

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

RECEIVED
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June 2, 1995

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CRIMINAL RULES

RALPH K. WINTER, JR.
EVIDENCE RULES

TO: Committee on Rules of Practice
and Procedure (Standing Committee)

Dear Colleagues:

The Advisory Committee brings four items requiring action of the Standing Committee. Please refer to the relevant portions of the Minutes of the Advisory Committee meeting for greater detail regarding each item. The first is a recommendation for transmission to the Judicial Conference. The other three are recommendations of rules to be published for comment.

Rule 5(e) (see Minutes pp.6-8)

We recommend forwarding to the Judicial Conference the attached proposed changes to 5(e) with committee note. A draft amendment of Rule 5(e) was published for comment on September 1, 1994. The Committee agreed to the changes to the published draft at its October 1994 and April 1995 meetings and those changes are reflected in the draft now before you.

Rule 26(c) (see Minutes pp. 9-10)

We recommend for publication proposed changes to Rule 26(c). The Judicial Conference at its March 1995 meeting returned to the Standing Committee for further consideration the amendments to Rule 26 recommended by the rules committees. Judge Stotler referred the matter to the Advisory Committee, which considered the rule and the conference action at its meeting in New York in April. The Advisory Committee decided to request that the Standing Committee publish for comment the proposed amended rule as submitted to the Judicial Conference.

The Judicial Conference voted to delete the words "on stipulation of the parties" from the rule and later voted to return the proposal for further consideration, but did not formally disclose its reasons. Press accounts and statements of Conference members expressed concern that the proposed rule would change existing practice by allowing entry of protective orders without a

showing of good cause; that it would tie the hands of trial judges reluctant to accept agreed orders. Several special interest groups launched a campaign with the Conference over the weekend before its meeting, supported by an editorial comment in the New York Times' Saturday edition. These groups criticized the decision not to submit the proposal for a second round of public comment given the addition after the first comment period of the "on stipulation" language. Several members of the Conference also expressed a similar concern. Apparently other provisions in the proposal, including the explicit provision for intervention by non-parties, were not discussed.

The amended rule recommended by the Advisory Committee and returned by the Judicial Conference was a delicate balance of privacy and public interest specifically, and the private and public character of civil litigation in general. The Advisory Committee was persuaded that the rule should contain an explicit statement that the proposed changes in Rule 26 were not intended to end the practical and significant role of agreed orders as a necessary balance to the provisions for intervention and expansion of the definition of the public interest. The explicit statement in the rule did not inhibit any judge from insisting upon a showing of good cause beyond the stipulation. In the Advisory Committee's view, it is not the case that the language would change present practice. Indeed, the Manual for Complex Litigation has recognized use of agreed protective orders for years.

Deleting the language regarding stipulations creates a record lending support to an argument that the rule would now require a trial judge to conduct a hearing to determine the "public interest" despite the fact that no litigant before the court wishes to contest the matter. This role of judicial ombudsman would be required by the bill introduced by Senator Kohl, legislation the Advisory Committee has not supported. The Advisory Committee was originally persuaded that clearly stated generous rights of intervention would achieve the desired goal of identifying protective orders that are not in the public interest with the benefit of adversary development of the issues. Relatedly, the Advisory Committee was persuaded that this broad gauged hostility toward protective orders fails to grasp their range of use and instead focuses on product liability claims. The reality, based on empirical study of the Federal Judicial Center conducted at the request of the Advisory Committee, is that protective orders are entered in civil rights cases over products cases by a two to one margin. This is not to quarrel with the action of the Judicial Conference. It is rather to explain, with all deference, why the Advisory Committee saw the proposed rule language as a closely laced and interrelated set of interest reconciliations.

The Advisory Committee accepts with due deference the decision by the Judicial Conference to delete the language regarding stipulations. Whatever its purpose, and regardless of its wisdom, the Conference's decision undid the compromise of the Advisory Committee, and the Committee is not prepared to recommend adoption of Rule 26 in the form returned to it by the Judicial Conference. At the same time, because an asserted absence of an opportunity for public comment regarding the stipulation language was at least one of the substantial concerns expressed by the Judicial Conference, we are also persuaded that the best course is to provide for this public comment. First, this is the only direct cure for this concern. Second, to fully meet the Conference request to consider the rule again, we did not want to end the effort to improve Rule 26 without full exploration of other ways to achieve a balanced and nuanced response to the problems of protective orders.

I explained the recommendation of the Advisory Committee in a recent letter to Chief Judge Merritt, Chair of the Executive Committee of the Judicial Conference. A copy is attached.

Rule 9(h) (see Minutes pp. 8 & 9)

We recommend for publication revised 9(h) with committee note attached.

Rule 47(a) (see Minutes pp. 10-16)

We recommend for publication the draft of 47(a) with committee note. We discussed this rule change at the last meeting of the Standing Committee. The discussion was limited, however, by time constraints and the decision that any change in the civil rule should proceed in tandem with any proposed change in the criminal rules, a decision I supported. The proposed rule also contains changes made by the Advisory Committee at its April 1995 meeting.

Despite the fact that a majority of the district judges in the United States follow a practice the proposed rule would require, it is opposed by many district judges. There are two words of caution about both the measure of opposition by judges and its present relevance. Much of the correspondence directed to me was solicited by a few judges opposed to any change in the rules. Many of these early letters expressed opposition despite the fact that the judges did not know what was proposed. At the same time, many judges expressed thoughtful and considered views in opposition to the rule. While it seems plain that many judges oppose any change, the majority have not been heard from.

The second caution is that in conscientious efforts to solicit the views of judges, we have given many judges an opportunity to comment before publication, an opportunity not given to the bar and academic community. The criticism of the adequacy of voir dire now being conducted in civil cases from the lawyer members of the Advisory Committee, including representatives of the American College of Trial Lawyers and the Litigation Section of the American Bar Association, was direct and strong. The decision whether to publish for comment should consider this possible unfairness in access to the system, an inequality in access that none of us intended.

Both the Civil and Criminal Rules Committees by overwhelming votes have concluded that the recommended change is required in the interest of justice. Publication will allow full opportunity to hear the range of views. For example, some of the judges expressed a preference for questionnaires over oral interrogation of venirepersons. Others expressed concern over the extensive probing in many questionnaires. The comment period will allow exploration of these issues. In short, the Advisory Committee does not see publication as an event that might polarize the bench and bar. To the contrary, the Advisory Committee views vigorous debate as a productive and healthy process.

Information Items Rule 23

The Minutes describe the activity of the Advisory Committee over the past several months, and I will not repeat that description. Much of the Committee's energy has been directed toward Rule 23. The Advisory Committee participated in conferences held at the University of Pennsylvania, S.M.U., and N.Y.U. These conferences brought together judges, lawyers, and academics, all students of class actions and the current phenomenon of aggregation. Our regimen for this look at Rule 23 began with "in-house" presentations of experts followed by the three conferences. It now moves to the decision phase.

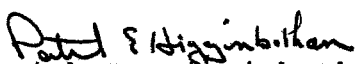
We have listened to an array of ideas, many intriguing. We are winnowing the numerous suggested reforms. Our narrowing process is now underway and will be completed this summer. I am attaching as an information item a questionnaire directed to members of the Advisory Committee. Surviving ideas will be translated into rule language in the early fall and considered at the Fall Meeting of the Advisory Committee. Possibilities range from the recommendation of no change, to large and significant changes. Some ideas have persisted throughout these discussions, including incorporating some look at the merits of a claim as an

element of class certification. This might be something like the requirement of a likelihood of success on the merits for a preliminary injunction. A second persistent idea is that there should be a right to appellate review of the class certification decision. Two large questions continue to overarch the myriad ideas for change: whether to make separate provision for settlement classes, and whether to respond directly to the large mass tort classes. We continue to work and, as always, welcome your ideas.

Congress

The Committee has also spent considerable time monitoring federal legislation. This has taken many forms and I will not attempt to describe them beyond the explanation that we have informally responded to Congressional staff as well as members of Congress. One example of our work warrants specific mention. I asked Tony Scirica to chair a subcommittee with Tom Rowe, David Doty, and Roger Vinson, charged to monitor Congressional efforts to address class actions in the securities field. Their work has been largely with the SEC and the Senate Committee on Banking, Housing, and Urban Affairs. For example, Ed Cooper, Tom Rowe, Tony Scirica, Phillip Wittmann, the always present John Rabiej, and I recently spent several hours with senior staffers of its majority and minority members reviewing the Committee's proposed legislation. We continue to respond to inquiries as the legislative progress of this Congress and its impact on the civil rules unfolds.

Sincerely yours,


Patrick E. Higginbotham

United States Court of Appeals
for the Fifth Circuit

April 27, 1995

PATRICK E. HIGGINBOTHAM
CIRCUIT JUDGE

UNITED STATES COURTHOUSE
1100 COMMERCE STREET
DALLAS, TEXAS 75242

Honorable Gilbert S. Merritt, Chair
Executive Committee
Judicial Conference of the United States
Washington, D.C. 20544

Re: Fed. R. Civ. 26(c)

Dear Chief Judge Merritt:

At its April 20, 1995 meeting, the Advisory Committee on Civil Rules voted unanimously to republish the proposed amendments to Rule 26(c) of the Federal Rules of Civil Procedure (Protective Orders) as they were submitted to the Judicial Conference in March. The recommendation will be transmitted to the Standing Rules Committee for consideration at its July 5-7, 1995 meeting. The proposed amendments will be published for public comment in early Fall 1995 if the Standing Committee approves our recommendation.

We hope that an additional comment period will enhance understanding of the use of protective orders, particularly in light of the concerns expressed by some members of the Judicial Conference. We accept, respectfully, the judgment of the conference, although both the Advisory Committee and Standing Committee were unanimously of a different view.

Our view is undoubtedly influenced by the manner in which we conduct our business. We reach for the views of the bench and bar and academic community. Representatives of the American College of Trial Lawyers and the Litigation Section of the American Bar Association participate in our meetings as they did in our decisions regarding Rule 26. Free and open discussion, sometimes robust and illuminating and sometimes otherwise, has been the hallmark of our work. In this spirit we are persuaded that the appropriate response to concern over a lack of opportunity for public comment is to provide that opportunity.

Please do not hesitate to call me for any additional information.

Sincerely yours,

Patrick E. Higginbotham
United States Court of Appeals

cc: Honorable Alicemarie H. Stotler

Rule 5. Service and Filing of Pleadings and Other Papers

* * *

1 (e) Filing with the Court Defined. The filing of papers with the
2 court as required by these rules shall be made by filing them
3 with the clerk of court, except that the judge may permit the
4 papers to be filed with the judge, in which event the judge
5 shall note thereon the filing date and forthwith transmit them
6 to the office of the clerk. A court may, by local rule,
7 permit papers to be filed, signed, or verified by ~~facsimile or~~
8 ~~other~~ electronic means, ~~if such means are authorized by and~~
9 ~~which must be consistent with any technical standards~~
10 ~~established by that~~ the Judicial Conference of the United
11 States may establish. [An electronic filing under a local
12 rule has the same effect as a written filing.] The clerk
13 shall not refuse to accept for filing any paper presented for
14 that purpose solely because it is not presented in proper form
15 as required by these rules or any local rules or practices.

16 COMMITTEE NOTE

17 The present Rule 5(e) has authorized filing by facsimile or
18 other electronic means on two conditions. The filing must be
19 authorized by local rule. Use of this means of filing must be
20 authorized by the Judicial Conference of the United States and must
21 be consistent with standards established by the Judicial
22 Conference. Attempts to develop Judicial Conference standards have
23 demonstrated the value of several adjustments in the rule.

24 The most significant change discards the requirement that the
25 Judicial Conference authorize local electronic filing rules. As
26 before, each district may decide for itself whether it has the
27 equipment and personnel required to establish electronic filing,
28 but a district that wishes to establish electronic filing need no
29 longer await Judicial Conference action.

30 The role of Judicial Conference standards is clarified by
31 specifying that the standards are to govern technical matters.
32 Technical standards can provide nationwide uniformity, enabling
33 ready use of electronic filing without pausing to adjust for the
34 otherwise inevitable variations among local rules. Judicial
35 Conference adoption of technical standards should prove superior to
36 specification in these rules. Electronic technology has advanced
37 with great speed. The process of adopting Judicial Conference
38 standards should prove speedier and more flexible in determining
39 the time for the first uniform standards, in adjusting standards at
40 appropriate intervals, and in sparing the Supreme Court and

41 Congress the need to consider technological details. Until
42 Judicial Conference standards are adopted, however, uniformity will
43 occur only to the extent that local rules deliberately seek to copy
44 other local rules.

45 It is anticipated that Judicial Conference standards will
46 govern such technical specifications as data formatting, speed of
47 transmission, means to transmit copies of supporting documents, and
48 security of communication. Perhaps more important, standards must
49 be established to assure proper maintenance and integrity of the
50 record and to provide appropriate access and retrieval mechanisms.
51 Local rules must address these issues until Judicial Conference
52 standards are adopted.

53 The amended rule also makes clear the equality of filing by
54 electronic means with written filings. An electronic filing that
55 satisfies the local rule satisfies all requirements for filing on
56 paper, signature, or verification. An electronic filing that
57 otherwise satisfies the requirements of 28 U.S.C. § 1746 need not
58 be separately made in writing. Public access to electronic filings
59 is governed by the same rules as govern written filings.

60 The separate reference to filing by facsimile transmission is
61 deleted. Facsimile transmission continues to be included as an
62 electronic means.

Rule 5(e)

A draft amendment of Rule 5(e) was published for comment on September 1, 1994. The Committee agreed on changes to the published draft at the October, 1994 meeting, as described in the minutes for that meeting.

Discussion began by observing that a change should be made in the third sentence of the first paragraph of the published Committee Note. The statement that "the local rule" must be authorized by the Judicial Conference is a misleading summary of the present rule. The Note should say instead that "Use of this means of filing" must be authorized by the Judicial Conference. The reference to "three conditions" also will be changed to "two conditions" rather than worry overmuch about the number of conditions that must be met to permit electronic filing under present Rule 5(e).

Comments on the published draft by the Association of the Bar of the City of New York led to discussion of the availability to the public of papers filed by electronic means. The Committee recognized two quite distinct issues. One issue is whether the right of public access is in any way affected by electronic filing. The Committee agreed clearly and emphatically that electronic filing does not in any way affect the right of public access. This answer is so plain that there is no need to provide any statement in the text of the rule, just as the rules have not had to spell out the right of public access to documents initially filed in tangible form. The other issue is the means of accomplishing actual exercise of the right of public access, recognizing that the public includes people without computer skills and that simply providing a public terminal in the clerk's office will not respond to all needs. It was concluded that this problem is one that should be addressed by a combination of the Judicial Conference standards process and by local rules. The means of access issue is obviously tied to the technical standards for filing, and is as obviously tied to such provisions as local rules

may make for requiring supplemental filings in tangible form.

The Committee was advised that the Administrative Office will attempt to help the Judicial Conference and its committees to draft technical standards quickly. Although it is clear that the amendments would authorize local rules that permit electronic filing before Judicial Conference Standards are adopted, it is possible that the standards will be available soon after the amended Rule 5(e) could take effect, and possibly even by the effective date.

There was renewed discussion of the October decision to delete from the published draft the sentence stating: "An electronic filing under this rule has the same effect as a written filing." The version published by the Appellate Rules Committee provides: "A paper filed by electronic means in accordance with this rule constitutes a written paper for the purpose of applying these rules." Concern was expressed that the reference to "this rule" might invalidate filings authorized by local rule, even though filing in compliance with a valid local rule would seem to be authorized by the rule. It was suggested that it would be better to refer to a filing "in accordance with," or "under," a local rule. The belief that the entire sentence is unnecessary was again expressed, in light of the fundamental authorization to file, sign, or verify documents by electronic means. The conclusion of this discussion was that the Chair and Reporter were authorized to coordinate language under the auspices of the Standing Committee to achieve uniform provisions in the Appellate, Bankruptcy, and Civil Rules.

It was agreed that the final two sentences of the published Committee Note should be deleted. These sentences disparaged filing by facsimile means, an enterprise that may be unnecessary if it is right that routine facsimile filing will prove attractive to few courts, but may prove wrong if facsimile filing proves more attractive to many courts than more advanced means of electronic filing.

The suggestion was made by the Eastern District of Pennsylvania, through the court clerk, several judges, and many lawyers, that Rule 5(b) should be amended to permit service by electronic means. The Committee has considered this question recently. Discussion confirmed the earlier conclusion: it seems better to await developing experience with electronic filing before pursuing the potentially more difficult problems that may surround electronic service.

The Eastern District of Pennsylvania also suggested that Rule 77(d) should be amended to permit a court clerk to effect service by electronic means. Although this question has not been considered by the Committee, and seems to pose fewer potential problems than electronic service among the parties, the conclusion

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was the same. Greater experience is needed before it will be time to move in this direction.

Rule 9. Pleading Special Matters

* * *

1 (h) Admiralty and Maritime Claims. A pleading or count setting
2 forth a claim for relief within the admiralty and maritime
3 jurisdiction that is also within the jurisdiction of the
4 district court on some other ground may contain a statement
5 identifying the claim as an admiralty or maritime claim for
6 the purposes of Rules 14(c), 38(e), 82, and the Supplemental
7 Rules for Certain Admiralty and Maritime Claims. If the claim
8 is cognizable only in admiralty, it is an admiralty or
9 maritime claim for those purposes whether so identified or
10 not. The amendment of a pleading to add or withdraw an
11 identifying statement is governed by the principles of Rule
12 15. ~~The reference in Title 28, U.S.C. § 1292(a)(3), to~~
13 ~~admiralty cases shall be construed to mean admiralty and~~
14 ~~maritime claims within the meaning of this subdivision.~~ A
15 case that includes an admiralty or maritime claim within this
16 subdivision is an admiralty case within 28 U.S.C. §
17 1292(a)(3).

18 COMMITTEE NOTE

19 Section 1292(a)(3) of the Judicial Code provides for appeal
20 from "[i]nterlocutory decrees of * * * district courts * * *
21 determining the rights and liabilities of the parties to admiralty
22 cases in which appeals from final decrees are allowed."

23 Rule 9(h) was added in 1966 with the unification of civil and
24 admiralty procedure. Civil Rule 73(h) was amended at the same time
25 to provide that the § 1292(a)(3) reference "to admiralty cases
26 shall be construed to mean admiralty and maritime claims within the
27 meaning of Rule 9(h)." This provision was transferred to Rule 9(h)
28 when the Appellate Rules were adopted.

29 A single case can include both admiralty or maritime claims
30 and nonadmiralty claims or parties. This combination reveals an
31 ambiguity in the statement in present Rule 9(h) that an admiralty
32 "claim" is an admiralty "case." An order "determining the rights
33 and liabilities of the parties" within the meaning of § 1292(a)(3)
34 may resolve only a nonadmiralty claim, or may simultaneously
35 resolve interdependent admiralty and nonadmiralty claims. Can
36 appeal be taken as to the nonadmiralty matter, because it is part
37 of a case that includes an admiralty claim, or is appeal limited to
38 the admiralty claim?

39 The courts of appeals have not achieved full uniformity in

40 applying the § 1292(a)(3) requirement that an order "determin[e]
41 the rights and liabilities of the parties." It is common to assert
42 that the statute should be construed narrowly, under the general
43 policy that exceptions to the final judgment rule should be
44 construed narrowly. This policy would suggest that the ambiguity
45 should be resolved by limiting the interlocutory appeal right to
46 orders that determine the rights and liabilities of the parties to
47 an admiralty claim.

48 A broader view is chosen by this amendment for two reasons.
49 The statute applies to admiralty "cases," and may itself provide
50 for appeal from an order that disposes of a nonadmiralty claim that
51 is joined in a single case with an admiralty claim. Although a
52 rule of court may help to clarify and implement a statutory grant
53 of jurisdiction, the line is not always clear between permissible
54 implementation and impermissible withdrawal of jurisdiction. In
55 addition, so long as an order truly disposes of the rights and
56 liabilities of the parties within the meaning of § 1292(a)(3), it
57 may prove important to permit appeal as to the nonadmiralty claim.
58 Disposition of the nonadmiralty claim, for example, may make it
59 unnecessary to consider the admiralty claim and have the same
60 effect on the case and parties as disposition of the admiralty
61 claim. Or the admiralty and nonadmiralty claims may be
62 interdependent. An illustration is provided by *Roco Carriers, Ltd.*
63 *v. M/V Nurnberg Express*, 899 F.2d 1292 (2d Cir. 1990). Claims for
64 losses of ocean shipments were against two defendants, one subject
65 to admiralty jurisdiction and the other not. Summary judgment was
66 granted in favor of the admiralty defendant and against the
67 nonadmiralty defendant. The nonadmiralty defendant's appeal was
68 accepted, with the explanation that the determination of its
69 liability was "integrally linked with the determination of non-
70 liability" of the admiralty defendant, and that "section 1292(a)(3)
71 is not limited to admiralty claims; instead, it refers to admiralty
72 cases." 899 F.2d at 1297. The advantages of permitting appeal by
73 the nonadmiralty defendant would be particularly clear if the
74 plaintiff had appealed the summary judgment in favor of the
75 admiralty defendant.

76 It must be emphasized that this amendment does not rest on any
77 particular assumptions as to the meaning of the § 1292(a)(3)
78 provision that limits interlocutory appeal to orders that determine
79 the rights and liabilities of the parties. It simply reflects the
80 conclusion that so long as the case involves an admiralty claim and
81 an order otherwise meets statutory requirements, the opportunity to
82 appeal should not turn on the circumstance that the order does - or
83 does not - dispose of an admiralty claim. No attempt is made to
84 invoke the authority conferred by 28 U.S.C. § 1292(e) to provide by
85 rule for appeal of an interlocutory decision that is not otherwise
86 provided for by other subsections of § 1292.

1 Rule 47. Selecting Selection-of Jurors

2 (a) ~~Examination-of~~Examining Jurors. The court may must ~~permit-the~~
3 ~~parties-or-their-attorneys-to~~ conduct the examination of
4 prospective jurors ~~or-may-itself-conduct-the-examination.~~ The
5 court must permit the parties to examine the prospective
6 jurors to supplement the court's examination within reasonable
7 limits of time, manner, and subject matter determined by the
8 court in its discretion. ~~In-the-latter-event,-the-court-shall~~
9 ~~permit-the-parties-or-their-attorneys-to-supplement-the~~
10 ~~examination-by-such-further-inquiry-as-it-deems-proper-or~~
11 ~~shall-itself-submit-to-the-prospective-jurors-such-additional~~
12 ~~questions-of-the-parties-or-their-attorneys-as-it-deems~~
13 ~~proper.~~

14 Committee Note

15 Rule 47(a) in its original and present form permits the court
16 to exclude the parties from direct examination of prospective
17 jurors. Although a recent survey shows that a majority of district
18 judges permit party participation, the power to exclude is often
19 exercised. See *Shapard & Johnson, Survey Concerning Voir Dire*
20 (Federal Judicial Center 1994). Courts that exclude the parties
21 from direct examination express two concerns. One is that direct
22 participation by the parties extends the time required to select a
23 jury. The second is that counsel frequently seek to use voir dire
24 not as a means of securing an impartial jury but as the first stage
25 of adversary strategy, attempting to establish rapport with
26 prospective jurors and influence their views of the case.

27 The concerns that led many courts to undertake all direct
28 examination of prospective jurors have earned deference by long
29 tradition and widespread adherence. At the same time, the number
30 of federal judges that permit party participation has grown
31 considerably in recent years. The Federal Judicial Center survey
32 shows that the total time devoted to jury selection is virtually
33 the same regardless of the choice made in allocating responsibility
34 between court and counsel. It also shows that judges who permit
35 party participation have found little difficulty in controlling
36 potential misuses of voir dire. This experience demonstrates that
37 the problems that have been perceived in some state-court systems
38 of party participation can be avoided by making clear the
39 discretionary power of the district court to control the behavior
40 of the party or counsel. The ability to enable party participation
41 at low cost is of itself strong reason to permit party
42 participation. The parties are thoroughly familiar with the case

43 by the start of trial. They are in the best position to know the
44 juror information that bears on challenges for cause and peremptory
45 challenges, and to elicit it by jury questioning. In addition, the
46 opportunity to participate provides an appearance and reassurance
47 of fairness that has value in itself.

48 The strong direct case for permitting party participation is
49 further supported by the emergence of constitutional limits that
50 circumscribe the use of peremptory challenges in both civil and
51 criminal cases. The controlling decisions begin with *Batson v.*
52 *Kentucky*, 476 U.S. 79 (1986) and continue through *J.E.B. v. Alabama*
53 *ex rel. T.B.*, 114 S.Ct. 1419 (1994). Prospective jurors "have the
54 right not to be excluded summarily because of discriminatory and
55 stereotypical presumptions that reflect and reinforce patterns of
56 historical discrimination." *J.E.B.*, 114 S.Ct. at 1428. These
57 limits enhance the importance of searching voir dire examination to
58 preserve the value of peremptory challenges and buttress the role
59 of challenges for cause. When a peremptory challenge against a
60 member of a protected group is attacked, it can be difficult to
61 distinguish between group stereotypes and intuitive reactions to
62 individual members of the group as individuals. A stereotype-free
63 explanation can be advanced with more force as the level of direct
64 information provided by voir dire increases. As peremptory
65 challenges become less peremptory, moreover, it is increasingly
66 important to ensure that voir dire examination be as effective as
67 possible in supporting challenges for cause.

68 Fair opportunities to exercise peremptory and for-cause
69 challenges in this new setting require the assurance that the
70 parties can supplement the court's examination of prospective
71 jurors by direct questioning. The importance of party
72 participation in voir dire has been stressed by trial lawyers for
73 many years. They believe that just as discovery and other aspects
74 of pretrial preparation and trial, voir dire is better accomplished
75 through the adversary process. The lawyers know the case better
76 than the judge can, and are better able to frame questions that
77 will support challenges for cause or informed use of peremptory
78 challenges. Many also believe that prospective jurors are
79 intimidated by judges, and are more likely to admit potential bias
80 or prejudgment under questioning by the parties.

81 Party examination need not mean prolonged voir dire, nor
82 subtle or brazen efforts to argue the case before trial. The court
83 can undertake the initial examination of prospective jurors,
84 restricting the parties to supplemental questioning controlled by
85 direct time limits. Effective control can be exercised by the
86 court in setting reasonable limits on the manner and subject-matter
87 of the examination. Lawyers will not be allowed to advance
88 arguments in the guise of questions, to seek committed responses to
89 hypothetical descriptions of the case, to assert propositions of
90 law, to intimidate or ingratiate, or otherwise turn the opportunity
91 to seek information about prospective jurors into improper
92 adversary strategies. The district court has ample power to

93 control the time, manner, and subject matter of party examination.
94 The process of determining the limits continues throughout the
95 course of each party's examination, and includes the power to
96 terminate further examination by a party that has misused or abused
97 the right of examination. Among other grounds, termination may be
98 warranted not only by conduct that may impair the trial jury's
99 impartiality but also by questioning that is repetitious,
00 confusing, or prolonged, or that threatens inappropriate invasion
01 of the prospective jurors' privacy. The determination to set limits
102 or to terminate examination is confided to the broad discretion of
103 the district court. Only a clear abuse of this discretion -
04 usually in conjunction with a clearly inadequate examination by the
105 court - could justify reversal of an otherwise proper jury verdict.

06 The voir dire process can be further enhanced by use of jury
07 questionnaires to elicit routine information before voir dire
108 begins. Questionnaires can save much time, and may improve in many
109 ways the development of important information about prospective
110 jurors. Potential jurors are protected against the embarrassment
111 of public examination. A potential juror may be more willing to
112 reveal potentially embarrassing information in responding to a
113 questionnaire than in answering a question in open court. Written
114 answers to a questionnaire also may avoid the risk that answers
115 given in the presence of other prospective jurors may contaminate
116 a large group.

