Preliminary Draft of Proposed Amendments to Bankruptcy Rules 5005(c) and 9036

1. Synopsis of Proposed Amendments

A. Rule 5005(c) is amended to include the clerk of the bankruptcy appellate panel among the persons who can transmit erroneously delivered papers to the clerk of the bankruptcy court. Under the existing Rule, the United States trustee, the trustee, the attorney for the trustee, a bankruptcy judge, district judge, and clerk of the district court are authorized to forward erroneously filed papers. The clerk of the bankruptcy appellate panel was not included in the list because those courts were not in place when the rule was originally promulgated. The amendment corrects that omission. The amendment also adds both the clerk of the bankruptcy appellate panel and a district judge to the list of persons who can transmit erroneously filed papers to the United States trustee when that is appropriate. This amendment similarly corrects an omission in the rule.

B Rule 9036 is amended to delete the current language that requires the sender of an electronic notice to have received confirmation of receipt of that notice for the notice to be complete. At the time the rule was promulgated, the sender of an electronic communication generally would receive a notification that the recipient of the notice actually received it. For the vast majority of internet service providers, these receipt notifications are no longer given. Moreover, the general level of confidence with electronic communications has increased to the point that it is presumed that these messages are received in the proper course, at least to the extent that other forms of notice (such as by regular mail) also are received. The amendment affirmatively states that the notice is complete upon its transmission. This is consistent with the treatment of notice by regular mail under the Bankruptcy Rules. It is also consistent with Civil Rule 5(b)(2)(B) and (D) that provide that service by mail and by electronic means is complete upon transmission.

The text of the proposed amendments to Bankruptcy Rules 5005(c) and 9036 are set out at the end of this Report.

III. Information Items

A. Publication of Proposed Amendments

At the June 2003 meeting, the Standing Committee authorized the publication of a preliminary draft of amendments to Bankruptcy Rules 1007, 3004, 3005, 4008, 7004, and 9006. The deadline for submitting comments on these proposals is February 16, 2004. A public hearing on the proposals is tentatively scheduled for January 30, 2004. The Advisory Committee will consider all of the comments submitted on these proposals at its meeting in March 2004. The Advisory Committee anticipates that it will present these amendments in June 2004, to the Standing Committee for its approval and transmittal to the Judicial Conference.

B. Amendments Proposed by the Director of the Executive Office of the United States trustee

The Director of the Executive Office of the United States trustee has submitted several proposed rules and forms amendments to the Advisory Committee The Advisory Committee began its consideration of these proposals at its last meeting in September 2003. A Subcommittee of the Advisory Committee is continuing the study of these proposals. The Subcommittee will be conducting a focus group meeting on January 30, 2004, in Washington, D.C., to obtain the views of interested parties of the proposals. The Subcommittee will make its recommendations to the Advisory Committee which will address the matter at the March 2004 meeting.

C Proposed Bankruptcy Legislation

The House of Representatives passed H.R. 975 on March 19, 2003. That bill has been sent to the Senate, but no action has been taken on the proposal to date. The bill is essentially the same bill passed by the House in the 107th Congress, but it does not include a dischargeability provision contained in the Senate version of the bill that was passed in 2002. This provision has caused the bill to stall in the past. The Senate is not expected to address H.R. 975 until the Spring.

Attachments: Proposed Amendments to Bankruptcy Rules 5005 and 9036
Draft of Minutes of the Advisory Committee Meeting of September 18-19, 2003

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE*

Rule 5005. Filing and Transmittal of Papers

* * * * *

(c) ERROR IN FILING OR TRANSMITTAL. A paper intended to be filed with the clerk but erroneously delivered to the United States trustee, the trustee, the attorney for the trustee, a bankruptcy judge, a district judge, the clerk of the bankruptcy appellate panel, or the clerk of the district court shall, after the date of its receipt has been noted thereon, be transmitted forthwith to the clerk of the bankruptcy court. A paper intended to be transmitted to the United States trustee but erroneously delivered to the clerk, the trustee, the attorney for the trustee, a bankruptcy judge, a district judge, the clerk of the bankruptcy appellate panel, or the clerk of the district court shall, after the date of its receipt has been noted thereon, be transmitted forthwith to the United States trustee. In the

*New material is underlined, matter to be omitted is lined through

interest of justice, the court may order that a paper erroneously delivered shall be deemed filed with the clerk or transmitted to the United States trustee as of the date of its original delivery.

COMMITTEE NOTE

The rule is amended to include the clerk of the bankruptcy appellate panel among the list of persons required to transmit to the proper person erroneously filed or transmitted papers. The amendment is necessary because the bankruptcy appellate panels were not in existence at the time of the original promulgation of the rule. The amendment also inserts the district judge on the list of persons required to transmit papers intended for the United States trustee but erroneously sent to another person. The district judge is included in the list of persons who must transmit papers to the clerk of the bankruptcy court in the first part of the rule, and there is no reason to exclude the district judge from the list of persons who must transmit erroneously filed papers to the United States trustee.

Rule 9036. Notice by Electronic Transmission

Whenever the clerk or some other person as directed by the court is required to send notice by mail and the entity entitled to receive the notice requests in writing that, instead of notice by mail, all or part of the information required to be

contained in the notice be sent by a specified type of electronic transmission, the court may direct the clerk or other person to send the information by such electronic transmission ~~Notice by electronic transmission is complete, and the sender shall have fully complied with the requirement to send notice, when the sender obtains electronic confirmation that the transmission has been received.~~ Notice by electronic means is complete on transmission.

COMMITTEE NOTE

The rule is amended to delete the requirement that the sender of an electronic notice must obtain electronic confirmation that the notice was received. The amendment provides that notice is complete upon transmission. When the rule was first promulgated, confirmation of receipt of electronic notices was commonplace. In the current electronic environment, very few internet service providers offer the confirmation of receipt service. Consequently, compliance with the rule may be impossible, and the rule could discourage the use of electronic noticing.

Confidence in the delivery of email text messages now rivals or exceeds confidence in the delivery of printed materials. Therefore, there is no need for confirmation of receipt of electronic messages just as there is no such requirement for paper notices.

ADVISORY COMMITTEE ON BANKRUPTCY RULES

Meeting of September 18-19, 2003
Stevenson, Washington

Draft Minutes

The following members attended the meeting:

Bankruptcy Judge A. Thomas Small, Chairman
District Judge Robert W. Gettleman
District Judge Ernest C. Torres
District Judge Thomas S. Zilly
District Judge Laura Taylor Swain
District Judge Irene M. Keeley
Bankruptcy Judge James D. Walker, Jr.
Bankruptcy Judge Christopher M. Klein
Bankruptcy Judge Mark B. McFeeley
Professor Mary Jo Wiggins
Professor Alan N. Resnick
Eric L. Frank, Esquire
Howard L. Adelman, Esquire
K. John Shaffer, Esquire
J. Christopher Kohn, Esquire

Professor Jeffrey W. Morris, Reporter, and Professor Bruce A. Markell, advisor to the Committee, attended the meeting

Bankruptcy Judge Dennis Montali, liaison to the Committee on the Administration of the Bankruptcy System (Bankruptcy Administration Committee); Peter G. McCabe, secretary of the Committee on Rules of Practice and Procedure (Standing Committee); and Martha L. Davis, Principal Deputy Director, Executive Office for United States Trustees (EOUST), attended. Circuit Judge Anthony J. Scirica, chair of the Standing Committee; Circuit Judge Harris L. Hartz, liaison to the Standing Committee; Professor Daniel Coquillette, reporter of the Standing Committee; and Lawrence A. Friedman, Director, EOUST, were unable to attend.

The following additional persons attended the meeting: James J. Waldron, Clerk, United States Bankruptcy Court for the District of New Jersey, John K. Rabiej, Chief, Rules Committee Support Office, Administrative Office of the United States Courts (Administrative Office); James Ishida, Rules Committee Support Office; James H. Wannamaker, Bankruptcy Judges Division, Administrative Office; and Robert Niemic, Research Division, Federal Judicial Center (FJC)

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 Matters

The Chairman welcomed all the members, liaisons, advisers, and guests to the meeting. Judge Zilly welcomed the Committee to Washington state. The Chairman announced the reappointment of Judge Zilly, Judge Klein, and Mr. Shaffer and the designation of Judge Hartz as liaison to the Standing Committee. The Chairman recognized Judge Gettleman, whose term expired with this meeting. The Chairman announced that Patricia Ketchum has retired and Mr. Wannamaker has replaced her as principal support staff for the Committee.

The Chairman praised the invaluable contributions of District Judge Norman C. Roettger, Jr., a member of the Committee, who passed away on July 26, 2003. Judge Roettger, who served on the federal bench for 31 years, had a keen mind and a wealth of knowledge about a wide and varied array of subjects. In addition to his Committee work, Judge Roettger was a great story teller and a wonderful dinner companion. Judge Zilly recalled Judge Roettger's appreciation for the work of the Committee and his contributions. **A motion to approve a memorial resolution recognizing Judge Roettger passed unanimously.**

The Committee approved the minutes of the April 2003 meeting.

The Chairman briefed the Committee on the June 2003 meeting of the Standing Committee. The Standing Committee approved proposed amendments to Rule 9014, technical amendments to Rules 1011 and 2002, and new Official Form 21. The Standing Committee approved the Committee's recommendation to publish proposed amendments to Rules 1007, 3004, 3005, 4008, 7004, and 9006 for public comment. Comments are due by February 16, 2004, and a public hearing on the comments has been tentatively scheduled for January 30, 2004, in Washington, D.C. District Judge David F. Levy has been designated as the new chair of the Standing Committee, replacing Judge Scirica, and District Judge Lee H Rosenthal has been designated as the new chair of the Advisory Committee on Civil Rules (Civil Rules Committee), replacing Judge Levy.

The Chairman reported that the Standing Committee discussed interest in possible rules changes relating to mass torts litigation if Congress fails to act on asbestos legislation. Mr. Rabiej stated that no decision has been made on holding a mass torts conference to discuss the situation.

The Chairman reported that the Supreme Court has approved and transmitted to Congress amendments to Bankruptcy Rules 1005, 1007, 2002, 2003, 2009, 2016, and 7007 1 The

amendments will take effect on December 1, 2003, unless Congress enacts legislation to reject, modify, or defer them. The Chairman reported that proposed amendments to the Model Local Rules for Electronic Case Filing have been placed on the consent calendar for the September 2003 meeting of the Judicial Conference.

Judge Montali reported on the June 2003 meeting of the Bankruptcy Administration Committee. Circuit Judge Marjorie O. Rendell has been designated as the new chair of the Bankruptcy Committee. Judge Montali reported that a major issue at the June meeting was whether retired bankruptcy judges and magistrate judges who conduct mediation and arbitration sessions are practicing law, which would disqualify them from receiving cost-of-living increases in their pensions. Responding to concerns that reversing the Administrative Office's current interpretation would have a negative impact on the prospects for a cost-of-living adjustment for active judges, the Bankruptcy Administration Committee agreed to defer consideration of the issue.

After a spirited debate on proposed adjustments in the Miscellaneous Fee Schedule, including doubling the fee for motions for relief from the automatic stay, the Bankruptcy Administration Committee endorsed the changes by a 6-5 vote The Bankruptcy Administration Committee recommended that the Judicial Conference express concern regarding legislation to provide for the expungement of the record of involuntary bankruptcy cases filed against individuals in bad faith and that the Conference request legislation to permit bankruptcy judges to hold court outside the district in emergencies.

Action Items

Rule 2002(g) — National Creditor Registry. The Bankruptcy Noticing Working Group has previously requested that the Committee consider amending Rule 2002(g) to permit creditors to receive notices on a national or regional basis. In addition, the Working Group asked that the Committee consider amending Rule 2002(g) to permit creditors to register in a single place the address or addresses they wish to be used in all cases and in all districts throughout the bankruptcy system. Section 315 of the Bankruptcy Reform Act of 2003, H.R. 975, as passed by the House of Representatives, includes a similar provision When the Working Group's proposal was discussed at the last Committee meeting, Committee members expressed skepticism about the software that would be used to match creditor names and addresses in bankruptcy cases with the creditors who sign up to receive notices on a national or regional basis. The software is already used to identify creditors that have signed up to receive electronic notices on a district-by-district basis.

The Technology Subcommittee met on May 19, 2003, in Washington, D.C., and heard from the contractor that operates the Bankruptcy Noticing Center (BNC) for the Judiciary as well as AO staff responsible for the noticing program. The contractor and AO staff explained the operation of the BNC's certified address-verification software, which is comparable to that used

by the United States Postal Service. The software, which has proved very reliable, determines whether any entities listed on the debtor's schedules have requested electronic notices. If there is not a perfect match between the creditor name and address supplied on the schedules and the names (or synonyms) and addresses of parties getting electronic notices, the notice is sent by mail to the address on the mailing matrix. The BNC representatives said approximately 1,100 entities use electronic noticing pursuant to 4,500 noticing agreements with the courts.

The Technology Subcommittee concluded (1) that any national creditor registry should only apply to chapter 7 and chapter 13 cases where high volume creditors are more likely to appear, (2) that the current registration system for electronic noticing works well but deleting the requirement for a separate noticing agreement for each district would facilitate operation of a national creditor registry, (3) that any potential problems with the accuracy and expedience on the part of notice providers other than the BNC could be addressed by performance standards set by the Administrative Office, and (4) that Rule 2002 should be amended. Judge Zilly, the chair of the subcommittee, said the only question is the form of the amendment.

The Reporter stated that the proposed legislation would let a creditor sign up for the national creditor registry with any bankruptcy court He said he followed the proposed legislation in drafting an amendment to Rule 2002(g) because there is no downside once you are satisfied with the accuracy of the system and because creditors take the risk by opting into the system. Mr. Frank stated that he was concerned about the possibility of a notice intended for an unregistered creditor going to a creditor that has registered for the system. The Reporter said the BNC's matching software is very good and that there is only a very, very minor chance of a registered creditor getting a notice intended for an unregistered creditor. Mr. Waldron said there is an infinitesimal chance of two creditors having the same name and address in the same Zip Code.

The Chairman stated that Rule 2002 covers not just notices given by the BNC, but also notices given by the clerk, the chapter 13 trustee, the debtor, and other persons designated by the court to give notices. If they are required to send notices to a creditor's registered address, they need access to the name- and address-matching software. Mr. Frank stated that he does not understand how a debtor would comply if the debtor was required to give notice and if use of the creditor address registry is mandatory, not a safe harbor. Professor Resnick asked how the national registry would function if creditors could register an address to be used by all courts with any court. Mr. Waldron said the clerk would forward the address to the BNC, which would maintain the registry, but that it would be easier for the clerk if creditor addresses were all registered at one place. Judge Swain suggested that an Official Form be prescribed for registering creditor addresses. Professor Resnick stated that requiring creditors to file their preferred address with the court would have the advantage of making it a matter of record. Judge Walker asked what filing would mean in this context and how the clerk would keep and treat the requests.

Professor Markell stated that creditors are always trying to make notices directed to a

creditor's local address, such as a store, ineffective. He said it might be best to craft the amendment as a safe harbor until the proposed legislation passes. Judge Torres suggested adding a sentence that the court's failure to send a notice to a registered address does not render invalid an otherwise valid address. Professor Resnick suggested tracking that provision in Rule 5003(e)

Judge Montali said the current presumption is that a notice to an address listed by the debtor actually goes there. The Reporter said the proposed amendment provides that a notice sent to a creditor at its registered address is presumed to be the proper address for the notice. Mr. Adelman said the debtor who puts the correct address on the schedules should not bear the risk that a notice is mishandled. Professor Resnick said the Committee Note should explain the consequences of the debtor scheduling a correct address which is not the creditor's registered address and the notice going to another registered address. The Reporter said a computer error in matching creditor names and addresses would be the same as a postal carrier taking the notice to the wrong house.

Professor Resnick said the registry of government addresses maintained by the clerk under Rule 5003(e) could be a model for the amendment to Rule 2002. Judge Klein stated that the Rule 5003 registry is available to anyone sending notices. He suggested that someone should maintain a registry of creditor addresses which would be the basis of contractual agreements with creditors on noticing. The Reporter stated that the Working Group's proposal was not intended to create a registry as such and that the database of creditor names and synonyms and addresses would be massive and would have to be updated every time a creditor opens a new store Judge Klein said debtors would use a creditor address registry because they want to get the most accurate addresses. Professor Resnick said the Committee declined to include municipal governments in the Rule 5003 registry because that would have been too many addresses.

Judge Walker suggested providing that a creditor could agree with an entity authorized to give notices as to the place and manner of receiving notices. The Reporter said that notice providers could be defined in Rule 9001 and that the provision for creditor agreements with notice providers could be included in Rule 2002. He said confidence in the notice providers would come from their certification by the AO. The Chairman said he had proposed this approach but that the Administrative Office expressed concern about setting technical standards and quality controls for authorized notice providers. Judge McFeeley said the clerk's office should not be excluded because CM/ECF will have the capacity to do this.

The Committee discussed how a deputy clerk mailing copies of a court order or a chapter 13 trustee sending notices would get a creditor's preferred address and how difficult that would be. Judge Klein said the BNC should be given latitude in implementing the proposal. Judge Swain said the amendment should be permissive, not mandatory, and should apply only to notices sent by the court. **The committee approved in principle permitting a creditor to obtain notices at a preferred address. The Chairman asked the Reporter to prepare alternative drafts of the proposed amendment for the next meeting. One draft would follow the subcommittee's recommendation, which would allow a creditor to notify a**

clerk's office of its preferred address. The other draft would allow a creditor and an approved notice provider to make their own arrangements. Professor Resnick suggested a third approach based on Rule 9036. **The Committee agreed to consider that as well.**

Rule 9036 — Confirmation of Receipt. Rule 9036 provides that electronic noticing is complete when the sender obtains electronic confirmation that the transmission has been received. The Reporter stated that confidence in the delivery of e-mail has increased greatly since the rule was added in 1993. The Technology Subcommittee met on May 19, 2003, in Washington, D.C., and heard from the contractor that operates the Bankruptcy Noticing Center (BNC) for the Judiciary as well as AO staff responsible for the program. The BNC conducted a test of the top 10 Internet Service Providers (ISPs) and obtained a 99.62 percent success rate for receipt of the messages, provided that the message contained a link to the notice rather than including the notice as an attachment. Because few ISPs offer return receipts, the Reporter stated that the confirmation requirement is arguably obsolete and may hinder the use of electronic noticing if enforced to its letter. The subcommittee recommended deleting the last sentence of Rule 9036, including the confirmation requirement.

Mr. Shaffer questioned why Rule 9014(b) requires that the motion initiating a contested matter be served in the manner provided for the service of a summons and complaint in Rule 7004 and, as a result, cannot be served electronically. He said many attorneys just serve the attorney for the other party electronically if both parties are already in the case and both attorneys are CM/ECF participants. Professor Resnick stated that contested matters are as important as any other litigation and, thus, historically service under Rule 7004 was required for contested matters Judge Walker suggested that the rule be revised to cover a number of other means of sending notice, including electronic transmission. Judge Klein stated that because Civil Rule 5(b)(2)(D) already applies in adversary proceedings, the amendment to Rule 9036 should be as close as possible to the civil rule to avoid inconsistencies between the two rules. The Reporter stated that Rule 5(b)(2)(D) also applies in contested matters.

Judge Zilly suggested adding a statement that the electronic transmission is complete on transmission. Judge Montali said Rule 9036 should be consistent with Rule 9006(e), which provides that service of notice by mail is complete on mailing The Committee discussed whether to add to Rule 9036 the provision in Civil Rule 5(b)(3), which is incorporated by Rule 7005, that service by electronic means is not effective if the party making service learns that the attempted service did not reach the intended person. Professor Resnick said requiring that a notice reach the intended "person" is ambiguous Judge Klein said an attorney who does not open his mail or who is on vacation when notice is given could argue that he or she did not receive the notice. Mr. Shaffer said signing up for electronic noticing is voluntary and that participants assume the risk that their e-mail system may be down. **Judge Walker's motion to strike the last sentence in Rule 9036 and substitute, "Notice by electronic means is complete on transmission." carried with two dissenting votes.**

Restyling Civil Rules. The Civil Rules Committee has initiated a project to restyle the

Civil Rules. Restyled versions of Civil Rules 1 through 15 were presented to the Standing Committee in June and approved for publication in August 2004. The Civil Rules Committee is continuing its restyling effort and expects to have another substantial portion of the restyled rules ready for presentation to the Standing Committee next year and, if the Standing Committee approves, for publication along with the first group of restyled rules.

This Committee discussed whether to begin restyling the Bankruptcy Rules immediately or whether to wait Professor Resnick stated that this Committee should wait to see what the Civil Rules Committee does and then respond. He said many of the Civil Rules are incorporated verbatim in the Bankruptcy Rules. Because the restyled Civil Rules will not be published until 2004 and because many of the changes are technical ones which do not require publication, Professor Resnick said waiting would, at worst, leave the Bankruptcy Rules only a year or two behind the Civil Rules in restyling. Judge Walker, the liaison to the Civil Rules Committee, said the Style Subcommittee of the Civil Rules Committee is very receptive to comments on the impact of changes in the Civil Rules on the Bankruptcy Rules.

Judge Zilly stated that Civil Rule 5 refers to electronic filings and service by electronic means if authorized by a local rule, but that many bankruptcy courts use general orders to authorize electronic filing and service. Professor Resnick stated that the Standing Committee prefers local rules, even if the rule refers to a general order. Mr. McCabe said the preferred practice was that the court authorize electronic filing and service in a local rule and then put the details in a general order or administrative procedure.

Mr. Rabiej said Civil Rules 1 through 37 and Rule 45 are to be published and that it would be difficult for each committee member to refer the whole package. He suggested that the Chairman assign portions of the restyled rules for review. **The Chairman stated that, when restyled rules are approved by the Standing Committee, they will be sent to all committee members. Any member wishing to discuss any restyled rule should inform the Chairman and the restyled rule will be added to the agenda for the spring 2004 meeting.**

Rule 5001(b) — Court Locations. The courts have been preparing plans to ensure their continued operation in the event of emergencies. Mr. Wannamaker stated that, in the course of the emergency planning, it became clear that some courts would be best served by conducting matters in another district. Under the existing statute and Rule 5001(b), there is a serious question as to whether a bankruptcy judge could hold court in the next most available court location. This led to a proposal before the Judicial Conference to seek an amendment to 28 U.S.C. § 152(d), which would permit bankruptcy judges to hold court outside of the district if emergency conditions are present and no location for holding court is reasonably available within the district. In addition, it has been suggested that Rule 5001(b) be amended.

Mr. Shaffer suggested moving the phrase, "Except as provided in 28 U.S.C. § 152(d)," from the beginning of the second sentence to after the word "but" in line 7 in the draft amendment prepared by the Reporter. **There was no objection.** Judge Montali said it

sometimes is difficult to say just where the court is. For instance, the judge may conduct a hearing by teleconference from a hotel room while the parties and counsel are other locations. Mr. McCabe stated that judges conduct trials from remote locations by videoconference. **At the suggestion of Mr. Rabiej, the Committee approved the proposed amendment in principle but deferred further action. If legislation is passed authorizing bankruptcy judges to hold court out of district, the Chairman stated that the Committee would consider the request by e-mail ballot.**

Rule 7004(b)(3). Judge Robert J. Kressel has urged the Committee to consider revising Rule 7004(b)(3) to clarify the requirement for service of a summons and complaint on a corporation. Judge Kressel observed that the rule is unclear as to whether it requires the name of an individual who is an officer or appropriate agent on the envelope or whether an envelope generically addressed to "any officer, or managing or general agent of XYZ, Inc." also is effective.

The Reporter stated that Judge Kressel's observation about the ambiguity of the rule is borne out in the case law. The Reporter presented two draft amendments to remove any perceived ambiguity. The first directed that the summons and complaint be served on a specific individual and the second was intended to clarify that under the current rule, generic service is acceptable. Professor Resnick and Judge Swain challenged whether the second draft amendment, which changed "an officer" to "any officer" clarifies the matter. Professor Resnick suggested inserting "by name or office." Mr. Frank stated that the Committee should not increase the burden on the party serving the summons and complaint and that mail addressed to the president or chief executive officer of a corporation should get to that person.

Judge Zilly and Judge Klein stated that they are reluctant to deviate from the parallel with the language of Civil Rule 4(h). Judge Klein said the district judges didn't seem to have a problem with that language in Rule 4(h). The Reporter stated that the bankruptcy rule permits service by first class mail while the civil rule requires delivering the documents to the person named. Judge Walker stated that young attorneys may serve the summons and complaint according to what they think is required by the rule. He said the Committee could be criticized if it knows that the existing rule is ambiguous, but doesn't fix it. Judge Montali and Judge Swain suggested setting out the address to be used in the rule. Judge Small stated that the Committee should decide whether to clarify the rule or to leave it as is. **With three members dissenting, the Committee decided that the rule was better left alone.**

Rule 3007 — Service of Objections to Claims. Judge Kressel has asked the Committee to consider amending Rule 3007 to clarify the service obligations of parties who object to claims. He suggested that these objections be treated as contested matters with service accomplished under Rule 7004 as provided in Rule 9014. The Reporter stated that Rule 9013 recognizes two forms of requests for orders — motions and applications. Mr Frank agreed that there is some ambiguity in the rules about whether objections to claims are something separate from motions and applications. Because the claimant has already initiated the matter by filing the claim, Mr.

Frank said service under Rule 7005 would be more appropriate than service under Rule 7004. Judge Klein stated that the claim is consent to the court's jurisdiction and that, because the objection to the claim is the equivalent of the answer to a complaint, service should be under Rule 7005.

The Reporter presented a draft amendment requiring that an objection to a claim be made by a written motion. Professor Resnick opposed the change in terminology because, he stated, everybody knows these objections as objections to claims. He stated that requiring service under Rule 7005 would allow the objections to be served electronically. **Professor Resnick's motion not to make the change recommended by Judge Kressel carried without dissent.**

Rule 3007(b) provides that when an objection to a claim is joined with a demand for relief of the kind specified in Rule 7001, it becomes an adversary proceeding Judge Klein stated that there is confusion in the courts on whether a separate adversary proceeding must be filed after the objection to claim. The Committee discussed the nature of the affirmative relief under Rule 3007 and how a clarification of the reference to an adversary proceeding in Rule 3007(b) should be worded. **The Committee agreed that a clarification is needed and that the Reporter draft a proposal for consideration at the spring meeting.**

Rule 5005(c). Judge Kressel has suggested that Rule 5005(c) be amended to add the clerk of the bankruptcy appellate panel (BAP) to the list of persons who are authorized, when they receive improperly filed or transmitted papers, to send the papers on to the proper person. The Reporter suggested also adding district judges to the second part of the rule

The Committee discussed whether the rule should be revised to include papers erroneously filed in the other districts and whether the reference to deeming erroneously delivered papers to have been filed is limited to the persons listed in the rule. Judge Walker said the discussion of hypothetical errors makes it clear that the last sentence refers only to the listed people. Judge Swain stated that adding other districts would enable parties to consider bundling their claims for the entire country and filing them in a single district. **The Committee agreed without dissent to add the clerk of the BAP and district court judges to the list of persons who are authorized to forward erroneously filed or transmitted papers to the proper person.**

Rule 9001(9) — Definition of Associate. Robert M. Barnes, a San Diego, California attorney, has requested an amendment to Rule 9001(9) to include accountants who are employed by accounting firms within the definition of "regular associates." The Reporter stated that the definition of "firm" in Rule 9001(6), which includes both law firms and accounting firms, is not parallel with the definition of "regular associate," which just includes attorneys. The Reporter presented a draft amendment to include attorneys regularly employed by, associated with, or of counsel to an individual attorney or firm, and accountants regularly employed by an individual accountant or firm. Judge Montali suggesting specifying law firms and accounting firms Judge Swain stated that multidisciplinary practice could create more problems.

The Reporter stated that the change could focus attention on the rule and prompt other groups to ask to be included in the rule. The Reporter said that while there may be some ambiguity in the rule, the courts appear to be handling it and redrafting the rule may create more problems than it would solve. The Committee discussed the application of the rule to accountants employed by law firms and attorneys employed by accounting firms. Judge Walker stated that an application for employment could cover the issue. **Judge Swain's motion to make no change in the rule carried without dissent.**

Rule 9014 — Electronic Service. Mr. Waldron stated that several electronic filers in his court have complained that they are required to serve the motion initiating a contested matter in the manner provided for the service of a summons and complaint in Rule 7004. He said the attorneys question why service by mail of a paper copy of the motion is needed when the attorney for the party has already received a Notice of Electronic Filing through the CM/ECF system. Mr. Waldron presented draft amendments to Rule 9014 which would permit electronic service of the motion initiating a contested matter under Rule 7005 unless the debtor is the party against whom relief is sought. **The Chairman referred the proposal to the Technology Subcommittee.**

Rule 4003(c) — Burden of Proof. At the March 2002 meeting, the Committee considered whether to amend Rule 4003(c) to reverse the burden of proof from the objecting party to the party who would have that burden under applicable nonbankruptcy law. Judge Barry Russell had raised the issue with the Committee, noting that the allocation of the burden of proof under Rule 4003(c) is arguably inconsistent with the Supreme Court's decision in Raleigh v. Illinois Dept. of Revenue, 530 U.S. 15 (2000). At the time, the Committee determined that it would take no action on the issue until the case law developed further. The Reporter stated that a number of courts have identified the issue but none of them have held that Raleigh renders Rule 4003(c) ineffective. **After a brief discussion, the Committee agreed to take no action at this time but to continue monitoring developments in the case law.**

Suggestions by the Director of the EOUST Concerning Rules 2003, 4002, 2016, and 7001 and Schedule I, and New Official Form. The amendments submitted by Mr. Friedman, Director of the EOUST, fall into three categories. The first category involves the debtor's obligation to provide complete and accurate information to the trustee and United States trustee; the second category concerns the debtor's attorney's obligation to disclose compensation received or promised in connection with the bankruptcy case for the year prior to commencement of the case. The third category relates to the entry of an order denying a discharge under section 727(a)(8) or (9) of the Bankruptcy Code. Ms. Davis presented the proposed amendments. She stated that the amendments would make the bankruptcy process more efficient and effective for the 1.2 million debtors who file chapter 7 each year, many of whom receive a discharge and are out of the system within 90 days of filing.

• Schedule I. Ms. Davis stated that a non-filing spouse's income can be material to making substantial abuse determinations under section 707(b) of the Bankruptcy Code and evaluating the household expenses set out on Schedule J. She said that requiring chapter 7

debtors to disclose their non-filing spouses' income on Schedule I would save time and work for the United States trustees. Schedule I already requires disclosure of the non-filing spouse's income in chapter 12 and chapter 13 cases.

Mr. Frank asked whether a husband and wife who are separated would be considered as part of the same household. The Reporter stated that Schedule J permits them to schedule their expenses separately. Several speakers asked whether domestic partners and roommates would be required to disclose their income and whether their income is relevant to section 707(b) determinations. Professor Resnick said requiring 1 2 million chapter 7 debtors to provide more information outweighs concerns about a small number of section 707(b) cases and that the change could be viewed as taking a position on the substantive question of whether a non-filing spouse's income is included in the section 707(b) determination. Professor Markell and Judge McFeeley stated that a non-filing spouse effectively gets a discharge in a community property state, which is another reason for making the change. **Judge McFeeley's motion to add non-filing spouses of chapter 7 debtors to Schedule I carried without dissent.**

• Rule 7001. Ms. Davis stated that removing objections to the debtor's discharge under sections 727(a)(8) and (9) of the Code from Rule 7001 and permitting the objections to be made by motion would save time for the United States trustee and the court. Because most section 727(a)(8) and (9) objections are uncontested and the debtors are simply ineligible for discharge, she said some courts handle them by show cause orders or motions to dismiss. The Committee discussed whether previous discharges within six years should be added to the list of automatic bars to discharge under Rule 4004(c) and whether the debtor would get a discharge under the current rule if the United States trustee missed the deadline for filing an objection based on a previous discharge.

Judge Montali stated that objections to discharge for previous discharge are a complete waste of time. Professor Resnick stated that the discharge is so important that it should not be denied automatically. Several committee members questioned whether permitting these objections to discharges to be filed as motions would save time and resources, especially if the United States trustee could move for default against the debtor Professor Wiggins stated that there is a distinction between objections under section 727(a)(8) and objections under section 727(a)(9). Ms. Davis agreed that objections under section 727(a)(9) for previous discharges in chapter 12 or chapter 13 present more factual issues. **The Chairman deferred the proposal to the next meeting.**

• Rule 2016(b) and New Official Form The proposed amendments to Rule 2016(b) would require that the debtor's attorney disclose the details of the legal services to be provided, whether the attorney has taken any interest in property from the debtor, and whether the attorney has received any payments from the debtor within a year prior to the filing, regardless of whether the fees were in connection with or in contemplation of the bankruptcy filing. Ms. Davis stated that the proposed changes in attorney fee disclosures are intended to address two problems — debtors who have no idea of the details of their attorney's fee disclosure (or of the extent of the

legal services to be provided) when fees are disputed later in the case and attorneys who bundle non-bankruptcy services with the bankruptcy filing, arguably in order to avoid disclosing the full extent of their fees under the existing rule. Judge Klein said it is possible to argue that the bundled prepetition services were in anticipation of bankruptcy and must be disclosed under the current rule.

Professor Resnick stated that the rule is to implement section 329 of the Bankruptcy Code, which only requires the disclosure of fees in contemplation of or in connection with the bankruptcy case The Reporter stated that the proposal raises questions of substantive law and goes beyond what can be fixed by changing the form. Professor Resnick questioned adopting a rule aimed at unethical lawyers when the rule goes well beyond the statute. Questioned about whether the proposal could require the disclosure of confidential or sensitive matters such as potential criminal matters or consideration of divorce, Ms. Davis said the disclosure form could be filed under seal. Judge Zilly stated that disclosing the payments for unrelated services would go beyond the statute but would not be privileged, but that disclosing the nature of the services may be a different matter. He said disclosing the fees would at least trigger a further inquiry by the United States trustee Judge Gettleman said if the information is privileged, the attorney can assert the privilege and request redaction.

The Committee discussed the practice of unbundling services in which an attorney may agree only to prepare the petition and schedules and represent the debtor at the meeting of creditors Professor Markell said some bankruptcy courts permit unbundling and others do not, but that the details of the legal services to be provided is a matter of disclosure. Judge Klein described the situation in which an attorney will not represent the debtor on a motion for relief from the automatic stay without additional payment As a result, he said his court uses a district court rule to require attorneys to represent the debtor for the entire case except for adversary proceedings.

Mr. Frank questioned why the debtor should have to sign another piece of paper when it is the attorney's disclosure, not the debtor's. The Reporter stated that the debtor would sign the disclosure so that the attorney would not lie. Mr. Adelman said disclosure is good for the attorney and may provide a "safe harbor." Judge Walker said the change could be made in the Statement of Financial Affairs, which is signed by the debtor. **The Committee agreed to require the disclosure of all payments by the debtor within a year prior to the filing, either in the attorney fee disclosure or in the debtor's Statement of Financial Affairs. The Chairman asked the Reporter to circulate alternative drafts within a month.** Professor Resnick asked whether the change should be limited to chapter 7 and chapter 13 cases since Rule 2014 already applies in chapter 11 cases. Ms. Davis agreed that consumer cases are the focus of the proposal but stated that section 329 applies across the board.

• Rules 2003 and 4002. Ms. Davis stated that the trustee has a statutory duty to investigate the financial affairs of the debtor and the debtor is under a statutory obligation to surrender books and records relating to property of the estate. She said the proposal to require

the debtor to bring certain core documents to the meeting of creditors may impose a burden on the debtor but that she believes the documents would have been assembled by debtor and the debtor's attorney to prepare the schedules and statement of financial affairs. Ms. Davis stated that, if the debtor can't produce the documents, the debtor could file a statement explaining why not. She said the proposal was based on similar local rules.

Mr. Frank stated that the proposal would be a dramatic change in bankruptcy practice. He said the production of key backup documents in every case would raise the expense of filing bankruptcy substantially. The debtor is already under oath at the meeting of creditors and subject to further inquiry and production of documents. He said the United States trustee assumes the production will produce a significant number of objections to discharge and additional distributions to creditors but that, ultimately, it is a value judgment and matter of costs vs. benefits. Mr. Frank suggested that the proposal is so controversial that it should be referred to a subcommittee, which could solicit additional comments and report back to the full Committee.

Judge Zilly said the debtor should bring the crucial documents to the meeting of creditors, rather than the trustee having to continue the meeting for their production. Judge Torres asked why it would be onerous to produce the listed documents at the meeting. He said the documents appear to be relevant and the trustee would have to review them at some time. Judge Walker said a more practical, focused proposal is needed. He said the production should be treated as an objection to discovery documents, with the debtor required to produce only what the trustee is going to consider carefully. Judge Walker asked whether the debtor would be required to bring copies of the documents or the originals, which would be reviewed by the trustee during the meeting. One Committee member asked whether the trustee might image the documents at the meeting and return them to the debtor.

Professor Markell said the debtor already supplies the information in summary form on the schedules and statement of financial affairs. The trustee reviews the schedules and statements before the meeting of creditors and the meeting itself is very routine in most cases. He said the trustee inquires further when needed and continues the meeting in those cases. Professor Markell said the proposal would alter the cost of filing bankruptcy for consumer debtors and their attorneys. By analogy, he said, despite the existence of tax fraud, taxpayers have to file only limited information on their tax returns.

Judge Torres asked about the possibility of the United States trustee requesting documents before the meeting of creditors if the documents appear to be needed on the basis of a review of the schedules and statements. Professor Markell and Mr Frank said informal discovery of this sort goes on now in many districts. Professor Wiggins said a targeted list of what is absolutely necessary would help the Committee make a cost-benefit analysis Judge Gettleman asked whether, if the trustees are already doing their job, bringing lots of papers to the meeting would change things. Mr. Adelman stated that the proposal raises a privacy issue because the debtor's Social Security number is on some of the listed documents, including tax returns, which could be viewed by a number of people. He said, however, that some of the listed

documents stand out because their production would expedite the case and uncover issues. Professor Morris said all of the listed documents could be the basis of an objection to discharge if the debtor failed to produce them at the trustee's request. Professor Resnick stated that the proposal is an extreme one based on the assumption that the debtor is dishonest

The Committee accepted Judge Klein's motion to refer the proposal to the Subcommittee on Consumer Issues. The Chairman stated that the subcommittee could meet in Washington, D.C., on January 30, 2004, and invite a focus group similar to the one convened on the privacy amendments to provide input from different viewpoints. Judge Zilly asked the EOUST to be more specific in light of the Committee's discussion. Mr. Shaffer asked about the requirement in the proposed amendment to Rule 4002 that, if the debtor used an incorrect Social Security number, the debtor must take steps to correct the bankruptcy court record and notify credit reporting agencies. Ms. Davis said one reason for the provision is to provide a road map for debtors and their attorneys so that they can furnish more accurate information.

Information Items

Uniform Rules. Rule 9029 states that local rules must conform to any uniform numbering system prescribed by the Judicial Conference. The Conference has directed that courts adopt a numbering system for local rules that corresponds with the relevant federal rules. (JCUS - SEP 88, p. 103; JCUS - MAR 96, p. 34). As the bankruptcy courts have begun accepting electronic filings over the Internet, the courts have been reviewing their local rules to determine how the rules should be revised to reflect the new electronic environment. Mr. McCabe stated that the Office of Judges Programs has received a number of requests for copies of the Uniform Numbering System for Local Bankruptcy Court Rules or for information on the system. The Uniform Numbering System was issued by the Committee in 1996 and revised slightly in April 2003. Earlier this year, copies of the Uniform Numbering System were distributed to all bankruptcy judges and posted on the JNET.

E-Government Act. Section 205(c)(3) of the E-Government Act of 2002, Pub. L. 107-347, requires that the Supreme Court prescribe rules to protect privacy and security concerns relating to the electronic filing of documents and the public availability of documents filed electronically. Mr Rabiej said that the statute mandates that the new rules provide that a party filing a redacted document also may file an unredacted copy of the document under seal. At the request of the Judiciary, legislation has been introduced deleting the provision for dual filing Mr. Rabiej said the Standing Committee has appointed a subcommittee to consider the rules required by the Act. He said changes may be needed in the bankruptcy rules, the civil rules, and the criminal rules.

Amendments to §§ 107 and 342(c) of the Bankruptcy Code. The Judiciary has requested revision of sections 107 and 342(c) of the Bankruptcy Code. The amendment to section 107

would authorize the court to redact "personal identifiers" in order to protect any person from identity theft or other harm. In addition, the revision would expand the scope of information a court could protect from "scandalous or defamatory matter" to "information that could cause undue annoyance, embarrassment, oppression or risk of injury to person or property." The amendment to section 342(c) would provide that a debtor include only the last four digits of his or her Social Security account number on notices the debtor provides to creditors.

Changes in the Claims Process. The CM/ECF Working Group's claims processing subcommittee is preparing recommendations to modify the proof of claim form and the process for filing claims in order to facilitate electronic filing and to accommodate the trade in buying claims. Judge McFeeley, the liaison to the subcommittee, said the proposed amendments are not yet ready to be submitted to this Committee. He said the revised form would be more suitable for filing claims as a datastream to the courts which are prepared to accept it

If a claim is transferred after the proof of claim is filed, Rule 3001(e) requires that the clerk notify the alleged transferor by mail Mr. Waldron said many claims buyers obtain notice waivers from the sellers although there are questions about the effectiveness of the waivers and his court does not allow them. He said processing the transfer of claims constitutes the largest increase in the clerk's office's workload in many districts. Professor Resnick said if there is fraud in the transfer, there also could be fraud in the waiver. Professor Markell said there is a legitimate business in buying consumer claims in bulk, even discharged chapter 7 claims. The Chairman stated that there is less concern about fraud when legitimate entities buy claims in chapter 13 but Judge McFeeley said it is difficult to write a rule that just applies to "legitimate" companies.

Professor Resnick stated that the 1991 amendments to the rule deleted disclosure of the compensation for the transfer and narrowed the provision to the disclosure of possible bogus transfers The Reporter stated that the nature of the creditors involved has changed since 1991, when the transfer of chapter 11 claims was at issue Professor Resnick said a cost-benefit analysis may be appropriate because the perception is that more sophisticated buyers are purchasing claims from vendors who should know what they are doing.

Implementation of the CM/ECF System Mr. Wannamaker reported that implementation of the Case Management/Electronic Case Files (CM/ECF) system in the bankruptcy courts is continuing. Fifty-nine bankruptcy courts are live on the system and another twenty-nine courts and the District of Guam are in the process of implementing CM/ECF.

FJC Study of Mandatory Disclosure under Civil Rule 26. Mr. Niemic discussed the proposed study by the FJC of whether certain types of adversary proceedings should be exempted by rule from the mandatory disclosure provisions of Rule 7026 and Civil Rule 26. The study is intended to determine whether certain types of adversary proceedings are resolved before due dates for Rule 26 disclosures. Mr. Niemic said the study could include whether attorneys are making the disclosures or stipulating that they will not make them, whether judges are exempting

attorneys from the disclosure requirements, whether the judges think mandatory disclosure makes sense in adversary proceedings, and whether the courts are doing anything to increase compliance with the rule

Mr. Niemic asked whether the Committee wanted a study based on a survey of the bankruptcy judges and, if so, whether the survey should be of a sample of the judges or of all bankruptcy judges. The Chairman suggested an email survey of all bankruptcy judges. He said the survey would remind the judges of the mandatory disclosure requirements in the rule Judge Klein said the response rate might be lower with an email survey but that it could show the extent of support for the conventional wisdom that the mandatory disclosure is unnecessary. **The Chairman asked Mr. Niemic to go forward with the survey with the help of Judge Klein and another committee member to be designated later.**

Administrative Matters

The Committee's next scheduled meeting will be at the Ritz-Carlton Hotel, Amelia Island, FL, on March 25-26, 2004. The Committee discussed several locations as possible sites of the fall 2004 meeting, including Seattle, Monterey, Chicago, Santa Fe, Sundance, and Las Vegas. The Subcommittee on Consumer Issues will meet in Washington, D.C., on January 30, 2004. Trustees and debtors' attorneys will be invited to participate in the January 30 meeting.

Respectfully submitted,

James H. Wannamaker, III

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

DAVID F. LEVI
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

SAMUEL A. ALITO, JR.
APPELLATE RULES

A. THOMAS SMALL
BANKRUPTCY RULES

LEE H. ROSENTHAL
CIVIL RULES

EDWARD E. CARNES
CRIMINAL RULES

JERRY E. SMITH
EVIDENCE RULES

To: **Honorable David F. Levi, Chair, Standing Committee on Rules of Practice and Procedure**

From: **Lee H. Rosenthal, Chair, Advisory Committee on Federal Rules of Civil Procedure**

Date: **December 16, 2003**

Re: **Report of the Civil Rules Advisory Committee**

Introduction

The Civil Rules Advisory Committee met on October 2 and 3, 2003, at the Hyatt Regency in Sacramento, California. Its Discovery Subcommittee met on September 5 in Washington, D.C., and its Civil Forfeiture Subcommittee met on December 9, also in Washington, D.C. Draft Minutes of the Advisory Committee meeting are attached.

Part I of this report describes recommendations to publish for comment Style versions of Civil Rules 16 through 37 plus Rule 45. Publication would be made in a single package with Rules 1 through 15, as approved for publication by the Standing Committee in June, 2003.

Part II of this report is an informational summary of matters described more fully in the draft Minutes.

I Action Items: Styled Civil Rules 16-37 and 45 for Publication

The Style Project has proceeded at a remarkable pace. This pace has been possible only because of the near-heroic efforts of the Standing Committee's Style Subcommittee and its consultants; of Administrative Office Staff; and of the Advisory Committee's Subcommittees and their consultants. Work is already under way on Rules 38 through 63, less Rule 45. It cannot be said that the end is yet in sight, but the ambitious schedule set for the project now seems feasible.

Styled versions of Civil Rules 16 through 25 (without Rule 23) were first considered by the Advisory Committee's Style Subcommittees at meetings in April and May, 2003. They were considered further at the August meetings that also worked through the discovery rules, Rules 26 through 37 and 45. Work on Rules 26 through 37 and 45 has been completed without the need for further subcommittee meetings.

The Advisory Committee recommends August 2004 publication for comment of Style Rules 16 through 37 and 45 as part of a single package with Style Rules 1 through 15 as approved for publication last June.

The Standing Committee's Style Subcommittee is reviewing Rules 1 through 37 and 45 to ensure that commonly used terms are used consistently throughout these rules. The inconsistent use of some common terms presents "global" issues that must be resolved. One rule, for example, may require that the court "direct" action, while another requires that it "expressly direct" action. It should be possible to decide whether "expressly" is ever useful to emphasize the need for clarity or to exclude any possibility of implicit direction. Establishing firm conventions now will expedite work on later rules. The Style Subcommittee expects to propose revisions to the first publication package for the Advisory Committee's consideration at its April 2004 meeting.

Apart from these matters, the Advisory Committee may recommend that the Style Project be supplemented by parallel proposals to make minor noncontroversial substantive changes. The repeated painstaking examination of the Civil Rules required by the Style process has inevitably revealed many candidates for revision. Some of the possible revisions will require close study and, at times, difficult judgments. But others, although in some sense "substantive" changes of meaning, seem beyond possible controversy. As one example, Civil Rule 26(g)(1) requires that the person who signs discovery papers provide an address. Unlike Rule 11, it does not require a telephone number. The Advisory Committee is concerned that adding a telephone number requirement to Rule 26(g)(1) would go beyond the limits of the Style Project. But it may prove possible to publish a small number of changes of this sort on a parallel track that lies between the pure Style proposals and the more complex proposals that are published in the ordinary course of the rules process. A recommendation whether to take this approach is likely to be made to the June, 2004 Standing Committee meeting.

II Information Items

A. Conference. Discovery of Computer-Based Information

Professor Dan Capra, Evidence Rules Committee Reporter, has sponsored a conference to be held next month at Fordham Law School. The conference will explore developing experience with discovery of information maintained in computer form. Members of the Advisory Committee and Standing Committee will attend. The conference discussion will provide current information on this continually evolving field. It also will help to advance consideration of the central questions Are rules amendments appropriate now? What might they be?

The question whether rules amendments are appropriate now can be divided into two broad parts. The first part looks to the progress courts and lawyers are making toward adapting the flexible discovery rules to the opportunities and problems that arise from computer-based information. If experience suggests that practice is moving toward uniform and satisfactory approaches, there may be no occasion to add specific rules to address discovery of these (very broad) forms of information. If experience suggests that practice is in a continuing state of upheaval because of ongoing changes in technology and the use of technology, the time to frame specific rules may lie in the future.

The second part of the inquiry assumes that it is sensible to continue to develop proposals to amend the discovery rules. This part looks to the specific topics that might be addressed and to rules to address them. The Minutes describe the Advisory Committee's October discussion. The topics listed there include a definition of electronic information; means to prompt early discussion among the parties to help approach computer-based information; the need to define what is a "document" in this realm (including such matters as "embedded" data and "metadata"); the form of production; the burdens that may be imposed to retrieve information that is not retrievable through routine ongoing operation of the information system ("much has been inadvertently retained"); inadvertent privilege waive (a problem familiar from paper discovery but perhaps exacerbated by

computer-based discovery); and preservation-spoliation obligations. Tentative drafts address each of these topics and will provide a basis for further study.

B. Civil Asset Forfeiture

Many statutes invoke the Supplemental Rules for Admiralty and Maritime claims to govern civil asset forfeiture proceedings. That makes it useful to continue to locate these procedures in the Supplemental Rules. But disadvantages arise from scattering the forfeiture provisions among the rules that were developed to deal with admiralty practice. Forfeiture practice presents issues that do not arise in admiralty. Some of these distinctive issues are addressed at different places in the present rules. Other of these distinctive issues are not addressed at all in the present rules. It will be useful to bring the present forfeiture provisions together with desirable new provisions in a single rule. Separation of civil forfeiture practice from admiralty practice will have the further advantage of insulating admiralty practice from interpretations of common provisions that reflect the distinctive needs of forfeiture practice at the expense of admiralty practice.

The Civil Asset Forfeiture Subcommittee held a series of lengthy conference calls over the spring and summer. These calls led to a substantially revised new Rule G. This revised draft was discussed during a day-long meeting in December, leading to modest further revisions. The National Association of Criminal Defense Lawyers will be asked to comment on this most recent draft. The Subcommittee hopes that with continuing work it will have a proposed rule to present to the Advisory Committee in April.

C Filed, Sealed Settlements

The Federal Judicial Center is nearing completion of its study of the occasional practice of filing settlement agreements under seal. The study includes a survey of statutes and court rules that address this topic; a comprehensive review of hundreds of thousands of federal actions to determine the frequency of the practice; and an effort to identify cases in which accepting a settlement agreement for filing under seal may have interfered with public access to information about matters that may impair public health or safety. The Advisory Committee and its Sealed Settlements Subcommittee will use the completed report in determining whether to recommend rules amendments to address this topic.

D. Class Action Settlements

The Federal Judicial Center also is nearing completion of its study of the impact of the *Amchem* and *Ortiz* decisions on settling class actions. The Advisory Committee and its Class-Action Subcommittee will use the completed report in its ongoing consideration of Rule 23 and in further considering the need for rule provisions specifically addressing settlement classes.

E. Other Rules

Three other rules have moved to the front of the agenda.

A single Subcommittee has been formed to study Rule 15 and Rule 50(b). The Rule 15 study was prompted by a Third-Circuit request to revise one feature of the relation-back provisions in Rule 15(c)(3). It has burgeoned to encompass many Rule 15 questions. The first question to be addressed by the Subcommittee is whether any of the possible problems justify rules amendments. The recommendation may be to leave Rule 15 as it is; to undertake one or more modest revisions; or to attempt a broader revision.

Rule 50(b) authorizes a post-verdict motion for judgment as a matter of law only if it renews a motion made at the close of all the evidence. The courts of appeals continue to wrestle with this requirement in cases that show that many lawyers overlook it. The cases also show some erosion of the requirement in decisions that accept various justifications for treating an earlier motion for judgment as a matter of law as if it had been made at the close of all the evidence. The functional values served by Rule 50(b) likely can be served equally well by provisions that do not catch so many lawyers unaware. But Rule 50(b) represents a fictionalization of old Seventh-Amendment lore. The central question will be whether the advantages of a more functional rule suffice to overcome the residue of long-ago Seventh-Amendment concerns.

The Solicitor General recommended that the Appellate Rules Committee consider a new rule that would regulate district-court relief from a judgment while an appeal is pending. The Appellate Rules Committee concluded that these questions are better addressed in the Civil Rules. This proposal — in the form of a draft new rule "62.1" — remains on the agenda for active consideration.

