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WASHINGTON, D.C. 20544

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

From: **Paul V. Niemeyer, Chair, Advisory Committee on the Federal Rules of Civil Procedure**

Date: **May , 2000**

Re: **Report of the Civil Rules Advisory Committee**

Introduction

The Civil Rules Advisory Committee met on April 10 and 11, 2000, at the Administrative Office of the United States Courts in Washington, D.C. It voted to recommend adoption of rules amendments that were published for comment in August 1999, with some modifications in response to the public comments. Part I of this report details these recommendations with respect to two packages. The first package, covering electronic service of papers after initial process, includes changes in Rules 5(b), 6(e), and 77(d). The second package, covering abrogation of the obsolete Copyright Rules of Practice, includes abrogation of those rules, a new Rule 65(f), and a corresponding change in Rule 81(a)(1). A third proposal for adoption included in this package would make an overdue technical correction to Rule 82; it is recommended that it be adopted without publication for comment.

Part II describes the Advisory Committee recommendation to publish for comment three sets of amendments. The first proposes a new Rule 7.1 governing disclosure of information that supports a determination whether a judge is disqualified. This proposal is advanced for consideration with parallel proposals by other advisory committees. The second set proposes amendments to Civil Rules 54(d)(2) and 58. This proposal is advanced for consideration with parallel proposals to amend Appellate Rule 4(a). The final proposal would amend Rule 81(a)(2) to integrate better with the rules governing habeas corpus cases and § 2255 motions.

Part III summarizes ongoing Advisory Committee work, primarily

by noting the work of several subcommittees.

I Action Items: Amendments Proposed for Adoption

The Advisory Committee recommends that each of the amendments discussed in this section be transmitted to the Judicial Conference with recommendations for adoption. The electronic service and copyright proposals were published for comment in August 1999. The changes made in response to the public comments are described with each package. The technical conforming change to Rule 82 has not been published for comment, but is recommended for adoption without publication.

I A. Electronic and Other Service: Rules 5(b), 6(e), and 77(d)

The proposed amendments to Rules 5(b) and 77(d) were published for comment in August, 1999. The Advisory Committee had voted not to recommend any change in Rule 6(e), but also published as an "alternative proposal" the change that it now recommends for adoption.

Rule 5(b) is restyled. Rule 5(b)(1) is clarified by expressly limiting it to service under Rules 5(a) and 77(d). The restyling of Rule 5(b)(2)(A), (B), and (C) is intended to make no change in the meaning of the present rule.

Rule 5(b)(2)(D) is new. Although the proposal emerged from the work of the Standing Committee's Technology Subcommittee and was designed to authorize electronic service, it also reaches service by other means. Written consent of the person served is required.

Rule 6(e) would be amended to allow an additional 3 days to respond when service is made under Rule 5(b)(2)(C) by leaving a copy with the clerk of the court, or by any means consented to under Rule 5(b)(2)(D). This amendment extends the present provision that adds 3 days when service is made by mail.

Rule 77(d) is amended to allow the clerk of court to serve notice of an order or judgment in any manner provided for in Rule 5(b). The immediate purpose is to support notice by facsimile or computer.

The public comments suggested drafting changes that were adopted by the Advisory Committee. These changes are described in the Gap report.

In displaying the text of the revised Rules, new matter is underlined, deleted matter is overstricken, and matter added since publication is double-underlined.

The Advisory Committee deliberations are summarized at pages 4 to 9 of the draft Minutes.

Rule 5(b)

~~**(b) Same: How Made.** Whenever under these rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party is ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to the party or attorney or by mailing it to the party or attorney at the attorney's or party's last known address or, if no address is~~

~~known, by leaving it with the clerk of the court. Delivery of a copy within this rule means: handing it to the attorney or to the party; or leaving it at the attorney's or party's office with a clerk or other person in charge thereof; or, if there is no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at the person's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. Service by mail is complete upon mailing.~~

(b) Making Service.

(1) Service under Rules 5(a) and 77(d) on a party represented by an attorney is made on the attorney unless the court orders service on the party.

(2) Service under Rule 5(a) is made by:

(A) Delivering a copy to the person served by:

(i) handing it to the person;

(ii) leaving it at the person's office with a clerk or other person in charge, or if no one is in charge leaving it in a conspicuous place in the office; or

(iii) if the person has no office or the office is closed, leaving it at the person's dwelling house or usual place of abode with someone of suitable age and discretion residing there.

(B) Mailing a copy to the last known address of the person served. Service by mail is complete on mailing.

(C) If the person served has no known address, leaving a copy with the clerk of the court.

(D) Delivering a copy by any other means, including electronic means, consented to in writing by the person served. Service by electronic means is complete on transmission; service by other consented means is complete when the person making service delivers the copy to the agency designated to make delivery. If authorized by local rule, a party may make service under this subparagraph (D) through the court's transmission facilities.

(3) Service by electronic means under Rule 5(b)(2)(D) is not effective if the party making service learns that the attempted service did not reach the person to be served.

Committee Note

Rule 5(b) is restyled.

Rule 5(b)(1) makes it clear that the provision for service on a party's attorney applies only to service made under Rules 5(a) and 77(d). Service under Rules 4, 4.1, 45(b), and 71A(d)(3) — as well as rules that invoke those rules — must be made as provided in those rules.

Subparagraphs (A), (B), and (C) of Rule 5(b)(2) carry forward the method-of-service provisions of former Rule 5(b).

Subparagraph (D) of Rule 5(b)(2) is new. It authorizes service by electronic means or any other means, but only if consent is obtained from the person served. The consent must be express, and cannot be implied from conduct. Early experience with electronic filing as authorized by Rule 5(d) is positive, supporting service by electronic means as well. Consent is required, however, because it is not yet possible to assume universal entry into the world of electronic communication. Subparagraph (D) also authorizes service by nonelectronic means. The Rule 5(b)(2)(B) provision making mail service complete on mailing is extended in subparagraph (D) to make service by electronic means complete on transmission; transmission is effected when the sender does the last act that must be performed by the sender. ~~As with other modes of service, however, actual notice that the transmission was not received defeats the presumption of receipt that arises from the provision that service is complete on transmission. The sender must take additional steps to effect service.~~ Service by other agencies is complete on delivery to the designated agency.

Finally, subparagraph (D) authorizes adoption of local rules

providing for service through the court. Electronic case filing systems will come to include the capacity to make service by using the court's facilities to transmit all documents filed in the case. It may prove most efficient to establish an environment in which a party can file with the court, making use of the court's transmission facilities to serve the filed paper on all other parties. Transmission might be by such means as direct transmission of the paper, or by transmission of a notice of filing that includes an electronic link for direct access to the paper. Because service is under subparagraph (D), consent must be obtained from the persons served.

Consent to service under Rule 5(b)(2)(D) must be in writing, which can be provided by electronic means. Parties are encouraged to specify the scope and duration of the consent. The specification should include at least the persons to whom service should be made, the appropriate address or location for such service — such as the e-mail address or facsimile machine number, and the format to be used for attachments. A district court may establish a registry or other facility that allows advance consent to service by specified means for future actions.

~~Service under subparagraph (D) does not allow the additional time provided by Rule 16(e) when service is made by mail under subparagraph (B). Electronic service commonly is effected with great speed. A party should consent to receive service by electronic or other means only as to modes that are trusted to provide prompt actual notice. By giving consent, a party also accepts the responsibility to monitor the appropriate facility for receiving service.~~

Rule 6(e) is amended to allow additional time to respond when service is made under Rule 5(b)(2)(D). The additional time does not relieve a party who consents to service under Rule 5(b)(2)(D) of the responsibilities to monitor the facility designated for receiving service and to provide prompt notice of any address change.

Paragraph (3) addresses a question that may arise from a literal reading of the provision that service by electronic means is complete on transmission. Electronic communication is rapidly improving, but lawyers report continuing failures of transmission, particularly with respect to attachments. Ordinarily the risk of non-receipt falls on the person being served, who has consented to this form of service. But the risk should not extend to situations in which the person attempting service learns that the attempted service in fact did not reach the person to be served. Given actual knowledge that the attempt failed, service is not effected. The person attempting service must either try again or show circumstances that justify dispensing with service.

Paragraph (3) does not address the similar questions that may arise when a person attempting service learns that service by means other than electronic means in fact did not reach the person to be

served. Case law provides few illustrations of circumstances in which a person attempting service actually knows that the attempt failed but seeks to act as if service had been made. This negative history suggests there is no need to address these problems in Rule 5(b)(3). This silence does not imply any view on these issues, nor on the circumstances that justify various forms of judicial action even though service has not been made.

Summary of Comments

Hurshal C. Tummelson, Esq., 99-CV-002: Addressing his comments to Rules 5(b), 65, 77(d), and 81, focuses on the "consented to by the person served" element of proposed Rule 5(b)(2)(D). Suggests "some specific clarification with reference to this form of service" because "there are so many possible means of service electronically or otherwise which might be used that the end result could be very confusing."

Jack E. Horsley, Esq., 99-CV-004 (Nov. 2, 1999 installment): "[E]lectronic means" may not be clear to all readers. It might be expanded to read: "Internet, fax, computer transmittal or other electronic means." In the November 11 installment concludes that "authorizing service by electronic means is consistent with current developments."

Joseph W. Phebus, Esq., 99-CV-006: Relays information from the firm's computer specialist. The e-mail system used by the firm provides date and time stamping for incoming and outgoing mail. It also automatically provides notice that a message is not delivered. If the address is not valid, notice is provided immediately. If the address is valid, the system attempts delivery every 20 minutes for four hours, then every four hours for the next 48 hours; at the end of that period, notice is given if delivery could not be accomplished.

David E. Romine, Esq., 99-CV-007: Strongly favors the "complete on transmission" rule. This rule is clear. Clarity prevents doubts and ensuing disputes about the time for responding. If service were made complete only on receipt, every party would need to consult every other party to confirm the time of receipt, and then would feel compelled to send a written memorial of the understanding to every other party. "What a waste." The ambiguity will be even worse when — as often happens — electronic service is made on a Friday afternoon. "[T]here will be a four-day window of plausibility," and the window "would be extended by holidays, vacations, or even business trips * * *." Resolution of disputes, finally, would turn on fact disputes that will be burdensome to litigate.

Charles L. Schlumberger, Esq., 99-CV-008: Opposes electronic service, even with consent. Notes that he had difficulty transmitting these comments to the Administrative Office. Electronic service will be abused — as it is, attorneys often fax papers late in the evening. Is round-the-clock monitoring of fax

and e-mail to be required? Even from out-of-town? Must an attorney defeat the security system that prevents even staff from reading the attorney's e-mail? If papers contain sensitive or protected information, the e-mail system offers no reliable security unless the information is encrypted. There should be express provisions detailing whether consent can be open-ended for an entire action, specific for particular papers, or revoked. Filing by electronic means is proper, notice under Rule 77(d) by electronic means is proper, but not service by attorneys — "I trust the clerks but not the lawyers."

Hon. Susan Pierson Sonderby, 99-CV-010: Service by electronic means or fax "should be valid, irrespective of consent, where available to the recipient." If the recipient is not equipped to receive such messages, the person responsible for making service can resort to mail or personal service. At the least, Rule 5(b) should authorize local district rules that permit electronic service without consent of the person served. And the provision for "other means" is puzzling: commercial express carrier service is routine now, on the theory that delivery constitutes hand delivery.

J. Michael Schaefer, Esq., 99-CV-011: There should be a page limit on fax transmissions: "I have had 50 pages faxes dumped into my machine, creating a burden to deal with unattached bulk paper and dissipating a toner supply." And seems to urge that "any pleading exceeding 10 pages" should be permitted only with the specific consent of the recipient no matter what method of service is used.

Joanne Fitzgerald Ross, Esq., for State Bar of Michigan Committee of the United States Courts, 99-CV-012: Approves proposed Rule 5(b), but would amend the proposal to require simultaneous mailing of a clean copy of any document served by fax.

Committees of the Association of the Bar of the City of New York, 99-CV-013: Supports the basic proposal; the requirement of consent, and the exclusion of initial service of process, "provide adequate safeguards of due process rights." Something should be done to make it clear that consent can be given either for all service during an action or only for service of specified papers. Some recipients may be reluctant to commit to the obligation to monitor continually for electronic receipt, which "may require a technical office capacity that is currently unavailable to some practitioners." It would help to prepare a Consent Form that accommodates various forms of service, provides specific address information, and is filed with the court. The Consent Form would specify whether consent is for all purposes of the action or is more limited. It is proper to make service complete on transmission, but some additional time should be provided to respond because messages often "must travel through multiple servers, compounding the risk of technical failures." See the comment on Rule 6(e).

David W. Ogden, Acting Assistant Attorney General, Civil Division, United States Department of Justice, 99-CV-014: Fully supports use

of electronic service with consent of the person served. But there is a risk that implied consent will be found, even from such simple acts as listing a fax or e-mail address on a letterhead. Rule 5(b)(2)(D) should be amended to refer to "other means, including electronic means, consented to in writing by the person served." And the Committee Note should include this added language:

> To be valid under subparagraph (D), consent must be explicit and in writing, and may not be implied. Parties are encouraged to specify the scope and duration of the consent, including, at a minimum, the persons to whom service should be made, the appropriate address or location for such service (e.g., for electronic service, the e-mail address or fax machine number), the format to be used for attachments, and the filings within a lawsuit to which the consent applies (e.g., the consent applies to all filings, only certain filings, or all non-jurisdictional filings). Such written consent may be provided through electronic communication.

Ralph W. Brenner, Esq., David H. Marion, Esq., and Stephen A. Madva, Esq., 99-CV-015: Support Rule 5 and 77 proposals. The "increase in efficiency will allow for our office to provide for more prompt and less costly service for our clients."

Francis Patrick Newell, Esq., 99-CV-016: Supports the Rule 5 and 77 proposals in terms similar to 99-CV-015.

William A. Fenwick,Esq,; David M. Lisi, Esq.; David C. McIntyre, Esq.; Mitchell Zimmerman, Esq. for Fenwick & West, 99-CV-017: (1) As a matter of style, urges that in 5(b)(1) and 5(b)(2) the expression "service is made" be changed to "service shall be made"; the change eliminates ambiguity and indicates clearly "that this provision is mandatory." (2) The reference to "address" in 5(b)(2)(B) and (C) should specify home address, office address, or either [present Rule 5(b) does not provide this specification]. (3) The provision that service is complete on "transmission" is ambiguous. The rule or the Committee Note should state that "service is complete upon successfully serving the document from the sender's server to the e-mail address designated in court papers by recipient." And it should make clear that the proper e-mail address is the one specified in the consent or in court papers.

Mark D. Reed, Esq., 99-BK-005: Wholeheartedly approves electronic service "(i.e. facsimile)"; "this manner of service is more effective than ordinary mail."

Hon. Dean Whipple, 99-CV- : Chief Judge Whipple reports on experience in W.D.Mo. as a prototpye CM/ECF court. A lawyer who agrees to participate in the CM/ECF system signs a statement agreeing to receive service of electronic filing on behalf of the client by hand, facsimile, authorized e-mail, or first-class mail. The party served in this way can read or download the paper from

the court's system. An electronic notice of filing apparently includes a hyperlink to the paper, facilitating prompt access. Chief Judge Whipple suggests this change in the language proposed for Rule 5(b)(2)(D): "Delivering a copy by any other means, including electronic ~~means~~ notice, consented to * * *."

Gap Report

Rule 5(b)(2)(D) was changed to require that consent be "in writing."

Rule 5(b)(3) is new. The published proposal did not address the question of failed service in the text of the rule. Instead, the Committee Note included this statement: "As with other modes of service, however, actual notice that the transmission was not received defeats the presumption of receipt that arises from the provision that service is complete on transmission. The sender must take additional steps to effect service. Service by other agencies is complete on delivery to the designated agency." The addition of paragraph (3) was prompted by consideration of the draft Appellate Rule 25(c) that was prepared for the meeting of the Appellate Rules Advisory Committee. This draft provided: "Service by electronic means is complete on transmission, unless the party making service is notified that the paper was not received." Although Appellate Rule 25(c) is being prepared for publication and comment, while Civil Rule 5(b) has been published and otherwise is ready to recommend for adoption, it seemed desirable to achieve some parallel between the two rules.

The draft Rule 5(b)(3) submitted for consideration by the Advisory Committee covered all means of service except for leaving a copy with the clerk of the court when the person to be served has no known address. It was not limited to electronic service for fear that a provision limited to electronic service might generate unintended negative implications as to service by other means, particularly mail. This concern was strengthened by a small number of opinions that say that service by mail is effective, because complete on mailing, even when the person making service has prompt actual notice that the mail was not delivered. The Advisory Committee voted to limit Rule 5(b)(3) to service by electronic means because this means of service is relatively new, and seems likely to miscarry more frequently than service by post. It was suggested during the Advisory Committee meeting that the question of negative implication could be addressed in the Committee Note. There was little discussion of this possibility. The Committee Note submitted above includes a "no negative implications" paragraph prepared by the Reporter for consideration by the Standing Committee.

The Advisory Committee did not consider at all a question that was framed during the later meeting of the Appellate Rules Advisory Committee. As approved by the Advisory Committee, Rule 5(b)(3) defeats service by electronic means "if the party making service

learns that the attempted service did not reach the person to be served." It says nothing about the time relevant to learning of the failure. The omission may seem glaring. Curing the omission, however, requires selection of a time. As revised, proposed Appellate Rule 25(c) provides: "Service by electronic means is complete on transmission, unless the party making service is notified within 3 calendar days after transmission that the paper was not received by the party served." The Appellate Rules Advisory Committee will have the luxury of public comment and another year to consider the desirability of this short period. If Civil Rule 5(b) is to be recommended for adoption now, no such luxury is available. This issue deserves careful consideration by the Standing Committee.

Several changes are made in the Committee Note. (1) It requires that consent "be express, and cannot be implied from conduct." This addition reflects a more general concern stimulated by a reported ruling that an email address on a firm's letterhead implied consent to email service. (2) The paragraph discussing service through the court's facilities is expanded by describing alternative methods, including "electronic link." (3) There is a new paragraph that states that the requirement of written consent can be satisfied by electronic means, and that suggests matters that should be addressed by the consent. (4) A paragraph is added to note the additional response time provided by amended Rule 6(e). (5) The final two paragraphs address newly added Rule 5(b)(3). The first explains the rule that electronic service is not effective if the person making service learns that it did not reach the person to be served. The second paragraph seeks to defeat any negative implications that might arise from limiting Rule 5(b)(3) to electronic service, not mail, not other means consented to such as commercial express service, and not service on another person on behalf of the person to be served.

Rule 6(e)

The Advisory Committee recommended that no change be made in Civil Rule 6(e) to reflect the provisions of Civil Rule 5(b)(2)(D) that, with the consent of the person to be served, would allow service by electronic or other means. Absent change, service by these means would not affect the time for acting in response to the paper served. Comment was requested, however, on the alternative that would allow an additional 3 days to respond. The alternative Rule 6(e) amendments are cast in a form that permits ready incorporation in the Bankruptcy Rules. Several of the comments suggest that the added three days should be provided. Electronic transmission is not always instantaneous, and may fail for any of a number of reasons. It may take three days to arrange for transmission in readable form. Providing added time to respond will not discourage people from asking for consent to electronic transmission, and may encourage people to give consent. The more who consent, the quicker will come the improvements that will make electronic service ever more attractive. Consistency with the

Bankruptcy Rules will be a good thing, and the Bankruptcy Rules Advisory Committee believes the additional three days should be allowed.

Rule 6(e)

(e) Additional Time After Service ~~by Mail~~ under Rule 5(b)(2)(B), (C), or (D). Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon the party and the notice or paper is served upon the party ~~by mail~~ under Rule 5(b)(2)(B), (C), or (D), 3 days shall be added to the prescribed period.

Committee Note

The additional three days provided by Rule 6(e) is extended to the means of service authorized by the new paragraph (D) added to Rule 5(b), including — with the consent of the person served — service by electronic or other means. The three-day addition is provided as well for service on a person with no known address by leaving a copy with the clerk of the court.

Summary of Comments

Rule 6(e)

Robert F. Baker, Esq., 99-CV-001: Favors extending the 3-day rule to "any method of service other than personal delivery. This would cover those situations where electronic service is made on week-ends or the recipient is away from their home or office for three days or less."

James E. Seibert, Esq., 99-CV-003: The 3-day rule should apply "to all service, other than personal delivery," so "there will be less confusion" and consistency with the bankruptcy rules.

John P. Calandra, Esq., 99-CV-005: Wants 3-days in electronic service cases. Electronic service late Friday might not be seen until Monday, or after a further week for vacation. "There are enough sources of pressure on our practices without imposing a new one."

Joseph W. Phebus, Esq., 99-CV-006: Relays the responses of the firm's computer specialist. The specialist, focusing on date and time stamping and eventual notice that a message is not delivered, believes there is no need for the extra three days.

David E. Romine, Esq., 99-CV-007: Favors the added three days. E-mail is not yet as reliable as postal delivery. Most firms now have the capacity to make or receive service by electronic means, but few actually do so. The fear stems from continuing experience

that some messages arrive in garbled or completely unusable form. It may take a few days to reach the other attorney and arrange for usable delivery. A party who is thinking of resort to electronic service is not likely to be deterred by a rule allowing an additional three days to respond — "[m]y decision as to method of service has never been driven by my opponent's response time," and the desire to shorten response time does not seem to affect other lawyers in deciding between personal service or mail service. The added three days, in short, will not discourage people from asking for consent to electronic service, and will encourage people to give consent.

Charles L. Schlumberger, Esq., 99-CV-008: The three-day rule should be dropped entirely; all current deadlines could be extended by three or five days. "But ultimately, who really cares? If someone needs three days, they're going to get the extension in just about every case, unless they've managed to badly get on the wrong side of the judge."

Hon. Susan Pierson Sonderby: agrees that Rule 6(e) should not be amended to provide an additional three days following service by electronic means. The three days allowed for service by mail reflects the typical period required for delivery by mail. Electronic service should "entail the presumption of same day delivery."

Joanne Fitzgerald Ross, Esq., for State Bar of Michigan Committee of the United States Courts, 99-CV-012: Recommends against extending the response time when service is made under Rule 5(b)(2)(D), in part because of the recommendation that Rule 5(b)(2)(D) should be amended to require that service by fax be supplemented by simultaneously mailing a clean copy of the document.

Committees of the Association of the Bar of the City of New York, 99-CV-013: Recommend that one additional day be allowed when service is made by electronic means or by overnight courier, and that three additional days be allowed when service is made by non-overnight courier service. This balances the incentives for the party asking for consent to alternative means of service and for the party asked to give consent.

David W. Ogden, Acting Assistant Attorney General, Civil Division, United States Department of Justice, 99-CV-014: Favors at least one added day. Current e-mail technology "is not always instantaneous and is not uniformly reliable." Few e-mail systems have "return receipt" mechanisms that are as reliable as those available for fax transmission. If large volumes of material are transmitted, the receiving equipment may lack the ability to store or print the material. Additional time also will encourage use of electronic service. Expanded use will encourage more rapid development of legal and technical standards, and will prompt lawyers to develop better methods for dealing with incoming materials. These developments will speed the migration toward electronic service.

Ralph W. Brenner, Esq., David H. Marion, Esq., Stephen A. Madva, Esq., 99-CV-015: Comments at the end that consistency between Civil Rules and Bankruptcy Rules "will enhance speedy and smooth processing of litigation." This comment may be intended to bear on the Rule 6(e) question. (The same comment is made by Francis Patrick Newell, 99-CV-016.)

William A. Fenwick, Esq.; David M. Lisi, Esq.; David C. McIntyre, Esq.; Mitchell Zimmerman, Esq. for Fenwick & West, 99-CV-017: The extra three days should be given. This will encourage consent; it reflects the potential for delay in transmission; and it will avoid any incentive to litigation gamesmanship.

Hon. Louise de Carl Adler, for Conference of Chief Bankruptcy Judges of Ninth Circuit, 99-BK-009: There are good arguments on both sides of the extra three-days question, but "we unanimously concluded that whatever policy is ultimately adopted, it should be the same for both the bankruptcy rules and the civil rules."

Martha L. Davis, Esq., for Executive Office for U.S. Trustees, 99-BK-012: Supports giving the additional three days. E-mail and other means of communication are still infants, and will experience technical difficulties. A transmitted message may be received after significant delay, and may not be intact; attached files may be corrupted and require retransmission; incompatible word-processing programs may create difficulties; offices with many lawyers may need to develop tracking systems. Consent will be encouraged by adding the three days. The three-day rule is familiar for mail service, and has not unduly delayed proceedings. If the three days are not allowed, parties may seek time extensions. And, looking to Civil Rule 6(e), uniformity between the bankruptcy and civil rules is important.

Gap Report

Proposed Rule 6(e) is the same as the "alternative proposal" that was published in August 1999.

Rule 77(d)

(d) Notice of Orders or Judgments. Immediately upon the entry of an order or judgment the clerk shall serve a notice of the entry ~~by mail~~ in the manner provided for in Rule 5(b) upon each party who is not in default for failure to appear, and shall make a note in the docket of the ~~mailing~~ service. Any party may in addition serve a notice of such entry in the manner provided in Rule 5(b) for the service of papers. * * *

Committee Note

Rule 77(d) is amended to reflect changes in Rule 5(b). A few

courts have experimented with serving Rule 77(d) notices by electronic means on parties who consent to this procedure. The success of these experiments warrants express authorization. Because service is made in the manner provided in Rule 5(b), party consent is required for service by electronic or other means described in Rule 5(b)(2)(D). The same provision is made for a party who wishes to ensure actual communication of the Rule 77(d) notice by also serving notice.

Summary of Comments

Rule 77(d)

Jack E. Horsley, Esq., 99-CV-004: Recommends adding these words: "the clerk shall serve a notice of the entry by hand or otherwise in the manner provided for in Rule 5(b) * * *."

Charles L. Schlumberger, Esq., 99-CV-008: Favors electronic notice from the clerk, although not among lawyers. The Eighth Circuit's VIA program seems to work satisfactorily.

Hon. Susan Pierson Sonderby, 99-CV-010: there is a drafting error at the end of the first sentence, to be corrected: "and shall make a note in the docket of the ~~mailing~~ service." (A similar suggestion is made by the Committees of the Association of the Bar of the City of New York, 99-CV-013, except that they would change "mailing" to "transmission." "Service" seems to fit better the general incorporation of Rule 5(b).)

William A. Fenwick,Esq.; David M. Lisi, Esq.; David C. McIntyre, Esq.; Mitchell Zimmerman, Esq. for Fenwick & West, 99-CV-017: They propose deleting the second sentence of present Rule 77(d), which authorizes a party to serve notice of the entry of judgment. This provision is characterized as "excess verbiage." The relationship of this sentence to Appellate Rule 4(a)(6)(A) is not noted.

Michael E. Kunz, Clerk of Court, E.D.Pa., 99-CV-018: Provides extensive statistics on the highly successful use of facsimile transmission to provide Rule 77(d) notice. The program "has been remarkably successful," effecting notice more rapidly and at lower cost than postal delivery. Mr. Kunz is pleased that his recommendation for amendments in Rule 5(b) and 77(d) has been endorsed by the Advisory Committee.

Gap Report

Rule 77(d) was amended to correct an oversight in the published version. The clerk is to note "service," not "mailing," on the docket.

I B. Abrogate Copyright Rules; Amend Rules 65(g), 81(a)(1)

The proposals published in August 1999 include a package that would abrogate the obsolete Copyright Rules of Practice adopted under the 1909 Copyright Act. A new Rule 65(f) would be added, confirming the common practice that has substituted Rule 65 preliminary relief procedures for the widely ignored Copyright Rules. Rule 81(a)(1) would be amended to delete the obsolete references to the Copyright Rules, and also to improve the expression of the relationship between the Civil Rules and the Bankruptcy Rules. Such little public comment as was provided on these changes was favorable. The Advisory Committee discussion is summarized at page 9 of the draft Minutes.

Rule 65. Injunctions

(f) Copyright impoundment. This rule applies to copyright impoundment proceedings.

Committee Note

New subdivision (f) is added in conjunction with abrogation of the antiquated Copyright Rules of Practice adopted for proceedings under the 1909 Copyright Act. Courts have naturally turned to Rule 65 in response to the apparent inconsistency of the former Copyright Rules with the discretionary impoundment procedure adopted in 1976, 17 U.S.C. § 503(a). Rule 65 procedures also have assuaged well-founded doubts whether the Copyright Rules satisfy more contemporary requirements of due process. See, e.g., *Religious Technology Center v. Netcom On-Line Communications Servs., Inc.*, 923 F.Supp. 1231, 1260-1265 (N.D.Cal.1995); *Paramount Pictures Corp. v. Doe*, 821 F.Supp. 82 (E.D.N.Y.1993); *WPOW, Inc. v. MRLJ Enterprises*, 584 F.Supp. 132 (D.D.C.1984).

A common question has arisen from the experience that notice of a proposed impoundment may enable an infringer to defeat the court's capacity to grant effective relief. Impoundment may be ordered on an ex parte basis under subdivision (b) if the applicant makes a strong showing of the reasons why notice is likely to defeat effective relief. Such no-notice procedures are authorized in trademark infringement proceedings, see 15 U.S.C. § 1116(d), and courts have provided clear illustrations of the kinds of showings that support ex parte relief. See *Matter of Vuitton et Fils S.A.*, 606 F.2d 1 (2d Cir.1979); *Vuitton v. White*, 945 F.2d 569 (3d Cir.1991). In applying the tests for no-notice relief, the court should ask whether impoundment is necessary, or whether adequate protection can be had by a less intrusive form of no-notice relief shaped as a temporary restraining order.

This new subdivision (f) does not limit use of trademark

procedures in cases that combine trademark and copyright claims. Some observers believe that trademark procedures should be adopted for all copyright cases, a proposal better considered by Congressional processes than by rulemaking processes.

Summary of Comments

The only comments are incidental to the brief comments on the Copyright Rules of Practice, set out below. They approve the proposal.

Gap Report

No change has been made.

Rule 81. Applicability in General

(a) ~~To What~~ Proceedings to which the Rules Apply~~icable.~~

(1) These rules do not apply to prize proceedings in admiralty governed by Title 10, U.S.C., §§ 7561-7681. They do ~~not~~ apply to proceedings in bankruptcy as provided by the Federal Rules of Bankruptcy Procedure ~~or to proceedings in copyright under Title 17, U.S.C., except in so far as they may be made applicable thereto by rules promulgated by the Supreme Court of the United States. They do not apply to mental health proceedings in the United States District Court for the District of Columbia~~. * * *

Committee Note

Former Copyright Rule 1 made the Civil Rules applicable to copyright proceedings except to the extent the Civil Rules were inconsistent with Copyright Rules. Abrogation of the Copyright Rules leaves the Civil Rules fully applicable to copyright proceedings. Rule 81(a)(1) is amended to reflect this change.

The District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub.L. 91-358, 84 Stat. 473, transferred mental health proceedings formerly held in the United States District Court for the District of Columbia to local District of Columbia courts. The provision ~~applying~~ that the Civil Rules do not apply to these proceedings is deleted as superfluous.

The reference to incorporation of the Civil Rules in the Federal Rules of Bankruptcy Procedure has been restyled.

Summary of Comments

Prof. Peter Lushing, 99-CV-009: The Committee Note to Rule 81 should say that the amendment deletes the provision that the rules do not apply in D.C. mental health proceedings.

Gap Report

The Committee Note was amended to correct the inadvertent

omission of a negative. As revised, it correctly reflects the language that is stricken from the rule.

RULES OF PRACTICE AS AMENDED

Rule 1

Proceedings in actions brought under section 25 of the Act of March 4, 1909, entitled "An Act to amend and consolidate the acts respecting copyright", including proceedings relating to the perfecting of appeals, shall be governed by the Rules of Civil Procedure, in so far as they are not inconsistent with these rules.

Rule 3

Upon the institution of any action, suit or proceeding, or at any time thereafter, and before the entry of final judgment or decree therein, the plaintiff or complainant, or his authorized agent or attorney, may file with the clerk of any court given jurisdiction under section 34 of the Act of March 4, 1909, an affidavit stating upon the best of his knowledge, information and belief, the number and location, as near as may be, of the alleged infringing copies, records, plates, molds, matrices, etc., or other means for making the copies alleged to infringe the copyright, and the value of the same, and with such affidavit shall file with the clerk a bond executed by at least two sureties and approved by the court or a commissioner thereof.

Rule 4

Such bond shall bind the sureties in a specified sum, to be fixed by the court, but not less than twice the reasonable value of such infringing copies, plates, records, molds, matrices, or other means for making such infringing copies, and be conditioned for the prompt prosecution of the action, suit or proceeding, for the return of said articles to the defendant, if they or any of them are adjudged not to be infringements, or if the action abates, or is discontinued before they are returned to the defendant, and for the payment to the defendant of any damages which the court may award to him against the plaintiff or complainant. Upon the filing of said affidavit and bond, and the approval of said bond, the clerk shall issue a writ directed to the marshal of the district where the said infringing copies, plates, records, molds, matrices, etc., or other means of making such infringing copies shall be stated in said affidavit to be located, and generally to any marshal of the United States, directing the said marshal to forthwith seize and hold the same subject to the order of the court issuing said writ, or of the court of the district in which the seizure shall be made.

Rule 5

The marshal shall thereupon seize said articles or any

smaller or larger part thereof he may then or thereafter find, using such force as may be reasonably necessary in the premises, and serve on the defendant a copy of the affidavit, writ, and bond by delivering the same to him personally, if he can be found within the district, or if he can not be found, to his agent, if any, or to the person from whose possession the articles are taken, or if the owner, agent, or such person can not be found within the district, by leaving said copy at the usual place of abode of such owner or agent, with a person of suitable age and discretion, or at the place where said articles are found, and shall make immediate return of such seizure, or attempted seizure, to the court. He shall also attach to said articles a tag or label stating the fact of such seizure and warning all persons from in any manner interfering therewith.

Rule 6

A marshal who has seized alleged infringing articles, shall retain them in his possession, keeping them in a secure place, subject to the order of the court.

Rule 7

Within three days after the articles are seized, and a copy of the affidavit, writ and bond are served as hereinbefore provided, the defendant shall serve upon the clerk a notice that he excepts to the amount of the penalty of the bond, or to the sureties of the plaintiff or complainant, or both, otherwise he shall be deemed to have waived all objection to the amount of the penalty of the bond and the sufficiency of the sureties thereon. If the court sustain the exceptions it may order a new bond to be executed by the plaintiff or complainant, or in default thereof within a time to be named by the court, the property to be returned to the defendant.

Rule 8

Within ten days after service of such notice, the attorney of the plaintiff or complainant shall serve upon the defendant or his attorney a notice of the justification of the sureties, and said sureties shall justify before the court or a judge thereof at the time therein stated.

Rule 9

The defendant, if he does not except to the amount of the penalty of the bond or the sufficiency of the sureties of the plaintiff or complainant, may make application to the court for the return to him of the articles seized, upon filing an affidavit stating all material facts and circumstances tending to show that the articles seized are not infringing copies, records, plates, molds, matrices, or means for making the copies alleged to infringe the copyright.

~~**Rule 10**~~

~~Thereupon the court in its discretion, and after such hearing as it may direct, may order such return upon the filing by the defendant of a bond executed by at least two sureties, binding them in a specified sum to be fixed in the discretion of the court, and conditioned for the delivery of said specified articles to abide the order of the court. The plaintiff or complainant may require such sureties to justify within ten days of the filing of such bond.~~

~~**Rule 11**~~

~~Upon the granting of such application and the justification of the sureties on the bond, the marshal shall immediately deliver the articles seized to the defendant.~~

~~**Rule 12**~~

~~Any service required to be performed by any marshal may be performed by any deputy of such marshal.~~

~~**Rule 13**~~

~~For services in cases arising under this section the marshal shall be entitled to the same fees as are allowed for similar services in other cases.~~

Summary of Comments

Jack E. Horsley, Esq., 99-CV-004 (Nov. 2 installment): The observation that the Copyright Rules are antiquated is "well taken." But is concerned that perhaps Copyright Rule 13 should be renumbered and preserved in some form because there is "nothing else which would address the matter of service in disputes involving the marshal or their being entitlement to the same fees as those allowed for similar services."

Charles L. Schlumberger, Esq., 99-CV-008: "Wholeheartedly" agrees with abrogation and the corresponding changes in Rules 65(f) and 81. Not only are some lawyers unaware of the Copyright Rules; "there are some judges who fall into that category, too!"

William A. Fenwick,Esq.; David M. Lisi, Esq.; David C. McIntyre, Esq.; Mitchell Zimmerman, Esq. for Fenwick & West, 99-CV-017: The firm specializes in high technology law, including copyright law. They "fully support" abrogation of the copyright rules and the corresponding changes in Rules 65(f) and 81. "[T]he Copyright Rules of Practice are arcane and fundamentally unfair."

Gap Report

No change has been made.

I C. Rule 82

Rule 82 concludes by referring to 28 U.S.C. §§ 1391 to 1393. Section 1393 was repealed in 1988. The Advisory Committee recommends correction of the anomaly as a technical conforming change that can be adopted without publication for comment. As revised, the final sentence of Rule 82 would read:

> An admiralty or maritime claim within the meaning of Rule 9(h) shall not be treated as a civil action for the purposes of Title 28, U.S.C. §§ 1391-~~93~~1392.

Committee Note

The final sentence of Rule 82 is amended to delete the reference to 28 U.S.C. § 1393, which has been repealed.

Style Comment

The recommendation that the change be made without publication carries with it a recommendation that style changes not be made. Styling would carry considerable risks. The first sentence of Rule 82, for example, states that the Civil Rules do not "extend or limit the jurisdiction of the United States district courts." That sentence is a flat lie if "jurisdiction" includes personal or quasi-in rem jurisdiction. The styling project on this rule requires publication and comment.

II Action Items: Proposals for Publication

Each of the three proposals to publish amendments for comment is the result of work coordinated with other advisory committees. The disqualification disclosure proposal involves several other committees. The proposal on entry of judgment involves the Appellate Rules Advisory Committee. The Rule 81(a)(2) proposal involves the Criminal Rules Committee.

II A: Disqualification Disclosure

The question of financial disclosure has been raised by the Committee on Codes of Conduct and was delegated to the several advisory committees by the Standing Committee. The Appellate Rules have, in Rule 26.1, the only present national rule on disclosure. Most of the circuits also have local rules that supplement the requirements of Rule 26.1. Disclosure requirements in the district courts are established by practice or local rule. The local circuit and district rules differ substantially among themselves. Substantial concern has arisen from two well-publicized newspaper accounts of situations in which federal judges failed to recognize investment conflicts that should have led to recusal. It may be desirable to respond to these pressures by publishing for comment a uniform disclosure rule that would apply to civil and criminal proceedings in the district courts, and to all proceedings in the courts of appeals. The uniform rule may also provide the template for a Bankruptcy Rule, but there are special problems that most likely will require development of special provisions that distinguish the Bankruptcy Rule from the uniform rule.

Two central needs must be recognized. The first is to get information from the parties to all actions. The second is to bring this information home to each judge who acts in a case. Although a national rule can direct that the clerk provide the information to each judge — and such a direction is included in draft Rule 7.1 — this problem is an internal administrative problem to be handled primarily within each court. The central focus of a national rule will be the need to get information from the parties. It is not entirely clear that even this subject should be addressed by a Rule of Appellate, Bankruptcy, Civil, or Criminal Procedure. The subject seems within the scope of the Enabling Act, however, and Appellate Rule 26.1 has already set an example.

If there is to be a national rule that requires some measure of uniform disclosure, the extent of the disclosure must be chosen. No one believes that a national rule can require disclosure of all the information that might be relevant to a recusal decision. Nor does anyone claim to know what reduced level of disclosure would reach the most common and important grounds for recusal. It is generally agreed that Appellate Rule 26.1 disclosure will cover a major fraction of the circumstances that actually call for disclosure, but no one can say whether the proportion is 60%, 90%,

or some more reassuring number. Few have suggested that a national rule should require disclosure about the attorneys who appear in a case; the focus commonly is on parties, excluding even amici curiae. (An addition might be made in the criminal rules to require disclosure of any corporation that may benefit from a restitution award.) As to parties, the focus commonly is on financial information, not on personal information. Appellate Rule 26.1 narrows this focus still further, addressing only parties that are nongovernmental corporations, and requiring information only about "parent corporations and * * * any publicly held company that owns 10% or more of" the corporation's stock.

Appellate Rule 26.1 is about as narrow a financial disclosure rule as could be drafted. When a somewhat broader form of Rule 26.1 was adopted in 1989, the Committee Note recognized the rule represented "minimum disclosure requirements" and observed that a court of appeals could "require additional information * * * by local rule." Although many local circuit rules do require additional information, there is no common pattern. Some require only modest additional disclosures; some require a great deal of additional information. These rules, and local district rules, are described in the Federal Judicial Center materials that accompany the present drafts.

The Civil Rules Advisory Committee considered draft rules that embodied several different approaches to disclosure, along with many different draft Committee Note provisions. The discussion is summarized at pages 9 to 15 of the draft Minutes. Two major questions were emphasized. The first is whether the time has come to require more extensive disclosures than Appellate Rule 26.1 requires. The Committee on Codes of Conduct believes that the best approach is simply to adopt Appellate Rule 26.1 in the rules that govern the district courts. The Advisory Committee agreed that it would not be wise to attempt to enshrine more detailed requirements in the Rules of Appellate, Bankruptcy, Civil, or Criminal Procedure. But it also concluded that it is desirable to leave the way open for adoption of additional disclosure requirements by a procedure that is more flexible than the Rules Enabling Act procedure. Inspiration for additional disclosure requirements may arise from at least two sources. Many courts, both circuit and district, require disclosures that extend beyond Appellate Rule 26.1. Experience with these local requirements may support development of more detailed national requirements. A second source of support for more detailed rules may be the continuing development of judicial support software. As computer systems become ever more powerful, it may prove feasible to bring together more complicated bodies of information about individual judges and about those involved in litigation. Draft Rule 7.1 leaves the way open to take advantage of these possible developments by authorizing adoption of a disclosure form by the Judicial Conference. There is no mandate that a form be developed. But there was strong support for the conclusion that if additional

disclosures are to be required, the best procedure for developing the requirements lies in the Judicial Conference. The Judicial Conference can act with the support of the Codes of Conduct Committee and the Administrative Office, and can adjust any form that may be adopted with greater facility than the Enabling Act permits.

The second question was whether the national rules should be framed to preempt local rules. This question is made difficult by competing considerations. Preemption of local rules can be easily supported. There is no apparent reason to believe that there is any local variation in the circumstances that affect the desirable level of disclosure. If the proposed model is the best disclosure rule, national uniformity has important advantages. One advantage is adherence to the Enabling Act ideal that there be uniform federal procedures. A second advantage is that parties and law firms that regularly appear in different federal courts are spared the burden of learning local rules and generating the different sets of information required by different local rules. Continued recognition of local rules, however, also can be easily supported. The Appellate Rules Advisory Committee recognized the role of local circuit rules when it first drafted Appellate Rule 26.1 in a form that required greater disclosure than the more recently amended version of Rule 26.1. This recognition reflected the drafting history, which began with more detailed disclosure requirements but receded in the face of substantial opposition. Most of the circuits have in fact adopted local rules that require disclosures more detailed than Rule 26.1 requires. Some district courts, acting in the absence of any national rule, also have adopted local rules that require disclosures more detailed than Rule 26.1 disclosure. This experience suggests that the minimal requirements of Rule 26.1 may not embody the best long-range approach. The compromise embodied in draft Rule 7.1 is to address local rules only in the Committee Note. The final paragraph of the Committee Note states that Rule 7.1 does not prohibit local rules unless the Judicial Conference adopts a disclosure form that preempts local rules.

Proposed Rule 7.1(c), which directs the clerk to deliver a copy of the Rule 7.1(a) disclosure to each judge acting in the action or proceeding, does not have a parallel in the drafts of Appellate Rule 26.1 and Criminal Rule 12.4. The Civil Rules Advisory Committee believes that there are justifications that distinguish the Civil Rules from the Appellate Rules and Criminal Rules on this matter. The experience of some committee members is that disclosure information does not always come promptly to the district judge. An express direction to the clerk will help ensure that the disclosure accomplishes the intended function. The other rules address different circumstances. Appellate Rule 26.1(b) requires that the disclosure be included in a party's principal brief, assuring that it will come to the attention of each judge who considers the appeal on the merits. The occasions for action

by a circuit judge before the principal briefs are filed are not so frequent as to require a direction to the clerk. Relatively few criminal cases involve corporate parties, and not many involve likely corporate restitution recipients.

Rule 7.1 Disclosure

(a) Required Disclosure. A party to [that appears in] an action or proceeding in a district court must:

(1) if it is a nongovernmental corporation, file two copies of a statement that

(A) identifies all its parent corporations [companies?] and also identifies any publicly held company [corporation?] that owns 10% or more of its stock, or

(B) states that there is nothing to report under Rule 7(a)(1)(A); and

(2) file two copies of a form providing any additional information required by the Judicial Conference of the United States.

(b) Time for Filing. A party must file the Rule 7.1(a) statement or form with its first appearance, pleading, petition, motion, response, or other request addressed to the court. A supplemental statement or form must be filed promptly upon any change in the circumstances that Rule 7.1(a) requires the party to identify.

(c) Form Delivered to Judge. The clerk must deliver a copy of the Rule 7.1(a) disclosure to each judge acting in the action or proceeding.

Committee Note

Rule 7.1 is drawn from Rule 26.1 of the Federal Rules of Appellate Procedure, with changes to adapt to the circumstances of district courts that dictate different provisions for the time of filing, number of copies, and the like. The information required by Rule 7.1(a)(1) reflects the "financial interest" standard of Canon 3C(1)(c) of the Code of Conduct for United States Judges. This information will support properly informed disqualification decisions in situations that call for automatic disqualification under Canon 3C(1)(c). It does not cover all of the circumstances that may call for disqualification under the subjective financial interest standard, and does not deal at all with other circumstances that may call for disqualification.

Although the disclosures required by Rule 7.1(a)(1) may seem limited, they are calculated to reach a majority of the circumstances that are likely to call for disqualification on the

basis of financial information that a judge may not know or recollect. Framing a rule that calls for more detailed disclosure will be difficult. Unnecessary disclosure requirements place a burden on the parties and on courts. Unnecessary disclosure of vast volumes of information may create a risk that a judge will overlook the one bit of information that might require disqualification, and also may create a risk that unnecessary disqualifications will be made rather than attempt to unravel a potentially difficult question. It has not been feasible to dictate more detailed disclosure requirements in Rule 7.1(a)(1).

Despite the difficulty of framing more detailed disclosure requirements, developing experience with divergent disclosure practices and with improving technology may provide the foundations for exacting additional requirements. The Judicial Conference, supported by the committees that work regularly with the Codes of Judicial Conduct and by the Administrative Office of the United States Courts, is in the best position to develop any additional requirements and to keep them adjusted to new information. Rule 7.1(a)(2) authorizes adoption of additional disclosure requirements by the Judicial Conference, to be embodied in a uniform form that can be used by all courts.

Rule 7.1(a)(2) requires every party to file a disclosure form if the Judicial Conference acts to adopt a form that reaches a party that is not a nongovernmental corporation. It cannot be predicted what information will be required, of what parties, if the Judicial Conference adopts a form. The Judicial Conference may adopt a form that applies only to some, not all parties. In that case, only the designated parties need file. Even if the form applies to all parties, it seems likely that many parties, and particularly individual parties, will not have any information that falls within the required categories. In that case, the Rule 7.1(a)(2) requirement is satisfied by filing a form that indicates that there is nothing to disclose as to any of the required categories.

Rule 7.1 does not prohibit local district or circuit rules that require disclosures in addition to those required by Rule 7.1 unless the Judicial Conference adopts a form that [expressly] preempts additional disclosures.

II B: Rules 54 and 58: Entry of Judgment

The Civil Rules Advisory Committee became involved with the entry-of-judgment question at the January 2000 Standing Committee meeting. The Appellate Rules Advisory Committee raised for discussion the problems that arise from the interplay of Appellate Rule 4 with Civil Rule 58. Appellate Rule 4 sets appeal time from the entry of judgment. Civil Rule 58 requires that a judgment be set forth on a separate document. The combination of these two rules has created a problem because district courts frequently ignore the separate document requirement. Failure to enter the final judgment on a separate document means that appeal time never starts to run. The Appellate Rules Advisory Committee is concerned that the judicial landscape is littered with many "time bombs" in the form of years-old judgments that at any time could explode into an appeal, shattering the victors' repose and potentially burdening the courts with further proceedings in disputes that have become stale if not petrified.

A satisfactory solution to this problem cannot be found in the Appellate Rules alone. The obvious strategy of decoupling Appellate Rule 4 from Civil Rule 58 creates real problems because the time for post-judgment motions in the district court would remain coupled to Rule 58. Civil Rules 50, 52, and 59 all require that motions be filed within 10 days after entry of judgment. The time for a motion to vacate under Civil Rule 60(b)(1), (2), or (3) also is geared to the time judgment is entered. If Appellate Rule 4 were to approach the problem in isolation, the result would be that appeal time could expire before the time had begun to run for motions for judgment as a matter of law, to amend findings of fact, for a new trial, or to alter or amend the judgment. Disposition of a post-appeal time motion could in turn lead to a timely appeal from denial or from an amended judgment.

Several approaches could be taken in joint consideration of these problems. One would begin with the definition of "judgment" in Civil Rule 54(a). The Civil Rules Advisory Committee put this approach aside with little discussion because the Rule 54(a) definition presents many horrid theoretical problems that in practice seem to have caused no real difficulty. A second approach would be to abandon the separate document requirement, which was added to the rules to provide a clear signal for the running of appeal time. The Civil Rules Advisory Committee resisted this approach in the belief that the separate document requirement remains valuable. A clear starting point is desirable not only for appeal time but also for the unalterable (Civil Rule 6(b)) time limits for the several post-judgment motions that are geared to the entry of judgment. Adherence to the separate judgment requirement, moreover, is simple. These considerations are not overwhelming, however, and the Advisory Committee recommends that if proposed Rule 58 is published, comments be solicited on the question whether the separate document requirement should be abandoned. A third approach might be to abandon the "mandatory and jurisdictional"

character of appeal time limits, a complex undertaking that need not be approached if a simpler solution can be found.

The resolution recommended for publication amends Civil Rule 58. Rule 58(a) retains the separate document requirement, but makes exceptions for orders disposing of any of the several motions that, under Appellate Rule 4, suspend appeal time. These exceptions respond to one of the problems explored by the Appellate Rules Advisory Committee. The courts of appeals have generated a confused body of discordant rulings on the need to use a separate document to set forth an order disposing of one of these motions. The exceptions are drafted in terms more general than the Appellate Rule 4 provisions for the sake of simplicity. Appellate Rule 4(a)(4)(A)(iii), for example, suspends appeal time on timely motion for attorney fees only if the district court acts under Civil Rule 58 to extend appeal time. Draft Rule 58(a)(1)(C) deletes the qualification in the belief that if district courts now overlook the separate document requirement with some frequency, it is too much to ask that a separate document be created for disposition of a motion for attorney fees if, but only if, appeal time has been extended.

The central feature for resolving the "time bomb" problem is Rule 58(b). As now, entry of judgment requires entry on the civil docket. If Rule 58(a) requires that the judgment be set forth on a separate document, the time of entry for purposes of Rules 50, 52, 54(d)(2)(B), 59, 60, and 62 occurs on one of two events: the judgment is set forth on a separate document and entered on the civil docket, or the judgment is entered on the civil docket and 60 days expire without setting the judgment forth on a separate document. The fuse that now can be ignited only by setting the judgment forth in a separate document is replaced by a relatively fast fuse that automatically starts to burn 60 days after judgment is entered on a separate document. A party anxious to avoid this 60-day delay, moreover, is encouraged by draft Rule 58(d) to request entry on a separate document.

Draft Appellate Rule 4(a)(7) completes the solution by adopting draft Civil Rule 58 for appeal-time purposes.

A conforming change is proposed for Rule 54(d)(2)(C), deleting the separate document requirement. This proposal also includes a minor change that would conform the time requirement in Rule 54(d)(2)(B) to the requirement recently made uniform in Rules 50, 52, and 59 — the motion for attorney fees must be filed no later than 14 days after entry of judgment, not both filed and served.

The Advisory Committee discussion of Rules 54 and 58 is summarized at pages 15 to 20 of the draft Minutes.

Rule 58. Entry of Judgment

~~Subject to the provisions of Rule 54(b): (1) upon a general~~

~~verdict of a jury, or upon a decision by the court that a party shall recover only a sum certain or costs or that all relief shall be denied, the clerk, unless the court otherwise orders, shall forthwith prepare, sign, and enter the judgment without awaiting any direction by the court; (2) upon a decision by the court granting other relief, or upon a special verdict or a general verdict accompanied by answers to interrogatories, the clerk shall promptly approve the form of the judgment, and the clerk shall thereupon enter it. Every judgment shall be set forth on a separate document. A judgment is effective only when so set forth and when entered as provided in Rule 79(a). Entry of the judgment shall not be delayed, nor the time for appeal extended, in order to tax costs or award fees, except that, when a timely motion for attorneys' fees is made under Rule 54(d)(2), the court, before a notice of appeal has been filed and has become effective, may order that the motion have the same effect under Rule 4(a)(4) of the Federal Rules of Appellate Procedure as a timely motion under Rule 59. Attorneys shall not submit forms of judgment except upon direction of the court, and these directions shall not be given as a matter of course.~~

(a) Separate Document.

(1) Every judgment and amended judgment must be set forth on a separate document, but a separate document is not required for an order disposing of a motion:

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

(B) to amend or make additional findings of fact under Rule 52(b);

(C) for attorney fees under Rule 54;

(D) for a new trial, or to alter or amend the judgment, under Rule 59; or

(E) for relief under Rule 60.

(2) Subject to [the provisions of] Rule 54(b):

(A) the clerk must, without awaiting the court's direction, promptly prepare, sign, and enter the judgment when:

(i) the jury returns a general verdict, or

(ii) the court awards only costs or a sum certain, or denies all relief;

(B) the court must promptly approve the form of the judgment, which the clerk must promptly enter, when:

(i) the jury returns a special verdict or a general verdict accompanied by interrogatories, or

(ii) the court grants other relief not described in Rule 58(a)(2).

(b) Time of Entry. Judgment is entered for purposes of Rules 50, 52, 54(d)(2)(B), 59, 60, and 62:

(1) when it is entered in the civil docket under Rule 79(a), and

(2) if a separate document is required by Rule 58(a)(1), upon the earlier of these events:

(A) when it is set forth on a separate document, or

(B) when 60 days have run [expired] from entry on the civil docket under Rule 79(a).

(c) Cost or Fee Awards.

(1) Entry of judgment may not be delayed, nor the time for appeal extended, in order to tax costs or award fees, except as provided in Rule 58(c)(2).

(2) When a timely motion for attorney fees is made under Rule 54(d)(2) the court may act before a notice of appeal has been filed and has become effective to order that the motion have the same effect under Rule 4(a)(4) of the Federal Rules of Appellate Procedure as a timely motion under Rule 59.

(d) Request for Entry. A party may request that judgment be set forth on a separate document as required by Rule 58(a)(1).

Committee Note

Rule 58 has provided that a judgment is effective only when set forth on a separate document and entered as provided in Rule 79(a). This simple requirement has been ignored in many cases. The result of failure to enter judgment is that the time for making motions under Rules 50, 52, 54(d)(2)(B), 59, and some motions under Rule 60, never begins to run. The time to appeal under Appellate Rule 4(a) also does not begin to run. There have been few visible problems with respect to Rule 50, 52, 54(d)(2)(B), 59, or 60 motions, but there have been many and horridly confused problems under Appellate Rule 4(a). These amendments are designed to work in conjunction with Appellate Rule 4(a) to ensure that appeal time does not linger on indefinitely, and to maintain the integration of the time periods set for Rules 50, 52, 54(d)(2)(B), 59, and 60 with Appellate Rule 4(a).

Rule 58(a) preserves the core of the present separate document requirement, both for the initial judgment and for any amended judgment. No attempt is made to sort through the confusion that some courts have found in addressing the elements of a separate document. It is easy to prepare a separate document that recites the terms of the judgment without offering additional explanation or citation of authority. Forms 31 and 32 provide examples.

Rule 58(a) is amended, however, to address a problem that arises under Appellate Rule 4(a). Some courts treat such orders as those that deny a motion for new trial as a "judgment," so that appeal time does not start to run until the order is entered on a separate document. Without attempting to address the question whether such orders are appealable, and thus judgments as defined by Rule 54(a), the amendment provides that entry on a separate document is not required for an order disposing of the motions listed in Appellate Rule 4(a). The enumeration of motions drawn from the Appellate Rule 4(a) list is generalized by omitting details that are important for appeal time purposes but that would unnecessarily complicate the separate document requirement. As one example, it is not required that any of the enumerated motions be timely. Many of the enumerated motions are frequently made before judgment is entered. The exemption of the order disposing of the motion does not excuse the obligation to set forth the judgment itself on a separate document.

Rule 58(b) discards the attempt to define the time when a judgment becomes "effective." Taken in conjunction with the Rule 54(a) definition of a judgment to include "any order from which an appeal lies," the former Rule 58 definition of effectiveness could cause strange difficulties in implementing pretrial orders that are appealable under interlocutory appeal provisions or under expansive theories of finality. Rule 58(b) replaces the definition of effectiveness with a new provision aimed directly at the time for making post-trial and post-judgment motions. If judgment is promptly set forth on a separate document, as should be done, the new provision will not change the effect of Rule 58. But in the cases in which court and clerk fail to comply with this simple requirement, the motion time periods set by Rules 50, 52, 54, 59, and 60 begin to run after expiration of 60 days from entry of the judgment on the civil docket as required by Rule 79(a).

A companion amendment of Appellate Rule 4(a)(7) integrates these changes with the time to appeal.

Rule 58(b) also defines entry of judgment for purposes of Rule 62. There is no reason to believe that the Rule 62(a) stay of execution and enforcement has encountered any of the difficulties that have emerged with respect to appeal time. It seems better, however, to have a single time of entry for motions, appeal, and enforcement.

This Rule 58(b) amendment defines "time of entry" only for purposes of Rules 50, 52, 54, 59, 60, and 62. This limit reflects

the problems that have arisen with respect to appeal time periods, and the belief that Rule 62 should be coordinated with Rules 50, 52, 59, and 60. In this form, the amendment does not resolve all of the perplexities that arise from the literal interplay of Rule 54(a) with Rule 58. In theory, the separate document requirement continues to apply, for example, to an interlocutory order that is appealable as a final decision under collateral-order doctrine. Appealability under collateral-order doctrine should not be complicated by failure to enter the order as a judgment on a separate document — there is little reason to force trial judges to speculate about the potential appealability of every order, and there is no means to ensure that the trial judge will always reach the same conclusion as the court of appeals. Appeal time should start to run when the collateral order is entered without regard to creation of a separate document and without awaiting expiration of the 60 days provided by Rule 58(b)(2). Drastic surgery on Rules 54(a) and 58 would be required to address this and related issues, however, and it is better to leave this conundrum to the pragmatic disregard that seems its present fate. The present amendments do not seem to make matters worse, apart from one false appearance. If a pretrial order is set forth on a separate document that meets the requirements of Rule 58(b), the time to move for reconsideration seems to begin to run, perhaps years before final judgment. And even if there is no separate document, the time to move for reconsideration seems to begin 60 days after entry on the civil docket. This apparent problem is resolved by Rule 54(b), which expressly permits revision of all orders not made final under Rule 54(b) "at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties."

New Rule 58(d) replaces the provision that attorneys shall not submit forms of judgment except on direction of the court. This provision was added to Rule 58 to avoid the delays that were frequently encountered by the former practice of directing the attorneys for the prevailing party to prepare a form of judgment, and also to avoid the occasionally inept drafting that resulted from attorney-prepared judgments. See *11 Wright, Miller & Kane, Federal Practice & Procedure: Civil 2d, § 2786.* The express direction in Rule 58(a)(2) for prompt action by the clerk, and by the court if court action is required, addresses this concern. The new provision allowing any party to move for entry of judgment on a separate document will protect all needs for prompt commencement of the periods for motions, appeals, and execution or other enforcement.

Rule 54. Judgments; Costs

* * *

(d) Costs; Attorneys' Fees.

* * *

(2) *Attorneys' Fees.*

(A) Claims for attorneys' fees and related nontaxable expenses shall be made by motion unless the substantive law governing the action provides for the recovery of such fees as an element of damages to be proved at trial.

(B) Unless otherwise provided by statute or order of the court, the motion must be filed ~~and served~~ no later than 14 days after entry of judgment; must specify the judgment and the statute, rule, or other grounds entitling the moving party to the award; and must state the amount or provide a fair estimate of the amount sought. If directed by the court, the motion shall also disclose the terms of any agreement with respect to fees to be paid for the services for which claim is made.

(C) On request of a party or class member, the court shall afford an opportunity for adversary submissions with respect to the motion in accordance with Rule 43(e) or Rule 78. The court may determine issues of liability for fees before receiving submissions bearing on issues of evaluation of services for which liability is imposed by the court. The court shall find the facts and state its conclusions of law as provided in Rule 52(a)~~, and a judgment shall be set forth in a separate document as provided in Rule 58~~.

* * *

Committee Note

Subdivision (d)(2)(C) is amended to delete the requirement that judgment on a motion for attorney fees be set forth in a separate document. This change complements the amendment of Rule 58(a)(1), which deletes the separate document requirement for an order disposing of a motion for attorney fees under Rule 54. These changes are made to support amendment of Rule 4 of the Federal Rules of Appellate Procedure. It continues to be important that a district court make clear its meaning when it intends an order to be the final disposition of a motion for attorney fees.

The requirement in subdivision (d)(2)(B) that a motion for attorney fees be not only filed but also served no later than 14 days after entry of judgment is changed to require filing only, to establish a parallel with Rules 50, 52, and 59. Service continues to be required under Rule 5(a).

II C: Rule 81(a)(2)

Rule 81(a)(2) now includes provisions governing the time to make a return to a petition for habeas corpus. These provisions are inconsistent with statutory provisions, and also are inconsistent with provisions in the separate sets of habeas corpus rules that are still more inconsistent with the statutory provisions. The Criminal Rules Committee will propose some changes in the rules that govern habeas corpus proceedings and those that govern 28 U.S.C. § 2255 motions to vacate sentence. The Criminal Rules Advisory Committee has recommended that all reference to these matters should be stricken from Rule 81(a)(2). The Civil Rules Advisory Committee agreed, recommending publication of the draft Rule 81(a)(2) revision set out below at the same time as the parallel Criminal Rules Committee proposals are published.

Rule 81. Applicability in General

(a) To What Proceedings Applicable.

* * *

(2) These rules are applicable to proceedings for admission to citizenship, habeas corpus, and quo warranto, to the extent that the practice in such proceedings is not set forth in statutes of the United States, the Rules Governing Section 2254 Cases, or the Rules Governing Section 2255 Proceedings, and has heretofore conformed to the practice in civil actions. ~~The writ of habeas corpus, or order to show cause, shall be directed to the person having custody of the person detained. It shall be returned within 3 days unless for good cause shown additional time is allowed which in cases brought under 28 U.S.C. § 2254 shall not exceed 40 days, and in all other cases shall not exceed 20 days.~~

Committee Note

This amendment brings Rule 81(a)(2) into accord with the Rules governing § 2254 and § 2255 proceedings; those rules govern as well habeas corpus proceedings under § 2241. In its present form, Rule 81(a)(2) includes return-time provisions that are inconsistent with the provisions in the Rules Governing §§ 2254 and 2255. The inconsistency should be eliminated, and it is better that the time provisions continue to be set out in the other rules without duplication in Rule 81. Rule 81 also directs that the writ be directed to the person having custody of the person detained. Similar directions exist in the § 2254 and § 2255 rules, providing additional detail for applicants subject to future custody. There is no need for partial duplication in Rule 81.

The provision that the Civil Rules apply to the extent that practice is not set forth in the § 2254 and § 2255 rules dovetails with the provisions in Rule 11 of the § 2254 Rules and Rule 12 of

the § 2255 Rules.

III Pending Projects

Several ambitious projects remain on the Advisory Committee agenda. Most are confided to subcommittees for initial deliberations and recommendations to the full committee. Summaries of the subcommittee reports provide useful pictures of major topics that will command committee attention over the next few years.

Discovery

The Report of the Discovery Subcommittee is summarized at pages 22 to 29 of the draft Minutes. The subcommittee guided the work that led to the discovery rules amendments that the Supreme Court transmitted to Congress in April. Important questions remain with the subcommittee, however, including discovery of computer-based information and a related question of protecting against inadvertent privilege waiver in discovery.

The subcommittee arranged a meeting to hear from lawyers, judges, and forensic computer specialists about the problems that have been encountered with discovery of computer-based information. The broad question is whether there is something unique about discovery of computer-based information that distinguishes it from discovery of other forms of information. If indeed there are unique problems, the next question is whether these problems should be addressed by amending the discovery rules. It may be that any special problems can be handled within the framework of the present rules, perhaps with assistance from a special manual and from programs to educate the bench and bar. More specific questions underlie these broad questions, and were well illuminated by the discussion.

It is possible that computer generation and storage of information is distinctive because the sheer volume of hard information, protected against the fallibility of human memory, is so great. This distinction, if it holds true, may nonetheless be offset by the ability to search computer-stored information with the aid of the computer.

Apart from sheer volumes of information, many distinctive questions may emerge. One set of questions arises from the ability to use a computer to search computer-based information. The person who has the information may have strong preferences about the form of production. At times, the preference will favor production in "hard" copy form after the person who has the information conducts the computer search. At other times, the preference will favor production in computer form, so that the burden of searching falls on the requesting party. The preferences may be influenced by conflicting desires. Some of the desires are clearly legitimate. It is easier to avoid production of irrelevant, protected, or privileged information if the search is done by the party who has the information. The burden of the search may be considerable,

however, and it may seem better to let the burden fall on the party who wants the information. Other desires may not be so clearly legitimate. A search by the party who has the information may not be as thorough; a search by the party who requests the information may be made unnecessarily difficult by lack of familiarity with the methods of storing and retrieving the information. A discovery response that allows access to a computer information system may be the equivalent of the "boxcar" responses to document production that led to the adoption of the final paragraph of Rule 34(b).

The method of production question is matched by the method of inquiry question. The party requesting information may seek to learn enough about the computer storage and retrieval methods to be able to formulate the search questions. Even this desire may be resisted on the ground that the computer system itself represents valuable computer information. Actual execution of the search raises further questions. The demanding party may prefer to execute the search, but often that will present a risk of access to protectible information.

Other questions emerge from peculiarities of computer-based storage methods that seem relatively benign until discovery comes around. Cumulatively, these peculiarities can greatly increase the cost of a thorough search for all information that is available somewhere, somehow, within an organization. Computer users routinely delete information, but the deleted information commonly remains in the system until it is overwritten at random. Much computer information is duplicated on "back-up" devices, commonly tapes, but in a completely unsystematic way. Back-up tapes may be retained for brief periods, or for long periods. The cost of searching through masses of unorganized data can be staggering. The old days of concentrated and managed central computer systems are yielding to an incredible dispersion of desktop and laptop computers, with huge amounts of information distributed wholesale and retained indefinitely in one place or another. The very act of creating or storing computer-based information commonly generates additional information — the "embedded" information — that is quite unknown to the person working on the computer. The only way to know what information is available to an organization is to examine all of these sources. The examination, moreover, must be undertaken immediately, at least in the form of data preservation, lest continuing operation of the computer system in the ordinary course destroy at-risk information that was earlier deleted but remains subject to recovery until it is overwritten.

Still other problems arise from the common use of computer systems for multiple purposes. Individuals within organizations commonly use organization computer facilities for personal activities, generating privacy issues that may further complicate the process of protecting against untoward revelations.

There is much more to be learned before the subcommittee can begin careful deliberation of the question whether there is any

need to revise the discovery rules to address distinctive problems arising from demands for computer-based information. A number of ideas have been considered, ranging from modest changes to more dramatic innovations. Some of the ideas are familiar. It has been urged that discovery of computer-based information provides special reason to consider a more limited form of the general cost-bearing proposal that was rejected by the Judicial Conference last September. The long-standing interest in devising a means to reduce the costs of protecting against inadvertent privilege waiver is given new meaning by computer-based discovery. Other ideas are more novel. It might be possible, for example, to provide that intentional deletion of information is the equivalent of shredding a paper document, or to establish presumptive limits on any obligation to search back-up information sources.

The subcommittee will continue to gather information. Part of its inquiry will be another informal conference, probably this September, as a sequel to the March conference. All Advisory Committee members will be invited to the conference.

Class Actions

The Mass Torts Working Group finished its appointed chores by presenting its Report in February 1999. It does not seem likely that a successor ad hoc committee will be appointed to carry forward the cross-committee work initiated by the Working Group. Each of the several Judicial Conference Committees that works in this area will continue to coordinate their efforts. The work of the Civil Rules Advisory Committee will focus on Rule 23. The Rule 23 Subcommittee will begin with the fruits of the work that has been ongoing since 1991. Tangible embodiments of this work include a four-volume set of working papers and a study done by the Federal Judicial Center for the Advisory Committee. Additional material is provided by the Report of the Mass Torts Working Group, including papers by the Federal Judicial Center and a number of draft proposals.

The Subcommittee report to the Advisory Committee is summarized at pages 29 to 39 of the draft Minutes. The Subcommittee recommended that the basic structure of Rule 23 should not be reconsidered, and that it is better not to pursue further many of the earlier proposals that stirred substantial controversy.

Much of the Subcommittee's report and Advisory Committee discussion focused on the question whether Rule 23 should be amended to address directly the problems considered in Amchem Products, Inc. v. Windsor, 521 U.S. 591 (1997), and touched upon in Ortiz v. Fibreboard Corp., 119 S.Ct. 2295 (1999). Rough drafts were submitted to illustrate the questions that must be faced if an attempt were made to approve certification of settlement classes in circumstances that are not permitted by the Amchem and Ortiz decisions. Other drafts were submitted to illustrate the ways in which Rule 23 might be amended simply to express the settlement-

class rules established by these decisions. All of the drafts address class actions in general, rather than "mass torts" classes alone. The drafts that go beyond the Amchem and Ortiz decisions raise particularly troubling questions about the theory of representation, settlement, federalism, and substantive law. The Advisory Committee concluded that at least for the time being, the Subcommittee should put aside the drafts that would go beyond present settlement-class limits. The question whether to articulate present limits in the text of Rule 23, taking account of the ways in which lower courts have developed the Amchem decision, was left open. If other changes are adopted that make it seem desirable to address certification for settlement only in Rule 23, the question will be considered further.

The Subcommittee will focus attention on a manageable number of proposals to improve the process of administering class actions. The proposals will seek to embody the best lessons of present practice, drawing from the most successful approaches to facilitate general adoption.

The process of reviewing proposed class-action settlements will be one major topic for consideration. A detailed draft Rule 23(e) has been prepared to illustrate topics that deserve study; not every topic in the present draft is likely to survive. Two central themes of the draft involve objections to a proposed settlement and factors for review. Objections are approached with the view that objections interposed in good faith provide a valuable source of information, often helping to overcome the phenomenon that adversary presentation fails when plaintiffs and defendants join in pursuing the approval of their settlement agreement. Support for objections is provided by way of discovery and a discretionary power to award expenses and fees incurred to support a successful objection. At the same time, it is recognized that objections may not always be advanced with a good-faith view to improve the settlement for the benefit of class members. It can be difficult to distinguish between objections made to advance the purposes of Rule 23 and objections made to seize the strategic value of threats to derail the settlement. The draft makes only gingerly approaches to the problem of "bad" objections, recognizing the danger that "good" objections might be deterred.

The Rule 23(e) draft includes a long list of factors to be considered in reviewing a proposed settlement. The factors are drawn from the welter of opinions that, together, say the same things.

Two other aspects of draft Rule 23(e) have survived for continuing study, but face certain controversy. The first would require that class members be allowed to opt out of the class — including an otherwise mandatory class — after the settlement terms are announced. This provision appears only in brackets, indicating a Subcommittee disposition to reject the proposal. The second would authorize appointment of a magistrate judge or other person

to make "an independent investigation and report to the court on the fairness of" the settlement. This proposal would involve the court system in a move outside its traditional reliance on adversary investigation and presentation. In the end, reliance may have to be placed on objectors alone.

Yet other aspects of class-action settlement remain to be developed by further Subcommittee work. One proposal is that neither would-be representatives nor would-be class counsel may do anything on behalf of a putative class until the class is certified. One of the central purposes of this proposal is to prohibit any settlement discussions, however tentative.

The Subcommittee also is considering questions of appointment and compensation of class counsel. These questions are highly controversial now. Any proposal to address them will go to the heart of many contemporary complaints about class-action practice, but also will go to the heart of many contemporary enthusiasms for class-action practice. Very rough drafts have been prepared that would require an application for appointment as class counsel even when only one contender appears, and that would address the procedure and criteria for awarding fees. The Advisory Committee recognizes that these issues will provoke hot disputes, but concluded that the Subcommittee should develop more detailed proposals.

Other Rule 23 topics will be considered as well. One will develop earlier draft proposals to address notice issues. The Federal Judicial Center will support work on notice by gathering model notice forms for a number of topics and types of class actions.

Rule 53: Special Masters

In 1994 the Advisory Committee briefly considered a draft that comprehensively revises Rule 53. Rule 53 now focuses on the use of special masters to support fact determinations at trial or to accomplish detailed matters of accounting. The draft seeks to bring into Rule 53 the developing practices that appoint masters for a variety of pretrial and post-judgment purposes. A Rule 53 Subcommittee was appointed to study these questions and as its first order of business requested the Federal Judicial Center to undertake a study of current practices.

The Federal Judicial Center study has been completed and was presented to the Advisory Committee. The first observation is that the question whether to appoint a special master arises in only a fraction of one percent of all federal cases, but even this fraction amounts to several hundred cases a year. Often the question was raised by the court, and more often than not there was no objection to the suggestion that a master be appointed. Consent, indeed, seems to play an important role in the decision whether to appoint a master, although at times apparent consent may conceal unvoiced misgivings. Generally judges, masters, and

attorneys agreed that actual experience with a master was successful. The greatest concern was not accomplishment of the intended purposes but the cost of paying for the master's services.

The study confirms the perception that pretrial and post-judgment appointments have become important. Pretrial appointments are made for a variety of purposes, including mediation and settlement. Discovery masters seem to be appointed when the parties have proved unable to manage discovery themselves. A master also may be appointed to assist the court in a case involving highly technical subject-matter; this use may overlap appointment of an expert under Evidence Rule 706, although use of Rule 706 is much less frequent than use of Civil Rule 53. Post-judgment masters tend to be appointed not merely for the traditional complicated accounting purpose but also for the modern purpose of monitoring implementation of institutional reform decrees or administering class-action judgments.

Two sets of problems were commonly encountered in the study. Concerns were often expressed about the method of selecting the person to be appointed as master. And the question of ex parte communications with parties or judge was frequently encountered. Appointments for administrative, procedural, or settlement purposes may virtually require ex parte communications with the parties. Other appointments may benefit from the ability of the master to have confidential communications with the judge. But ex parte communications with a person discharging a judicial function are always worrisome. Some orders prohibited ex parte communications; one judge explained that the master should not be subject to lobbying by the parties.

Interviews with judges, masters, and attorneys found reservations about the prospect of revising Rule 53, but several suggestions for ways in which Rule 53 could be improved. Perhaps the starting point is that Rule 53 was expressly noted in only a minority of the cases involving appointment of a master; it was as common to cite no authority at all as to cite Rule 53. A judge with particularly rich experience in the successful use of special masters expressed the dilemma: without revision, much present practice may have only tenuous support in Rule 53 or inherent authority, but revision runs the risk of encouraging undesirable expansion or discouraging desirable expansion.

Judge Scheindlin presented the Subcommittee report in conjunction with the report of the Federal Judicial Center study. The summary appears at pages 39 to 43 of the draft Minutes. Informal surveys duplicate the findings of the formal study. Special masters are used in many ways that are not reflected in Rule 53. Many of these uses are highly desirable. But there are problems that need to be studied. Standards for appointment need to be articulated. Explicit provisions may be useful to protect against conflicts of interest. Standards of review by the court should be considered. The relationship between the use of special

masters and reliance on magistrate judges needs further thought. Ex parte communications should be addressed directly in Rule 53, perhaps by requiring that the issue be resolved in the order of appointment. Still other issues will be considered.

The Advisory Committee directed the Subcommittee to develop a draft revised Rule 53 for consideration by the committee.

Simplified Procedure

The simplified procedure project remains in an early stage. Various groups of district judges have expressed enthusiasm about the project to create an alternative set of simplified procedures for some actions. A first draft has been prepared that seeks to simplify regular procedure by expanding the emphasis on pleading and disclosure, while scaling back on discovery. Motion practice would be curtailed. The draft also would require an early and firm trial date. Many questions remain to be addressed: should application of the rules require consent of all parties, or should some cases be assigned by other means? More generally, what kinds of cases would benefit from a procedures that lack the open-ended potential for great expense that may characterize the general rules? Will cases that would benefit come to the federal courts in greater numbers if an alternative procedure system is devised? Is it desirable to devote limited judicial resources to these cases? How would simplified rules relate to the many different systems that are used by many districts to assign cases to different procedural tracks? Is there a risk of interference with alternate dispute resolution mechanisms? All of these questions affect the design of a simplified system. If consent of all parties is required, for example, it is possible to consider waiver of jury trial, agreement that a firm trial date will be held even if that requires trial before a magistrate judge, and so on.

The Simplified Procedure Subcommittee hopes to identify a small group of lawyers who have experience relevant to these and other questions raised by the simplified procedure project. When a group is identified, the Subcommittee will meet with them to seek inspiration and advice.

Other Continuing Work

The Advisory Committee plans to continue coordination and cooperation with other Judicial Conference committees that are considering questions relevant to mass torts litigation. The chairs of several committees have agreed to keep each other advised of the committees' work, and to meet in conjunction with Judicial Conference sessions. This effort will seek to carry forward, albeit in a less integrated way, the projects of the Mass Torts Working Group.

The Agenda Subcommittee has developed a system for reviewing and making recommendations on public suggestions for rules changes. The system is working well in assigning projects for immediate

action, more detailed study, long-run coordination with other projects, or other disposition.