To: Honorable Alicemarie H. Stotler, Chair, Standing Committee on Rules of Practice and Procedure

From: Patrick E. Higginbotham, Chair, Advisory Committee on Civil Rules

DATE: May 17, 1996

Re: Report of the Advisory Committee on Civil Rules

I Introduction

The Advisory Committee on Civil Rules met on April 18 and 19, 1996, at the Administrative Office of the United States Courts in Washington, D.C. The Committee considered public comments on four rules that had been published for comment in September, 1995: Civil Rules 9(h), 26(c), 47(a), and 48. In part II(A) of this Report, the Committee recommends that the amendments to Rules 9(h) and 48 be submitted unchanged to the Judicial Conference with a recommendation for adoption. For reasons discussed in this Introduction, the Committee concluded that Rule 26(c) should be held for further consideration as part of a new project to study the general scope of discovery authorized by Rule 26(b)(1) and the scope of document discovery under Rules 34 and 45. (This project is described further in Part III.) This Introduction also will describe the Committee conclusion that amendment of Rule 47(a) should be postponed in favor of efforts to encourage mutual education and communication between bench and bar on the values of lawyer participation in the voir dire examination of prospective jurors.

Part II(B) of this Report recommends that this Committee approve for publication and comment revisions of the class action rule, Civil Rule 23. These proposed revisions result from a course of Committee study that began when, in March, 1991, the Judicial Conference requested that this Committee "direct the Advisory Committee on Civil Rules to study whether Rule 23, F.R.C.P. be amended to accommodate the demands of mass tort litigation." The proposals address some of the issues that arise in contemporary mass tort litigation, and address as well some issues that arise in small-claims class litigation.

Part III provides information about the plan to study the scope of discovery.

At the end are summaries of public comments and testimony on published Rules 26(c) and 47(a), separated out because of length. There follow the Minutes of the November, 1995 meeting and Draft Minutes of the April, 1996 meeting. The draft April Minutes are included because they bear directly on the Rule 23 recommendation described in Part II(B).

I (A)(1): Rule 26(c)

The protective order provisions of Rule 26(c) have been before the Committee for some time. Following public comment on a proposal published in October, 1993, this Committee accepted the Advisory Committee's recommendation that proposed amendments be transmitted to the Judicial Conference for its approval. This proposal was changed in several ways from the proposal that had been published. The Judicial Conference voted to delete the explicit reference to stipulated protective orders and then remanded for further consideration. Because there had not been an opportunity for public comment on the amendments in the form transmitted to the Judicial Conference, this Committee approved publication of the amendments in that form. A new round of public comment and hearings followed. Detailed summaries of the comments and testimony are provided toward the end of this Report. Comments supporting the proposal generally observed that it would clarify and confirm the general and better current practice. Comments opposing the proposal expressed continuing concern about the recognition of stipulated-protective-order practice, expressed fear that consideration of reliance on a protective order in determining whether to dissolve or modify the order would defeat desirable access, and often concluded that it would be better to make no changes than to adopt the proposal. The Committee decided to defer further consideration of protective orders for two related sets of reasons.

The first set of reasons for holding Rule 26(c) for further action basically turns on the lack of any urgent need for revision. Consideration of Rule 26(c) began with efforts to cooperate with Congress, in conjunction with pending legislative proposals. Painstaking consideration of the topic through the Rules Enabling Act procedure has shown that while there are differences of view about the need for public access to discovery materials produced in private litigation, there is no clear problem that demands rapid action.

The second and more important set of reasons for holding Rule 26(c) for further action arises from the Committee's conclusion that it is time to reconsider once again the basic scope of civil discovery. Protective order practice is intimately bound up with the sweeping scope of discovery under Rule 26(b)(1). Discovery may force production of information that is not admissible in any judicial proceeding, and that indeed proves not even relevant to the dispute. Consideration of Rule 26(c) has constantly reminded the Committee of the need to maintain the integral role of protective orders in justifying discovery of this scope. If reconsideration of the scope of discovery leads to significant changes, parallel changes in Rule 26(c) may prove advisable. If no changes are made in the scope of discovery, on the other hand, there will be time enough to resume consideration of Rule 26(c).

The text of Rule 26(c) as published for comment, and the Advisory Committee Note, are set out below.

RULE 26(c)

(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) appl~~y~~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.

Advisory 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 (1), as all of Rule 26(c), deals only with discovery protective orders. It does not address any other form of order that limits access to court proceedings or materials submitted to a court.

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 need not meet the technical requirements of Rule 24. It is enough to show that the applicant has a sufficient interest to justify consideration of the motion. These provisions are supported by the practice that has developed through a long line of decisions.

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, and mere commercial embarrassment deserves little concern. 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. This factor will often overlap the fifth enumerated factor that considers the interests of persons seeking information relevant to other litigation. Submission to the protective order, however, does not establish an automatic right to modification. It may be better to leave to the court entertaining related litigation the question whether information is discoverable at all, the balance between the needs for discovery and for privacy, and the terms of protection that may reconcile these competing needs. These issues often are highly case-specific, and the court that entered the protective order may not be in a good position to address them.

Submission to the protective order and the court's enforcement jurisdiction also may justify disclosure to a state or federal agency. A public agency that has regulatory or enforcement jurisdiction often can compel production of the protected information by other means. The test of modification, however, does not turn on a determination whether the agency could compel production. Rather than provoke satellite litigation of this question, protection is provided by requiring the agency to submit to the protective order and the court's enforcement jurisdiction. If there is substantial doubt whether the agency's submission is binding, the court may deny disclosure. One obvious source of doubt would be a freedom of information act that does not clearly exempt information uncovered by this process.

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.

A protective order does not of itself defeat discovery of the protected information by independent discovery demands made in independent litigation on the person who produced the information. The question of protection must be resolved independently in each action. At the same time, it may be more efficient to reap the fruits of discovery already under way or completed without undertaking duplicating discovery. The closer the factual relationships between separate actions or potential actions, the greater the reasons for modifying a protective order to allow disclosure by the most efficient means.

Assessment of the need for disclosure in support of related litigation may require joint action by two courts. The court that entered the protective order can determine most easily the circumstances that justified the order and the extent of justifiable reliance on the order. The court where related litigation is pending can determine most easily the importance of the information in that litigation, and often can determine most accurately the balance between the interest in disclosure and the interest in nondisclosure or further protection. The rule does not attempt to prescribe procedures for cooperative action.

Special questions arise from the prospect of multiple related actions brought at different times and in different courts. Great inefficiencies can be avoided by establishing means of sharing information. Informal means are frequently found by counsel, and occasional efforts are made at establishing more formal means even outside the framework of consolidated proceedings. There is not yet sufficient experience to support adoption of formal rules establishing – and regulating the terms of access to – litigation support libraries, document depositories, depositions taken once for many actions, or similar devices. To the extent that consolidation devices may not prove equal to the task, however, these questions will deserve attention in the future.

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.

I (A)(2): Rule 47(a)

The Committee decided not to proceed with the preliminary draft of proposed amendments to Civil Rule 47 that would have entitled attorneys to participate in voir dire and orally examine prospective jurors under reasonable court-imposed limits. Comments from nearly 200 judges, lawyers, and legal organizations were submitted and three public hearings were held on the proposed amendments.

The amendments addressed a significant concern voiced by the bar that some judges are doing an inadequate or perfunctory job of questioning prospective jurors. Nearly 70% of trial judges currently allow attorneys to supplement the judge's questions to prospective jurors as contemplated under the proposed rule. But the judges' major objection to the proposals continued to be the fear that — despite provisions of the proposed rule granting authority to impose reasonable limits — the loss of absolute judicial control would lead to abuse. Other judges were concerned that the proposal would lead to more appeals.

Adequate voir dire remains an important concern for the bar. Twenty-five national and local bar and other legal associations commented in favor of the proposed amendments. Some argued that a trial lawyer is more knowledgeable of a particular case and in a better position to ask pertinent questions of venire members than is a trial judge. Contrary to the views of some judges, lawyers also believed — with support by some juror studies — that prospective jurors are more comfortable responding to lawyer questioning rather than questioning by a jduge whose stature and office may intimidate them.

The Committee was not persuaded that pursuing the proposed changes in the rules was the appropriate response to the range of expressed concerns. Instead, the Committee urges study of the jury selection process and exploration of voir dire methods at judicial workshops and orientations for newly appointed judges, including informed discussions with experienced trial lawyers and judges regarding voir dire.

The Advisory Committee is of the strong view that the rulemaking process operated as it was designed. The bench, bar, and public expressed their views, and the Committee carefully reviewed each comment before reaching a decision. The Advisory Committee is persuaded that training sponsored by the Federal Judicial Center offers a good first step in bridging the gap between the bench and bar on voir dire and in achieving methods of jury selection that — while drawing upon local practice — are both fair and efficient.

Rule 47. Selecting ~~Selection of~~ Jurors

(a) **~~Examination of~~Examining Jurors.** The court ~~may~~ shall ~~permit the parties or their attorneys to~~ conduct the voir dire examination of prospective jurors ~~or may itself conduct the examination~~. But the court shall also permit the parties to orally examine the prospective jurors to supplement the court's examination within reasonable limits of time, manner, and subject matter, as the court determines in its discretion. The court may terminate examination by a person who violates those limits, or for other good cause. ~~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.~~

ADVISORY 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 regardless of the choice made in allocating responsibility between court and counsel. 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). *See also Purkett v. Elem*, 115 S.Ct. 1769 (1995). 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 to turn the opportunity to seek information about prospective jurors into improper adversary strategies. The district court has ample power to control the time, manner, and subject matter of party examination. The process of determining the limits continues throughout the course of each party's examination, and includes the power to terminate further examination by a person that has misused or abused the right of examination. Among other grounds, termination may be warranted not only by conduct that may impair the trial jury's impartiality but also by questioning that is

repetitious, confusing, or prolonged, or that threatens inappropriate invasion of the prospective jurors' privacy. The determination to set limits or to terminate examination is confided to the broad discretion of the district court. 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 improve in many ways the development of important information about prospective jurors. Potential jurors are protected against the embarrassment of public examination. A prospective juror may be more willing to reveal potentially embarrassing information in responding to a questionnaire than in answering a question in open court. 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. At the same time, it is important to guard against the temptation to extend questionnaires beyond the limits needed to support challenges for cause and fair use of peremptory challenges. Just as voir dire examination, questionnaires can be used in an attempt to select a favorable jury, not an impartial one. Prospective jurors must be protected against unwarranted invasions of privacy; the duty of jury service does not support casual inquiry into such matters as religious preferences, political views, or reading, recreational, and television habits. Indeed the list of topics that might be of interest to a party bent on manipulating the selection of a favorable jury through the use of sophisticated social-science profiles and personality evaluations is virtually endless. Selection of an impartial jury requires suppression of such inquiries, not encouragement. The court's guide must be the needs of impartiality, not party advantage.

II. ACTION ITEMS

A. Rules Transmitted for Judicial Conference Approval
Rules 9(h), 48

1. Synopsis of proposed amendments

This brief synopsis will be followed by a separate introduction for each of Rules 9(h) and 48.

These proposed amendments of Rules 9(h) and 48 were published for comment in September, 1995. They are now submitted with a recommendation that they be transmitted to the Judicial Conference for approval in the form in which they were published.

The Rule 9(h) amendment resolves a possible ambiguity by including nonadmiralty claims in an admiralty action within the interlocutory appeal provisions of 28 U.S.C. § 1292(a)(3).

The Rule 48 amendment restores the 12-person civil jury, but without alternates and with the continuing right of the parties to stipulate to smaller juries down to a floor of six.

(a) Rule 9(h)

28 U.S.C. § 1292(a)(3) provides for interlocutory appeals in "admiralty cases." Rule 9(h) now provides that "admiralty cases" in this statute "shall be construed to mean admiralty and maritime claims within the meaning of this subdivision (h)." Because an admiralty case may include nonadmiralty claims, this language is not easily applied when a district court disposes of a nonadmiralty claim advanced in an admiralty case by an order that otherwise fits the requirements of § 1292(a)(3). The amendment resolves the question by allowing an appeal without regard to whether the order disposes of an admiralty claim or a nonadmiralty claim.

(b) Rule 48

The proposed amendment of Rule 48 would restore the 12-person jury, albeit without alternates. The Committee weighed the following benefits of the proposal. First, a 12-person jury would significantly increase the statistical probability of including a more diverse cross-section of the community than a smaller jury, and, in particular, would include greater minority representation. For example, a 12-person jury is one and one-half times as likely to include at least one member of a minority constituting 10% of the population than is a 6-person jury. An empirical study has shown minorities represented on 12-person juries 82% of the time and on 6-person juries only 32% of the time. Second, a 12-person jury has a greater capacity for recalling all facts and arguments presented at trial. Third, a larger jury would be less likely to be dominated by a single aggressive juror and less likely to reach

an aberrant decision. Fourth, recent studies have challenged the data relied on by the courts when they originally decided to reduce jury size in the early 1970s. Fifth, few magistrate judges lack access to 12-person jury courtrooms within reasonable proximity to their chambers. Sixth, although the added costs are not insignificant, the increase would be less than 13% of the funds allocated to pay for jurors' expenses, and only one-third of one percent of the judiciary's overall $3 billion budget.

Two objections to the proposal were elicited during the public comment period. First, the present flexibility in the rule, which allows, but does not require, a judge to seat a jury of fewer than 12 persons, has been working well, and the proposed change is unnecesssary. Second, incurring added costs to pay the expenses of additional venire members and courtrooms would be unwise, especially in these times of financial restraints.

After discussing the comments, the Committee voted to recommend that the proposed amendments to Rule 48 be submitted to the Standing Committee. The Committee found particularly helpful the article written by Chief Judge Richard S. Arnold, which reviews the long history and extols the virtues of a 12-person jury. 22 *Hofstra L. Rev.* 1 (1993). In the end, the Committee was persuaded that the jury function lies at the heart of the Article III courts; that it is vital that we regain the benefits of 12-person juries, restoring a tradition adhered to for hundreds of years.

(2) Text of Proposed Amendments, GAP Report, and Summary of Comments Relating to Particular Rules:

Rule 9. Pleading Special Matters

* * *

(h) Admiralty and Maritime Claims. A pleading or count setting forth a claim for relief within the admiralty and maritime jurisdiction that is also within the jurisdiction of the district court on some other ground may contain a statement identifying the claim as an admiralty or maritime claim for the purposes of Rules 14(c), 38(e), 82, and the Supplemental Rules for Certain Admiralty and Maritime Claims. If the claim is cognizable only in admiralty, it is an admiralty or maritime claim for those purposes whether so identified or not. The amendment of a pleading to add or withdraw an identifying statement is governed by the principles of Rule 15. ~~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 this subdivision (h)~~ A case that includes an admiralty or maritime claim within this subdivision is an admiralty case within 28 U.S.C. § 1292(a)(3).

ADVISORY COMMITTEE NOTE

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

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

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

The courts of appeals have not achieved full uniformity in applying the § 1292(a)(3) requirement that an order "determin[e] the rights and liabilities of the parties." It is common to assert that the statute should be construed narrowly, under the general policy that exceptions to the final judgment rule should be construed narrowly. This policy would suggest that the ambiguity should be resolved by limiting the interlocutory appeal right to orders that determine the rights and liabilities of the parties to an admiralty claim.

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

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

GAP REPORT ON RULE 9(h)

No changes have been made in the published proposal.

Summary of Comments: Rule 9(h)

95-CV-156: Robert J. Zapf, Esq., for the Practice and Procedure Committee, U.S. Maritime Law Assn.: Fully supports the proposal. "[I]nterlocutory appeals in admiralty cases are very useful, even if rare." Nonmaritime claims, such as environmental claims, should be included.

95-CV-193: Carolyn B. Witherspoon, Esq., for the Federal Legislation and Procedures Committee, Arkansas Bar Assn.: The Committee had no objections.

95-CV-274: Kent S. Hofmeister, Esq., for Federal Bar Assn. by Mark D. Laponsky, Esq., Chair of Labor Section: Congress should study the desirability of § 1292(a)(3) and interlocutory appeals in general. But so long as § 1292(a)(3) persists, the right to appeal should extend to nonadmiralty matters included in an admiralty case. The proposal is endorsed.

Testimony on Rule 9(h)

George J. Koelzer, Esq. December 15: Tr at 107: "Proposed Rule 9(h) * * * is one I suppose everybody endorses."

Rule 48. Number of Jurors — Participation in Verdict

The court shall seat a jury of ~~not fewer than six and not more than~~ twelve members. ~~and a~~All jurors shall 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 be unanimous, and (2) no verdict ~~shall~~ may be taken from a jury ~~reduced in size to~~ of fewer than six members.

Advisory 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.

GAP Report on Rule 48

No changes have been made in Rule 48 as published.

Rule 48
Prepublication Comments

(The prepublication comments are presented in the order of the set presented to the Committee on Rules of Practice and Procedure for the July, 1995 meeting.)

Hon. William T. Moore, Jr.: As practicing lawyer and newly appointed judge, has had no difficulties with Rule 48, and recommends that it not be changed.

Hon. John F. Nangle: In practice, 7- and 8-member juries are used due to the elimination of alternates. In 21 years on the bench has never had a hung jury. Are majority verdicts being considered? Why ask for trouble? Do not adopt the proposal.

Hon. Morey L. Sear: The Rule 47 proposal is very bad. "[T]he proposal to go back to 12 person juries is equally bad."

Hon. J. Clifford Wallace: The Judicial Council of the Ninth Circuit unanimously opposes the Rule 48 proposal. Experiences with smaller juries generally have been positive, and there are no compelling reasons to empanel larger juries for all cases.

Hon. Ann C. Williams: The Court Administration and Case Management Committee unanimously declined to endorse the proposal. The present rule provides flexibility, allowing 12-person juries when the complexity of the case warrants. Mandating 12-person juries for all cases would require citizens to spend more time in the judicial process in cases where that may not be necessary. Education of judges regarding jury size in particular cases is a better alternative. And some court facilities are not equipped for 12-person juries.

Hon. Joseph E. Stevens, Jr.: In complete accord with Judge Nangle. Would prefer to eliminate civil juries. Barring any such radical departure, 6- or 8-person juries are economical and expeditious. They should not be abandoned.

Hon. Claude M. Hilton: There are no problems with the 6-person civil jury, and no reason to consider any changes.

Hon. John A. MacKenzie: "In 28 years on this bench, I have never felt the jury size had produced a bad verdict." We now routinely seat 8 jurors.

Hon. James M. Rosenbaum: Writes as chair of the Court Design Guide Subcommittee of the Judicial Conference Committee on Security, Space and Facilities. Present Design Guide standards contemplate 6- to 8-person juries for magistrate judges. The square foot costs of court construction range from $150 to $250. There are 50 court facilities in various stages of design and construction; all would be affected by the proposed amendment. The Committee has and offers no opinion on the advisability of the rules change.

Hon. Richard L. Williams: The need for a rule governing the number of civil jurors is a mystery. "Please notify whatever group of the federal judiciary concerned about this issue to table it in perpetuity and move on to something that will be helpful."

Hon. Rebecca Beach Smith: Endorses her approval on Judge Williams' letter.

Anthony A. Alaimo: Concurs completely with the views expressed by Judge John Nangle, noted above.

Comments After Publication

95-CV-95: Hon. Stewart Dalzell: In E.D.Pa., the cost of adding four jurors at $50 to $52 a day would be $261,000 a year. Never has empaneled an 8-person jury without at least one black juror. If 8-person jurors were more unstable, we would expect longer deliberations; in fact, there seems to be no difference in deliberation time between 8- and 12-person juries. (The same remarks have been appended to Judge Dalzell's later letter, 95-CV-109.)

95-CV-98: John Wissing, Esq.: True community representation is not possible with 6 jurors. "[L]uck, chance or bias * * * play a role in the verdict because too few minds are at work." 12-person juries are better.

95-CV-99: Hon. Edwin F. Hunter: W.D.La. initiated the 6-person jury. This should be left to the discretion of the court.

95-CV-100: Hon. Andrew W. Bogue: The Committee Note is "absolute nonsense." "I do not appreciate broad, general comments such as you people made without any empirical studies whatsoever." 6- or 7-person juries are easier to manage and save money.

95-CV-101: Hon Stanwood R. Duval, Jr.: Most judges seat 8 or 9 jurors; Batson ensures minority representation; there is no unfairness; 12 increases the prospect of "one person who is recalcitrant, obdurate, biased * * *, thereby increasing the possibility of a mistrial." The number of peremptories would not be increased.

95-CV-102: Charles W. Daniels, Esq.: "It is hard to believe that you are getting a fair cross section of the community when you have only 6 people sitting in the jury box * * *."

95-CV-107: Hon Martin L.C. Feldman: 12-person juries add needless time to the selction process and cost more. E.D.La. has long used 6-person juries, which dispense quality justice and achieve diversity.

95-CV-108: Hon. Robert B. Propst: Disagrees with the proposal. if there is change, why not 8- or 9-person juries? And less than unanimous verdicts?

95-CV-109: Hon. Stewart Dalzell: E.D.Pa. is in the process of creating nine courtrooms with jury boxes that will hold only 8 people; the building cannot accommodate larger jury boxes and still fit nine courtrooms in the available space. In addition, there are existing courtrooms, in constant use for civil trials, that seat only 12; they would be unusable because of the need to seat alternates as well.

95-CV-110: Bertram W. Eisenberg, Esq.: The time and administrative savings supposed to follow reduction to 6-member juries "never really panned out." It is good to return to 12.

95-CV-111: Frank E. Tolbert, Esq.: It is good to return to the common law tradition of 12, even though 6-person juries are "more prompt."

95-CV-112: Hon. Jackson L. Kiser: 6-person juries have worked admirably. Do not increase costs. If there is a strong leader on the jury, "that is the luck of the draw"; 11 others can be led as easily as 5 others.

95-CV-113: Hon. Judith N. Keep, for the unanimous judges of the Southern District of California: Realistically, this will mean 11- and 12-person juries in short cases, and 6- or 7-person juries in long cases because of attrition in long cases. And there is no hope of a cross-section in long cases in any event, since financial and family hardships eliminate many groups of people. And "tradition" is not a compelling concern when various states have widely different practices.
95-CV-114: Hon. John W. Bissell: The "core" of the 12-person jury will not be restored, because fewer will be left at verdict time in protracted cases; 16 or 18 would be needed to have 12 to decide. Costs would go up. And New Jersey has 6-person juries; defendants would be encouraged to remove, expecting less risk of a substantial plaintiff's verdict from a 12-person jury ("did the defense insurance industry promote and/or endorse the proposed amendment"?).
95-CV-115 Hon. Richard L. Williams: Present juries generally have 8 members. A 50% increase would increase the burden on citizens called to serve. Sufficient representativeness is achieved by 8. Larger juries will protract deliberations, and increase the number of mistrials for failure to agree.
95-CV-118: Richard C. Watters, Esq.: "Rule 48 would be a positive step in civil jury trials."
95-CV-119: Richard A. Sayles, Esq.: "[J]uries of less than twelve, especially of six, produce extreme results, one way or the other, more often than juries of twelve."
95-CV-121: Hon. Michael A. Telesca: Increasing jury size will lead to greater costs, particularly with jury-box sizes now often set at eight. If the judge carefully selects the jury, 6 will not be susceptible to domination, can accurately recall the evidence, and can decide fairly.
95-CV-122: Allen L. Smith, Jr., Esq.: I participated in a Supreme Court case that questioned 6-person juries in 1972. I heartily approve a return to 12. 12 are needed to provide "a desirable experiential diversity needed in so much civil litigation."
95-CV-126: Daniel V. Flatten, Esq.: Favors the proposal.
95-CV-127: Daniel A. Ruley, Jr., Esq.: "My experience with six person juries is that they lend themselves to control by one or two dominant persons, something that seldom happened with twelve persons." (See also 95-CV-165.)
95-CV-128: Mike Milligan, Esq.: Favors the increase. It will make it more difficult to exercise peremptory challenges in a discriminatory manner.
95-CV-129: Hon. Charles P. Sifton: As chief judge of E.D.N.Y., currently constructing two new courthouses with 8-person jury boxes in magistrate judges' courtrooms, objects to a proposal that will require redesign and increased expense.
95-CV-132: Hon. Robert P. Propst: (See also 95-CV-108): The Committee should consider less-than-unanimous verdicts. This may be particularly desirable if a first trial has mistried for failure to reach unanimous agreement.
95-CV-134: Professor Michael H. Hoffheimer: It is good to return to

12-member juries, but bad to allow them to be reduced to as few as 6 at deliberation time. This will encourage court and attorneys to tolerate significant attrition.

95-CV-137: Hon. Philip M. Pro: 12-member juries can be used now where appropriate; juries of less and 8 or 9 are rare. And magistrate judges now conduct many civil jury trials; their courtrooms are not large enough for 12-person jury boxes.

95-CV-139: Hon. Joseph M. Hood: Questions whether the additional cost is warranted.

95-CV-140: Michael E. Oldham, Esq., and Heather Fox Vickles, Esq.: 12-person juries "increase the representative quality of most juries, enhancing the probability of minority participation, and improve the sociologic and psychological dynamics of jury deliberations."

95-CV-141: Brent W. Coon, Esq.: Supports the proposal.

95-CV-142: Hon. Alan A. McDonald: Smaller juries are more efficient and economical. What data show that larger juries are more representative? Nor is there factual support for the assertion that the sociological and psychological dynamics are affected. All that can be said is that it is easier to hang a 12-person jury.

95-CV-143: Hon. Fred Van Sickle: The amendment would increase costs, and ask more of prospective jurors. It will increase the risk of hung juries; parties rarely stipulate to nonunanimous verdicts. It will increase removal from state court to take advantage of the unanimous 12-member jury requirement. The Chief Judges of the Ninth Circuit have voted unanimous opposition.

95-CV-145: Hon. William O. Bertelsman: No strong opposition, but most civil juries now are 8 to 10. There is no need for change.

95-CV-147: Hon. Peter C. Dorsey: Agrees with Judge Telesca, 95-CV-121 above.

95-CV-149: Thomas D. Allen, Esq.: 12-member juries, with a unanimity requirement provide "a greater probability of correctness."

95-CV-152: Richard W. Nichols, Esq.: California permits 9-3 verdicts; if federal courts use 12-person unanimous juries, defendants will remove many more cases because this practice favors them. Diversity can be protected by effective use of the proposed Rule 47(a) power to participate in voir dire, and by astute observance of Batson. Jurors are more likely to be influenced by a lawyer on the jury than a loudmouth. Costs will be increased, particularly in a state such as California where some jurors live so far from court that they must be housed in hotels. It is better to leave this matter for local rules that can respond to local conditions.

95-CV-154: Ira B. Grudberg, Esq.: Supports for the reasons stated in the commentary.

95-CV-155: J. Houston Gordon, Esq.: 12-person juries are more representative and less likely to be dominated by one or two. The verdicts are more acceptable to the public.

95-CV-159: Hon. B. Avant Edenfield: Vigorously opposed. 12-person juries are used at times now, but it is more orderly to use 8. There is no information showing 12-person juries are better. (Judge

Edenfield renewed his comments in 95-CV-272.)

95-CV-160: Hon. Michael M. Mihm: 6-member juries work well. There are few complaints about lack of minority representation, and verdicts do not "fall along minority lines." The social tinkering represented by concern with the sociological and psychological dynamics of jury deliberation "has no place within the Federal Rules of Civil Procedure."

95-CV-162: J. Richard Caldwell, Jr., Esq.: 12-person juries represent a meaningful cross-section. There is less risk that one juror with a private agenda will dominate. There is no reason to expect that significantly more time will be required.

95-CV-163: Hon. Prentice H. Marshall: Wholeheartedly approves.

95-CV-164: Hon. Donald D. Alsop: The amendment at least should provide for quotient [sic for majority] verdicts if the jury is unable to agree unanimously after a stated number of hours. Minnesota state courts allow a 5/6 verdict after 6 hours of deliberation; the practice is successful.

95-CV-165: Daniel A. Ruley, Jr., Esq.: 6-person juries frequently are controlled by one or two dominant persons, leading to higher and lower verdicts and, at times, verdicts contrary to the evidence. These risks are reduced by 12-person juries. (See also 95-CV-127.)

95-CV-166: Hon. Lucius D. Bunton: A survey of all 10 active judges in W.D. Tex. shows 9 opposed to changing rule 48. None now use 12 jurors; most use 7 or 8. Minorities "are more than adequately represented." An experiment with 3-person shadow juries showed that in 80% of the cases the 3-person juries reached the same result as the 6-person juries. An increase in numbers is expensive.

95-CV-169: Hon. Gene E. Brooks: 12-person juries will bring additional costs. Minority participation in the *system* will be unchanged; only the numbers in particular trials will be affected. Differences between 6 and 12 in sociological and psychological dynamics should be statistically insignificant: "For the Committee to base its preference upon psychological intangibles is wrong."

95-CV-172: Hon. Jerry Buchmeyer: The change "is also unnecessary. I use 12-member juries in all my criminal and civil trials."

95-CV-173: Hon. Sam R. Cummings: Registers opposition.

95-CV-174: Hon. Virginia M. Morgan, for Federal Magistrate Judges Assn.: Opposes. Magistrate judges presided at 17.2% of federal civil jury trials in the year ending September 30, 1994. Jury sizes now generally range from 7 to 9; they perform well. There are no perceptible problems in including minority representatives. The fear of domination by an aggressive juror has not been demonstrated. Increased jury size will add to costs. And most magistrate judges have courtrooms designed for smaller juries. (The same statement has been given number 95-CV-202.)

95-CV-180: Hon. Stewart Dalzell: See also 95-CV-95, 109: Supplementing earlier comments, adds that the architects have now stated that jury boxes could be expanded in the E.D.Pa. space renovation project only by reducing the number of courtrooms, and that there is no money to draft a contingency plan.

95-CV-181: Hon. Thomas P. Griesa, for the unanimous judges of S.D.N.Y.: There is no significant benefit in returning to 12-person juries. The change would increase cost and lengthen the time needed to select a jury. 6-, 8-, and 9-member juries are as likely to be representative of the community, and are no more likely to be dominated by a single member. (The same statement was forwarded by Judge John F. Keenan and assigned number 95-CV-181.)
95-CV-183: Hon. Fred Biery: Experience with 6- and 12-member juries in state and federal courts has shown no observable difference. Jury funds are stretched already.
95-CV-184: Paul W. Mollica, Esq., for the Federal Courts Committee of the Chicago Council of Lawyers: Endorses 12-person juries for the reasons advanced by the Committee Note, adding that larger juries may reduce the incidence of Batson violations.
95-CV-185: Hon. Clarence A. Brimmer: I try cases to 7-person juries "to save funds." 12-person juries would be "a waste of money."
95-CV-186: Hon. Sam Sparks: 6-person jury verdicts parallel 12-person jury verdicts. The expense of jury trials is staggering; why double it?
95-CV-187: Hon. Edward C. Prado for the 5th Circuit District Judges Assn.: A poll of 94 district judges in the 5th Circuit produced 73 responses as of the date of writing. 63 oppose the proposal, while 10 favor it.
95-CV-189: Hon. Barefoot Sanders: Normally uses 8- or 9-person juries. Only speculation supports the proposal to revert to 12.
95-CV-190: Robert R. Sheldon, for the Connecticut Trial Lawyers Assn.: Because attorney voir dire takes time, expanding the jury may hamper efforts to provide attorney voir dire. 12-member juries may lead to compromise verdicts because of the difficulty of securing unanimity; the proposal "contains a strong bias against the party carrying the burden of proof — which means that the proposal would work against plaintiffs in civil cases."
95-CV-193: Carolyn B. Witherspoon, Esq., for the Federal Legislation and Procedures Committee, Arkansas Bar Assn.: No objection.
95-CV-198: Hon. John D. Rainey: 12-person juries will result in longer trials, and add delay for illness, car trouble, or the like. There will be more mistrials and more expense.
95-CV-200: Hon. David Hittner: There is no need for a 12-person jury when a unanimous verdict is required. It will add expense.
95-CV-203: Hon John F. Nangle: By eliminating alternates, we have gone to 7- or 8-person juries. "The idea of securing more diversity with 12 is ridiculous! Why not 14 or 16? * * * [A]re you still going to require a unanimous verdict"?
95-CV-206: Dean M. Harris, Esq., for Atlantic Richfield Co.: A 12-person jury is more likely to be representative, and more likely to render an impartial verdict.
95-CV-214: Kathleen L. Blaner, Esq., for Litigation Section, D.C. Bar: The proposal "should foster improved diversity among jury members, resulting in a jury that is more representative of the community."
95-CV-215: Hon. Terry C. Kern: 12 jurors will increase costs, and

lead to a dramatic increase in mistrials. Requiring a unanimous 12-person verdict "would be a heavy burden for plaintiffs and would skew the process dramatically in the defendant's favor."

95-CV-221: Norbert F. Bergholtz, Esq.: 12-person juries will be as representative of society as possible. And "[p]arties in * * * high risk litigation deserve to have the issues decided by the collective wisdom of a reasonable number of individuals."

95-CV-230: Gordon R. Broom, Esq., for Illinois Assn. of Defense Trial Counsel: A 12-person jury is more representative, and less susceptible of domination. But there should be discretion to add alternate jurors for long trials.

95-CV-233: Roger D. Hughey, Esq., for Wichita Bar Assn.: 12 jurors increase the quality of jury discourse and may increase diversity. But "a requirement of unanimity in a 12-member jury * * * will cause an increase in mistrials, and may increase the burden of proof upon plaintiffs." Agreement of 10 jurors should be sufficient to return a verdict.

95-CV-234: James A. Strain, Esq., for Seventh Cir. Bar Assn.: The interests served by returning to 12-person juries "must be juxtaposed to a civil justice system plagued with back-log." It is not clear that a return to 12-person juries is desirable.

95-CV-238: Hon. Lawrence P. Zatkoff: So long as the verdict is unanimous, 12 are not better than 6. The proposal will be self-defeating, because with 12 jurors the parties will stipulate to nonunanimous verdicts. It is difficult to get enough jurors as it is. Costs will soar. The time needed to empanel juries will increase; delays from illness, tardiness, and absenteeism will increase. The total number of minorities serving will increase, but not the proportion.

95-CV-240: Hon. T.F. Gilroy Daly: The increase to 12 jurors "would unduly increase the cost of a trial to no useful purpose."

95-CV-245: Robert F. Wise, Jr., Esq., for Commercial and Federal Litigation Section, N.Y. State Bar Assn.: Most civil juries now are 8- or 10-person juries. The proposal will increase the burdens imposed by jury service at a time when efforts are directed to reduce them. If 12-person juries really are better, the proposal should require that 12 remain at deliberation time. And the belief that 12 are better is suspect; much recent criticism has been directed toward unanimous 12-person jury verdicts in criminal cases. Minority participation is best ensured by developing representative jury-selection lists; the increase in the number of particular juries that include any particular minority is not of itself sufficient reason to increase jury size. This would be a step backward.

95-CV-247: Don W. Martens, Esq., for American Intellectual Property Law Assn.: A 12-person jury "will better represent the community as a whole and collectively bring a better cross-section of experience to the task of deciding * * *."

95-CV-248: Michael A. Pope, Esq., for Lawyers For Civil Justice: History is strong. "Small juries are more prone to err than larger ones. * * * The importance of group dynamics in the jury setting cannot be overstated." Concerns over finding jurors and costs are

minimal. This is a sound proposal.

95-CV-249: Hugh F. Young, Jr., Executive Director, for the Product Liability Defense Council: This is "consistent with the finest tradition of American jurisprudence."

95-CV-253: William B. Poff, Esq., for Executive Committee, Nat. Assn. of Railroad Trial Counsel: Approves.

95-CV-256: Harriet L. Turney, Esq., for State Bar of Arizona: Opposes the proposal. To be sure, 12 members would increase diversity in the makeup of the jury and the views expressed, and make it more difficult for one person to dominate. But the requirement of unanimity makes it easier for one person to deadlock the jury. And the added cost is not insignificant.

95-CV-257: Brian T. Mahon, Esq., for Connecticut Bar Assn.: Opposes. Experience in Connecticut federal courts shows that juries of 8 work well; the problems feared in the Committee Note have not occurred. There is no magic in the traditional 12.

95-CV-258: Hon. Robert N. Chatigny: It is difficult to know whether 12 jurors are better. But a strong case should be shown to overcome the added costs, including the burdens imposed by summoning more people for jury service and by taking longer to seat a jury.

95-CV-267: Hon. A. Joe Fish: Usually uses a jury of more than 6, but fewer than 12, depending on the length and nature of the case. There is no need to revert to 12 — the supporting arguments "are rather nebulous and * * * insufficient to overcome the known, and very real, costs * * *."

95-CV-269: James R. Jeffery, Esq., for Ohio State Bar Assn. Bd. of Governors: Cannot endorse the proposal, for fear that 12 jurors would reduce the likelihood of reaching a verdict. Any increase in jury size should be supplemented by allowing a 3/4 majority verdict, requiring agreement of at least 8 jurors in all cases.

95-CV-271: Hon. Paul A. Magnuson: "To double the number required for civil panels would cripple the system."

95-CV-273: Pamela Anagnos Liapakis, Esq., for Association of Trial Lawyers of America: "[W]here there is a requirement of unanimity, twelve-member juries tend to be a cumbersome mechanism which are more likely to be sidetracked by a single intransigent or biased juror * * *. Nor are six-member juries necessarily destined to be less representative of the community if there is adequate opportunity for voir dire." But there is no reason to have a uniform national practice. The Committee should "draft a new rule which would make the jury size the same whether a litigant is in state or federal court in any given jurisdiction" — conformity to state jury practice. [It is not clear whether this proposal would include state majority-verdict rules as well.]

95-CV-274: Kent S. Hofmeister, Esq., for Federal Bar Assn. by Mark D. Laponsky, Esq., Chair, Labor Law Section: The jury system is as close to participatory democracy as we get. The movement to smaller juries "may well be a cause of public dissatisfaction with the operation of the jury system." Twelve may be as large a jury as can be managed. The benefits of returning to the presumption of 12 "seem to far outweigh the costs."

95-CV-281: Hon. Dean Whipple: 13 years of trying cases with 12-person juries in state court and 8 years with 6-person juries in federal court show "no difference in jury verdicts." The Committee Note arguments "appear to be result driven and an attempt to perpetuate the myth that only juries made up of 12 people are really juries." The dollar cost will increase, as will the time needed to sit a jury.

95-CV-282: Steven R. Merican, for Development of the Law Committee, Chicago Bar Assn.: Our committee has been addressed by Dr. R. Scott Tindale of Loyola University "regarding the dynamics of juror interaction and jury decision-making in large and small groups." The Committee voted unanimously to support the Rule 48 amendment.

95-CV-283: Terisa E. Chaw, Executive Director, National Employment Lawyers Assn.: The Association is constituted by lawyers "who primarily or exclusively represent individual employees in employment-related matters." The 12-person jury amendment is desirable, "providing [sic] that a less than unanimous jury could return a verdict." Unanimity will prolong deliberations and increase mistrials; mistrials are a problem for individual litigants who lack the resources for retrials. "A jury system which is less than unanimous will not engender an overwhelming number of verdicts in favor of plaintiffs." Before adopting the amendment, the Advisory Committee should study "whether the unanimity requirement substantially affects the results of trials compared to states which have 6-person juries."

95-CV-284: Michael W. Unger, Esq., for Court Rules & Administration Comm., Minn. State Bar Assn.: If the costs can be borne, agrees that "the quality of decision-making is improved by a larger jury." But Minnesota has good experience with a rule permitting 5/6 verdict after 6 hours of deliberation; this should be considered, to offset the increased risk of a hung jury with 12 jurors.

95-CV-289: Anthony C. Epstein, Esq., for D.C.Bar Section on Courts, etc.: Supports. "The jury is, next to the ballot itself, the most important civic institution in our democracy. Participation in jury service is one [of] the most important opportunities and obligations of citizenship." And jury service improves public understanding of the judicial system, for the better.

95-CV-290: Reagan Wm. Simpson, Esq., for ABA Tort & Ins. Practice Section: ABA Policy favors 12-person juries, but only if a 10/12 verdict is permitted.

95-CV-291: Hon. Joe Kendall: "[T]here is nothing magical about the number twelve." Smaller juries save precious taxpayer money.

95-CV-295: Thomas F. Clauss, Jr., for "certain members of the Federal Rules Revision Subcommittee of the Pre-Trial Practice and Discovery Committee of the Litigation Section of the ABA": Any concerns about judicial economy "are far outweighed by (i) the improved deliberative process which results from a slightly larger jury and (ii) the need to increase the representative nature of juries and, in particular, to increase the number of jurors who are members of minority groups." The social science evidence relied upon by the Supreme Court when it approved 6-person criminal and civil juries has been shown wrong.

95-CV-297: David K. Hardy, Esq.: We should return to a 12-person jury. "The length and complexity of trials as well as the enormity of the issues to be resolved more than justify the extra cost * * *."

95-CV-298: Hon. Ernest C. Torres: I have tried civil cases with both 6- and 12-person juries and see no difference in the quality of decisions. Elimination of alternates has de facto increased most civil juries to 8. Larger juries will increase the number of hung juries and compromise verdicts. Time and expense will be increased. We should not change.

Testimony on Rule 48

Peter Hinton, Esq., December 15: Tr. 29 to 49: The 12-person jury proposal "is an analytically motivated trip to injustice" unless it is coupled with provision for a nonunanimous verdict. Any increase in the risk of hung juries tips the playing field in favor of corporate defendants, because individual plaintiffs cannot afford retrials. Attorney voir dire will help offset this risk, but not enough. And by increasing the number of jurors, "you have significantly increased the potential for an aberrant jury." "If you had a nine-person majority and adequate peremptories, I would be all for this."

Hon. Michael R. Hogan, December 15: Tr 49 to 63: 6-person juries work. It is increasingly difficult to get citizens to serve as jurors. Many courtrooms are built with 7- or 8-person jury boxes, including our magistrate judge courtrooms. Although with trials by consent before magistrate judges 6-person juries could be made part of the consent process, this might reduce our ability to rely on magistrate judge trials — and we have relied on magistrate judges extensively and successfully.

Dr. Judy Rothschild, December 15: Tr 63 to 87: (Dr. Rothschild's background is described with her Rule 47(a) comments.) There are stray marks favorable to 12-person juries, but most of the testimony focuses on the suggestion that if jury size is increased, the number of peremptory challenges should be increased accordingly.

George J. Koelzer, Esq., December 15: Tr 98 to 113: Has never had an experience, going well back into the days when 12-person juries were used in civil cases as well as criminal, in which the inability to agree on a verdict could be ascribed to the size of the jury. Law and centuries of experience show that a jury of 12 works quite well. It brings more experience and common sense to the task, and is more representative.

Robert Aitken, Esq., December 15: Tr 113 to 125: The shrinkage of the jury is obvious. The number 12 was settled long ago, and worked for centuries. If we can shrink to 6, why not 1?

Robert B. Pringle, Esq., December 15: Tr 133 to 142: Has practiced both on the defense side and — increasingly, particularly in intellectual property cases — on the plaintiff side. Began with the view that a large jury favors the defense, but now prefers it for all sides. A larger jury gives a fair cross-section of the community. It helps in technical cases to have an engineer or two on the panel; there is a risk they will dominate a 6-person jury, but less concern with a jury of 12. I do believe that juries are capable of assessing technical issues, indeed at least as capable as judges. They bring common sense, whatever the level of formal education. There is no need to add alternates.

Elia Weinbach, Esq., December 15: Tr 142 to 151: There is a risk that 12-person juries will result in more hung juries; the federal judges who have made this observation to me were, to be sure, appointed after 1978 (so have no experience with 12-person civil juries).

Louise A. La Mothe, Esq., December 15: Tr 153 to 168: While I was

a member of the California State Judicial Council we had a study done by the National Center for State courts on moving from 12- to 8-person juries. The initial results caused the Council to lose any interest in the change. 12-person juries are more representative, a matter of great importance in our increasingly diverse society. And the influence of any single juror is reduced. The perception of fairness is enhanced.

Professor Charles Weisselberg, December 15: Tr 168 to 185: The return to 12-person juries is good. But it would be better to provide for alternates, to increase the prospect that there will be 12 jurors left to deliberate at the end of a long and complex trial. A fair trial is more important than the disappointment of alternates who are excused without deliberating at the end of trial.

Hon. Duross Fitzpatrick, January 26: Tr 3 to 15: Always uses 12-person juries. They give a good cross-section. The parties accept the results better than might be with smaller juries. I regularly chat with the jurors after the verdict. They understand the instructions. Judge Arnold has made irrefutable points in favor of 12-person juries. Majority verdicts are not a good idea; "a hung jury is not always a bad idea." Fallout from the O.J. case has put people in a panic about jury trial; "I don't think we need to be changing the jury system because of one case that's tried in California."

John T. Marshall, Esq., January 26: Tr 15 to 21: Lawyers select a jury much differently when it is six, because of concern that a single juror can dominate in a way that is not likely with a jury of 12. I have had two experiences when both sides agreed that a 6-person jury came out opposite from what we expected.

Frank C. Jones, Esq., January 26: Tr. 22 to 31: There is a very different dynamic with 12-person juries. One or two strong persons can influence the outcome with 6-person juries, but this is much more difficult with 12. And a 12-person jury is more likely to be truly representative of the community.

Michael A. Pope, Esq., January 26: Tr. 74 to 80: In Illinois we have always had 12-person juries. "There is something about it that seems to work. * * * And it does seem to bring out the best in people * * *." And hung juries "are extremely rare."

Kenneth Sherk, Esq., January 26: Tr 80 to 86: Chair, Federal Rules of Civil Procedure Committee, American College of Trial Lawyers. We endorse the 12-person jury "if for no other reason than for the representativeness factor, just get a better cross-section."

J. Richard Caldwell, Jr., Esq., January 26: Favors the proposal. Magistrate judges try civil cases in M.D.Fla. They can use an empty courtroom with a 12-member jury box, or add a few chairs to their own courtrooms. "They work perfectly well with a twelve-member jury."

John A. Chandler, Esq., January 26: Tr 93 to 100: The rationale in the Advisory Committee Note supports the proposal, "to provide more diversity and to avoid the odd verdict. * * * You get more aberrant decisions with six-person juries * * *. I think predictability helps lawyers and helps clients assess cases." There are anecdotes

suggesting that plaintiffs' lawyers tend to choose the 6-person jury state court in Fulton county, rather than the 12-person jury superior court, because "they believe that they are more likely to get a result that's outside of the box with a six-person jury."

Stephen M. Dorvee, Esq., January 26: Tr 100 to 105: A 12-person jury does bring a wide diversity of viewpoints. But it also "sees everything, hears everything, despite what some of my brethren thinks, understand[s] everything. I'm not sure that's the case with a six-person jury. * * * You want a greater collective memory." They have a much more thorough view of the case.

Hon. Hayden W. Head, February 9: All but 2 of the judges of S.D. Tex. oppose the return to 12-person juries. Their views are largely based on cost, and the belief that they have seen adequate and fair verdicts returned by smaller juries. A poll of the 5th Circuit District Judges Association got 73 responses from 94 members. 63 oppose the proposal, while 10 support it. Again, the feeling is that the proposal increases costs without real benefit.

Hon. Virginia M. Morgan, February 9: Tr 43 to 49. President, Federal Magistrate Judges Association. There are concerns about costs.

Hon. John F. Keenan, February 9: Tr 56 to 64: For all the judges, S.D.N.Y. "There is no data or reliable information to support the concept that 12-member juries achieve better results than 6, 8 or 10-person juries." We use 8-member juries; to do that, we have a venire panel of 22. If we go to 12-member juries, the panel must increase to 33 to offset increased losses. "This would increase our annual expenses for jurors by 50 percent on the civil side, an expenditure which we view as totally unnecessary." In New York we have great diversity, and our jury panels reflect that diversity now. The value of jurors as emissaries for the judicial system is well served by smaller juries.

Hon. John M. Roper, February 9: Tr. 64 to 80: Appearing for the Economy Subcommittee, Budget Committee of the Judicial Conference. This testimony is directed only to cost implications, not to the wisdom of the proposal as a matter of procedure. (The chair of the Budget Committee has vigorously supported a return to 12-person juries as a matter of policy.) The cost of returning to 12-person juries could go as high as $12,000,000. The more jurors you select, the greater the pool, the greater the number of challenges for cause, the greater the number of people who simply do not show up, the greater the need to send marshals out to round up people, and so on. There are also courtroom costs, both with respect to retrofitting existing magistrate judge courtrooms with larger jury boxes and with respect to new court construction plans that contemplated shared use of courtrooms in ways that permit construction of some courtrooms for smaller juries, and others for 12-person juries. Although parties can be told that they can have a magistrate-judge trial only if they consent to a smaller jury, this may reduce the frequency of consents to magistrate-judge trials. Some defense firms believe there is a greater prospect of a hung jury with 12, and are willing to pay for it, whether or not the perception is accurate.

Al Cortese, Esq., February 9: Tr 98 to 109: The National Chamber Litigation Center supports the proposal.

B. Rule 23 Transmitted for Publication

1. Introduction and Synopsis

Rule 23 has been before the Committee since March, 1991, when the Judicial Conference approved a recommendation of the Ad Hoc Committee on Asbestos Litigation by voting "to request its Standing Committee on Rules of Practice and Procedure to direct the Advisory Committee on Civil Rules to study whether Rule 23, F.R.C.P. be amended to accommodate the demands of mass tort litigation." The Committee began with a draft that adopted many of the suggestions made in 1986 by the American Bar Association Litigation Section. This draft would have collapsed the categorical distinctions now observed between subdivision (b)(1), (b)(2), and (b)(3) classes; authorized the court to permit or deny opting out of any class action; created an opt-in class provision; specifically governed notice requirements for (b)(1) and (b)(2) classes; and made many other changes, many of them independently significant.

The initial draft approach was recommended for publication but then withdrawn for further study. At the request of the Committee, the Federal Judicial Center undertook a study of class action files for all cases terminated in a two-year period in four districts where many class actions are filed. The Committee also continued to study the rule, inviting experienced class action practitioners to meet with the committee, holding a conference at the University of Pennsylvania Law School, attending a symposium at Southern Methodist University Law School, and participating in an Institute of Judicial Administration symposium at New York University Law School. Many lawyers and representatives of bar groups attended the November, 1995, and April, 1996 meetings of the Committee, and several spoke to the Committee. A substantially revised draft was the focus of discussion during the later stages of this process. This draft continued to include a large number of revisions, large, medium, and small.

By spring, 1995, the Committee concluded that the work should be divided into two segments. Attention would focus first on the question whether a small number of relatively signficant changes should be proposed. Only after disposing of those changes would the Committee determine whether it was wise to consider and propose additional changes.

The draft now proposed for publication focuses only on the relatively small number of changes described below. Once the Committee concluded that these changes should be proposed, it further concluded that it would be unwise to add other changes. Careful consideration of the proposed changes in the remaining steps of the Enabling Act process will demand close attention and great effort. It is better not to diffuse attention across too many proposals.

Subdivision (b)(3) is changed in several ways that emphasize the distinction between class actions that aggregate small claims and those that aggregate larger claims. Subparagraph (A) is added to the illustrative list of matters pertinent to the predominance and superiority findings. This factor emphasizes the practical ability of individual class members to pursue their claims without class certification. It will confirm and encourage the use of class actions to enforce small claims that will not support separate actions, subject to new subparagraph (F). At the same time, it will encourage courts to reflect carefully on the advantages of individual litigation before rushing to certify classes — such as mass tort classes — that include claims that would support separate actions. Subparagraph (B) is revised to make it clear that the court should consider not only solo litigation but also aggregation alternatives to a proposed class that do not involve "control" by individual class members. Subparagraph (C) is revised, among other things, to include the maturity of related litigation as a factor bearing on certification; this factor has loomed particularly large in the early years of litigating dispersed mass torts. New subparagraph (F) supports a comparison between the probable relief to individual class members and the costs and burdens of class litigation. Certification can be denied if the costs to the parties and burdens on the court of resolving the merits overshadow any probable relief to individual class members.

New subdivision (b)(4) authorizes certification of a (b)(3) class for purposes of settlement. It requires that all of the subdivision (a) prerequisites for class certification be met, and that the predominance and superiority requirements of (b)(3) also be met. But it authorizes evaluation of these prerequisites and requirements from the perspective of settlement. A settlement class may be certified even though the same class would not be certified for purposes of litigation. Although (b)(4) is set out as a separate paragraph, the class is certified under (b)(3) and is subject to the rights of notice and exclusion that apply to all (b)(3) classes. Certification is permitted only on motion by parties to a settlement agreement already reached. The separate subdivision (e) requirements for notice of settlement and court approval continue to apply.

Subdivision (c) is amended by deleting the requirement that the determination whether to certify a class be made "as soon as practicable" after commencement of the action. The change to "when" practicable supports the common practice of deciding motions to dismiss or for summary judgment before addressing the certification question. The change also supports precertification efforts to settle and seek certification of a settlement class.

Subdivision (e) is amended to confirm the common understanding that a hearing must be held as part of the process of reviewing and deciding whether to approve dismissal or compromise of a class

action.

New subdivision (f) is added to provide a method of permissive interlocutory appeal, in the sole discretion of the court of appeals, from orders granting or denying class certification.

In reviewing the Rule 23 proposals, it would help to consider the Minutes of the November, 1995 meeting and Draft Minutes of the April, 1996 Advisory Committee meeting. These Minutes are the final items in this Report.

(2) Text of Proposed Rule 23 and Note

Rule 23

* * *

(B) **Class Actions Maintainable.** An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition: * * *

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include:

(A) the practical ability of individual class members to pursue their claims without class certification;

(~~A~~B) ~~the interest of members of the class in individually controlling the prosecution or defense of~~ class members' interests in maintaining or defending separate actions;

(~~B~~C) the extent, ~~and~~ nature, and maturity of any related litigation ~~concerning the controversy already commenced by or against~~ involving class members ~~of the class~~;

(~~C~~D) the desirability or undesirability of concentrating the litigation of the claims in the particular forum;

(~~D~~E) the difficulties likely to be encountered in the management of a class action; and

(F) whether the probable relief to individual class members justifies the costs and burdens of class litigation; or

(4) the parties to a settlement request certification under subdivision (b)(3) for purposes of settlement, even though the requirements of subdivision (b)(3) might not be met for purposes of trial.

(c) **Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.**

(1) ~~As soon as~~ When practicable after the commencement of an action brought as a class action, the court shall

determine by order whether it is to be so maintained.

* * *

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without hearing and the approval of the court, ~~and~~ after notice of the proposed dismissal or compromise ~~shall be~~ has been given to all members of the class in such manner as the court directs.

(f) Appeals. A court of appeals may in its discretion permit an appeal from an order of a district court granting or denying class action certification under this rule if application is made to it within ten days after entry of the order. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

ADVISORY COMMITTEE NOTE

Class action practice has flourished and matured under Rule 23 as it was amended in 1966. Subdivision (b)(1) continues to provide a familiar anchor that secures the earlier and once-central roles of class actions. Subdivision (b)(2) has cemented the role of class actions in enforcing a wide array of civil rights claims, and subdivision (b)(3) classes have become one of the central means of aggregating large numbers of small claims that would not support individual litigation. The experience of more than three decades, however, has shown ways in which Rule 23 can be improved. These amendments may effect modest expansions in the availability of class actions in some settings, and modest restrictions in others. New factors are added to the list of matters pertinent to determining whether to certify a class under subdivision (b)(3). Settlement problems are addressed, both by confirming the propriety of "settlement classes" in subdivision (b)(4) and by making explicit the need for a hearing as part of the subdivision (e) approval procedure. The requirement in subdivision (c)(1) that the determination whether to certify a class be made as soon as practicable after commencement of an action is changed to require that the determination be made when practicable. A new subdivision (f) is added, establishing a discretionary interlocutory appeal system for orders granting or denying class certification. Many of these changes will bear on the use of class actions as one of the tools available to accomplish aggregation of tort claims. The Advisory Committee debated extensively the question whether more adventurous changes should be made to address the problems of managing mass tort litigation, particularly the problems that arise when a common course of conduct causes injuries that are dispersed in time and space. At the end, the Committee concluded that it is too early to anticipate the lessons that will be learned from the continuing and rapid development of practice in this area.

At the request of the Advisory Committee, the Federal Judicial Center undertook an empirical study designed to illuminate the general use of class actions not only in settings that capture

general attention but also in more routine settings. The study is published as T.E. Willging, L.L. Hooper, and R.J. Niemic, *An Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules (1996)*. The study provided much useful information that has helped shape these amendments.

Subdivision (b)(3). Subdivision (b)(3) has been amended in several respects. Some of the changes are designed to redefine the role of class adjudication in ways that sharpen the distinction between the aggregation of individual claims that would support individual adjudication and the aggregation of individual claims that would not support individual adjudication. Current attempts by courts and lawyers to adapt Rule 23 to address the problems that arise from torts that injure many people are reflected in part in some of these changes, but these attempts have not matured to a point that would support comprehensive rulemaking.

The probability that a claim would support individual litigation depends in part on the expected recovery. One of the most important roles of certification under subdivision (b)(3) has been to facilitate the enforcement of valid claims for small amounts. The median individual class-member recovery figures reported by the Federal Judicial Center study ranged from $315 to $528. These amounts are far below the level that would be required to support individual litigation, unless perhaps in a small claims court. This vital core, however, may branch into more troubling settings. The mass tort cases may sweep into a class many members whose individual claims would support individual litigation, controlled by the class member. In such cases, denial of certification or careful definition of the class may be essential to protect these plaintiffs. As one example, a defective product may have inflicted small property value losses on millions of consumers, reflecting a small risk of serious injury, and also have caused serious personal injuries to a relatively small number of consumers. Class certification may be appropriate as to the property damage claims, but not as to the personal injury claims. More complicated variations of this problem may arise when different persons suffer injuries that are similar in type but that vary widely in extent. A single course of securities fraud, for example, may inflict on many people injuries that could not support individual litigation and at the same time inflict on a few people or institutions injuries that could readily support individual litigation. The victims who could afford to sue alone may be ideal representatives if they are willing to represent a class, and may be easily able to protect their interests in separate litigation if a (b)(3) class is certified. If a (b)(1) or (b)(2) class were certified, however, the court should consider the possibility of excluding these victims from the class definition.

Individual litigation may affect class certification in a different way, by shaping the time when a substantial number of individual decisions illuminate the nature of the class claims.

Exploration of mass tort questions time and again led experienced lawyers to offer the advice that it is better to defer class litigation until there has been substantial experience with actual trials and decisions in individual actions. The need to wait until a class of claims has become "mature" seems to apply peculiarly to claims that involve highly uncertain facts that may come to be better understood over time. New and developing law may make the fact uncertainty even more daunting. A claim that a widely used medical device has caused serious side effects, for example, may not be fully understood for many years after the first injuries are claimed. Pre-maturity class certification runs the risk of mistaken decision, whether for or against the class. This risk may be translated into settlement terms that reflect the uncertainty by exacting far too much from the defendant or according far too little to the plaintiffs.

These concerns underlie the changes made in the subdivision (b)(3) list of matters pertinent to the findings whether the law and fact questions common to class members predominate over individual questions and whether a class action is superior to other available methods for the fair and efficient adjudication of the controversy. New factors are added to the list, and some of the original factors have been reformulated.

Subparagraph (A) is new. The focus on the practical ability of individual class members to pursue their claims without class certification can either encourage or discourage class certification. This factor discourages — but does not forbid — class certification when individual class members can practicably pursue individual actions. If individual class members cannot practicably pursue individual actions, on the other hand, this factor encourages class certification. This encouragement may be offset by new subparagraph (F) if the probable relief to individual class members is too low to justify the burdens of class litigation.

Subparagraph (B), revised from former subparagraph (A), complements new subparagraph (A). The practical ability of individual class members to pursue individual actions is important when class members have significant interests in maintaining or defending separate actions. These interests include such fundamental matters as choice of forum; the timing of all events from filing to judgment; selection of coparties and adversaries; the ability to gain choice of more favorable law to govern the decision; control of litigation strategy; and litigation in a single proceeding that includes all issues of liability and remedy. These interests may require a finding that class adjudication is not superior because it is not as fair to class members, even though it may be more efficient for the judicial system in the limited sense that fewer judicial resources are required. The right to request exclusion from a (b)(3) class does not fully protect these interests, particularly as to class members who have not yet retained individual counsel at the time of class notice.

These interests of class members may be served by a variety of alternatives that may not amount to individual control of separate litigation. The alternatives to certification of the requested class may be certification of a different class or smaller classes, intervention in other pending actions, voluntary joinder, and consolidation of individual actions — including transfer for coordinated pretrial proceedings or transfer for consolidated trial.

The practical ability of individual class members to pursue individual litigation and their interests in maintaining separate actions may come into conflict when there is a significant risk that the insurance and assets of the defendants may not be sufficient to fully satisfy all claims growing out of a common course of events. The plaintiffs who might win the race to secure and enforce individual judgments have an interest that is served at the cost of other plaintiffs whose interests are defeated by exhaustion of the available assets. In these circumstances, fairness and efficiency may require aggregation in a way that marshals the assets for equitable distribution. This need may justify certification under subdivision (b)(3), or in appropriate cases under subdivision (b)(1). Bankruptcy proceedings may prove a superior alternative. The decision whether to certify a (b)(3) class must rest on a judgment about the practical realities that may thwart realization of the abstract interests that point toward separate individual actions.

Factor (C), formerly factor (B), has been amended in several respects. Other litigation can be considered so long as it is related and involves class members; there is no need to determine whether the other litigation somehow concerns the same controversy. The focus on other litigation "already commenced" is deleted, permitting consideration of litigation without regard to the time of filing in relation to the time of filing the class action. The more important change authorizes consideration of the "maturity" of related litigation. In one dimension, maturity can reflect the need to avoid interfering with the progress of related litigation already well advanced toward trial and judgment. When multiple claims arise out of dispersed events, however, maturity also reflects the need to support class adjudication by experience gained in completed litigation of several individual claims. If the results of individual litigation begin to converge, class adjudication may seem appropriate. Class adjudication may continue to be inappropriate, however, if individual litigation continues to yield inconsistent results, or if individual litigation demonstrates that knowledge has not yet advanced far enough to support confident decision on a class basis.

Subparagraph (F) has been added to subdivision (b)(3) to effect a retrenchment in the use of class actions to aggregate trivial individual claims. If the probable relief to individual class members does not justify the costs and burdens of class litigation, a class action is not a superior means of efficient

adjudication. The near certainty that few or no individual claims will be pursued for trivial relief does not require class certification.

The prospect of significant benefit to class members combines with the public values of enforcing legal norms to justify the costs, burdens, and coercive effects of class actions that otherwise satisfy Rule 23 requirements. If probable individual relief is slight, however, the core justification of class enforcement fails.

The value of probable individual relief must be weighed against the costs and burdens of class-action proceedings. No particular dollar figure can be used as a threshold. A smaller figure is appropriate if issues of liability can be quickly resolved without protracted discovery or trial proceedings, the costs of class notice are low, and the costs of administering and distributing the award likewise are low. Higher figures should be demanded if the legal issues are complex or complex proceedings will be required to resolve the merits, identification of class members and notice will prove costly, and distribution of the award will be expensive. Often it will be difficult to measure these matters at the commencement of an action, when individually significant relief is likely to be demanded and the costs of class proceedings cannot be estimated with any confidence. The opportunity to decertify later should not weaken this threshold inquiry. At the same time decertification should be considered whenever the factors that seemed to justify an initial class certification are disproved as the action is more fully developed.

Subdivision (b)(4). Subdivision (b)(4) is new. It permits certification of a class under subdivision (b)(3) for settlement purposes, even though the same class might not be certified for trial. Many courts have adopted the practice reflected in this new provision, some very recent decisions have stated that a class cannot be certified for settlement purposes unless the same class would be certified for trial purposes. This amendment is designed to resolve this newly apparent disagreement.

Although subdivision (b)(4) is formally separate, any class certified under its terms is a (b)(3) class with all the incidents of a (b)(3) class, including the subdivision (c)(2) rights to notice and to request exclusion from the class. Subdivision (b)(4) does not speak to the question whether a settlement class may be certified under subdivisions (b)(1) or (b)(2). As with all parts of subdivision (b), all of the prerequisites of subdivision (a) must be satisfied to support certification of a (b)(4) settlement class. In addition, the predominance and superiority requirements of subdivision (b)(3) must be satisfied. Subdivision (b)(4) serves only to make it clear that implementation of the factors that control certification of a (b)(3) class is affected by the many differences between settlement and litigation of class claims or defenses. Choice-of-law difficulties, for example, may force

certification of many subclasses, or even defeat any class certification, if claims are to be litigated. Settlement can be reached, however, on terms that surmount such difficulties. Many other elements are affected as well. A single court may be able to manage settlement when litigation would require resort to many courts. And, perhaps most important, settlement may prove far superior to litigation in devising comprehensive solutions to large-scale problems that defy ready disposition by traditional adversary litigation. Important benefits may be provided for those who, knowing of the class settlement and the opportunity to opt out, prefer to participate in the class judgment and avoid the costs of individual litigation.

For all the potential benefits, settlement classes also pose special risks. The court's Rule 23(e) obligation to review and approve a class settlement commonly must surmount the informational difficulties that arise when the major adversaries join forces as proponents of their settlement agreement. Objectors frequently appear to reduce these difficulties, but it may be difficult for objectors to obtain the information required for a fully informed challenge. The reassurance provided by official adjudication is missing. These difficulties may seem especially troubling if the class would not have been certified for litigation, or was shaped by a settlement agreement worked out even before the action was filed.

These competing forces are reconciled by recognizing the legitimacy of settlement classes but increasing the protections afforded to class members. Certification of a settlement class under (b)(4) is authorized only on request of parties who have reached a settlement. Certification is not authorized simply to assist parties who are interested in exploring settlement, not even when they represent that they are close to agreement and that clear definition of a class would facilitate final agreement. Certification before settlement might exert untoward pressure to reach agreement, and might increase the risk that the certification could be transformed into certification of a trial class without adequate reconsideration. These protections cannot be circumvented by attempting to certify a settlement class directly under subdivision (b)(3) without regard to the limits imposed by (b)(4).

Notice and the right to opt out provide the central means of protecting settlement class members under subdivision (b)(3), but the court also must take particular care in applying some of Rule 23's requirements. As to notice, the Federal Judicial Center study suggests that notices of settlement do not always provide the clear and succinct information that must be provided to support meaningful decisions whether to object to the settlement or – if the class is certified under subdivision (b)(3) – whether to request exclusion. One of the most important contributions a court can make is to ensure that the notice fairly describes the litigation and the terms of the settlement. Definition of the class also must be approached with care, lest the attractions of

settlement lead too easily to an over-broad definition. Particular care should be taken to ensure that there are no disabling conflicts of interests among people who are urged to form a single class. If the case presents facts or law that are unsettled and that are likely to be litigated in individual actions, it may be better to postpone any class certification until experience with individual actions yields sufficient information to support a wise settlement and effective review of the settlement.

Subdivision (c). The requirement that the court determine whether to certify a class "as soon as practicable after commencement of an action" is amended to provide for certification "when practicable."

The Federal Judicial Center study showed many cases in which it was doubtful whether determination of the class-action question was made as soon as practicable after commencement of the action. This result occurred even in districts with local rules requiring determination within a specified period. These practices may reflect the dominance of practicability as a pragmatic concept that effectively has translated "as soon as" to mean "when." The amendment makes this approach secure, and supports the changes made in subdivision (b)(3) and the addition of subdivision (b)(4). Significant preliminary preparation may be required in a (b)(3) action, for example, to appraise the factors identified in new or amended subparagraphs (A), (B), (C), and (F). These and similar inquiries should not be made under pressure of an early certification requirement. Certification of a settlement class under new subdivision (b)(4) cannot happen until the parties have reached a settlement agreement, and there should not be any pressure to reach settlement "as soon as practicable."

Amendment of the "as soon as practicable" requirement also confirms the common practice of ruling on motions to dismiss or for summary judgment before the class certification decision. A few courts have feared that this useful practice is inconsistent with the "as soon as practicable" requirement.

Subdivision (e). Subdivision (e) is amended to confirm the common practice of holding hearings as part of the process of approving dismissal or compromise of a class action. The judicial responsibility to the class is heavy. The parties to the settlement cease to be adversaries in presenting the settlement for approval, and objectors may find it difficult to command the information or resources necessary for effective opposition. These problems may be exacerbated when a proposed settlement is presented at, or close to the beginning, of the action. A hearing should be held to explore a proposed settlement even if the proponents seek to waive the hearing and no objectors have appeared.

Subdivision (f). This permissive interlocutory appeal provision is adopted under the power conferred by 28 U.S.C. § 1292(e). Appeal from an order granting or denying class certification is permitted in the sole discretion of the court of

appeals. No other type of Rule 23 order is covered by this provision. It is designed on the model of § 1292(b), relying in many ways on the jurisprudence that has developed around § 1292(b) to reduce the potential costs of interlocutory appeals. At the same time, subdivision (f) departs from § 1292(b) in two significant ways. It does not require that the district court certify the certification ruling for appeal, although the district court often can assist the parties and court of appeals by offering advice on the desirability of appeal. And it does not include the potentially limiting requirements of § 1292(b) that the district court order "involve[] a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation."

Permission to appeal should be granted with restraint. The Federal Judicial Center study supports the view that many suits with class action allegations present familiar and almost routine issues that are no more worthy of immediate appeal than many other interlocutory rulings. Yet several concerns justify expansion of present opportunities to appeal. An order denying certification may confront the plaintiff with a situation in which the only sure path to appellate review is by proceeding to final judgment on the merits of an individual claim that, standing alone, is far smaller than the costs of litigation. An order granting certification, on the other hand, may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability. These concerns can be met at low cost by establishing in the court of appeals a discretionary power to grant interlocutory review in cases that show appeal-worthy certification issues.

The expansion of appeal opportunities effected by subdivision (f) is modest. Court of appeals discretion is as broad as under § 1292(b). Permission to appeal may be granted or denied on the basis of any consideration that the court of appeals finds persuasive. Permission is most likely to be granted when the certification decision turns on a novel or unsettled question of law, or when, as a practical matter, the decision on certification is likely dispositive of the litigation. Such questions are most likely to arise during the early years of experience with new class-action provisions as they may be adopted into Rule 23 or enacted by legislation. Permission almost always will be denied when the certification decision turns on case-specific matters of fact and district court discretion.

The district court, having worked through the certification decision, often will be able to provide cogent advice on the factors that bear on the decision whether to permit appeal. This advice can be particularly valuable if the certification decision is tentative. Even as to a firm certification decision, a statement of reasons bearing on the probable benefits and costs of immediate appeal can help focus the court of appeals decision, and

may persuade the disappointed party that an attempt to appeal would be fruitless.

The 10-day period for seeking permission to appeal is designed to reduce the risk that attempted appeals will disrupt continuing proceedings. It is expected that the courts of appeals will act quickly in making the preliminary determination whether to permit appeal. Permission to appeal does not stay trial court proceedings. A stay should be sought first from the trial court. If the trial court refuses a stay, its action and any explanation of its views should weigh heavily with the court of appeals.

Appellate Rule 5 has been modified to establish the procedure for petitioning for leave to appeal under subdivision (f).

III Informational Item

The Federal Rules of Civil Procedure Committee of the American College of Trial Lawyers has urged that the Committee reconsider the scope of discovery permitted under Rule 26(b)(1). Rule 26(b)(1) now permits discovery:

> regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the aprty seeking discovery or to the claim or defense of any other party * * *. The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Discovery topics have been continually on the Committee agenda for at least three decades. Dissatisfaction with discovery practice has not been allayed by the many amendments that began in 1970. Proposals to narrow the basic scope of discovery continue to be made. Perhaps the most common proposal has been that relevance to "the subject matter involved in the pending action" sweeps too far. Instead, it is urged that discovery should be limited to issues defined by the pleadings. A beginning step was made with the Rule 26(a)(1) disclosure provisions, which tie the duty to disclose to information "relevant to disputed facts alleged with particularity in the pleadings." This step was intended to encourage more specific pleading as a means of deepening the disclosure obligations of an adversary. Several years of experience will be needed to determine whether the intent will be borne out in practice. Whatever comes of this effort, it does not limit the scope of discovery. But it does reflect the difficulty of discovery that is limited only by the "subject matter" revealed by notice pleading.

It remains to be seen whether the scope of discovery can be attacked directly without also taking up the subject of notice pleading. It may be that any effort to define discovery in relation to the pleadings must either surmount the generality of notice pleading or take on notice pleading itself.

An alternative approach may be to make few or no changes in Rule 26(b)(1), but to reconsider the premise that all modes of discovery should be treated alike. Many of the ongoing complaints about discovery relate to document production. It may be possible to restrict the scope of document discovery, both as to parties and

as to nonparties, without making the same changes in the scope of other discovery tools. The full scope of Rule 26(b)(1) may be better suited to depositions, and perhaps also to interrogatories, than to document production.

These matters will be on the Committee agenda in October.

Summary of Comments: Rule 26(c)

95-CV-96: Edward L. Dunkerly, Esq.: "I simply do not think this rule is in the public interest," apparently referring to the stipulation aspect.

95-CV-106: Hon. Bruce M. Van Sickle: Adding item (ii), referring to public and private interests, erodes "the broad principle." "Why not leave the rule clean and pristine? Let judicial decisions articulate the parameters of the rule."

95-CV-135: Peter Chase Neumann, Esq.: The stipulation provision should be deleted, and if anything the good cause requirement should be strengthened. Product-liability and fraudulent insurance practice defendants routinely exact stipulated protective orders, complete with stipulated damages, calculated to defeat sharing information needed to support litigation by others injured by the same products or practices. Procedure should not cripple the ability of the tort system to force correction of dangerous products.

95-CV-136: Gary L. Spahn, Esq.: The proposal has it right. Radical changes promoted by a minority of plaintiffs' lawyers and press interests "constitute a formula for disastrous abuse of the discovery process at the expense of the litigants * * * and for the dubious benefit of those outside the process who have other established channels for obtaining the type of information sought."

95-CV-140: Michael E. Oldham, Esq., and Heather Fox Vickles, Esq.: The proposal essentially codifies existing law and everyday practice. Stipulated protective orders encourage greater cooperation in discovery.

95-CV-161: Hon. David L. Piester: Supports the substance, but recommends clarifications. The Rule should state explicit standards for intervention. It should be made clear whether the (c)(3)(B) standard for modification or dissolution is the same as the "good cause" standard for granting a protective order. It would help to offer advice on appealability.

95-CV-162: J. Richard Caldwell, Jr., Esq.: The proposal reflects existing law. Protective orders are very important, particularly those that protect confidential information. Stipulated orders are common because all parties have an interest in efficient resolution of discovery problems. The order can be enforced against third parties, such as experts, who are a common source of difficulty.

95-CV-163: Hon. Prentice H. Marshall: Shares the concerns of those apprehensive about stipulated orders, but understands that the matter still lies in the discretion of the court.

95-CV-174: Hon. Virginia M. Morgan for the Federal Magistrate Judges Assn.: Supports. Stipulated protective orders are common and are a valuable means of facilitating discovery. The provisions on modification or dissolution provide helpful clarification and

guidance. (The same statement has been given number 95-CV-202.)

94-CV-184: Paul W. Mollica, Esq., for the Federal Courts Committee of the Chicago Council of Lawyers: Supports the proposal, with one change. Documents or exhibits filed with the court should not be sealed without a judicial finding of good cause. Proposes a new paragraph for subdivision (c) that permits stipulated protected orders, without a finding of good cause, with the limit that a stipulated order may not permit or require documents to be filed under seal.

95-CV-191: Walter R. Krueger, Esq.: Plaintiffs are under intense pressure from defendants to accept stipulated protective orders. The only protection for injured workers and consumers is an open court house. A showing of good cause should be required.

95-CV-192: Kieron F. Quinn, Esq.: The problem is too much secrecy, not too little protection. It should be harder to obtain protective orders; public access to litigation information should be easier. Too many claimants are willing to stipulate to protective orders "in exchange for some real or perceived additional cash for themselves." Protective orders in earlier litigation can cause unjustified delay and expense in access to information in later and related litigation.

95-CV-193: Carolyn B. Witherspoon, Esq., for the Federal Legislation and Procedures Committee, Arkansas Bar Assn.: The Committee has no objection, although some concern that (c)(3) may dilute the finality of protective orders.

95-CV-205: Robert L. Abell, Esq.: Stipulated protective orders enable defendants to coerce plaintiffs and keep information from public view, often obstructing discovery in related cases. Protective orders should be less common, not more common.

95-CV-206: Dean M. Harris, Esq., for Atlantic Richfield Co.: It is good to codify stipulated order practice, which saves legal fees and court time.

95-CV-210: Richard J. Gilloon, Esq.: Large defendants can coerce small plaintiffs to stipulate to protective orders that deprive plaintiffs of the important opportunity to share information. A judicial finding of good cause should be required.

95-CV-212: Mary E. Alexander, Esq., for Consumer Attorneys of California: Defendants can coerce stipulations from plaintiffs, creating another barrier to access to court by consumers who are cut off from vital information. By specifying matters that must be considered on motion to modify or dissolve, without adding a similar list to the provisions governing entry of a protective order, the proposal creates an imbalance that favors defendants and harms consumer plaintiffs.

95-CV-213: William R. Fry, Executive Director, and Paul A. Friedman, Program Counsel, for HALT - An Organization of Americans

for Legal Reform: (The original submission was replaced by a new one received on March 15, 1996.) Stipulated protective orders undermine the good cause standard. Ordinarily discovery should take place in public. Reliance of the parties is not a basis for refusing dissolution or modification when the order rests on stipulation, not a showing of good cause. Concern for public health and safety should be paramount. The proposal should be rejected.

95-CV-214: Kathleen L. Blaner, Esq., for Litigation Section, D.C. Bar: Changes to Rule 26(c) are unnecessary, but we support the proposals because they preserve existing practice. The Note should be modified to confirm that the Rule only codifies existing practice. The recent outcry about secrecy rests on "hyperbole and the business interests of a few special interest groups." Stipulated orders do not eliminate the good cause requirement, and facilitate efficient discovery; discovery should be self-executing to the greatest possible extent.

95-CV-221: Norbert F. Bergholtz, Esq.: The proposal incorporates general practice both as to stipulated protective orders and as to the grounds for modification or dissolution. The ability to stipulate to protective orders is important to reduce costs to the parties and burdens on the courts. Protective orders do not prevent access to discovery information by others "where circumstances justify disclosure."

95-CV-224: Donald C. Cramer, Esq.: Encourages adoption of realistic rules that will continue the practice of allowing district courts to enact protective orders. Crucial design data and sensitive financial information must be protected.

95-CV-225: Robert R. Sheldon, Esq., for Connecticut Trial Lawyers Assn.: The amendment would encourage protective orders and made modification more difficult. Protective orders should be discouraged. They increase the cost of parallel litigation and conceal information important to public health and safety. The proposal would permit protective orders without a showing of good cause. It would require consideration of "reliance," a change that will encourage defendants to coerce plaintiffs into protective orders.

95-CV-229: Leslie A. Brueckner, Esq., for Trial Lawyers for Public Justice: This 29-page comment is rich in detail that cannot be easily summarized. There are two main points: stipulated protective orders should not be entered until a judge has made a good cause review and determination; reliance on a protective order should not be a basis for opposing modification or dissolution. General public interest values, the efficiency of related litigation, protection of health and safety, democratic access to the works of the courts, and First Amendment values are urged. Present practice protects unnecessary secrecy at every stage. In 1989 they launched Project Access to combat secrecy. (1) As to stipulated orders, it is stated that present practice requires a

judicial finding of good cause; although some judges may shirk this duty, the cure is not a radical change in existing law but adherence to it. Plaintiffs are coerced into stipulations. The FJC study does not show how many protective orders there would be if stipulations could be made without showing good cause. Sealed records cause great public harm from continued use of dangerous products, exposure to toxic pollutants, and being treated by incompetent doctors. Protective orders commonly provide for filing under seal; limiting the rule to protective orders does not undo this added harm. If the problem is that present discovery is too broad, or "good cause" does not provide enough protection, these practices should be addressed directly. The good cause standard imposes no great burden; it can be found as to categories of documents in cases that present great amounts of discovery material. The opportunity to seek modification is no alternative, because the very nature of secrecy prevents informed applications. (2) As to reliance, this factor ignores the fact that parties are obliged to respond to discovery. It is a particularly weak factor when information is sought for use in related litigation. (3) In addition, the modification standard should make it clear that the party seeking continued protection should have the burden of showing good cause for protection against the present demand; this is particularly important as to stipulated protective orders.

<u>95-CV-234: James A. Strain, for Seventh Cir. Bar Assn.</u>: If the parties can agree to a stipulated protective order, there should be no need to establish good cause. The remainder of the amendments provide an appropriate balance.

<u>95-CV-235: Henry T. Courtney, Esq.</u>: The amendment should be rejected. Many years of litigating automobile injury cases show routine misuse of protective orders by manufacturers for the purpose of preventing access to information needed by plaintiffs in related cases, even when it is clear beyond doubt that the underlying information has no competitive value.

<u>95-CV-243: Richard Vuernick, Legal Policy Director, for Citizen Action</u>: The stipulation provision erodes the public right to know events in the courts, which are public institutions. It will spawn more litigation as more people are injured by products, toxics, and negligent health care providers for want of access to discovery information. The direction to consider reliance means that good cause will be ignored both when the order is entered and again when modification or dissolution is sought.

<u>95-CV-244: Hon. Lloyd Doggett, U.S. Congress</u>: The stipulation proposal admittedly reflects actual practice in too many courts, but runs counter to the principle that courts should function under a presumption of openness. The reliance provision exacerbates the effect of the proposal. "I am convinced that buried in discovery documents are too many secrets that can maim or kill consumers * * *. I have seen such documents during the course of my service as a Justice of the Texas Supreme Court."

95-CV-245: Robert F. Wise, Jr., Esq., for Commercial & Federal Litigation Section, New York State Bar Assn.: The proposals simply conform to general present practice. The decision to recommit to the Committee arose from "a last-minute lobbying effort" by those who appear to be "opposed to any protective orders at all," or who fail to appreciate that the proposal addresses only protective discovery orders. But it would be better to allow entry of stipulated orders without requiring a motion.

95-CV-246: Mary Ellen Fise, Esq., Mary Griffin, Esq., & Jay Feldman, for Consumer Fedn. of America, Consumers Union, and National Coalition Against Misuse of Pesticides: The stipulation and reliance provisions are bad. Concealment of discovery materials hides information important to consumers and government agencies "and allows harmful products to remain in the marketplace." Repetitive discovery will be forced. The purpose of civil actions specifically designed to remedy societal harms, including civil rights actions and other statutory actions — such as for violation of the Consumer Product Safety Act —, will be thwarted. Increased concealment will make it more difficult for injured plaintiffs to find lawyers willing to take their cases, for want of knowing how strong the claims are. Rule 26(c) should be amended to include "a presumption against protective orders if the subject matter of the order relates to public health, public safety, environmental protection, or government operations."

95-CV-247: Don W. Martens, Esq., for American Intellectual Property Law Assn.: Proposed (c)(3)(A) is desirable; it confirms the existing power to modify protective orders. This issue often arises when a patent is involved in successive actions, making it desirable to avoid duplicate discovery by allowing access to the materials of the first action. But (c)(3)(B) should be deleted. It is unprecedented to list factors that a court "must" consider. The list clearly is not inclusive, but focus on these factors may mislead a court to weight them too heavily in comparison to factors not listed.

95-CV-248: Michael A. Pope, Esq., for Lawyers For Civil Justice: The proposal strikes a reasonable balance "between dual and seemingly irreconcilable objectives of public access and personal privacy." Those who publicly protest stipulated orders often "derive enormous benefit from entering protective orders on stipulation of parties which has facilitated the full and free exchange of documents." The modification provisions contain important guideposts. This is "a modest but meaningful reform."

95-CV-249: Hugh F. Young, Jr., Executive Director, for Product Liability Advisory Council: The provision for stipulated orders recognizes sound current practice; it does not diminish the good cause standard — good cause must be shown whenever continuing protection is challenged. Stipulated orders are essential to the discovery process. The modification proposal also is sound, but there should be more explicit statements about what it does not do.

It does not change the law of standing to seek modification or dissolution. It does not — and, under the Enabling Act, perhaps could not — apply to confidentiality provisions in voluntary settlement agreements. And it does not create a right of public access to information in the possession of the parties but not filed with the court.

95-CV-250: Jane E. Kirtley, Esq., et al., for Reporters Committee for Freedom of the Press: The stipulation amendment should not be adopted. "Restrictions on access would conceal information important to public health and welfare, serve as de facto prior restraints, and would not be a harmless codification of an already accepted practice." The common-law right of access limits the power to impose protective orders on judicial documents. Access should be permitted only to protect a compelling interest, and should be narrowly tailored to that interest. Parties who oppose protective orders are not likely to resist them, for fear of increased litigation costs and delay. The public interest in disclosure should be considered on entry of an order, and continually on motions to modify or dissolve. Wise courts now insist on a showing of good cause.

95-CV-252: Nan Aron, Esq., for Alliance For Justice: Existing problems of court secrecy would be exacerbated by the stipulation and reliance provisions. Needless secrecy can leave plaintiffs ignorant of their claims, or unable to bear the costs of discovery and proof; it also increases the probability that more people will be harmed by the same or similar products, discriminatory practices, or pollution.

95-CV-253: William B. Poff, Esq., for Executive Committee, Nat. Assn. of Railroad Trial Counsel: Approves the proposal.

95-CV-254: Marjorie E. Powell, Esq., for Pharmaceutical Research & Mfrs. of America: Protective orders in personal injury and intellectual property litigation related to drugs protect not only commercially sensitive information but also personal patient information. Stipulated orders protect against the need to engage in a dispute solely for the purpose of obtaining protections that all parties agree are appropriate. The standards for modification are appropriate, keeping in mind that it is in the public interest to encourage discovery without extensive disputes. Courts should remember that there are other agencies charged with protecting the public interest, and that these agencies commonly have power to compel production of information. The FDA, indeed, requires drug companies to maintain the confidentiality of some information, such as information that would identify the person who reported an adverse drug event and the patient who was involved. It would help to add to the Note an illustration based on the need to protect information involved in intellectual property litigation.

95-CV-255: Kevin P. Sullivan, Esq., for Washington State Trial Lawyers Assn. Court Rules Committee: The proposal will make protective orders easier to obtain, a disservice to the public

interest. Washington State has adopted "sunshine" laws requiring a court to weigh the public interest before signing any protective order, even if the parties stipulate to the order.

95-CV-258: Hon. Robert N. Chatigny: I cause surprise and consternation by refusing to sign stipulated protective orders, without prejudice to renewal when the parties show good cause. "Agreed orders supported by a showing of good cause can be very helpful." But even agreed orders can impose substantial burdens and breed satellite litigation; they should be entered only for good cause.

95-CV-259: Sandra S. Baron, Esq., for Libel Defense Resource Center: Comments of Associated Press, Dow Jones & Co., Magazine Publishers of America, National Assn. of Broadcasters, Newspaper Assn. of America, Radio-Television News Directors Assn., and Socy. of Professional Journalists: The amendment that permits third parties to intervene to seek modification is a positive step, but it cannot substitute for a threshold determination of good cause by the court. Stipulated orders should be forbidden. And the rule should require a showing of compelling interests to justify sealing any material filed with the court. (1) The routine use of protective orders is "[t]roubling because the public, the press, the government, even congressional investigators are shut out, and plaintiffs — and sometimes defendants — are shut up." There are numerous illustrations of secrecy orders that have caused continuing injury by dangerous products. (2) Protective orders impair reporting on the judicial process. Access to trial records is less useful as so few cases proceed to trial; discovery materials are increasingly important. (3) Seattle Times v. Rinehart has been understood to require a judicial determination of good cause to protect First Amendment concerns. (4) The parties share a common interest in secrecy — plaintiffs because they obtain more favorable settlements. The public interest demands publicity. (5) Placing the burden on nonparties to justify access is untoward, because they do not know what is there. Smaller media firms cannot afford the cost of a quest for information that may or may not be of public interest. (6) Courts need not examine every document. They can define categories of documents likely to deserve protection in each case, and articulate categories for which good cause likely cannot be shown. Parties can be required to submit a log describing specific documents designated confidential. (7) Parties commonly stipulate to filing under seal any motion that annexes or refers to protected discovery information, defeating the constitutional presumption of access; this practice should be specifically prohibited, unless a compelling interest can be shown. (A supplement to this filing calls attention to the decision in Proctor & Gamble Co. v. Bankers Trust Co., 6th Cir. 95-4078, March 5, 1996, and the opinions of Chief Judge Merritt and Judge Martin about broad stipulated protective orders.)

95-CV-260: Martin R. Jenkins, Esq., for New Hampshire Trial Lawyers Assn.: "[O]pposes any change in the Rule which would permit greater

secrecy by wrong-doers." The proposal "would seem to do nothing more than allow a broad cloak of secrecy for tort feasors to hide behind."

95-CV-261: John Seigenthaler, Chairman; Paul K. McMasters, First Amendment Ombudsman, The Freedom Forum: "Accustomed to frustration and failure in other venues, the people expect more success in the courts when they go in search of Truth and Justice." "Now comes the Advisory Committee on Civil Rules offering changes that challenge the concept of maximum access and frustrate the search for the truths that serve Justice." Significant injury to First Amendment principles will be caused by the proposals. Expanding secrecy, denying camera access to trials, filing documents under seal, and protection in other forms is untoward. As Chief Judge Merritt has written, common sense tells us that the greater the motivation a corporation has to shield its operations, the greater the public's need to know. (1) Stipulations should not be tolerated. Plaintiffs acquiesce to obtain or speed settlement. (2) This is exacerbated by allowing consideration of reliance. (3) Without access to the discovery documents, potential intervenors cannot obtain the information needed to support an application for dissolution or modification.

95-CV-262: John DeQ. Briggs, Esq.; Walter H. Beckham III, Esq.; Donald R. Dunner, Esq., for ABA Sections of Antitrust Law, Intellectual Property Law, and Tort and Insurance Practice: Stipulated protective orders are essential and conserve judicial resources. They also encourage voluntary exchange of information under Rule 26(a) early in the litigation. There is no evidence, other than anecdotal, of any injury to public health and safety. The court retains complete discretion to reject, dissolve, or modify any stipulated protective order. Courts even now frequently allow access to unfiled discovery information by parties to other litigation, on condition that the applicable protective order include the new parties. (The Section of Intellectual Property Law expresses concern with the provision in (c)(1) requiring a certificate that the movant has conferred in an attempt to resolve the dispute without court action; there is no dispute when the parties stipulate. The language of subparagraph (c)(1)(E) does not make it clear that no one may be present other than the persons designated; this should be clarified.)

95-CV-263: Robert A. Graham, Esq., for Center for Auto Safety and Consumers for Automotive Reliability and Safety Foundation: The stipulation and reliance features threaten "the invaluable role discovery * * * plays both in deterring reckless conduct by manufacturers and in aiding regulatory authorities in their information-gathering functions." Just as ultimate liability, the threat of disclosure of product defects deters manufacturers from marketing defective vehicles. Under the proposed amendments, "the manufacturer no longer needs to forbear from marketing those products." It need only wrest a stipulated order from a plaintiff without time or resources to battle for disclosure. "In the

meantime, the automaker can continue to place defective products on the road and reap whatever economic benefit it can from those sales, all the while effectively immune from serious negative repercussions." (Several examples are given of cases in which private discovery has spurred public enforcement efforts or other correction, including sidesaddle fuel tanks, all-terrain vehicles, and utility vehicles.) To allow reliance on a stipulated protective order to defeat modification "would enable a party to act unilaterally then to rely on that unilateral act."

95-CV-264: Robert C. Nissen, Esq.: Adds his article, *Open Court Records in Product Liability Litigation Under Texas Rule 76a*, 72 Tex.L.Rev. 931 (1994). Concludes that the proposal "is fine for unfiled discovery," but that there should be a separate rule establishing strict standards for sealing discovery information filed with the court or introduced at trial (the focus on information filed with the court seems to be on information used to support a motion). Experience with the Texas rule shows that although courts are required to make findings as to public health and safety, they are not able to review unfiled information to make the required determination; the rule has had little impact. Indeed, the rule may have raised a barrier to settlement.

95-CV-265: Senators Herb Kohl, Howell Heflin, Edward M. Kennedy, William S. Cohen, Paul Simon: There is evidence that protective orders are abused to the detriment of public health and safety. The courts should not become an exclusive, private system. Rather than weaken the current rule by eliminating the good cause requirement for stipulated orders, the Committee should strengthen the rule by requiring consideration of public health and safety.

95-CV-266, Marjorie Heins, Esq., for Committee on Communications and Media Law, Assn. of Bar, City of N.Y.: The change permitting nonparties to intervene is commended. The stipulation provision, which eliminates the requirement of a judicial finding of good cause, is decried on several grounds. (1) It is an impermissible delegation of Article III judicial power to private parties. Courts can implement a "good cause" requirement without looking at every document. They must establish specific types of documents and categories of information for which good cause can be met, and then allow parties to make initial designations subject to challenge. (2) Protective orders are unlike private agreements because contempt is available. (3) The public may have a legitimate interest in access to the information. (4) Protective orders may have collateral consequences for constitutional freedoms. A judicial good-cause finding is essential to protect First Amendment interests, both of parties to speak and of public access to court records. (5) Parties commonly insert stipulated provisions requiring that all protected discovery information be filed under seal, even when used in support of a motion or pleading. The Committee should adopt a specific rule forbidding any provision in a protective order that permits sealing court records on mere stipulation of the parties.

95-CV-268: William S. Dixon, Esq., [apparently] for Albuquerque Journal: The reference to stipulation "would be a disaster for public access to civil proceedings and amounts to practically divesting the trial court of power to superintend discovery material * * *." It is not necessary that there be a hearing on each motion, but a showing of good cause in writing should be required. The debate should not focus on product liability cases, a mere fraction of the problem, but on civil rights and other litigation. "The public interest embraces * * * corrupt politicans, dysfunctional judges, institutional misconduct and pedophile priests." The rule should require that any protective order motion be docketed "in a convenient format in the clerk's office for public inspection and some evidentiary showing in the form of affidavit or testimony to establish 'good cause.' With notification, interested third parties, including the press, will be apprised * * *."

95-CV-270: Edward B. Havas, Esq., for Utah Trial Lawyers Assn.: The stipulation provision should be deleted. "Protective orders * * * while occasionally justified, are most often used to preclude the publication of harmful information regarding a defendant's product or conduct, and to stymie through effort and expense the ability of a victim to obtain the evidence needed to substantiate a legitimate claim." The good cause requirement should be enforced more stringently than it is. And the addition of a "reliance" factor "carries insidious potential," because the party who obtains an order always will rely on it. "This 'reliance' provision will have the * * * effect of maintaining the status quo largely because it is the status quo."

95-CV-273: Pamela Anagnos Liapakis, Esq., for Association of Trial Lawyers of America: Incorporates the February 9 testimony of James L. Gilbert and accompanying statement. "Stipulations are in fact usually agreements of adhesion." Plaintiffs are forced to accede because they cannot afford discovery battles. Courts do not in fact often enter orders on agreement of the parties without a showing of good cause, and should not. The result is to increase the costs of related litigation, or deter it altogether. Often the result also is to suppress information about ongoing dangers "involving products such as drugs, medical devices, and even aircraft." "Reliance is easy to allege and difficult to disprove," and this factor will "harden the resolve of defendants to claim reliance on protective orders * * *."

95-CV-274: Kent S. Hofmeister, Esq., for Federal Bar Assn. by Mark D. Laponsky, Chair Labor Law Section: Endorses the proposal. Discovery proceedings are not inherently public. The proposal does not require that the court enter a stipulated order: "This is the way it should be." As courts increase pressure to expedite discovery, parties may agree to protective orders to enable completion of discovery by cut-off dates. The analogy to Rule 35, however, is not apposite, since physical examination of a party involves only private interests; the public interest in access is

involved with protective orders. The Committee Note "should * * * specifically disavow both a presumption of public access and open disclosure, as well as a presumption of confidentiality." And it should show that protective orders are not disfavored.

95-CV-276: Patrick A. Hamilton, Esq., for Kansas Trial Lawyers Assn.: The stipulation language would promote injustice. Plaintiffs cannot afford the increased discovery costs that follow refusal to stipulate to a protective order. Defendants routinely demand protection for information that is not at all confidential, including television and newspaper advertisements. Secrecy increases the costs of parallel litigation, and often suppresses information about dangers associated with consumer products. The "reliance" provision in (c)(3) "would make it much more difficult for litigants with similar cases to modify a protective order and gain access to non-confidential information * * *."

95-CV-277: Edmund Mierzwinski, Consumer Program Director, for U.S. Public Interest Research Group: The stipulation and reliance provisions "pose grave threats not only to the public health and safety, but also to the critical role the courts themselves play in protecting the public interest, not merely refereeing between the parties." These are not mere technical changes, nor a codification of existing practice. Concurs with the views of Trial Lawyers for Public Justice, expressed at the February 9 hearing.

95-CV-278: Mary E. Alexander, Esq, for Consumer Attorneys of California: The "stipulation" provision should be deleted; good cause should be required for all protective orders. Defendants use superior bargaining power to win stipulations. Defendants often act merely from the desire to hide information. Protective orders conceal dangerous practices and other information the public needs to know. And it is inconsistent to allow stipulated orders without a showing of good cause and at the same time evince distrust of courts by listing factors that must be considered on a motion to modify or dissolve: "This imbalance favors the defendants and limits the ability of consumer plaintiffs to use the vital information that is easily concealed."

95-CV-279: Hon. William W. Deaton: The amendment may be read to permit stipulated protective orders that require automatic sealing of documents filed with the court. This should not be permitted. Sealing is cumbersome for the Clerk.

95-CV-280: Robert Jacobs, Esq.: The "good faith" requirement should be maintained. Corporate defendants routinely insist on boilerplate protective orders that my clients cannot resist, and routinely designate as confidential much that is not. Product liability victims do not have the ability to litigate document production requests time and time again.

95-CV-289: Anthony C. Epstein, for D.C. Bar Section on Courts, etc.: This comment is lengthy and tightly written. A fair summary would run to several pages. Even the highlights run on. The

Section supports the proposed amendments, with the suggestion that it might be better to complete consideration of agreements to return or destroy discovery materials before going ahead with a package of amendments. As an empirical matter, the public interest in access to discovery materials is offset by the legitimate needs for protection and the fact that "in the overwhelming majority of fededral cases," there is no significant nonparty or public interest in discovery materials. Most often, the only real interest is in learning about the workings of the discovery process as part of the judicial process. That is why nonparties rarely seek access to "non-adjudicatory discovery materials." In addition, "the parties should be given considerable discretion to regulate discovery without supervision by the court." (1) Courts should have discretion to enter stipulated protective orders without a pro forma recital of good cause. Including a recital of good cause may make it inappropriately difficult to secure modification later. But judges should be alert to overbroad protective orders in cases "where a strong public interest is apparent." (2) It is useful to confirm the power to modify or dissolve. (3) Several factors should be added to the 26(c)(3)(B) list: [a] whether the circumstances that justified protection have changed (even though this may be implicit in the proposal); [b] whether the order was entered by stipulation, or was based on a judicial finding of good cause after opportunity for public comment; and [c] whether the case has been finally resolved — once a case is over, the parties should not have to spend more time and money on it. (4) (c)(3) should make it clear that the burden is on the party seeking modification or dissolution. (5) The relatively permissive standard for intervention described in the Committee Note is proper. (6) There should not be any requirement that parties make available to nonparties nonadjudicatory discovery materials that have not been filed with the court. The burdens of making these materials available can be substantial. The federal rules should not "become a federally mandated document retention policy." Document retention after judgment should be ordered only in exceptional cases. (7) Private agreements, including return-or-destroy agreements, may deserve treatment in a single package with the present proposal. Finally, there is a separate statement of Arthur B. Spitzer, Esq., taking issue with the Committee's initial statement that the Federal Rules presume that normally discovery materials should be available to the public absent a showing of reasons to restrict public access. He writes that the purpose of discovery is to resolve private litigation. For this purpose, discovery compels disclosure of information that need not be disclosed for any other purpose. "A statute requiring citizens to place such information in a public data bank would be a gross intrusion into personal privacy, and would be unconstitutional." Absent protection, defendants may feel compelled to settle.

<u>95-CV-293: Billie J. Kincaid, for The Victim's Committee for Recall of Defective Vehicles, Inc.</u>: The Committee is a group of those affected by exploding "side-saddle" design pickup trucks. The

writer's son was killed in 1989 when his pickup truck exploded and burned in a collision. At that time the manufacturer had effectively kept the danger secret with protective orders attached to settlement agreements. All court secrecy is a bad thing. But if there is to be protection, it should be ordered by an impartial party — the judge. Only this will protect the public interest.

95-CV-294: Ken Suggs, Esq.: Stipulated protective orders will increase the costs of litigation in related cases, and deprive the public of important information. Consideration of reliance in deciding a motion to dissolve or modify a protective order "impedes the judge's ability to vacate prior orders in the interest of justice * * *." At least in product liability and medical negligence cases, the proposed amendments would have grave negative consequences.

95-CV-296: Jo Anne B. Hennigan, Esq.: As corporate counsel for Michelin North America, is involved in the company's share of federal litigation. The proposed amendment "is unncessary," but "will help to clarify and reinforce approval of the use of protective orders * * *." "The use of protective orders, particularly stipulated ones, allows the parties to focus on the real dispute at issue — liability and damages — without protracted discovery motions necessitated by the fear that any information produced in discovery will be open to public — especially competitors' — view. Absent the availability of enforceable and meaningful protective orders, Michelin would be forced to fight to the death virtually every discovery effort made against it * * *."

95-CV-297: David K. Hardy, Esq.: Most jurisdictions permit stipulated protective orders, a common-sense practice that has worked well to date. "The factors relevant to modification or vacation of a protective order are, likewise, wisely made explicit by the proposed rule."

Testimony on Rule 26(c)

Kevin J. Dunne, Esq., December 15: Tr pp. 5 to 17: Supports the amendments. Experience is defending products cases, including many pharmaceutical cases. There are three alternatives: private agreements governing discovery; stipulated protective orders; and the "maximum pain" approach of contesting every dispute. Ordinarily plaintiffs' attorneys agree to stipulated orders because that is the best means of representing their clients. Stipulated orders save time and expense for all parties, and may save vast expense in complex cases. Public safety seldom is threatened — most product cases are filed after public disclosure of the risk. Most often, courts enter the orders in "rubber stamp" fashion, but some change is possible. The proposed language leaves the court free to reject the stipulation. There is little press interest in most cases: "I represented defendants in DES, Dalkon Shield, Breast Implant. I have negotiated stipulated protective orders for 27 years. Not once has the press ever tried to get any of those documents."

Peter Hinton, Esq., December 15: Tr 29 to 49: Although plaintiff attorneys often stipulate to protective orders, they do not do it "gladly" as Mr. Dunne suggests. The proposed changes are desirable because there may be an increased concern for public safety. Of course as plaintiff in a sexual harassment suit, I would gladly stipulate to an order that protected her privacy.

Frank C. Jones, Esq., January 26: Tr 22 to 31: for Product Liability Advisory Council. The provision for stipulated orders is good. I had a case with some 5,000,000 pages of discovery documents. Under a stipulated protective order, discovery went well; there was no need to burden the court with repeated disputes. If anything, lawyers overproduce under these orders. Once a challenge is made, the burden of showing good cause for protection remains on the party resisting discovery. The consideration of reliance when modification or dissolution is sought is proper. The alternative is always having to burden the court with requests for protection.

Dierdre M. Shelton, Esq., January 26: Tr 31 to 36: "The style changes are excellent. It makes the Rule much easier to read." The stipulation provision does not change anything. The court can still reject the stipulation, and insist on showing good cause; it is difficult to understand how some comments have failed to understand this point. In practice, if the parties are agreed on a protective order, the judge really does not have the information required to draft an order. And when the parties are unable to agree, judges "hate it. And we don't get good rulings because they don't want to deal with it."

Cornish F. Hitchcock, Esq., January 26: Tr 36 to 74: Asks that the proposal be discarded. If it is retained, the references to stipulations and reliance should be stricken; at the end, he concludes that simply removing these items would not require a new

round of public comment. He has often represented journalists, scholars, researchers, and other third parties challenging protective orders. The case law now generally allows third-party applications for relief from protective orders. The key point is that "good cause" can mean different things at different points in the progress of an action. During the initial discovery stages, it can be good cause for a protective order that the order facilitates discovery; if the parties are happy to exchange information under a protective order, there is no case or controversy in front of the judge and no basis for denying good cause. There is no need for a hearing at that stage. Protective orders can be justified "on the grounds that it is temporary, that it is pretrial, because once you get to trial, that's when all the information comes out. * * * Now, the problem in 90 percent of all civil cases is you never get to trial." "We recognzie stipulations still exist and think that the practice could continue." But there is no need for explicit recognition of this practice in the rule. The problem arises later in the litigation when a third party comes in to challenge the order. At that point it should be clear that the party seeking continued protection has the burden of demonstrating good cause for protecting the specific information sought. At that point — and it may be after settlement — "efficient case management may not be good cause any more." The reliance factor should not have any independent force; what counts is good cause for protection at the time access is demanded. The stipulation provision "would change the presumption of openness." Reliance "is a very subjective standard. It's not one that's really amenable to proof one way or the other." What counts is showing a specific justification for continued protection; a show-cause order and response, with the burden on the party seeking protection, is an effective procedure at that point. The reliance argument "will inevitably be made. * * * It cannot be used as a touchstone in and of itself unless it is grounded in a claim of objective harm because there will be a harm following disclosure of a sort that courts don't like to happen."

Michael A. Pope, Esq., January 26: Tr 74 to 80: President, Lawyers for Civil Justice. "The rule has worked fairly effectively up to now, but I certainly see the changes as a proper clarification * * *." "A stipulation provision is a very clear one, and one that certainly is the practice around the country * * *." Privacy is one of the central concerns. Under agreed orders, the parties avoid the costs of fighting discovery, and may produce material that "may not have had to be produced, but it is done by agreement." "Where there is a question, we go ahead and do it because we're relying on the fact that it's only for the purpose of this litigation and will be returned to us at the end." And if the system becomes less predictable — if reliance is not protected — clients will not be as cooperative about producing information. We lawyers "don't control everything." It would be a great disservice to delete reliance from the published proposal; courts would be left puzzling just what is meant.

Kenneth Sherk, Esq., January 26: Tr 80 to 86: The Federal Rules of Civil Procedure Committee of the American College of Trial Lawyers supports the proposal, and earlier wrote at length on the "reasons why stipulated protective orders ought very definitely to be in the rule."

J. Richard Caldwell, Jr., Esq.: January 26: If the stipulation language were deleted now, lawyers would surely argue that the Committee intended to reject stipulated orders. Of course the argument could be met, but it is better to retain the provision. Stipulations work; in my practice, they outnumber contested orders ten to one. Reliance must be protected. One illustration suffices. In litigation involving Widget Model A-5, there may be a demand for production of design drawings, test results, and the like for models A-1 through A-4, and models A-6 through A-20. My client says they all are so different that these materials are not relevant. But it is less costly simply to produce the materials if we can stipulate to a protective order "with some fair degree of confidence that all of this other material and these other widgets are not going to be admissible in any event." If we had resisted discovery, probably we would not have had to produce the material at all. "That's legitimate reliance." And reliance may be the only argument available to defeat modification when someone else comes in and demands access. It would be better not to allow consideration of public injury on a motion to modify or dissolve, but as a package the (c)(3) factors are "very admirable."

John A. Chandler, Esq., January 26: Tr 93 to 100: Strongly favors stipulated protective orders. Accounting firms commonly have client papers, that were given to the firms with an expectation of confidentiality. "Stipulated protective orders in a system such as that [in which there is no federal accountant-client privilege] makes it easier for a protective order I think is essential."

James Gilbert, Esq., February 9: Tr 15 to 25: For Association of Trial Lawyers of America. The proposal "will give an unfair litigation advantage to a broad category of defendants" — "hundreds, if not thousands, of product manufacturers." Consumers come to product litigation with a need for critical information about design, development, testing, marketing, and the rest, all of it in the possession of the defendant. The defendant hopes to maintain its informational advantage, and seizes on the first legitimate discovery request as the occasion to force agreement to a protective order. The plaintiff is forced to acquiesce; his concern is getting a wheelchair, 24-hour care, or whatever, not advancing fair and efficient litigation by others. "The sole objective of the industry is not to keep this away from their competitors, but to isolate the plaintiff." The issue is about litigation advantage, not privacy; manufacturers have asserted confidentiality as to such public documents as federal safety standards, excerpts from the Federal Register, complaints in public files, filings with the National Safety Administration, and technical papers obtainable in any engineering library in the

country. Stipulations should be approved by the court only if an attorney certifies that the information has been reviewed and is indeed private; severe sanctions should be imposed for certification of nonconfidential material. It would be better to delete the reference to stipulations, retaining the good cause requirement of the present rules. As to reliance, it should not be made an explicit rule factor with respect to modification or dissolution, although there may be circumstances in which a court can properly consider reliance, particularly if the court considered all the appropriate factors and entered an adjudicated protective order at the beginning. The easier it is to win a protective order by stipulation, the easier it should be to win modification or dissolution.

Leslie A. Brueckner, Esq., February 9: Tr 25 to 43: On behalf of Trial Lawyers for Public Justice. The stipulation language should be deleted. This goes beyond existing practice — although many judges enter stipulated orders, many judges do not. Some hold that the court is required to make an independent good cause determination even though the parties have agreed. These courts also emphasize the special danger presented by stipulated orders "because none of the parties is advocating for openness in that situation." These orders, moreover, commonly provide for automatic sealing of any discovery materials filed with the court; the court should be required to make an independent determination that the more stringent standards for sealing court records have been met, at least with respect to materials filed in support of a motion. It is enough that the court find that there is good cause for secrecy with respect to categories of information; it is not required that every piece of information be publicly revealed so that the court can determine whether it should not have had to be revealed, nor that the court must examine every document in chambers. As Mr. Gilbert testified earlier today, "what is necessary is that the party seeking secrecy affirmatively aver to the court and is subject to the requirement in the order that anything designated confidential is truly within one of the categories that is considered appropriately secret under Rule 26(c)." The First Amendment, indeed, stands in the way of eliminating the good cause requirement by stipulation; Seattle Times finds the First Amendment is satisfied by protective orders entered for good cause. And "reliance" ought not be a factor on motions to dissolve or modify. The question is whether information continues to deserve secrecy; reliance is not in and of itself reason to maintain secrecy. "[N]o party could reasonably rely on a stipulated protective order," but as drafted the rule seems to protect reliance even on stipulated orders. That goes beyond existing law. It will create a trap, and make it very difficult to unseal protective orders.

Hon. Virgina M. Morgan, February 9: Tr 43 to 49: President, Federal Magistrate Judges Association. The proposal addresses well "the issues of privacy, of moving the litigation forward, of protecting

the interests of all the parties." Stipulated orders are appropriate. Commonly they identify categories of documents, and designate those that will be only for the attorney, those that can be shared with the client or house counsel, those that can be shared with experts, and so on. Most of the cases are not product cases. They frequently involve civil rights, or patent or copyright litigation. Reliance is the purpose of entering the order. At times lawyers resist the protective order because they want to share the fruits of discovery with another lawyer who has a different client but a similar claim. That should be addressed up front, recognizing that the purpose of litigation commonly is to provide redress to the plaintiff. It is not a Freedom of Information Act.

Linda C. Lightfoot, Editor, The Advocate, February 9: Tr 80 to 88: Appears for the American Society of Newspaper Editors. The good cause standard should not be diluted by permitting stipulated protective orders. Indeed, the good cause standard should be strengthened, creating "a presumption of openness to be overcome only by a showing of specific serious and substantial interest that clearly outweighs the public interest in disclosure." Civil litigation often is the business of the public, not the parties and attornies alone. Stipulated orders guarantee secrecy "in the very cases that arouse the most public curiosity and are the most latent with public interest implications." In the Baton Rouge area there are chemical spills and accidental emissions that are of interest to the public; a lawyer owes primary allegiance to the client, and it is the role of the news media and other public interest groups to serve the broader public interest. Secrecy orders impose a form of prior restraint on parties who may want to share information with the public. Even if confidentiality orders facilitate settlement, the interest in achieving settlement should not outweigh the public interest.

Victoria Bassetti, Esq., February 9: Tr 88 to 98: A member of the Senate Judiciary Committee staff, speaking for Senator Kohl. The Judiciary Committee has held hearings on bills designed to protect the public health and safety against protective orders, and has deferred action to allow action by the Judicial Conference. "[W]e are saddened to learn that rather than actually confronting the problems that the Judiciary Committee had identified the Conference seems to be backing away from and holding back the requirements of Rule 26(c)." The factors for modification or dissolution, apart from a quibble about reliance, are a step in the right direction; they could easily be incorporated into the initial effort to enter a protective order. The express provision for stipulated orders is a step backward, even though a judge can demand a showing of good cause for a stipulated order under present practice and under the proposed rule. Notwithstanding a proposed stipulation, "the judge is capable of, say, looking at the facts of the case and exercising his or her own independent judgment * * *." The stipulation provision will encourage parties to rely on stipulations. It need

not be more difficult to get relief from an order entered after a finding of good cause than from a stipulated order — in either case, an intervenor must show new considerations to justify relief. The requirement of good cause — and, we would add, a requirement that the judge find that there are no public health or safety interests affected by the order — can be met without holding a hearing, and without requiring the judge to sort through all of the documents covered by the order. The type of case can provide much guidance. "I find it doubtful that in the course of a civil rights litigation the judge or any of the parties are going to stumble across a smoking gun that indicates the Ford Pinto case." In a product liability case, on the other hand, inquiry should be made whether there is good cause to justify closing off access to information that involves the public health or safety. "[O]ne protective order entered in one case can implicate thousands of lives and thousands of people's health and safety." The inquiry might "cost very little." The judge can ask the parties to indicate which protected documents are simply proprietary sales or economic information. It is proper to rely on the parties. "You have to be able to rely on the parties to stipulate and sift through documents. To rely upon them a little bit more doesn't strike me as that big a burden," particularly since they will be subject to contempt sanctions if they make misrepresentations about public health and safety implications.

<u>Al Cortese, Esq., February 9</u>: Tr 98 to 109: For the National Chamber Litigation Center. "If there's any reason for promulgating this rule, I think basically it is to put an end to the nonissue of court secrecy." The proposal merely codifies existing practice; if there is to be any change in the proposal, it should be to make it even more clear that it simply confirms present practice. There is no common-law or constitutional right of access to discovery materials. To the contrary, "the real constitutional protections are to protect the information that is required to be disclosed in litigation." The property right in information that must be disclosed only because someone has brought a lawsuit cannot be extinguished; a presumption of access "would be unconstitutional because of the right of due process." The stipulation language does not eliminate the good cause requirement. Stipulations enable discovery to go forward, allowing the parties to sort through millions of pages of documents that in large part are totally irrelevant, without the need in advance of discovery to review all the material, create a confidentiality log, and dispute everything. Under a stipulated protective order, the parties can limit any disputes to specific items. The specific provisions for modification protect any asserted public interest. Reliance is a necessary factor on a petition to modify. It is not possible to say in the abstract whether it would be desirable to take a different approach that simultaneously narrowed the overall scope of discovery and made it more difficult to secure protective orders, but it is clear that no matter what the scope of discovery, protective orders still will be necessary.

Summary of Comments: Rule 47(a)

Prepublication Comments

(The prepublication comments are presented in the order of the set presented to the Committee on Rules of Practice and Procedure for the July, 1995 meeting. Most of the comments were elicited by questionnaires sent to judges in the Fourth and Seventh Circuits.)

Hon. Terrence W. Boyle: Commenting on Criminal Rule 24(a): present practices are fair and efficient. This is a striking difference from North Carolina state court practice with lawyer-initiated voir dire examination.

Hon. Albert v. Bryan, Jr.: (Three letters) Judges who favor lawyer voir dire can permit it under the current rule. Most judges in E.D.Va. regularly select juries in routine cases in 30 minutes or less. Lawyers wish to use voir dire to sell the case to the jury.

Hon. J. Calvitt Clarke, Jr.: (Three letters) The proposals will add another ground for appeal whenever any limits are imposed; lawyers will feel compelled to participate to protect themselves against client protests; prisoners will routinely add incomptent voir dire to their complaints. Lawyer participation greatly adds to the time of trial.

Hon. James C. Fox: (Two letters) The new process will be time-consuming; lawyers will "court" jurors; any court-imposed limits will be the occasion for argument and appeal. Intrusions into jurors' personal lives would be increased.

Hon. Marvin J. Garbis: Commenting on Criminal Rule 24(a): "The advantages of having the judge, and not the advocates, conduct the voir dire examination * * * are many and obvious."

Hon. