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

December 13, 1994

TO: Committee on Rules of Practice and Procedure
Standing Committee

Re: Report of Advisory Committee on Civil Rules

Dear Colleagues:

The Advisory Committee on Civil Rules met on October 20-21, 1994. Professor Ed Cooper, Reporter to the committee, has prepared draft Minutes of the meeting, a copy of which is attached. I will refer to these Minutes in this report.

This was the first meeting for two new members. Justice Christine Durham of the Utah Supreme Court replaces Chief Justice Holmes. Judge David Levi, United States District Court in Sacramento replaces Magistrate Judge Wayne Brazil. The American College of Trial Lawyers was represented by Robert Campbell, and the Litigation Section of the American Bar Association by Barry McNeil. This was the first meeting attended by a representative of the Litigation Section.

I.

Five items require action by the Standing Committee:

1. Rule 4(m) - Suits in Admiralty Act (Minutes pp. 1-2). The Advisory Committee recommends that the Standing Committee urge Judicial Conference approval of a recommendation that Congress delete the service provisions from 42 U.S.C. § 742.

2. Rule 26(c) (Minutes p. 6). The Minutes set out the history of the proposed changes to Rule 26(c). Following extensive discussion at the meeting in Tucson, the committee voted by ballot as follows:

BALLOT NO. 1

Expanded Version of (c)(3), Without "Intervention"

(3) On motion, the court may dissolve or modify a protective order. In ruling, the court must consider, among other matters, the following:
- (A) the extent of reliance on the order;
- (B) the public and private interests affected by the order, including any risk to public health or safety;
- (C) the movant's consent to submit to the terms of the order;
- (D) the reasons for entering the order, and any new information that bears on the order; and
- (E) the burden that the order imposes on persons seeking information relevant to other litigation.

Votes for the published version: 3
Votes for the expanded version: 10

BALLOT NO. 2

Expanded Version, With "Intervention" Provision

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

(B) In ruling on a motion to dissolve or modify a protective order, the court must consider, among other matters, the following: (The same list as above, cast as (i), etc., rather than A through E.)

Votes to add the intervention language to whichever version of (c)(3) wins: 8

Votes against adding the intervention language to the winning (c)(3) version: 5

It is the judgment of the committee that these changes will not require a second publication. We recommend that Rule 26(c) be transmitted to the Judicial Conference for approval. The full text of Rule 26(c) with changes shown is attached as Exhibit 1, with a summary of public comments on the published version.

3. Rule 43(a) (Minutes pp. 13-14). The history of the proposed revision of Rule 43(a) is set out at pp. 13-14 of the Minutes. The only recommended change from the published version is to require "good cause shown in compelling circumstances." It was the judgment of the committee that since the only change from the published version narrows the availability of transmission, no additional period of comment is required. Conforming changes to the Committee Note are also made. The full text of Rule 43(a), as recommended with changes shown, is attached as Exhibit 2, with a summary of public comments on the published version.

4. Rule 47(a) (Minutes pp. 14-17). The history of the proposed change to 47(a) is set out in the Minutes at pp. 14-17. The Advisory Committee unanimously recommends that the following change (full text and note are attached as Exhibit 3) to Rule 47(a) be published for comment:

> The court must conduct the examination of prospective jurors. The parties are entitled to examine the prospective jurors to supplement the court's examination within reasonable limits of time, manner, and subject matter set by the court in its discretion.

The Federal Judicial Center, at the committee's request, conducted a survey of the district court concerning voir dire. The study reflects that somewhere between 51% and 67% of all district judges allow counsel questioning. It further found that the average time devoted to voir dire was virtually the same for all levels of attorney participation. The averages for civil cases ranged from 65 minutes to 75 minutes. The Center study also reported:

> Among judges who reported any time expended by counsel, the average was 31 minutes in civil cases and 40 in

> criminal cases. Perhaps most intriguing, however, is the absence of much relationship between total voir dire time and the judge's indication of his or her standard practice regarding attorney participation in voir dire.

The Litigation Section of the American Bar Association and the American College of Trial Lawyers strongly endorse this change. The lawyers are critical of voir dire now being conducted by judges in many courts. Under Batson and J.E.B., lawyers must now articulate nondiscriminatory reasons for their preemptory challenges. Lawyers complain of unfairness in requiring their articulation of reasons derivable by a process by which they are not allowed to directly participate; that requesting the judge to ask follow-on questions is often inadequate.