117 Questionnaires are not required by Rule 47(a), but should be
118 seriously considered. At the same time, it is important to guard
119 against the temptation to extend questionnaires beyond the limits
120 needed to support challenges for cause and fair use of peremptory
121 challenges. Just as voir dire examination, questionnaires can be
122 used in an attempt to select a favorable jury, not an impartial
123 one. Potential jurors must be protected against unwarranted
124 invasions of privacy; the duty of jury service does not support
125 casual inquiry into such matters as religious preferences,
126 political views, or reading, recreational, and television habits.
127 Indeed the list of topics that might be of interest to a party bent
128 on manipulating the selection of a favorable jury through the use
129 of sophisticated social-science profiles and personality
130 evaluations is virtually endless. Selection of an impartial jury
131 requires suppression of such inquiries, not encouragement. The
132 court's guide must be the needs of impartiality, not party
133 advantage.

PROPOSED AMENDMENTS TO
RULES OF CIVIL PROCEDURE

Rule 26. General Provisions Governing
Discovery; Duty of Disclosure

* * * * *

1 (c) Protective Orders. ~~(1)~~ Upon On motion by a
2 party or by the person from whom discovery is
3 sought, accompanied by a certification that the
4 movant has in good faith conferred or attempted to
5 confer with other affected parties in an effort to
6 resolve the dispute without court action, ~~and for good~~
7 ~~cause shown~~, the court ~~in which~~ where the action is
8 pending ~~or~~ — and alternatively, on matters relating
9 to a deposition, also the court in the district where
10 the deposition ~~is to~~ will be taken — may, for good
11 cause shown or on stipulation of the parties, make
12 any order ~~which~~ that justice requires to protect a

*New matter is underlined; matter to be omitted
is lined through.

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13 party or person from annoyance, embarrassment,
14 oppression, or undue burden or expense, including
15 one or more of the following:

16 ~~(1A) that precluding the disclosure or~~
17 ~~discovery — not be had;~~

18 ~~(2B) that specifying conditions, including time~~
19 ~~and place, for the disclosure or discovery may~~
20 ~~be had only on specified terms and conditions,~~
21 ~~including a designation of the time or place;~~

22 ~~(3C) that the discovery may be had only by~~
23 ~~prescribing a discovery method of discovery~~
24 ~~other than that selected by the party seeking~~
25 ~~discovery;~~

26 ~~(4D) that excluding certain matters not be~~
27 ~~inquired into, or that limiting the scope of the~~
28 ~~disclosure or discovery be limited to certain~~

29 matters;

30 (5E) designating the persons who may be

31 present while that the discovery is be

32 conducted with no one present except persons

33 designated by the court;

34 ~~(6F) that a deposition, after being sealed,~~

35 directing that a sealed deposition be opened

36 only by order of the upon court order;

37 (7G) ordering that a trade secret or other

38 confidential research, development, or

39 commercial information not be revealed or be

40 revealed only in a designated way; and or

41 (8H) directing that the parties simultaneously

42 file specified documents or information

43 enclosed in sealed envelopes, to be opened as

44 directed by the court directs.

4

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45 (2) If the a motion for a protective order is wholly or
46 partly denied in whole or in part, the court may, on
47 such just terms and conditions as are just, order that
48 any party or other person provide or permit discovery
49 or disclosure. The provisions of Rule 37(a)(4)
50 applies to the award of expenses incurred in relation
51 to the motion.

52 (3) (A) The court may modify or dissolve a protective
53 order on motion made by a party, a person bound by
54 the order, or a person who has been allowed to
55 intervene to seek modification or dissolution.

56 (B) In ruling on a motion to dissolve or modify a
57 protective order, the court must consider, among
58 other matters, the following:

59 (i) the extent of reliance on the order;

- 60 (ii) the public and private interests affected
61 by the order, including any risk to
62 public health or safety;
- 63 (iii) the movant's consent to submit to the
64 terms of the order;
- 65 (iv) the reasons for entering the order, and
66 any new information that bears on the
67 order; and
- 68 (v) the burden that the order imposes on
69 persons seeking information relevant to
70 other litigation.

* * * * *

Committee Note

Subdivisions (1) and (2) are revised to conform to the style conventions adopted for simplifying the present rules. No change in meaning is intended by these style changes.

Subdivision (1) also is amended to confirm the common practice of entering a protective order on

stipulation of the parties. Stipulated orders can provide a valuable means of facilitating discovery without frequent requests for action by the court, particularly in actions that involve intensive discovery. If a stipulated protective order thwarts important interests, relief may be sought by a motion to modify or dissolve the order under subdivision (3).

Subdivision (3) is added to the rule to dispel any doubt whether the power to enter a protective order includes power to modify or vacate the order. The power is made explicit, and includes orders entered by stipulation of the parties as well as orders entered after adversary contest. The power to modify or dissolve should be exercised after careful consideration of the conflicting policies that shape protective orders. Protective orders serve vitally important interests by ensuring that privacy is invaded by discovery only to the extent required by the needs of litigation. Protective orders entered by agreement of the parties also can serve the important need to facilitate discovery without requiring repeated court rulings. A blanket protective order may encourage the exchange of information that a court would not order produced, or would order produced only under a protective order. Parties who rely on protective orders in these circumstances should not risk automatic disclosure simply because the material was once produced in discovery and someone else might want it.

Modification of a protective order may be sought to increase the level of protection afforded as well as to reduce it. Among the grounds for increasing protection might be violation of the order, enhanced appreciation of the extent

to which discovery threatens important interests in privacy, or the need of a nonparty to protect interests that the parties have not adequately protected.

Modification or dissolution of a protective order does not, without more, ensure access to the once-protected information. If discovery responses have been filed with the court, access follows from a change of the protective order that permits access. If discovery responses remain in the possession of the parties, however, the absence of a protective order does not without more require that any party share the information with others.

Despite the important interests served by protective orders, concern has been expressed that protective orders can thwart other interests that also are important. Two interests have drawn special attention. One is the interest in public access to information that involves matters of public concern. Information about the conduct of government officials is frequently used to illustrate an area of public concern. The most commonly offered example focuses on information about dangerous products or situations that have caused injury and may continue to cause injury until the information is widely disseminated. The other interest involves the efficient conduct of related litigation, protecting adversaries of a common party from the need to engage in costly duplication of discovery efforts.

The first sentence of subparagraph (A) recognizes that a motion to modify or dissolve a protective order may be made by a party, a person bound by the order, or a person allowed to intervene for this purpose. A motion to

intervene for this purpose is made for the limited purpose of establishing standing to pursue the request for modification or dissolution. Intervention should be granted if the applicant asserts an interest that justifies full argument and consideration of the motion to modify or dissolve. Because intervention is for this limited purpose, there is no need to invoke the Rule 24 standards that would apply to a request to intervene as a party. Several courts have relied on limited intervention in this setting, and the procedure has worked well.

Subparagraph (B) lists some of the matters that must be considered on a motion to dissolve or modify a protective order. The list is not all-inclusive; the factors that may enter the decision are too varied even to be foreseen.

The most important form of reliance on a protective order is the production of information that the court would not have ordered produced without the protective order. Often this reliance will take the form of producing information under a blanket protective order without raising the objection that the information is not subject to disclosure or discovery. The information may be protected by privilege or work-product doctrine, the outer limits of Rule 26(b)(1), or other rules. Reliance also may take other forms, including the court's own reliance on a protective order less sweeping than an order that flatly prohibits discovery. If the court would not have ordered discovery over proper objection, it should not later defeat protection of information that need not have been produced at all. Reliance also deserves consideration in other settings, but a finding that information is properly discoverable directs

attention to the question of the terms — if any — on which protection should continue.

The public and private interests affected by a protective order include all of the myriad interests that weigh both for and against discovery. The question whether to modify or dissolve a protective order is, apart from the question of reliance, much the same as the initial determination whether there is good cause to enter the order. An almost infinite variety of interests must be weighed. The public and private interests in defeating protection may be great or small, as may be the interests in preserving protection. Special attention must be paid to a claim that protection creates a risk to public health or safety. If a protective order actually thwarts publication of information that might help protect against a significant threat of serious injury to person or property, only compelling reasons could justify protection. Claims of commercial disadvantage should be examined with particular care. On the other hand, it is proper to demand a realistic showing that there is a need for disclosure of protected information. Often there is full opportunity to publicize a risk without access to protected discovery information. Paradoxically, the cases that pose the most realistic public risk also may be the cases that involve the greatest interests in privacy, such as a yet-to-be-proved claim that a party is infected with a communicable disease.

Consent to submit to the terms of a protective order may provide strong reason to modify the order. Submission to the terms of the order should include submission to the jurisdiction of the court to enforce the order. Submission,

however, does not establish an automatic right to modification. The court still must balance the need for access to information against the interests of privacy. If the need for access arises from pending or impending litigation of parallel claims, it may prove better to defer to the protective order discretion of the court responsible for the other litigation, or even to work out a cooperative approach that allows each court to consider the factors most familiar to it.

The role of the court in considering the reasons for entering the protective order is affected by the distinction between contested and stipulated orders. If the order was entered on stipulation of the parties, the motion to modify or dissolve requires the court to consider the reasons for protection for the first time. All of the information that bears on the order is new to the court and must be considered. If the order was entered after argument, however, the court may justifiably focus attention on information that was not considered in entering the order initially.

Rule 26(c)(3) applies only to the dissolution or modification of protective orders entered by the court under subdivision (c)(1). It does not address private agreements entered into by litigants that are not submitted to the court for its approval. Nor does Rule 26(c)(3) apply to motions seeking to vacate or modify final judgments that occasionally contain restrictions on the disclosure of specified information. Rules 59 and 60 govern such motions.