Style Draft of Rules 16 through 22 and 23.1 through 25, Federal Rules of Civil Procedure

As revised by the Advisory Committee on Civil Rules

And further revised and annotated by the Style Subcommittee of the Committee on Rules of Practice and Procedure

(with Committee Notes)

November 13, 2003

Rule 16. Pretrial Conferences; Scheduling; Management	Rule 16. Pretrial Conferences; Scheduling; Management
(a) Pretrial Conferences; Objectives. In any action, the court may in its discretion direct the attorneys for the parties and any unrepresented parties to appear before it for a conference or conferences before trial for such purposes as **(1)** expediting the disposition of the action, **(2)** establishing early and continuing control so that the case will not be protracted because of lack of management, **(3)** discouraging wasteful pretrial activities, **(4)** improving the quality of the trial through more thorough preparation, and, **(5)** facilitating the settlement of the case	**(a) Purposes of a Pretrial Conference.** In any action, the court may direct the attorneys and any unrepresented parties to appear for one or more pretrial conferences for such purposes as **(1)** expediting disposition of the action, **(2)** establishing early and continuing control so that the case will not be protracted because of lack of management, **(3)** discouraging wasteful pretrial activities, **(4)** improving the quality of the trial through more thorough preparation, and **(5)** facilitating settlement

(b) Scheduling and Planning. Except in categories of actions exempted by district court rule as inappropriate, the district judge, or a magistrate judge when authorized by district court rule, shall, after receiving the report from the parties under Rule 26(f) or after consulting with the attorneys for the parties and any unrepresented parties by a scheduling conference, telephone, mail, or other suitable means, enter a scheduling order that limits the time **(1)** to join other parties and to amend the pleadings, **(2)** to file motions, and **(3)** to complete discovery The scheduling order may also include **(4)** modifications of the times for disclosures under Rules 26(a) and 26(e)(1) and of the extent of discovery to be permitted, **(5)** the date or dates for conferences before trial, a final pretrial conference, and trial, and **(6)** any other matters appropriate in the circumstances of the case The order shall issue as soon as practicable but in any event within 90 days after the appearance of a defendant and within 120 days after the complaint has been served on a defendant A schedule shall not be modified except upon a showing of good cause and by leave of the district judge or, when authorized by local rule, by a magistrate judge	**(b) Scheduling.** **(1)** ***Scheduling Order.*** Except in categories of actions exempted by local rule as inappropriate, the district judge — or a magistrate judge when authorized by local rule — must issue a scheduling order **(A)** after receiving the parties' report under Rule 26(f), or **(B)** after consulting with the parties' attorneys and any unrepresented parties at a scheduling conference or by telephone, mail, or other suitable means **(2)** ***Time to Issue.*** The judge must issue the scheduling order as soon as practicable, but in any event within 120 days after any defendant has been served with the complaint and within 90 days after any defendant has appeared **(3)** ***Contents of the Order.*** **(A)** *Required Contents* The scheduling order must limit the time to join other parties, amend the pleadings, complete discovery, and file motions **(B)** *Permitted Contents* The scheduling order may **(i)** modify the timing of disclosures under Rules 26(a) and 26(e)(1), **(ii)** modify the extent of discovery, **(iii)** set dates for pretrial conferences and for trial, and **(iv)** include other appropriate matters **(4)** ***Modifying a Schedule.*** A schedule may be modified only for good cause and by leave of the judge

(c) Subjects for Consideration at Pretrial Conferences. At any conference under this rule consideration may be given, and the court may take appropriate action, with respect to **(1)** the formulation and simplification of the issues, including the elimination of frivolous claims or defenses, **(2)** the necessity or desirability of amendments to the pleadings, **(3)** the possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof, stipulations regarding the authenticity of documents, and advance rulings from the court on the admissibility of evidence, **(4)** the avoidance of unnecessary proof and of cumulative evidence, and limitations or restrictions on the use of testimony under Rule 702 of the Federal Rules of Evidence, **(5)** the appropriateness and timing of summary adjudication under Rule 56, **(6)** the control and scheduling of discovery, including orders affecting disclosures and discovery pursuant to Rule 26 and Rules 29 through 37,	**(c) Attendance and Matters for Consideration at Pretrial Conferences.** **(1)** ***Attendance.*** A represented party must authorize at least one of its attorneys to make stipulations and admissions about all matters that can reasonably be anticipated for discussion at a pretrial conference If appropriate, the court may require that a party or its representative be present or reasonably available by telephone to consider possible settlement **(2)** ***Matters for Consideration*** At any pretrial conference under this rule, the court may consider and take appropriate action on the following matters **(A)** formulating and simplifying the issues, and eliminating frivolous claims or defenses, **(B)** amending the pleadings if necessary or desirable, **(C)** obtaining admissions and stipulations regarding facts and documents to avoid unnecessary proof, and ruling in advance on the admissibility of evidence, **(D)** avoiding unnecessary proof and cumulative evidence, and limiting the use of testimony under Federal Rule of Evidence 702, **(E)** determining the appropriateness and timing of summary adjudication under Rule 56, **(F)** controlling and scheduling discovery, including orders affecting disclosures and discovery under Rule 26 and Rules 29 through 37,

(7) the identification of witnesses and documents, the need and schedule for filing and exchanging pretrial briefs, and the date or dates for further conferences and for trial,	**(G)** identifying witnesses and documents, scheduling the filing and exchange of any pretrial briefs, and fixing dates for further conferences and for trial,
(8) the advisability of referring matters to a magistrate judge or master,	**(H)** referring matters to a magistrate judge or master,
(9) settlement and the use of special procedures to assist in resolving the dispute when authorized by statute or local rule,	**(I)** settling the case and using special procedures to assist in resolving the dispute when authorized by statute or local rule,
(10) the form and substance of the pretrial order,	**(J)** determining the form and content of the pretrial order,
(11) the disposition of pending motions,	**(K)** disposing of pending motions,
(12) the need for adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems,	**(L)** adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems,
(13) an order for a separate trial pursuant to Rule 42(b) with respect to a claim, counterclaim, cross-claim, or third-party claim, or with respect to any particular issue in the case,	**(M)** ordering a separate trial under Rule 42(b) of a claim, counterclaim, crossclaim, third-party claim, or particular issue,
(14) an order directing a party or parties to present evidence early in the trial with respect to a manageable issue that could, on the evidence, be the basis for a judgment as a matter of law under Rule 50(a) or a judgment on partial findings under Rule 52(c),	**(N)** directing the presentation of evidence early in the trial regarding a manageable issue that might, on the evidence, be the basis for a judgment as a matter of law under Rule 50(a) or a judgment on partial findings under Rule 52(c),
(15) an order establishing a reasonable limit on the time allowed for presenting evidence, and	**(O)** establishing a reasonable limit on the time allowed to present evidence, and
(16) such other matters as may facilitate the just, speedy, and inexpensive disposition of the action	**(P)** facilitating in other ways the just, speedy, and inexpensive disposition of the action
At least one of the attorneys for each party participating in any conference before trial shall have authority to enter into stipulations and to make admissions regarding all matters that the participants may reasonably anticipate may be discussed If appropriate, the court may require that a party or its representative be present or reasonably available by telephone in order to consider possible settlement of the dispute	

(d) **Final Pretrial Conference.** Any final pretrial conference shall be held as close to the time of trial as reasonable under the circumstances The participants at any such conference shall formulate a plan for trial, including a program for facilitating the admission of evidence The conference shall be attended by at least one of the attorneys who will conduct the trial for each of the parties and by any unrepresented parties	(d) **Pretrial Orders.** After any conference under this rule, the court should enter an order reciting the action taken This order controls the course of the action unless the court modifies it
(e) **Pretrial Orders.** After any conference held pursuant to this rule, an order shall be entered reciting the action taken This order shall control the subsequent course of the action unless modified by a subsequent order The order following a final pretrial conference shall be modified only to prevent manifest injustice	(e) **Final Pretrial Conference and Orders.** The court may hold a final pretrial conference to formulate a trial plan, including a plan to facilitate the admission of evidence The conference must be held as close to the start of trial as is reasonable, and must be attended by at least one attorney who will conduct the trial for each party and by any unrepresented party The court may modify an order made after a final pretrial conference only to prevent manifest injustice

(f) Sanctions. If a party or party's attorney fails to obey a scheduling or pretrial order, or if no appearance is made on behalf of a party at a scheduling or pretrial conference, or if a party or party's attorney is substantially unprepared to participate in the conference, or if a party or party's attorney fails to participate in good faith, the judge, upon motion or the judge's own initiative, may make such orders with regard thereto as are just, and among others any of the orders provided in Rule 37(b)(2)(B), (C), (D) In lieu of or in addition to any other sanction, the judge shall require the party or the attorney representing the party or both to pay the reasonable expenses incurred because of any noncompliance with this rule, including attorney's fees, unless the judge finds that the noncompliance was substantially justified or that other circumstances make an award of expenses unjust	**(f) Sanctions.** **(1)** ***In General.*** The court, on motion or on its own, may issue any just orders, including those authorized by Rule 37(b)(2)(B), (C), and (D), if a party or its attorney **(A)** fails to appear at a scheduling or other pretrial conference, **(B)** is substantially unprepared to participate — or does not participate in good faith — in a scheduling or other pretrial conference, or **(C)** fails to obey a scheduling or other pretrial order **(2)** ***Imposing Fees and Costs.*** Instead of or in addition to any other sanction, the court must require the party, its attorney, or both to pay the reasonable expenses — including attorney's fees — incurred because of any noncompliance with this rule, unless the noncompliance was substantially justified or other circumstances make an award of expenses unjust

COMMITTEE NOTE

The language of Rule 16 has been amended as part of the general restyling of the Civil 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

IV. PARTIES **Rule 17. Parties Plaintiff and Defendant; Capacity**	**TITLE IV. PARTIES** **Rule 17. The Plaintiff and Defendant; Capacity**
(a) Real Party in Interest. Every action shall be prosecuted in the name of the real party in interest An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in that person's own name without joining the party for whose benefit the action is brought, and when a statute of the United States so provides, an action for the use or benefit of another shall be brought in the name of the United States No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest, and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest	**(a) Real Party in Interest.** **(1)** ***Requirement and Designation.*** An action must be prosecuted in the name of the real party in interest The following may sue in their own names without joining the person for whose benefit the action is brought **(A)** an executor, **(B)** an administrator, **(C)** a guardian, **(D)** a bailee, **(E)** a trustee of an express trust, **(F)** a party with whom or in whose name a contract has been made for another's benefit, and **(G)** a party authorized by statute **(2)** ***Action in the Name of the United States for Another's Use or Benefit.*** When a United States statute so provides, an action for another's use or benefit must be brought in the name of the United States **(3)** ***Joinder of the Real Party in Interest.*** The court may not dismiss an action for failure to prosecute in the name of the real party in interest until, after objection, a reasonable time has been allowed for the real party in interest to ratify, join, or be substituted into the action After ratification, joinder, or substitution, the action proceeds as if it had been commenced by the real party in interest

(b) **Capacity to Sue or Be Sued.** The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of the individual's domicile The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held, except (1) that a partnership or other unincorporated association, which has no such capacity by the law of such state, may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States, and (2) that the capacity of a receiver appointed by a court of the United States to sue or be sued in a court of the United States is governed by Title 28, U S C , Sections 754 and 959(a)	(b) **Capacity to Sue or Be Sued.** Capacity to sue or be sued is determined as follows (1) for an individual who is not acting in a representative capacity, by the law of the individual's domicile, (2) for a corporation, by the law under which it was organized, and (3) for all other parties, by the law of the state where the court is held, except that **(A)** a partnership or other unincorporated association with no such capacity under that state's law may sue or be sued in its common name to enforce a substantive right existing under the United States Constitution or laws, and **(B)** 28 U S C §§ 754 and 959(a) govern the capacity of a receiver appointed by a United States court to sue or be sued in a United States court
(c) **Infants or Incompetent Persons.** Whenever an infant or incompetent person has a representative, such as a general guardian, committee, conservator, or other like fiduciary, the representative may sue or defend on behalf of the infant or incompetent person An infant or incompetent person who does not have a duly appointed representative may sue by a next friend or by a guardian ad litem The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person	(c) **Minor or Incompetent Person.** (1) ***With a Representative.*** The following representatives may sue or defend on behalf of a minor or an incompetent person **(A)** a general guardian, **(B)** a committee, **(C)** a conservator, or **(D)** a like fiduciary (2) ***Without a Representative.*** A minor or an incompetent person who does not have a duly appointed representative may sue by a next friend or by a guardian ad litem The court must appoint a guardian ad litem — or issue another appropriate order — to protect a minor or incompetent person who is unrepresented in an action

COMMITTEE NOTE

The language of Rule 17 has been amended as part of the general restyling of the Civil 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

Rule 18. Joinder of Claims and Remedies	Rule 18. Joinder of Claims and Remedies
(a) Joinder of Claims. A party asserting a claim to relief as an original claim, counterclaim, cross-claim, or third-party claim, may join, either as independent or as alternate claims, as many claims, legal, equitable, or maritime, as the party has against an opposing party	**(a) Joinder of Claims.** A party asserting a claim, counterclaim, crossclaim, or third-party claim may join, as independent or alternate claims, as many claims as it has against an opposing party
(b) Joinder of Remedies; Fraudulent Conveyances. Whenever a claim is one heretofore cognizable only after another claim has been prosecuted to a conclusion, the two claims may be joined in a single action, but the court shall grant relief in that action only in accordance with the relative substantive rights of the parties In particular, a plaintiff may state a claim for money and a claim to have set aside a conveyance fraudulent as to that plaintiff, without first having obtained a judgment establishing the claim for money	**(b) Joinder of Remedies; Contingent Claims.** A party may join two claims even though one of them is contingent on the disposition of the other, but the court may grant relief only in accordance with the parties' relative substantive rights In particular, a plaintiff may state a claim for money and a claim to set aside a conveyance that is fraudulent as to that plaintiff, without first obtaining a judgment for the money

COMMITTEE NOTE

The language of Rule 18 has been amended as part of the general restyling of the Civil 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.

Modification of the obscure former reference to a claim "heretofore cognizable only after another claim has been prosecuted to a conclusion" avoids any uncertainty whether Rule 18(b)'s meaning is fixed by retrospective inquiry from some particular date

Rule 19. Joinder of Persons Needed for Just Adjudication	Rule 19. Required Joinder of Parties
(a) Persons to Be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest If the person has not been so joined, the court shall order that the person be made a party If the person should join as a plaintiff but refuses to do so, the person may be made a defendant, or, in a proper case, an involuntary plaintiff If the joined party objects to venue and joinder of that party would render the venue of the action improper, that party shall be dismissed from the action	**(a) Persons Required to Be Joined if Feasible.** **(1)** ***Required Party.*** A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if **(A)** in that person's absence, the court cannot accord complete relief among existing parties, or **(B)** that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may **(i)** as a practical matter impair or impede the person's ability to protect the interest, or **(ii)** leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest **(2)** ***Joinder by Court Order.*** If a person has not been joined as required, the court must order that the person be made a party A person who refuses to join as a plaintiff may be made either a defendant or, in a proper case, an involuntary plaintiff **(3)** ***Venue.*** If a joined party objects to venue and the joinder would render venue improper, the court must dismiss that party
(b) Determination by Court Whenever Joinder Not Feasible. If a person as described in subdivision (a)(1)–(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable The factors to be considered by the court include first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties, second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided, third, whether a judgment rendered in the person's absence will be adequate, fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder	**(b) When Joinder Is Not Feasible.** If a person who is required to be joined if feasible cannot be joined, the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed The factors for the court to consider include **(1)** the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties, **(2)** the extent to which any prejudice could be lessened or avoided by **(A)** protective provisions in the judgment, **(B)** shaping the relief, or **(C)** other measures, **(3)** whether a judgment rendered in the person's absence would be adequate, and **(4)** whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder

(c) Pleading Reasons for Nonjoinder. A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in subdivision (a)(1)–(2) hereof who are not joined, and the reasons why they are not joined	**(c) Pleading Reasons for Nonjoinder.** When asserting a claim for relief, a party must state **(1)** the names, if known, of any persons who are required to be joined if feasible but are not joined, and **(2)** the reasons for not joining them
(d) Exception of Class Actions. This rule is subject to the provisions of Rule 23	**(d) Exception for Class Actions.** This rule is subject to Rule 23

COMMITTEE NOTE

The language of Rule 19 has been amended as part of the general restyling of the Civil 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

Former Rule 19(b) described the conclusion that an action should be dismissed for inability to join a Rule 19(a) party by carrying forward traditional terminology: "the absent person being thus regarded as indispensable." "Indispensable" was used only to express a conclusion reached by applying the tests of Rule 19(b) It has been discarded as redundant

Rule 20. Permissive Joinder of Parties	Rule 20. Permissive Joinder of Parties
(a) Permissive Joinder. All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action All persons (and any vessel, cargo or other property subject to admiralty process in rem) may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities	**(a) Persons Who May Join or Be Joined.** **(1)** ***Plaintiffs.*** Persons may join in one action as plaintiffs if **(A)** they assert any right to relief jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences, and **(B)** any legal or factual question common to all plaintiffs will arise in the action **(2)** ***Defendants.*** Persons — as well as a vessel, cargo, or other property subject to admiralty process in rem — may be joined in one action as defendants if **(A)** any right to relief is asserted against them jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences, and **(B)** any legal or factual question common to all defendants will arise in the action **(3)** ***Extent of Relief.*** Neither a plaintiff nor a defendant need be interested in obtaining or defending against all the relief demanded The court may grant judgment to one or more plaintiffs according to their rights, and against one or more defendants according to their liabilities
(b) Separate Trials. The court may make such orders as will prevent a party from being embarrassed, delayed, or put to expense by the inclusion of a party against whom the party asserts no claim and who asserts no claim against the party, and may order separate trials or make other orders to prevent delay or prejudice	**(b) Protective Measures.** The court may issue orders — including an order for separate trials — to protect an existing party against embarrassment, delay, expense, or other prejudice arising from the joinder of a person against whom the party asserts no claim and who asserts no claim against the party

COMMITTEE NOTE

The language of Rule 20 has been amended as part of the general restyling of the Civil 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

Rule 21. Misjoinder and Non-Joinder of Parties	Rule 21. Misjoinder and Nonjoinder of Parties
Misjoinder of parties is not ground for dismissal of an action Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just Any claim against a party may be severed and proceeded with separately	Misjoinder of parties is not a ground for dismissing an action On motion or on its own, the court may at any time, on just terms, add or drop a party Any claim against a party may be severed and adjudicated separately

COMMITTEE NOTE

The language of Rule 21 has been amended as part of the general restyling of the Civil 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

Rule 22. Interpleader	Rule 22. Interpleader
(1) Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability It is not ground for objection to the joinder that the claims of the several claimants or the titles on which their claims depend do not have a common origin or are not identical but are adverse to and independent of one another, or that the plaintiff avers that the plaintiff is not liable in whole or in part to any or all of the claimants A defendant exposed to similar liability may obtain such interpleader by way of cross-claim or counterclaim The provisions of this rule supplement and do not in any way limit the joinder of parties permitted in Rule 20 (2) The remedy herein provided is in addition to and in no way supersedes or limits the remedy provided by Title 28, U S C , §§ 1335, 1397, and 2361 Actions under those provisions shall be conducted in accordance with these rules	**(a) Grounds.** (1) ***By a Plaintiff.*** Persons with claims that may expose a plaintiff to double or multiple liability may be joined as defendants and required to interplead Joinder for interpleader is proper even though (A) the claims of the several claimants, or the titles on which their claims depend, lack a common origin or are adverse and independent rather than identical, or (B) the plaintiff denies liability in whole or in part to any or all of the claimants (2) ***By a Defendant.*** A defendant exposed to similar liability may seek interpleader through a crossclaim or counterclaim **(b) Relation to Other Rules and Statutes.** This rule supplements — and does not limit — the joinder of parties permitted by Rule 20 The remedy it provides is in addition to — and does not supersede or limit — the remedy provided by 28 U S C §§ 1335, 1397, and 2361 Actions under those statutes must be conducted under these rules

COMMITTEE NOTE

The language of Rule 22 has been amended as part of the general restyling of the Civil 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

Rule 23.1. Derivative Actions by Shareholders	Rule 23.1. Derivative Actions
In a derivative action brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association, the corporation or association having failed to enforce a right which may properly be asserted by it, the complaint shall be verified and shall allege (1) that the plaintiff was a shareholder or member at the time of the transaction of which the plaintiff complains or that the plaintiff's share or membership thereafter devolved on the plaintiff by operation of law, and (2) that the action is not a collusive one to confer jurisdiction on a court of the United States which it would not otherwise have The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action the plaintiff desires from the directors or comparable authority and, if necessary, from the shareholders or members, and the reasons for the plaintiff's failure to obtain the action or for not making the effort The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association The action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to shareholders or members in such manner as the court directs	**(a) Prerequisites.** This rule applies when one or more shareholders or members of a corporation or an unincorporated association bring a derivative action to enforce a right that the corporation or association may properly assert but has failed to enforce The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of shareholders or members that are similarly situated in enforcing the right of the corporation or association **(b) Pleading Requirements.** The complaint must be verified and must **(1)** allege that the plaintiff was a shareholder or member at the time of the transaction complained of, or that the plaintiff's share or membership later devolved on it by operation of law, **(2)** allege that the action is not a collusive one to confer jurisdiction that the court would otherwise lack, and **(3)** state with particularity **(A)** the efforts, if any, made by the plaintiff to obtain the desired action from the directors or comparable authority and, if necessary, from the shareholders or members, and **(B)** the reasons for not obtaining the action or not making the effort **(c) Settlement, Dismissal, and Compromise.** A derivative action may be settled, voluntarily dismissed, or compromised only with the court's approval Notice of a proposed settlement, voluntary dismissal, or compromise must be given to shareholders or members in the manner that the court directs

COMMITTEE NOTE

The language of Rule 23 1 has been amended as part of the general restyling of the Civil 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.

Rule 23.2. Actions Relating to Unincorporated Associations	Rule 23.2. Actions Relating to Unincorporated Associations
An action brought by or against the members of an unincorporated association as a class by naming certain members as representative parties may be maintained only if it appears that the representative parties will fairly and adequately protect the interests of the association and its members In the conduct of the action the court may make appropriate orders corresponding with those described in Rule 23(d), and the procedure for dismissal or compromise of the action shall correspond with that provided in Rule 23(e)	This rule applies to an action brought by or against the members of an unincorporated association as a class by naming certain members as representative parties The action may be maintained only if it appears that those parties will fairly and adequately protect the interests of the association and its members In conducting the action, the court may issue any appropriate orders corresponding with those in Rule 23(d), and the procedure for settlement, voluntary dismissal, or compromise must correspond with the procedure in Rule 23(e)

COMMITTEE NOTE

The language of Rule 23 2 has been amended as part of the general restyling of the Civil 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.

Rule 24. Intervention	Rule 24. Intervention
(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action (1) when a statute of the United States confers an unconditional right to intervene, or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties	**(a) Intervention of Right.** Upon timely motion, the court must permit anyone to intervene who **(1)** is given an unconditional right to intervene by a United States statute, or **(2)** claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposition of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent the movant's interest
(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action (1) when a statute of the United States confers a conditional right to intervene, or (2) when an applicant's claim or defense and the main action have a question of law or fact in common When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties	**(b) Permissive Intervention.** **(1)** ***In General.*** Upon timely motion, the court may permit anyone to intervene who **(A)** is given a conditional right to intervene by a United States statute, or **(B)** has a claim or defense that shares a common question of law or fact with the main action **(2)** ***By a Government Officer or Agency.*** Upon timely motion, the court may permit a federal or state governmental officer or agency to intervene if a party's claim or defense is based on **(A)** a statute or executive order administered by the officer or agency, or **(B)** any regulation, order, requirement, or agreement issued or made under the statute or executive order **(3)** ***Delay or Prejudice.*** In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights

(c) **Procedure.** A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5 The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought The same procedure shall be followed when a statute of the United States gives a right to intervene When the constitutionality of an act of Congress affecting the public interest is drawn in question in any action in which the United States or an officer, agency, or employee thereof is not a party, the court shall notify the Attorney General of the United States as provided in Title 28, U S C § 2403 When the constitutionality of any statute of a State affecting the public interest is drawn in question in any action in which that State or any agency, officer, or employee thereof is not a party, the court shall notify the attorney general of the State as provided in Title 28, U S C § 2403 A party challenging the constitutionality of legislation should call the attention of the court to its consequential duty, but failure to do so is not a waiver of any constitutional right otherwise timely asserted	(c) **Procedure.** (1) ***Notice and Pleading Required.*** A motion to intervene must be served on the parties as provided in Rule 5 The motion must state the grounds for intervention and be accompanied by a pleading that sets forth the claim or defense for which intervention is sought (2) ***Challenge to a Statute; Court's Duty.*** When the constitutionality of a statute affecting the public interest is questioned in any action, the court must, as provided in 28 U S C § 2403, notify (A) the Attorney General of the United States, if an Act of Congress is challenged and neither the United States nor any of its officers, agencies, or employees is a party, and (B) the Attorney General of the state, if a state statute is challenged and neither the state nor any of its officers, agencies, or employees is a party (3) ***Party's Responsibility.*** A party challenging the constitutionality of a statute should call the court's attention to its duty under Rule 24(c)(2), but failing to do so does not waive any constitutional right otherwise timely asserted

COMMITTEE NOTE

The language of Rule 24 has been amended as part of the general restyling of the Civil 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

The former rule stated that the same procedure is followed when a United States statute gives a right to intervene. This statement is deleted because it added nothing

Rule 25. Substitution of Parties	Rule 25. Substitution of Parties
(a) Death. **(1)** If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties The motion for substitution may be made by any party or by the successors or representatives of the deceased party and, together with the notice of hearing, shall be served on the parties as provided in Rule 5 and upon persons not parties in the manner provided in Rule 4 for the service of a summons, and may be served in any judicial district Unless the motion for substitution is made not later than 90 days after the death is suggested upon the record by service of a statement of the fact of the death as provided herein for the service of the motion, the action shall be dismissed as to the deceased party **(2)** In the event of the death of one or more of the plaintiffs or of one or more of the defendants in an action in which the right sought to be enforced survives only to the surviving plaintiffs or only against the surviving defendants, the action does not abate The death shall be suggested upon the record and the action shall proceed in favor of or against the surviving parties	**(a) Death.** **(1)** ***Substitution if the Claim Is Not Extinguished*** If a party dies and the claim is not extinguished, the court may order substitution of the proper party A motion for substitution may be made by any party or by the decedent's successor or representative If the motion is not made within 90 days after service of a statement noting the death, the action must be dismissed with respect to the decedent **(2)** ***Continuation Among the Remaining Parties.*** After a party's death, if the right sought to be enforced survives only to or against the remaining parties, the action does not abate, but proceeds in favor of or against the remaining parties The death should be noted on the record **(3)** ***Service.*** A motion to substitute, together with a notice of hearing, must be served on the parties as provided in Rule 5 and on nonparties as provided in Rule 4 A statement noting death must be served in the same manner Service may be made in any judicial district
(b) Incompetency. If a party becomes incompetent, the court upon motion served as provided in subdivision (a) of this rule may allow the action to be continued by or against the party's representative	**(b) Incompetency.** If a party becomes incompetent, the court may, on motion, allow the action to be continued by or against the party's representative The motion must be served as provided in Rule 25(a)(3)
(c) Transfer of Interest. In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party Service of the motion shall be made as provided in subdivision (a) of this rule	**(c) Transfer of Interest.** If an interest is transferred, the action may be continued by or against the original party unless the court, on motion, directs the transferee to be substituted in the action or joined with the original party The motion must be served as provided in Rule 25(a)(3)

(d) Public Officers; Death or Separation From Office. **(1)** When a public officer is a party to an action in an official capacity and during its pendency dies, resigns, or otherwise ceases to hold office, the action does not abate and the officer's successor is automatically substituted as a party Proceedings following the substitution shall be in the name of the substituted party, but any misnomer not affecting the substantial rights of the parties shall be disregarded An order of substitution may be entered at any time, but the omission to enter such an order shall not affect the substitution **(2)** A public officer who sues or is sued in an official capacity may be described as a party by the officer's official title rather than by name, but the court may require the officer's name to be added	**(d) Public Officers; Death or Separation from Office.** **(1)** ***Automatic Substitution.*** An action does not abate when a public officer who is a party in an official capacity dies, resigns, or otherwise ceases to hold office while the action is pending The officer's successor is automatically substituted as a party Later proceedings should be in the substituted party's name, but any misnomer not affecting the parties' substantial rights must be disregarded The court may order substitution at any time, but the absence of such an order does not affect the substitution **(2)** ***Officer's Name.*** A public officer who sues or is sued in an official capacity may be designated by official title rather than by name, but the court may order that the officer's name be added

COMMITTEE NOTE

The language of Rule 25 has been amended as part of the general restyling of the Civil 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.

STYLE 458

Style Draft of Rules 26 through 37 and 45, Federal Rules of Civil Procedure

As revised by the Advisory Committee on Civil Rules and further revised by the Style Subcommittee of the Committee on Rules of Practice and Procedure

(with Committee Notes)

November 13, 2003

V. DEPOSITIONS AND DISCOVERY **Rule 26. General Provisions Governing Discovery; Duty of Disclosure**	**V. DISCLOSURES AND DISCOVERY** **Rule 26. Duty to Disclose; General Provisions Governing Discovery**
(a) Required Disclosures; Methods to Discover Additional Matter. **(1) Initial Disclosures.** Except in categories of proceedings specified in Rule 26(a)(1)(E), or to the extent otherwise stipulated or directed by order, a party must, without awaiting a discovery request, provide to other parties **(A)** the name and, if known, the address and telephone number of each individual likely to have discoverable information that the disclosing party may use to support its claims or defenses, unless solely for impeachment, identifying the subjects of the information, **(B)** a copy of, or a description by category and location of, all documents, data compilations, and tangible things that are in the possession, custody, or control of the party and that the disclosing party may use to support its claims or defenses, unless solely for impeachment,	**(a) Required Disclosures.** **(1)** ***Initial Disclosures.*** **(A)** *In General* Except as exempted by Rule 26(a)(1)(B) or as otherwise stipulated by the parties or ordered by the court, a party must, without awaiting a discovery request, provide to the other parties **(i)** the name and, if known, the address and telephone number of each individual likely to have discoverable information — along with the subjects of that information — that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment, **(ii)** a copy — or a description by category and location — of all documents, data compilations, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment,
(C) a computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rule 34 the documents or other evidentiary material, not privileged or protected from disclosure, on which such computation is based, including materials bearing on the nature and extent of injuries suffered, and **(D)** for inspection and copying as under Rule 34 any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment	**(iii)** a computation of each category of damages claimed by the disclosing party — and also make available for inspection and copying as under Rule 34 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation of damages is based, including materials bearing on the nature and extent of injuries suffered, and **(iv)** for inspection and copying as under Rule 34, any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment or to indemnify or reimburse for payments made to satisfy the judgment

(E) The following categories of proceedings are exempt from initial disclosure under Rule 26(a)(1) (i) an action for review on an administrative record, (ii) a petition for habeas corpus or other proceeding to challenge a criminal conviction or sentence, (iii) an action brought without counsel by a person in custody of the United States, a state, or a state subdivision, (iv) an action to enforce or quash an administrative summons or subpoena, (v) an action by the United States to recover benefit payments, (vi) an action by the United States to collect on a student loan guaranteed by the United States, (vii) a proceeding ancillary to proceedings in other courts, and (viii) an action to enforce an arbitration award	**(B)** *Proceedings Exempt from Initial Disclosure* The following categories of proceedings are exempt from initial disclosure **(i)** an action for review on an administrative record, **(ii)** a petition for habeas corpus or any other proceeding to challenge a criminal conviction or sentence, **(iii)** an action brought without counsel by a person in the custody of the United States, a state, or a state subdivision, **(iv)** an action to enforce or quash an administrative summons or subpoena, **(v)** an action by the United States to recover benefit payments, **(vi)** an action by the United States to collect on a student loan guaranteed by the United States, **(vii)** a proceeding ancillary to a proceeding in another court, and **(viii)** an action to enforce an arbitration award

These disclosures must be made at or within 14 days after the Rule 26(f) conference unless a different time is set by stipulation or court order, or unless a party objects during the conference that initial disclosures are not appropriate in the circumstances of the action and states the objection in the Rule 26(f) discovery plan In ruling on the objection, the court must determine what disclosures – if any – are to be made, and set the time for disclosure Any party first served or otherwise joined after the Rule 26(f) conference must make these disclosures within 30 days after being served or joined unless a different time is set by stipulation or court order A party must make its initial disclosures based on the information then reasonably available to it and is not excused from making its disclosures because it has not fully completed its investigation of the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures	**(C)** *Time for Initial Disclosures — In General* A party must make the initial disclosures at or within 14 days after the Rule 26(f) conference unless a different time is set by stipulation or court order, or unless a party objects during the conference that initial disclosures are not appropriate in the circumstances of the action and states the objection in the Rule 26(f) discovery plan In ruling on the objection, the court must determine what disclosures, if any, are to be made and must set the time for disclosure **(D)** *Time for Initial Disclosures — For Parties Served or Joined Later* A party that is first served or otherwise joined after the Rule 26(f) conference must make the initial disclosures within 30 days after being served or joined unless a different time is set by stipulation or court order **(E)** *Basis for Initial Disclosure, Unacceptable Excuses* A party must make its initial disclosures based on the information then reasonably available to it A party is not excused from making its disclosures because it has not fully completed its investigation of the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures

(2) Disclosure of Expert Testimony. **(A)** In addition to the disclosures required by paragraph (1), a party shall disclose to other parties the identity of any person who may be used at trial to present evidence under Rules 702, 703, or 705 of the Federal Rules of Evidence **(B)** Except as otherwise stipulated or directed by the court, this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor, the data or other information considered by the witness in forming the opinions, any exhibits to be used as a summary of or support for the opinions, the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years, the compensation to be paid for the study and testimony, and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years	**(2)** ***Disclosure of Expert Testimony.*** **(A)** *In General* In addition to the disclosures required by Rule 26(a)(1), a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rules of Evidence 702, 703, or 705 **(B)** *Written Report* Unless otherwise stipulated by the parties or ordered by the court, this disclosure must be accompanied by a written report — prepared and signed by the witness — if the witness is one retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony The report must contain **(i)** a complete statement of all opinions the witness will express and of the basis and reasons for them, **(ii)** the data or other information considered by the witness in forming them, **(iii)** any exhibits that will be used to summarize or support them, **(iv)** the witness's qualifications, including a list of all publications authored in the previous ten years, **(v)** a list of all other cases in which, during the previous four years, the witness testified as an expert at trial or by deposition, and **(vi)** a statement of the witness's compensation for study and testimony in the case
(C) These disclosures shall be made at the times and in the sequence directed by the court In the absence of other directions from the court or stipulation by the parties, the disclosures shall be made at least 90 days before the trial date or the date the case is to be ready for trial or, if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under paragraph (2)(B), within 30 days after the disclosure made by the other party The parties shall supplement these disclosures when required under subdivision (e)(1)	**(C)** *Time for Disclosing Expert Testimony* A party must make these disclosures at the times and in the sequence that the court orders Absent a stipulation by the parties or a court order, the disclosures must be made **(i)** at least 90 days before the date set for trial or for the case to be ready for trial, or **(ii)** if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under Rule 26(a)(2)(B), within 30 days after the other party's disclosure **(D)** ***Supplementing the Disclosure.*** The parties must supplement these disclosures when required under Rule 26(e)

(3) Pretrial Disclosures. In addition to the disclosures required by Rule 26(a)(1) and (2), a party must provide to other parties and promptly file with the court the following information regarding the evidence that it may present at trial other than solely for impeachment **(A)** the name and, if not previously provided, the address and telephone number of each witness, separately identifying those whom the party expects to present and those whom the party may call if the need arises, **(B)** the designation of those witnesses whose testimony is expected to be presented by means of a deposition and, if not taken stenographically, a transcript of the pertinent portions of the deposition testimony, and **(C)** an appropriate identification of each document or other exhibit, including summaries of other evidence, separately identifying those which the party expects to offer and those which the party may offer if the need arises Unless otherwise directed by the court, these disclosures must be made at least 30 days before trial Within 14 days thereafter, unless a different time is specified by the court, a party may serve and promptly file a list disclosing (i) any objections to the use under Rule 32(a) of a deposition designated by another party under Rule 26(a)(3)(B), and (ii) any objection, together with the grounds therefor, that may be made to the admissibility of materials identified under Rule 26(a)(3)(C) Objections not so disclosed, other than objections under Rules 402 and 403 of the Federal Rules of Evidence, are waived unless excused by the court for good cause	**(3)** ***Pretrial Disclosures.*** **(A)** *In General* In addition to the disclosures required by Rule 26(a)(1) and (2), a party must provide to the other parties and promptly file the following information about the evidence that it may present at trial other than solely for impeachment **(i)** the name and, if not previously provided, the address and telephone number of each witness — separately identifying those the party expects to present and those it may call if the need arises, **(ii)** the designation of those witnesses whose testimony the party expects to present by deposition and, if not taken stenographically, a transcript of the pertinent parts of the deposition, and **(iii)** an appropriate identification of each document or other exhibit, including summaries of other evidence — separately identifying those items the party expects to offer and those it may offer if the need arises **(B)** *Time for Pretrial Disclosures, Objections* Unless the court directs otherwise, these disclosures must be made at least 30 days before trial Within 14 days after they are made, unless the court sets a different time, a party may serve and promptly file a list that states the following objections any objections to the use under Rule 32(a) of a deposition designated by another party under Rule 26(a)(3)(A)(ii), and any objection, together with the grounds for it, that may be made to the admissibility of materials identified under Rule 26(a)(3)(A)(iii) An objection not so made — except for one under Federal Rule of Evidence 402 or 403 — is waived unless excused by the court for good cause
(4) Form of Disclosures. Unless the court orders otherwise, all disclosures under Rules 26(a)(1) through (3) must be made in writing, signed, and served **(5) Methods to Discover Additional Matter** Parties may obtain discovery by one or more of the following methods depositions upon oral examination or written questions, written interrogatories, production of documents or things or permission to enter upon land or other property under Rule 34 or 45(a)(1)(C), for inspection and other purposes, physical and mental examinations, and requests for admission	**(4)** ***Form of Disclosures.*** Unless the court orders otherwise, all disclosures under Rule 26(a) must be in writing, signed, and served

(b) Discovery Scope and Limits. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows **(1) In General.** Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence All discovery is subject to the limitations imposed by Rule 26(b)(2)(i), (ii), and (iii)	**(b) Discovery Scope and Limits.** **(1)** ***Scope in General.*** Unless otherwise limited by court order, the scope of discovery is as follows Parties may obtain discovery regarding any nonprivileged matter that is relevant to the claim or defense of any party — including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence All discovery is subject to the limitations imposed by Rule 26(b)(2)(B)(i), (ii), and (iii)
(2) Limitations. By order, the court may alter the limits in these rules on the number of depositions and interrogatories or the length of depositions under Rule 30 By order or local rule, the court may also limit the number of requests under Rule 36 The frequency or extent of use of the discovery methods otherwise permitted under these rules and by any local rule shall be limited by the court if it determines that (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive, (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought, or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues The court may act upon its own initiative after reasonable notice or pursuant to a motion under Rule 26(c)	**(2)** ***Limitations on Frequency and Extent.*** **(A)** *When Permitted* By order, the court may alter the limits in these rules on the number of depositions and interrogatories or on the length of depositions under Rule 30 By order or local rule, the court may also limit the number of requests under Rule 36 **(B)** *When Required* The court must limit the frequency or extent of discovery otherwise permitted by these rules or by local rule if it determines that **(i)** the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive, **(ii)** the party seeking discovery has had ample opportunity by discovery in the action to obtain the information, or **(iii)** the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the discovery in resolving the issues **(C)** *On Motion or the Court's Own Initiative* The court may act on motion or on its own after reasonable notice

(3) Trial Preparation: Materials. Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person If the request is refused, the person may move for a court order The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion For purposes of this paragraph, a statement previously	**(3) *Trial Preparation: Materials.*** **(A)** *Documents and Tangible Things* Generally, a party may not discover documents and tangible things otherwise discoverable under Rule 26(b)(1) and prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) But, subject to Rule 26(b)(4), those materials may be discovered if the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain the substantial equivalent of the materials by other means **(B)** *Protection Against Disclosure* If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation **(C)** *Previous Statement* Any party or other person may, on request and without the showing required under Rule 26(b)(3)(A), obtain the person's own previous statement about the action or its subject matter If the request is refused, the person may move for a court order, and Rule 37(a)(5) applies to the award of expenses A previous statement is either

made is (A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded **(4) Trial Preparation: Experts.** **(A)** A party may depose any person who has been identified as an expert whose opinions may be presented at trial If a report from the expert is required under subdivision (a)(2)(B), the deposition shall not be conducted until after the report is provided **(B)** A party may, through interrogatories or by deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means **(C)** Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under this subdivision, and (ii) with respect to discovery obtained under subdivision (b)(4)(B) of this rule the court shall require the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert	**(i)** a written statement that the person has signed or otherwise adopted or approved, or **(ii)** a contemporaneous stenographic, mechanical, electrical, or other recording — or a transcription of it — that recites substantially verbatim the person's oral statement **(4)** ***Trial Preparation: Experts.*** **(A)** *Expert Who May Testify* A party may depose any person who has been identified as an expert whose opinions may be presented at trial If Rule 26(a)(2)(B) requires a report from the expert, the deposition may be conducted only after the report is provided **(B)** *Expert Employed Only for Trial Preparation* Generally, a party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial But a party may do so **(i)** as provided in Rule 35(b), or **(ii)** on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means **(C)** *Payment* Unless manifest injustice would result, the court must require that the party seeking discovery **(i)** pay the expert a reasonable fee for time spent in responding to discovery under Rule 26(b)(4)(A) or (B), and **(ii)** with respect to discovery under Rule 26(b)(4)(B), also pay the other party a fair portion of the fees and expenses it reasonably incurred in obtaining the expert's facts and opinions
(5) Claims of Privilege or Protection of Trial Preparation Materials. When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection	**(5)** ***Claiming Privilege or Protecting Trial-Preparation Materials.*** When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must **(A)** expressly make the claim, and **(B)** describe the nature of the documents, communications, or things not produced or disclosed — and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection

(c) Protective Orders. Upon motion by a party or by the person from whom discovery is sought, accompanied by a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following **(1)** that the disclosure or discovery not be had, **(2)** that the disclosure or discovery may be had only on specified terms and conditions, including a designation of the time or place, **(3)** that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery, **(4)** that certain matters not be inquired into, or that the scope of the disclosure or discovery be limited to certain matters,	**(c) Protective Orders.** **(1)** ***In General.*** A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending — or as an alternative on matters relating to a deposition, in the court for the district where the deposition will be taken The motion must be accompanied by a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action The court may, for good cause, make any order that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following **(A)** forbidding the disclosure or discovery, **(B)** specifying terms, including time and place, for the disclosure or discovery, **(C)** prescribing a discovery method other than the one selected by the party seeking discovery, **(D)** forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters,
(5) that discovery be conducted with no one present except persons designated by the court, **(6)** that a deposition, after being sealed, be opened only by order of the court, **(7)** that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way, and **(8)** that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or other person provide or permit discovery The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion	**(E)** designating the persons who may be present while the discovery is conducted, **(F)** directing that a deposition be sealed and opened only on court order, **(G)** directing that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way, and **(H)** directing that the parties simultaneously file specified documents or information enclosed in sealed envelopes, to be opened as the court directs **(2)** ***Ordering Discovery.*** If a motion for a protective order is wholly or partly denied, the court may, on just terms, order that any party or person provide or permit discovery **(3)** ***Awarding Expenses.*** Rule 37(a)(5) applies to the award of expenses

(d) Timing and Sequence of Discovery. Except in categories of proceedings exempted from initial disclosure under Rule 26(a)(1)(E), or when authorized under these rules or by order or agreement of the parties, a party may not seek discovery from any source before the parties have conferred as required by Rule 26(f) Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence, and the fact that a party is conducting discovery, whether by deposition or otherwise, does not operate to delay any other party's discovery	**(d) Timing and Sequence of Discovery.** **(1)** ***Timing.*** A party may not seek discovery from any source before the parties have conferred as required by Rule 26(f), except in categories of proceedings exempted from initial disclosure under Rule 26(a)(1)(B), or when authorized by these rules, by order, or by agreement of the parties **(2)** ***Sequence.*** Unless, on motion, the court orders otherwise for the parties' and witnesses' convenience and in the interests of justice **(A)** methods of discovery may be used in any sequence, and **(B)** discovery by one party does not require any other party to delay its discovery

(e) Supplementation of Disclosures and Responses. A party who has made a disclosure under subdivision (a) or responded to a request for discovery with a disclosure or response is under a duty to supplement or correct the disclosure or response to include information thereafter acquired if ordered by the court or in the following circumstances **(1)** A party is under a duty to supplement at appropriate intervals its disclosures under subdivision (a) if the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing With respect to	**(e) Supplementing Disclosures and Responses.** **(1)** ***In General.*** A party who has made a disclosure under Rule 26(a) — or who has responded to an interrogatory, request for production, or request for admission — must supplement or correct its disclosure or response **(A)** in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or correcting information has not otherwise been made known to the other parties during the discovery process or in writing, and **(B)** as ordered by the court
testimony of an expert from whom a report is required under subdivision (a)(2)(B) the duty extends both to information contained in the report and to information provided through a deposition of the expert, and any additions or other changes to this information shall be disclosed by the time the party's disclosures under Rule 26(a)(3) are due **(2)** A party is under a duty seasonably to amend a prior response to an interrogatory, request for production, or request for admission if the party learns that the response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing	**(2)** ***Expert Witness.*** For an expert whose report must be disclosed under Rule 26(a)(2)(B), the party's duty to supplement extends both to information included in the report and to information given during the expert's deposition Any additions or changes to this information must be disclosed by the time the party's pretrial disclosures under Rule 26(a)(3) are due

(f) Conference of Parties; Planning for Discovery. Except in categories of proceedings exempted from initial disclosure under Rule 26(a)(1)(E) or when otherwise ordered, the parties must, as soon as practicable and in any event at least 21 days before a scheduling conference is held or a scheduling order is due under Rule 16(b), confer to consider the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case, to make or arrange for the disclosures required by Rule 26(a)(1), and to develop a proposed discovery plan that indicates the parties' views and proposals concerning **(1)** what changes should be made in the timing, form, or requirement for disclosures under Rule 26(a), including a statement as to when disclosures under Rule 26(a)(1) were made or will be made, **(2)** the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused upon particular issues, **(3)** what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed, and **(4)** any other orders that should be entered by the court under Rule 26(c) or under Rule 16(b) and (c) The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging the conference, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 14 days after the conference a written report outlining the plan A court may order that the parties or attorneys attend the conference in person If necessary to	**(f) Conference of the Parties; Planning for Discovery.** **(1)** ***Conference Timing.*** Except in categories of proceedings exempted from initial disclosure under Rule 26(a)(1)(B) or when otherwise ordered, the parties must confer as soon as practicable — and in any event at least 21 days before a scheduling conference is held or a scheduling order is due under Rule 16(b) **(2)** ***Conference Content; Parties' Responsibilities.*** In conferring, the parties must consider the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case, make or arrange for the disclosures required by Rule 26(a)(1), and develop a proposed discovery plan The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging the conference, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 14 days after the conference a written report outlining the plan The court may order the parties or attorneys to attend the conference in person **(3)** ***Discovery Plan.*** A discovery plan must state the parties' views and proposals on **(A)** what changes should be made in the timing, form, or requirement for disclosures under Rule 26(a), including a statement of when initial disclosures were made or will be made, **(B)** the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused on particular issues, **(C)** what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed, and **(D)** any other orders that should be entered by the court under Rule 26(c) or under Rule 16(b) and (c)
comply with its expedited schedule for Rule 16(b) conferences, a court may by local rule (i) require that the conference between the parties occur fewer than 21 days before the scheduling conference is held or a scheduling order is due under Rule 16(b), and (ii) require that the written report outlining the discovery plan be filed fewer than 14 days after the conference between the parties, or excuse the parties from submitting a written report and permit them to report orally on their discovery plan at the Rule 16(b) conference	**(4)** ***Expedited Schedule.*** If necessary to comply with its expedited schedule for Rule 16(b) conferences, a court may by local rule **(A)** require the conference to occur fewer than 21 days before the scheduling conference is held or a scheduling order is due under Rule 16(b), and **(B)** require the written report outlining the discovery plan to be filed fewer than 14 days after the conference, or excuse the parties from submitting a written report and permit them to report orally on their discovery plan at the Rule 16(b) conference

(g) Signing of Disclosures, Discovery Requests, Responses, and Objections. **(1)** Every disclosure made pursuant to subdivision (a)(1) or subdivision (a)(3) shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated An unrepresented party shall sign the disclosure and state the party's address The signature of the attorney or party constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the disclosure is complete and correct as of the time it is made **(2)** Every discovery request, response, or objection made by a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated An unrepresented party shall sign the request, response, or objection and state the party's address The signature of the attorney or party constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the request, response, or objection is	**(g) Signing Disclosures, Discovery Requests, Responses, and Objections.** **(1)** ***Signature Required; Effect of Signature.*** Every disclosure under Rule 26(a)(1) or (a)(3) and every discovery request, response, or objection must be signed by at least one attorney of record in the attorney's own name — or by the party personally, if unrepresented — and must state the signer's address By signing, an attorney or party certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry **(A)** with respect to a disclosure, it is complete and correct as of the time it is made, and
(A) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, **(B)** not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation, and **(C)** not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation	**(B)** with respect to a discovery request, response, or objection, it is **(i)** not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the litigation costs, **(ii)** consistent with these rules and warranted by existing law or a good-faith argument for extending, modifying, or reversing existing law, and **(iii)** neither unreasonable nor unduly burdensome or expensive, given the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the litigation

If a request, response, or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, response, or objection, and a party shall not be obligated to take any action with respect to it until it is signed (3) If without substantial justification a certification is made in violation of the rule, the court, upon motion or upon its own initiative, shall impose upon the person who made the certification, the party on whose behalf the disclosure, request, response, or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney's fee	(2) ***Failure to Sign.*** The court must strike an unsigned disclosure, request, response, or objection unless the omission is corrected promptly after being called to the attorney's or party's attention Until the signature is provided, the other party has no duty to respond (3) ***Sanction for Improper Certification.*** If a certification is made in violation of this rule without substantial justification, the court, on motion or on its own, must impose an appropriate sanction on the signer, the party on whose behalf the signer was acting, or both The sanction may include an order to pay the reasonable expenses caused by the violation, including a reasonable attorney's fee

COMMITTEE NOTE

The language of Rule 26 has been amended as part of the general restyling of the Civil 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

Former Rule 26(a)(5) served only as an index of the discovery methods provided by later rules It was deleted as redundant.

Former Rule 26(b)(1) began with a general statement of the scope of discovery that appeared to function as a preface to each of the five numbered paragraphs that followed This preface has been shifted to the text of paragraph (1) because it does not accurately reflect the limits embodied in paragraphs (2), (3), or (4), and because paragraph (5) does not address the scope of discovery

The reference to discovery of "books" in former Rule 26(b)(1) was deleted to achieve consistent expression throughout the discovery rules. Books remain a proper subject of discovery

Amended Rule 26(b)(3) states that a party may obtain a copy of the party's own previous statement "on request." Former Rule 26(b)(3) expressly made the request procedure available to a nonparty witness, but did not describe the procedure to be used by a party. This apparent gap is closed by adopting the request procedure, which ensures that a party need not invoke Rule 34 to obtain a copy of the party's own statement

Rule 26(e) stated the duty to supplement or correct a disclosure or discovery response "to include information thereafter acquired." This apparent limit is not reflected in practice; parties recognize the duty to supplement or correct by providing information that was not originally provided although it was available at the time of the initial disclosure or response. These words are deleted to reflect the actual meaning of the present rule

Former Rule 26(e) used different phrases to describe the time to supplement or correct a disclosure or discovery response. Disclosures were to be supplemented "at appropriate intervals." A prior discovery response must be "seasonably * * * amend[ed]." The fine distinction between these phrases has not been observed in practice Amended Rule 26(e)(1)(A) uses the same phrase for disclosures and discovery responses. The party must supplement or correct "in a timely manner."

Former Rule 26(g)(1) did not call for striking an unsigned disclosure. The omission was an obvious drafting oversight. Amended Rule 26(g)(2) includes disclosures in the list of matters that the court must strike unless a signature is provided "promptly after being called to the attorney's or party's attention."

Rule 27. Depositions before Action or Pending Appeal	Rule 27. Depositions to Perpetuate Testimony
(a) Before Action. **(1) Petition.** A person who desires to perpetuate testimony regarding any matter that may be cognizable in any court of the United States may file a verified petition in the United States district court in the district of the residence of any expected adverse party The petition shall be entitled in the name of the petitioner and shall show 1, that the petitioner expects to be a party to an action cognizable in a court of the United States but is presently unable to bring it or cause it to be brought, 2, the subject matter of the expected action and the petitioner's interest therein, 3, the facts which the petitioner desires to establish by the proposed testimony and the reasons for desiring to perpetuate it, 4, the names or a description of the persons the petitioner expects will be adverse parties and their addresses so far as known, and 5, the names and addresses of the persons to be examined and the substance of the testimony which the petitioner expects to elicit from each, and shall ask for an order authorizing the petitioner to take the depositions of the persons to be examined named in the petition, for the purpose of perpetuating their testimony	**(a) Before an Action Is Filed.** **(1)** ***Petition.*** A person who wants to perpetuate testimony about any matter cognizable in a United States court may file a verified petition in the district court for the district where any expected adverse party resides The petition must ask for an order authorizing the petitioner to depose the named persons in order to perpetuate their testimony The petition must be titled in the petitioner's name and must show **(A)** that the petitioner expects to be a party to an action cognizable in a United States court but cannot presently bring it or cause it to be brought, **(B)** the subject matter of the expected action and the petitioner's interest, **(C)** the facts that the petitioner wants to establish by the proposed testimony and the reasons to perpetuate it, **(D)** the names or a description of the persons whom the petitioner expects to be adverse parties and their addresses, so far as known, and **(E)** the name, address, and expected substance of the testimony of each deponent

(2) **Notice and Service.** The petitioner shall thereafter serve a notice upon each person named in the petition as an expected adverse party, together with a copy of the petition, stating that the petitioner will apply to the court, at a time and place named therein, for the order described in the petition At least 20 days before the date of hearing the notice shall be served either within or without the district or state in the manner provided in Rule 4(d) for service of summons, but if such service cannot with due diligence be made upon any expected adverse party named in the petition, the court may make such order as is just for service by publication or otherwise, and shall appoint, for persons not served in the manner provided in Rule 4(d), an attorney who shall represent them, and, in case they are not otherwise represented, shall cross-examine the deponent If any expected adverse party is a minor or incompetent the provisions of Rule 17(c) apply	(2) ***Notice and Service.***[1] At least 20 days before the hearing date, the petitioner must serve each expected adverse party with a copy of the petition and a notice stating the time and place of the hearing The notice may be served either inside or outside the district or state under Rule 4 If that service cannot be made with due diligence, the court may order service by publication or otherwise The court must appoint an attorney for a person not served under Rule 4, the attorney may cross-examine the deponent if the person is not otherwise represented Rule 17(c) applies if any expected adverse party is a minor or is incompetent
(3) **Order and Examination.** If the court is satisfied that the perpetuation of the testimony may prevent a failure or delay of justice, it shall make an order designating or describing the persons whose depositions may be taken and specifying the subject matter of the examination and whether the depositions shall be taken upon oral examination or written interrogatories The depositions may then be taken in accordance with these rules, and the court may make orders of the character provided for by Rules 34 and 35 For the purpose of applying these rules to depositions for perpetuating testimony, each reference therein to the court in which the action is pending shall be deemed to refer to the court in which the petition for such deposition was filed (4) **Use of Deposition.** If a deposition to perpetuate testimony is taken under these rules or if, although not so taken, it would be admissible in evidence in the courts of the state in which it is taken, it may be used in any action involving the same subject matter subsequently brought in a United States district court, in accordance with the provisions of Rule 32(a)	(3) ***Order and Examination.*** If satisfied that perpetuating the testimony may prevent a failure or delay of justice, the court must enter an order that designates or describes the persons whose depositions may be taken, specifies the subject matter of the examinations, and states whether the depositions will be taken orally or by written interrogatories The depositions may then be taken according to these rules, and the court may make orders like those authorized by Rules 34 and 35 References in these rules to the court in which an action is pending means, for purposes of this rule, the court in which the petition for the deposition was filed (4) ***Using the Deposition.*** A deposition to perpetuate testimony may be used under Rule 32(a) in any later-filed district-court action involving the same subject matter if the deposition either was taken under these rules or, although not so taken, would be admissible in evidence in the courts of the state where it was taken

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1 The following substantive revision of Rule 27(a)(2) was published for public comment in August 2003

> (2) **Notice and Service.** At least 20 days before the hearing date, the petitioner must serve each expected adverse party with a copy of the petition and a notice stating the time and place of the hearing on the petition The notice may be served either inside or outside the district or state in the manner provided in Rule 4 If service cannot be made with due diligence on an expected adverse party, the court may order service by publication or otherwise The court must appoint an attorney to represent persons not served in the manner provided by Rule 4 and to cross-examine the deponent on behalf of persons not served and not otherwise represented Rule 17(c) applies if any expected adverse party is a minor or is incompetent

The published version raises some drafting issues not presented by the style draft For example, the phrase "on the petition" in the first sentence seems unnecessary, and the omission of "that" between "If" and "service" in the third sentence makes the rule less clear, and "not served" appears to be repeated unnecessarily in the fourth sentence This also presents the larger issue of how to deal with pending and recent changes The Style Subcommittee prefers the style-draft version and intends to seek conforming changes to the published draft after public comment has been received

(b) Pending Appeal. If an appeal has been taken from a judgment of a district court or before the taking of an appeal if the time therefor has not expired, the district court in which the judgment was rendered may allow the taking of the depositions of witnesses to perpetuate their testimony for use in the event of further proceedings in the district court In such case the party who desires to perpetuate the testimony may make a motion in the district court for leave to take the depositions, upon the same notice and service thereof as if the action was pending in the district court The motion shall show (1) the names and addresses of persons to be examined and the substance of the testimony which the party expects to elicit from each, (2) the reasons for perpetuating their testimony If the court finds that the perpetuation of the testimony is proper to avoid a failure or delay of justice, it may make an order allowing the depositions to be taken and may make orders of the character provided for by Rules 34 and 35, and thereupon the depositions may be taken and used in the same manner and under the same conditions as are prescribed in these rules for depositions taken in actions pending in the district court	**(b) Pending Appeal.** **(1)** ***In General.*** The district court in which a judgment has been rendered may, if an appeal has been taken or may be taken, allow a party to depose witnesses to perpetuate their testimony for use in the event of further proceedings in the district court **(2)** ***Motion.*** The party who wants to perpetuate testimony may move in the district court for leave to take the depositions, upon the same notice and service as if the action were pending in that court The motion must show **(A)** the names and addresses of the deponents and the expected substance of each one's testimony, and **(B)** the reasons for perpetuating their testimony **(3)** ***Court Order.*** If the court finds that perpetuating the testimony may prevent a failure or delay of justice, the court may allow the depositions to be taken and may make orders like those authorized by Rules 34 and 35 The depositions may be taken and used as any other deposition taken in an action pending in the district court
(c) Perpetuation by Action. This rule does not limit the power of a court to entertain an action to perpetuate testimony	**(c) Perpetuation by an Action.** This rule does not limit a court's power to entertain an action to perpetuate testimony

COMMITTEE NOTE

The language of Rule 27 has been amended as part of the general restyling of the Civil 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.

Rule 28. Persons Before Whom Depositions May Be Taken	Rule 28. Persons Before Whom Depositions May Be Taken
(a) Within the United States. Within the United States or within a territory or insular possession subject to the jurisdiction of the United States, depositions shall be taken before an officer authorized to administer oaths by the laws of the United States or of the place where the examination is held, or before a person appointed by the court in which the action is pending A person so appointed has power to administer oaths and take testimony The term officer as used in Rules 30, 31 and 32 includes a person appointed by the court or designated by the parties under Rule 29	**(a) Within the United States.** **(1)** ***In General.*** Within the United States or a territory or insular possession subject to the jurisdiction of the United States, a deposition must be taken before **(A)** an officer authorized to administer oaths either by United States law or by the law in the place of examination, or **(B)** a person appointed by the court in which the action is pending to administer oaths and take testimony **(2)** ***Definition of "Officer."*** The term "officer" in Rules 30, 31, and 32 includes a person appointed by the court under this rule or designated by the parties under Rule 29(a)

(b) In Foreign Countries. Depositions may be taken in a foreign country (1) pursuant to any applicable treaty or convention, or (2) pursuant to a letter of request (whether or not captioned a letter rogatory), or (3) on notice before a person authorized to administer oaths in the place where the examination is held, either by the law thereof or by the law of the United States, or (4) before a person commissioned by the court, and a person so commissioned shall have the power by virtue of the commission to administer any necessary oath and take testimony A commission or a letter of request shall be issued on application and notice and on terms that are just and appropriate It is not requisite to the issuance of a commission or a letter of request that the taking of the deposition in any other manner is impracticable or inconvenient, and both a commission and a letter of request may be issued in proper cases A notice or commission may designate the person before whom the deposition is to be taken either by name or descriptive title A letter of request may be addressed "To the Appropriate Authority in [here name the country] " When a letter of request or any other device is used pursuant to any applicable treaty or convention, it shall be captioned in the form prescribed by that treaty or convention Evidence obtained in response to a letter of request need not be excluded merely because it is not a verbatim transcript, because the testimony was not taken under oath, or because of any similar departure from the requirements for depositions taken within the United States under these rules	**(b) In a Foreign Country.** **(1)** ***In General.*** A deposition may be taken in a foreign country **(A)** under an applicable treaty or convention, **(B)** under a letter of request, whether or not captioned a "letter rogatory", **(C)** on notice, before a person authorized to administer oaths either by United States law or by the law in the place of examination, or **(D)** before a person commissioned by the court to administer any necessary oath and take testimony **(2)** ***Issuing a Letter of Request or a Commission.*** A letter of request, a commission or, in an appropriate case, both may be issued **(A)** on appropriate terms after an application and notice of it, and **(B)** without a showing that taking the deposition in another manner is impracticable or inconvenient **(3)** ***Form of a Request, Notice, or Commission.*** A deposition notice or a commission must designate by name or descriptive title the person before whom the deposition is to be taken When a letter of request or any other device is used according to a treaty or convention, it must be captioned in the form prescribed by that treaty or convention A letter of request may be addressed "To the Appropriate Authority in [name of country] " **(4)** ***Letter of Request — Admitting Evidence.*** Evidence obtained in response to a letter of request need not be excluded merely because it is not a verbatim transcript, because the testimony was not taken under oath, or because of any similar departure from the requirements for depositions taken within the United States

(c) Disqualification for Interest. No deposition shall be taken before a person who is a relative or employee or attorney or counsel of any of the parties, or is a relative or employee of such attorney or counsel, or is financially interested in the action	**(c) Disqualification.** A deposition must not be taken before a person who is any party's relative, employee, or attorney, who is related to or employed by any party's attorney, or who is financially interested in the action

COMMITTEE NOTE

The language of Rule 28 has been amended as part of the general restyling of the Civil 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.

Rule 29. Stipulations Regarding Discovery Procedure	Rule 29. Stipulations About Discovery Procedure
Unless otherwise directed by the court, the parties may by written stipulation (1) provide that depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions, and (2) modify other procedures governing or limitations placed upon discovery, except that stipulations extending the time provided in Rules 33, 34, and 36 for responses to discovery may, if they would interfere with any time set for completion of discovery, for hearing of a motion, or for trial, be made only with the approval of the court	Unless the court orders otherwise, the parties may stipulate that **(a)** a deposition may be taken before any person, at any time or place, upon any notice, and in the manner specified — and may then be used in the same way as any other deposition, and **(b)** other procedures governing or limiting discovery be modified — but a stipulation extending the time for any form of discovery must have court approval if it would interfere with the time set for completing discovery, for hearing a motion, or for trial

COMMITTEE NOTE

The language of Rule 29 has been amended as part of the general restyling of the Civil 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.

Rule 30. Depositions Upon Oral Examination	Rule 30. Depositions by Oral Examination
(a) When Depositions May Be Taken; When Leave Required. (1) A party may take the testimony of any person, including a party, by deposition upon oral examination without leave of court except as provided in paragraph (2) The attendance of witnesses may be compelled by subpoena as provided in Rule 45 (2) A party must obtain leave of court, which shall be granted to the extent consistent with the principles stated in Rule 26(b)(2), if the person to be examined is confined in prison or if, without the written stipulation of the parties, (A) a proposed deposition would result in more than ten depositions being taken under this rule or Rule 31 by the plaintiffs, or by the defendants, or by third-party defendants, (B) the person to be examined already has been deposed in the case, or (C) a party seeks to take a deposition before the time specified in Rule 26(d) unless the notice contains a certification, with supporting facts, that the person to be examined is expected to leave the United States and be unavailable for examination in this country unless deposed before that time	**(a) When a Deposition May Be Taken.** (1) ***Without Leave.*** A party may, by oral questions, depose any person, including a party, without leave of court except as provided in Rule 30(a)(2) The deponent's attendance may be compelled by subpoena under Rule 45 (2) ***With Leave.*** A party must obtain leave of court, and the court must grant leave to the extent consistent with Rule 26(b)(2) (A) if the parties have not stipulated to the deposition and (i) the deposition would result in more than ten depositions being taken under this rule or Rule 31 by the plaintiffs, or by the defendants, or by third-party defendants, (ii) the deponent has already been deposed in the case, or (iii) the party seeks to take the deposition before the time specified in Rule 26(d), unless the party certifies in the notice, with supporting facts, that the deponent is expected to leave the United States and be unavailable for examination in this country after that time, or (B) if the deponent is confined in prison
(b) Notice of Examination: General Requirements; Method of Recording; Production of Documents and Things; Deposition of Organization; Deposition by Telephone. (1) A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify the person or the particular class or group to which the person belongs If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall be attached to, or included in, the notice	**(b) Notice of the Deposition; Other Formal Requirements.** (1) ***Notice in General.*** A party who wants to depose a person by oral questions must give reasonable written notice to every other party The notice must state the time and place of the deposition and, if known, the deponent's name and address If the deponent's name is unknown, the notice must provide a general description sufficient to identify the person or the particular class or group to which the person belongs (2) ***Producing Documents.*** If a subpoena duces tecum is to be served on the deponent, the materials designated for production, as set forth in the subpoena, must be listed in the notice or in an attachment The notice to a party deponent may be accompanied by a request complying with Rule 34 to produce documents and tangible things at the deposition

(2) The party taking the deposition shall state in the notice the method by which the testimony shall be recorded Unless the court orders otherwise, it may be recorded by sound, sound-and-visual, or stenographic means, and the party taking the deposition shall bear the cost of the recording Any party may arrange for a transcription to be made from the recording of a deposition taken by nonstenographic means (3) With prior notice to the deponent and other parties, any party may designate another method to record the deponent's testimony in addition to the method specified by the person taking the deposition The additional record or transcript shall be made at that party's expense unless the court otherwise orders	(3) ***Method of Recording.*** (A) *Method Stated in the Notice* The party noticing the deposition must state in the notice the method for recording the testimony Unless the court orders otherwise, testimony may be recorded by audio, audiovisual, or stenographic means The party noticing the deposition bears the recording costs Any party may arrange to transcribe a deposition that was taken nonstenographically (B) *Additional Method* With prior notice to the deponent and other parties, any party may designate another method for recording the testimony in addition to that specified by the person noticing the deposition That party bears the expense of the additional record or transcript unless the court orders otherwise (4) ***By Remote Means.*** The parties may agree in writing — or the court may on motion order — that a deposition be taken by telephone or other remote electronic means For the purpose of this rule and Rules 28(a), 37(a)(1), and 37(b)(1), the deposition takes place where the deponent answers the questions
(4) Unless otherwise agreed by the parties, a deposition shall be conducted before an officer appointed or designated under Rule 28 and shall begin with a statement on the record by the officer that includes (A) the officer's name and business address, (B) the date, time, and place of the deposition, (C) the name of the deponent, (D) the administration of the oath or affirmation to the deponent, and (E) an identification of all persons present If the deposition is recorded other than stenographically, the officer shall repeat items (A) through (C) at the beginning of each unit of recorded tape or other recording medium The appearance or demeanor of deponents or attorneys shall not be distorted through camera or sound-recording techniques At the end of the deposition, the officer shall state on the record that the deposition is complete and shall set forth any stipulations made by counsel concerning the custody of the transcript or recording and the exhibits, or concerning other pertinent matters (5) The notice to a party deponent may be accompanied by a request made in compliance with Rule 34 for the production of documents and tangible things at the taking of the deposition The procedure of Rule 34 shall apply to the request	(5) ***Officer's Duties.*** (A) *Before the Deposition* Unless the parties agree otherwise, a deposition must be conducted before an officer appointed or designated under Rule 28 The officer must begin the deposition with an on-the-record statement that includes (i) the officer's name and business address, (ii) the date, time, and place of the deposition, (iii) the deponent's name, (iv) the officer's administration of the oath or affirmation to the deponent, and (v) the identity of all persons present (B) *Conducting the Deposition, Avoiding Distortion* If the deposition is recorded nonstenographically, the officer must repeat the items in Rule 30(b)(5)(A)(i)-(iii) at the beginning of each unit of the recording medium The deponent's and attorneys' appearance or demeanor must not be distorted through camera or sound-recording techniques (C) *After the Deposition* At the end of a deposition, the officer must state on the record that the deposition is complete and set forth any stipulations made by the attorneys about custody of the transcript or recording and of the exhibits, or about any other pertinent matters

(6) A party may in the party's notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested In that event, the organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify A subpoena shall advise a non-party organization of its duty to make such a designation The persons so designated shall testify as to matters known or reasonably available to the organization This subdivision (b)(6) does not preclude taking a deposition by any other procedure authorized in these rules **(7)** The parties may stipulate in writing or the court may upon motion order that a deposition be taken by telephone or other remote electronic means For the purposes of this rule and Rules 28(a), 37(a)(1), and 37(b)(1), a deposition taken by such means is taken in the district and at the place where the deponent is to answer questions	**(6)** ***Notice or Subpoena Directed to an Organization.*** In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, or a governmental agency and describe with reasonable particularity the matters for examination The named organization must then designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and it may set forth the matters on which each person designated will testify A subpoena must advise a nonparty organization of its duty to make this designation The designees must testify about information known or reasonably available to the organization This paragraph does not preclude depositions by any other procedure authorized in these rules

(c) Examination and Cross-Examination; Record of Examination; Oath; Objections. Examination and cross-examination of witnesses may proceed as permitted at the trial under the provisions of the Federal Rules of Evidence except Rules 103 and 615 The officer before whom the deposition is to be taken shall put the witness on oath or affirmation and shall personally, or by someone acting under the officer's direction and in the officer's presence, record the testimony of the witness The testimony shall be taken stenographically or recorded by any other method authorized by subdivision (b)(2) of this rule All objections made at the time of the examination to the qualifications of the officer taking the deposition, to the manner of taking it, to the evidence presented, to the conduct of any party, or to any other aspect of the proceedings shall be noted by the officer upon the record of the deposition, but the examination shall proceed, with the testimony being taken subject to the objections In lieu of participating in the oral examination, parties may serve written questions in a sealed envelope on the party taking the deposition and the party taking the deposition shall transmit them to the officer, who shall propound them to the witness and record the answers verbatim	**(c) Examination and Cross-Examination; Record of the Examination; Objections; Written Questions.** **(1)** ***Examination and Cross-Examination.*** The examination and cross-examination of a deponent proceed as they would at trial under the Federal Rules of Evidence, except Rules 103 and 615 After putting the deponent under oath, the officer must record the testimony by the method designated under Rule 30(b)(3)(A) The testimony must be recorded by the officer personally or by a person acting in the presence and under the direction of the officer **(2)** ***Objections.*** An objection at the time of the examination — whether to evidence, to a party's conduct, to the officer's qualifications, to the manner of taking the deposition, or to any other aspect of the deposition — must be noted in the record, but the examination still proceeds, the testimony is taken subject to any objection An objection must be stated concisely in a nonargumentative and nonsuggestive manner A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation ordered by the court, or to present a motion under Rule 30(d)(3) **(3)** ***Participating Through Written Questions.*** Instead of participating in the oral examination, a party may serve written questions in a sealed envelope on the party noticing the deposition, who must deliver them to the officer The officer must ask the deponent those questions and record the answers verbatim

(d) Schedule and Duration; Motion to Terminate or Limit Examination. **(1)** Any objection during a deposition must be stated concisely and in a non-argumentative and non-suggestive manner A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation directed by the court, or to present a motion under Rule 30(d)(4) **(2)** Unless otherwise authorized by the court or stipulated by the parties, a deposition is limited to one day of seven hours The court must allow additional time consistent with Rule 26(b)(2) if needed for a fair examination of the deponent or if the deponent or another person, or other circumstance, impedes or delays the examination **(3)** If the court finds that any impediment, delay, or other conduct has frustrated the fair examination of the deponent, it may impose upon the persons responsible an appropriate sanction, including the reasonable costs and attorney's fees incurred by any parties as a result thereof	**(d) Duration; Sanction; Motion to Terminate or Limit.** **(1)** ***Duration.*** Unless otherwise agreed by the parties or authorized by the court, a deposition is limited to one day of seven hours The court must allow additional time consistent with Rule 26(b)(2) if needed for a fair examination of the deponent or if the deponent or another person, or other circumstance, impedes or delays the examination **(2)** ***Sanction.*** The court may impose an appropriate sanction — including reasonable costs and attorney's fees incurred by any party — on any person who impedes, delays, or frustrates the fair examination of the deponent
(4) At any time during a deposition, on motion of a party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending or the court in the district where the deposition is being taken may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in Rule 26(c) If the order made terminates the examination, it may be resumed thereafter only upon the order of the court in which the action is pending Upon demand of the objecting party or deponent, the taking of the deposition must be suspended for the time necessary to make a motion for an order The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion	**(3)** ***Motion to Terminate or Limit.*** **(A)** *Grounds* At any time during a deposition, the deponent or a party may move to terminate or limit it on the ground that it is being conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses the deponent or party The motion may be filed in the court where the action is pending or the deposition is being taken If the objecting party or deponent so demands, the deposition must be suspended for the time necessary to obtain an order **(B)** *Order* The court may order that the deposition be terminated or may limit its scope and manner as provided in Rule 26(c) If terminated, the deposition may be resumed only by order of the court where the action is pending **(C)** *Award of Expenses* Rule 37(a)(5) applies to the award of expenses

(c) **Review by Witness; Changes; Signing.** If requested by the deponent or a party before completion of the deposition, the deponent shall have 30 days after being notified by the officer that the transcript or recording is available in which to review the transcript or recording and, if there are changes in form or substance, to sign a statement reciting such changes and the reasons given by the deponent for making them The officer shall indicate in the certificate prescribed by subdivision (f)(1) whether any review was requested and, if so, shall append any changes made by the deponent during the period allowed	(e) **Review by the Witness; Changes.** (1) ***Review; Statement of Changes.*** If requested by the deponent or a party before the deposition is completed, the deponent must be allowed 30 days after being notified by the officer that the transcript or recording is available in which **(A)** to review the transcript or recording, and **(B)** if there are changes in form or substance, to sign a statement listing the changes and the reasons for making them (2) ***Changes Indicated in Officer's Certificate.*** The officer must indicate in the certificate prescribed by Rule 30(f)(1) whether a review was requested and, if so, must append any changes the deponent makes during the period allowed

(f) Certification and Delivery by Officer; Exhibits; Copies. **(1)** The officer must certify that the witness was duly sworn by the officer and that the deposition is a true record of the testimony given by the witness This certificate must be in writing and accompany the record of the deposition Unless otherwise ordered by the court, the officer must securely seal the deposition in an envelope or package indorsed with the title of the action and marked "Deposition of [here insert name of witness]" and must promptly send it to the attorney who arranged for the transcript or recording, who must store it under conditions that will protect it against loss, destruction, tampering, or deterioration Documents and things produced for inspection during the examination of the witness, must, upon the request of a party, be marked for identification and annexed to the deposition and may be inspected and copied by any party, except that if the person producing the materials desires to retain them the person may (A) offer copies to be marked for identification and annexed to the deposition and to serve thereafter as originals if the person affords to all parties fair opportunity to verify the copies by comparison with the originals, or (B) offer the originals to be marked for identification, after giving to each party an opportunity to inspect and copy them, in which event the materials may then be used in the same manner as if annexed to the deposition Any party may move for an order that the original be annexed to and returned with the deposition to the court, pending final disposition of the case	**(f) Certification and Delivery; Exhibits; Copies of the Transcript or Recording; Filing.** **(1)** ***Certification and Delivery.*** The officer must certify in writing that the witness was duly sworn and that the deposition accurately records the witness's testimony The certificate must accompany the record of the deposition Unless the court orders otherwise, the officer must securely seal the deposition in an envelope or package bearing the title of the action and marked "Deposition of [witness's name]" and must promptly send it to the attorney who arranged for the transcript or recording The attorney must store it under conditions that will protect it against loss, destruction, tampering, or deterioration **(2)** ***Documents and Tangible Things.*** **(A)** *Originals and Copies* Documents and tangible things produced for inspection during a deposition must, on a party's request, be marked for identification and attached to the deposition Any party may inspect and copy them But if the person who produced them wants to keep the originals, the person may **(i)** offer copies to be marked, attached to the deposition, and then used as originals — after giving all parties a fair opportunity to verify the copies by comparing them with the originals, or **(ii)** give all parties a fair opportunity to inspect and copy the originals after they are marked — in which event the originals may be used as if attached to the deposition **(B)** *Order Regarding the Originals* Any party may move for an order that the originals be attached to the deposition pending final disposition of the case
(2) Unless otherwise ordered by the court or agreed by the parties, the officer shall retain stenographic notes of any deposition taken stenographically or a copy of the recording of any deposition taken by another method Upon payment of reasonable charges therefor, the officer shall furnish a copy of the transcript or other recording of the deposition to any party or to the deponent **(3)** The party taking the deposition shall give prompt notice of its filing to all other parties	**(3)** ***Copies of the Transcript or Recording.*** Unless otherwise agreed by the parties or ordered by the court, the officer must retain stenographic notes of a deposition taken stenographically or a copy of the recording of a deposition taken by another method When paid reasonable charges, the officer must furnish a copy of the transcript or recording to any party or the deponent **(4)** ***Notice of Filing.*** A party who files the deposition must promptly notify all other parties of the filing

(g) Failure to Attend or to Serve Subpoena; Expenses. **(1)** If the party giving the notice of the taking of a deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court may order the party giving the notice to pay to such other party the reasonable expenses incurred by that party and that party's attorney in attending, including reasonable attorney's fees **(2)** If the party giving the notice of the taking of a deposition of a witness fails to serve a subpoena upon the witness and the witness because of such failure does not attend, and if another party attends in person or by attorney because that party expects the deposition of that witness to be taken, the court may order the party giving the notice to pay to such other party the reasonable expenses incurred by that party and that party's attorney in attending, including reasonable attorney's fees	**(g) Failure to Attend a Deposition or Serve a Subpoena; Expenses.** A party who, expecting a deposition to be taken, attends in person or by an attorney may recover reasonable expenses for attending, including reasonable attorney's fees, if the noticing party failed to **(1)** attend and proceed with the deposition, or **(2)** serve a subpoena on a nonparty deponent, who consequently did not attend

COMMITTEE NOTE

The language of Rule 30 has been amended as part of the general restyling of the Civil 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

Rule 31. Depositions Upon Written Questions	Rule 31. Depositions by Written Questions
(a) Serving Questions; Notice. **(1)** A party may take the testimony of any person, including a party, by deposition upon written questions without leave of court except as provided in paragraph (2) The attendance of witnesses may be compelled by the use of subpoena as provided in Rule 45 **(2)** A party must obtain leave of court, which shall be granted to the extent consistent with the principles stated in Rule 26(b)(2), if the person to be examined is confined in prison or if, without the written stipulation of the parties, **(A)** a proposed deposition would result in more than ten depositions being taken under this rule or Rule 30 by the plaintiffs, or by the defendants, or by third-party defendants, **(B)** the person to be examined has already been deposed in the case, or **(C)** a party seeks to take a deposition before the time specified in Rule 26(d)	**(a) When a Deposition May Be Taken.** **(1)** ***Without Leave.*** A party may, by written questions, depose any person, including a party, without leave of court except as provided in Rule 31(a)(2) The deponent's attendance may be compelled by subpoena under Rule 45 **(2)** ***With Leave.*** A party must obtain leave of court, and the court must grant leave to the extent consistent with Rule 26(b)(2) **(A)** if the parties have not stipulated to the deposition and **(i)** the deposition would result in more than ten depositions being taken under this rule or Rule 30 by the plaintiffs, or by the defendants, or by third-party defendants, **(ii)** the deponent has already been deposed in the case, or **(iii)** the party seeks to take a deposition before the time specified in Rule 26(d), or **(B)** if the deponent is confined in prison
(3) A party desiring to take a deposition upon written questions shall serve them upon every other party with a notice stating (1) the name and address of the person who is to answer them, if known, and if the name is not known, a general description sufficient to identify the person or the particular class or group to which the person belongs, and (2) the name or descriptive title and address of the officer before whom the deposition is to be taken A deposition upon written questions may be taken of a public or private corporation or a partnership or association or governmental agency in accordance with the provisions of Rule 30(b)(6) **(4)** Within 14 days after the notice and written questions are served, a party may serve cross questions upon all other parties Within 7 days after being served with cross questions, a party may serve redirect questions upon all other parties Within 7 days after being served with redirect questions, a party may serve recross questions upon all other parties The court may for cause shown enlarge or shorten the time	**(3)** ***Service; Required Notice.*** A party who wants to depose a person by written questions must serve them on every other party, with a notice stating, if known, the deponent's name and address If the deponent's name is unknown, the notice must provide a general description sufficient to identify the person or the particular class or group to which the person belongs The notice must also state the name or descriptive title and address of the officer before whom the deposition will be taken **(4)** ***Questions Directed to an Organization.*** A public or private corporation, a partnership, an association, or a governmental agency may be deposed by written questions in accordance with Rule 30(b)(6) **(5)** ***Questions from Other Parties.*** Any questions to the deponent from other parties must be served on all parties as follows cross-questions, within 14 days after being served with the notice and direct questions, redirect questions, within 7 days after being served with cross-questions, and recross-questions, within 7 days after being served with redirect questions The court may, for good cause, extend or shorten these times

(b) Officer to Take Responses and Prepare Record. A copy of the notice and copies of all questions served shall be delivered by the party taking the deposition to the officer designated in the notice, who shall proceed promptly, in the manner provided by Rule 30(c), (e), and (f), to take the testimony of the witness in response to the questions and to prepare, certify, and file or mail the deposition, attaching thereto the copy of the notice and the questions received by the officer **(c) Notice of Filing.** When the deposition is filed the party taking it shall promptly give notice thereof to all other parties	**(b) Delivery to the Officer; Officer's Duties.** The party who noticed the deposition must deliver to the officer a copy of all the questions served and of the notice The officer must proceed promptly in the manner provided in Rule 30(c), (e), and (f) to **(1)** take the deponent's testimony in response to the questions, **(2)** prepare and certify the deposition, and **(3)** send it to the party, attaching a copy of the questions and of the notice **(c) Notice of Filing.** A party who files the deposition must promptly notify all other parties of the filing

COMMITTEE NOTE

The language of Rule 31 has been amended as part of the general restyling of the Civil 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.

Rule 32. Use of Depositions in Court Proceedings	Rule 32. Using Depositions in Court Proceedings
(a) Use of Depositions. At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the following provisions	**(a) Using Depositions.** **(1)** ***In General.*** At any trial or hearing, all or part of a deposition may be used against a party on these conditions **(A)** the party was present or represented at the taking of the deposition or had reasonable notice of it, **(B)** it is used to the extent it would be admissible under the rules of evidence if the deponent were present and testifying, and **(C)** the use is permitted by paragraphs (2) through (8)
(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness, or for any other purpose permitted by the Federal Rules of Evidence **(2)** The deposition of a party or of anyone who at the time of taking the deposition was an officer, director, or managing agent, or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a public or private corporation, partnership or association or governmental agency which is a party may be used by an adverse party for any purpose	**(2)** ***Impeachment and Other Uses.*** Any party may use a deposition to contradict or impeach the testimony given by the deponent as a witness, or for any other purpose permitted by the Federal Rules of Evidence **(3)** ***Deposition of Party, Agent, or Designee.*** An adverse party may use for any purpose the deposition of a party or anyone who, when deposed, was the party's officer, director, managing agent, or designee under Rule 30(b)(6) or 31(a)(4)
(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds **(A)** that the witness is dead, or **(B)** that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition, or **(C)** that the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment, or **(D)** that the party offering the deposition has been unable to procure the attendance of the witness by subpoena, or **(E)** upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used	**(4)** ***Unavailable Witness.*** A party may use for any purpose the deposition of a witness, whether or not a party, if the court finds **(A)** that the witness is dead, **(B)** that the witness is more than 100 miles from the place of trial or hearing or is outside the United States, unless it appears that the witness's absence was procured by the party offering the deposition, **(C)** that the witness cannot attend or testify because of age, illness, infirmity, or imprisonment, **(D)** that the party offering the deposition could not procure the witness's attendance by subpoena, or **(E)** on application and notice, that exceptional circumstances make it desirable — in the interest of justice and with due regard to the importance of live testimony in open court — to allow the deposition to be used

A deposition taken without leave of court pursuant to a notice under Rule 30(a)(2)(C) shall not be used against a party who demonstrates that, when served with the notice, it was unable through the exercise of diligence to obtain counsel to represent it at the taking of the deposition, nor shall a deposition be used against a party who, having received less than 11 days notice of a deposition, has promptly upon receiving such notice filed a motion for a protective order under Rule 26(c)(2) requesting that the deposition not be held or be held at a different time or place and such motion is pending at the time the deposition is held	**(5)** ***Limitations on Use.*** **(A)** *Deposition Taken on Short Notice* A deposition may not be used against a party that, having received less than 11 days notice of the deposition, promptly moved for a protective order under Rule 26(c)(1)(B) requesting that it not be taken or be taken at a different time or place — and this motion was still pending when the deposition was taken **(B)** *Unavailable Deponent, Party Could Not Obtain an Attorney* A deposition taken without leave of court under the unavailability provision of Rule 30(a)(2)(A)(iii) may not be used against a party that demonstrates that, when served with the notice, it could not, despite diligent efforts, obtain an attorney to represent it at the deposition
(4) If only part of a deposition is offered in evidence by a party, an adverse party may require the offeror to introduce any other part which ought in fairness to be considered with the part introduced, and any party may introduce any other parts Substitution of parties pursuant to Rule 25 does not affect the right to use depositions previously taken, and, when an action has been brought in any court of the United States or of any State and another action involving the same subject matter is afterward brought between the same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in the former action may be used in the latter as if originally taken therefor A deposition previously taken may also be used as permitted by the Federal Rules of Evidence	**(6)** ***Using Part of a Deposition.*** If a party offers in evidence only part of a deposition, an adverse party may require the offeror to introduce other parts that in fairness should be considered with the part introduced, and any party may itself introduce any other parts **(7)** ***Substituting a Party.*** Substituting a party under Rule 25 does not affect the right to use a deposition previously taken **(8)** ***Deposition Taken in Earlier Action.*** A deposition lawfully taken and, if required, filed in any federal- or state-court action may be used in a later action involving the same subject matter between the same parties, or their representatives or successors in interest, to the same extent as if taken in the later action A deposition previously taken may also be used as permitted by the Federal Rules of Evidence

(b) Objections to Admissibility. Subject to the provisions of Rule 28(b) and subdivision (d)(3) of this rule, objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying	**(b) Objections to Admissibility.** Subject to Rules 28(b) and 32(d)(3), an objection may be made at a trial or hearing to the admission of any deposition testimony that would be inadmissible if the witness were present and testifying
(c) Form of Presentation. Except as otherwise directed by the court, a party offering deposition testimony pursuant to this rule may offer it in stenographic or nonstenographic form, but, if in nonstenographic form, the party shall also provide the court with a transcript of the portions so offered On request of any party in a case tried before a jury, deposition testimony offered other than for impeachment purposes shall be presented in nonstenographic form, if available, unless the court for good cause orders otherwise	**(c) Form of Presentation.** Unless the court orders otherwise, a party must provide a transcript of any deposition testimony the party offers, but may provide the court with the testimony in nontranscript form as well On any party's request, deposition testimony offered in a jury trial for any purpose other than impeachment must be presented in nontranscript form, if available, unless the court for good cause orders otherwise

(d) Effect of Errors and Irregularities in Depositions. **(1) As to Notice.** All errors and irregularities in the notice for taking a deposition are waived unless written objection is promptly served upon the party giving the notice **(2) As to Disqualification of Officer.** Objection to taking a deposition because of disqualification of the officer before whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence **(3) As to Taking of Deposition.** **(A)** Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time	**(d) Objections.** **(1)** ***To the Notice.*** An objection to an error or irregularity in a deposition notice is waived unless promptly served in writing on the party giving the notice **(2)** ***To the Officer's Qualification.*** An objection based on disqualification of the officer before whom a deposition is to be taken is waived if it is not made **(A)** before the deposition begins, or **(B)** promptly after the basis for disqualification becomes known or, with reasonable diligence, could have been known **(3)** ***To the Taking of the Deposition.*** **(A)** *Objection to Competence, Relevance, or Materiality* An objection to a deponent's competence — or to the competence, relevance, or materiality of testimony — is not waived by a failure to make the objection before or during the deposition, unless the ground for it might have been corrected at that time
(B) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties, and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition	**(B)** *Objection to an Error or Irregularity* An objection to an error or irregularity at an oral examination is waived if **(i)** it relates to the manner of taking the deposition, the form of a question or answer, the oath or affirmation, a party's conduct, or other matters that might have been corrected at that time, and **(ii)** it is not timely made during the deposition
(C) Objections to the form of written questions submitted under Rule 31 are waived unless served in writing upon the party propounding them within the time allowed for serving the succeeding cross or other questions and within 5 days after service of the last questions authorized **(4) As to Completion and Return of Deposition.** Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, indorsed, transmitted, filed, or otherwise dealt with by the officer under Rules 30 and 31 are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained	**(C)** *Objection to a Written Question* An objection to the form of a written question under Rule 31 is waived if it is not served in writing on the party submitting the question within the time for serving responsive questions or — if the question is a recross-question — within 5 days after being served with the question **(4)** ***To Completing and Returning the Deposition.*** An objection to how the testimony has been transcribed or how the deposition has been prepared, signed, certified, sealed, endorsed, transmitted, filed, or otherwise dealt with by the officer is waived unless a motion to suppress is made promptly after the defect or irregularity becomes known or, with reasonable diligence, could have been known

COMMITTEE NOTE

The language of Rule 32 has been amended as part of the general restyling of the Civil 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

Former Rule 32(a) applied "at the trial or upon the hearing of a motion or an interlocutory proceeding." The amended rule describes the same events as "any trial or hearing "

The final paragraph of former Rule 32(a) allowed use in a later action of a deposition "lawfully taken and duly filed in the former action " Because of the 2000 amendment of Rule 5(d), many depositions are not filed. Amended Rule 32(a)(8) reflects this change by excluding use of an unfiled deposition only if filing was required in the former action.

Rule 33. Interrogatories to Parties	Rule 33. Interrogatories to Parties
(a) Availability. Without leave of court or written stipulation, any party may serve upon any other party written interrogatories, not exceeding 25 in number including all discrete subparts, to be answered by the party served or, if the party served is a public or private corporation or a partnership or association or governmental agency, by any officer or agent, who shall furnish such information as is available to the party Leave to serve additional interrogatories shall be granted to the extent consistent with the principles of Rule 26(b)(2) Without leave of court or written stipulation, interrogatories may not be served before the time specified in Rule 26(d)	**(a) In General.** **(1)** ***Number.*** Without leave of court or stipulation by the parties, a party may serve on any other party no more than 25 written interrogatories, including all discrete subparts Leave to serve additional interrogatories may be granted to the extent consistent with Rule 26(b)(2) **(2)** ***Scope.*** An interrogatory may relate to any matter that may be inquired into under Rule 26(b) An otherwise proper interrogatory is not objectionable merely because it asks for an opinion or contention that relates to fact or the application of law to fact, but the court may order that the interrogatory need not be answered until designated discovery is complete, or until a pretrial conference or some other time
(b) Answers and Objections. **(1)** Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the objecting party shall state the reasons for objection and shall answer to the extent the interrogatory is not objectionable **(2)** The answers are to be signed by the person making them, and the objections signed by the attorney making them **(3)** The party upon whom the interrogatories have been served shall serve a copy of the answers, and objections if any, within 30 days after the service of the interrogatories A shorter or longer time may be directed by the court or, in the absence of such an order, agreed to in writing by the parties subject to Rule 29 **(4)** All grounds for an objection to an interrogatory shall be stated with specificity Any ground not stated in a timely objection is waived unless the party's failure to object is excused by the court for good cause shown **(5)** The party submitting the interrogatories may move for an order under Rule 37(a) with respect to any objection to or other failure to answer an interrogatory	**(b) Answers and Objections.** **(1)** ***Responding Party.*** The interrogatories must be answered **(A)** by the party to whom they are directed, or **(B)** if that party is a public or private corporation, a partnership, an association, or a governmental agency, by any officer or agent, who must furnish the information that is available to the party **(2)** ***Answering Each Interrogatory.*** Each interrogatory must, to the extent it is not objected to, be answered separately and fully in writing under oath **(3)** ***Time to Respond.*** The responding party must serve its answers and any objections within 30 days after being served with the interrogatories A shorter or longer time may be ordered by the court or be stipulated by the parties under Rule 29 **(4)** ***Objections.*** All grounds for objecting to an interrogatory must be stated with specificity Any ground not stated in a timely objection is waived unless the court, for good cause, excuses the failure **(5)** ***Signature.*** The person who makes the answers must sign them, and the attorney who objects must sign any objections

(c) Scope; Use at Trial. Interrogatories may relate to any matters which can be inquired into under Rule 26(b)(1), and the answers may be used to the extent permitted by the rules of evidence An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact, but the court may order that such an interrogatory need not be answered until after designated discovery has been completed or until a pre-trial conference or other later time	**(c) Use.** An answer to an interrogatory may be used to the extent permitted under the rules of evidence
(d) Option to Produce Business Records. Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, including a compilation, abstract or summary thereof, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries A specification shall be in sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party served, the records from which the answer may be ascertained	**(d) Option to Produce Business Records.** If the answer to an interrogatory may be determined by examining, auditing, inspecting, compiling, abstracting, or summarizing a party's business records, and if the burden of deriving or ascertaining the answer will be substantially the same for either party, the responding party may answer by **(1)** specifying the records that must be reviewed, in sufficient detail to permit the interrogating party to locate and identify them as readily as the responding party could, and **(2)** giving the interrogating party a reasonable opportunity to examine, audit, and inspect the records and to make copies, compilations, abstracts, or summaries

COMMITTEE NOTE

The language of Rule 33 has been amended as part of the general restyling of the Civil 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.

The final sentence of former Rule 33(a) was a redundant cross-reference to the discovery moratorium provisions of Rule 26(d). Rule 26(d) is now familiar, obviating any need to carry forward the redundant cross-reference.

Former Rule 33(c) stated that an interrogatory "is not necessarily objectionable merely because an answer * * * involves an opinion or contention * * * " "[I]s not necessarily" seemed to imply that the interrogatory might be objectionable merely for this reason. This implication has been ignored in practice. Opinion and contention interrogatories are used routinely. Amended Rule 33(1)(2) embodies the current meaning of Rule 33 by omitting "necessarily "

Former Rule 33(b)(5) was a redundant reminder of Rule 37(a) procedure that is omitted as no longer useful.

Rule 34. Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes	Rule 34. Producing Documents and Tangible Things, or Entering onto Land, for Inspection and Other Purposes
(a) Scope. Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on the requestor's behalf, to inspect and copy, any designated documents (including writings, drawings, graphs, charts, photographs, phono-records, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served, or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26(b)	**(a) In General.** A party may serve on any other party a request within the scope of Rule 26(b) **(1)** to produce and permit the requesting party or its representative to inspect and copy the following items in the responding party's possession, custody, or control **(A)** any designated documents — including writings, drawings, graphs, charts, photographs, recordings, and other data compilations from which information can be obtained either directly or after the responding party translates them into a reasonably usable form, or **(B)** any tangible things — and to test or sample these things, or **(2)** to permit entry onto designated land or other property possessed or controlled by the responding party, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it
(b) Procedure. The request shall set forth, either by individual item or by category, the items to be inspected, and describe each with reasonable particularity The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts Without leave of court or written stipulation, a request may not be served before the time specified in Rule 26(d) The party upon whom the request is served shall serve a written response within 30 days after the service of the request A shorter or longer time may be directed by the court or, in the absence of such an order, agreed to in writing by the parties, subject to Rule 29 The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for the objection shall be stated If objection is made to part of an item or category, the part shall be specified and inspection permitted of the remaining parts The party submitting the request may move for an order under Rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested A party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request	**(b) Procedure.** **(1)** ***Form of the Request.*** The request must **(A)** describe with reasonable particularity each item or category of items to be inspected, and **(B)** specify a reasonable time, place, and manner for the inspection and for performing the related acts **(2)** ***Responses and Objections.*** **(A)** *Time to Respond* The party to whom the request is directed must respond in writing within 30 days after being served A shorter or longer time may be ordered by the court or stipulated by the parties under Rule 29 **(B)** *Responding to Each Item* For each item or category, the response must either state that inspection and related activities will be permitted as requested or state an objection to the request, including the reasons **(C)** *Objections* An objection to part of a request must specify the part and permit inspection with respect to the rest **(D)** *Producing the Documents* A party producing documents for inspection must produce them as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request

(c) **Persons Not Parties.** A person not a party to the action may be compelled to produce documents and things or to submit to an inspection as provided in Rule 45	(c) **Nonparties.** As provided in Rule 45, a nonparty may be compelled to produce documents and tangible things or to permit an inspection

COMMITTEE NOTE

The language of Rule 34 has been amended as part of the general restyling of the Civil 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.

The redundant reminder of Rule 37(a) procedure in the final sentence of former Rule 34(b) is omitted as no longer useful.

Rule 35. Physical and Mental Examinations of Persons	Rule 35. Physical and Mental Examinations
(a) Order for Examination. When the mental or physical condition (including the blood group) of a party or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a suitably licensed or certified examiner or to produce for examination the person in the party's custody or legal control The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made	**(a) Order for an Examination.** **(1)** ***In General.*** The court in which the action is pending may order a party whose mental or physical condition — including blood group — is in controversy to submit to a physical or mental examination by a suitably licensed or certified examiner The court has the same authority to order a party to produce for examination a person who is in its custody or under its legal control **(2)** ***Motion and Notice; Contents of the Order.*** The order **(A)** may be made only on motion for good cause and on notice to all parties and the person examined, and **(B)** must specify the time, place, manner, conditions, and scope of the examination, as well as the person or persons who will perform it
(b) Report of Examiner. **(1)** If requested by the party against whom an order is made under Rule 35(a) or the person examined, the party causing the examination to be made shall deliver to the requesting party a copy of the detailed written report of the examiner setting out the examiner's findings, including results of all tests made, diagnoses and conclusions, together with like reports of all earlier examinations of the same condition After delivery the party causing the examination shall be entitled upon request to receive from the party against whom the order is made a like report of any examination, previously or thereafter made, of the same condition, unless, in the case of a report of examination of a person not a party, the party shows that the party is unable to obtain it The court on motion may make an order against a party requiring delivery of a report on	**(b) Examiner's Report.** **(1)** ***Request by the Party or Person Examined.*** The party who moved for the examination must, on request, deliver to the requester a copy of the examiner's report, together with like reports of all earlier examinations of the same condition The request may be made by the party against whom the examination order was made or by the person examined **(2)** ***Contents.*** The examiner's report must be in writing and must set out in detail the examiner's findings, including diagnoses, conclusions, and the results of any tests **(3)** ***Request by the Moving Party.*** After delivering the reports, the party who moved for the examination may request — and is entitled to receive — from the party against whom the examination order was made like reports of all earlier or later examinations of the same condition But those reports need not be delivered by the party with custody or control of the person examined if the party shows that it could not obtain them from the person examined

such terms as are just, and if an examiner fails or refuses to make a report the court may exclude the examiner's testimony if offered at trial **(2)** By requesting and obtaining a report of the examination so ordered or by taking the deposition of the examiner, the party examined waives any privilege the party may have in that action or any other involving the same controversy, regarding the testimony of every other person who has examined or may thereafter examine the party in respect of the same mental or physical condition **(3)** This subdivision applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise This subdivision does not preclude discovery of a report of an examiner or the taking of a deposition of the examiner in accordance with the provisions of any other rule	**(4)** ***Waiver of Privilege.*** By requesting and obtaining the examiner's report, or by deposing the examiner, the party examined waives any privilege it may have — in that action or any other action involving the same controversy — concerning testimony about all examinations of the same condition **(5)** ***Failure to Deliver a Report.*** The court on motion may order — on just terms — that a party deliver a report, and if the examiner's report is not provided, the court may exclude the examiner's testimony at trial **(6)** ***Scope.*** This subdivision (b) applies also to an examination made by the parties' agreement, unless the agreement states otherwise This subdivision does not preclude obtaining an examiner's report or deposing an examiner under other rules

COMMITTEE NOTE

The language of Rule 35 has been amended as part of the general restyling of the Civil 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

Rule 36. Requests for Admission	Rule 36. Requests for Admission
(a) Request for Admission. A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of Rule 26(b)(1) set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying Without leave of court or written stipulation, requests for admission may not be served before the time specified in Rule 26(d) Each matter of which an admission is requested shall be separately set forth The matter is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow or as the parties may agree to in writing, subject to Rule 29, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by the party's attorney If objection is made, the reasons therefor shall be stated The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter A denial shall fairly meet the substance of the requested admission, and when good faith requires that	**(a) Scope and Procedure.** **(1)** ***Scope.*** A party may serve on any other party a written request to admit, for purposes of the pending action only, the truth of any matters within the scope of Rule 26(b)(1) relating to **(A)** facts, the application of law to fact, or opinions about either, and **(B)** the genuineness of any described documents **(2)** ***Form; Copy of a Document.*** Each matter must be separately stated A request to admit the genuineness of a document must be accompanied by a copy of the document unless it is, or has been, otherwise furnished or made available for inspection and copying **(3)** ***Time to Respond; Effect of Not Responding.*** A matter is admitted unless, within 30 days after being served, the party to whom the request is directed serves on the requesting party a written answer or objection addressed to the matter and signed by the party or its attorney A shorter or longer time for responding may be ordered by the court or stipulated by the parties under Rule 29 **(4)** ***Answer.*** If a matter is not admitted, the answer must specifically deny it or state in detail why the answering party cannot truthfully admit or deny it A denial must fairly respond to the substance of the matter, and when good faith requires that a party

a party qualify an answer or deny only a part of the matter of which an admission is requested, the party shall specify so much of it as is true and qualify or deny the remainder An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless the party states that the party has made reasonable inquiry and that the information known or readily obtainable by the party is insufficient to enable the party to admit or deny A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request, the party may, subject to the provisions of Rule 37(c), deny the matter or set forth reasons why the party cannot admit or deny it The party who has requested the admissions may move to determine the sufficiency of the answers or objections Unless the court determines that an objection is justified, it shall order that an answer be served If the court determines that an answer does not comply with the requirements of this rule, it may order either that the matter is admitted or that an amended answer be served The court may, in lieu of these orders, determine that final disposition of the request be made at a pre-trial conference or at a designated time prior to trial The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion	qualify an answer or deny only a part of a matter, the answer must specify the part admitted and qualify or deny the rest The answering party may assert lack of information or knowledge as a reason for failing to admit or deny only if the party states that it has made reasonable inquiry and that the information it knows or can readily obtain is insufficient to enable it to admit or deny (5) ***Objections.*** The grounds for any objection must be stated (6) ***Matter Presenting a Trial Issue.*** A party who believes that a request concerns a matter presenting a genuine issue for trial must not — on that ground alone — object to the request, subject to Rule 37(c), the party may deny the matter or state why it cannot admit or deny (7) ***Motion Regarding the Sufficiency of Answers and Objections.*** The requesting party may move to determine the sufficiency of an answer or objection Unless the court finds an objection justified, it must order that an answer be served Upon finding that an answer does not comply with this rule, the court may order either that the matter is admitted or that an amended answer be served The court may defer its final decision until a pretrial conference or a designated time before trial Rule 37(a)(5) applies to the award of expenses

(b) **Effect of Admission.** Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission Subject to the provision of Rule 16 governing amendment of a pre-trial order, the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice that party in maintaining the action or defense on the merits Any admission made by a party under this rule is for the purpose of the pending action only and is not an admission for any other purpose nor may it be used against the party in any other proceeding	(b) **Effect of an Admission; Withdrawing or Amending It.** A matter admitted under this rule is conclusively established unless the court, on motion, permits the admission to be withdrawn or amended Subject to Rule 16(d) and (e), the court may permit withdrawal or amendment if it would promote the presentation of the merits of the action and if the court is not persuaded that it would prejudice the requesting party in maintaining or defending the action on the merits An admission under this rule is for purposes of the pending action only, is not an admission for any other purpose, and cannot be used against the party in any other proceeding

COMMITTEE NOTE

The language of Rule 36 has been amended as part of the general restyling of the Civil 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.

The final sentence of the first paragraph of former Rule 36(a) was a redundant cross-reference to the discovery moratorium provisions of Rule 26(d) Rule 26(d) is now familiar, obviating any need to carry forward the redundant cross-reference

Rule 37. Failure to Make Disclosure or Cooperate in Discovery; Sanctions	Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions
(a) Motion For Order Compelling Disclosure or Discovery. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling disclosure or discovery as follows **(1) Appropriate Court.** An application for an order to a party shall be made to the court in which the action is pending An application for an order to a person who is not a party shall be made to the court in the district where the discovery is being, or is to be, taken **(2) Motion.** **(A)** If a party fails to make a disclosure required by Rule 26(a), any other party may move to compel disclosure and for appropriate sanctions The motion must include a certification that the movant has in good faith conferred or attempted to confer with the party not making the disclosure in an effort to secure the disclosure without court action	**(a) Motion For an Order Compelling Disclosure or Discovery.** **(1)** ***In General.*** On notice to other parties and all affected persons, a party may move for an order compelling disclosure or discovery **(2)** ***Appropriate Court.*** A motion for an order to a party must be made in the court where the action is pending A motion for an order to a nonparty must be made in the court where the discovery is or will be taken **(3)** ***Specific Motions.*** **(A)** *To Compel Disclosure* If a party fails to make a disclosure required by Rule 26(a), any other party may move to compel disclosure and for appropriate sanctions The motion must include a certification that the movant has in good faith conferred or attempted to confer with the party failing to make the disclosure in an effort to obtain it without court action

(B) If a deponent fails to answer a question propounded or submitted under Rules 30 or 31, or a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or material without court action When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before applying for an order **(3) Evasive or Incomplete Disclosure, Answer, or Response.** For purposes of this subdivision an evasive or incomplete disclosure, answer, or response is to be treated as a failure to disclose, answer, or respond	**(B)** *To Compel a Discovery Response* A discovering party may move for an order compelling an answer, designation, production, or inspection The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make the discovery in an effort to obtain the information or material without court action This motion may be made if **(i)** a deponent fails to answer a question asked under Rule 30 or 31, **(ii)** a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a)(4), **(iii)** a party fails to answer an interrogatory submitted under Rule 33, or **(iv)** a party fails to respond that inspection will be permitted — or fails to permit inspection — as requested under Rule 34 **(C)** *Related to a Deposition* When taking an oral deposition, the party asking a question may complete or adjourn the examination before moving for an order **(4)** ***Evasive or Incomplete Disclosure, Answer, or Response.*** For purposes of Rule 37(a), an evasive or incomplete disclosure, answer, or response must be treated as a failure to disclose, answer, or respond

(4) Expenses and Sanctions. **(A)** If the motion is granted or if the disclosure or requested discovery is provided after the motion was filed, the court shall, after affording an opportunity to be heard, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in making the motion, including attorney's fees, unless the court finds that the motion was filed without the movant's first making a good faith effort to obtain the disclosure or discovery without court action, or that the opposing party's nondisclosure, response, or objection was substantially justified, or that other circumstances make an award of expenses unjust **(B)** If the motion is denied, the court may enter any protective order authorized under Rule 26(c) and shall, after affording an opportunity to be heard, require the moving party or the attorney filing the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust **(C)** If the motion is granted in part and denied in part, the court may enter any protective order authorized under Rule 26(c) and may, after affording an opportunity to be heard, apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner	**(5) *Payment of Expenses; Protective Orders.*** **(A)** *If the Motion Is Granted (or Disclosure or Discovery Is Provided After Filing)* If the motion is granted — or if the disclosure or requested discovery is provided after the motion was filed — the court must, after giving an opportunity to be heard, require the party or deponent whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees But the court may not order this payment if **(i)** the movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action, **(ii)** the opposing party's nondisclosure, response, or objection was substantially justified, or **(iii)** other circumstances make an award of expenses unjust **(B)** *If the Motion Is Denied* If the motion is denied, the court may make any protective order authorized under Rule 26(c) and must, after giving an opportunity to be heard, require the movant, the attorney filing the motion, or both to pay the party or deponent who opposed the motion its reasonable expenses incurred in opposing the motion, including attorney's fees But the court may not order this payment if the motion was substantially justified or other circumstances make an award of expenses unjust **(C)** *If the Motion Is Granted in Part and Denied in Part* If the motion is granted in part and denied in part, the court may enter any protective order authorized under Rule 26(c) and may, after giving an opportunity to be heard, apportion the reasonable expenses incurred regarding the motion

(b) Failure to Comply With Order. **(1) Sanctions by Court in District Where Deposition Is Taken.** If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the district in which the deposition is being taken, the failure may be considered a contempt of that court **(2) Sanctions by Court in Which Action Is Pending.** If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, or if a party fails to obey an order entered under Rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following **(A)** An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order, **(B)** An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence,	**(b) Failure to Comply with a Court Order.** **(1)** ***Sanctions in the District Where the Deposition Is Taken.*** If a deponent fails to be sworn or to answer a question after being ordered to do so by the court where the discovery is taken, the failure may be treated as contempt of court **(2)** ***Sanctions in the District Where the Action Is Pending.*** **(A)** *For Not Obeying a Discovery Order* If a party or a party's officer, director, or managing agent — or a witness designated under Rule 30(b)(6) or 31(a)(4) — fails to obey an order to provide or permit discovery, including an order under Rule 26(f), 35, or 37(a), the court in which the action is pending may make further just orders They may include the following **(i)** directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims, **(ii)** prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence,
(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party, **(D)** In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination,	**(iii)** striking pleadings in whole or in part, **(iv)** staying further proceedings until the order is obeyed, **(v)** dismissing the action or proceeding in whole or in part, **(vi)** rendering a default judgment against the disobedient party, or **(vii)** treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination
(E) Where a party has failed to comply with an order under Rule 35(a) requiring that party to produce another for examination, such orders as are listed in paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply shows that that party is unable to produce such person for examination In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust	**(B)** *For Not Producing a Person for Examination* If a party does not comply with an order under Rule 35(a) requiring it to produce another person for examination, the court may issue any of the orders listed in Rule 37(b)(2)(A)(i)-(vi), unless the disobedient party shows that it cannot produce the other person **(C)** *Payment of Expenses* Instead of or in addition to the orders above, the court must order the disobedient party, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust

(c) Failure to Disclose; False or Misleading Disclosure; Refusal to Admit.	**(c) Failure to Disclose, to Amend an Earlier Response, or to Admit.**
(1) A party that without substantial justification fails to disclose information required by Rule 26(a) or 26(e)(1), or to amend a prior response to discovery as required by Rule 26(e)(2), is not, unless such failure is harmless, permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed In addition to or in lieu of this sanction, the court, on motion and after affording an opportunity to be heard, may impose other appropriate sanctions In addition to requiring payment of reasonable expenses, including attorney's fees, caused by the failure, these sanctions may include any of the actions authorized under Rule 37(b)(2)(A), (B), and (C) and may include informing the jury of the failure to make the disclosure	**(1)** ***Failure to Disclose or Amend.*** If a party fails to disclose the information required by Rule 26(a), or to provide the additional or correcting information required by Rule 26(e), the party is not permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed, unless the failure was substantially justified or is harmless In addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard **(A)** may require payment of the reasonable expenses, including attorney's fees, caused by the failure, **(B)** may inform the jury of the party's failure, and **(C)** may impose other appropriate sanctions, including any of the orders listed in Rule 37(b)(2)(A)(i)-(vi)
(2) If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, the requesting party may apply to the court for an order requiring the other party to pay the reasonable expenses incurred in making that proof, including reasonable attorney's fees The court shall make the order unless it finds that (A) the request was held objectionable pursuant to Rule 36(a), or (B) the admission sought was of no substantial importance, or (C) the party failing to admit had reasonable ground to believe that the party might prevail on the matter, or (D) there was other good reason for the failure to admit	**(2)** ***Failure to Admit.*** If a party fails to admit what is requested under Rule 36 and if the requesting party later proves a document to be genuine or the matter true, the requesting party may move that the party who failed to admit pay the reasonable expenses, including attorney's fees, incurred in making that proof The court must so order unless **(A)** the request was held objectionable under Rule 36(a), **(B)** the admission sought was of no substantial importance, **(C)** the party failing to admit had a reasonable ground to believe that it might prevail on the matter, or **(D)** there was other good reason for the failure to admit

(d) Failure of Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take the deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under subparagraphs (A), (B), and (C) of subdivision (b)(2) of this rule Any motion specifying a failure under clause (2) or (3) of this subdivision shall include a certification that the movant has in good faith conferred or attempted to confer with the party failing to answer or respond in an effort to obtain such answer or response without court action In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust	**(d) Party's Failure to Attend Its Own Deposition, Serve Answers to Interrogatories, or Respond to a Request for Inspection.** **(1)** ***In General.*** **(A)** *Motion, Grounds for Sanctions* The court in which the action is pending may, on motion, order sanctions if **(i)** a party or a party's officer, director, or managing agent — or a person designated under Rule 30(b)(6) or 31(a)(4) — fails, after being served with proper notice, to appear for that person's deposition, or **(ii)** a party, after being properly served with interrogatories under Rule 33 or a request for inspection under Rule 34, fails to serve its answers, objections, or written response **(B)** *Certification* The motion for sanctions must include a certification that the movant has in good faith conferred or attempted to confer with the party failing to answer or respond in an effort to obtain the answer or response without court action
The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has a pending motion for a protective order as provided by Rule 26(c)	**(2)** ***Unacceptable Excuse for Failing to Act.*** A failure described in Rule 37(d)(1)(A) is not excused on the ground that the discovery sought was objectionable, unless the party failing to act has a pending motion for a protective order under Rule 26(c) **(3)** ***Types of Sanctions.*** Sanctions may include any of the orders listed in Rule 37(b)(2)(A)(i)-(vi) Instead of or in addition to these sanctions, the court must require the party failing to act, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust
(e) [Abrogated.]	
(f) [Repealed.]	

(g) Failure to Participate in the Framing of a Discovery Plan. If a party or a party's attorney fails to participate in good faith in the development and submission of a proposed discovery plan as required by Rule 26(f), the court may, after opportunity for hearing, require such party or attorney to pay to any other party the reasonable expenses, including attorney's fees, caused by the failure	**(e) Failure to Participate in Framing a Discovery Plan.** If a party or its attorney fails to participate in good faith in the development and submission of a proposed discovery plan as required by Rule 26(f), the court may, after giving an opportunity to be heard, require that party or attorney to pay to any other party the reasonable expenses, including attorney's fees, caused by the failure

COMMITTEE NOTE

The language of Rule 37 has been amended as part of the general restyling of the Civil 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

Rule 45. Subpoena	Rule 45. Subpoena
(a) Form; Issuance. **(1)** Every subpoena shall **(A)** state the name of the court from which it is issued, and **(B)** state the title of the action, the name of the court in which it is pending, and its civil action number, and **(C)** command each person to whom it is directed to attend and give testimony or to produce and permit inspection and copying of designated books, documents or tangible things in the possession, custody or control of that person, or to permit inspection of premises, at a time and place therein specified, and **(D)** set forth the text of subdivisions (c) and (d) of this rule A command to produce evidence or to permit inspection may be joined with a command to appear at trial or hearing or at deposition, or may be issued separately	**(a) In General.** **(1)** ***Form and Contents.*** **(A)** *Requirements* Every subpoena must **(i)** state the court from which it issued, **(ii)** state the title of the action, the court in which it is pending, and its civil-action number, **(iii)** command each person to whom it is directed to do the following at a specified time and place attend and testify, or produce and permit the inspection and copying of designated documents or tangible things in that person's possession, custody, or control, or permit the inspection of premises, and **(iv)** set forth the text of Rule 45(c) and (d) **(B)** *Command to Produce Evidence or Permit Inspection* A command to produce evidence or to permit inspection may be included in a subpoena commanding attendance at a deposition, hearing, or trial, or may be set forth in a separate subpoena

(2) A subpoena commanding attendance at a trial or hearing shall issue from the court for the district in which the hearing or trial is to be held A subpoena for attendance at a deposition shall issue from the court for the district designated by the notice of deposition as the district in which the deposition is to be taken If separate from a subpoena commanding the attendance of a person, a subpoena for production or inspection shall issue from the court for the district in which the production or inspection is to be made	(2)[1] ***Issued from Which Court.*** A subpoena must issue as follows **(A)** for attendance at a trial or hearing, from the court for the district where the hearing or trial is to be held, **(B)** for attendance at a deposition, from the court for the district where the deposition is to be taken, stating the method for recording the testimony, and **(C)** for production and inspection, if separate from a subpoena commanding a person's attendance, from the court for the district where the production or inspection is to be made
(3) The clerk shall issue a subpoena, signed but otherwise in blank, to a party requesting it, who shall complete it before service An attorney as officer of the court may also issue and sign a subpoena on behalf of **(A)** a court in which the attorney is authorized to practice, or **(B)** a court for a district in which a deposition or production is compelled by the subpoena, if the deposition or production pertains to an action pending in a court in which the attorney is authorized to practice	(3) ***Issued by Whom.*** The clerk must issue a subpoena, signed but otherwise in blank, to a party who requests it That party must complete it before service An attorney, as an officer of the court, may also issue and sign a subpoena from **(A)** a court in which the attorney is authorized to practice, or **(B)** a court for a district where a deposition is to be taken or production is to be made, if the attorney is authorized to practice in the court in which the action is pending

1 This style draft incorporates the proposed amendment of Rule 45(a)(2) that was published for public comment in August 2003, except that the phrase "in the name of the court" in has been restyled to "from the court " If the proposed amendment is adopted, further style revisions should be made when restyled Rules 26-37 & 45 are published

(b) Service. (1) A subpoena may be served by any person who is not a party and is not less than 18 years of age Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person and, if the person's attendance is commanded, by tendering to that person the fees for one day's attendance and the mileage allowed by law When the subpoena is issued on behalf of the United States or an officer or agency thereof, fees and mileage need not be tendered Prior notice of any commanded production of documents and things or inspection of premises before trial shall be served on each party in the manner prescribed by Rule 5(b)	**(b) Service.** (1) ***By Whom; Tendering Fees; Serving a Copy of Certain Subpoenas.*** Any person who is at least 18 years old and not a party may serve a subpoena Serving a subpoena on a named person requires delivering a copy to that person and, if the subpoena commands that person's attendance, tendering to that person the fees for one day's attendance and the mileage allowed by law Fees and mileage need not be tendered when the subpoena issues on behalf of the United States or any of its officers or agencies If the subpoena commands the production of documents or tangible things or the inspection of premises before trial, then before it is served on the named person, a notice must be served on each party as provided in Rule 5(b)
(2) Subject to the provisions of clause (ii) of subparagraph (c)(3)(A) of this rule, a subpoena may be served at any place within the district of the court by which it is issued, or at any place without the district that is within 100 miles of the place of the deposition, hearing, trial, production, or inspection specified in the subpoena or at any place within the state where a state statute or rule of court permits service of a subpoena issued by a state court of general jurisdiction sitting in the place of the deposition, hearing, trial, production, or inspection specified in the subpoena When a statute of the United States provides therefor, the court upon proper application and cause shown may authorize the service of a subpoena at any other place A subpoena directed to a witness in a foreign country who is a national or resident of the United States shall issue under the circumstances and in the manner and be served as provided in Title 28, U S C § 1783 (3) Proof of service when necessary shall be made by filing with the clerk of the court by which the subpoena is issued a statement of the date and manner of service and of the names of the persons served, certified by the person who made the service	(2) ***Service in the United States.*** Subject to Rule 45(c)(3)(A)(ii), a subpoena may be served at any place **(A)** within the district of the court from which it is issued, **(B)** outside that district but within 100 miles of the place of the deposition, hearing, trial, production, or inspection specified in the subpoena, **(C)** within the state of the court from which it is issued if a state statute or court rule permits serving a subpoena issued by a state court of general jurisdiction sitting in the place of the deposition, hearing, trial, production, or inspection specified in the subpoena, or **(D)** that the court authorizes, if a United States statute so provides, upon proper application and for good cause (3) ***Service in a Foreign Country.*** 28 U S C § 1783 governs the issuance and service of a subpoena directed to a United States national or resident who is in a foreign country (4) ***Proof of Service.*** Proving service, when necessary, requires filing with the court from which the subpoena issued a statement showing the date and manner of service and the names of the persons served The statement must be certified by the server

(c) Protection of Persons Subject to Subpoenas. **(1)** A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee	**(c) Protecting a Person Subject to a Subpoena.** **(1)** ***Avoiding Undue Burden or Expense; Sanctions.*** A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena The issuing court must enforce this duty and must impose on a party or attorney who fails to comply with the duty an appropriate sanction, which may include lost earnings and reasonable attorney's fees
(2)(A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial **(B)** Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded	**(2)** ***Command to Produce Materials or Permit Inspection.*** **(A)** *Appearance Not Required* A person commanded to produce and permit the inspection and copying of designated documents or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial **(B)** *Objections* Subject to Rule 45(d)(2), a person commanded to produce and permit inspection and copying may serve on the party or attorney designated in the subpoena a written objection to inspecting or copying any or all of the designated materials or to inspecting the premises The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served If an objection is made, the following rules apply **(i)** At any time, on notice to the commanded person, the serving party may move the court from which the subpoena issued for an order compelling production, inspection, or copying **(ii)** Inspection and copying may be done only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance

(3)(A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it (i) fails to allow reasonable time for compliance, (ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held, or (iii) requires disclosure of privileged or other protected matter and no exception or waiver applies, or (iv) subjects a person to undue burden	(3) ***Quashing or Modifying a Subpoena.*** (A) *When Required* On timely motion, the court from which a subpoena issued must quash or modify a subpoena that (i) fails to allow a reasonable time to comply, (ii) requires a person who is neither a party nor a party's officer to travel more than 100 miles from the place where that person resides, is employed, or regularly transacts business in person — except that, subject to Rule 45(c)(3)(B)(iii), such a person may be commanded to attend a trial by traveling from any place within the state where the trial is held, (iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies, or (iv) subjects a person to undue burden
(B) If a subpoena (i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or (ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or (iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions	(B) *When Permitted* To protect a person subject to or affected by a subpoena, the court from which it issued may, on timely motion, quash or modify the subpoena if it requires (i) disclosure of a trade secret or other confidential research, development, or commercial information, (ii) disclosure of an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party, or (iii) travel of more than 100 miles to attend trial by a person who is neither a party nor a party's officer, as a result of which the person will incur substantial expense (C) *Specifying Conditions as an Alternative* In the circumstances described in Rule 45(c)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the party on whose behalf the subpoena was issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and ensures that the subpoenaed person will be reasonably compensated

(d) Duties in Responding to Subpoena. (1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand (2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim	**(d) Duties in Responding to a Subpoena.** (1) ***Producing Documents.*** A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business, or organize and label them according to the categories in the demand (2) ***Claiming Privilege or Protection.*** A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must **(A)** expressly assert the claim, and **(B)** describe the nature of the documents, communications, or things not produced in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the applicability of the privilege or protection
(e) Contempt. Failure by any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court from which the subpoena issued An adequate cause for failure to obey exists when a subpoena purports to require a non-party to attend or produce at a place not within the limits provided by clause (ii) of subparagraph (c)(3)(A)	**(e) Contempt.** The court from which a subpoena issued may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena A nonparty's disobedience must be excused if the subpoena purports to require the nonparty to attend or produce at a place not within the limits of Rule 45(c)(3)(A)(ii)

COMMITTEE NOTE

The language of Rule 45 has been amended as part of the general restyling of the Civil 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.

The reference to discovery of "books" in former Rule 45(a)(1)(C) was deleted to achieve consistent expression throughout the discovery rules. Books remain a proper subject of discovery

Former Rule 45(b)(1) required "prior notice" to each party of any commanded production of documents and things or inspection of premises. Courts have agreed that notice must be given "prior" to the return date, and have tended to converge on an interpretation that requires notice to the parties before the subpoena is served on the person commanded to produce or permit inspection. That interpretation is adopted in amended Rule 45(b)(1) to give clear notice of general present practice

The language of former Rule 45(d)(2) addressing the manner of asserting privilege is replaced by adopting the wording of Rule 26(b)(5) The same meaning is better expressed in the same words

DRAFT MINUTES

CIVIL RULES ADVISORY COMMITTEE

OCTOBER 2-3, 2003

The Civil Rules Advisory Committee met on October 2 and 3, 2003, at the Hyatt Regency in Sacramento, California. The meeting was attended by Judge Lee H. Rosenthal, Chair; Sheila Birnbaum, Esq.; Judge C. Christopher Hagy; Justice Nathan L. Hecht; Robert C. Heim, Esq.; Dean John C. Jeffries, Jr., Hon Peter D. Keisler; Judge Paul J Kelly, Jr.; Judge Richard H. Kyle; Professor Myles V. Lynk; Judge H. Brent McKnight; Judge Thomas B. Russell; Judge Shira Ann Scheindlin; and Andrew M. Scherffius, Esq.. Professor Edward H. Cooper was present as Reporter, Professor Richard L Marcus was present as Special Reporter, and Professor Thomas D. Rowe, Jr., was present as Consultant. Judge David F. Levi, Chair, Judge Sidney A. Fitzwater, and Professor Daniel R. Coquillette, Reporter, represented the Standing Committee. Judge James D. Walker, Jr., attended as liaison from the Bankruptcy Rules Committee. Judge J. Garvan Murtha, chair of the Standing Committee Style Subcommittee, and Style Subcommittee member Dean Mary Kay Kane also attended Professor R. Joseph Kimble and Joseph F. Spaniol, Jr., Style Consultants to the Standing Committee, also attended. Peter G. McCabe, John K. Rabiej, Robert Deyling, and Professor Steven S. Gensler, Supreme Court Fellow, represented the Administrative Office. Thomas E. Willging, Kenneth Withers, and Tim Reagan represented the Federal Judicial Center. Ted Hirt, Esq., Department of Justice, was present. Stefan Cassella, Esq., also attended for the Department of Justice, with Assistant United States Attorneys Richard Hoffman and Courtney Lind. Observers included Judge Christopher M. Klein; Peter Freeman, Esq., and Jeffrey Greenbaum, Esq. (ABA Litigation Section), Stefanie Bernay, Esq.; Brooke Coleman, Esq., and Alfred W. Cortese, Jr., Esq..

Judge Rosenthal began the meeting by noting that in an unusual twist, no Committee member has become a law school dean — or even migrated to the academy — since the last meeting. Judge McKnight has become a District Judge. Sheila Birnbaum is attending her final meeting at the conclusion of her second term as a member, carrying on active involvement in the Committee's work that began several years before appointment as a member and that bids fair to continue into the future. Judge Levi has been appointed chair of the Standing Committee Both graduates will be suitably recognized at dinner. Frank Cicero, Jr., a new Committee member, attended Style Subcommittee meetings in August but was not able to attend this meeting.

Minutes

The Minutes for the May 1-2, 2003, meeting were approved.

Administrative Office Report

John Rabiej delivered the Administrative Office Report. The Office has focused its legislative attention on three bills.

The E-Government Act of 2002 is law. It requires promulgation of rules through the Enabling Act process to address concerns about privacy and security arising from the conversion to electronic court records. There is no time deadline for adopting these rules. By 2007, all e-court records must be made available to the public. The Judicial Conference is authorized to issue interim rules and interpretive statements. The Standing Committee has taken the lead in implementing the Enabling Act Rules requirement, creating a subcommittee chaired by Judge Fitzwater. All of the advisory committee reporters are members, with Professor Capra as lead reporter. Judge Scheindlin is the Civil Rules Advisory Committee member of the subcommittee. It seems likely that subcommittee proposals will be reviewed by the advisory committees before final Standing Committee action. The Judicial Conference has adopted a privacy policy for some cases, and is working on a policy for criminal cases. Judge Levi plans to invite two members from the Committee on Court Administration and Case Management to serve as liaisons on the subcommittee.

The minimum-diversity class-action bill that passed the House this year includes a mandatory interlocutory appeal provision that would undo the recently adopted Civil Rule 23(f) discretionary appeal provision. The Senate bill has no comparable provision. There had been plans to bring the bill to the Senate floor in September; it may yet be brought to the Senate this session. An earlier version of the House bill included several provisions that would interfere with the Rule 23 amendments slated to take effect this December 1. As passed, the House bill includes a provision that would accelerate the effective date of the Rule 23 amendments if the bill should become law before December 1; that prospect is diminishing. Absent further developments, the pending amendments will take effect on December 1

An asbestos bill has emerged with great effort on all sides. Judge Becker of the Third Circuit has been working hard to find a compromise solution that will be acceptable to all sides. The prospects for success, however, do not appear promising.

There is a bill pending to undo the Lexecon decision, so that a multidistrict consolidation court could retain cases for trial as well as pretrial proceedings.

This Committee had no proposals to present to the Judicial Conference at its September meeting.

The Judicial Conference did resolve to address several removal questions dealing with the time to remove when defendants are served at different times; removal when the diversity amount-in-controversy requirement does not appear on the face of the original state-court complaint but later appears; exceptions to the present requirement that a diversity action be removed no more than one year after filing; and the "separate and independent claim or cause of action" provision in 28 U.S C § 1441(c).

Style: Rules 16-25, less 23

Judge Rosenthal observed that the Style Project is successfully meeting the ambitious schedule we have set. The process begins with revision of the "Garner-Pointer" draft by the Style consultants; review by "the professors"; submission of a further-revised draft to the Style Subcommittee; consideration by Subcommittee A or B of a draft annotated with footnote questions; and, with further revisions, consideration by the full Committee. Each rule has a member-in-charge for consideration in the subcommittee and then in the full Committee. Specific difficult issues may be subject to additional research at each step.

The project remains careful to avoid changes in the substance of any rule. Desirable changes of meaning — including resolutions of ambiguities that cannot be corrected as a matter of style without risk of changed meaning — are collected for action on separate tracks. Some of these substantive changes may be published for comment in tandem with the style drafts.

This process has not only managed to stay on schedule but has also worked very well. Style Rules 1 through 15 have been approved by the Standing Committee for publication as part of a larger package. We hope to publish all of Rules 1-37 and 45, minus Rule 23, as a first Style package. At this meeting we have for consideration Rules 16-37, minus Rule 23, plus Rule 45.

The Style Project has produced a long list of "global issues" that must be considered after we have achieved an overview of the contexts in which troubling words and phrases appear. Examples include the choices between "stipulate" and "agree"; between "disobedient" and some other word such as "noncompliant"; between "United States statute" and "federal statute " Some of these

choices are likely to be made by adopting a single term to be used consistently throughout the Rules; others likely will lead to use of different terms according to context and history.

We also need to remain aware of the need to adjust Rules amendments made in the ongoing course of business to Style conventions. Rules 24, 27, and 45 are on today's Style agenda, for example, and also are the subject of amendments published for comment last August.

Judge Russell began the Subcommittee A presentation by noting that the Standing Committee's Style Subcommittee and those who have worked with it in bringing drafts to the Advisory Committee Subcommittees have done outstanding work in focusing the issues for discussion.

Rule 16. Discussion began with the first part of Style Rule 16(a). The current Style draft adheres to the present rule by referring to "one or more conferences before trial." The Style Subcommittee would prefer to refer only to "pretrial conferences" throughout Rule 16. This recommendation was questioned by noting that bankruptcy courts have an aggressive practice called "pretrial" that occurs immediately after filing. It is understood that this event is different from later pretrial conferences. "Conferences before trial" is more suitable. Another comment was that in practice it is common to refer to the final conference held to set trial issues as the "pretrial" conference, and that it is better to refer to other conferences as other conferences. So the first conference often is called the "Rule 16" or "scheduling" conference; later trials are "pretrial" conferences," while the trial-setting conference is the "final pretrial conference." And "settlement conferences" are quite distinct from conferences that focus on preparing the case for trial. Rule 26(f), moreover, refers to the Rule 16(b) conference as the scheduling conference. On the other hand, it was noted that the caption of present Rule 16 and the tag-line of present Rule 16(a), refer to "pretrial conferences." At the end, the consensus was to adopt "pretrial conference" throughout if that continues to be the Style Subcommittee preference.

So Style Rule 16(b)(3)(B)(iii) refers to "other conferences"; this will be changed, as the Style Subcommittee recommends, to "pretrial."

Present Rule 16(c)(3) refers to action with respect to "the possibility of obtaining admissions." Style 16(c)(2)(C) refers simply to "obtaining admissions." Some participants are concerned that this form may be read by some eager judges to imply an authority to direct "admissions" that a party resists. But the very concept of "admission" may be so imbued with notions of willing consent that "possibility of" adds no useful restraint. The Style draft will remain as it is.

Separately, it was asked whether the Committee Note should make it clear that a settlement conference is a "pretrial conference" governed by Rule 16. Both present and Style Rules 16(a)(5) refer to facilitating settlement as an object of a pretrial conference. There is no change, and no need for Note comment.

Present Rule 16(e) states that after any Rule 16 conference, "an order shall be entered reciting the action taken." Style Rule 16(d) translates "shall" as "should." "Should" was adopted as an accurate reflection of practice. But does it accurately reflect the original intent? This illustrates the global question whether "must" often seems to change the character of discretion established by present rules into a binding "instruction manual." Does "must enter an order" mean that the court cannot comply by simply stating the results on the record? And what of the frequent occurrence that there is no reporter, no record, and no order?

Further discussion expanded on the general global issue "Shall" may be used in the present rules as a deliberate ambiguity. Working from a presumption that it should be translated as "must" is a mistake. The Rules are aimed primarily at guiding the lawyers, reposing discretion in judges that should not be confined by unnecessary force. The rules should be drafted for the typical judge — that is, for the good judge — and not for the rare bad judge The choice makes a subtle but powerful difference that can affect the entire rule process into the future In various places we wind up saying "must" when there is discretion not to act as the rule says the judge must. "Must" is appropriate when there is a nondiscretionary statutory duty, or a duty so clear as to warrant appellate enforcement by extraordinary writ, or some other clearly nondiscretionary duty. Style Rule 16(b)(1), saying that a judge "must" enter a scheduling order, is an example; many times the parties and court have agreed that the time deadline that Rule 16(b)(2) says "must" be honored is inappropriate and should be deferred.

So Style Rule 16(b)(3)(A) says that the scheduling order must limit the time to complete discovery. But there are many cases in which the court and parties know there will be no discovery. Why must the order include a meaningless time limit?

Professor Kimble noted that this argument is an observation that "shall" has been corrupted, to state only a "soft duty." We do need to pay attention to each use of shall in the present rules to be alert to this possibility, and to translate each use according to present meaning. So we attempt to recognize clearly established discretion by using "may" or "should" rather than "must "

It was observed that Rule 16 took on its present form in 1983 and later. The commands were designed to encourage judges to do things they had not been doing. The command that an order must be entered after every conference made more sense before those changes were adopted. And as time has passed, judges are keeping cases managed and on track Requiring an order after a settlement conference, for example, may seem inappropriate.

Carrying forward on the global issue, it was suggested that "shall" "is a soft imperative." Changing to "may," which conveys no imperative sense, is a change of meaning even if it reflects practice and good sense. "Should" is not as much of a reduction; it implies an obligation to adhere as an ordinary practice, with room to deviate.

Another general question asked whether it is within the Style Project to adopt changes merely because they reflect current practice: Does practice justify changes of language only when practice reflects interpretive resolution of present ambiguity, or can practice not authorized by clear present language justify new language?

Another suggestion was that the feeling of departure from present "shall" language may be reduced by relying on the passive voice. "An order should be entered." The passive voice suggests flexibility· the lawyer prepares an order to be entered, or the "order" is taken on the record and a "minute" order is entered that simply recites entry of a full order in the record. Professor Kimble responded that this is an "end run." If we indulge this finesse in Rule 16, will it be used elsewhere?

"May" also may be ambiguous — it can be used to express a grant of authority, but it also can be used in a predictive way. The Style Project seeks to avoid the predictive sense, using "may" only in the sense of recognizing authority.

The Committee was reminded that this is the third Style Project. The "shall"-to-"must" presumption has been adopted for the Appellate and Criminal Rules. Deviations in the Civil Rules, frequently translating to "may" or "should," could create confusion.

A further source of difficulty arises from the use of "shall" and "may" together in closely related parts of a single present rule. If we render some present "shalls" as "may," we eliminate a contrast that surely has meaning in the present rule. The present contrast implies different levels of discretion; the change will often affect meaning as the former contrast is forgotten.

The discussion was briefly brought back to Style Rule 16(d) by asking whether there was a consensus on the use of "should," and then opened up to the question whether all of Rule 16 should be reexamined for this question.

Support was offered for "should" in Style Rule 16(d). But it was pointed out that Style (b)(2) uses "must" for issuing a scheduling order as soon as practicable, and urged that Style (b)(3)(A) should be changed from "must" limit specific matters to "should." It was pointed out that a single "shall" covers both of these matters in present 16(b), and urged that because this is a global issue the choices might be postponed for later discussion. But it was suggested in response that the Committee should make decisions that are appropriate to each context as it goes through the rules. The eventual global discussion will be better informed by this careful effort to think through each present "shall."

One view is that "should" is the better word when the present "shall" means "should in the normal course, if appropriate." So in Style 16(d), "should" enter a pretrial is better, while in Style 16(e) it is better to say that the final pretrial conference "must" be held as close to the start of trial as is reasonable. But the qualification implied by "as is reasonable" can inform the choice in either of two ways: it shows that "must" does not mean what it says, but by that very token it mollifies the apparent command of "must" and avoids any real mischief. A further difficulty appears, however, in the continuation of the same Style Rule 16(e) sentence, which says that the final pretrial conference must be attended by at least one attorney who will conduct the trial for each party. This truly is a command. Present Rule 16(d) says "shall" in both settings; is it proper to translate one shall as "should," the other as "must"? If we actually mean different levels of command, why not use different words of command?

Another suggestion was that the purpose of the Style Project is to hew as closely as possible to the present rule "Should" may imply too much discretion to ignore the command that the final pretrial conference be held close to trial. The discretion implied by "as is reasonable" may afford discretion enough, "must" is not burdensome.

A motion to amend Style Rule 16(e) to say: "The [final] pretrial conference ~~must~~ should be held as close to the start of trial as is reasonable" failed by 3 votes in favor, 7 votes against.

It was agreed that Style Rule 16(b)(2) will continue to say that the judge "must" issue the scheduling order as soon as practicable, etc.

Turning back to Style Rule 16(b)(3)(A), which says that the scheduling order "must" limit the time to join parties, and so on, it was noted that a change to "should" or "may" could justify collapsing subparagraphs (A) and (B) into a single paragraph that lists all subjects as permissive contents of the scheduling order. Adherence to "must" was defended on the ground that a command

was intended in 1983, but the defense was weakened by the further observation that "may" or "should" may conform better to actual practice.

An observer commented that courts have been flexible on all these issues, seeing them as a matter of discretionary case management. This comment was seconded by agreement and a suggestion that "should" fits the matters described as "required contents" in Style Rule 16(b)(3)(A) If we do adopt "should," perhaps the Committee Note should explain that the translation of "shall" reflects modern practice. But this course is appropriate only if the present rule is ambiguous and current practice is uniform. And it may be difficult to say that the present rule is ambiguous; the first three scheduling orders are listed as "shall," while the next three are listed after "may." But if current practice treats all as a matter of permission, not command, is that enough? Particularly if we retain two subparagraphs — (A) would be "should" include what now is "shall" include, while (B) would continue the present "may."

This discussion led to the suggestion that there seemed to be a consensus that "should" is better for the "required" topics, but that it is a change from the present rule. If so, the change is better left to a parallel noncontroversial-but-substantive change track.

Discussion came full circle to the observation that "shall" has become intrinsically ambiguous wherever it appears in the present rules. If we translate it as "must," we risk increasing the force of the command and adding rigidity. If we translate it as "should," and even more so if we translate it as "may," we risk reducing the force of the behest. So if the present "shall" is treated as a matter of discretion in case management, translating it as "must" may widen the gap from current practice.

The approach of resolving style ambiguities by relying on current practice was then addressed directly by pointing to three possible approaches: (1) The intent of the original drafters can be researched (2) The interpretive approaches in current cases can be researched to the extent that the decisions have been put into accessible public research resources. (3) We can rely on more impressionistic views of what is current practice. But "the plural of anecdote is not data " The collective experience even of a group as diverse and as experienced as the Committee and those who assist it is great, but not all-encompassing

One judge observed that the Style 16(b)(3)(A) time limits are set because they can be modified. It is good to have initial targets from the beginning. "Must" keeps the current structure. Another observed that the original drafters wanted the court to address these matters The structure should be preserved. An observer added that in practice it is important to have closure of pretrial practice, and clarity about deadlines We should be careful about changes.

Returning to the ambiguity of "shall," it was suggested that it has the virtues that ambiguity at times presents. It preserves discretion, "but with an imperative overtone." "Must," on the other hand, seems to confer a right on litigants, and does not seem appropriate in the (b)(3)(A) context There is an existing comfort with "shall" that disappears with "must." No one reads "shall" as a "very strict imperative." "Should," on the other hand, may seem a substantive change — and that is unfortunate

One modest beginning might be to delete the Style taglines: (b)(3)(A) is "Required Contents," and (B) is "Permitted Contents." But the stylists protested that taglines are used for all subparagraphs unless the subparagraphs are simply items in a list. Perhaps different taglines could be adopted· "Ordinary Contents" and "Additional Contents."

At this point Professor Kimble stated that a review of 1,300 appellate cases shows courts agreeing that "shall" is mandatory. But then many of the opinions go on to recognize qualifications. "Over time, there are corruptions; it has been made ambiguous."

A motion to approve the present structure of Style Rule 16(b)(3) with the taglines as is was approved, 7 votes for and 3 votes against.

An attempt was made to capture this discussion by suggesting three things. First, the ambiguity of "shall" cannot be resolved by the strategy used for many other ambiguities With many ambiguities, present language can be carried forward without change for fear that any change to resolve the ambiguity will bring a change of meaning. But we have forsworn any use of "shall," so we must resolve the ambiguity each time it appears. The discussion shows that many of the resolutions will effect changes of meaning. Second, there is a particular problem when years or even decades of practice demonstrate nearly universal disregard of original intent. It may have been intended that district judges always "must" enter scheduling orders according to a defined schedule, and always "must" address specific topics. But if discretion is widely recognized in practice, we must face two propositions — "shall" is treated as ambiguous, and there almost certainly are good reasons to exercise discretion Third, the Committee needs to focus again on the recurring uncertainty whether to establish a parallel track for changes that seem too close to substance to be made as a matter of style, but that seem right and noncontroversial. Care must be taken to avoid confusion in the important stage of public comment.

The separate track issue was addressed by the suggestion that a limited number of small substantive changes can be addressed. A large number likely would cause great delay, engender consternation, and defeat any opportunity for Committee consideration of more important things. The best approach is to accumulate a list of possible small substantive changes as the Style process goes on. At the end, the list can be culled, selecting a manageable number of items for substantive revision.

A style suggestion was made for Style Rule 16(b)(4). Style 16(b)(1) says that "the district judge — or a magistrate judge when authorized by local rule — must issue a scheduling order." There is no apparent need to repeat all of this in (b)(4), which might be shortened: "and by leave of the ~~district~~ judge ~~or, when authorized by local rule, of a magistrate judge~~." "[T]he judge" plainly refers to the judge who entered the order

Style Rule 16 was approved subject to this discussion.

Rule 17 Style Rule 17(a)(2) says that an action under a United States statute for another's use or benefit "must" be brought in the name of the United States. Professor Rowe's research shows that every use-plaintiff statute requires this form. It is a proper rendition of "shall" in present Rule 17(a).

Style Rule 17 was approved.

Rule 18. Present Rule 18 addresses the situation in which "a claim is one cognizable only after another claim has been prosecuted to a conclusion." Extensive discussion in the subcommittee left substantial uncertainty as to the best translation of these antique phrases Research by Professor Rowe indicates that the best translation is that one claim "is contingent on the disposition of the other."

Style Rule 18 was approved.

Rule 19. Style Rule 19(a)(1)(B) was drafted to require joinder if feasible of a person who "appears to have" an interest relating to the action. This draft rested on a First Circuit decision adopting this phrase as a translation of present Rule 19(a)'s reference to a person who "claims" an interest. This translation seemed a good rendition of probable original intent. Further research by Professor Rowe, however, shows that other courts have found meaning in "claims." Some cases say that joinder is not required if the absent person does not mean to assert the claim that appears. Because the change of language might have substantive consequences, the Style draft presented for approval reverts to "claims an interest." This return to the present rule was approved.

The addition of "either" in Style Rule 19(a)(2) was approved. "a person who refuses to join as a plaintiff may be made either a defendant or * * * a plaintiff." This addition makes it clear that the person must be joined as one or the other, defeating any implication that nonjoinder is available as a third alternative.

When Rule 19(b) was revised in 1966, the drafters retained the familiar reference to an "indispensable" party, but demoted it to the role of mere label. After a court completes the required analysis and concludes that an action should not proceed without a nonparty that cannot be joined, the action is dismissed, "the absent person being thus regarded as indispensable." The Style draft discards "indispensable " Because the word has been used in merely conclusional fashion, no substantive change will follow. And although a few lawyers may encounter some research difficulties in looking for the familiar "indispensable" label, the change will promote clarity. The word "is not necessary."

Style Rule 19 was approved.

Rule 20. Style Rule 20(a)(1)(A) joins two elements in a single subparagraph: the plaintiffs (1) assert any right to relief jointly, severally, or in the alternative; and (2) the right is "with respect to or arising out of the same transaction," etc. It was suggested that here, and again in (b)(2)(A), it would be better to separate these two thoughts into individual subparagraphs. It was agreed that the Style Subcommittee would consider this question.

Style Rule 20 was approved, subject to consideration whether to divide the two (A) subparagraphs into two subparagraphs or to designate the two thoughts as items.

Rule 21. Style Rule 21 was approved.

Rule 22. Style Rule 22 was approved.

Rule 23.1, 23.2. Style Rules 23.1 and 23.2 were discussed together.

The reduced reference in Style 23.1(b)(2) to a "court," rather than "court of the United States," was approved. It is clear from the context that the reference can be only to the court of the United States in which the action is filed.

In subcommittee discussion, the dismissals that require court approval and notice were limited to "voluntary" dismissals. The theory was that Rule 23.2 in particular invokes Rule 23(e) procedures, and on December 1 Rule 23(e) will be amended to require court approval of a class action dismissal only if the dismissal is voluntary. The theory is that court approval inheres in an involuntary dismissal. The voluntary dismissal concept was added to Style Rule 23.1 to keep it parallel with 23.2. But it was suggested that there is a problem. Present Rule 23.1 says that the action shall not be dismissed without court approval, and notice of the proposed dismissal shall be

given in such manner as the court directs. What is the parallel to Rule 23(e), which as amended will require court approval of a voluntary dismissal only if the class has been certified? Research could be undertaken on the dismissal question, with perhaps uncertain results, or the references to "voluntary" and "voluntarily" can be stripped from both Style rules. There is no apparent loss in deleting these words. Deletion was approved. The second paragraph of the draft Committee Note will be deleted.

The notice question is different. Present Rule 23 1 says that notice of a dismissal or compromise of a derivative action shall be given to shareholders or members in such manner as the court directs. Style Rule 23.1(c) renders this as "must." "Must" may be important, whether the dismissal is voluntary or involuntary, because notice is an important element in determining whether the dismissal has res judicata effects on nonparty shareholders or members. It was agreed that research would be undertaken to determine whether it is proper to say that notice "must" be given.

Separately, it was complained that the boilerplate Style revision language that constitutes the first paragraph of every Style Rule Committee Note does not accurately reflect the uncertainties that inhere in translating "shall" as "may," "should," or "must "

Finally, it was agreed that further research would be undertaken to verify the belief that there is no meaning in this stylistic difference between present Rules 23.1 and 23.2 Rule 23.1 says a derivative action "may not be maintained if * * *." Rule 23.2 says the action "may be maintained only if * * *." The Style Subcommittee would prefer to adopt a consistent expression, recognizing that the inconsistent expressions were adopted when both rules were created at the same time in 1966.

With these changes and open questions, Style Rules 23.1 and 23.2 were approved.

Rule 24. Style Rules 24(a) and (b) were approved without discussion.

Style Rule 24(c)(1) accurately renders present "shalls" as "must." But it simply provides that a motion to intervene must be served on the parties, eliminating the present rule's "as provided in Rule 5." This may create an ambiguity. One reason for intervening, rather than seeking to amend a complaint to join as an added plaintiff, is to avoid the possible difficulties of effecting Rule 4 service of summons and complaint on one or more defendants The present rule makes it clear that Rule 4 service is not required. Although Rule 5 states the procedure for serving a motion, elimination of the cross-reference may create uncertainty. It was agreed to restore the reference: "A motion to intervene must be served on the parties under Rule 5." This will provide a useful reassurance.

Style Rule 24(c)(2) and (3) are caught up in the August publication of a proposed Rule 5.1 that would supersede these portions of present Rule 24(c). These provisions address the court's statutory duty to notify the United States Attorney General or a state attorney general when the constitutionality of an Act of Congress or state statute is called in question. The style of Rule 5.1, and its content, will be subject to further discussion after the comment period concludes. One particular point of style contention will be whether the statutory reference to intervention when an "Act of Congress" is challenged should be restyled to some more colloquial term. The Style Subcommittee prefers to use a different phrase.

The Style Rule 24(c)(3) tag line refers to a party's "duty" to call the court's attention to the court's notice duty, but the text refers to the party's responsibility and only says that the party

"should" act. Is this a party "duty"? The rule expressly says that failure to act does not waive any constitutional rights otherwise timely asserted. One suggestion was that although the right is not lost, the party might lose the case — that sounds like a duty. Other sanctions might be appropriate for failure to call the court's attention to the court's notice duty. Perhaps the tag line might better be "Party's responsibility," drawing directly from the Style text. The Style Subcommittee will consider this question.

Separately, there was an intimation of questions that will be raised when proposed Rule 5 1 comes back for discussion after the public comment period. Problems were seen in requiring a party to give notice to a nonparty (the attorney general), and in providing for two notices — one from the party, and a second from the court.

Style Rule 24 was approved, after restoring "under Rule 5" to subdivision (a)(1) and subject to the style questions carried forward to the Rule 5.1 discussion.

Rule 25. Present Rule 25(a)(2) says that when, upon death of a party, the action survives only among the surviving parties, the death shall be suggested on the record. Style Rule 25 does not anywhere refer to this requirement. Elimination of a direction to note death on the record has been thought appropriate on the theory that the only function of the suggestion is to trigger the 90-day period for substituting a new party for a deceased party. The treatises describe that as the only function of the statement. That subject is covered by present and Style Rules 25(a)(1) But the suggestion may have other values, helping to defeat strategic choices not to reveal a death. The deletion may have substantive consequences, and restoration is easy. Rule 25(a)(2) would begin "If a party dies, the death must be stated on the record and if the right * * * survives only * * *."

Who, it was asked, must make the statement? There is an awkwardness here. Who is to be sanctioned for failure — presumably it is the person with knowledge Stating that the death "must" be stated, rather than "should" be stated, may increase the inclination to impose sanctions. And sanctions may be useful because the party who knows may not want to trigger the time to substitute. If the focus is on the party who wants to obtain the benefit of the substitution period, "should" may be a better word.

It was suggested that the obligation to state the death on the record might be moved from (a)(2) to (a)(1), where it fits with the purpose to trigger the substitution period. There may be some difficulty with the question whether present Rule 25(a)(1) recognizes the court's authority to effect substitution without a party motion. Some cases seem to imply that the court lacks this authority, saying that substitution cannot be made and that it "is too bad that no one made a motion" to substitute. There is some ambiguity in the first two sentences of present (a)(1) The first sentence says that the court may order substitution. But the second sentence begins by stating that "the motion for substitution may be made," perhaps implying that a motion must be made. It does seem strange to have a court acting on its own to add parties to an action. But a court can act under Rule 17(c) to appoint a guardian ad litem. A court can extend the Rule 25(a)(1) substitution period if an estate is not formed in time to be substituted.

It was agreed that the behest to state death on the record should be softened to "should". "If a party dies, the death should be stated on the record * * * " And it was agreed that this provision should be restored to some place within Style Rule 25(a).

The question whether to locate the suggestion of death in Rule 25(a)(1) instead of (a)(2) invoked some uncertainty. It is strange that present (a)(1) does not refer to any duty to state death;

it merely sets the time to substitute from the suggestion on the record. Present (a)(2) does state a duty to suggest death, but attaches no apparent consequence. The theory that its only function is to operate through (a)(1) implies careless drafting. An alternative view is that (a)(1) leaves the matter to the initiative of any party that wishes to trigger the substitution period, while (a)(2) states a duty in order to make the record clear so that the court will know when the action is concluded by disposition of all claims among all remaining parties, and perhaps so that the remaining parties are spared the burdens of continuing the action as if procedural duties were owed a person who has become irrelevant by death and the failure of survivorship

It was agreed that the Style Subcommittee will study the question whether the statement of death provision should remain in (a)(2), or instead should be moved to (a)(1).

Another question was left for further research. Present Rule 25(a)(1) says in the first sentence that the court may order substitution if a party dies and the claim is not extinguished. Standing alone, it seems to imply that the court may act without motion. The second sentence, however, begins: "The motion for substitution may be made * * * " This sentence may imply that the court can act only on motion. Style drafts have taken different approaches to this uncertainty. One draft said in the first sentence that "the court may, on motion, order substitution." The current draft deletes "on motion" from the first sentence, and begins the second sentence with "A motion for substitution may be made * * *." Discussion reflected continuing uncertainty. It was suggested that there are no cases that recognize a court's authority to substitute parties without a motion, and that it is unseemly for a court to seek to control the identity of the adversaries who appear before it. In addition, cases that deal with untimely motions to substitute often seem to assume that there is no authority to act without motion, expressing regret that no timely motion was made to enable substitution. Research will inform the decision whether to fall back on the earlier draft.

The balance of Style Rule 25 was approved, subject to a determination whether to retain in (a)(2) the provision that death should be stated on the record, or whether instead the provision should be moved to (a)(1).

Style Rules 26-37 and 45, minus 23

Rule 26(a). Judge Kelly, chair of Subcommittee B, launched the discussion of Rule 26.

Mixed references to "agree," "agree in writing," and "stipulate" recur throughout the discovery rules. Choices have been made in reviewing the Style drafts, but it is recognized that this issue is a global issue that will be considered at the spring Advisory Committee meeting.

It was noted that Style Rule 26(a)(1)(A) has been changed from referring to exceptions "directed" by the court to refer to exceptions "ordered" by the court. The purpose of the change is to rely on the convention that an "order" is a case-specific event, ousting any implication that a court may direct exceptions by adopting a local rule

Since the subcommittee meeting, Style Rule 26(a)(2)(B)(i), (ii), and (iii) have been rearranged, raising the question whether "them" at the ends of (ii) and (iii) clearly refers back to the opinions described in (i). This is a question for the Style Subcommittee.

The elimination of present Rule 26(a)(5) as a redundant index was noted without further discussion. The Committee Note should explain the deletion.

Rule 26(b). Style Rule 26(b)(1) carries forward the reference to "books" that appears in the present rule. This has seemed an antiquated reference. Usage in the present rules is not consistent. "Books" does not appear in the Rule 34(a) definition of "documents," but does appear in Rule 45(a)(1)(C) — which is supposed to be the nonparty analogue of Rule 34. No case of recent vintage turns anything on the reference to "books." The Committee concluded that "books" should be deleted from Style Rules 26(b)(1) and 45(a)(1)(A)(iii). The Committee Note should explain that discovery of "books" continues to be permitted.

Present Rule 26(b)(2) says that the court may alter the limits on discovery, and then says that the frequency or extent of use of discovery "shall be limited" if the court determines any of three enumerated things, such as the (iii) determination that the burden outweighs likely benefit. Style (b)(2)(B) renders "shall" as "must." Subcommittee B raised the question whether "should" would be better than "must " Views supporting "should" urged that it is "softer, better." There is so much discretion built into the enumerated factors, which call for balancing judgments of many sorts, that "must" does not fit. Saying "must," further, may discourage the court from making the findings — the conclusion that discovery should not be limited will be expressed by finding that none of these determinations is appropriate Defense of "must," however, began with the observation that the tag lines of (b)(2)(A) and (B) are useful: "(A) When Permitted," and "(B) When Required." Not long ago Rule 26(b)(1) was amended to include an express but redundant reminder that all discovery is subject to the three (b)(2) factors. We have decided to retain this redundant reminder in Style 26(b)(1) to emphasize the importance of these limits. It would be a mistake to fall back on the softer "should." If one of these findings is made, some limit should be required: "must" expresses the intended command. The Committee did not recommend a change from "must."

To correct a slip of the style pen, it was agreed that 26(b)(2)(B) should refer to local rule in the singular, not to local rules.

It was agreed that the Committee Note to Style 26(b)(3) should explain that the clear provision for obtaining a party's own statement by request fills in an apparent gap in the present rule, which establishes the request procedure for a nonparty but does not describe the procedure for a party.

Another style question was asked of 26(b)(4)(B), which begins: "Generally, a party may not * * *." Generally is ordinarily disfavored. The Style Subcommittee chose to use it here, however, and it will remain.

Rule 26(e) Style Rule 26(e) presented two questions. From the beginning in 1970, Rule 26(e) has stated a duty to supplement discovery responses to include "information thereafter acquired." Style 26(e)(1) deletes these words. Attempting to unravel the limiting effect these words might have is difficult. In 1970 Rule 26(e) stated that a party who had responded to a discovery request with a response that was "complete when made" had a duty to supplement the response only as follows. The "as follows" included the limit to information thereafter acquired, and then complicated matters further by distinguishing between an answer that was "incorrect when made" and an answer that "though correct when made is no longer true." Although nothing in the context or Committee Note indicates it, the underlying assumption may have been that there is a continuing duty to supply information that was available at the time of the initial response but not supplied. The additional information would be a continuing response to the initial request, not a supplemental response. On that reading, "information thereafter acquired" would serve the purpose of distinguishing the narrower duty to supplement from the broader duty to continue the initial response process. The

Committee agreed that there should be a duty to supply information that was available at the time of the initial disclosure or discovery response but was not provided. The question is whether that is what the rule means now. There is no obvious reading. There is some natural attraction to the view that the rule only attaches to information acquired after the initial response, rather like the opportunity to engage in supplemental pleading under Rule 15(d) Carrying out the Rule 15 analogy, information available at the time of the initial response would be supplied by amending the initial disclosure or response, not by supplementing. But it was suggested that in practice there is a continuing stream of information as parties provide first responses and then continuing responses. Despite the curious drafting of Rule 26(e) as it began in 1970 and has since been amended, it seems now to mean that there is a continuing duty to supply relevant information, whether it was available but not supplied at the time of the first response or was acquired after that time. Deletion of "to include information thereafter acquired" was approved.

The second Rule 26(e) question arises from the distinction between present (e)(1) and present (e)(2). (e)(1) states a duty to supplement Rule 26(a) disclosures "at appropriate intervals." (e)(2) states a duty "seasonably to amend a prior response to" a discovery request. The distinct expression of the timing requirement in present (e)(1) was deliberately adopted when Rule 26(a) disclosure was adopted in 1993. Whatever the subtle distinction may have been, the cases do not reflect any difference in application. Style Rule 26(e)(1) thus brings disclosure and discovery together, and states a duty to supplement "in a timely manner." The Committee Note will explain that this change reflects the determination that no distinction has been observed in practice.

Rule 26(g). Both present and Style Rules 26(g)(1) require the signature to a disclosure and discovery response to include the signer's address. The temptation to add "and telephone number" was resisted because it might be a substantive change. The issue may, however, be addressed separately as a desirable substantive change.

Style Rule 26(g)(1)(B)(i) brings back a question faced with Rule 11(b)(1) Both present rules refer to "needless increase in the cost of litigation." Style Rule 11(b)(1) changed this to "unnecessary * * * expense." Style Rule 26(b)(1)(B)(i) initially adopted the Style Rule 11 phrase, but the subcommittee changed it back to "needlessly increase the litigation costs " It was agreed that the same expression should be used in both rules, despite the observation that Rule 11 is widely perceived as having real force while Rule 26(g) may be something of a paper tiger. In revisiting the question, however, the subcommittee believed that "needlessly increase the litigation costs" has a clearer focus on something wasteful or bad. "Unnecessary expense" is not as pointed. A change to "unnecessary expense," further, could change the result. The question whether "litigation costs" might be confused with statutory taxable costs was answered by agreeing that "litigation costs" is not a term of art and does not invoke the limited concept of taxable costs. A motion to change Rule 11 to conform with the current Style Rule 26(g)(1)(B)(i) formulation passed. Style Rule 11 will be changed to adopt the formula "needlessly increase the litigation costs."

Present Rule 26(g)(2)(A) provides that the signature on a discovery request, response, or objection certifies that it is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law. It does not include the provision in present Rule 11(b)(2) that recognizes in addition a nonfrivolous argument for the establishment of new law Style Rule 11 carries forward the argument to establish new law The contrast between Rule 26(g) and Rule 11 is troubling. But adding the new-law argument to Rule 26(g) may be a substantive change. The change will not be made in the Style process The question, however, may deserve separate consideration as a substantive improvement.

Present Rule 26(g)(1) does not say that an unsigned disclosure must be stricken. Present Rule 26(g)(2) does say that an unsigned discovery request, response, or objection must be stricken unless it is signed promptly. Style Rule 26(g)(2) calls for striking an unsigned disclosure. The Committee Note will explain that this extension corrects an obvious drafting oversight that is properly corrected within the scope of the Style Project

Style Rule 26 was approved with the changes made in the discussion

Rule 27

Style Rule 27(a)(1) changes "in any court of the United States" in the present rule to "in a United States court." It has been determined that "court of the United States" has been used in the Civil Rules in a sense that does not derive from the definition in 28 U.S.C. § 451. But "court of the United States" might seem to imply that the rule authorizes a petition to perpetuate testimony in a state court. It might be better to say "a United States court," or "a federal court." This is a global issue that recurs throughout the rules. Drafting must be clear that territorial courts are included. Consideration of the choice will carry forward

Style Rule 27(a)(2) overlaps an amendment that was published for comment in August. The Style Subcommittee will continue work on the published amendment as the amendment continues through the comment and later action periods. Because that process is independent of the Style process, it is possible to make changes that affect meaning subject to the usual tests that determine whether further publication is required.

The Committee Note will state that the reference in Style Rule 27(b)(1) to an appeal that "may be taken" means the same thing as the reference in present Rule 27(b) to the situation in which the time for appeal has not expired. This period includes the time after expiration of the initial appeal period if the district court retains authority to extend appeal time.

Style Rule 27 was approved.

Rule 28

Present Rule 28(b) states that a notice or commission "may designate the person before whom the deposition is to be taken either by name or descriptive title." Style Rule 28(b)(3) initially changed this to "must" designate, but has reverted to "may designate — by name or descriptive title — the person before whom the deposition is to be taken." "Must" was changed because it could create complications for practitioners. The State Department has expressed a preference for "may." But a question remains. The present rule says "either by name or descriptive title"; does that imply that one or the other must be used? And does the Style draft, by eliminating "either," change the meaning so that the notice or commission may designate by name, designate by descriptive title, or not designate at all? Without "either," the choice not to designate at all seems available. With "either," the present rule is ambiguous The question whether to restore "either" was left to the Style Subcommittee.

It was agreed that the caption of (b)(3) would be changed by adding "a". "Form of a Request * * *."

Style Rule 28 was approved subject to the questions raised in the discussion.

Rule 29

Style Rule 29 was approved without discussion.

Rule 30

Style Rule 30(b)(5)(A)(iv) refers to administration of the "oath," omitting the present rule's reference to "affirmation." Although Rule 43(d) says that a solemn affirmation may be used whenever a Civil Rule requires an oath, the sensitivities that many feel toward an oath requirement led to agreement that "or affirmation" should be restored to the Style Rule, and also to Style Rule 32(d)(3)(B)(i).

Style Rule 30(f)(2)(A)(ii) resolves an ambiguity in present Rule 30(f). Rule 30(f) now says that a party who produces documents or things for inspection at a deposition may retain "the materials" if, (B), it "offer[s] the originals to be marked for identification, after giving to each party an opportunity to inspect and copy them, in which event the *materials* may then be used in the same manner as if annexed to the deposition." "Materials" might refer only to the originals, an implication perhaps strengthened by the reference to annexation. But it might refer also to copies. The Style Rule resolves this by saying that "the originals" may be used as if annexed. It was pointed out that Evidence Rule 1003 allows copies to be used as evidence in many circumstances. And at least in some places, people actually practice by using copies. To refer only to "originals" in the Style Rule may be to narrow the rule. But to refer to "originals or copies" may be to broaden the rule. We cannot adopt either expression without further and perhaps uncertain research. A motion to go back to "materials" passed.

Further discussion of subdivision (f) increased the perplexities. Many lawyers faced with voluminous documents or things produced at a deposition react by postponing the deposition to enable a careful examination rather than attempt to depose a witness without understanding the materials. Should that bear on the understanding of "materials" as used in the present rule? Even the need to make copies, much less carefully inspect the originals, may prolong a deposition needlessly (and what of the presumptive 7-hour limit?). And is the uncertainty compounded by the further provision, carried forward in Style 30(f)(2)(B), that a party may move for an order to attach the originals to the deposition? Attaching the originals avoids the need to make copies at the deposition, and reduces the risk that inaccurate copies may be used later if copies may be used

It was agreed that these aspects of Rule 30(f) need further study.

Separately, it was noted that Style Rule 30(f)(2)(B) omits the statement in the present rule that originals attached to the deposition may be ordered returned to the court. Since Rule 5(d) establishes a general rule that depositions need not be filed, it should be clear that filing the originals occurs only if there is a Rule 5(d) order to file the deposition.

Style Rule 30 was approved subject to this discussion.

Rule 31

Present Rule 31(b) directs the officer who administers a deposition on written questions to "prepare, certify, and file or mail the deposition." Style Rule 31(b)(2) and (3) translate this as "prepare and certify the deposition" and "send it to the party." "File" is deleted in deference to the 2000 amendment of Rule 5(d) that bars filing absent use in the action or court order. "Send it" seems

broader than "mail," because it encompasses other methods of delivery. But this makes sense and is appropriate to balance the elimination of the filing alternative.

Discussion of Style Rule 31(c) wound back to the 31(b) discussion in part. Present Rule 31(c) directs the party taking the deposition to give notice to all other parties when the deposition is filed. Until the 2000 amendment of Rule 5(d), the rules contemplated that depositions would be filed; during this time, Rule 31(c) assured notice to all parties that the deposition had been taken. Now that filing occurs only when the deposition is used in the action or when a court orders filing, it is possible that the other parties will never be informed that the deposition has been taken. Style Rule 31(c) fills this gap in part, providing that a party who files a Rule 31 deposition must give notice of the filing to all other parties. Other approaches were considered. The most direct alternative would require that the party who noticed the deposition give notice to all other parties when the deposition is "completed." Given the finite definition of the Rule 31 deposition by the written questions, the concept of "completion" might work without undue uncertainty. But that might be a change greater than a Style Project should undertake

It was asked why there is any need to give notice of completion. If any party attempts to use the deposition, there will be a motion and the motion will be served on others, providing notice and often excerpts of the deposition. In some courts, it is routine to direct that an entire deposition be filed whenever any part of it is used. One response was that a deposition may be filed in circumstances that do not give notice. And of course a party who does not like the deposition answers may not use the deposition, leaving to other parties the burden of inquiring into the completion and outcome.

Another suggestion was that Style 31(b)(3) could direct the officer to send the deposition to the parties, not only "the party" who noticed the deposition. In some ways it may be a good idea to send it to all parties. But present Rule 31(b) does not direct that the deposition be sent to all parties; this would be a significant change. The change, moreover, requires consideration of payment for the costs of sending copies of the deposition — including any exhibits — to all parties. Although Rule 31 continues to be used in practice, it is difficult to suppose that there is any consistent established practice that we could conform to as a mere Style improvement. And there may be no special need for the change. All parties know that the deposition is to be taken. Any party can arrange with the reporter to get a copy by offering to pay.

It was concluded that Style Rule 31(b)(2) and (3), and Style Rule 31(c), should carry forward as submitted.

Style suggestions were made It was agreed that Style Rule 31(c) should be changed to refer to "the" deposition: "A party who files ~~a~~ the deposition must * * *." It was further agreed that Rule 31(c) should track the style of Style Rule 30(f)(4): "A party who files the deposition must promptly notify all other parties when it is filed." The reference to "who" was explained on the ground that the choice between "a party who" and "a party that" depends on context. When "party" is used in a generic sense, the choice is "who "

Style Rule 31 was approved with the style changes noted.

Rule 32

Judge Russell opened Subcommittee A's presentation with Style Rule 32.

Present Rule 32(a) applies to "the trial or * * * the hearing of a motion or an interlocutory proceeding." The Committee Note will explain that Style Rule 32(a)(1)'s reference to "any trial or hearing" includes the "interlocutory proceeding" reference. In similar fashion, the Note will explain that "hearing" includes disposition of a motion, whether or not there is an oral hearing on the motion.

Present Rule 32(a) introduces four numbered paragraphs by stating that a deposition is admissible "in accordance with any of the following provisions." This limit was omitted in earlier Style drafts. Research confirms, however, that the limit is an effective limit. Style Rule 32(a)(1)(C) was added accordingly, limiting use to a use "permitted by paragraphs (2) through (8) "

Present Rules 32 and 33 refer variously to "the rules of evidence" and to "the Federal Rules of Evidence " The Committee Note will explain that the Style Rules carry these usages forward without change, but will not comment further on the perplexities that arise from the distinction.

Style Rule 32(a)(5)(B) presents a style choice — whether to refer, as the Style Draft does, to "a party who demonstrates that" or instead to refer, as pure grammar might require, to "a party that demonstrates that."

The final paragraph of present Rule 32(a) allows use of a deposition "lawfully taken and duly filed" in a former action. The elimination of a general filing requirement by the 2000 Rule 5(d) amendment creates a translation problem. Elimination of the general filing requirement creates a slight risk by reducing the assurance of authenticity. But consistent with the limits of the Style project, it was agreed that the best resolution is that proposed by Style Rule 32(a)(8): A deposition "lawfully taken and, if required, filed * * *" in a prior action may be used in a later action.

It was noted that Style Rule 32(d)(2)(B) changes an earlier style draft reference to "due" diligence back to the "reasonable diligence" used in the present rule. Present Rule 32(d)(4) refers to "due" diligence, and the Style draft had sought uniformity. Uniformity is achieved in the current Style draft by using "reasonable" in both places. "Reasonable" seems the better choice because "due diligence" is a phrase that has acquired special connotations that do not fit this procedural context.

"Affirmation" will be added back to Style Rule 32(d)(3)(B), to accord with the decision made for Style Rule 30(b)(5)(A)(iv).

A style question was raised by asking whether it would be better to refer to a witness's "competence" rather than "competency" in Style Rule 32(d)(3)(A). "Competency" is used in the Evidence Rules. The Style Subcommittee controls this choice.

Style Rule 32 was approved with the change in (d)(3)(B).

Rule 33

The Committee Note to Style Rule 33(a)(1) will explain deletion of the present Rule 33(a) cross-reference to the Rule 26(d) discovery moratorium. The cross-reference was redundant when added in 1993, but served a purpose as a reminder of the new Rule 26(d) provisions That purpose has been served. The same Note will be provided for the same point in Style Rules 34(b) and 36(a)

The Committee Note to Style Rule 33(a)(2) also will explain deletion of "not necessarily" from the present Rule 33(c) provision that an interrogatory "is not necessarily objectionable" because it calls for an opinion or contention. Although the deletion may seem a clear change of substance, it is not. Contention and opinion discovery are routinely permitted in practice without pausing to ask what circumstances might make discovery objectionable "merely because it asks for an opinion or contention * * *."

Style Rule 33(b)(3) includes a cross-reference to Rule 29. The use of cross-references is a global issue, but the outcome almost certainly will be that some cross-references are appropriate. This cross-reference is useful because it ensures that a stipulation extending the time to respond to interrogatories must adhere to the restrictions imposed by Rule 29. The Committee recommends that the cross-reference be preserved.

Present Rule 33(d) may seem ambiguous when it refers to an answer that may be ascertained "from an examination, audit or inspection of such business records, including a compilation, abstract or summary thereof." Style Rule 33(d) changes this to an answer that may be determined "by examining, auditing, inspecting, compiling, abstracting, or summarizing a party's business records." This style assumes that an existing compilation, abstract, or summary that is a business record is within the present rule, and that the inquiring party can be put to the chore of compiling, abstracting, or summarizing all records, including existing compilations, abstracts, or summaries. The change was approved. No Committee Note explanation is necessary.

Style Rule 33 was approved.

Rule 34

The era of discovering computer-based information was anticipated in present Rule 34(a)'s definition of "documents" to include "other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form." Translating this definition into a new style is difficult, and overlaps with the ongoing Discovery Subcommittee study of computer-based discovery. Style Rule 34(a)(1)(A) is the most recent effort: "other data compilations from which information can be obtained or can, if necessary, be translated by the responding party into a reasonably usable form." Present Rule 34(a) rather clearly seems to refer to translation of the data compilations, at least if the commas are to be trusted. The Style draft could be read to refer to translation of the information. The Style draft also may be more open to the view that the responding party can produce the data compilation and wait for a request to render it into reasonably usable form. Suggested alternatives included: "from which information can be obtained after any necessary translation by the responding party," or — to avoid burying the "translate" verb in "translation" — "from which information can be obtained after the responding party translates the data into a reasonably usable form." The Style Subcommittee will continue to work on this drafting chore.

The reference in Style Rule 34(a)(1)(A) to "sound recordings" is a generalization of the present rule's reference to "phono-records." It clearly includes tape media. But it would reach a video recording only if focus were put on the sound track, ignoring the video. It was suggested that "video recordings" should be added to the Style rule. Everyone understands that video recordings are subject to Rule 34 discovery. It was decided that the better style choice would be to strike "sound," so that the definition of documents will include "recordings."

Style Rule 34(a)(1) allows a requesting party to inspect and copy "and to test or sample" documents. The reference to testing or sampling was brought up from an earlier Style draft that, carrying forward the present rule, referred to testing and sampling only with respect to tangible things. The intention was to reflect the common practice of testing documents for authenticity. But the reference to sampling may venture into the domain of electronic discovery, creating an opportunity to "sample" data in the electronic system where it resides. Rather than push the Style Project into areas that are being explored by the Discovery Subcommittee, it was concluded that " — and to test or sample — " should be deleted from Style Rule 34(a)(1)(A), and restored to (a)(1)(B) as in the next prior Style draft.

The Committee Note will explain deletion of the redundant cross-reference to the Rule 26(d) discovery moratorium that appears in present Rule 34(b), as with Rules 33 and 36.

Style Rule 34 was approved with these changes.

Rule 35

Rule 35(b) presents serious difficulties when read literally. The references to who may demand a copy of a Rule 35 examination report and the statement of the demand's consequences suggest questionable results. There is no indication, however, that these conceptual difficulties have caused any difficulty in practice. Rather than attempt to resolve them as a matter of style, the Committee agreed to carry them forward in Style Rule 35(b) without change.

Style 35(b)(1) does, however, present a question that was referred to the Style Subcommittee for further consideration. Present Rule 35(b)(1) states that on request, the party causing the examination to be made "shall deliver to the requesting party a copy of" the report. Style 35(b)(1) simply says that the party who moved for the examination must deliver a copy of the report, without saying to whom it must be delivered. Perhaps it should say. "must, on request, deliver to the requester a copy * * *."

Style Rule 35 was approved.

Rule 36

Style Rule 36 was approved

Rule 37

Style Rule 37(b)(2)(B) presents a style question that was deferred for later resolution. Present Rule 37(b)(2)(E) refers to "the party failing to comply " The Style rule refers to "the disobedient party " "Disobedient" seems harsh, almost offensive, to some. Some other expression may be preferable.

The final paragraph of present Rule 37(b) states that "in lieu of or in addition []to" any of the sanctions listed in subparagraphs (A) through (E), "the court *shall* require" a party failing to obey a discovery order to pay the reasonable expenses caused by the failure. Style Rule 37(b)(2)(C) translates "shall" as "must." In 1970, "shall" was intended to be mandatory, although there are many escapes built into the rule. Great discretion is built into the excuses that the failure was substantially justified or that other circumstances make an expense award unjust. But the structure confirms the mandatory intent. "Must" is the only word that accurately reflects the original intention At the same time, the original intent has not been honored in practice. Courts seldom award expenses, particularly attorney fees. "Must," moreover, might seem to imply that the court is obliged to make

the award — unless it finds an excuse — even though no party has moved for an award It was concluded that the original intent should be honored by retaining "must" in the Style rule. Even if awards are rare in actual practice, the practice does not reflect a general interpretive conclusion that "shall" really means "should" or "may."

Separately, it was agreed that "require" should be changed to "order" in Style Rule 37(b)(2)(C): "the court must ~~require~~ order the disobedient party * * *."

It also was agreed that Style Rule 37(c)(2) can say that the requesting party "may move that the party who failed to admit pay." There is no need to say "move for an order."

Style Rule 37 was approved with the change of "require" to "order."

Rule 45

Style Rule 45(a)(1)(A)(iii) deletes the reference to "books" from present Rule 45(a)(1)(C). The deletion was approved, adopting the decision made with Style Rule 26(b)(1).

A proposed revision of Rule 45(a)(2) was published for comment in August. The style does not agree in all details with Style Rule 45(a)(2) It was agreed that the style issues can be resolved when the published proposal is considered for adoption next spring.

The heading of Style 45(a)(3), "Issued by Whom," was approved.

Present Rule 45(a)(3) authorizes an attorney to issue a subpoena "on behalf of a court." Style Rule 45(a)(3) authorizes an attorney to issue a subpoena "from" a court. It may seem odd to describe a subpoena issued by an attorney as one "from" a court. But the attorney is acting as an officer of the court, and it is desirable to maintain a uniform reference to subpoenas as "from" the court. This expression was approved

Rule 45(b)(1) now says that "[p]rior notice" of a subpoena commanding production of documents or things must be served on each party. It does not say "prior to what." It is clear enough that notice must be given before compliance. Style Rule 45(b)(1) says that a copy of the subpoena must be served "before it issues." Research by Professor Rowe, however, suggests that the cases tend to look for service on other parties before the subpoena is served on the person commanded to produce. "Issuance" does not make much sense as the focus, particularly when the process of generating a copy in the lawyer's office is difficult to distinguish from the process of "issuing" the subpoena. "Before it is served on the witness" may be better.

A related question asked why require a copy of the actual subpoena; why not simply require notice of what the subpoena requires? The present rule speaks only of "prior notice of any commanded production," not of a copy of the subpoena. It was agreed that the Style Subcommittee should revise the Style Rule to provide that the notice served on the parties may be a copy of the subpoena, but that the notice also may be in some other form. This approach will be particularly valuable if there can be orders to produce directed to a nonparty by means other than a subpoena.

Returning to the translation of "prior notice," it was suggested that some practitioners serve the subpoena on the witness and notice on other parties at the same time. It also was suggested that in practice parties are not served before the witness is served. "'Prior notice' does not mean before service That's not how it is done."

So, it was suggested, one strategy might be to "serve" the parties by mail on Thursday, followed by personal service on the witness on Friday in hopes that immediate compliance might be accomplished before the other parties even have notice. The cases show concern about abuse, about deliberate delay in serving notice on the parties who might object to the scope of the subpoena or seek production of other items from the same witness. To carry forward "prior notice" would leave an ambiguity that the cases pretty much reject.

The first vote was to retain "prior notice," to carry forward the ambiguity of the present rule.

Renewed discussion, however, led to a different result. The 1991 Committee Note says that "prior notice" was added to give the parties an opportunity to object to the production, to demand production of other things, and to monitor compliance. One leading treatise says that notice is required before service on the witness; notice before the witness complies does not suffice. No case adopts a "before return time" reading, and several cases expressly reject it. The cases show that the argument seems to arise when there is good-faith misunderstanding, or else when there is wilful cutting of corners. The ability to crank out your own subpoena is a temptation to serve and hope for compliance before other parties do anything. Something specific in the rule would be useful, and need not be a substantive change.

It was observed that notice to the parties before service on the witness should be appraised in light of impending court capacities. Soon it will be possible to serve all parties and the witness simultaneously by electronic means. By the same token, it will be possible to serve all parties at one moment, and to serve the witness a moment later

The question whether a substantive change would be worked by changing "prior notice" to "before it is served" was addressed by finding that "prior notice" is patently ambiguous, and that the cases pretty much resolve the ambiguity to calling for notice to the parties before service on the witness. This is not perfect because notice may be served on the witness by means more expeditious than the means chosen to serve the parties, but it is within the realm of the Style Project.

A motion to require service of notice on the parties before the subpoena is served was adopted.

The question whether the rule should say "must be served on each party as provided in Rule 5(b) before it is served on the witness" was addressed by observing that Style Rule 45 does not refer to witnesses. But it is useful to complete "before it is served" with an explicit reference to the person served. The Style Subcommittee will work on this. A rough beginning, along the lines of the discussion, would be:

> * * * If the subpoena commands the production of documents or tangible things or the inspection of premises before trial, then notice of the command[ed production or inspection] must be served on each party as provided in Rule 5(b) before the subpoena is served on the person commanded to [produce]{make the production} or to permit inspection.

Present Rule 45(d)(2) describes the manner of asserting privilege to resist a subpoena. The language differs from the language of Rule 26(b)(5) addressing the same subject. It was agreed that Style Rule 45(d)(2) should adopt the language of Style Rule 26(b)(5), expressing the same thought in the same words. The Committee Note will explain the change in these terms.

Style Rule 45 was approved, subject to the discussion.

Discovery of Computer-Based Information

Judge Rosenthal introduced the discussion of discovering information stored in electronic media. The Committee and the Discovery Subcommittee have been preparing the groundwork for some time now. The question is whether rules changes are necessary, or at least desirable, to address the questions that grow out of efforts to discover information stored in computers or other electronic media. The time seems to have come to engage the issue fully. The practice is growing. Cases are emerging. The results of the cases are not uniform. Even questions familiar from other forms of discovery may become more acute — inadvertent privilege waiver may fall into this category.

The Discovery Subcommittee has been busy and productive. They have prepared drafts to focus discussion at this meeting

Further work on these questions will be enhanced by a conference planned for next February Professor Dan Capra, Reporter of the Evidence Rules Committee, has volunteered to sponsor a conference on electronic discovery at Fordham Law School. The format will involve several panel discussions that will include audience participation The central focus will be to advise the Advisory Committee and the Standing Committee whether we need rules, and if so what the rules might be All members of both Committees will be invited to attend. Many people are engaged in working through these discovery problems. Several have already shared their views with the Subcommittee. The conference will afford an opportunity for sustained discussion and an exchange of views and experience among panel members and other participants.

Professor Lynk then launched the Discovery Subcommittee Report. After the Subcommittee met in May, it divided proposed rule topics among groups of two subcommittee members for each proposal. Their draft rules were designed to identify the issues: which rules might be used to address electronic discovery. Professor Marcus then integrated these proposals into a single package that was presented to the Subcommittee at a day-long meeting on September 5. The meeting discussed each proposal extensively, and also continued to explore the possible need for rules changes. Several categories of possible change were explored: (1) whether the parties should be encouraged to discuss these questions through changes in Rules 16(b) and 26(f), and also Form 35. (2) whether Rule 34 should define "documents" to include electronic information in terms different from present terms. (3) whether Rule 34(a) should define the form for producing electronic information. (4) whether a safe-harbor for data preservation should be provided, perhaps in Rule 34(a), or Rule 37, or a new Rule "34.1." (5) whether there should be separate sanctions provisions, perhaps subject to a "materiality" limit. And (6) whether inadvertent disclosure of privileged information, a problem familiar from discovering paper documents, is a greater problem with electronic discovery; this question has been addressed in the past, with draft "quick peek" rules, and raises special questions about the 28 U.S.C. § 2074(b) limits on adopting rules that affect privileges.

After the September 5 meeting, Professor Marcus produced the memorandum in the agenda materials The memorandum includes specific rule drafts. The drafts, however, are not recommendations. Instead they are designed to support Advisory Committee discussion by providing an informed synthesis of Subcommittee deliberations up to now.

Three broad areas are open for discussion: Are there issues that should be addressed in addition to those addressed by these drafts? Should some of the issues addressed by these drafts be dropped from further consideration? Is the general perspective appropriate?

Professor Marcus noted that discovery changes inspire controversy. Many people are paying close attention to discovery of computer-based information. At least three have commented on the agenda materials within days after the agenda book became available. The interest of many establishes the need to take care, but also ensures that help is available.

The Subcommittee discussed the possibility of creating initial disclosure obligations with respect to computer-based information. Study of several alternatives, however, led to the conclusion that there is no real need to follow this approach. Comments on the advantages of pursuing it further are welcome Without addressing initial disclosure, seven topics remain in this set of proposals.

Definition of Electronic Information. The first question is whether to undertake a definition of the subject, including a choice of label — electronic-information? Computer-based information? Digital data? The phrase used for the moment is "electronically stored data." It is used in the Rule 26 draft in a way designed to support its use throughout the discovery rules. But is some other phrase better? It would be good to have a single term to be used throughout, and perhaps a definition of the term. At some point, in rule or Committee Note, it would be useful to provide a comprehensive explanation of the subject. As an example, work is being done to develop non-electronic means of computing by chemical or biological methods.

It was asked whether computer-science experts had been consulted in the effort to define, or at least describe, the subject. Ken Withers of the Federal Judicial Center is a nationally recognized expert on these problems. The first panel at the February conference will present computer experts who will address this question. Even with this help, the question remains open, both whether a workable definition is possible and what it might be. Mr. Withers noted that in his view the proposed language is only a beginning. It should be circulated to information managers, information science experts, and others for comments. The definition likely should be more general than specific — no one knows what new technology will emerge. The only common term now available is "digital," referring to information reduced to base-two numeric form.

It was observed that the draft definition would be more effective if the list of examples were changed from "and" to "or" — "the use of electronic technology such as, but not limited to, computers, telephones, personal digital assistants, media players, ~~and~~ or media viewers."

An observer suggested concern that the proposal "will advance the mind-set of electronic discovery." This is an emerging practice. Must we start saving our voice mails? The list will become part of every lawyer's check list. The proposal is "getting out ahead of the bar " It should suffice to say that "electronic data" are discoverable. General terms are better, leaving the way open for case-by-case development and refinement. Practice has moved beyond any question whether electronic data are discoverable as "documents." The fights now are over reasonable relationship to the issues in the case.

It also was stated that there is an entire industry of "information management." The subjects are not merely electronic or digital. "Information is what discovery is about. No one questions the idea you're looking for intelligible information. We should be as generic as possible " The focus should be on discoverability without regard to storage medium. It should be up to the responding party to seek protection against undue burdens

The definition will affect attorney behavior. One participant described a law firm that has directed its attorneys not to discuss conflicts of interest by e-mail or voice mail.

Another observer said that the problems have now been with us for some time. It is essential "to simplify, clarify, and generalize." There is no need for a Rule 26 definition. A definition might be useful in Rule 34, perhaps even in Rule 33 The central point is that electronic information is discoverable on the same terms as all other information.

Raising the profile of this topic may increase discovery activity The question whether to attempt to draft rules, whether on definition or anything else, remains constantly before the Committee. The question persists because many people say that they want guidelines, not ex post judicial responses

Yet another observation was that "this is what discovery is about today." Some enterprises do everything on computers. It is not possible to raise the profile of these discovery topics higher than it is now And it is possible to do something to help. Many lawyers and many enterprises want rational guidance on what they need to do. Such discovery can be a multi-million dollar undertaking even in a single case. A definition is needed somewhere

At the same time, the Committee was reminded that many cases have no discovery at all. Only limited discovery is undertaken in many others. Rules permitting discovery do not automatically cause discovery Rules in this area will not foment greater activity.

Prompting Early Discussion. The second set of questions is whether the rules should be amended to prompt early discussion of electronic discovery. The materials include draft amendments of Rules 26(f) and 16(b), and also a revised Form 35. These drafts respond to the common agreement that it is important to talk about these issues before the problems become intractable. Inviting discussion will not impose any new burdens on discovery in cases that will not involve electronic information.

The Rule 26(f) draft adds two items to the discovery plan. The first, written in general terms, addresses whether any party anticipates disclosure or discovery of electronically stored data, and any arrangements that might facilitate management of such disclosure or discovery. General terms were thought better in this provision, leaving more detailed exemplification to the Committee Note or other devices. The second addresses inadvertent privilege waiver, a topic that is involved with all forms of discovery.

Some district courts have adopted local rules addressing discussion of electronic information at the discovery conference. One question is whether such provisions suffice in themselves — need the rules do more than direct attention to discussion and resolution among the parties? Are additional rules helpful to focus the parties on what they can do?

The Form 35 changes are designed to remind the parties of the need to focus on these issues in the discovery conference.

The Rule 16(b) changes similarly are designed to remind the court of the need to attend to these issues.

The first suggestion was that it might be useful to address preservation issues in Rule 26(f), rather than defer them for later rules. We may need to encourage the parties to consider a preservation order at the beginning of the litigation. This approach is illustrated in an elaborated form of Rule 26(f)(3) set out in note 2 on page 6 of the agenda materials.

An observer suggested a cross-reference to Rule 53 to encourage discussion about the possible use of a master to manage discovery. A discovery master can be useful in general, but may be particularly useful in dealing with electronic discovery.

Another value of adopting some provision in Rule 26(f) is to catch up with the local rules. If a national rule is not adopted soon, there will be a patchwork of different rules across many districts. There are at least four local district rules now. They are very specific. But the proposed national rule will not supersede them — the specificity does not seem to be inconsistent with the draft as it stands now.

It also was asked whether the Rule 16 approach would fit better in Rule 16(a), suggesting that electronic discovery is more a general matter within the broad objectives of the pretrial conference structure than a specific matter for a scheduling order But it was noted that Rule 16(c) seemed inappropriate, and that Rule 16(b) focuses on the time when the judge should be thinking about these issues.

Define "Document". The third question is illustrated by a draft Rule 34(a) definition of "document." It may be that this is the only place where a definition is needed, satisfying the needs that instead might be addressed by a general Rule 26 definition. At least as a first effort, this draft is more abbreviated than the Rule 26 draft. But it includes, as optional material, a controversial provision that includes in the definition "all data stored or maintained on that document." These words describe "metadata" and "embedded data." An extension of this alternative would limit discovery by requiring production of metadata or embedded data only on court order. Production in sanitized form — .pdf or tiff — does not reveal this information. The "metadata" include information generated by the computer itself when a document is created or a data base is used. This information identifies such matters as when a document was created, what computer was used to create it, what is the history of the document, and so on. Embedded data are previous edits, comments, and the like, created by users but stored in ways that do not "appear on the screen" unless a specific direction is given. Both metadata and embedded data are searchable. Whether they need be produced stirs much debate.

Production of metadata and embedded data "is not a small issue." We could define "document" to include only the information that appears on the screen. That is all that is captured in portable document format and like "picture" translations of electronic documents. Or we could define "document" to include all the associated information stored in the computer. No one will know which definition is correct unless the rule provides it. The choice is fought out in all big cases. It is not possible to assert that there is a settled or common practice now to provide only pdf or .tiff format. In some cases, at least, parties are providing the information on discs that include the metadata Each party wants the metadata because it facilitates electronic searching. A "paper" response is relatively useless in comparison — the chore of visually sorting through 10,000,000 document pages is no longer necessary. The live question is whether to make discovery of metadata and embedded data available only on court order. And an answer can be found in present Rule 34 only by asking a person who takes the view you want

This view was seconded by the observation that what you want in discovery is intelligible data. A .pdf picture is not enough. Far more information can be pulled out of the electronic file if the metadata are attached.

A caution was sounded in the reminder that the document people consciously create does not show who created it, when, who all got copies, and so on. The question is whether we should compel production of information in addition to the "document" itself. The added information can be useful in a small number of cases. But the cost may be great when large numbers of documents are involved, and often there will be no benefit. We need a better understanding of practical realities before undertaking to draft a rule.

A rejoining observation was that if metadata and embedded data are not included in the definition of a document, discovery will be difficult because the requesting party will need to show relevance. The relevance of hidden information may be hard to establish.

All of this simply frames the issue. Electronic creation and preservation of documents includes information that commonly is not preserved for paper documents. Ordinarily it is easy to produce this information. It may seem as relevant as the visible "document" it attaches to. Should we have a different test of relevance because there was no intent to create or preserve this information? And should the question be addressed only as one of relevance, without attempting to shoehorn it into a definition of "document"?

An observer suggested that it is a trap to try to understand these questions through focusing on the definition of a "document." Metadata and embedded data are not documents. They are data. There are many bits of data that have nothing to do with letters, memoranda, or the like. Emerging best-practice information storage is quite different from the practices that have developed for paper documents. The questions should be addressed by means other than the definition of a document.

The question was reframed in direct terms. should a party be able to demand production in a form that can be searched by computer? The document that appears on the screen or that is printed is only part of the file. If we define document to include the whole file, you will get it and be able to search it. The issue indeed is more important than this, because databases commonly do not exist in a form that even resembles a "document " Information is put in. No document exists until someone directs specific questions that are answered by preparing something that is a document. As more information is put in, the same questions would be answered by creating a different "document." This form of data storage and manipulation may not yield to capture within a definition of "document."

The question of local rules returned briefly: if a general national rule is adopted, should more specific local rules be accepted? The intent should be made clear.

Returning to the definition question, it was suggested that we need to cope with what is a document today. The 20th-Century concept of a document no longer avails

The difficulties were suggested again by asking what you should do when you get a Rule 34 request for documents on specified topics. The information may be stored on thousands of computers. A common approach is to establish a new server specifically for responding to this discovery. Then an electronic search is done of the rest of the system, searching by words, dates, and the like. The information is downloaded and stored on the discovery server The search process is based on metadata, and captures embedded data. One question is who gets to formulate the search queries. A responding party will seek to formulate the queries, and will assert that the choices made are themselves protected from discovery as work-product material. But if work-product protection is to be made available, there may be a need for some form of judicial review to ensure that the search was undertaken in a manner designed to gather all relevant information

The values of broad discovery were suggested by observing that discovery is a search for evidence, for truth. The analogue to embedded data in earlier technology is audio dictation that has been erased but may be recoverable. What we decide in addressing these questions will govern what is preserved. But the costs of preservation may not be as great today as they were yesterday, and may shrink still further tomorrow.

The final suggestion was that probably the rules cannot avoid the need for case-by-case analysis. Generally we think of discovery in terms of good litigants who honestly seek to provide existing information and bad-faith litigants who seek to conceal existing information. But new technology makes it possible to generate new information from data even though the person who possesses the data does not know that the data can generate the information. This phenomenon will not readily yield to definition.

Form of Production. The fourth question addressed by the drafts is the form of producing electronically stored information. The first draft presents alternative Rule 34(b) provisions — the first requires that the party requesting discovery specify the form in which electronically stored data are to be produced, while the second alternative simply permits specification of form. The form of production will determine whether metadata and embedded data are produced. The Subcommittee could not decide whether to require, or simply to permit, that the request specify the form of production.

When the request specifies the form of production there must be an opportunity to object to the chosen form. Provision is made in a draft rule that again has several alternative provisions bearing on the need to search for documents that are not reasonably accessible or are not available in the usual course of the producing party's activities.

Finally, the draft provides that a party may produce electronically stored information in the form in which it is ordinarily stored, and need produce in only one form.

Discussion began with an observer's suggestion that the form of production affects two issues. One is the integrity of the data. The other is the utility of the data — production in the form in which the data are maintained may not be best. Production in a form that cannot be changed avoids disputes about who changed the document when competing versions emerge later Some litigants are driven by the desire to avoid producing useful information There are neutral, non-alterable formats that can preserve integrity. And it is important to provide metadata, which can lead to admissible evidence; this is an important part of the utility of the data, and should be discoverable.

These suggestions were reflected in the suggestion that the form of production is related to the Rule 26 definition of the scope of discovery. Information is made useful by metadata. Although this may not fit the traditional sense of leading to the discovery of admissible evidence, it is important for the same reasons. And the metadata or embedded data may be relevant in themselves. Perhaps it is better to capture these elements in the scope of discovery than to relegate them to the definition of a document or the form of responding. Or perhaps there should be an independent provision for the production of "data" that is not anchored in the definition of a "document."

Another observer suggested that the draft should be written in the alternative Information may be created in one form, stored in another, and protected for integrity in a third. Flexibility should be retained for the producing party If the procedure is made too rigid, costs will be magnified greatly. The form of the response should be addressed by focusing on the needs of the case, beginning with the Rule 23(f) conference. And it will be difficult to define "metadata" or

"embedded data." It is better here also to be general, to avoid confining definitions. But the scope of discovery should not be expanded far beyond the present scope.

It was asked how many computer users are even aware that their computers generate and preserve metadata and embedded data. Should we demand that people produce information they were not aware of creating?

In further discussion, an observer asked whether it is wise to allow the inquiring party to specify a form of production. It does happen that the inquiring party may demand paper, not electronic, materials. A reply was that we want to protect against an obligation to produce in two forms. If the responding party chooses the form, the inquiring party may find it more difficult to use and ask for production in another form Allowing an initial specification avoids that problem.

Another observer suggested that this question shows another aspect of the fallacy of thinking and defining in terms of "documents." The hard copy is an excised version of the information in the electronic file. A responding party may play the game by providing only paper copy. Rather than define "document" the rules should focus on data or information.

This comment was met by the assertion that it is not a game. The paper copy gives what has always been given in discovery. We still need to get better information about the costs and burdens of providing metadata and embedded data We do not know what will be the effect of requiring that they be produced.

In related fashion, it was noted that good studies have been made of the practices of big business enterprises. In many otherwise sophisticated companies very few people are aware of the reach of discovery. Only a minority of major corporations even have looked into these questions.

The form of production issue also affects Rule 33 interrogatory responses. The drafts include a new subdivision (e) that would permit a party to respond to an interrogatory by producing electronically stored data for search by the inquiring party. Rule 33(d) occupies a nether world between Rule 33 answers to interrogatories and Rule 34 document production. An interrogatory can compel a party to create an answer that did not exist before the party investigated the information required to frame an answer. Rule 33(d) enables a responding party to produce business records that enable the inquiring party to undertake the investigation and create the answer. The Rule 33(e) draft builds on analogy to Rule 33(d), permitting a response that provides electronic business records Since most business records are kept in electronic form today, it seems certain that Rule 33(d) already is being invoked by providing electronic business records.

Providing electronic business records may require use of the responding party's software to enable the inquiring party to determine the answer as readily as the responding party could. That is built into the draft, but could lead to real complications.

It is difficult to know how often this provision will be used. The answer will be informed by the present use of Rule 33(d), remembering that in the present setting a Rule 33(d) response ordinarily must include access to electronic records. The draft can be seen as a way to describe and regulate discovery practice that must be occurring now.

A judge described a case in which a party had to reconstruct a decommissioned computer system, giving access to records through the software it had to recreate.

It was suggested that we need much more information about the comparative costs of producing records in different forms. This suggestion was met by the response that the purpose is to create a system in which the burden of determining an answer is equal for both parties The responding party has a choice. it can assume the burden of making the information available in a form that makes access and manipulation equal, or it can undertake to research the information and provide an answer to the interrogatory. Access to electronic records simply mimics present Rule 33(d); the responding party has a choice of how to respond.

Another tactic has been to use a neutral, perhaps a court-appointed master, to do the search.

Burden of Responding. The fifth set of questions involves the burden of retrieving, reviewing, and producing inaccessible data. The proposed direction of the rule is clear enough: the Subcommittee believes the rule should protect against the burden of producing "inaccessible" data unless a court determines that the burden is justified. The difficulty is in defining or describing the distinction between data that are accessible only with undue effort and data that genuinely are beyond recall. The draft addresses these questions through new Rule 26 provisions, so as to reach all modes of discovery.

One question is whether these provisions should address disclosure as well as discovery The answer reflected in the draft is that disclosure should not be addressed. As reconstituted, disclosure addresses only information that a party may use in its case. If a party has in fact retrieved information for its own purposes and intends to use it, the information should be disclosed even though the party would not have been required to retrieve it in response to a discovery request. For that matter, once the information has in fact been retrieved, it should be subject to discovery without regard to the burden undertaken to retrieve it and the retrieving party's choice not to use it in its own case.

That leaves the problem of describing the information that need not be retrieved. Much of the problem arises from disaster-recovery systems, designed for business purposes and storing information in a form that can be searched only with great difficulty. But it seems awkward to frame a rule in terms of disaster-recovery systems. A rule could refer in open terms to undue burden or expense, or to the need to migrate the information to a usable form, or to availability in the usual course of business. The draft adds an optional proviso that protects against the undue burdens — however described — only if the responding party preserves a single day's full set of backup data.

One difficulty with relying on access in the ordinary course of business is that there is little apparent reason to protect data that are easily accessible merely because there is no occasion to access them during ordinary business operations. Rule 34 already is expansive, looking for production of documents in a party's possession, custody, or control. There is little reason to cut back on this concept for electronic records, but the translation is not easy.

Even if reliance were to be placed on the "ordinary course of business," some further translation is required to reach parties whose records are not maintained for business purposes. Ordinary people should enjoy the protection of whatever protection is appropriate. And ordinary people should not be able to defeat any production by asserting that because they are not in business, nothing is accessible in the ordinary course of business

The one-day data backup was suggested as a pragmatic maneuver to protect against data destruction But it presents serious problems.

However the basic protection comes to be defined, the draft also provides that further discovery can be ordered for good cause. The order may direct that the inquiring party pay part or all of the response expenses. The basic provision that a court may order production of data difficult to access has not been controversial in the Subcommittee But there is concern about adding explicit cost-bearing provisions. A past proposal to make explicit the cost-bearing authority implicit in Rule 26(b)(2) provoked controversy and was withdrawn from Judicial Conference consideration. It may be better to avoid any repetition of that experience. The draft also suggests that the cost-bearing direction might be limited to paying for "extraordinary efforts." The term is borrowed from Texas practice, where lawyers like it, but the concept may prove elusive

The short of it is that no one on the Subcommittee favors a duty to "scour the earth" in all discovery requests in all cases, but no one has suggested an easy approach through rule language. There is constant change in what is accessible, what is inaccessible without great effort, what is in fact inaccessible no matter what effort is expended Accessibility may differ greatly across different information systems.

Returning to the question of disaster-recovery systems, it was suggested that the practical question is back-up tapes. They are designed for disaster recovery, not information retrieval There should be a presumption that a party need not bear the expense of maintaining back-up tapes indefinitely or searching whatever back-up tapes are available. "Extraordinary" efforts might include that approach, but we should seek a better definition.

Discussion of back-up tapes expanded. A back-up tape is a "data dump" of everything in a straight physical bit-stream order. It does not distinguish deleted data, programs, or anything else. It all can be reloaded on the computer. But it is impossible to retrieve anything without restoring the entire tape to the original system with the same software Back-up tapes are useless for business purposes after more than a few days. But information technology people refuse to destroy them unless there is a clear and clearly enforced recycling program. That means that many firms are stuck with vast numbers of old back-ups. It costs a minimum of $1,200 per tape to restore. If there are 1,000 tapes the cost is $1,200,000 before you can even start to search the material. Consider a large corporation that has several thousand servers to back up. To order it to suspend recycling tapes inflicts some cost in acquiring ever more tapes, but the cost is not great. The cost of doing anything with the preserved tapes, however, can be enormous

The back-up tape question is different from the "archive" systems maintained by many firms with systems for managing electronic data. The archive systems often are not "on line," but are "near line." The information is easily accessible. The problem is that perhaps 30% of companies have this Many information technology people use back-up tapes as a substitute for archive systems

A pithy summary was that "much has been inadvertently retained."

The one-day "snapshot" of information was first questioned by asking why we should require preservation of information simply because it is no longer in the regular computer system. Why not treat it as destroyed, just as paper documents that have been discarded? Particularly if a system includes archived information, why require a search beyond it into back-up tapes that still may be preserved? Perhaps we should frame a rule that creates an incentive to maintain a good archive system, protecting against discovery of information inadvertently retained only if there is a systematic and thorough preservation system.

The Committee was reminded that "deleted" information often remains available on forensic inquiry. Information generated by the computer on its own also often remains available even though the associated document was deliberately "deleted." The question remains whether any of this material should be discoverable.

The scope of discovery today includes relevant information reasonably calculated to lead to the discovery of admissible evidence. Do these problems suggest a need to reconsider this general scope, as a way to free firms to revamp the way they manage information?

An observer seconded this question, adding that any rule that forces people to design information system behavior in circumstances not directly tied to an actual litigation is outside the Enabling Act. This suggestion met the response that the drafts only tell parties what to do in litigation. If the litigation duties induce people to change their practices to make it easier to comply with litigation duties, that is their affair. Of course many people will not choose to change. Others will change because they have been educated by their lawyers. Lawyers already are telling business firms to recycle their backup tapes. Business firms are changing their information practices in other ways because of the demands of discovery

The Rule 26(b)(1) question was renewed with the statement that the Committee should not back into expanding the scope of discovery. "Reasonably calculated to lead to the discovery of admissible evidence" takes on a new meaning for information "buried on the hard drive " We have lived in a physical world. We are trying to adjust to a world of plasma and semiconductors. But the principles are the same. Perhaps we should not attempt in the rules to address "inaccessible" electronic information any more than we have attempted to address "inaccessible" paper information — which is not addressed at all. It seems likely that most people today treat printed information that has been covered by "white-out" as inaccessible. And thirty years of warehoused files are likely treated as inaccessible in many circumstances. How can we address all of these problems?

Privilege Waiver. The sixth problem addressed, inadvertent privilege waiver, exists with respect to paper discovery. The Subcommittee heard a single illustration of a case in which 27 people were used for six weeks to screen paper documents for privilege. Is that worth doing? Privilege protection adds to the burden of screening. The need to avoid inadvertent production is greatly increased because production often is held to waive privilege not only for the produced document but for all other privileged communications on the same subject. The drafts submitted for discussion thus go beyond electronic information.

In approaching protection against inadvertent waiver, attention must be paid to 28 U.S.C. § 2074(b), which requires an Act of Congress to approve any rule that creates, modifies, or abolishes an evidentiary privilege But there is a strong argument that this section does not apply to either of the proposals. Some rules already touch on privilege, including rules adopted after § 2074(b) was enacted. The Committee Note to revised Rule 26(b)(4) says that privilege is waived as to documents used to prepare an expert trial witness. Rule 26(b)(5) requires a privilege log. These rules, and the proposals on inadvertent waiver, regulate the discovery process rather than privileges.

The first proposal has been before the Committee for several years. Characterized as the "quick peek," it draws from practices adopted by many lawyers in cases that involve discovery of large quantities of paper. The parties agree that they can look at everything without any privilege waiver Specific discovery demands are framed to focus only on the papers the parties actually want; discovery objections are made in response to those demands. These agreements have proved effective between the parties, but it is uncertain whether they protect against nonparty claims that

a privilege has been waived by disclosure The proposal relies on both agreement among the parties and court order At first blush, however, it may seem that this approach will not work for electronic information Often "the warehouse" is provided entire in the form of a few compact discs. The requesting party has possession of all the information; how is its search to be restricted to the parts it later specifies as the subject of formal "production"? But if the discovery response takes a different form, the "quick peek" approach still may work. Discovery may take the form of questions addressed directly to the responding party's computer system, often through an intermediary and at times through direct cooperation of the parties

A second approach is designed to capture the tests that have emerged in the cases that struggle to limit the perils of inadvertent waiver. Mistaken production does not always waive privilege. The general test is to ask whether waiver is fair. This general test is detailed by looking to a number of open-ended factors such as the volume of documents searched in response to the discovery request; the efforts made to avoid disclosure of privileged materials; whether the privilege was identified and asserted promptly after the mistaken production; the extent of the disclosure; and the prejudice to any party that would result from finding or refusing to find a waiver.

These proposals both relate to all forms of discovery, not merely discovery of electronically stored information The question remains whether it is appropriate to address the problem at all through the Civil Rules.

Discussion began with a new question not addressed by these proposals. Raw electronic data may be produced in response to a discovery request. The party who requested the data may then manipulate the data to produce information that the producing party never intended to come into existence, revealing trade secrets, confidential business information, or the like. The substantive law of trade-secret protection requires diligent efforts to maintain secrecy. Does the discovery response defeat protection? The "quick peek" approach can work in this area as well as in the area of evidentiary privileges.

The Committee was reminded that one reason for approaching the waiver problem by rule is that party agreements for a "quick peek" may not be binding on nonparties. The quick peek approach is being used now. It works reasonably well. But the difficulties of attempting to enshrine it in a rule are great.

Despite the difficulties, the Committee has heard that the huge cost of privilege review is the greatest source of expense in document production. And now it is starting to hear that the volume of electronic data further increases the cost. The pressure to do something through the rules increases in measure with the costs. It would be good to know how frequently the "quick peek" approach is used now by party agreement, and whether other forms of party agreements are being used. We should be anxious to get information about approaches that might be incorporated into the rules.

Texas has a simple rule. Inadvertently produced privileged matter must be returned if the producing party asks quickly. But even with this rule, litigators say they routinely negotiate agreements like this

A long-familiar theme was brought back from other contexts. The draft that summarizes the factors considered in the cases must encounter the tradition that rules should not simply adopt a list of case-developed factors. A rule that requires return of the inadvertently produced document is

better; the fighting then will contest whether the document is privileged, not the multiple factors that may limit inadvertent waiver.

An observer noted that there is case law requiring reasonable efforts to protect privilege. Electronic information systems may not be designed to establish reasonable efforts. Waiver may occur outside inadvertent discovery responses.

Preservation. The final problem addressed by the proposals is the duty to preserve electronically stored data after the commencement of an action. Two drafts present the same approach as a new Rule 34.1 and as an addition to Rule 26. The rule announces a preservation obligation, but then provides a safe harbor for the good-faith operation of disaster-recovery or other systems. The safe harbor is framed by stating that "nothing in these rules" requires suspension of ordinary systems in order to make it clear that the rule does not address preservation requirements imposed by other law. The Rule 26 draft is more limited than the Rule 34.1 draft, however, because it addresses only electronically stored data. The Rule 34.1 draft also addresses documents and tangible things. Lastly, the drafts include new Rule 37 provisions that prohibit sanctions for failure to preserve electronically stored information unless the party willfully or recklessly destroyed data in violation of Rule 34.1 [or 26(h)(3)], or destroyed data described with reasonable particularity in a discovery request. Sanctions could not be imposed for negligent destruction of data not specifically described in a discovery request. This focus on "willfully or recklessly" responds to concerns raised by the Residential Funding decision.

A drafting question was raised by pointing out that the sanction limit for destroying data described in a discovery request does not state that the discovery request must have been received before the responsive data were deleted. The drafting will be reviewed to make this clear

A second question asked whether a sanction could be imposed for destruction of data that are not material. The footnotes illustrate a possible approach that requires a showing of material prejudice to the requesting party. This provision was not included in the draft because of a belief that courts exercise restraint in imposing sanctions in ways that make it unnecessary.

An explanation of the link between the sanction provision and the duty to preserve described in Rule 34.1 [or 26(h)(3)] was offered by referring to the common-law duty to preserve information It is not certain when the common-law duty attaches with respect to information relevant to litigation not yet filed but likely to be brought. Should a party that anticipates being sued be obliged, for example, to preserve backup tapes? It was thought risky to draft a rule that might incorporate these uncertain open-ended obligations.

The Rule 37 sanctions provision reaches a party who "made unavailable" electronically stored information Does that reach failure to turn over data that continue to exist? As drafted, the rule seems to reach a "failure to produce," and "making unavailable" can easily describe a failure to produce. But the association among "deleted, destroyed, or otherwise made unavailable" may limit the apparent meaning This drafting question will be considered further.

A direct duty-to-preserve illustration was put as a question. Your computers are leased. The lease runs out and the computers must be returned, hard drives and all. Is there an obligation to preserve the information on the hard drives?

This question was addressed by an observer who found it difficult to create preservation requirements by procedural rule What must be preserved by a huge enterprise with many computer

systems? The problem is illustrated by the proviso that would require a party to preserve "a single day's full set of * * * backup data" when an action is commenced. A big company is sued every day. The proviso would require it to maintain a full set of backup data covering many years.

So it was asked whether preservation requirements include substantive components beyond Enabling Act reach. There are many substantive statutes and regulations that impose preservation requirements. The Committee has heard many plaintive assertions that there is an acute need for guidance, particularly with respect to electronically stored information. Requesting parties need protection against information loss. But producing parties need assurance that they are protected in the ongoing routine operation of their computer systems, despite an inadvertent failure to preserve data relevant to an ongoing litigation. There is a risk that discovery rules will impose undue costs — itself a "substantive" consequence of great importance. Perhaps in the end the Committee will conclude that preservation guidance is beyond the proper scope of the Enabling Act. But continuing inquiry may at least show some steps that can be taken to provide guidance.

These observations were followed by a reminder that the first formal inquiry made by the Discovery Subcommittee was a conference held at Hastings College of the Law. Both plaintiffs' and defendants' representatives reflected great concern about the problems of preservation and spoliation The agreement that there are serious problems suggests that there may be ways in which the Committee can help. The fact that electronically stored information has generated special sensitivities, however, should not blind the Committee to the risk that rules that address only electronic information may generate unintended inferences as to other forms of information.

Draft Admiralty Rule G

The minutes of the May meeting summarize the review of draft Supplemental Rule G as it then stood. The purpose of this rule is to gather all the forfeiture provisions that are now scattered throughout the Supplemental Rules, separating them from admiralty procedure and placing them together. The draft also addresses many issues that are not addressed by the Supplemental Rules, responding to statutory changes, the great increase in the number of civil forfeiture actions, and even new constitutional developments. The National Association of Criminal Defense Lawyers was asked to provide comments on an earlier draft and responded with detailed criticisms that have been addressed throughout the continuing revision process.

The present discussion does not aim at approval of any part of the current draft. Instead it aims at providing information about the direction of the draft, providing advance notice of one of the difficult issues — standing — that will be presented when a draft is presented for Committee deliberation. With continued hard work and some luck, the draft may be ready for study at the spring meeting.

Judge McKnight described the work of the subcommittee charged to work on developing Rule G. The subcommittee has held five conference calls, running two hours each. It has come a long way in the project to explore every part of the draft Many issues have been thoroughly researched and discussed. Stefan Cassella, acting for the Department of Justice, and the letters from the National Association of Crminal Defense lawyers, have provided invaluable help and direction. Standing to claim property subject to forfeiture has proved a particularly thorny issue Ned Diver, Rules Clerk for Judge Scirica, prepared a lengthy and excellent memorandum on standing The central question is whether a possessory interest should suffice to establish claim standing. Once standing is recognized, the claimant can put the government to its proof. The Department of Justice has urged a relatively narrow definition that limits standing to a person who would qualify as an

"owner" within the definition of the innocent-owner defense of the Civil Asset Forfeiture Reform Act (CAFRA), 18 U.S.C. § 983(d)(6). The Department presents compelling arguments for its position. But the issue is not simple. The definition of standing affects property rights. Some possessory interests would not be protected. This narrowing may better be a matter for Congress. A further reason for avoiding any attempt to define claim standing is that the problems appear to arise in a relatively small portion of the cases The subcommittee has concluded that we should aim for a rule that does not undertake to define standing.

The reasons for avoiding a definition of claim standing were stated in greater detail. In part, the reasons go to the limits of the Enabling Act process. In other part, the reasons go to the difficulty of justifying the limits chosen in the drafts

The limits of the Enabling Act process begin with the changes that have made standing a matter of renewed concern to the Department of Justice. Before CAFRA, the government's burden in a civil forfeiture proceeding was to show probable cause to forfeit. Probable cause could be shown even by reliance on hearsay evidence Once probable cause was shown, the claimant had the burden either to prove that the property was not forfeitable or to prove a defense In this setting, courts adopted a "colorable interest" standing test that allowed claim standing on the basis of any interest that, if proved, would satisfy the Article III "injury-in-fact" standing test. The apparent reason was that if the property were indeed forfeitable, the claimant's interest would be resolved at the step of determining ownership as an element of innocent ownership. CAFRA, however, places the burden on the government to prove forfeitability by a preponderance of the admissible evidence. Two difficulties appear One is that the case for forfeiture often depends on circumstantial evidence, however compelling, reliance on circumstantial evidence is at times chancy. The second is that more direct evidence may be available, but can be produced only at the cost of jeopardizing ongoing criminal investigations or risking the effectiveness and even the lives of confidential informants. Put to the choice of revealing this direct evidence or risking loss of the forfeiture, the government may be compelled to rely on the circumstantial evidence alone. The government believes that it should not be forced to these burdens and risks absent a significant preliminary showing that the claimant has a worthy protectable interest.

Against this background, several reasons urge caution in relying on the Enabling Act process to define claim standing.

First, there is a plausible argument that CAFRA intends to define claim standing by § 983(a)(4), which states that any person claiming an interest in the seized property may make a claim. There are good reasons to doubt that this provision was intended to define claim standing. Ordinarily standing must be established by more than mere assertion; Article III does not recognize standing for anyone who claims to have an interest but cannot point to any concrete interest. The provision seems procedural, designed to invoke the admiralty rule procedures, rather than definitional But some astute observers believe that the provision may define standing, and the argument that it does define standing will surely be made. An attempt to narrow the definition of standing will be characterized, rightly or wrongly, as an attempt to supersede Congress's recent work

Second, the very occasion for the attempt to narrow standing arises from the consequences of the amendments that place the burden on the government. The attempt will be seen as an effort to undermine the Reform Act determination that the burden should be increased, quite apart from any theory that CAFRA itself defines standing. It will be argued, and the argument will be carried

to Congress with force, that the Enabling Act is being invoked to countermand the consequences of a deliberate legislative choice.

Third, Enabling Act rules are not to abridge, enlarge, or modify any substantive right. As standing doctrine exists today, the protection of claim standing extends to possessory interests and record-title interests that do not qualify as "ownership" within the definition of § 983(d)(6). A person who has possession of an attache case containing $100,000 wrapped in duct tape and surrounded by fabric softener sheets is protected by state substantive law against anyone who takes it from him. The narrow standing definition would defeat that protection against the United States when it claims civil forfeiture. So a person who has record title to real property is protected against the world. The narrow standing definition would defeat that protection when the record title is treated as transparent. These refusals to recognize or protect interests protected by state law can easily be seen as the modification or abridgement of substantive rights.

Finally, and more generally, it is difficult to resolve in the Enabling Act process the policy choices that must be made in deciding whether to supersede the judicially developed claim standing tests They seem better fit for resolution by Congress.

Taken together, these concerns suggest that a narrow definition of claim standing should be undertaken only for the most compelling reasons.

Even if an attempt is made to define claim standing in Rule G, there are reasons to doubt the wisdom of borrowing the § 983(d)(6) definition of "ownership." Although it is said that Congress looked to the standing decisions in drafting the definition, the definition clearly is narrower than the standing decisions on the books when Congress acted. There is little reason to suppose that the tests should be the same. The innocent-owner defense is relevant only if the property is otherwise forfeitable, the reasons to refuse to protect attenuated interests sustain the policies that establish forfeiture. Claim standing, on the other hand, is also relevant when the property is not forfeitable. More attenuated interests deserve protection — and are protected under current standing law — when the only issue is whether the government must establish forfeitability in order to keep the property.

The difficulty of appraising the arguments for a narrow standing test is most apparent in confronting the pragmatic arguments. It is difficult to know how often the government will fail to establish a worthy forfeiture claim because the only evidence is circumstantial. Accepting the argument that the government may need to withhold evidence to protect ongoing criminal investigations or confidential informants, it is difficult to know how often this happens. Equal difficulties arise in determining how often the risks are run, leading to actual interference with ongoing investigations or loss of confidential informants. So too with nuisance claimants (the prisoner who reads the Wall Street Journal and claims in every published forfeiture), stalking horses who hold nominal record title, and couriers Claims are made by such people, but it is difficult to know how frequently and with what effect.

The reasons for adopting the § 983(d)(6) definition of ownership as the standing test were stated more succinctly. The starting point is that forfeiture is an in rem proceeding. The government does not choose its adversaries. Claimants in fact include couriers, prisoners, and nominal title owners. Claims have been made by people who assert that although they possessed the property, they were not aware of the possession — "I did not know that money was in my suitcase" — mere naked possession. Current case law does deny standing to general unsecured creditors and to the naked-unknowing possessor.

Claims based on tenuous or fictitious interests are a great problem for the government. The government should be required to prove forfeitability only when a claim is made by someone with an interest. An illustration is presented by a case in which a motorist saw money spilling from laundry detergent boxes falling from the car in front of him. He stopped to gather the money and was assailed by the driver of the first car. While they were fighting, a passing motorist called the police The possessory interest of the following motorist surely does not deserve protection But claim standing was recognized, and the government had to pay a $10,000 settlement in order to avoid putting on proof of forfeitability that would have jeopardized an undercover operation.

Present standing theory evolved when courts saw no harm in it. The government's burden to show probable cause was not onerous. Tenuous relationships could be sorted out and rejected when the proceedings moved to the innocent-owner defense Now the standing theory works real harm

CAFRA, in § 983(d)(6), establishes an affirmative defense. The first step requires the claimant to prove ownership, broadly defined. Then the claimant must establish innocence, more narrowly defined. A donee, for example, may not be a bona fide purchaser for value and will fail for that reason. It is better to eliminate the "colorable interest" test of current standing decisions and begin with ownership as defined in § 983(d)(6).

If standing is not to be addressed by Rule G, however, it will be even more important to establish procedures to resolve standing before proceeding to the government's proof of forfeitability A classic example is the person who claims that the cash is the proceeds of selling a ranch in Mexico. At least there should be a preliminary showing that there was a ranch, that it was sold, and that the selling price can account for the amount of cash involved.

It also is important to clarify the approach to be taken when cross-motions for summary judgment are filed. Both forfeitability and innocent ownership may be addressed. The case for forfeitability may depend on circumstantial evidence that presents questions for trial. But summary judgment for the government may be appropriate on the innocent-owner defense; if so, judgment should be entered for the government without need to try forfeitability.

Adoption of provisions addressing preliminary determinations on standing will require careful drafting to ensure that the court does not resolve triable fact issues that invoke the right to jury trial.

Facing these pressures, and with the help of Ned Diver's excellent memorandum, the subcommittee asked for a draft that excludes a definition of standing The draft includes procedural protections for the government in addition to those that address pretrial determination of standing. Under G(5)(a), a claim must state the claimant's interest. G(5)(c) provides for interrogatories addressing claim standing that must be answered before a motion to dismiss can be granted. This limitation on dismissal addresses the experience that objections are made on venue, limitations, and particularized pleading grounds before an answer is filed. The government wants to be able to determine whether the claimant has a real interest, or is only a stalking horse, before being put to address these issues.

A reminder of Enabling Act sensitivities was added. One concern is that if Congress allows an Enabling Act rule to take effect by inaction, there is no Act of Congress to provide the President an opportunity to review and perhaps to veto. The Executive Branch shares the interest that the Enabling Act process pay attention to desirable constraints Even when a particular proposal seems to favor Executive Branch interests, these concerns remain and should be honored.

The relationship between bankruptcy and forfeiture proceedings was addressed. What if a Trustee acquires interests in forfeiture property through § 541: can bankruptcy be used as a tactic to expand standing? What about the automatic stay? The intersection of forfeiture and bankruptcy is very complex. No attempt is made to deal with that in draft Rule G. There is a growing body of case law on which goes first, whether the government becomes only a claimant for forfeiture in the bankruptcy proceeding. Some cases say the forfeiture goes first if issue is joined. So if the forfeiture is initiated after the bankruptcy proceeding commences, the Ninth Circuit Bankruptcy Appellate Panel says the forfeiture goes ahead, but some bankruptcy courts reach the opposite conclusion. The Department of Justice has decided not to address these issues in Rule G at this time.

Draft G(7)(d)(ii) says that standing is for the court, not the jury: why? This is the weight of case law. Some cases, however, assume without analysis that the question is for the jury, as part of the ownership question It was noted that the most recent conference call began to discuss this question and related questions, but did not conclude. They remain open for further subcommittee work.

As a separate question, it was asked whether the Department of Justice intends to ask for CAFRA amendments. Although there are some provisions that it would like have amended, none focus on standing. It does not seem likely that other amendments will be suggested in the near future. Congress exhausted its energies for forfeiture issues during the seven years of dispute that produced CAFRA.

The discussion concluded by observing that many of the provisions in draft Rule G were written by the Department of Justice to improve the position of claimants. This has not been a one-way street. For the first time, for example, the rule provides individual notice to potential claimants in addition to notice by publication. The effort is to produce a balanced rule that fairly weighs competing interests.

Filed, Sealed Settlements

Confidential settlement agreements are common. Much attention has been drawn, however, to the occasional practice of filing a settlement agreement under seal. The District of South Carolina has adopted a local rule that purports to prohibit sealing a filed settlement agreement. The Committee asked the Federal Judicial Center to undertake a study of this practice

Tim Reagan presented a progress report on the study. The report addressed the frequency of filing sealed settlement agreements, and the circumstances of filing.

The frequency of filed sealed settlement agreements varies from district to district. Docket records have been analyzed for just more than half of all districts. Across this sample, the average rate is slightly less than one in three hundred cases — about 0 3%. About ten percent of the courts examined have no such filings. Another ten percent have filings at twice or more the national rate The rate in the District of Puerto Rico is about 3%. In the District of Hawaii the rate is about 2%,

but that seems to be accounted for by the practice of filing under seal the transcript of a successful settlement conference.

The reasons for filing are obvious in about half the cases. The settlement needs court approval; the filing is the transcript of a settlement conference; the settlement is filed with a motion to enforce It seems likely that other filings were made to facilitate any enforcement proceeding that might become necessary in the future. For the most part the motive seems to be to protect information about the amount paid.

Looking to what is sealed, with an eye to determining whether important information is closed to public access, it turns out that the complaint is almost never sealed. In a very small number of cases the whole file has been sealed.

It was noted that James Rooks, of ATLA, submitted two papers on court secrecy that were circulated to the Committee for this meeting. The focus is on secrecy in broad terms that reach far beyond filed and sealed settlement agreements.

Another observation was that the FJC study provides valuable fact information to address conjectural fears that sealed settlement agreements filed in court are depriving the public of information needed to protect health and safety. This is a remarkably thorough study. But still further inquiries are being made to determine whether present practices interfere with public access to important information.

The FJC study also includes a survey of court rules on sealing. The docket study seems to suggest that there is no correlation between court rules and the frequency of sealing.

In response to a question why the study has not turned up a greater frequency of sealed settlement conference transcripts, it was noted that the search method reaches only matters that are entered on the docket sheet with "seal." In the District of Hawaii the docket entries are unusually complete, enabling researchers to catch more subtle nuances that may be obscured in other districts. And of course practices vary. Some judges — perhaps many — do not transcribe anything at a settlement conference. Perhaps commonly there is nothing in the record to seal. But if the court retains jurisdiction to enforce a settlement, then the agreement is filed and sealed.

The search cannot provide assured information about rejected motions to file under seal But the sense is that this does not occur frequently. So too, there seem to be few motions to unseal. When there is a motion to unseal, it may be made by a party or by a nonparty — usually the nonparty is the press.

Consideration will be given to the question whether the FJC study has reached a point at which it would be helpful to describe the interim findings to Senator Kohl, who has long expressed interest in access to litigation materials and who has introduced legislation on the topic.

Federal Judicial Center Rule 23 Study

Judge Rosenthal noted that the Class Action Subcommittee has carried forward the question whether to adopt a settlement-class rule. The proposal that was published for comment several years ago generated great controversy. The proposal was withdrawn as the *Amchem* and *Ortiz* decisions were anticipated and then handed down. Those decisions emphasized limits imposed by present Rule 23, leaving open the question whether Rule 23 should be amended to reduce rule-based obstacles to settlement classes. Constitutional constraints remain, however, and must inform any

rule. A rule must observe constitutional requirements. Wise rulemaking often yields further, accounting for the policies that shape constitutional requirments beyond the limits of compulsion.

The Federal Judicial Center was asked to undertake a study that might show whether there is now a need to pursue a settlement-class rule.

Mr. Willging presented a summary of the present stage of the FJC study. The "bottom line" is that Amchem and Ortiz do not drive plaintiffs' choices between filing in state or federal courts, and do not drive defendants' decisions whether to attempt removal of state-court actions. General class-certification rules and approaches do seem to have some importance, generally in the minds of defendants contemplating removal. Direct questions focused on the *Amchem* and *Ortiz* decisions showed that they are not major factors, but at times were among the concerns that influence the choice of forum. The effect is particularly likely to be felt in property damage and personal injury cases.

One finding has been that the cases that were settled in federal courts involved classes much smaller than the classes in cases that settled in state courts. The amount of recovery per individual class member, however, was considerably greater in the federal-court actions. There is no clear explanation of this pattern.

Many of the cases in the study had parallel litigation that also was settled Again, it is difficult to know what this information might suggest for possible Rule 23 amendments.

It was observed that it is intrinsically difficult for a study like this to gather information about cases that could not be settled because of doubts arising from the *Amchem* and *Ortiz* decisions.

The Committee thanked the Federal Judicial Center for undertaking the study The final report will be ready for the spring meeting.

Rules 15, 50(b)

The Committee has carried forward for some time the inquiry whether Rule 15 should be amended. One particular proposal has been to adjust the relation-back provisions of Rule 15(c)(3). Other questions address the right to amend once as a matter of course and the best means of expressing and perhaps distinguishing the tests for amendment before trial and at trial. The issues are conceptually difficult. The real-world importance of the issues has not yet been examined; if they are primarily theoretical, there may be little reason to wrestle with the conceptual questions. In order to help frame the questions for action, a Subcommittee chaired by Judge Kyle will study the proposals and report to the Committee. It may be that proposals can be pursued in tandem with the Style Project.

A more recent proposal addresses Rule 50(b) The proposal is easily defined. Rule 50(b) continues to allow a post-verdict motion for judgment as a matter of law only if the moving party moved for judgment at the close of all the evidence Many decisions reflect failures to comply with this requirement, and several decisions have announced approaches that have eroded the requirement at the margins. The question is whether the purposes served by the present rule can be served as well by a rule that is easier to apply and that does not cause inadvertent forfeiture of a deserved judgment. Although easily identified, the question touches Seventh Amendment sensitivities that must be carefully judged. This proposal too is referred to the Subcommittee chaired by Judge Kyle

Rule 62.1

In response to a proposal by the Solicitor General referred to the Committee by the Appellate Rules Committee, a draft of a new Rule "62.1" has been prepared The draft seeks to express a procedure adopted by most of the circuits to regulate relationships between district courts and appellate courts when a motion is made to vacate a judgment pending appeal. There are some variations in practice across the country, and many lawyers remain unfamiliar with the proper procedure. Even district courts might benefit from having the procedure spelled out in the rules This proposal will be carried forward on the agenda.

Next Meeting

The next Committee meeting was tentatively set for April 29 and 30, probably in Washington, D.C.

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

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EVIDENCE RULES

TO: **Hon. David F. Levi, Chair**
Standing Committee on Rules of Practice and Procedure

FROM: **Edward E. Carnes, Chair**
Advisory Committee on Federal Rules of Criminal Procedure

SUBJECT: **Report of the Advisory Committee on Criminal Rules**

DATE: **December 8, 2003**

I. Introduction

The Advisory Committee on the Rules of Criminal Procedure met on October 15-16, 2003, in Gleneden Beach, Oregon, and took action on a number of proposed amendments to the Rules of Criminal Procedure. The Minutes of that meeting are included at Appendix A.

This Report addresses several informational items. The Committee has no items requiring action by the Standing Committee.

II. Information Item—Public Comment Period on Proposed Amendments to Rules

At its June 2003 meeting, the Standing Committee approved publication of proposed amendments to the following rules. The comment period expires on February 16, 2004. The Criminal Rules Committee has scheduled a hearing on those proposed amendments for January 23, 2004 in Atlanta, Georgia.

A. Rule 12.2. Notice of Insanity Defense; Mental Examination

A proposed amendment to Rule 12.2 would include a new provision for sanctions in those cases where the defense fails to disclose the results of a mental examination conducted by the defense expert.

B. Rules 29, 33, 34 and 46; Proposed Amendments re Rulings by Court

Rules 29, 33, and 34 require that certain motions be filed within 7 days of the times specified in those rules. In the alternative the moving party may obtain an extension of time for filing the motions, but the court must grant the extension and fix a new due date within the original 7-day period specified in each rule. The published amendments to those three rules address the problem when a motion for an extension of time is filed in a timely fashion, but the court fails to rule on that request within the seven days. Under the proposed amendments, the court could grant the motion for an extension at any time after the seven-day period has expired, as long as that motion is filed within the seven-day period.

The Committee has also proposed a conforming amendment to Rule 46 concerning timely filings.

C. Rule 32.1. Revoking or Modifying Probation or Supervised Release

Currently, there is no provision in Rule 32.1 for the defendant's right to allocution when probation or supervised release is being revoked. The proposed amendment to to Rule 32.1 would provide for the right of allocution.

D. Proposed Rule Regarding Appeal of Rulings by Magistrate Judges

A proposed new rule, Rule 59, would parallel Rule of Civil Procedure 72(a), which addresses what counsel must do to preserve an issue for appeal from a magistrate judge's rulings on nondispositive and dispositive matters.

III. Information Item—Rules Under Consideration by Criminal Rules Committee

At its meeting in October, 2003, the Criminal Rules Committee considered proposed amendments to several rules. Those proposals are being actively researched and prepared for further discussion at the Committee's May 2004 meeting.

A. Rule 29. Proposed Amendment Regarding Appeal for Judgments of Acquittal

The Committee is considering, at the request of the Department of Justice, an amendment to Rule 29 that would require a judge to defer ruling on a motion for a judgment for acquittal until after the jury has returned a verdict. The Committee first discussed the issue at its Spring 2003, meeting and it continued that discussion at the October 2003 meeting where the Committee considered information supplied by the Federal Judicial Center concerning the practice in the States and numerical summaries.

The Department's position is that the amendment is necessary because some of the rulings granting Rule 29 motions before verdict are erroneous, and they all are rendered unappealable by the Double Jeopardy Clause. By allowing a judge to enter a judgment of acquittal before the jury has returned a verdict, and thereby insulating that ruling from any further review, Rule 29 is the only rule that permits a dispositive ruling that is not appealable. Nothing else in the criminal or civil rules is like it in that respect.

Originally, Rule 29 did not permit a judge to defer until after verdict the ruling on a motion for judgment of acquittal that was made at the close of the government's case. The rule was amended in 1994 to permit a judge to defer ruling until after verdict, but deferral is not required. If a judge declines to defer ruling and grants an acquittal before verdict, that ruling ends the case regardless of how erroneous the ruling may be. The Department of Justice presented the Committee with a number of examples of cases in which it appears a judge entered a pre-verdict judgment of acquittal that was clearly wrong.

The Committee fully discussed the Department's proposal, the implications of the Double Jeopardy Clause, and special problems that would arise under a proposed amendment in multi-count situations and in cases where there is a deadlocked jury. Ultimately, the proposal was approved in concept by a vote of 7 to 4, subject to further work on the special problems that were identified. The matter will be on the agenda for the Committee's May 2004 meeting.

B. Proposed Amendments to Rules 3, 4, 32.1, and 40 Regarding Use of Facsimile Copies and Production of Original Documents

The Committee is considering amendments to a number of rules that would authorize the parties and the court to use facsimile copies of various documents. A subcommittee has been appointed to review Rules 3, 4, 32.1 and 40, to conduct a poll of Magistrate Judges, and to prepare a report for the May 2004 meeting.

IV. Information Item—Consideration of Pending Items on the Criminal Rules Committee Docket.

Finally, at its October 2004 meeting, the Committee considered and discussed a number of miscellaneous proposals about amending the rules that had been carried

[DRAFT] MINUTES
of
THE ADVISORY COMMITTEE
on
FEDERAL RULES OF CRIMINAL PROCEDURE

October 15-16, 2003
Gleneden Beach, Oregon

The Advisory Committee on the Federal Rules of Criminal Procedure met at Gleneden Beach, Oregon on October 15 and 16, 2003. These minutes reflect the discussion and actions taken at that meeting.

I. CALL TO ORDER & ANNOUNCEMENTS

Judge Carnes, Chair of the Committee, called the meeting to order at 8:30 a.m. on Wednesday, October 15, 2003. The following persons were present for all or a part of the Committee's meeting:

Hon. Edward E. Carnes, Chair
Hon. Susan C. Bucklew
Hon. Paul L. Friedman
Hon. David G. Trager
Hon. James P. Jones
Hon. Anthony J. Battaglia
Hon. Reta M. Strubhar
Mr. Robert B. Fiske, Jr.
Mr. Donald J. Goldberg
Mr. Lucien B. Campbell
Mr. Jonathan Wroblewski, 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. Mark R. Kravitz, member of the Standing Committee and liaison to the Criminal Rules Committee; Mr. Peter McCabe and Mr. James Ishida 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; Ms. Laural Hooper of the Federal Judicial Center; Judge John Roll and Magistrate Judge Tommy Miller, former members of Committee; and Mr. George Leone, Chief, Appeals Division, United States Attorney's Office, D.N.J. Prof. Nancy J. King participated by telephone.

Judge Carnes recognized Judges John M. Roll and Tommy E. Miller and thanked them for their six years of dedicated service on the Committee. He also noted that Judge Tashima's term on the Standing Committee had ended in September 2003, and welcomed

Judge Kravitz, of the Standing Committee, as the new liaison member to the Criminal Rules Committee.

Judge Carnes also welcomed the two new members of the Committee. Judges James Jones and Anthony Battaglia.

II. APPROVAL OF MINUTES

Mr. Goldberg moved that the minutes of the Committee's meeting in Santa Barbara, California, in April 2003 be approved The motion was seconded by Judge Bucklew and, following corrections to the Minutes, carried by a unanimous vote.

III. STATUS OF PROPOSED AMENDMENTS TO RULES

Judge Carnes, Professor Schlueter, and John Rabiej informed the Committee that the package of amendments submitted to the Standing Committee in June 2003 (Rules Governing § 2254 Proceedings, Rules Governing § 2255 Proceedings, and the Official Forms Accompanying those Rules, and Rule 35) had been approved by the Judicial Conference and would be transmitted to the Supreme Court in the next month or so. They pointed out that at the request of the Department of Justice, the Standing Committee had decided not to forward at this time the Committee's proposed amendments to Rule 41 (tracking device warrants, etc.), so that the Department could again review the need, scope, and purpose of the proposed amendments.

Mr. Rabiej stated that the amendments proposed for public comment (Rules 12.2, 29, 32, 32.1 33, 34, 45, and 59) had been published and that a hearing on those amendments had been set for January 23, 2004, in Atlanta, Georgia.

IV. PROPOSED AMENDMENTS TO RULES UNDER ACTIVE CONSIDERATION

A. Rule 29. Proposed Amendment Regarding Appeal of Judgments of Acquittal.

Judge Carnes noted that at the Committee's meeting in April 2003, the Department of Justice had asked the Committee to consider an amendment to Rule 29 that would require a judge to defer ruling on a motion for a judgment for acquittal until after the jury had returned a verdict Following discussion at that meeting, the Committee had asked the Federal Judicial Center to conduct some additional research on the issue.

Mr. Wroblewski responded by stating that the Department had continued to address some of the questions raised at the Spring 2003 meeting. He continued by stating that the Department had been concerned about problems stemming from the inability to

appeal what it believed to be erroneous rulings on Rule 29 motions for a judgment of acquittal, and that about five years ago, it began to study the issue in more detail. He introduced Mr George Leon, from the United States Attorney's office in New Jersey, who had conducted more extensive research on the point.

Mr. Leon provided an extensive background on Rule 29 and emphasized that it is the only rule that provides for a dispositive ruling that is not appealable, although the Supreme Court has indicated that a ruling may be appealable as long as it is consistent with the Double Jeopardy Clause. In contrast, he said, in the Civil Rules, all rulings are appealable. He recognized that in 1994 the Committee had amended Rule 29 to permit judges to defer ruling on the motion, but in those cases where the judge decided the motion before verdict, the Department was aware of cases where the judge had clearly abused his or her discretion in granting the motion. He cited several examples. He also noted that several appellate courts have encouraged trial judges to defer their rulings. Despite that, according to his statistics, approximately 71% of Rule 29 rulings are still made prior to the verdict. He recognized that the Department's data is largely anecdotal, but in post-verdict grants of the motion, there is reversal in approximately 50% of the cases. He continued by noting that it would thus be reasonable to conclude that a similar percentage of pre-verdict rulings would also be defective.

Mr. Leon highlighted what he thought were the advantages of the amendment. First, it would protect the government's right to appeal a district court's ruling on the motion. He cited the legislative history of the rule which showed an intent to remove all non-constitutional barriers to an appeal. The amendment would also promote accurate results, the very purpose of the criminal justice system. Second, he pointed out, the amendment would permit the appellate process to work. Third, it would avoid the necessity of a second trial, thus the government's and defendant's interests would be protected. Fourth, it would permit the jury to fulfill its function. Fifth, it would prevent the waste of time and resources. In short, he said, the benefits of the amendment would outweigh any disadvantages.

Ms. Laural Hooper, of the Federal Judicial Center, commented along the lines of the written report that she had provided to the Committee prior to the meeting, which included in part, a study of the rules and practices in the State courts.

Mr. Campbell observed that the central theme of the Department's proposal was the view that if a few judges are abusing their discretion, then all are abusing their discretion. He also emphasized that this was an important subject; even if the accused was not technically subjected to "double jeopardy," the defendant would be exposed to extended jeopardy. A defendant should not have to respond until the government has put on its case. The inability of the government to appeal some Rule 29 motions is not an anomaly, as suggested by the Department. He pointed out that all but three states use the procedure currently used in the Federal system and that there are other rulings that are practically dispositive, for example, rulings on arguments. In his view, the amendment would not fix the problems identified by the Department. If some judges have committed

acts amounting to misconduct, there are other avenues for dealing with those issues. He also pointed out that the biggest problems would arise in those cases involving multiple counts and multiple defendant cases and that it is important for the judge to be able to weed out weak allegations earlier, rather than later, in the case. Mr. Campbell pointed out that the premise supporting the amendment is that the system can trust the prosecutors, but not the judges.

Judge Bucklew questioned whether there were any statistics on those cases where some, but not all of the counts were dismissed. Mr Rabiej responded that that data could probably be retrieved. Judge Bucklew observed that from a judge's standpoint, it is easier to grant the motion in a high-profile case at the end of the government's case, and before the jury retires to deliberate.

Mr. Fiske supported the proposed amendment and said that the statistical data supports the need for a change in the rule.

Judge Battaglia agreed with Mr. Campbell that the Rule was not an anomaly. Instead, the instances cited by the Department to support the amendment seemed to be an anomaly.

Judge Friedman stated that he agreed with Judge Bucklew that it is very difficult to grant a motion for a judgment of acquittal after the jury as returned a guilty verdict and that he does not have confidence in the statistics presented by the Department, considering the recent history of the Department presenting misleading statistics to Congress in support of the Feeney Amendment. Nonetheless, he could support some portions of the amendment, if certain revisions were adopted. For example, there must be an opportunity for a Rule 29 acquittal when the jury cannot reach a verdict. He also observed that recently he has perceived a lack of appropriate discretion and judgment in the prosecution of cases, and said that he has a conceptual problem with an amendment that would potentially limit the trial judge's role.

Judge Roll was skeptical about the amendment, but was impressed with the Department's statistics. He had continuing concerns about the problem of the case involving multiple counts, where it seems very clear that one or more of them should not be presented to the jury.

Professor King, participating by telephone, believed that the Rule did not need "fixing." In her view, the Department had not presented sufficient evidence to show that there was a problem that needed to be remedied. She also questioned a number of the statistical findings in the Department's memo. For example, the 50% reversal rate reflected only the number of cases handled by the appellate divisions. Second, she questioned whether the error rate would be the same for post-verdict rulings. She thought that the error rate might be higher in those cases going to verdict, because those would probably reflect cases involving "close calls." She expressed agreement with the

comments by Judges Bucklew, Friedman, and Roll and stated that in her view she did not believe that accuracy in results would be increased with the amendment.

Judge Kravitz expressed concern about the multi-count cases, especially where the judge believes that going to the jury with all of the counts may simply confuse the jury.

Judge Carnes recognized that there may be judges who clearly abuse their discretion in granting the motion, but it is not clear how many judges are actually involved. Mr. Leon noted that their records tended to show some repetition, perhaps 30 judges. In response, Judge Carnes wondered whether an amendment was required where it would only affect a small percentage of judges. He also expressed concern about the "big case" and the perception of the public and observed that there is a cost for government appeals of Rule 29 appeals — continued jeopardy for the defendant.

Judge Trager stated that on a philosophical level, the concept of double jeopardy is very different in some European countries where the criminal justice system is integrated. He said that the real problem seems to be that some judges are hostile to the prosecution and that the amendment would not solve the problem where the judge makes a "creative" evidentiary ruling that in effect ends the prosecution. Nonetheless, he strongly supported the amendment.

Judge Jones said that the amendment presented a close question but that he could be persuaded of the need for the amendment. He shared Judge Friedman's concern about the ability of the judge to grant a Rule 29 motion in those cases where the jury cannot reach a verdict. But, he also recognized the problems associated with multi-count cases.

Mr. Goldberg observed that the rules will never deter egregious behavior by judges and noted that the statistics show that less than one tenth of one percent of the cases are involved in this debate. He stated that he opposed the amendment, noting that the current practice works well in both the federal and state systems.

Judge Strubhar was concerned that the amendment would focus on only a few judges but that she was not opposed to publishing an amendment for public comment.

The Reporter noted that in 1994 the Committee had addressed the concerns raised by the Department and that at that time, the amendment, which gave the judge the discretion to defer the ruling, was viewed as a reasonable and balanced approach to the problem He also pointed out that a good argument could be made that a rule should not be amended to affect only a few isolated cases.

Mr. Wroblewski responded to the observations of the Committee and pointed out that first, he believes that the current rule is still inconsistent with the spirit of the statutory view that the government should have a right to appeal. Second, it was not accurate to say that the amendment would remove the judge's discretion The intent

behind the amendment, he said, is to have the jury hear the case. He recognized the problems of hung juries and multi-count cases, but was confident that those issues could be addressed in any amendment.

Mr. Leone noted that the proposed amendment was not an idea generated by the current administration and that the issue had been discussed within the Department for a number of years. He also stated that he believed the issues of hung juries and multi-count cases could be addressed although drafting suitable language to address multi-count cases might not be feasible. Mr. Leone added that there is no real constitutional impediment to the amendment and that the possibility of an appeal would keep trial judges from acting improperly. He also observed that it could be equally difficult for a judge to grant a pre-verdict motion in a high profile case and that the amendment is not just about a few number of judges, it is about obtaining accuracy in the outcome of a case.

Mr. Fiske urged the Committee not to let the experience of the Feeney Amendment to affect its decision to consider the amendment to Rule 29. In his view, the amendment would not dilute the judge's authority and the amendment would also address the problem of the well-intentioned judge who errs in ruling on the motion.

Judge Friedman again commented on the problem of the hung jury and that the problems associated with the jury's inability to reach a verdict did not fit into the model proposed by the Department.

Mr. Wroblewski moved that the Committee approve in concept the proposed amendment. Judge Trager seconded the motion, which carried by a vote of 7 to 4. Judge Carnes asked Mr. Wroblewski to work on the amendment and attempt to address the concerns raised in the discussion, in particular the multi-count case and cases involving hung juries.

B. Rule 32.1. Revoking Or Modifying Probation Or Supervised Release; Proposed Amendment To Remove Requirement For Production Of Certified Copies Of Judgment.

The Reporter noted that at its April 2003 meeting, the Committee had discussed a proposal from Magistrate Judge Sanderson, who had recommended that Rule 32.1 be amended to remove the requirement that the government provide certified copies of the judgment At that meeting, he continued, Judge Miller had agreed to poll other magistrate judges to determine if there were other similar problems that needed to be addressed. Judge Miller reported that he had done so and that he had discovered other similar issues that probably deserved attention. For example, he noted, facsimile copies of documents were being used, not only for search warrants under Rule 41, but also for *Gerstein v. Pugh* probable cause decisions under Rules 3 and 4, and bail-jumping proceedings under Rule 40. Judge Battaglia informed the Committee that on a typical weekend, a magistrate judge in his district (San Diego, California) might consider 30 to 35 *Gerstein* facsimile proffers from law enforcement personnel.

Following additional discussion, Judge Carnes asked Judge Battaglia, Mr. Campbell, and Mr. Wroblewski to study the issue further, poll magistrate judges, if necessary, and prepare some draft language for the Committee to consider at its Spring 2004 meeting.

C. Rule 41. Amendment Regarding Tracking Device Warrants and Delayed Notification

1. Tracking-Device Warrants.

Judge Carnes provided some additional background information on the status of the proposed amendments to Rule 41 (noted above). At the Spring 2003 meeting the Committee had considered the public comments submitted on the proposed amendments to Rule 41 that would have addressed procedures to be used in issuing tracking-device warrants. The Committee had made several minor changes to the proposed language and had voted to send the amendment to the Standing Committee, with a recommendation to approve it and forward it to the Judicial Conference. At the Standing Committee meeting the Committee initially voted to approve the amendment. But after the meeting, the Deputy Attorney General, who had abstained on the vote, requested that the Standing Committee defer forwarding the amendment until the Department had had a chance to review the matter and present its concerns to the Committee. That request was granted. Judge Carnes continued by noting that from a jurisdictional viewpoint, the proposed amendment was still before the Standing Committee for its consideration and that the Criminal Rules Committee had not been asked to formally reconsider its proposal. Judge Kravitz agreed with that assessment

Judge Miller expressed concern that the Department of Justice, which had originally proposed the amendments, had later requested the Standing Committee not to forward the amendment to the Judicial Conference. Mr. Wroblewski responded that subsequent to the Committee's approval of the amendments at the Spring 2003 meeting, the Deputy Attorney General had raised some significant concerns that the amendment might require a finding of probable cause before issuing a tracking-device warrant. Mr. Wroblewski indicated that various entities in the Department were being polled for additional information on the need for an amendment to Rule 41 and expressed hope that the matter would be soon resolved. Professor King pointed out that in response to the Department's earlier concerns about the probable cause requirement, the Committee had redrafted a portion of the Committee Note to make it clear that the amendment did not address the issue of whether probable cause was required, thus leaving that particular issue for the case law.

Mr. Rabiej added that apart from the proposed amendments to Rule 41, Congress was considering a possible change to the notice provision in 18 U S.C. § 3103a(b). He said that he would continue to monitor those possible changes.

2. Proposed Amendment to Address Warrants for Electronic Files

The Reporter presented a proposal from Magistrate Judge B. Janice Ellington to amend Rule 41 to address explicitly the validity of issuing search warrants for out-of-state electronic files. In her proposal she noted that there seems to be a conflict between 18 U.S.C. § 2703(a), which requires a search warrant for certain electronic files, and Rule 41(b), which permits out-of-district search warrants only in terrorism cases. The Reporter pointed out that at its April 2002 meeting, the Committee had discussed the question of whether Rule 41 should be amended to incorporate some of the provisions in the USA Patriot Act, and in particular the question of whether the rule should contain guidance on search warrants for electronic files. Finally, he pointed out that upon recommendation of the Rule 41 subcommittee chaired by Judge Miller, the Committee decided not to include that provision. Judge Miller added that nothing since that meeting indicated a need to amend Rule 41 and that the language of § 2703 permitted such search warrants, although Rule 41 was silent. He also noted that that provision had a sunset provision

Following additional discussion, Mr. Fiske moved that Rule 41 not be amended as requested. Judge Trager seconded the motion, which carried by a unanimous vote.

3. Rule 24(b). Discussion Regarding Number of Peremptory Challenges in Capital Case.

The Reporter informed the Committee that Judge Ellis, a member of the Appellate Rules Committee, had sent an inquiry to Mr. Rabiej concerning the language in restyled Rule 24(b). He had concluded that the amended Rule contained a substantive change that had not been identified as such in the accompanying Committee Note; he pointed out that the former rule provided that each side had 20 peremptory challenges "if the offense charged is punishable by death.. " While the caption of the restyled rule refers to "Capital case," the text provides 20 peremptory challenges to the government when the death penalty actually is being sought.

During the discussion which followed, the members were of the view that the new language probably accurately reflected the case law and the amended rule did not reflect a substantive change in practice.

Judge Friedman moved that no action be taken on the matter. Mr. Fiske seconded the motion, which carried by a unanimous vote.

V. OTHER PROPOSED AMENDMENTS TO THE RULES — PENDING AND DEFERRED AS LISTED ON CRIMINAL RULES DOCKET

The Reporter stated that according to the Criminal Rules Docket, maintained by the Rules Committee Support Office, a significant number of proposed amendments to the Criminal Rules were listed either as pending or deferred, or as having been referred to the Chair and Reporter for possible action. He recommended that the Committee discuss the list with a view to disposing of those proposals.

A. Rule 4. Proposed Amendment From Magistrate Judge B. Zimmerman re Clarification of Ability of Judges to Issue Warrants via Facsimile Transmission

The Reporter stated that during the comment period on the restyled Criminal Rules, Judge Zimmerman had recommended that Rule 4 be amended to permit judges to issue warrants by facsimile. There was no record that that particular proposal had been voted on by the Committee. He pointed out that the issue had been raised in 1991, when a Subcommittee had considered, and rejected a similar proposal. Several members of the Committee believed that the issue was worthy of further consideration, given the recent interest in using electronic filings and communications throughout the judicial and law enforcement systems. Following additional discussion, Judge Carnes asked a subcommittee, consisting of Judge Battaglia (chair), Mr. Campbell, and Mr. Wroblewski to study the proposal in the context of other proposals concerning use of facsimile transmissions in connection with not only Rule 4, but with other rules as well.

B. Rule 6. Proposed Amendment from ABA to Permit Counsel to Accompany Witness to Grand Jury

The Reporter indicated that a proposed amendment to Rule 6 from the American Bar Association had been referred to the Chair and Reporter during the comment period on the restyling project. The amendment would permit counsel to accompany a witness to the grand jury proceeding. He noted that the issue had been discussed by the Committee on prior occasions but that this particular proposal was listed as pending.

Mr Goldberg moved that the proposal be given further consideration. Mr. Campbell seconded the motion, which failed by a vote of 2 to 9. The Reporter indicated that the docket sheet would be changed to reflect that the proposal is "completed."

C. Rule 7(b). Proposed Amendment re Effect of Tardy Indictment, Proposed by Congressional Constituent

The Reporter informed the Committee that he and Judge Carnes had received a communication from a constituent for Congressman Jim Gibbons, in which the constituent raised concerns about the interplay between the statute of limitations and Rule 7 The communication did not contain any proposed changes to that Rule Following a

brief discussion, Judge Carnes stated that it was clear that there was a consensus not to continue any consideration of the issue

D. Rule 10. Proposal by Magistrate Judge W. Crigler re Guilty Plea at Arraignment

At its Fall 1994 meeting, the Reporter said, the Committee had briefly considered a proposal from Magistrate Judge Crigler (then a member of the Committee) regarding the ability of a magistrate judge to take guilty pleas at arraignments. Although there was apparently an agreement to place the item on a future agenda, it was not directly addressed as an agenda item at any later meeting. Several members pointed out, however, that the issue had been discussed, at least indirectly, in the context of other proposed amendments, including the pending addition of proposed new rule 59. Following brief discussion, Judge Bucklew moved that the proposal be removed from the docket. Judge Battaglia seconded the motion, which carried by a unanimous vote.

E. Rule 11. Proposal by Mr. Richard Douglas, Senate Foreign Relations Committee re Advising Defendant of Collateral Consequences (Immigration) of Guilty Plea

The Reporter indicated that in 2001, Mr. Richard Douglas, a staff member of the Senate Foreign Relations Committee, recommended that the Committee consider an amendment to Rule 11 that would require the judge to inform the defendant that a guilty plea might affect the defendant's immigration status. The Reporter stated that although his specific proposal had not been considered, the issue had been raised on prior occasions, and rejected, as recently as the April 2003 meeting. Judge Friedman spoke on behalf of the proposal and suggested that the Committee reconsider its opposition to the amendment Following brief discussion, Judge Carnes concluded that a clear consensus had formed to reject the proposal and to change the docket sheet to reflect the fact that the issue had been "completed."

F. Rule 11. Proposal by Judge David Dowd re Determining Whether Plea Agreement was Communicated to Defendant

In 2002, the Reporter stated, Judge Dowd, a former member of the Committee, had written to Mr. Rabiej suggesting that Rule 11 be amended to require that the judge inquire as to whether the prosecution has made a plea offer and whether that offer was ever communicated to the defendant. The matter had been referred to the Chair and the Reporter but had not been discussed at any prior meetings. Mr. Campbell stated that he did not believe that this issue needed to be addressed in a rule; other members noted that similar problems might exist and that it would be difficult to cover all possible contingencies in the rule. Following additional discussion, Judge Carnes stated that there was a consensus to list the proposal as having been "completed," on the docket sheet

G. Rule 16. Proposal from Judge W. Wilson re Disclosure of Government Witnesses to Defense

Judge Wilson, a former member of the Standing Committee, had written to Judge Davis, the former chair of the Committee, in 1999 asking the Committee to once again address the issue of government disclosure of the names of its witnesses to the defense. The Reporter provided a brief overview of a similar amendment which had been proposed by the Criminal Rules Committee, published for comment, and approved by the Standing Committee. Judge Wilson had been one of the chief supporters of that proposal. The amendment did not receive the support of the Judicial Conference and the issue had not been revisited since then. Judge Friedman noted that there was some merit to the idea and recommended that the Committee consider the issue again That proposal failed by a vote of 3 to 8.

H. Rule 23. Proposal from Mr. Jeremy Bell re Issue of Whether Jury Trial is Authorized

The Reporter explained that in 2000, during the comment period of the restyling project, one of Judge Miller's students at William and Mary School of Law had proposed an amendment to Rule 23 that would specifically indicate when a defendant was entitled to a jury trial. He added that the item was being carried on the docket as pending further action. Following a brief discussion, Judge Friedman moved that the proposal be rejected. The motion was seconded by Mr. Goldberg and carried by a unanimous vote.

I. Rule 32(c)(5). Proposal from Mr. Gino Agnello, Clerk of 7th Circuit re Whether Clerk is Required to File Notice of Appeal

The Reporter stated that in 2000, Judge Davis (former Chair of the Committee) received a letter from the Clerk of the Seventh Circuit Court of Appeals requesting that the Committee consider a possible amendment to Rule 32 should address the possibility that the clerk of the court would fail to file a notice of appeal, when requested to do so by the defendant. The court, in *United States v. Hirsch*, had addressed the problem in a case where the defense counsel and defendant were under the mistaken impression that the clerk had complied with the defendant's request that a notice of appeal be filed. By the time the error was discovered, all of the permissible time limits for perfecting an appeal had expired; the only real remedy at that point, according to the court, was for the defendant to file a § 2255 motion. Mr. Wroblewski said that he had contacted various United States Attorneys and had concluded that this issue was not a problem requiring an amendment to the rules. Other members noted that the same issue could arise in any rule provision that required a party or court to take a particular action, and no action is taken. Judge Carnes noted that a clear consensus had formed to not address the issue in an amendment and asked that the Administrative Office relay that information to the Appellate Rules Committee.

J. Rule 32.1. Decision in October 1997 to Monitor Legislation re Victims' Rights.

The Reporter explained that in 1997, Congress had considered legislation concerning victim allocution and that in response to that development, Judge Davis had appointed a subcommittee to consider whether Rules 11, 32, and 32.1 should be amended to provide for victim allocution and to monitor pending legislation. At some point, not reflected in the Committee's records, the subcommittee was discontinued Although the Committee has subsequently considered amendments to Rule 32 concerning victim allocution (including a pending amendment) no additional action had been taken with regard to Rules 11 and 32.1. The Criminal Rules docket indicates that the matter is still pending and the Reporter recommended that the issue be treated as "completed." Mr Wroblewski stated that the Department was not opposed to that action but that there are other pending victim allocution issues that may require the Committee's attention in the future. Judge Trager moved that the item be listed as completed. Mr. Goldberg seconded the motion, which carried by a unanimous vote.

K. Rule 35. Proposal from ABA to Permit Defendant to Move for Reduction of Sentence

In 2001, as part of the public comment period on the restyled Rules of Criminal Procedure, the American Bar Association had recommended that Rule 35 be amended to permit the defendant to move for sentence reduction. The matter had not been specifically addressed since that time, although the proposal appears on the docket as pending. The Reporter indicated that the issue has been raised from time to time, without any formal vote. Following additional discussion, Judge Carnes provided the Committee with an opportunity to move to propose the amendment. When no motion was forthcoming, he stated that the proposal had been considered rejected, for lack of a motion and that the docket should be amended to reflect that the proposal had been "completed."

L. Rule 40. Proposal from Magistrate Judge Collings to Authorize Magistrate Judge to Set New Conditions on Release

The Reporter stated that in January 2003 Magistrate Judge Collings had written to the Committee recommending that Rule 40 be amended to address the authority of a magistrate judge to issue conditions of release if a defendant is arrested for some offense other than failing to appear In his view, the proposed change would grant magistrate judges the same powers they now have in cases involving arrests for failure to comply with other conditions of release set in another district. Several members expressed the view that the proposal had merit. Judge Carnes asked the subcommittee, consisting of Judge Battaglia, Mr. Campbell, and Mr. Wroblewski, to study the problem and report to the Committee at its April 2004 meeting.

M. Rule 41. Proposal from Judge David Dowd re Recording of Oral Search Warrant

The Reporter stated that in 1998 Judge Dowd, a former member of the Committee, had recommended an amendment to Rule 41 that would require the court to prepare a written transcript of sworn testimony presented to the magistrate judge in requesting a search warrant. The matter had been discussed at the April 1998 meeting during which the Committee decided "not to take any action to amend Rule 41 at this time." Consequently, the proposal continued to be carried as "deferred indefinitely." He recommended that the Committee direct that the proposal be shown as being "completed" on the docket with no expectation that the Committee will need to address it any further. Following brief discussion, the Committee concurred in that proposal.

N. Rule 57. Proposal from Standing Committee (12/97) re Uniform Effective Date for Local Rules.

Finally, the Reporter stated that in June 1997, members of the Standing Committee had recommended that the Advisory Committees consider adoption of a uniform effective date for any amendments to local rules. He added, however, that the docket continued to carry the item as "pending" although he could not recall that the Committee had ever fully discussed the matter or voted on it. Mr. Rabiej stated that the matter was in effect "completed" because other developments in the area of local rules had disposed of the matter. Thus, the docket will be changed to reflect that fact.

VII. REPORT OF THE ADMINISTRATIVE OFFICE ON MATTERS PENDING BEFORE CONGRESS

Mr. Rabiej reported briefly on several matters pending before Congress, including a status report on the continuing attempts to amend Rule 46. He also noted that Congress was considering an amendment to Rule 32.2 to correct a problem in those cases where the forfeiture order is not included in the judgment.

VIII. DESIGNATION OF TIME AND PLACE OF NEXT MEETING

The Committee tentatively agreed to hold its next meeting in April or May 2004. Judge Carnes asked Mr Rabiej to circulate a list of possible dates to the Committee and asked members to indicate if they could not attending any of those dates.

The meeting adjourned at 11:45 a.m on Thursday, October 16, 2003

Respectfully submitted

David A. Schlueter
Professor of Law
Reporter, Criminal Rules Committee

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

DAVID F. LEVI
CHAIR

PETER G. McCABE
SECRETARY

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CIVIL RULES

EDWARD E. CARNES
CRIMINAL RULES

JERRY E. SMITH
EVIDENCE RULES

TO: **Honorable David F. Levi, Chair**
Standing Committee on Rules of Practice and Procedure

FROM: **Honorable Jerry E. Smith, Chair**
Advisory Committee on Evidence Rules

DATE: **December 1, 2003**

RE: **Report of the Advisory Committee on Evidence Rules**

I. Introduction

The Advisory Committee on Evidence Rules (the "Committee") met on November 13, 2003 in Washington, D.C. At this meeting, the Committee continued with its long-term project of reviewing the Evidence Rules to determine whether amendments must be proposed to rectify conflicts in courts about the meaning or application of an Evidence Rule. The goal of the project is to prepare a package of amendments, if necessary, and present that package to the Standing Committee in June, 2004 to seek authorization for release for public comment.

Part III of this Report provides a summary of the Committee's long-term projects. A complete discussion of these matters can be found in the draft minutes of the November 2003 meeting, attached to this Report.

II. Action Items

No action items

III. Information Items

A. Long-Term Project on Possible Changes to Evidence Rules

Two years ago the Evidence Rules Committee, as part of its long-range planning, directed its Reporter to review scholarship, caselaw, and other sources of evidence law to determine whether there are any evidence rules that might be in need of amendment. At its April 2002 meeting, the Committee reviewed a number of potential changes and directed the Reporter to prepare a report on a number of different rules, so the Committee could take an in-depth look at whether those rules require amendment. At its October 2002 meeting, the Committee began to consider the Reporter's memoranda on some of the rules that have been found worthy of in-depth consideration. The Committee agreed that the problematic rules should be considered over the course of four Committee meetings and that if any Rules are found in need of amendment, the amendment proposals would be delayed in order to package them as a single set of proposed amendments to the Evidence Rules. This would mean that the package of amendments, if any, would go to the Standing Committee at its June 2004 meeting, with a recommendation that the proposals be released for public comment.

The Committee continued its consideration of reports on a number of possibly problematic Evidence Rules at its Fall 2003 meeting. The goal of the Committee was not to vote definitively on whether to propose an amendment to any of those rules, but rather to determine whether to proceed further with any particular rule as part of a possible package of amendments.

The Committee voted to reject the following proposals:

1 *Rule 607*· The Committee found it unnecessary to codify the lower court case law that prohibits a party from calling a witness solely to impeach that witness with evidence that is otherwise inadmissible. Courts have handled this abusive practice under the existing Rule, and there is no dispute in the courts as to the impermissibility of this practice.

2. *Rule 613(b):* Rule 613(b) provides that a prior inconsistent statement can be admitted without giving the witness an opportunity to examine it in advance of admission. The witness, however, must be given an opportunity at some point in the trial to explain or deny the statement. The Rule thus rejects the common-law procedure under which the proponent was required to lay a foundation for the prior inconsistent statement at the time the witness testified. The Committee considered whether the Rule should be amended to return to the common-law foundation requirement. After reviewing case law, the Committee voted unanimously not to propose an amendment to the Rule. The Committee concluded that the Rule does not appear to create problems for courts or litigants. Courts use their discretion to control the order of proof to prohibit the admission of a witness's inconsistent statement *before* the witness testifies. And prudent counsel are unlikely to wait to introduce the statement *after* the witness leaves the stand, because counsel would thereby assume the risk that the witness might not be available to explain or deny the statement. After discussion, Committee members agreed that any conceptual problems in the Rule largely have been solved by the proper use of judicial discretion and by prudent practice of counsel.

3. *704(b):* The Committee considered whether Rule 704(b) should be amended to limit its coverage to the expert testimony of mental health professionals. The Committee found no need for an amendment of this Rule, as it has been applied consistently and without significant problems.

4. *Rule 801(d)(1)(B):* The Committee considered a proposal to amend Rule 801(d)(1)(B) to expand the hearsay exception for prior consistent statements to cover every statement that would be admissible to rehabilitate the credibility of the declarant-witness. Following its presumption against amending the Evidence Rules, the Committee found no problem in the application of Rule 801(d)(1)(B) that was substantial enough to justify the significant costs of an amendment.

5. *Rule 803(18):* The Committee investigated whether the learned treatise exception to the hearsay rule should be amended to cover authoritative publications in electronic form (e.g., video). The Committee saw the virtue of accommodating technological advances in the presentation of evidence. The Committee chose, however, not to proceed with an amendment to Rule 803(18) at this time. Only one federal court has considered whether a learned treatise may be admitted in electronic form. That court had no trouble admitting an authoritative videotape under the learned treatise exception. The Committee decided that it would not be prudent to propose an amendment when only one court has weighed in on the question.

6. *Rule 806:* Rule 806 provides generally that the credibility of a hearsay declarant may be impeached to the same extent as if the declarant were testifying at trial. The Committee reviewed a suggestion made in academic commentary to amend the Rule to permit extrinsic evidence of a hearsay declarant's bad acts when they are pertinent to the declarant's character for untruthfulness The Committee rejected this proposal on the ground that extrinsic evidence carries a risk of confusion and can be very time-consuming. This is why such evidence is not admissible to impeach a witness's character for truthfulness at trial, under the terms of Rule 608(b) The Committee saw no reason to make an exception to the well-reasoned extrinsic evidence ban for impeachment of a hearsay declarant.

The Committee voted to give tentative approval to the following proposals:

1. *Rule 404(a)*: The Committee has agreed on tentative language for a possible amendment to Rule 404(a)(1) to clarify that character evidence is never admissible to prove conduct in a civil case. The text of Rule 404(a) seems to prohibit the circumstantial use of character evidence in a civil case, and yet two circuits have held that such evidence is admissible when a defendant is charged by the plaintiff with what amounts to criminal activity. The Committee will revisit this proposal at its meeting in Spring 2004.

2. *Rule 408:* The Committee is continuing to work on a possible amendment to Rule 408, the Rule that limits the admissibility of evidence of settlement and compromise. Currently there is substantial dispute in the courts over three important questions: a) whether evidence of a civil compromise is admissible in subsequent criminal litigation; b) whether statements made during

settlement negotiations can be admitted to impeach a party for prior inconsistent statement or contradiction; and c) whether an offer to settle can be admitted in favor of the party who made the offer. The Committee has tentatively agreed on an amendment that would limit the protection of Rule 408 to civil cases; prohibit the use of compromise evidence when offered to impeach by way of prior inconsistent statement or contradiction; and prohibit the admission of compromise evidence no matter which party offers it. The Committee has also tentatively agreed to restructure the Rule to make it easier to read and apply.

3. *Rule 410:* The Committee has agreed that Evidence Rule 410—the Rule that excludes most statements and offers made during guilty plea negotiations—should be amended to protect the statements and offers of prosecutors as well as defendants and defense counsel. Currently the Rule does not protect statements and offers of prosecutors from admissibility at trial. The Committee has determined that the policy of encouraging plea bargaining would be furthered by providing protection for the statements of all of the parties to a plea negotiation. The Committee will give further consideration to the language for a proposed amendment at its Spring 2004 meeting.

4. *Rule 606(b):* Evidence Rule 606(b) generally excludes juror affidavits or testimony concerning jury deliberations. The rule is silent, however, on whether juror statements are admissible to prove that the verdict reported by the jury was different from that actually agreed upon by the jurors. Courts have generally allowed juror statements to prove errors in the reporting of the verdict, but there is dispute among the courts as to the scope of this court-created exception to the Rule. The Committee has tentatively agreed to propose an amendment to Rule 606(b) that would codify a narrow exception, permitting proof from jurors on whether there was a clerical mistake in the reporting of the verdict. A broader exception that would permit proof of juror statements whenever the jury misunderstood or ignored the court's instruction was thought to have the potential of intruding into juror deliberations and upsetting the finality of verdicts in a large and undefined number of cases. In contrast, an exception permitting proof only on questions of clerical error preserves the privacy of jury deliberations, as the inquiry concerns only what the jury decided, not why it decided as it did. The Committee will revisit the proposed amendment to Rule 606(b) at its Spring 2004 meeting.

5. *Rule 609(a):* Rule 609(a)(2) provides that convictions for crimes involving dishonesty or false statement (rendered within a certain time period) are automatically admissible to impeach a witness's character for truthfulness. The admissibility of convictions for crimes not involving dishonesty or false statement is subject to a balancing test under Rule 609(a)(1). Rule 609(a)(2) does not define which crimes involve dishonesty or false statement Courts have taken different and conflicting approaches to defining the crimes that fall within Rule 609(a)(2). Many courts look to the manner in which the crime was committed – the underlying facts If the crime was committed in a deceitful manner, then the crime is found "automatically" admissible under Rule 609(a)(2). Other courts look only to the statutory elements of the crime for which the witness was convicted. Under this view, the conviction is admissible under Rule 609(a)(2) only if its statutory elements necessarily require the commission of an act of false statement or deceit.

The Evidence Rules Committee has tentatively agreed to propose an amendment to resolve the conflict in the courts over the definition of crimes involving dishonesty or false statement. It has also tentatively resolved that if the Rule is to be amended, it should adopt an "elements" definition of crimes involving dishonesty or false statement. Under the proposed amendment, a crime involves dishonesty or false statement within the meaning of Rule 609(a)(2) only if its statutory elements necessarily involve the commission of an act of dishonesty or false statement. The Committee believes an "elements" approach promotes efficiency and more uniform results. In contrast a rule requiring the court to look behind the conviction, to the manner in which it was committed, will often result in an indeterminate inquiry and an unjustified expenditure of the court's time. The Committee will revisit the proposed amendment to Rule 609 at its Spring 2004 meeting

In addition, and as set forth in the Report to the Standing Committee in June 2002, the Committee has directed the Reporter to prepare memoranda on the following rules, to determine whether any changes to these rules are necessary:

1. Rule 706 (to consider certain stylistic suggestions and to determine whether to incorporate civil trial practice standards developed by the ABA).

2. Rule 803(3) (to consider whether the Rule should be amended to cover statements of the declarant's state of mind where offered to prove the conduct of someone other than the declarant).

3. Rule 803(8) (to consider whether the language excluding law enforcement reports in criminal cases should be replaced by general language requiring that public reports are to be excluded if they are untrustworthy under the circumstances).

I wish to emphasize that in regard to any rules or other items as to which the Committee has indicated possible interest, the Committee continues to be wary of recommending changes that are not considered absolutely necessary to the proper administration of justice.

B. Privileges

The Committee's Subcommittee on Privileges has been working on a long-term project to prepare a "survey" of the existing federal common law of privileges. The end-product is intended to be a descriptive, non-evaluative presentation of the existing federal law, and not a proposal for any amendment to the Evidence Rules. The survey is intended to help courts and lawyers in working through the existing federal common law of privileges, and if completed it will be published as a work of the Consultant to the Committee, Professor Ken Broun, and the Reporter. At this stage, the survey of the psychotherapist-patient privilege has been substantially completed, and Professor Broun is beginning work on the attorney-client privilege

IV. Minutes of the November 2003 Meeting

The Reporter's draft of the minutes of the Committee's November 2003 meeting is attached to this report. These minutes have not yet been approved by the Committee.

Advisory Committee on Evidence Rules

Minutes of the Meeting of November 13th, 2003

Washington, D.C.

The Advisory Committee on the Federal Rules of Evidence (the "Committee") met on November 13th, 2003 at the Thurgood Marshall Federal Judiciary Building in Washington, D.C..

The following members of the Committee were present:

Hon. Jerry E. Smith, Chair
Hon. Ronald L. Buckwalter
Hon. Robert L. Hinkel
Hon. Jeffrey L. Amestoy
David S. Maring, Esq.
Thomas W. Hillier, Esq.
Stuart A. Levey, Esq , Department of Justice

Also present were:

Hon. Thomas W. Thrash, Jr., Liaison from the Standing Committee on Rules of Practice and Procedure
Hon Christopher M. Klein, Liaison from the Bankruptcy Rules Committee
Hon. Richard H. Kyle, Liaison from the Civil Rules Committee
Hon. David G. Trager, Liaison from the Criminal Rules Committee
Hon. C. Arlen Beam, Chair of the Drafting Committee for the Uniform Rules of Evidence
Professor Daniel R. Coquillette, Reporter to the Standing Committee on Rules of Practice and Procedure
Peter G. McCabe, Esq., Secretary, Standing Committee on Rules of Practice and Procedure
John K. Rabiej, Esq., Chief, Rules Committee Support Office
James Ishida, Esq., Rules Committee Support Office
Jennifer Marsh, Esq., Federal Judicial Center
Professor Daniel J. Capra, Reporter to the Evidence Rules Committee
Professor Kenneth S. Broun, Consultant to the Evidence Rules Committee
Roger Pauley, Esq., former member of the Evidence Rules Committee
Professor Steven Genzler, Research Fellow, Administrative Office
Peter Freeman, Esq., representative of the ABA Section of Litigation
Professor Liesa Richter, University of Oklahoma School of Law

Opening Business of the Committee Meeting

Judge Smith extended a welcome to those who were attending the Evidence Rules Committee for the first time: Stuart Levey, the new Justice Department representative, and Judge Beam, the Chair of the Drafting Committee for the Uniform Rules of Evidence. Judge Smith asked for approval of the draft minutes of the April 2003 Committee meeting. The minutes were approved unanimously. Judge Smith then gave a short report on the June 2003 Standing Committee meeting. He noted that the Standing Committee was unanimous in approving the proposed amendment to Evidence Rule 804(b)(3). The amendment was thereafter approved by the Judicial Conference and is currently being considered by the Supreme Court.

Judge Smith also noted that the Evidence Rules Committee would participate in the work of the Standing Committee in implementing the privacy provisions of the E-Government Act. Judge Smith announced that he had appointed Judge Hinkel to be the Evidence Rules Committee's representative to the Standing Committee's subcommittee that is considering the privacy requirements mandated by the E-Government Act.

Long-Range Planning — Consideration of Possible Amendments to Certain Evidence Rules

At its April 2001 meeting, the Committee directed the Reporter to review scholarship, caselaw, and other bodies of evidence law to determine whether there are any evidence rules that might be in need of amendment as part of the Committee's long-range planning. At the April 2002 meeting, the Committee reviewed a number of potential changes and directed the Reporter to prepare a report on a number of different rules, so that the Committee could take an in-depth look at whether those rules require amendment.

At the October 2002 meeting, the Committee began to consider the Reporter's memoranda on some of the rules that have been found worthy of in-depth consideration. The Committee agreed that the problematic rules should be considered over the course of four Committee meetings, and that if any rules are found in need of amendment, the proposals would be delayed in order to package them as a single set of amendments to the Evidence Rules. This would mean that the package of amendments, if any, would go to the Standing Committee at its June 2004 meeting, with a recommendation that the proposals be released for public comment. With that timeline in mind, the Committee considered reports on several possibly problematic Evidence Rules at its April 2003 meeting, and this consideration continued at the Fall 2003 meeting.

1. Rule 404(a)

At its Fall 2002 meeting, the Committee tentatively agreed on language that would amend Evidence Rule 404(a) to prohibit the circumstantial use of character evidence in civil cases. The Committee determined that an amendment is necessary because the circuits are split over whether character evidence can be offered to prove conduct in a civil case. Such a circuit split can cause disruption and disuniform results in the federal courts. Moreover, the question of the admissibility of character evidence to prove conduct arises frequently in section 1983 cases, so an amendment to the Rule would have a helpful impact on a fairly large number of cases. The Committee also concluded that as a policy matter, character evidence should not be admitted to prove conduct in a civil case. The circumstantial use of character evidence is fraught with peril in *any* case, because it could lead to a trial of personality and could cause the jury to decide the case on improper grounds. But the risks of character evidence historically have been considered worth the costs where a criminal defendant seeks to show his good character or the pertinent bad character of the victim. This so-called "rule of mercy" is thought necessary to provide a counterweight to the resources of the government, and is a recognition of the possibility that the accused, whose liberty is at stake, may have little to defend with other than his good name. None of these considerations is operative in civil litigation. In civil cases, the substantial problems raised by character evidence were considered by the Committee to outweigh the dubious benefit that character evidence might provide.

Judge Smith then asked whether any member of the Committee wanted to revisit or to question the amendment to Rule 404(a) that was tentatively approved at the Fall 2002 meeting. The Reporter suggested a technical change that could be made to the draft language intended to clarify that the protections of Rule 412 supersede the provision of Rule 404(a)(2) that permits proof of a victim's character. Committee members agreed that the suggested change was an improvement. No Committee member expressed any other concerns about the working draft of the proposed amendment. The working draft of the proposed amendment to Rule 404(a)(1) provides as follows:

Rule 404. Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes

(a) Character evidence generally.—Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) Character of accused.— ~~Evidence~~ In a criminal case, evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same, or if evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under Rule 404(a)(2), evidence of the same trait of character of the accused offered by the prosecution;

(2) Character of alleged victim — ~~Evidence~~ In a criminal case, and

subject to the limitations of Rule 412, evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide case to rebut evidence that the alleged victim was the first aggressor;

* * *

The working draft of the Committee Note to the proposed amendment to Rule 404(a) reads as follows:

The Rule has been amended to clarify that in a civil case evidence of a person's character is never admissible to prove that the person acted in conformity with the character trait. The amendment resolves the dispute in the case law over whether the exceptions in subdivisions (a)(1) and (2) permit the circumstantial use of character evidence in civil cases. *Compare Carson v. Polley*, 689 F.2d 562, 576 (5th Cir. 1982) ("when a central issue in a case is close to one of a criminal nature, the exceptions to the Rule 404(a) ban on character evidence may be invoked"), *with SEC v. Towers Financial Corp.*, 966 F.Supp 203 (S.D.N.Y. 1997) (relying on the terms "accused" and "prosecution" in Rule 404(a) to conclude that the exceptions in subdivisions (a)(1) and (2) are inapplicable in civil cases). The amendment is consistent with the original intent of the Rule, which was to prohibit the circumstantial use of character evidence in civil cases. *See Ginter v. Northwestern Mut. Life Ins. Co.*, 576 F.Supp. 627, 629-30 (D. Ky 1984) ("It seems beyond peradventure of doubt that the drafters of F.R.Evi. 404(a) explicitly intended that all character evidence, except where 'character is at issue' was to be excluded" in civil cases).

The circumstantial use of character evidence is generally discouraged because it carries serious risks of prejudice, confusion and delay. *See Michelson v. United States*, 335 U.S. 469, 476 (1948) ("The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice."). In criminal cases, the so-called "mercy rule" permits a criminal defendant to introduce evidence of pertinent character traits of the defendant and the victim; but that is because the accused, whose liberty is at stake, may need "a counterweight against the strong investigative and prosecutorial resources of the government." C. Mueller and L. Kirkpatrick, *Evidence: Practice under the Rules*, pp. 264-5 (2d ed. 1999). See also Richard Uviller, *Evidence of Character to Prove Conduct: Illusion, Illogic, and Injustice in the Courtroom*, 130 U.Pa.L.Rev. 845, 855 (1982) (the rule prohibiting circumstantial use of character evidence "was relaxed to allow the criminal defendant with so much at stake and so little available in the way of conventional proof to have special dispensation to tell the factfinder just what sort of person he really is.").Those concerns do not apply to parties in civil cases.

The amendment also clarifies that evidence otherwise admissible under Rule 404(a)(2) may nonetheless be excluded in a criminal case involving sexual misconduct. In such a case, the admissibility of evidence of the victim's sexual behavior and predisposition is governed by the more stringent provisions of Rule 412.

2. Rule 408

The Reporter's memorandum on Rule 408, prepared for the Fall 2002 meeting, noted that the courts are divided on three important questions concerning the scope of the Rule:

1) Some courts hold that evidence of compromise is admissible against the settling party in subsequent criminal litigation while others hold that compromise evidence is excluded in subsequent criminal litigation when offered as an admission of guilt.

2) Some courts hold that statements in compromise can be admitted to impeach by way of contradiction or prior inconsistent statement. Other courts disagree, noting that if statements in compromise could be admitted for contradiction or prior inconsistent statement, this would chill settlement negotiations, in violation of the policy behind the Rule.

3) Some courts hold that offers in compromise can be admitted in favor of the party who made the offer; these courts reason that the policy of the rule, to encourage settlements, is not at stake where the party who makes the statement or offer is the one who wants to admit it at trial. Other courts hold that settlement statements and offers are never admissible to prove the validity or the amount of the claim, regardless of who offers the evidence. These courts reason that the text of the Rule does not provide an exception based on identity of the proffering party, and that admitting compromise evidence would raise the risk that lawyers would have to testify about the settlement negotiations, thus risking disqualification.

At the Fall 2002 meeting, the Committee agreed to present, as part of its package, an amendment that would 1) limit the impeachment exception to use for bias, and 2) exclude compromise evidence even if offered by the party who made an offer of settlement. The remaining issue–whether compromise evidence should be admissible in criminal cases–was the subject of extensive discussion at the Spring and Fall 2003 meetings. The Justice Department representative expressed concern that some statements made in civil compromise (e g , to tax investigators) could be critical evidence needed in a criminal case to prove that the defendant had committed fraud. If Rule 408 were amended to exclude statements made in compromise in criminal cases, then this

important evidence would be lost to the government. The DOJ representative recognized the concern that the use of civil compromise evidence in criminal cases would deter civil settlements. But he contended that the Civil Division of the DOJ had not noted any deterrent to civil compromise from such a rule in the circuits holding that civil compromise evidence is indeed admissible in criminal cases.

Other Committee members noted that some courts have held that statements made to internal corporate investigators can qualify for protection under Rule 408; they reasoned that if such statements could not then be admitted in a criminal case, a shield could be placed over the corporation and criminal prosecution might be extremely difficult. In response, one member of the Committee asserted that it was unlikely that such internal corporate statements would even be covered by Rule 408, and adhered to the view that if compromise evidence is admissible in criminal cases, this would significantly diminish the incentive to settle civil litigation.

After extensive argument, the Committee unanimously agreed that Rule 408 should specify, one way or another, whether civil compromise evidence is admissible in subsequent criminal litigation. For one thing, the current split in the circuits makes it impossible for parties to plan in advance on how compromise evidence can be used, and creates disparate results on a critical question of evidence law.

A straw vote was taken and the Committee, with one dissent, agreed to proceed with an amendment providing that the protections of Rule 408 are limited to civil cases only. The Committee agreed unanimously with a suggestion that the Committee Note provide that while Rule 408 will not protect a party in a criminal case, a court might still use Rule 403 to exclude civil compromise evidence on a case-by-case basis.

Further discussion on the Rule indicated Committee dissatisfaction with Rule 408 as originally structured. As it stands, Rule 408 is structured in four sentences The first sentence states that an offer or acceptance in compromise "is not admissible to prove liability for or invalidity of the claim or its amount." The second sentence provides the same preclusion for statements made in compromise negotiations–an awkward construction because a separate sentence is used to apply the same rule of exclusion applied in the first sentence. The third sentence says that the rule "does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations." The rationale of this sentence, added by Congress, is to prevent parties from immunizing pre-existing documents from discovery simply by bringing them to the negotiating table The addition of this sentence at this point in the Rule, however, creates a structural problem because the fourth sentence of the rule contains a list of permissible purposes for compromise evidence, including proof of bias. As such, the third sentence provides a kind of break in the flow of the Rule. Moreover, the fourth sentence is arguably completely unnecessary, because none of the permissible purposes involves using compromise evidence to prove the validity or amount of the claim. Because the only impermissible purpose for this evidence is when it is offered to prove the validity or amount of a claim, it is unnecessary to add a sentence specifying certain (though apparently not all) permissible purposes for the evidence.

For the Fall 2003 meeting, the Reporter prepared a restructured Rule 408 for the Committee's consideration. Committee members expressed the opinion that the restructured Rule was easier to read and made it much easier to accommodate an amendment (previously agreed upon by the Committee) that would prohibit the use of compromise statements for impeachment by way of prior inconsistent statement or contradiction.

In the discussion of a restructured Rule 408, the Committee considered whether to retain the language of the existing Rule that evidence "otherwise discoverable" is not excluded merely because it was presented in the course of compromise negotiations. After extensive debate, the Committee agreed with courts, commentators, and rules drafters in several states, and concluded that the "otherwise discoverable" sentence is superfluous. It was added to the Rule to emphasize that pre-existing records were not immunized simply because they were presented to the adversary in the course of compromise negotiations. But such a pretextual use of compromise negotiations has never been permitted by the courts. The Committee therefore agreed, with one dissent, to drop the "otherwise discoverable" sentence from the text of the revised Rule 408, with an explanation for such a change to be placed in the Committee Note.

Finally, the Committee considered whether it was necessary to improve the language that triggers the protection of the amendment: the Rule applies to compromise negotiations as to a "matter which was in dispute." The Reporter prepared a description of the cases and commentary on this question and the Committee determined that it would not be appropriate to change this language, as the courts were not in conflict as to its application.

The working draft of an amendment to Evidence Rule 408, together with the Committee Note, follows immediately below. The Committee will consider at its next meeting whether to change it in any respect and whether to forward it to the Standing Committee for release for public comment.

Rule 408. Compromise and Offers to Compromise

(a) **General rule.** -- ~~Evidence of~~ The following is not admissible in a civil case on behalf of any party, when offered to prove liability for or invalidity of a claim or its amount or for the impeachment purposes of prior inconsistent statement or contradiction:

(1) Evidence of furnishing or offering or promising to furnish, or ~~(2)~~ accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a civil claim that ~~which~~ was disputed as to either validity or amount, ~~is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of~~

(2) Evidence of conduct or statements made in ~~compromise~~ negotiations ~~is~~

~~likewise not admissible~~ over a civil claim that was disputed as to validity or amount.

~~This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations.~~

(b) Other purposes. -- This rule ~~also~~ does not require exclusion when the evidence is offered for ~~another purpose, such as~~ a purpose not prohibited by subdivision (a). Examples of permissible uses include: proving bias or prejudice of a witness~~;~~ ; negativing a contention of undue delay~~;~~ ; ~~or~~ and proving an effort to obstruct a criminal investigation or prosecution.

The working draft of the Committee Note to the proposed amendment to Rule 408 reads as follows:

Working Draft of Proposed Committee Note

Rule 408 has been amended to make it easier to read and apply, and to settle some questions in the courts about the scope of the Rule. First, the amendment clarifies that Rule 408 does not protect against the use of compromise evidence when it is offered in a criminal case. *See, e.g., United States v. Logan*, 250 F.3d 350, 367 (6th Cir. 2001) (while the inapplicability of Rule 408 to criminal cases "arguably may have a chilling effect on administrative or civil settlement negotiations in cases where parallel civil and criminal proceedings are possible, we find that this risk is heavily outweighed by the public interest in prosecuting criminal matters"); *Manko v United States*, 87 F.3d 50, 54-5 (2d Cir. 1996) (the "policy favoring the encouragement of civil settlements, sufficient to bar their admission in civil actions, is insufficient, in our view, to outweigh the need for accurate determinations in criminal cases where the stakes are higher") Statements and offers made in civil compromise negotiations may be excluded in criminal cases where the circumstances so warrant under Rule 403. But there is no absolute exclusion imposed by Rule 408.

Statements and offers made during negotiations to settle a *criminal* case are not protected by Rule 408. *See United States v. Graham,* 91 F.3d 213, 218-219 (D.C. Cir. 1996) (declaring that Rule 408 "does not address the admissibility of evidence concerning negotiations to 'compromise' a criminal case" and that "the very existence" of Rule 410 "strongly support[s] the conclusion that Rule 408 applies only to civil matters").

Statements and offers by a prosecuting attorney during plea negotiations are likewise not protected under Rule 408. Some courts have held that the "principles" of Rule 408 justify protection of such statements and offers. *See United States v. Verdoorn*, 528 F.2d 103, 107 (8th Cir. 1976) (noting that offers by the prosecutor are not protected under Rule 410, but reasoning that the "principles" of Rule 408 warranted exclusion of the government's offers in a criminal case). After considering this case law, the Committee concluded that if any amendment is necessary to protect prosecution statements and offers in guilty plea

negotiations, that amendment should be placed in Rule 410 and not Rule 408. Even without a change to Rule 408 or Rule 410, statements and offers by a prosecutor remain subject to exclusion under Rule 403. *See, e.g., United States v. Delgado*, 903 F.2d 1495 (11th Cir. 1990) (plea agreement and statements by the prosecutor cannot be offered as an admission by the government, because the deal may have been struck for reasons other than the government's belief in the innocence of the accused; relying upon Rule 403).

The amendment prohibits the use of statements made in settlement negotiations when offered to impeach by prior inconsistent statement or through contradiction. Such broad impeachment would tend to swallow the exclusionary rule and would impair the public policy of promoting settlements. *See McCormick on Evidence*, 5th ed. 1999 at 186 ("Use of statements made in compromise negotiations to impeach the testimony of a party, which is not specifically treated in Rule 408, is fraught with danger of misuse of the statements to prove liability, threatens frank interchange of information during negotiations, and generally should not be permitted."). *See also EEOC v. Gear Petroleum, Inc.*, 948 F.2d 1542 (10th Cir.1991). (letter sent as part of settlement negotiation cannot be used to impeach defense witnesses by way of contradiction or prior inconsistent statement; such broad impeachment would undermine the policy of encouraging settlement)

The amendment makes clear that Rule 408 excludes compromise evidence even when a party seeks to admit its own settlement offer or statements made in settlement negotiations. If a party were to reveal its own statement or offer, this could itself reveal the fact that the adversary entered into settlement negotiations. Thus, it would not be fair to hold that the protections of Rule 408 can be waived unilaterally, because the Rule, by definition, protects both parties from having the fact of negotiation disclosed to the jury. Moreover, proof of statements and offers made in settlement would often have to be made through the testimony of attorneys, leading to the risks and costs of disqualification. *See generally Pierce v F.R. Tripler & Co.*, 955 F.2d 820, 828 (2d Cir 1992) (settlement offers are excluded under Rule 408 even if it is the offeror who seeks to admit them; noting that the "widespread admissibility of the substance of settlement offers could bring with it a rash of motions for disqualification of a party's chosen counsel who would likely become a witness at trial").

The sentence of the Rule referring to evidence "otherwise discoverable" has been deleted as superfluous. *See, e.g.,* Advisory Committee Note to Maine Rule of Evidence 408 (refusing to include the sentence in the Maine version of Rule 408 and noting that the sentence "seems to state what the law would be if it were omitted"); Advisory Committee Note to Wyoming Rule of Evidence 408 (refusing to include the sentence in Wyoming Rule 408 on the ground that it was "superfluous"). The intent of the sentence was to prevent a party from trying to immunize admissible information, such as a pre-existing document, through the pretense of disclosing it during compromise negotiations. *See Ramada Development Co v. Rauch,* 644 F.2d 1097 (5th Cir 1981). But even without the sentence, the Rule cannot be read to protect pre-existing information simply because it was presented to the adversary in discovery.

3. Rule 410

In extensive discussions over the previous two meetings, the Committee concluded that Rule 410 should be amended to protect statements and offers made by prosecuting attorneys, to the same extent as the Rule currently protects statements and offers made by defendants and their counsel. A mutual rule of exclusion will encourage a free flow of discussion that is necessary to efficient guilty plea negotiations. The Committee also determined, however, that if an amendment is required to protect government statements and offers in guilty plea negotiations, that amendment should be placed in Rule 410, not Rule 408. The latter Rule by its terms covers statements and offers made in the course of attempting to settle a *civil* claim. Rule 410, which governs efforts to settle criminal charges, is the appropriate place for any amendment that would exclude statements and offers in guilty plea negotiations.

A draft proposal was prepared by the Reporter for the April 2003 meeting that simply added "against the government" to the opening sentence of the Rule, at the same place in which the Rule provides that offers and statements in plea negotiations are not admissible "against the defendant." At that meeting the Committee determined that this would not be a satisfactory drafting solution. If the Rule were amended simply to provide that offers and statements in guilty plea negotiations were not admissible "against the government," this might provide too broad an exclusion It would exclude, for example, statements made *by the defendant* during plea negotiations that could be offered "against the government," for example, to prove that the defendant had made a prior consistent statement, or to prove that the defendant believed in his own innocence, or was not trying to obstruct an investigation. Thus, the Committee resolved that any change to Rule 410 should specify that the government's protection would be limited to statements and offers *made by prosecutors* during guilty plea negotiations.

At the April 2003 meeting the Committee also determined that the Rule's protection should cover statements and offers made during the course of guilty pleas that are either rejected by the court or vacated on review Currently the Rule specifically covers only guilty pleas that are "withdrawn".Committee members noted that as a policy matter, there was no basis for distinguishing a withdrawn plea from a plea that is rejected or vacated. In any of these cases, the policy of protecting plea negotiations warrants protection from these subsequent unforeseen developments–otherwise negotiations are likely to be chilled by uncertainty.

Finally, the Committee agreed that the question of whether the protections of Rule 410 can be waived should be addressed in the Committee Note and not in the Rule. The Supreme Court has decided that the defendant can agree that his statements made in plea negotiations can be used to impeach him should he testify at trial, but courts are still working out whether the power to waive the protections of Rule 410 extends to other situations. Thus, it would be counterproductive to codify a waiver rule in the text But it would be important to acknowledge the waiver rule in the Committee Note, so as to prevent speculation that any amendment was rejecting Supreme Court precedent on

the subject.

At its Fall 2003 meeting the Committee considered a draft of an amendment to Rule 410 that was intended to implement the consensus of the Committee. Committee members discussed whether the government should be protected from statements and offers made by the prosecutor in plea negotiations even where the evidence is offered by a different defendant. All Committee members, including the DOJ representative, recognized that a defendant should be able to inquire into a deal struck or to be struck with a former codefendant who is a cooperating witness at the time of the trial–and such inquiry may be pertinent to the bias or prejudice of the cooperating witness even if a deal has not been formally reached or even offered. On the other hand, most Committee members agreed that statements of fact made by a prosecutor in negotiations with one defendant should not be offered as any kind of party-admission by another defendant or in another proceeding To allow such broad admissibility could tend to chill the open discussions that Rule 410 seeks to promote.

After substantial discussion, a straw vote was taken and the Committee tentatively agreed on language for a proposed amendment to Rule 410 that would provide that statements and offers by prosecutors in the course of plea discussions are not admissible except to prove the bias or prejudice of a witness. The vote was unanimous. The Committee then discussed whether the Rule should be broken down into subdivisions. All agreed that the addition of protection of prosecution statements and offers made it necessary to subdivide the Rule. The alternative (working within the existing Rule) would be a Rule with internal subparts– (1) through (4) – setting forth the evidence that is not admissible against the defendant, followed by a freestanding paragraph providing for exclusion of prosecution statements and offers, followed by another freestanding paragraph setting forth exceptions in which statements otherwise covered by the rule can be admitted against a defendant. The use of two consecutive hanging paragraphs would make the rule difficult to read and is certainly contrary to the working standards of the Style Subcommittee of the Standing Committee. The Evidence Rules Committee therefore agreed unanimously to set forth three subdivisions in its proposed amendment to Rule 410.

The Committee determined that it would revisit the working draft of the proposed amendment to Rule 410 to determine whether it should be forwarded to the Standing Committee for release for public comment. As the proposal currently stands, it reads as follows:

Rule 410. Inadmissibility of Pleas, Plea Discussions, and Related Statements

(a) Against the defendant. – Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:

(1) a plea of guilty ~~which~~ that was later withdrawn, rejected or vacated;

(2) a plea of *nolo contendere;*

(3) any statement made in the course of any proceedings under Rule 11 of the Federal Rules of Criminal Procedure or comparable state procedure regarding either of the foregoing pleas; or

(4) any statement made in the course of plea discussions with an attorney for the prosecuting authority ~~which~~ that do not result in a plea of guilty or ~~which~~ that result in a plea of guilty later withdrawn, rejected or vacated.

(b) Against the government. – Any statement or offer made in the course of plea discussions by an attorney for the prosecuting authority is not admissible against the government in the proceeding in which the statement or offer was made, except as proof of bias or prejudice of a witness.

(c) Exceptions. – ~~However, such a statement~~ A statement described in this rule is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness to be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record and in the presence of counsel.

The working draft of the Committee Note to the proposed amendment to Rule 410 reads as follows:

Working Draft of Committee Note to Rule 410

Rule 410 has been amended to make the following changes:

1. The government, as well as the defendant, is entitled to invoke the protections of the Rule. Courts have held that statements and offers by prosecutors during guilty plea negotiations are inadmissible, using a variety of theories. See, e.g., *United States v. Verdoorn,* 528 F.2d 103, 107 (8th Cir. 1976) (relying on the "principles" of Rule 408 even though that Rule, by its terms, only governs attempts to compromise a civil claim); *United States v. Delgado,* 903 F.2d 1495 (11th Cir. 1990) (government offer properly excluded under Rule 403 because it would have confused the jury); *Brooks v. State,* 763 So. 2d 859 (Miss. 2000) (relying on the "spirit" of state version of Rule 410 substantively identical to the Federal Rule). The amendment endorses the results of this case law, but provides a unitary source of authority for excluding statements and offers by prosecutors during guilty plea negotiations. Protecting those statements and offers will encourage the unrestrained candor from both sides that produces effective plea discussions. Statements and offers by the prosecution are not excluded by the rule, however, if they are offered by a defendant to prove the bias or prejudice of a witness who may be cooperating with the government as the result of, or in order to obtain, leniency from the government.

2. The protections provided to defendants are extended to statements and offers related to guilty pleas that are rejected by the court or vacated on appeal or collateral attack. Given the policy of the rule to promote plea negotiations, there is no reason to distinguish between guilty pleas that are withdrawn and those that are either rejected by the court or vacated on direct or collateral review.

Nothing in the amendment is intended to affect the rule and analysis set forth in *United States v. Mezzanatto*, 513 U.S. 196 (1995), and its progeny. The Court in *Mezzanatto* upheld an agreement in which the defendant knowingly and voluntarily waived the protections of Rule 410 insofar as his statements made in plea negotiations could be used to impeach him at trial. See also *United States v. Burch,* 156 F.3d 1315 (D.C. Cir 1998) (reasoning that the holding in *Mezzanatto* logically extends to permit agreements to use the defendant's statements during the prosecution's case-in-chief); *United States v. Rebbe,* 314 F.3d 402 (9th Cir. 2002) (reasoning that the rationale in *Mezzanatto* applies equally to waivers permitting use of the defendant's statements in rebuttal). Nor is the amendment intended to cover the admissibility of the defendant's rejection of an offer of immunity from prosecution, when that rejection is probative of the defendant's consciousness of innocence In such a case, the important evidence is the defendant's rejection, not the government's offer. *See generally United States v. Biaggi,* 909 F.2d 662, 690 (2d Cir 1990) ("a jury is entitled to believe that most people would jump at the chance to obtain an assurance of immunity from prosecution and to infer from rejection of the offer that the accused lacks knowledge of wrongdoing").

4. Rule 606(b)

At its April 2002 meeting, the Committee directed the Reporter to prepare a report on a possible amendment to Rule 606(b) that would clarify whether and to what extent juror testimony can be admitted to prove some disparity between the verdict rendered and the verdict intended by the jurors. At its Spring 2003 meeting, the Committee agreed in principle on a proposed amendment to Rule 606(b) that would be part of a possible package of amendments to be referred to the Standing Committee in 2004.

The Committee reviewed the working draft of the proposed amendment at its Fall 2003 meeting. Once again, all Committee members recognized the need for an amendment to Rule 606(b). There are two basic reasons for an amendment to the Rule: 1. All courts have found an exception to the Rule permitting jury testimony on certain errors in the verdict, even though there is no language permitting such an exception in the text of the Rule; and, more importantly, 2. The courts are in dispute about the breadth of that exception. Some courts allow juror proof whenever the verdict has an effect that is different from the result that the jury intended to reach, while other courts follow a narrower exception permitting juror proof only where the verdict reported is different from that which the jury actually reached because of some clerical error. The former exception is broader because it would permit juror proof whenever the jury misunderstood (or ignored) the court's instructions. For example, if the judge told the jury to report a damage award without reducing it by the plaintiff's proportion of fault, and the jury disregarded that instruction, the verdict reported would

be a result different from what the jury actually intended, thus fitting the broader exception. But it would not be different from the verdict actually reached, and so juror proof would not be permitted under the narrow exception for clerical errors.

After extensive discussion, the Committee continued to be unanimous in its belief that an amendment to Rule 606(b) is warranted and that the amendment should codify the narrower exception of clerical error. An exception that would permit proof of juror statements whenever the jury misunderstood or ignored the court's instruction would have the potential of intruding into juror deliberations and upsetting the finality of verdicts in a large and undefined number of cases. As such, the broad exception is in tension with the policies of the Rule. In contrast, an exception permitting proof only if the verdict reported is different from that actually reached by the jury does not intrude on the privacy of jury deliberations, as the inquiry only concerns what the jury decided, not why it decided as it did.

The Committee then turned to the working draft of the proposed amendment to consider whether the language accurately captured the narrow exception that should be added to the Rule. The working language permitted juror proof into whether "the verdict reported is the verdict that was agreed upon by the jury." Committee members expressed concern that this language could be too broad. It might be construed, for example, to allow proof from a juror that he never actually "agreed" with the verdict the jury rendered, he only acquiesced because he wanted to make other jurors happy, or because he misunderstood the court's instructions. Thus, the language of the working draft could be read to encompass the broader exception to the Rule currently used by some courts; it could be read to allow an inquiry into jury deliberations, contrary to the policy of Rule 606(b).

The Committee deliberated and voted unanimously to change the language of the working draft to narrow the exception to situations where the verdict reported is "the result of a clerical mistake." Members pointed out that Civil Rule 60(a) uses the same term "clerical mistake" to cover the analogous situation of correcting mistakes in judgments and orders. Committee members recognized that the exception for "clerical mistakes" would rarely apply in practice. But that was considered to be the very reason for adopting the amendment: the "clerical mistake" language would provide a very narrow exception to allow for correction in the rare cases of clerical error, and it would thereby *reject* the broader exception used by those courts permitting juror testimony whenever the jurors misunderstood the impact of the verdict that they actually agreed upon.

The Committee resolved to revisit the proposed amendment at its next meeting, with the goal to finalize it as part of a package to be submitted to the Standing Committee for authorization for public comment. The Reporter was directed to research cases under Civil Rule 60(a) to determine whether helpful comparisons could be drawn between that Rule and the narrow amendment to Evidence Rule 606(b) proposed by the Committee.

The current working draft of a proposed amendment to Rule 606(b) provides as follows:

Rule 606. Competency of Juror as Witness

(a) *At the trial.* — A member of the jury may not testify as a witness before that jury in the trial of the case in which the juror is sitting as a juror. If the juror is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.

(b) *Inquiry into validity of verdict or indictment.* — Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith~~; except that~~ But a juror may testify ~~on the question~~ about (1) whether extraneous prejudicial information was improperly brought to the jury's attention, (2) ~~or~~ whether any outside influence was improperly brought to bear upon any juror, or (3) whether the verdict reported is the result of a clerical mistake. ~~Nor may a~~ A juror's affidavit or evidence of any statement by the juror ~~concerning~~ may not be received on a matter about which the juror would be precluded from testifying ~~be received for these purposes~~.

Draft Committee Note

Rule 606(b) has been amended to provide that juror testimony may be used to prove that the verdict rendered was tainted by a clerical error. The amendment responds to a divergence between the text of the Rule and the case law that has established an exception for proof of clerical errors. *See, e.g., Plummer v. Springfield Term. Ry. Co.,* 5 F.3d 1, 3 (1st Cir. 1993) ("A number of circuits hold, and we agree, that juror testimony regarding an alleged clerical error, such as announcing a verdict different than that agreed upon, does not challenge the validity of the verdict or the deliberation of mental processes, and therefore is not subject to Rule 606(b)."); *Teevee Toons, Inc., v. MP3.Com, Inc* , 148 F.Supp.2d 276, 278 (S D N.Y 2001) (noting that Rule 606(b) has been silent regarding inquiries designed to confirm the accuracy of a verdict). Cf. Fed.R.Civ.P. 60(a) (providing relief from "[c]lerical mistakes in judgments, orders, or other parts of the record . . .").

In adopting the exception for proof of clerical errors, the amendment specifically rejects the broader exception, adopted by some courts, permitting the use of juror testimony to prove that the jurors were operating under a misunderstanding about the consequences of the result that they agreed upon. *See, e.g., Attridge v. Cencorp Div. of Dover Techs. Int'l, Inc.,* 836 F.2d 113, 116 (2d Cir. 1987), *Eastridge Development Co., v. Halpert Associates, Inc* , 853 F.2d 772 (10th Cir. 1988). The broader exception is rejected because an inquiry into whether the jury misunderstood or misapplied an instruction goes to the jurors' mental processes underlying the verdict, rather than the verdict's accuracy in capturing what the

jurors had agreed upon. *See, e.g , Karl v. Burlington Northern R.R Co.,* 880 F.2d 68, 74 (8th Cir. 1989) (error to receive juror testimony on whether verdict was the result of jurors' misunderstanding of instructions: "The jurors did not state that the figure written by the foreman was different from that which they agreed upon, but indicated that the figure the foreman wrote down was intended to be a net figure, not a gross figure. Receiving such statements violates Rule 606(b) because the testimony relates to how the jury interpreted the court's instructions, and concerns the jurors' 'mental processes,' which is forbidden by the rule."); *Robles v. Exxon Corp.,* 862 F.2d 1201, 1208 (5th Cir. 1989) ("the alleged error here goes to the substance of what the jury was asked to decide, necessarily implicating the jury's mental processes insofar as it questions the jury's understanding of the court's instructions and application of those instructions to the facts of the case"). Thus, the "clerical error" exception to the Rule is limited to cases such as "where the jury foreperson wrote down, in response to an interrogatory, a number different from that agreed upon the by the jury, or mistakenly stated that the defendant was 'guilty' when the jury had actually agreed that the defendant was not guilty." *Id.*

5. Rule 607

At its Spring 2002 meeting the Evidence Rules Committee directed the Reporter to prepare a memorandum to advise the Committee on whether it is necessary to amend Evidence Rule 607. Rule 607 states categorically that a party can impeach any witness it calls. On its face, the Rule permits a party to call a witness solely for the purpose of "impeaching" them with evidence that would not otherwise be admissible, such as hearsay. For example, the Rule would appear to permit a party to call an adverse witness solely to "impeach" the witness with a prior inconsistent statement that would not otherwise be admissible. The purpose of that tactic could well be to evade the hearsay rule in the hope that the jury would ignore the court's limiting instruction and consider the inconsistent statement for its truth.

The Committee wished to consider whether Rule 607 should be amended to prohibit a party from calling a witness for the sole purpose of impeaching that witness with evidence that would not otherwise be admissible. The Reporter's research indicated that the courts have uniformly prohibited this abusive practice even though Rule 607 contains no specific prohibitory language. So the Committee discussed whether the Rule should be amended to "codify" this case law and thereby eliminate the divergence between the case law and the text of the Rule.

In discussion, the Committee was skeptical that any amendment to Rule 607 was necessary. The Committee noted that courts are uniform in prohibiting the abusive practice that any amendatory language would prohibit. The Committee continues to be committed to the principle that an amendment to the Evidence Rules is justified only in extreme circumstances in which courts are in conflict about the meaning of a Rule, or the Rule is creating practical problems of administration or

unjust application. None of these conditions exist under Rule 607. .

The Committee also noted that it would be difficult to write an amendment that would fully encompass all the situations in which a party *should* be allowed to call witnesses and impeach them with otherwise inadmissible evidence. New Jersey and Ohio have tried to do so by permitting impeachment when the party is "surprised" by adverse testimony. But this fails to cover all of the situations in which impeachment should be permitted. For example, impeachment should be allowed where a party knows in advance that a witness will give partially favorable and partially unfavorable testimony. A more broadly worded rule permitting a party to call a witness and impeach the witness whenever it is in "good faith" is not very helpful and risks adding confusion to a body of case law that is currently quite understandable and uniform. Thus, the risk of "codification" is that the drafters may not get it completely right, thereby generating confusion and perhaps creating an unintended substantive change.

A vote was taken and the Committee unanimously agreed to terminate the consideration of any amendment to Rule 607.

6. Rule 609

Rule 609(a)(2) provides for automatic impeachment of all witnesses with prior convictions involving "dishonesty or false statement." Rule 609(a)(1) provides a nuanced balancing test for impeaching witnesses whose convictions do not fall within the definition of Rule 609(a)(2). At its Spring 2002 meeting the Evidence Rules Committee directed the Reporter to prepare a memorandum to advise the Committee on whether it is necessary to amend Evidence Rule 609(a)(2). An investigation into this Rule indicates that the courts are in conflict on how to determine that a certain conviction involves dishonesty or false statement within Rule 609(a)(2). The basic conflict is that some courts determine "dishonesty or false statement" solely by looking at the elements of the conviction for which the witness was found guilty. If none of the elements require proof of falsity or deceit beyond a reasonable doubt, then the conviction must be admitted under Rule 609(a)(1) or not at all. Other courts look behind the conviction to determine whether the witness committed an act of dishonesty or false statement before or after committing the crime. Under this view, for example, a witness convicted of murder would have committed a crime involving dishonesty or false statement if he lied about the crime, either before or after committing it.

After discussion, Committee members unanimously agreed that Rule 609(a)(2) should be amended to resolve the dispute in the courts over how to determine whether a conviction involves dishonesty or false statement. And amendment would resolve an issue on which the circuits are clearly divided. The Committee was further unanimously in favor of an "elements" definition of crimes involving dishonesty or false statement. Committee members noted that requiring the judge

to look behind the conviction to the underlying facts could (and often does) impose a burden on trial judges. Moreover, the inquiry is indefinite because it is impossible to determine, simply from a guilty verdict, what facts of dishonesty or false statement the jury might have found Most importantly, whatever additional probative value there might be in a crime committed deceitfully, it is lost on the jury assessing the witness's credibility when the elements of the crime do not in fact require proof of dishonesty or false statement. This is because when the conviction is introduced to impeach the witness, the jury is told only about the conviction, not about its underlying facts.

Committee members noted that the "elements" approach to defining crimes that fall within Rule 609(a)(2) is litigant-neutral, in that it would apply to all witnesses in all cases. It was also noted that if a crime not involving false statement as an element (e.g., murder or drug dealing) were inadmissible under Rule 609(a)(2), it might still be admitted under the balancing test of Rule 609(a)(1), moreover, if such a crime *were* committed in a deceitful manner, the underlying facts of deceit might still be inquired into under Rule 608. Thus, the costs of an "elements" approach are low as it would not result in an unjustified loss of evidence pertinent to credibility; and its benefits in judicial efficiency seem obvious.

A vote was taken and the Committee unanimously resolved to continue with an amendment to Rule 609(a)(2) that would use an "elements" approach to define the crimes that are automatically admissible for impeachment under Rule 609(a)(2). It was noted that an "elements" approach to the Rule would be consistent with the recently approved amendments to the Uniform Rules of Evidence. The Committee agreed to reconsider the working draft of the amendment and the Committee Note, with the view to finalizing it as part of a package of amendments to be sent to the Standing Committee in June, 2004.

The Working Draft of the Proposed Amendment to Rule 609 reads as follows:

Rule 609. Impeachment by Evidence of Conviction of Crime

(a) *General rule* —For the purpose of attacking the ~~credibility~~ character for truthfulness of a witness,

(1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and

(2) evidence that any witness has been convicted of a crime shall be admitted ~~if it involved dishonesty or false statement,~~ regardless of the punishment if the statutory elements of the crime necessarily involve dishonesty or false statement.

(b) *Time limit* — Evidence of a conviction under this rule is not admissible if a

period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than ten years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

(c) *Effect of pardon, annulment, or certificate of rehabilitation.* — Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime ~~which~~ that was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) *Juvenile adjudications.* — Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

(e) *Pendency of appeal.* — The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

The working draft of the proposed Committee Note to Rule 609 reads as follows:

Proposed Committee Note to Working Draft

The amendment provides that a conviction is not automatically admissible under Rule 609(a)(2) unless the statutory elements of the crime for which the witness was convicted necessarily involves proof beyond a reasonable doubt that the witness committed an act of dishonesty or false statement. The Rule prohibits the court from determining that a conviction is "automatically admissible" by inquiring into the underlying facts of the crime. Such facts are often difficult to determine *See Emerging Problems Under the Federal Rules of Evidence* at 173 (2d ed. 1998) ("The difficulty of ascertaining [facts underlying a conviction] especially from the records of out-of-state proceedings might make the broad approach operate unevenly and feasible only for local convictions. . . . A simple, almost mechanical, rule that only those convictions for crimes whose *statutory elements* include deception, untruthfulness or falsehood under Rule 609(a)(2) arguably would result in a more efficient, predictable proceeding.") (emphasis in original). See also Uniform Rules of Evidence, Rule 609(a)(2) (adopting an "elements" approach). Moreover, the probative value of the underlying facts of a conviction, when the conviction is offered to impeach the

witness's character for truthfulness, is lost on the jury because the jury is not informed about the details of a conviction under Rule 609. *See, e.g., United States v. Beckett*, 706 F.2d 519 at n.1 (5th Cir. 1983) (a testifying witness is required "to give answers only as to whether he has been previously convicted of a felony, as to what the felony was, and as to when the conviction was had"); *Radtke v. Cessna Aircraft Co.*, 707 F.2d 999 (8th Cir. 1983) (impeachment with a prior conviction is limited to the recitation of the conviction itself).*See also* C. Mueller & L. Kirkpatrick, *Federal Evidence* at 742 (2d ed. 1999) ("Scrutiny of underlying facts seems vaguely inconsistent with allowing inquiry only on the essentials of convictions (name of crime, punishment imposed, time, and sometimes place) with further details kept off limits: If the jury hears only the basics, why should the judge consider an elaboration of factual detail in deciding whether to permit the questioning?").

The legislative history of Rule 609 indicates that the automatic admissibility provision of Rule 609(a)(2) was to be narrowly construed. This amendment comports with that intent. See Conference Report to proposed Rule 609, at 9 ("By the phrase 'dishonesty and false statement' the Conference means crimes such as perjury or subornation of perjury, false statement, criminal fraud, embezzlement, or false pretense, or any other offense in the nature of *crimen falsi*, the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the [witness's] propensity to testify truthfully.").

It should be noted that while the facts underlying a conviction are irrelevant to the admissibility of that conviction under Rule 609(a)(2), those underlying facts might be a proper subject of enquiry under Rule 608. *See* e.g., *United States v. Hurst*, 951 F.2d 1490 (6th Cir. 1991) (underlying facts of a conviction were the proper subject of inquiry under Rules 403 and 608 where they were probative of the defendant's character for untruthfulness and not unduly prejudicial).

The amendment also substitutes the term "character for truthfulness" for the term "credibility" in the first sentence of the Rule. The limitations of Rule 609 are not applicable if a conviction is admitted for a purpose other than to prove the witness's character for untruthfulness. *See, e.g., United States v. Lopez*, 979 F.2d 1024 (5th Cir. 1992) (Rule 609 not applicable where the conviction was offered for purposes of contradiction). The use of the term "credibility" in subsection (d) is retained, however, as that subdivision is intended to govern the use of a juvenile adjudication for any type of impeachment.

7. Rule 613(b)

Rule 613(b) provides that a prior inconsistent statement can be admitted without giving the witness an opportunity to examine it in advance of admission. The witness simply must be given

an opportunity at some point in the trial to explain or deny the statement. The Rule thus rejects the common-law rule under which the proponent was required to lay a foundation for the prior inconsistent statement at the time the witness testified. Despite the language of the Rule and Committee Note, however, some courts have reverted to the common-law rule, and most lawyers continue to lay a foundation for a prior inconsistent statement when the witness testifies.

At its April 2002 meeting, the Committee directed the Reporter to prepare a report on any conflict in the case law in interpreting Rule 613(b), so that the Committee could determine whether an amendment to the Rule would be necessary. At the Fall 2003 meeting the Reporter reported orally that he would have a complete report ready by the next meeting, but that his research had indicated that the Rule did not appear to create problems for courts or litigants. Courts use their discretion to control the order of proof to prohibit the admission of a witness's inconsistent statement *before* the witness testifies. And prudent counsel are unlikely to wait to introduce the statement *after* the witness leaves the stand, because counsel would thereby assume the risk that the witness might not be available to explain or deny the statement. After discussion, Committee members agreed that any conceptual problems in the Rule largely have been solved by the proper use of judicial discretion and by prudent practice of counsel. Members expressed concern that a proposal to amend Rule 613(b) would not rise to the same level of necessity as exists in the proposals to amend the other Rules that are part of the tentative package to be presented to the Standing Committee. A vote was taken and the Committee unanimously determined that it would not proceed with an amendment to Rule 613(b)

8. Rule 704(b)

Rule 704(b) would seem to prohibit all expert witnesses from testifying that a criminal defendant either did or did not have the requisite mental state to commit the crime charged. It states that "[n]o expert witness . . . may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto." Some courts have held (and others have implied) that the Rule is applicable only to mental health experts, and therefore does not prohibit intent-based testimony from such witnesses as law enforcement agents testifying about the narcotics trade. At a previous meeting, the Reporter was directed to prepare a report on whether it might be necessary to propose an amendment to Rule 704(b). At the Fall 2003 meeting, the Reporter indicated that while some courts have questioned the applicability of Rule 704(b) to non-mental health experts, the Rule in fact imposes few limitations on proof in criminal cases even if it is applied to all experts. As construed by the courts, the Rule simply prohibits an expert from opining, in a conclusory fashion, that the defendant either did or did not intend to commit the crime charged. It does not prohibit testimony about facts or opinions that might be indicative of a mental state. In essence, the Rule prohibits only the expert testimony that would not assist the jury because it would be nothing more than a conclusion of law. In that sense, Rule 704(b) simply emphasizes the point made by Rule 702: that expert testimony is inadmissible unless it assists the jury.

The Committee considered whether to continue with an amendment that would not solve any problems in practice. Members were mindful that the Rule was directly enacted by Congress. A vote was taken and the Committee agreed unanimously that it would not propose any amendment to Rule 704(b).

9. Rule 706

Judge Gettleman has requested that the Committee consider an amendment to Rule 706 that would make stylistic changes and that also would dispense with the requirement of an order to show cause before an expert is appointed. Courts and commentators have raised other problems in the administration of the Rule, including allocation of the costs of an expert, the process of appointment, deposition of court-appointed experts, and instructions to the jury. The Committee agreed that it would consider a report on Rule 706 at the next Committee meeting, to determine whether an amendment to the Rule should be included as part of the package to be sent to the Standing Committee.

10. Rule 801(d)(1)(B)

At the request of Judge Bullock, the Committee considered a proposal to amend Rule 801(d)(1)(B), the hearsay exception for prior consistent statements. Prior consistent statements are admissible to rehabilitate a declarant in at least three situations: 1) to rebut a charge of recent fabrication or bad motive, when made before the motive arose; 2) to explain away an apparent inconsistency; and 3) to rebut a charge of bad memory. The problem raised by Judge Bullock is that Rule 801(d)(1)(B) permits prior consistent statements to be used substantively in only one situation–where they rebut a charge of recent fabrication or bad motive and are made before the motive arose. Thus the Rule mandates a dichotomy where some prior consistent statements are admissible only for rehabilitation and others are admissible for their truth. Judge Bullock contends that the distinction between substantive and rehabilitation use of a prior consistent statement is one that is lost on jurors and on counsel.

The Committee considered the merits of proposing an amendment to Rule 801(d)(1)(B) to provide that a prior consistent statement would be substantively admissible whenever it could be admitted to rehabilitate the witness's credibility. The Judges on the Committee uniformly contended that the amendment was unnecessary. The case law is basically uniform in its distinction between substantive and rehabilitation use of prior consistent statements. Courts are reaching the correct results. Committee members recognized that the instruction to use a prior consistent statement for rehabilitation and not for its truth is one that jurors will find difficult to follow. But this difficulty is not enough to justify an amendment. The general assumption is that jurors follow instructions, except in extreme situations (e.g., *Bruton*), and the Committee did not see Rule 801(d)(1)(B) as

presenting such an exceptional situation. Other Committee members were concerned that an amendment could send the wrong signal–it might be seen as an invitation toward broader admissibility and therefore broader use of prior consistent statements, contrary to the Supreme Court's admonition in *Tome v. United States* that the exception is to be narrowly construed.

After extensive discussion, the Committee agreed unanimously that it would not propose an amendment to Rule 801(d)(1)(B).

11. Rule 803(3)

Rule 803(3) incorporates the famous *Hillmon* doctrine, providing that a statement reflecting the declarant's state of mind can be offered as probative of the declarant's subsequent conduct in accordance with that state of mind. The Rule is silent, however, on whether a declarant's statement of intent can be used to prove the subsequent conduct of someone other than the declarant. The original Advisory Committee Note refers to the Rule as allowing only "evidence of intention as tending to prove the act intended"– implying that the statement can be offered to prove how the declarant acted, but cannot be offered to prove the conduct of a third party. The legislative history is ambiguous. The case law is conflicted. Some courts have refused to admit a statement that the declarant intended to meet with a third party as proof that they actually did meet. Other courts hold such statements admissible if the proponent provides corroborating evidence that the meeting took place.

The Committee directed the Reporter to prepare a report on Rule 803(3), analyzing whether the conflict in the case law warrants a possible amendment to the Rule to clarify whether statements can be admitted to prove the conduct of someone other than the declarant. The Reporter stated that the report would be ready for the Spring 2004 meeting so that if the Committee did find it necessary to propose an amendment, the proposal could be placed with the rest of the package that would be submitted to the Standing Committee.

12. Rule 803(8)

The Committee engaged in a preliminary consideration of Rule 803(8), the hearsay exception for public reports. Committee members noted that the Rule is subject to several drafting problems. It is divided into three subdivisions, each defining admissible public reports, but the subdivisions are overlapping. Subdivisions (B) and (C) exclude law enforcement reports in criminal cases from the exception, but courts have held that these exclusions are not to be applied as broadly as they are written. The exceptions are intended to protect against the admission of unreliable public reports, but this concern might be better stated if the exception were written simply to admit a public report unless the court finds it to be untrustworthy under the circumstances. The Uniform Rules have

departed from the Federal model, as have many States.

The Committee directed the Reporter to prepare a report on whether it is necessary to amend Rule 803(8) to clarify that a public report is admissible unless the court finds it to be untrustworthy under the circumstances The Reporter stated that the report would be ready for the Spring 2004 meeting so that if the Committee did find it necessary to propose an amendment, the proposal could be placed with the rest of the package that would be submitted to the Standing Committee.

13. Rule 803(18)

Rule 803(18) provides a hearsay exception for "statements contained in published treatises, periodicals, or pamphlets" if they are "established as a reliable authority" by the testimony or admission of an expert witness or by judicial notice. This "Learned Treatise" exception does not on its face permit evidence in electronic form, such as a film or video. The Committee considered whether the Reporter should be directed to prepare a report on the necessity of an amendment to Rule 803(18) that would cover electronic evidence explicitly

The Reporter noted that there was only one reported Federal case on the matter, and that in that case the court had no trouble finding that learned treatises could be admitted even if in electronic form. There is no reported decision that *excludes* a learned treatise on the ground that it is electronic form. Committee members noted that in the absence of any conflict in the courts, and given the dearth of case law, an amendment to Rule 803(18) was not justified at this point. The Committee unanimously agreed that it would not propose an amendment to Rule 803(18) as part of any package of amendments to be submitted to the Standing Committee in June 2004.

14. Rule 806

At its Fall 2002 meeting the Committee directed the Reporter to prepare a memorandum on the advisability of amending Evidence Rule 806, the Rule permitting impeachment of hearsay declarants under certain conditions. Rule 806 provides that if a hearsay statement is admitted under a hearsay exception or exemption, the opponent as a general rule may impeach the hearsay declarant to the same extent as if the declarant were testifying in court. The courts are in dispute, however, on whether a hearsay declarant's character for truthfulness may be impeached with prior bad acts under Rule 806 If the declarant were to testify at trial, he could be asked about pertinent bad acts, but no evidence of those acts could be proffered—Rule 608(b) prohibits extrinsic evidence of bad acts offered to impeach the witness's character for truthfulness. For hearsay declarants, however, ordinarily the only way to impeach with bad acts is to proffer extrinsic evidence, because the declarant is not on the stand to be asked about the acts. Rule 806 does not explicitly say that extrinsic evidence of bad acts is allowed Two circuits prohibit bad acts impeachment of hearsay declarants, and one permits it

The Committee reviewed the Reporter's report and discussed whether the problems raised by Rule 806 were serious enough to justify the substantial costs of an amendment. Several members opined that the Rule, fairly read, prohibits the use of extrinsic evidence to impeach a hearsay declarant, for the reasons expressed by the Third Circuit in *United States v Saada,* 212 F.3d 210, 221-22 (3d Cir. 2000). If Congress had wanted to permit the use of extrinsic evidence to impeach a hearsay declarant, it certainly could have said so (as it had with inconsistent statements, by dispensing with the foundation requirement that is applied for in-court witnesses). Committee members expressed concern that an amendment permitting extrinsic evidence to impeach a hearsay declarant's character for truthfulness could be subject to abuse. It could lead to drawn-out proceedings and hearings on collateral matters--with little benefit given the fact that the only purpose would be to show that the hearsay declarant committed some act that had some bearing on the declarant's character for truthfulness Members also noted that if the declarant were to testify, extrinsic evidence would be inadmissible under Rule 608(b), for the very reason that the delay and confusion resulting from proving up extrinsic evidence is not worth the attenuated benefit of impeaching the witness with a bad act. Committee members saw no justification for permitting proof of extrinsic evidence when it would not be permitted were the witness to testify.

The Committee resolved by unanimous vote to reject any proposed amendment to Rule 806.

PROJECT ON PRIVILEGES

At its Fall 2002 meeting, the Evidence Rules Committee decided that it would not propose any amendments to the Evidence Rules on matters of privilege. The Committee determined, however, that it could – under the auspices of its Reporter and consultant on privileges, Professor Broun – perform a valuable service to the bench and bar by giving guidance on what the federal common law of privilege currently provides. This could be accomplished by a publication outside the rulemaking process, such as has been previously done with respect to outdated Advisory Committee Notes and caselaw divergence from the Federal Rules of Evidence. Thus, the Committee agreed to continue with the privileges project and determined that the goal of the project would be to provide, in the form of a draft rule and commentary, a "survey" of the existing federal common law of privilege. This essentially would be a descriptive, non-evaluative presentation of the existing federal law, not a "best principles" attempt to write how the rules of privilege "ought" to look. Rather, the survey would be intended to help courts and lawyers determine what the federal law of privilege actually is and where it might be going. The Committee determined that the survey of each privilege will be structured as follows:

1. The first section for each rule would be a draft "survey" rule that would set out the existing federal law of the particular privilege. Where there is a significant split of authority in the federal courts, the draft would include alternative clauses or provisions.

2. The second section for each rule would be a commentary on existing federal law. This section would provide case law support for each aspect of the survey rule and an explanation of the alternatives, as well as a description of any aberrational caselaw. This commentary section is intended to be detailed but not encyclopedic. It would include representative cases on key points rather than every case, and important law review articles on the privilege, but not every article.

3. The third section would be a discussion of reasonably anticipated choices that the federal courts, or Congress if it elected to codify privileges, might take into consideration. For example, it would include the possibility of different approaches to the attorney-client privilege in the corporate context and the possibility of a general physician-patient privilege. This section, like the project itself, will be descriptive rather than evaluative.

At the Fall 2003 meeting, Professor Broun presented, for the Committee's information and review a draft of the survey rule, commentary, and future developments discussion with respect to the psychotherapist-patient privilege. Committee members commended Professor Broun on his excellent work product and provided commentary and suggestions. Some suggestions included the need to consider the relevance of statutory reporting requirements; the scope of waiver (which will be dealt with in a separate waiver rule); and whether the privilege should apply when confidential communications are released without the patient's authorization. Professor Broun noted that these suggestions were quite helpful and he would consider how to incorporate them in the working draft.

Professor Broun informed the Committee that he was beginning to work on the attorney-client privilege and that he would submit a progress report for the Spring 2004 meeting. After discussion, it was resolved that the survey project would cover those privileges and rules that were covered in the original Advisory Committee's draft of privileges.

NEXT MEETING

The next meeting of the Advisory Committee on Evidence Rules is scheduled for April 29th and 30th, 2004.

The meeting was adjourned at 3:30 p.m., November 13.

Respectfully submitted,

Daniel J. Capra
Reed Professor of Law
Reporter

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

DAVID F. LEVI
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JERRY E. SMITH
EVIDENCE RULES

Memorandum To: Standing Committee on Rules of Practice and Procedure
From: Subcommittee on Local Rules
Re: List of local rules to be reported to District Courts
Date: December 1, 2003

An important goal of the Local Rules Project is to inform district courts of local rules that may violate the limitations on local rulemaking set forth in Rule 83 and 28 U.S.C. § 2071 Both statute and rule require that local rules must be "consistent with" national law; and Rule 83 further requires that local rules must not be "duplicative of" national law.

The Standing Committee has determined that the district courts should be made aware of local rules in their respective districts that fall within one of four categories: 1) a local rule that is in conflict with national law; 2) a local rule that tries to duplicate national law but in a confusing or unhelpful manner; 3) a local rule that is outmoded because it regulates a practice or form of action that no longer arises in the federal courts; and 4) local rules that do not conform with the uniform numbering system

This report provides a listing of rules that appear to fit into the above categories. It also includes discussion of rules on which reasonable minds can differ as to whether they present a conflict or an unhelpful duplication.

The report groups the local rules under their Federal analogs, as has been the practice for the Local Rules Project. It works from, and adapts, the report of Mary Squiers that was distributed to the Standing Committee at the June 2003 meeting.

The goal of the local rules project is to use this report as the blueprint for a letter to each district court that has problematic local rules, as defined in this report.

It is important to note several provisos in this analysis of local rules:

1. In accordance with the discussion of the Standing Committee at two previous meetings, the list on "inconsistent" local rules covers only those rules that are in conflict with the text of a Federal Rule or a federal statute. Local rules are not included if they are inconsistent with case law, because neither section 2071 nor Rule 83 prohibits local rules that are inconsistent with case law.

2. The report focuses on those rules that are clearly inconsistent with the text of a national law. It avoids subjective arguments that a particular local rule violates the "spirit" of a national law. However, for the information of the Committee, a separate section is added listing local rules that, while not clearly in conflict with a national law, might arguably create a conflict as applied.

3. Rule 83 states that local rules must not be "duplicative of" one of the Federal Rules. Mary Squiers' report purports to identify a large number of rules that "repeat" a Federal Rule, and she concludes that all of these rules so identified should be abrogated. On closer inspection, however, most of the local rules cited do not *repeat* the text of a federal rule; rather, they simply *refer* to the Rule. Those local rules are not problematic and are not prohibited by Rule 83. Moreover, there is probably little harm and actually much good to be found in duplicating some of the Federal provisions, as it is possible that practitioners will look to the local rules first to determine the governing standards. On the other hand, if the local rule does a bad job at "duplication," i.e., by poor paraphrasing or selective duplication, the local rule will undoubtedly do more harm than good.

Thus, the list of "duplicative" rules in this report covers only those local rules that purport to replicate the text of a national rule in a way that might be more confusing than helpful to the practitioner.

4 The local rules were taken from the websites of the respective districts. The working assumption is that the local rules posted on the website are the actual rules currently applicable in the district.

5. Professor Capra, the principal author of this report, has reviewed every single local rule that Mary identified as problematic. He has not attempted to research other rules that might be problematic and yet were not cited in Mary's report. It is likely that the report is underinclusive in uncovering offending local rules, but this is a problem that could only be corrected by another systematic nationwide search and analysis. The subcommittee has resolved that the way to deal with potential underinclusiveness is to inform the districts that the report is not intended to be comprehensive.

6. There are a large number of civil rules on which Mary made no report. There are hundreds of local rules on these unreported topics. For example, many districts have local rules on class actions, and Mary made no report on Rule 23. No attempt has been made to research the rules that Mary has not reported on. The subcommittee has resolved that any letter to a district court should point out that the local rules project reviewed only a selected number of rules

7. The local rules are a moving target. By the time this report is finalized, there are likely to be new local rules somewhere that conflict with a national rule. It is also possible that some of the rules listed as problematic in this report will be changed or abrogated by the time the report is finalized. The subcommittee has resolved that before any letter is sent out to a district citing a rule as problematic, the rule will be double-checked on the court's website to assure that it has not been changed or abrogated.

What follows is an analysis of local rules grouped under the Federal Civil Rule referent.

Rule 1

No local rules to report.

Rule 3–Filing Fee

No local rules to report.

Rule 3–Civil Cover Sheet

No local rules to report.

Rule 3–In Forma Pauperis

Arguable Conflict:

1. *Form Requirement.* Four courts have local rules requiring that a form application must be used in seeking *in forma pauperis* status.[1] These rules do not appear to allow for the use of an equivalent affidavit but rely solely on the form affidavit.

It could be argued that the form requirement is inconsistent with the *in forma pauperis* statute, which requires only the submission of an affidavit "that includes a statement of all assets such prisoner possesses [and a statement] that the person is unable to pay such fees or give security therefor "[2] On the other hand, it could be argued that these local rules require nothing but what the statute requires, albeit in a particular form; this is especially so if the actual practice in the jurisdiction allows the litigant to conform an original submission to the mandated form without prejudice.

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[1] N D Cal LR3-10, E D Mo LR2 05(a), D Utah LR3-2; W D Wash LRCR3

[2] 28 U S C §1915(a)

Rule 5 – Proof of Service

Arguable Conflicts:

1. *Certificate of Service:* W.D.Pa. LR 5.2 provides that "the filing or submission to the court by a party of any pleading or paper required to be served by other parties pursuant to Fed.R.Civ.P. 5 shall constitute a representation that a copy thereof has been served upon each of the parties upon whom service is required. No further proof of service is required unless an adverse party raises a question of notice."

This local rule is arguably inconsistent with the text of Rule 5(d), which envisions a separate certificate of service to be filed with the court. But the inconsistency is not all that clear, because the local rule could be read as simply a way to define the form or content of proof of service by declaring that the filing *is* a proof of service. Moreover, the local rule contains a safety valve that allows an adverse party to raise a question of notice. Thus, the local rule arguably conflicts with the "spirit" of the Federal Rule, but there is no clear inconsistency with the text of the Federal Rule.

2. *Timeliness of service:* Rule 5(d) provides: "All papers after the complaint required to be served upon a party, together with a certificate of service, shall be filed with the court within a reasonable time after service...." Two courts have local rules that allow the proof of service to be filed anytime unless material prejudice would result.[3] One court's local rule provides that the court may refuse to take action on a document until the proof of service is filed. [4] Another court provides that the clerk may permit papers to be filed without proof of service but shall require such proof of service to be filed "promptly."[5] An argument can be made that these timing rules are inconsistent with the Rule 5 provision requiring that the filing occur "within a reasonable time after service." However, none of these rules are facially inconsistent with the "reasonable time" requirement of Rule 5, indeed they could be seen as giving more specific content to what is a "reasonable time," elaborating in a way that provides some guidance to practitioners.

Rule 5 – Filing of Discovery Materials

Conflict:

1. E.D.Wis. GR LR 5.1 provides that all papers in the action must be filed, with no exceptions for discovery materials. This provision conflicts with the recently amended Federal Rule 5(d), which provides that discovery materials "must not be filed until they are used in the proceeding

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[3] D Neb LR5 2(b), D.Nev. LR5-1(b)

[4] D Nev LR5-1

[5] W D Tex CV-5(b)

or the court orders filing." It is possible, however, that this rule will be changed in response to the amendment by the time this report is finalized.

***Arguable Conflict*:**

1. Four courts have local rules providing that the original deposition must be maintained by the party seeking it. These courts are:

S D Fla LR26 1, N.D Ga. LR5 4, D Idaho LR 5 4, M.D Pa LR5.4

These rules may be inconsistent with Rule 30 (f)(1) as applied in certain cases. Rule 30(f)(1) provides that a deposition transcript or recording must be stored by the attorney who arranged for the transcript or recording. The attorney who arranged for the transcript or recording may not be the attorney who sought the deposition. Rule 30(f)(1) directs that "the deposition" be sent to the attorney who arranged for the transcript or recording. The local rule could therefore conflict when the attorney who arranged for the transcript or recording is not the one who noticed the deposition

Rule 9 – Three Judge Courts

Conflict:

1. D.Ariz. LR 2.3 is a local rule concerning the number of copies to be filed in a three-judge court. This local rule complements federal practice; however, the text of that rule refers to "A District Court Composed of Three District Judges."[6] This definition is inconsistent with the clear language of 28 U.S C. § 2284, governing the practice of three-judge courts The statute requires three judges "at least one of whom shall be a circuit judge."

Rule 9–RICO Cases

Arguable Conflict:

1. RICO Case Statement: Five courts have local rules relating to civil actions brought under the Racketeering Influence and Corrupt Organization Act (RICO).[7] For example, three of these courts have local rules explaining that a RICO case statement is needed within thirty days of filing

[6] D Ariz LR2 3

[7] S D Cal LR11.1, S D.Fla. LR12 1, S D Ga LR9 1, D Haw LR 9 1, 9 2, 9 3, N D N Y LR9 2

the complaint.[8] Another court requires that the statement be filed with the complaint.[9] Five courts explain that the statement must include facts relied upon to initiate the claim.[10] One court provides a long list of the facts that must be set forth.[11] Two courts provide that a failure to submit a statement may mean dismissal.[12]

These rules may serve courts and litigants well in some instances, by emphasizing the particularized procedural requirements for RICO actions. On the other hand, some of these rules may be applied inconsistently with the detailed requirements of the statute or with the national rules governing pleading requirements, e.g., Rules 8, 9, 12(e) and 56. This would seem to be a situation where some notice might go to the district courts alerting them to a possible problematic relationship between local rule and national law, without having to (or being unable to) come out and say that the local rule definitely conflicts with federal law.

Rule 9 – Social Security and Other Administrative Appeal Cases

***Conflict*:**

1. *Extension of Time to Answer:* Local rules in two jurisdictions purport to extend the time within which the Secretary of Health and Human Services may answer the complaint from sixty days to within thirty days after the record is filed[13] or within ninety days after service.[14] Both of these rules are inconsistent with Rule 12(a)(3)(A) of the Federal Rules of Civil Procedure, which requires the agency head to file an answer within sixty days after service. This is not to say that the local rules embody bad policy. But in the absence of amendment either to the Social Security Act or to the Federal Rule, a local rule extending time to answer is in conflict with the time period mandated by national law.

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[8] S D Cal LR11 1, S D Fla LR12.1, N D.N Y LR9 2

[9] D.Haw. LR9 1

[10] S D Cal. LR11 1; S D Fla LR12 1; S D Ga LR9 1; D Haw. LR 9.1, N D N Y. LR9 2.

[11] S D.Fla LR12 1

[12] S D Cal LR11 1, D Haw LR9 2

[13] W D Mo LR9.1 (defendant files answer within thirty days after filing record)

[14] D N H LR9 1 (defendant files answer and record within ninety days after service of complaint)

Arguable Conflict:

1. Placing Social Security Numbers in the Complaint: Nine courts have local rules requiring that the social security number be set forth in the complaint.[15] These rules appear to be in tension with the Social Security Administration Act, which discusses the confidential nature of the social security number:

> Social security account numbers and related records that are obtained or maintained by authorized persons pursuant to any provision of law, enacted on or after October 1, 1990, shall be confidential, and no authorized person shall disclose any such social security account number or related record.[16]

"Authorized persons" include employees of the federal government. Local rules requiring that the social security number be set forth in the complaint do not directly violate the statute, however, as the statute requires authorized persons to maintain confidentiality *once the record is obtained or maintained.* This would not explicitly prohibit a rule requiring a party to include a social security number on a filed document, so long as confidentiality were maintained thereafter

Local rules requiring disclosure of a social security number are also in some tension with the Judicial Conference policy adopted in 2002, which requires that social security numbers, though filed with the court, must be redacted or modified so that the full number is not available to the public. However, this Judicial Conference policy is not embodied in a Federal Rule or a federal statute, and therefore conflicting local rules are not violative of Rule 83. Nonetheless, it would seem that district courts would welcome notification that a local rule as applied might be in conflict with the published policy of the Judicial Conference.

Rule 15 – Amended and Supplemental Pleadings

Arguable Conflicts:

1. *Time for Answer*: The District Court of Nevada has a local rule providing that the date for a party to answer shall run from the date of filing the order allowing the pleading to be amended or, where there was no order, from the date of service of the amended pleading.[17] Specifically, the local rule provides:

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[15] E D Cal LR8-206, E D Ky LR9 1; W.D Ky LR9 1, M D.La. LR9 2, W D La. LR9 2; E D Mich LR9 1(e), N.D Ohio LR9 1, E D Okla LR9 1, N D.Tex. LR9 1

[16] 42 U S C §405(c)(2)(C)(viii)

[17] D Nev LR15-1

> The time under Fed. R. Civ. P. 15(a) for an entity already a party to answer or reply to an amended pleading shall run from the date of service of the order allowing said pleading to be amended, or where no order is required under Fed._R. Civ._P. 15(a), from the date of service of the amended pleading.

This rule might create tension with Rule 15(a), which states that the responding party must plead "within the time remaining for response to the original pleading or within 10 days after service of the amended pleadings, whichever period may be longer...." The conflicts are indicated by three possible problems in the application of the local rule

First Problem: The complaint is served on Day 0. On Day 2 the plaintiff files an amended complaint. On Day 5 the plaintiff moves for leave to amend. The motion is granted and the order is served on the defendant on Day 8. Rule 15(a) allows the defendant to answer as late as day 20 (or, if the United States is defendant, on day 60) The local rule seems to set the time to answer running from day 8, but does not say how much time there is: does it mean to allow the full time set by Rule 15(a), so the provision running from service of the order is irrelevant after all?

Second Problem. A complaint is filed and the defendant answers. The plaintiff moves for leave to amend without attaching an amended complaint. The order granting leave is served on the defendant. Fifteen days later the plaintiff serves an amended complaint on the defendant. Was the defendant supposed to file an answer 10 days after service of the order allowing amendment?

Third Problem. A complaint is served and an answer filed The plaintiff attaches an amended complaint to the motion for leave to amend. The order granting leave to amend is served on the defendant Because the defendant already has the amended complaint, it may make sense to set the time to answer running from service of the order.

All three of these questions arise because the Nevada local rule provides that "the time under F.R.Civ.P. 15(a)" runs from the date of serving the order allowing the amendment. But the time periods set by Rule 15(a) are measured by the time to respond to the original pleading (first problem) or (ten days) from service of the amended pleading (second problem and third variation). A time measured by service of the order allowing amendment is not the time under Rule 15(a). Thus, there is a problem in matching the local rule to the time periods in Rule 15(a) that results in an arguable conflict, depending on how the local rule is applied.

2. *Limitation on acts that can be included in the motion:* Northern District of New York Local Rule 7.1 states that a motion to supplement a pleading must be limited to acts occurring after the filing of the original complaint. Civil Rule 15(d) provides that a court may permit the party to serve a supplemental pleading "setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented." The Federal Rule is thus less inclusive as to the acts that can be included in a supplemental pleading. If the local rule is read literally, this might result in a conflict in certain circumstances. For example, assume the plaintiff files a complaint. One year later the plaintiff files an amended complaint. Still later the plaintiff seeks to supplement by adding something that happened between filing the original complaint and

filing the supplemental complaint. The local rule would appear to permit this practice while the Federal rule would not.

It is unlikely, however, that the local rule means what it says, because it explicitly refers to Civil Rule 15(d):

> Where leave to supplement a pleading is sought under Fed. R. Civ. P. 15(d), the proposed supplemental pleading must be limited to acts that occurred subsequent to the filing of the original pleading.

Thus, any "conflict" may only be the result of careless drafting that may not have an effect on local practice.

Rule 16–Arbitration

Conflicts:

1. Automatic Arbitration: At least six courts provide that some cases are automatically referred to arbitration[18] while three of those courts provide relief from the automatic referral for good cause.[19]

The rules providing for automatic arbitration, regardless of the parties' consent, would appear to be in conflict with the Alternative Dispute Resolution Act of 1998, which authorizes referral to arbitration "when the parties consent."[20] However, 28 U S.C. § 648 in effect "grandfathers" compulsory arbitration plans that existed under the original arbitration statute (Public Law 100-702). That statute established a pilot program of mandatory arbitration in a number of district courts. The districts in which mandatory arbitration is grandfathered include. N.D. Cal , M.D. Fla., N.J , W.D. Mich., and W D. Okla. Thus, the only district with a mandatory arbitration program that is not grandfathered is D.Ariz. That district's arbitration rule is in conflict with federal law, as it is mandatory rather than permissive.

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[18] D Ariz LR2 11, N D Cal ADR 4; M D Fla LR8 02(a) ; W D Mich LR16 6, D N J LR201 1(d), W D.Okla LR16 3 Supp R 5 2

[19] N D Cal ADR 4, D N J LR201 1(d), W D Okla. LR16 3 Supp

[20] *See* 28 U S C §652(a)("Any district court that elects to require the use of alternative dispute resolution in certain cases may do so only with respect to mediation, early neutral evaluation, and, if the parties consent, arbitration ")

2. *Burdens on seeking trial de novo:* Twelve courts require a party to deposit an amount equal to the arbitrator's fee when seeking a trial de novo.[21] Three of these courts further provide that, if the trial de novo amount is not "substantially more favorable" than the award, the opposing party may be awarded costs and fees pursuant to 28 U.S.C. §655(e).[22] Six of these courts explain that the arbitrator's fee is assessed to the party demanding a trial de novo if the trial award is not more favorable than the arbitration award.[23] One court defines "substantially more favorable" as 10 per cent above the award.[24] These local rules were undoubtedly passed to supplement the old statute that allowed the arbitrator's fee to be taxed as costs against the party demanding a trial de novo under certain enumerated circumstances.[25] Under the current Act, all of these rules, to the extent they impose a burden on seeking a trial de novo, are probably inconsistent with the statutory provision of 28 U.S.C. § 657(c)(2), which provides that on demand for trial de novo the action "shall be . . . treated for all purposes as it if had not been referred to arbitration."

Rule 17 – Parties Plaintiff and Defendant: Capacity

Arguable Conflict:

1. *Action by Guardian or Guardian ad litem:* The local rule in one court states that minors or incompetent persons may sue or defend only by a general or testamentary guardian or by a guardian *ad litem*.[26] To the extent this requirement seeks to distinguish between an appointed guardian as who can bring an action and a "next friend" who cannot, this local rule might run afoul of Rule 17(c), which, by its terms, contemplates that a minor or incompetent person may be represented by a next friend as well as by a guardian *ad litem*. Rule 17(c) seeks to eliminate any distinction between appointed guardians and a "next friend", permitting either to be a representative. It is unclear, however, whether this local rule actually purports to make that distinction. It may be that the rule is targeted toward representative actions brought by guardians, and the question of an action brought by a "next friend" was simply not considered; next friend actions are not *explicitly*

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[21] D Ariz LR2 11(k); N D Cal. LRADR 4, M D Fla LR8 06 , M D Ga. LR16 2, W D.Mich LR16 6, D N J LR201 1, W.D N Y. LR16.2; N D Ohio LR16 7, W D Okla LRL Civ R16.3 Supp , E D Pa. LR53.2, W D Pa LR16 2, E D Wash. LR16 2

[22] D Ariz. LR2 11, W D N Y. LR16 2; N D Ohio LR16 7

[23] D Ariz LR2 11; M.D Fla. LR8 06 ; W D N Y LR16 2, N D.Ohio LR16.7, W D Okla. LR16 3 Supp ; E D Pa LR53 2

[24] D Ariz LR2 11, *see also* W D Mich LR16 6 (formula for preventing assessment of costs if award is rejected and trial de novo sought)

[25] *See* 28 U S C. §655(d) (1988)

[26] M.D N Car LR17 1

prohibited in the local rule. At any rate, local rules regulating representatives seem justified by the need to require some formal review of the purported representative–either by appointment under state law or confirmation by the federal court.

Rule 24–Intervention–Claim of Unconstitutionality

Conflict:

1. *Notice Requirement Imposed on Litigant:* Three courts have local rules that require the litigant to carry out the court's responsibility under Rule 24 to provide notice to the government of a claim of unconstitutionality. These rules require that notice be served on the judge, the parties, and the designated government official.[27] Currently, these local rules appear inconsistent with 28 U.S.C. § 2403 and Rule 24(c), both of which place the burden on the *court* to provide notice of a claim of unconstitutionality. It should be noted, however, that the Civil Rules Committee has published a proposed amendment that would require both the litigant and the court to notify the attorney general of a claim of unconstitutionality. This development counsels caution in suggesting any change to the local rule on grounds of "conflict."

Arguable Conflicts:

1. *Content of the notice:* Twelve courts have local rules setting forth particular requirements for the content of the notice of a claim of unconstitutionality, e.g., that the notice must state the title of the cause, a reference to the questioned statute sufficient for its identification, the respect in which it is claimed that the statute is unconstitutional, and the like.[28] The relevant statute and Federal Rule do not set forth specific requirements for the content of the notice. But local rules setting forth specific requirements for the notice are not necessarily inconsistent with national law. These local rules generally do not require the information to be set forth in a pleading, and so in that respect they do not appear to be inconsistent with the permissive pleading standards of Federal Rule 8. As to Rule 24, it simply states that the party shall call the court's attention to its duty to inform the government of the claim of unconstitutionality. It does not prevent local courts from placing procedural requirements on the notice, and there appears to be no inconsistency between Rule 24 and procedural requirements that will assist the court in complying with its duty. More importantly, most of the notice requirements are written specifically with the intent of aiding the court in giving the notice required under the Federal Rule; and none appear to require excessive or onerous detail.

2. *Claim of unconstitutionality to be served as a pleading:* Northern District of Oklahoma Local Rule 24.1 requires that notice of a claim of unconstitutionality shall be provided by a separate

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[27] E.D Cal. LR 24-133, D Colo LR24 1; D Kan LR24 1

[28] D Ariz LR2 4, E.D Cal. LR24-133; S D Cal. LR24 1; D Colo LR24 1; N D Fla LR24 1, S D Fla LR24 1, D Kan LR24.1, D N J LR24 1, W D N Y LR24, M D Pa LR4 5, D.Utah LR24-1, E D Wash LR24 1

pleading.[29] No such requirement is imposed by the statute or by Rule 24. On the other hand, the national law does not explicitly prohibit a local court from imposing this requirement, which appears to be one of form and not unduly burdensome. (It is not as if the district court was unaware of or trying to be inconsistent with national law, as Rule 24(c) is cited as support in the text of the local rule) Thus, the conflict between national and local rule is not clear.

Rule 34–Production of Documents, etc.

Arguable Conflict:

1. Limiting the number of requests for production: Two courts have local rules that impose a limit on the number of requests for production that can be served, unless court permission is obtained. The limit in one court is 10,[30] and in the other is 30.[31] It could be argued that these limits conflict with the spirit of the Federal Rules by reasoning that those rules do not limit, and that Rule 34 "intimates" that unlimited requests are permissible by referring to "any" documents or tangible things One could also reason that the Rule has been amended and yet no numerical limitation has been added.

On the other hand, it could be argued that nothing in the national rules specifically says that requests can be made in unlimited number, accordingly, there is nothing specifically in the national law that prohibits local courts from imposing such a number. But even more importantly, these local rules do not *prohibit* discovery requests beyond a certain number; rather, they require court permission for discovery requests beyond a designated number. There seems to be nothing in Rule 34 that specifically prohibits a local court from establishing a regime of court control over excessive discovery requests.

Rule 35: Physical and Mental Examinations

Arguable Conflict:

1. *Timing:* D.Kan. LR 35.1 provides that "[p]ursuant to Fed.R.Civ.P. 35 the physical and mental examination of a party may be ordered at any time prior to trial."[32] The Federal Rule does not forbid an order for an examination after the close of discovery so the rule, read in conjunction with its title, seems accurate. But it could be argued that the local rule is inconsistent with Rule 26, which indicates that, in at least most cases, there can be no discovery until after the Rule 26(f) discovery

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[29] N D Okla LR24 1

[30] M D Ga. LR34

[31] D Md LR104 1

[32] D Kan LR35 1

conference is held. However, Rule 26(d) does allow a court to order discovery before the Rule 26(f) conference Any inconsistency between this local rule and national law is arguable, but not obvious.

Rule 36 – Requests for Admission

Arguable Conflicts:

1. *Timing of requests for admission:* D.Wyo. has a local rule stating that requests for admission cannot be served until the self-executing discovery is complete.[33] Arguably, this rule is in conflict with the current time sequences set forth in Rule 26: "These disclosures [initial, self-executing disclosures] must be made at or within 14 days after the Rule 26(f) conference unless a different time is set by stipulation or court order...."[34] The conflict is not clear, however, because of the possibility in federal court of different time periods being set by stipulation or court order.

2. *Objections made earlier than responses:* E.D.Va.LR 26(c) requires that objections to requests for admission be made earlier than responses to the requests, unless the court otherwise provides.[35] To the extent the timing period in the local rule is not alleviated by the judge, it is inconsistent with Rule 36, which sets the same time limit for the parties to respond either by admitting, denying, or objecting. Thus, the local rule as applied has a potential to conflict with the national rule.

Arguably Problematic Duplication:

1. *Objections to requests for admission:* Rules in nine courts require that any objections be specific and/or contain the reasons.[36] These rules cover the same ground as Rule 36(a), requiring that the answer "shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter." Whether this is a problematic duplication or a helpful reminder is a matter for debate.

Rule 38 – Jury Trial of Right

No Local Rules to Report

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[33] D Wyo LR36.1 ("Requests for admissions shall not be served by any party prior to the completion of routine self-executing discovery pursuant to Local Rule 26.1(c)")

[34] Fed R Civ P 26(a)(1)

[35] E D Va. LR26(c)

[36] E D.Ark LR33.1, W D Ark LR33.1, E D Cal LR36-250; S D Ga LR26 7, D Mass LR36 1; D Or LR36 2, M D Pa LR36.2, D R I LR13(b); E D Va LR26(c)

Rule 39 – Trial by Jury or the Court

No Local Rules to Report

Rule 41 – Dismissal of Actions

Arguable Conflicts:

1. *Requirement of Seeking Leave to Refile:* Three courts have local rules that require a party to seek permission to refile after a voluntary dismissal.[37] This requirement appears to be inconsistent with Rule 41, *unless* the practice in the court is to grant such permission as a matter of routine. Rule 41 provides that a voluntary dismissal is "without prejudice," and this at least implies that there is no constraint on the party's ability to file a subsequent action However, Rule 41 does not specifically prohibit a requirement that the plaintiff seek permission to refile, and at any rate, if the permission is granted as a matter of course, there would seem to be no direct conflict between the local and national rule. In sum, there is a potential conflict in the rule as applied.

2. *Reversing the Presumption as to Involuntary Dismissals:* Rules in eight jurisdictions indicate that an involuntary dismissal is made without prejudice unless the court states otherwise.[38] These rules reverse the presumption of Rule 41(b), that an involuntary dismissal is with prejudice unless the court orders otherwise. This could result in a conflict in the rules as applied. It would depend on the local practice.

3. *Dismissal with or without prejudice·* Local rules in six courts provide that the involuntary dismissal may be determined with or without prejudice.[39] These local rules are in some tension with Rule 41, which sets forth a presumption that an involuntary dismissal operates with prejudice. Arguably, however, these local rules do not pose a direct conflict, because Rule 41 does in the final analysis permit the court to dismiss with or without prejudice. In essence, the local rules take away, rather than reverse, the federal presumption. This may or may not present a conflict, depending on local practice.

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[37] E D La LR41 1, M D La LR41 1, W D.La LR41 1

[38] C D Cal LR 41-2, S D.Cal LR41 1, M D La. LR41 3, E D La LR 41.3, W D La LR41 3, D Mass LR41 1; E D Pa LR41 1, E D Wash LR41 1

[39] D Colo. LR41 1, D Me LR41 1; E D Mo LR 8 01; D R I LRLR21(b); D Utah LR 41-2, E D Wis LR 41 3

Rule 42 – Consolidation – Separate Trials

Arguably Problematic Duplication:

1. *Copies served on all parties:* Two courts require that copies of the moving papers for a motion to consolidate, along with supporting documentation, must be served on all parties.[40] It could be argued that these directives repeat the service requirement of Rule 5. These local rules, however, do not exactly repeat the requirement laid out in Rule 5. Rule 5 requires service of "every motion" on all the parties. The local rules make that requirement more particularized to a specific motion – the motion to consolidate Whether that is a problematic "duplication" is a matter for argument.

Rule 47– Selection of Jurors

No Local Rules to Report

Rule 48 – Number of Jurors

Outmoded reference:

D.P.R. LR 321 assumes that alternate jurors may be seated in determining how many jurors to seat.[41] Rule 46, as amended in 1991, no longer allows the practice of seating alternative jurors so this rule is inconsistent with current national law.

Rule 51 – Instructions to Jury; Objections

Cautionary Note: The forthcoming amendment to Rule 51 will create a moving target for local rules on the subject of instructions to the jury. Arguably the district courts should be given some time to enact local rules consistent with the amendment. Almost all of the districts responded to the Federal discovery amendments within two years, and one could expect the same reaction to the amendment to Rule 51.

Assuming, however, that the plan is to report on local counterparts to Rule 51, this can obviously only be done by referring to the amended rule. The remainder of this discussion compares the local rules to the national rule as amended.

Arguable Conflicts:

1. *Limiting the number of instructions:* M.D.Pa. LR 51.1 provides that a party may submit more than 12 instructions only with leave of court. It can be argued that a rule limiting the number

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[40] D N J LR42 1, N D Tex. LR42.1

[41] D P R LR321 ("In all civil jury cases, the jury shall consist of six (6) members, and such alternates as the Court may determine ")

of instructions is inconsistent with Rule 51, which allows a party to submit requests without any specific limit. The M D.Pa. rule allows more requests upon leave of court, so there is no absolute limit on number. But unless leave of court is routinely granted, the requirement is a limitation in practice that is inconsistent with the Federal rule.

2. *Timing requirements for submitting instruction requests:* The new Rule 51 states that the court may direct an "earlier reasonable time" for submission of requests for instructions. Four jurisdictions require that proposed instructions be submitted at least five days before trial [42] Four jurisdictions require they be submitted seven days before trial–though the Western District of Louisiana rule specifically states that the seven-day period "shall not be interpreted or enforced to prevent a party from filing written requests pursuant to FRCP 51 at the close of evidence or at such earlier time during trial as the court may reasonably direct."[43] One court requires they be submitted three days before the pretrial conference.[44] Three courts require they be submitted ten days before trial.[45] The District of Idaho requires they be submitted fourteen days before trial. [46]

It could be argued that all of these timing rules are inconsistent with Rule 51, which provides that instructions should be submitted at the close of the evidence or at an earlier reasonable time that the court directs. But even assuming that local counterparts to Rule 51 should be evaluated at this time, a strong argument can be made that most if not all of these local rules are not in conflict with the Rule as amended. First off, many of these rules (e.g., C.D.Cal., E.D.Wash.) allow the court to fix an alternative time period. Thus, the court can operate on a case-by-case basis, just as it does under Rule 51. At most, these rules add a presumption that might possibly be problematic under local practice. Second, the Rule in Western District Louisiana specifically provides for an alternative time period *if mandated by Rule 51*–no conflict there.

But more importantly, all of these rules can be seen as simply defining the "reasonable" time period set forth in Rule 51. There seems to be nothing wrong with local rules giving definition to an open-ended federal standard, so long as the rule chosen is itself reasonable. It can certainly be argued that all of the time periods set forth in these local rules are reasonable.

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[42] C.D Cal LR 51-1 (unless the court otherwise provides), E D Va. LR51 (unless the court otherwise provides) , E D Wash LR51.1 (or such other time as fixed by the court), D.Wyo LR51 1

[43] D Guam LR 51 1; D Haw LR51 1, W D.La LR51 1, D Vt. LR51 1(a)

[44] D Del LR51 1.

[45] D Alaska LR 51 1; N D Miss LR51 1, S.D Miss LR51 1

[46] D Idaho LR51 1

Rule 54 – Jury Cost Assessment

No Local Rules to Report

Rule 65 – Temporary Restraining Orders

Arguably Problematic Duplications:

1. *Affidavit Requirements:* Two courts require that a party seeking a TRO must submit an affidavit that speaks to irreparable injury.[47] One of these courts also requires that the affidavit explain any efforts used to give notice to the opposing party.[48] These rules repeat requirements that currently are found in Rule 65. Such duplication could be seen as helpful, however, given the presumably emergency circumstances that surround the filing of a TRO. [Note also that the E D. Cal. Local Rule may be in tension with Rule 65, as the local rule provides that the statement about irreparable injury is to be made in an affidavit, while Rule 65 allows it to be made in a verified complaint as well; the M.D. Fla. Rule does permit the filing in a verified complaint.]

2 *Standard for Issuing a No-notice TRO:* Local rules in five courts require that no temporary restraining order issue without notice except in extraordinary circumstances.[49] Rule 65(b) provides that a TRO may be issued without notice "only if (1) it clearly appears ... by affidavit or by verified complaint that immediate and irreparable injury, loss, or damage will result ...[before any hearing in opposition] and (2) the applicant's attorney certifies to the court in writing the efforts, if any, ... made to give notice and the reasons ... that notice should not be required."

There is no indication in any of these local rules that there is an intent to provide a standard different from that set forth in Rule 65. So if these local rules are problematic at all, it would have to be on grounds of duplication. One could argue that these local rules serve as helpful reminders that no-notice TRO's are to be a rarity. But one could also argue that if the local rule is to be a reminder, it should refer specifically to the national rule or use the same terminology as is used in the national rule

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[47] E D.Cal. LR65-231, M D Fla LR4.05

[48] E D Cal LR65-231

[49] E D Cal LR65-231 ("most extraordinary of circumstances"), D D C LR65 1 ("emergency"), M D Fla LR4 05 ("emergency"), M D La LR 65 1 ("emergency"); W D La LR65 1 ("emergency")

Rule 81 – Naturalization

Outmoded Rules:

1. *Naturalization Petition Procedures:* The district court's role with respect to naturalization petitions is to administer the oath of allegiance if requested by the applicant. Seven courts have more extensive rules concerning naturalization petitions, enacted at a time when such petitions were heard in the district court.[50] These rules purport to govern practices other than administering the oath of allegiance; as such they are outmoded and should be abrogated. This should probably include general provisions, such as found in Alaska and in all the districts of Louisiana, that "All petitions for naturalization shall be heard as directed by the court."

Rule 81–Jury Demand in Removed Case

Conflicts:

1. *Different time limits:* N.D.Okla. LR 81.2 sets forth time periods for filing a jury demand after removal that differ from those set forth in Rule 81(c). As such it conflicts with the Federal Rule.

2. *Obligation to Reassert a Jury Demand:* Local rules in two district courts require a party to reassert its demand for a jury trial after removal. A rule requiring a jury demand to be made in a removed case, no matter the circumstances, does conflict with Rule 81(c), which provides that a party is under no obligation to reassert a demand for jury trial if a demand was properly made under state law. The Nebraska rule, which appears to admit of no exception, therefore conflicts with federal law. But the N.D.Okla. rule is not so clearly in conflict on this point. It states that a demand need not be made if the demand "is in the removed case file."[51]

Rule 83–Promulgation of Local Rules

Arguable Conflicts:

1. *Amendments:* D.Mass. LR 83.1 states that the court, by majority vote, may amend or rescind local rules.[52] Mary has argued that this rule conflicts with Federal Rule 83 because it "omits any discussion of the need for public comment." Reasonable minds can differ about whether this is a conflict on paper. It is not, however, a conflict in application, as research indicates that the district has complied with the public comment requirements in promulgating amendments.

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[50] D Alaska LR81 2; N D Ga LR83 10, E.D La LR83 1; M.D La LR83 1, W D La. LR83.1, M D N.Car LR77 1(c), D Wyo LR83 8

[51] N D Okla LR81 2

[52] D Mass LR83.1A

2. *Suspending or Modifying Local Rules:* N.J. LR 83.2 permits the Chief Judge, after a recommendation from the advisory committee and with court approval, to relax or modify a local rule on a temporary basis for up to one year. It can be argued that this rule is in conflict with the national law, which provides that once a local rule is enacted, it remains in effect "unless modified or abrogated by the judicial council of the relevant circuit." But it could also be argued that it is unwise to enter the thicket of individual-judge discretion to depart from a local rule. The D.N.J. rule allowing the chief judge to suspend a local rule on a temporary basis may be quite useful in some circumstances, and because it is part of all of the local rules and qualifies them all, it may not be inconsistent with § 2071. The part of the rule that allows the chief judge to modify a local rule on a temporary basis does seem inconsistent with § 2071.

Conclusion

The Local Rules that are clearly in conflict with Federal law are as follows:

1 E D.Wisc. GR LR 5.1: requires all papers in the action to be filed, with no exception for discovery materials. Apparent conflict with Rule 5(d).

2. D.Ariz. LR 2.3. refers to "A District Court Composed of Three District Judges" and so is inconsistent with the clear language of 28 U.S.C. § 2284, governing the practice of three-judge courts. The statute requires three judges "at least one of whom shall be a circuit judge."

3. W.D.Mo.LR 9.1 and D.N.H. LR 9.1: extending the time to answer in a Social Security action, inconsistent with Rule 12(a)(3)(B).

4. D.Ariz. LR2.11 provides for mandatory arbitration, in conflict with the Alternative Dispute Resolution Act of 1998, as that district was not grandfathered as a pilot district for mandatory arbitration.

5. D.Ariz.LR2.11(k); N.D.Cal. LRADR 4; M D.Fla. LR8.06.; M.D.Ga. LR16.2; W.D.Mich. LR16.6; D.N.J. LR201.1; W.D.N.Y. LR16.2; N.D.Ohio LR16.7; W.D.Okla. LRL.Civ.R16.3 Supp.; E.D.Pa. LR53.2; W.D.Pa. LR16.2; ; E.D.Wash. LR16.2. Imposing burdens on trial de novo after arbitration, in conflict with the Alternative Dispute Resolution Act of 1998.

6. E.D.Cal. LR 24-133; D.Colo. LR24.1; D.Kan. LR24.1 Requiring the litigant to carry out the court's responsibility under Rule 24 to provide notice to the government when there is a claim that a statute is unconstitutional. These local rules conflict with 28 U S.C. § 2403 and Rule 24(c), both of which place the burden on the court to provide notice to the government of a claim of unconstitutionality.

7. D.P.R. LR 321: Assumes that alternate jurors may be seated in determining how many jurors to seat. Rule 46, as amended in 1991, no longer allows the practice of seating alternative jurors so this rule is inconsistent with current national law.

8. D.Alaska LR81.2; N.D.Ga. LR83.10; E.D.La LR83.1; M.D La. LR83.1; W.D.La. LR83.1; M.D.N Car. LR77.1(c); D.Wyo. LR83.8: referring to naturalization proceedings that are no longer conducted in the federal district courts.

9. N.D.Okla. LR 81.2· Establishes a time period within which the parties must file jury demands after removal, which time periods are different from those set forth in Rule 81(c).

10. D.Neb. LR 81.2· Requiring a party to reassert a demand for jury trial in a removed case, apparently even if a jury trial was properly demanded in state court. This conflicts with Federal Rule 81, under which a new demand is not required if a demand was properly made in state court

In addition, the following districts do not comply with the Uniform Numbering System, as required by federal law:

1. District of Arizona

2. Middle District of Florida

3. District of Maryland (though it does have a cross-reference to the Uniform Numbering System on its website).

4. District of Puerto Rico

5. Middle District of Tennessee

6. Southern District of West Virginia

Other rules listed in this report as "arguably in conflict" or "arguably problematic duplication" should be considered and reported on a case-by-case basis, as determined by the Standing Committee and the Subcommittee on Local Rules.

SECTION 205 OF THE E-GOVERNMENT ACT OF 2002

Public Law 107–347
107th Congress

An Act

To enhance the management and promotion of electronic Government services and processes by establishing a Federal Chief Information Officer within the Office of Management and Budget, and by establishing a broad framework of measures that require using Internet-based information technology to enhance citizen access to Government information and services, and for other purposes

Dec 17, 2002
[H R 2458]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

E-Government Act of 2002

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) SHORT TITLE.—This Act may be cited as the "E-Government Act of 2002". 44 USC 101 note

(b) TABLE OF CONTENTS.—The table of contents for this Act is as follows.

SEC. 205. FEDERAL COURTS.

44 USC 3501 note.

(a) INDIVIDUAL COURT WEBSITES.—The Chief Justice of the United States, the chief judge of each circuit and district and of the Court of Federal Claims, and the chief bankruptcy judge of each district shall cause to be established and maintained, for the court of which the judge is chief justice or judge, a website that contains the following information or links to websites with the following information:

(1) Location and contact information for the courthouse, including the telephone numbers and contact names for the clerk's office and justices' or judges' chambers.

(2) Local rules and standing or general orders of the court.

(3) Individual rules, if in existence, of each justice or judge in that court.

(4) Access to docket information for each case.

(5) Access to the substance of all written opinions issued by the court, regardless of whether such opinions are to be published in the official court reporter, in a text searchable format.

(6) Access to documents filed with the courthouse in electronic form, to the extent provided under subsection (c).

(7) Any other information (including forms in a format that can be downloaded) that the court determines useful to the public.

(b) MAINTENANCE OF DATA ONLINE —

(1) UPDATE OF INFORMATION —The information and rules on each website shall be updated regularly and kept reasonably current

(2) CLOSED CASES —Electronic files and docket information for cases closed for more than 1 year are not required to be made available online, except all written opinions with a date of issuance after the effective date of this section shall remain available online.

(c) ELECTRONIC FILINGS —

Public information

(1) IN GENERAL.—Except as provided under paragraph (2) or in the rules prescribed under paragraph (3), each court shall make any document that is filed electronically publicly available online. A court may convert any document that is filed in paper form to electronic form To the extent such conversions are made, all such electronic versions of the document shall be made available online

(2) EXCEPTIONS —Documents that are filed that are not otherwise available to the public, such as documents filed under seal, shall not be made available online.

Regulations

(3) PRIVACY AND SECURITY CONCERNS —(A)(i) The Supreme Court shall prescribe rules, in accordance with sections 2072 and 2075 of title 28, United States Code, to protect privacy and security concerns relating to electronic filing of documents and the public availability under this subsection of documents filed electronically.

(ii) Such rules shall provide to the extent practicable for uniform treatment of privacy and security issues throughout the Federal courts.

(iii) Such rules shall take into consideration best practices in Federal and State courts to protect private information or otherwise maintain necessary information security.

(iv) To the extent that such rules provide for the redaction of certain categories of information in order to protect privacy and security concerns, such rules shall provide that a party that wishes to file an otherwise proper document containing such information may file an unredacted document under seal, which shall be retained by the court as part of the record, and which, at the discretion of the court and subject to any applicable rules issued in accordance with chapter 131 of title 28, United States Code, shall be either in lieu of, or in addition, to, a redacted copy in the public file

(B)(i) Subject to clause (ii), the Judicial Conference of the United States may issue interim rules, and interpretive statements relating to the application of such rules, which conform to the requirements of this paragraph and which shall cease to have effect upon the effective date of the rules required under subparagraph (A)

(ii) Pending issuance of the rules required under subparagraph (A), any rule or order of any court, or of the Judicial Conference, providing for the redaction of certain categories of information in order to protect privacy and security concerns

arising from electronic filing shall comply with, and be construed in conformity with, subparagraph (A)(iv).

(C) Not later than 1 year after the rules prescribed under subparagraph (A) take effect, and every 2 years thereafter, the Judicial Conference shall submit to Congress a report on the adequacy of those rules to protect privacy and security. Deadlines. Reports.

(d) DOCKETS WITH LINKS TO DOCUMENTS.—The Judicial Conference of the United States shall explore the feasibility of technology to post online dockets with links allowing all filings, decisions, and rulings in each case to be obtained from the docket sheet of that case.

(e) COST OF PROVIDING ELECTRONIC DOCKETING INFORMATION.—Section 303(a) of the Judiciary Appropriations Act, 1992 (28 U.S.C. 1913 note) is amended in the first sentence by striking "shall hereafter" and inserting "may, only to the extent necessary,".

(f) TIME REQUIREMENTS.—Not later than 2 years after the effective date of this title, the websites under subsection (a) shall be established, except that access to documents filed in electronic form shall be established not later than 4 years after that effective date. Deadlines.

(g) DEFERRAL.—

(1) IN GENERAL.—

(A) ELECTION.—

(i) NOTIFICATION.—The Chief Justice of the United States, a chief judge, or chief bankruptcy judge may submit a notification to the Administrative Office of the United States Courts to defer compliance with any requirement of this section with respect to the Supreme Court, a court of appeals, district, or the bankruptcy court of a district.

(ii) CONTENTS.—A notification submitted under this subparagraph shall state—

(I) the reasons for the deferral; and

(II) the online methods, if any, or any alternative methods, such court or district is using to provide greater public access to information.

(B) EXCEPTION.—To the extent that the Supreme Court, a court of appeals, district, or bankruptcy court of a district maintains a website under subsection (a), the Supreme Court or that court of appeals or district shall comply with subsection (b)(1).

(2) REPORT.—Not later than 1 year after the effective date of this title, and every year thereafter, the Judicial Conference of the United States shall submit a report to the Committees on Governmental Affairs and the Judiciary of the Senate and the Committees on Government Reform and the Judiciary of the House of Representatives that— Deadline.

(A) contains all notifications submitted to the Administrative Office of the United States Courts under this subsection; and

(B) summarizes and evaluates all notifications.

Agenda Item ___
_____ Committee

SUBJECT: Program-Based Planning and Budgeting (Information)

The long-range planning meeting of the Judicial Conference committee chairs was held on September 22, 2003. A copy of the meeting report is attached. The primary focus of the meeting was to discuss the judiciary's future budget outlook and the concept of program-based planning and budgeting. Chief Judge John G. Heyburn II, chair of the Budget Committee, explained that the judiciary submits its budget to Congress in terms of the needs of the judiciary's primary programs, which are the appellate courts, district courts, bankruptcy courts, probation and pretrial services, defender services, and court security. The budget request submitted to the Budget Committee and approved by the Judicial Conference, however, is not developed along these primary program areas. Instead, requests for staffing, technology, space, and other needs are submitted by the Judicial Conference committees with policy-recommending responsibilities for these areas. The overall needs of each court program are not combined and viewed as a whole in order to determine what is best for each court program's unique needs.

This budgeting process has worked relatively well in the past, but it could become more difficult as resources become more scarce. Identifying the specific needs and priorities for the appellate courts, district courts, bankruptcy courts, probation and pretrial services, defender services and court security programs may improve the ability to assess trade-off options in the context of each court program's unique circumstances. The resulting requirements would then be reflected in the annual budget requests.

At the long-range planning meeting, all committee chairs and representatives agreed that the concept of program-based planning and budgeting was worth further consideration and discussion.

Attachment: Report of the September 22, 2003 Long-Range Planning Meeting

Judicial Conference Committee Chairs Long-Range Planning Meeting

September 22, 2003

Report

Administrative Office of the United States Courts
Office of Management, Planning and Assessment

SUMMARY REPORT
SEPTEMBER 2003 LONG-RANGE PLANNING MEETING

The September 22, 2003 long-range planning meeting was held in Washington, D.C. It was facilitated by Judge D. Brock Hornby, planning coordinator for the Judicial Conference's Executive Committee. The meeting was attended by Chief Judge Carolyn Dineen King, chair of the Executive Committee, chairs or representatives of 13 Judicial Conference committees, and several additional members of the Executive Committee. Also in attendance were: Administrative Office Associate Director Clarence A. Lee, Jr.; Deputy Associate Director Cathy A. McCarthy and Long-Range Planning Officer William M. Lucianovic, who provide principal staff support for the long-range planning process; and other Administrative Office staff. A list of all participants is included as Appendix A.

Program-Based Planning and Budgeting

Chief Judge John G. Heyburn II, chair of the Committee on the Budget, explained that the judiciary presents its budget to Congress in terms of the needs of the judiciary's primary programs: appellate courts, district courts, bankruptcy courts, probation and pretrial services, defender services, and court security. He pointed out that the budget, however, is not developed along these major program lines. Instead, requests for staffing, technology, space, and other needs are submitted by Judicial Conference committees with responsibility for these areas. Insufficient attention is paid the total needs for court programs. The process has worked pretty well in the past because funding levels were sufficient to meet critical needs. Judge Heyburn commented that while the budget process always involves trade-off decisions, these decisions become more difficult and more important as funding gets tighter. When the Budget Committee works with the other committees to make trade-off decisions in order to construct a final budget request for Judicial Conference consideration, information about how these decisions will impact the operation of court programs sometimes is lacking or is incomplete.

The committee chairs considered the potential merits of adopting a program-based approach to planning and budgeting. A paper on the concept is included as Appendix B. A programmatic approach to planning and budgeting would involve the compilation of all resource requirements for each program as a whole. These needs would then be considered in light of the unique needs and circumstances of each particular program. Viewed in terms of a program's objectives and priorities, decisions would be made about where to invest more resources and where to cut back, if necessary. Program-based

planning and budgeting for the district courts, for example, would consider all resource needs for Article III and magistrate judges, chambers and court staff, information technology operations and new projects, space, lawbooks, training, and other operating expenses. Currently, these resource needs are mostly identified through separate efforts.

Judge Heyburn suggested that a program-based approach could provide information about the interaction of resources within a program, for example, the impact of additional staff or information technology on space needs and rental costs. Judge Jane R. Roth, chair of the Committee on Security and Facilities, mentioned a number of space-related issues that involve other committees – all of which have cost implications.

There was general agreement that the concept has merit, although there are many implementation issues to consider. Some committee chairs suggested that better communication among committees and a coordination mechanism might be needed to ensure better integration of multiple committees' plans and resource requests for each program area. Others noted that increased coordination would be beneficial, but it would be difficult for each individual committee to have a full perspective of all program objectives and resource needs. The long-range planning meeting of committee chairs helps in this regard, but in the end it has fallen to the Budget Committee to ask key questions in order to identify trade-off opportunities.

Chief Judge John W. Lungstrum, chair of the Committee on Court Administration and Case Management, observed that providing for more coordination and collaboration might be the best approach for the short term, while further consideration is given to figuring out how to build the budget from the start in a manner that allows for more of a program-based approach.

It was suggested that the committees' planning efforts could stay ahead of the budgeting process so that objectives and priorities can be discussed in advance of the development of the budget. Each committee could develop plans for its area of jurisdiction broken out by program, including cost estimates for achieving these plans. These plans and estimates would be shared among the committees, which would look for connections and possible interactions among the planned events and initiatives. Such an approach could include a multi-year perspective on a program's goals and initiatives, and the estimated costs. Judge Marjorie O. Rendell, incoming chair of the Committee on the Administration of the Bankruptcy System, added that the two processes lend themselves to different approaches, with planning being more collaborative and input-based, and budgeting more of an executive function.

Chief Judge Carolyn D. King, chair of the Executive Committee, discussed the difficulties of developing the judiciary's financial plan when there is a large gap between what is requested from Congress in the budget and what is appropriated. She said the Executive Committee is not well-equipped to identify the trade-offs and areas for adjustment that will do the least harm to the judiciary's programs. She suggested that during the development of the budget request, the committees could try to identify options under different potential funding scenarios.

Chief Judge John M. Walker, Jr. described his perspective as someone who served on the Budget Committee for nine years and now serves on the Executive Committee. In developing the budget request, the Budget Committee benefits from a process that provides for thoughtful deliberation and a great deal of input from Judicial Conference committees. He also noted that more programmatic thinking is needed in the development of the financial plan.

All participants agreed that the concept of program-based planning and budgeting is worth exploring further. The chairs determined to discuss this subject at their upcoming meetings and provide feedback to the planning coordinator and Budget Committee.

Recent Committee Planning Efforts

Security and Facilities Committee

Judge Roth reported that in July 2003 the Committee on Security and Facilities conducted a two-and-one-half day planning meeting facilitated by Judge Joseph F. Bataillon (NE), a member of the committee. Judge Roth observed that having a judge facilitate the session who is knowledgeable about committee matters and possible initiatives was preferable to an outside facilitator. The first two mornings provided stakeholder perspectives, with the afternoons reserved for committee-only discussions on the topics presented by the stakeholders. On the first morning, the committee considered security issues and heard from representatives of the U.S. Marshals Service and the Federal Protective Service, and a private-sector expert in chemical and biological hazards. On the second morning, representatives from the General Services Administration and the U.S. Postal Service, an architect, a general contractor, two district clerks and a circuit executive provided their perspectives on space-related issues. On the third morning, the committee identified a tentative set of strategic issues, goals, and action plans in five major areas for further consideration by the committee at its December 2003 meeting. They are:

1. Planning sufficient resources and maintaining an effective security program for the federal courts with an emphasis on unity of command.

2. Enhancing emergency preparedness tools and guidelines for use by the federal courts.

3. Continuing to pursue a new courthouse construction program.

4. Strengthening the cooperative relationship with the General Services Administration.

5. Assessing emerging technology as it relates to security and facilities of the federal courts.

Information Technology Committee

Judge Catherine D. Perry, representing the Committee on Information Technology, reported that since establishing what is now the Judiciary Information Technology Fund in 1991, Congress has required a five-year automation plan for the judiciary with annual updates (28 USC §612). Based on recommendations from its Strategic Issues Subcommittee, the committee prioritizes current projects and develops the annual updates which are submitted to the Judicial Conference for approval before they are sent to Congress. In addition to its regular planning activities related to the annual updates to the *Long-Range Plan for Information Technology*, the committee has undertaken a number of efforts related to planning, for example a study of the roles and responsibilities of information technology staff in the courts; a study of information technology investment costs; and the refinement of information technology architecture standards and variations across the judiciary. The committee's Strategic Issues Subcommittee is also looking specifically at how technology can help judges do their work.

Defender Services Committee

Judge Patti B. Saris, chair of the Committee on Defender Services, reported that the committee has been engaged in long-range strategic planning since 1995. After initial skepticism, the committee became convinced that the strategic planning process is vital to the success of the defender services program. In May 2000, the committee endorsed a performance-based strategic planning process.

There are many groups involved in the strategic planning process: the committee, its subcommittees, the Defender Services Division, and several advisory and performance

measurement working groups. The Long-Range Planning and Budgeting Subcommittee receives regular input from federal defenders and panel attorneys, and meets twice each year. The goals defined through this process guide program activities. They are:

1. Timely provide assigned counsel services to all eligible persons.

2. Timely provide assigned counsel services that are consistent with the best practices of the legal profession.

3. Provide cost-effective services, limiting increases in costs to those due to inflation and those necessary to respond to changes in prosecutorial, judicial, or law enforcement practices.

4. Protect the independence of the defense function performed by assigned counsel so that the rights of individual defendants are safeguarded and enforced.

As part of the planning process, the committee has been interested in further developing performance measures and best practices. The committee has considered quantitative measures of the quality of representation provided under the Criminal Justice Act, such as when and how often attorneys visit with clients. The committee is now focusing on developing objective criteria for qualitative measures that are observable by judges, to include in surveys in FY 2004.

Proposals for Controlling the Future Cost of Rent

Judge Roth stated that rent is 20 percent of the judiciary's budget, and many committees tend not to think about space costs as a consequence of their programmatic decisions. The committee is trying to sensitize other committees to look at space costs in a new light – as a consequence of their actions. At its last meeting, the committee identified some options for reducing the future cost of rent that it will forward for consideration by other committees. These include:

- Restrict space planned for headquarters and satellite libraries.

- Reconfigure space in headquarters and satellite libraries to house staff instead of acquiring new space for that staff.

- Reevaluate the space standards for clerks' offices, e.g., filing space requirements, in light of the Case Management/Electronic Case Files (CM/ECF) initiative.

- House probation and pretrial services offices in leased space where the rent is less expensive.

- Limit the size of public space (atriums, lobbies) in new courthouses.

- Develop a policy on courtrooms for recalled bankruptcy judges and magistrate judges.

- Ensure that the circuit executive provides the full range of available housing options and their cost implications to the circuit judicial council before it decides upon a space request from a court or court unit.

- When considering a request for a new magistrate judge position or conversion of a part-time position to full-time status, provide information on the space implications and related costs of the position under consideration as part of the justification to the court and the circuit judicial council and also to the Judicial Conference.

The Security and Facilities Committee is interested in receiving feedback from other committees about how program decisions can have an impact on rent costs.

Update on Trends in Trials and Juror Utilization

Judge Lungstrum provided an update on trends relating to jury trials and juror utilization. He reported that the total number of trials has remained about the same, while the number of jury trials has increased slightly – 2 percent during the 12-month period ending June 30, 2003. This slight increase in the overall number of jury trials reverses a trend of declining jury trials since 1997.

Among jury trials, the number of civil jury trials declined by 4 percent while the number of criminal jury trials increased 7 percent. The increase in the number of criminal jury trials reverses the steady decline in the number of criminal jury trials since the mid-1990s.

At the same time, the number of jurors not selected, serving or challenged has grown from 34 percent in 1998 to 39.6 percent in 2003. The Committee on Court Administration and Case Management will discuss this trend at its December meeting and consider whether to reinstate a report that ranked districts by their juror utilization rates.

Judge Lungstrum also reported that last October, the *ABA Journal* published an article discussing some of the implications of a drop in the number of trials. As a followup to the article, the Litigation Section of the ABA undertook a "Vanishing Trials" project to study what it called the "issues posed by the disappearance of trials from our courts." A group of nearly 20 legal scholars and researchers will participate in the project. A conference is planned for December 12-14, 2003 in San Francisco. Chief Judge Harold W. Albritton III (AL-M) and Judge Gladys Kessler (DC) will represent the CACM Committee at the conference. It is expected that other federal judges will be invited, along with representatives from the Administrative Office, the Federal Judicial Center, the National Center for State Courts, and the CPR Institute for Dispute Resolution. As this issue is explored, one of the primary concerns of the CACM Committee will be to ensure that statistics about the trends in trials and the work of judges are not misused or misinterpreted.

Appreciation for Executive Committee Planning Coordinator

Judge Hornby announced that since his term on the Executive Committee would be expiring on September 30, a new planning coordinator will convene the next meeting. Led by Judge Lungstrum, the group expressed its appreciation to Judge Hornby for his insights and leadership in coordinating the planning process for the past year.

Next Long-Range Planning Meeting

The next committee chairs' long-range planning meeting is scheduled for March 15, 2004.

Appendix A: Participants in the September 2003 Long-Range Planning Meeting

Committee Representatives	**Administrative Office Staff**
Planning Coordinator, Executive Committee	
Hon. D. Brock Hornby	Clarence A. Lee, Jr. Cathy A. McCarthy William M. Lucianovic Brian Lynch
Executive Committee	
Hon. Carolyn Dineen King Hon. Gregory W. Carman Hon. Joel M. Flaum Hon. John M. Walker, Jr.	Helen G. Bornstein
Committee on the Administrative Office	
Hon. Lourdes G. Baird, Chair	Cathy A. McCarthy
Committee on the Administration of the Bankruptcy System	
Hon. Marjorie O. Rendell	Francis F. Szczebak Kevin Gallagher
Committee on the Budget	
Hon. John G. Heyburn II, Chair Hon. Robert C. Broomfield	George H. Schafer Gregory D. Cummings Bruce E. Johnson Penny Jacobs Fleming James R. Baugher
Committee on Court Administration and Case Management	
Hon. John W. Lungstrum, Chair	Noel J. Augustyn Abel J. Mattos Mark S. Miskovsky
Committee on Criminal Law	
Hon. Sim Lake, Chair	John M. Hughes Kim M. Whatley

Committee on Defender Services Hon. Patti B. Saris, Chair	Noel J. Augustyn Theodore J. Lidz Steven G. Asin Carole Cheatham
Committee on Federal-State Jurisdiction Hon. Frederick P. Stamp, Jr., Chair	Karen M. Kremer
Committee on Information Technology Hon. Catherine D. Perry	Melvin J. Bryson Terry A. Cain Michel Ishakian
Committee on Intercircuit Assignments Hon. Royce C. Lamberth	Ellyn L. Vail
Committee on Judicial Resources Hon. Dennis Jacobs, Chair	Charlotte G. Peddicord H. Allen Brown Beverly Bone
Committee on the Administration of the Magistrate Judges System Hon. Harvey E. Schlesinger, Chair	Thomas C. Hnatowski Charles E. Six
Committee on Rules of Practice and Procedure Hon. Lee H. Rosenthal	Peter G. McCabe
Committee on Security and Facilities Hon. Jane R. Roth, Chair	Ross Eisenman Linda Holz

Other Administrative Office staff in attendance:

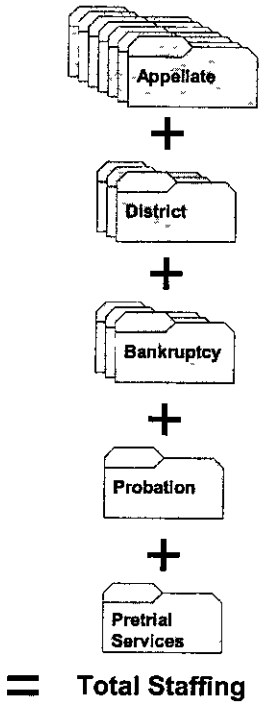
Robert Lowney	Tara Treacy
Peggy Irving	Nancy Miller
Leeann R. Yufanyi	Robert P. Deyling
Jeffrey A. Hennemuth	

Appendix B: Paper on Program-Based Planning and Budgeting

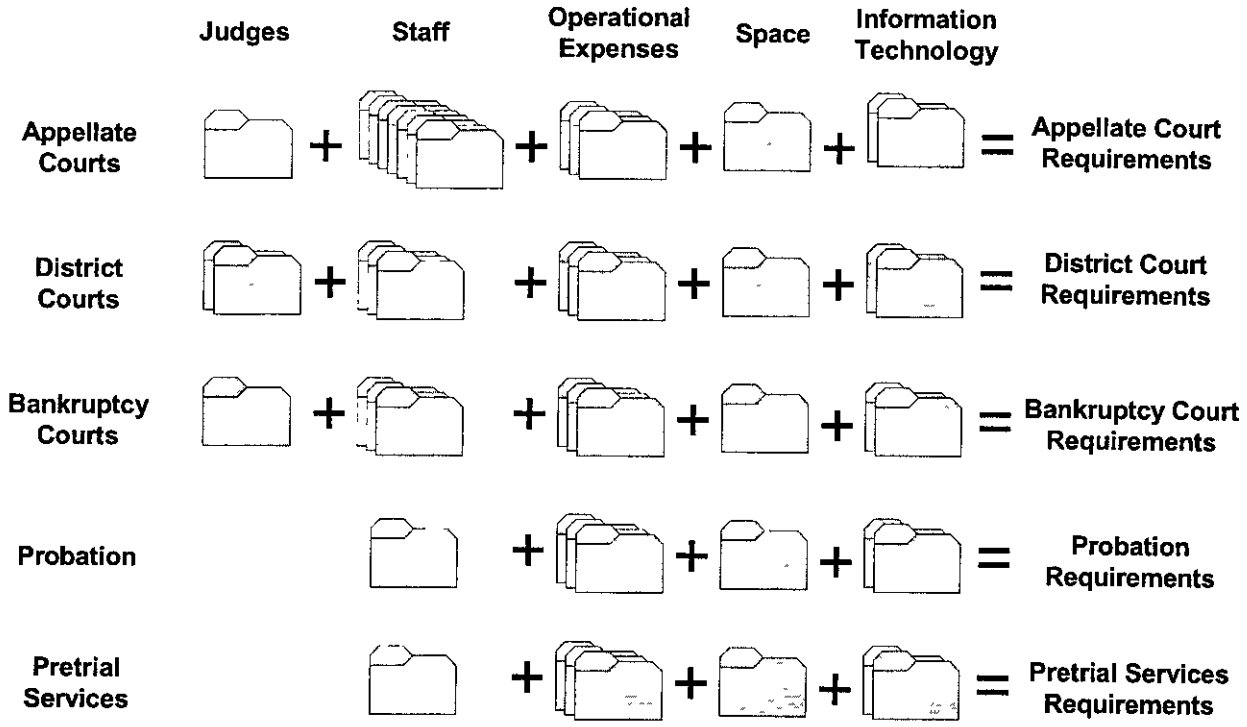
Program-Based Planning and Budgeting

The practice of planning and organizing budgets to show the total costs associated with specific programs is now standard practice for most government organizations. Because budgeting involves a series of choices and tradeoffs about scarce resources, these decisions can be easier to make if the entire portfolio of resource needs is viewed comprehensively in the context of each program's unique goals and objectives. Also, reviewing resource needs in the context of an entire program allows decision-makers to consider how resources such as people, technology, and facilities interact with one another and impact program goals.

The judiciary's budget request presented to Congress is already organized by program. The judiciary presents its request for each of its programs: appellate courts, district courts, bankruptcy courts, probation, pretrial services, defender services, and court security. The defender services and court security budgets are each developed by a single committee. However, the judiciary's current approach to planning and budgeting emphasizes separate planning efforts for staffing, technology, space and other spending areas. Judicial Conference committees plan and formulate budget requests for particular expenses using formulas or other well-founded estimates for categories of spending, such as for salaries, information technology, and space, and present them to the Budget Committee. In some, but not all instances, formulas and estimates exist for each individual judiciary program. For example, the judiciary's staffing requirements are determined by various program-specific staffing formulas:



The Budget Committee reviews and analyzes these discrete items. Only after committees have submitted their segments is the budget organized by program to display the full needs of the appellate courts, district courts, bankruptcy courts, probation, and pretrial services for presentation to Congress.



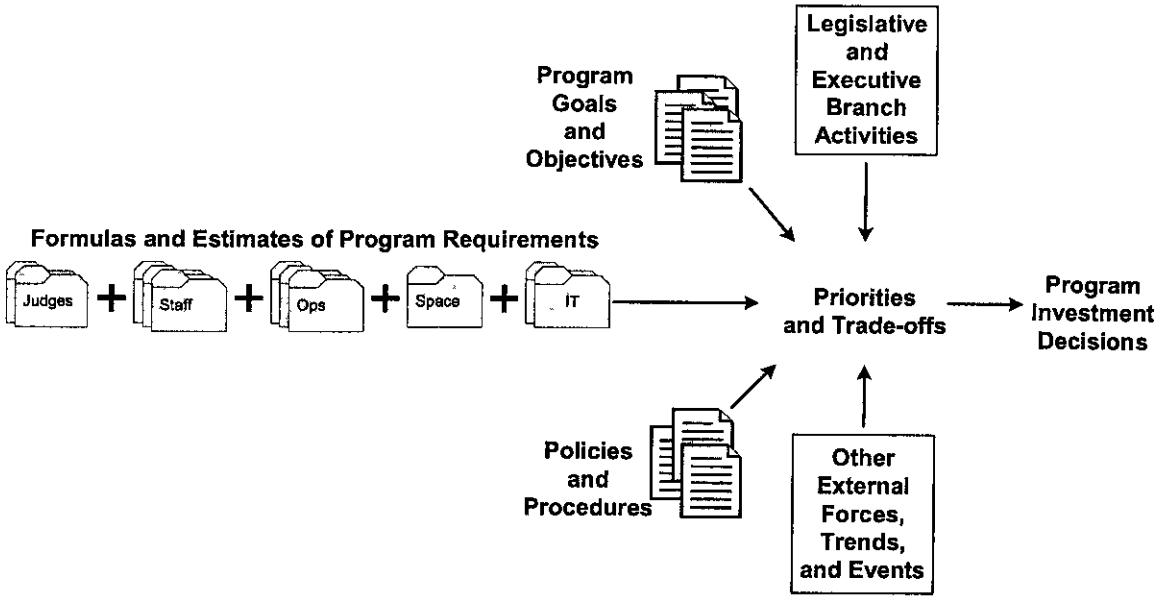
What is program-based planning and budgeting?

Program-based planning and budgeting is an approach in which an entire program is considered as the basis for long-range planning and the formulation of budget requests. This concept has many variations and titles in the public and private sectors, but in each case the focus is on a program, its purpose or mission, and its goals. All of the resources or inputs related to each program are identified. For example, instead of showing a single IT budget for an entire agency, program-related IT costs would be shown as a part of the budget for each of the agency's specific programs.

The idea that budgets should be formulated in a way that allows decision-makers to focus on the purposes and results of government initiatives, in conjunction with their needs, is not new. Among the arguments made in the early 20th century for a unified federal budget was that it would allow for the allocation of resources in order to obtain program results. In practice, different forms of program-based planning and budgeting were developed and implemented

during the second half of the 20th century. Today, most federal and state government organizations conduct budget formulation and execution by program, at least in part.

The movement toward program-based planning and budgeting is a natural extension of the view that expenditure categories such as providing technology or hiring new staff are not ends in themselves, but are essential components to achieve a program's business objectives. Thus, both government and private sector organizations have found that decisions about whether and how much to invest in information technology, facilities, people, or other expenditure items, are more effective if made in the context of relative value with other business decisions; in light of the connections and interdependencies between technology, staffing, operations and space; and from a strategic perspective of the longer-term benefits of today's investment decisions.



Would the judiciary's planning and budgeting processes benefit from a greater focus on total program needs and costs?

Organizing the judiciary's budget information by program at an earlier stage could allow review and analysis of all resource requirements for each program. For example, resource requirements for information technology projects within an individual program could be considered in conjunction with the entire range of resource requirements for that program, and with investment trade-off recommendations made based on the particular needs of each court program. The impact of not funding certain projects on program operations could also be identified. Having programs responsible for defining IT needs in their areas was a key recommendation of an independent study of the judiciary's information technology program.

The topic of program-based planning and budgeting will be discussed at the long-range planning meeting of Judicial Conference committee chairs on September 22, 2003.