On the other hand, the committee is persuaded that most trial judges conduct a thorough and probing voir dire. Indeed, over half of the judges reporting in the Federal Judicial Center study now conduct voir dire in essentially the same manner contemplated by the proposed rule. Many of these judges informally report that lawyers seldom exercise the opportunity to examine the panel directly.

A number of district judges in Virginia and one from North Carolina have written letters opposing any participation by lawyers in voir dire. These letters express concern over losing control of the examination of the venire and express fear of transporting various "state court practices" into federal court. The committee also opposes granting uncontrolled examination by lawyers of the jury panel and also opposes any licensing of the feared "state court" voir dire. It is the strong sense of the Advisory Committee that the trial judge should shoulder primary responsibility for examining the venire; that a thorough voir dire by the trial judge in the first instance asking questions, including questions the trial lawyers have asked the judge to ask, will ordinarily leave little necessary supplementation by counsel. The committee expects that the judge will conduct a probing examination. Indeed, questions that step on the privacy of venirepersons are best asked by the court, not counsel.

The Advisory Committee was also of the view that the trial judge ought to be able to properly confine trial counsel to questions that go directly to jury qualification, and that the court has not already asked. That is, a trial judge should be well within her discretion to cut off questions that move from jury qualification to jury persuasion or are repetitive. The text and comment of the proposed rule is intended to reflect these views. We have also heard the views of trial judges who have selected thousands of panels by the procedure contemplated by the rule, with no difficulty in maintaining control, and without experiencing abusive or repetitive examination.

The committee concludes the proposed rule by casting control by the trial judge into the area of trial court discretion. We anticipate that this will likely produce an abuse of discretion standard of review.

In short, the committee sees the proposed rule as a small, but necessary, change. We understand the sincere concerns expressed by some district judges. We are not persuaded, however, that the rule will pose the difficulties they fear. War stories are legion in this field and they can be arrayed on both sides of this debate. We emphasize that the committee disagrees in only one material respect with the judges who have written to the committee in opposing any participation by counsel in voir dire. The committee is not persuaded that the proposed rule transports into federal practice the fear of abuses now occurring in many state court systems. We think many of those same judges would agree that properly modulated attorney voir dire can be particularly helpful. United States v. Hawkins, 658 F.2d 279 (5th Cir., Unit A, 1981), is instructive. In Hawkins, the district judge allowed counsel to follow its questioning regarding publicity. During the court's questioning, no member of the venire acknowledged hearing or seeing media reports regarding defendants and the pending charges. During counsel's voir dire, 48 of 56 members of the venire acknowledged hearing media reports.

Finally, we think it important to send this rule out for comment to ensure that lawyers and judges are fairly heard. At the least, we must put the matter on the table for discussion. Few of the judges writing to the committee have had an opportunity to see the proposed

rule and note. We need the benefit of discussion disciplined by the actual proposal.

5. Rule 48 (Minutes pp. 17-19). The committee unanimously recommends a return to 12-person juries by amending Rule 48. The full text and note are attached as Exhibit 4. The amendment would not alter the requirement of unanimity, nor require the sitting of alternates. A civil jury would be required to commence with 12 persons, in the absence of a stipulation by counsel of a lesser number, but could lose down to 6 as excused by the trial judge for illness, etc.

The Minutes at pp. 17-19 describe the committee's discussion regarding 12-person juries. We have surveyed the literature and gathered much of it in a binder called "Background Materials on Jury Size." The literature is remarkably consistent in its criticism of 6-person juries. These studies largely validate intuitive judgments that 12-person juries deliver a more stable deliberative body than 6. Whatever the origins of the number 12, it is a number that works well.

As strong as it is, the relative instability of 6-person juries is not the most powerful argument for returning to the 12-person jury. It is, rather, that increasing the civil jury to 12 persons works an exponential increase in its ability to reflect the interests of minorities. There is irony in the circumstance that the reduction of the civil jury from 12 to 6 persons came during the same time period that the court began to heavily question their failure to adequately represent the community. Reducing the size from 12 to 6 plainly deals a heavier blow to the representativeness of the civil jury than any bigoted exercise of preemptory challenges.

The argument for 6-person juries revolves largely around cost and efficiency. We are persuaded that dollar cost is quite small. In any event, any savings will not compensate for its instability and frustration of minority participation. Nor have the studies shown a substantial increase in the time required to seat a 12-person jury over a 6-person jury. Throughout the United States today the district courts are seating 8 and 10 person juries for any other than the most routine civil matters. Indeed, the rules themselves encourage district judges to do precisely that, as a companion to the abolition of alternates. So, the rule change brings a

step up from 8 or 10 to 12 and not from 6 to 12, at least in most cases of length.

II.

There are seven information items. They are each described in the Minutes.

1. Rule 5(e) (Minutes pp. 2-3).

2. Rule 6(c) (Minutes p. 4).

3. Rule 23 (Minutes p. 6).

4. Rule 53 (Minutes pp. 19-22).

5. Rule 68 (Minutes pp. 22-23).

6. Evidence Rules 413-415 (Minutes pp. 23-24).

7. Rule 9(h) (Minutes pp. 4-5). Rule 9(h) provides:

> The reference in Title 28, U.S.C. § 1292(a)(3), to admiralty cases shall be construed to mean admiralty and maritime claims within the meaning of the subdivision (h).

This language is ambiguous when applied to a case that includes both an admiralty claim and a nonadmiralty claim. The committee is considering a revision that, with current style conventions, would read:

> A case that includes an admiralty or maritime claim within this subdivision is an admiralty case within 28 U.S.C. § 1292(a)(3).

Sincerely yours,

Patrick E. Higginbotham

(c) (1) **Protective Orders.** ~~Upon~~ On motion by a party or by the person from whom discovery is sought, accompanied by a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action, ~~and for good cause shown,~~ the court ~~in which~~ where the action is pending ~~or~~ – and ~~alternatively~~, on matters relating to a deposition, also the court in the district where the deposition ~~is to~~ will be taken – may, for good cause shown or on stipulation of the parties, make any order ~~which~~ that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

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

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

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

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

(~~5~~E) designating the persons who may be present while ~~that~~ the discovery is ~~be~~ conducted ~~with no one present except persons designated by the court~~;

(~~6~~F) ~~that a deposition, after being sealed,~~ directing that a sealed deposition be opened

only ~~by order of the~~ upon court order;

(~~7~~G) ordering that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way; or

(~~8~~H) directing that the parties simultaneously file specified documents or information enclosed in sealed envelopes, to be opened as ~~directed by~~ the court directs.

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

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

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

(i) the extent of reliance on the order;

(ii) the public and private interests affected by the order, including any risk to public health or safety;

(iii)the movant's consent to submit to the terms of the order;

(iv) the reasons for entering the order, and any new information that bears on the order; and

(v) the burden that the order imposes on

persons seeking information relevant to other litigation.

Committee Note

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

Subdivision (1) also is amended to confirm the common practice of entering a protective order on stipulation of the parties. Stipulated orders can provide a valuable means of facilitating discovery without frequent requests for action by the court, particularly in actions that involve intensive discovery. If a stipulated protective order thwarts important interests, relief may be sought by a motion to modify or dissolve the order under subdivision (3).

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

Modification of a protective order may be sought to increase the level of protection afforded as well as to reduce it. Among the grounds for increasing protection might be violation of the order, enhanced appreciation of the extent to which discovery threatens important interests in privacy, or the need of a nonparty to protect interests that the parties have not adequately protected.

Modification or dissolution of a protective order does not, without more, ensure access to the once-protected information. If discovery responses have been

filed with the court, access follows from a change of the protective order that permits access. If discovery responses remain in the possession of the parties, however, the absence of a protective order does not without more require that any party share the information with others.

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

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

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

The most important form of reliance on a protective order is the production of information that the court would not have ordered produced without the protective order. Often this reliance will take the form of producing information under a blanket protective order without raising the objection that the information is not

subject to disclosure or discovery. The information may be protected by privilege or work-product doctrine, the outer limits of Rule 26(b)(1), or other rules. Reliance also may take other forms, including the court's own reliance on a protective order less sweeping than an order that flatly prohibits discovery. If the court would not have ordered discovery over proper objection, it should not later defeat protection of information that need not have been produced at all. Reliance also deserves consideration in other settings, but a finding that information is properly discoverable directs attention to the question of the terms – if any – on which protection should continue.

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

Consent to submit to the terms of a protective order may provide strong reason to modify the order. Submission to the terms of the order should include submission to the jurisdiction of the court to enforce the order. Submission, however, does not establish an automatic right to modification. The court still must balance the need for access to information against the interests of privacy. If the need for access arises from pending or impending litigation of parallel claims, it may prove better to defer to the protective order discretion of the court responsible for the other

litigation, or even to work out a cooperative approach that allows each court to consider the factors most familiar to it.

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

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

(a) Form. In ~~all~~ every trials, the testimony of witnesses ~~shall~~ must be taken ~~orally~~ in open court, unless ~~otherwise provided by an Act of Congress or by~~ a federal law, these rules, the Federal Rules of Evidence, or other rules adopted by the Supreme Court provide otherwise. The court may, for good cause shown in compelling circumstances and upon appropriate safeguards, permit presentation of testimony in open court by contemporaneous transmission from a different location.

Committee Note

Rule 43(a) is revised to conform to the style conventions adopted for simplifying the present Civil Rules. The only intended changes of meaning are described below.

The requirement that testimony be taken "orally" is deleted. The deletion makes it clear that testimony of a witness may be given in open court by other means if the witness is not able to communicate orally. Writing or sign language are common examples. The development of advanced technology may enable testimony to be given by other means. A witness unable to sign or write by hand may be able to communicate through a computer or similar device.

Contemporaneous transmission of testimony from a different location is permitted only on showing good cause in compelling circumstances. The importance of presenting live testimony in court cannot be forgotten. The very ceremony of trial and the presence of the factfinder may exert a powerful force for truthtelling. The opportunity to judge the demeanor of a witness face-to-face is accorded great value in our tradition. Transmission cannot be justified merely by showing that it is inconvenient for the witness to attend the trial.

The most persuasive showings of good cause and compelling circumstances are likely to arise when a witness is unable to attend trial for unexpected reasons, such as accident or illness, but remains able to testify from a different place. Contemporaneous transmission may be better than an attempt to reschedule the trial, particularly if there is a risk that other — and perhaps

more important – witnesses might not be available at a later time.

Other possible justifications for remote transmission must be approached cautiously. Ordinarily depositions, including video depositions, provide a superior means of securing the testimony of a witness who is beyond the reach of a trial subpoena, or of resolving difficulties in scheduling a trial that can be attended by all witnesses. Deposition procedures ensure the opportunity of all parties to be represented while the witness is testifying. An unforeseen need for the testimony of a remote witness that arises during trial, however, may establish good cause and compelling circumstances. Justification is particularly likely if the need arises from the interjection of new issues during trial or from the unexpected inability to present testimony as planned from a different witness.

Good cause and compelling circumstances may be established with relative ease if all parties agree that testimony should be presented by transmission. The court is not bound by a stipulation, however, and can insist on live testimony. Rejection of the parties' agreement will be influenced, among other factors, by the apparent importance of the testimony in the full context of the trial.

A party who could reasonably foresee the circumstances offered to justify transmission of testimony will have special difficulty in showing good cause and the compelling nature of the circumstances. Notice of a desire to transmit testimony from a different location should be given as soon as the reasons are known, to enable other parties to arrange a deposition, or to secure an advance ruling on transmission so as to know whether to prepare to be present with the witness while testifying.

No attempt is made to specify the means of transmission that may be used. Audio transmission without video images may be sufficient in some circumstances, particularly as to less important testimony. Video transmission ordinarily should be preferred when the cost is reasonable in relation to the matters in dispute, the means of the parties, and the circumstances that justify transmission. Transmission that merely produces the equivalent of a written statement ordinarily should not be used.

Safeguards must be adopted that ensure accurate identification of the witness and that protect against

influence by persons present with the witness. Accurate transmission likewise must be assured.

Other safeguards should be employed to ensure that advance notice is given to all parties of foreseeable circumstances that may lead the proponent to offer testimony by transmission. Advance notice is important to protect the opportunity to argue for attendance of the witness at trial. Advance notice also ensures an opportunity to depose the witness, perhaps by video record, as a means of supplementing transmitted testimony.

Rule 47. Selecting ~~Selection of~~ Jurors

(a) ~~Examination of~~Examining Jurors. The court ~~may~~ must ~~permit the parties or their attorneys to~~ conduct the examination of prospective jurors ~~or may itself conduct the examination~~. The parties are entitled to examine the prospective jurors to supplement the court's examination within reasonable limits of time, manner, and subject matter set by the court in its discretion. ~~In the latter event, the court shall permit the parties or their attorneys to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions of the parties or their attorneys as it deems proper.~~

Committee Note

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

The concerns that led many courts to undertake all direct examination of prospective jurors have earned deference by long tradition and widespread adherence. At the same time, the number of federal judges that permit party participation has grown considerably in recent years. The Federal Judicial Center survey shows that the total time devoted to jury selection is virtually the same across all variations between no party participation and party conduct of most or all of the voir dire. It also shows that judges who permit party participation have found little difficulty in controlling potential misuses of voir dire. This experience demonstrates that the problems that have been perceived in some state-court systems of party participation can be avoided by making clear the discretionary power of the district court to control the behavior of the party or counsel. The ability to enable party participation at low cost is of itself strong reason to permit party participation. The parties are thoroughly familiar with the case by the start of trial. They are in the best position to know the juror information that bears on challenges for cause and

peremptory challenges, and to elicit it by jury questioning. In addition, the opportunity to participate provides an appearance and reassurance of fairness that has value in itself.

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

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

Party examination need not mean prolonged voir dire, nor subtle or brazen efforts to argue the case before trial. The court can undertake the initial examination of prospective jurors, restricting the parties to supplemental questioning controlled by direct time limits. Effective control can be exercised by the court in setting reasonable limits on the manner and subject-matter of the examination. Lawyers will not be allowed to advance arguments in the guise of questions, to seek committed responses to hypothetical descriptions of the case, to assert propositions of law, to intimidate or ingratiate, or otherwise turn the opportunity to seek information about prospective jurors into improper adversary strategies. The district court has broad discretion to control the time, manner, and subject matter of party examination. Only a clear abuse of this discretion – usually in conjunction with a clearly inadequate examination by the court – could justify reversal of an otherwise proper jury verdict.

The voir dire process can be further enhanced by use of jury questionnaires to elicit routine information before voir dire begins. Questionnaires can save much time, and may avoid the embarrassment of public examination or the failure to confess publicly to information that a juror would provide in response to a questionnaire. Written answers to a questionnaire also may avoid the risk that answers given in the presence of other prospective jurors may contaminate a large group. Questionnaires are not required by Rule 47(a), but should be seriously considered.

Rule 48. Number of Jurors — Participation in Verdict

The court ~~shall~~ must seat a jury of ~~not fewer than six and not more than~~ twelve members. ~~and a~~All jurors ~~shall~~ must participate in the verdict unless excused from service ~~by the court pursuant to~~ under Rule 47(c). Unless the parties ~~otherwise~~ stipulate otherwise, (1) the verdict ~~shall~~ must be unanimous, and (2) no verdict ~~shall~~ may be taken from a jury ~~reduced in size to~~ of fewer than six members.

Committee Note

Rule 48 was amended in 1991 to reflect the conclusion that it had been "rendered obsolete by the adoption in many districts of local rules establishing six as the standard size for a civil jury." Six-person jury local rules were upheld by the Supreme Court in Colgrove v. Battin, 413 U.S. 149 (1973). The Court concluded that the Seventh Amendment permits six-person juries, and that the local rules were not inconsistent with Rule 48 as it then stood.

Rule 48 is now amended to restore the core of the twelve-member body that has constituted the definition of a civil jury for centuries. Local rules setting smaller jury sizes are invalid because inconsistent with Rule 48.

The rulings that the Seventh Amendment permits six-member juries, and that former Rule 48 permitted local rules establishing six-member juries, do not speak to the question whether six-member juries are desirable. Much has been learned since 1973 about the advantages of twelve-member juries. Twelve-member juries substantially increase the representative quality of most juries, greatly improving the probability that most juries will include members of minority groups. The sociological and psychological dynamics of jury deliberation also are strongly influenced by jury size. Members of a twelve-person jury are less easily dominated by an aggressive juror, better able to recall the evidence, more likely to rise above the biases and prejudices of individual members, and enriched by a broader base of community experience. The wisdom enshrined in the twelve-member tradition is increasingly demonstrated by contemporary social science.

Although the core of the twelve-member jury is restored, the other effects of the 1991 amendments remain unchanged. Alternate jurors are not provided. The jury includes twelve members at the beginning of trial, but may be reduced to fewer members if some are excused under Rule 47(c). A jury may be reduced to fewer than six members, however, only if the parties stipulate to a lower number before the verdict is returned.

Careful management of jury arrays can help reduce the incremental costs associated with the return to twelve-member juries.

Sylistic changes have been made.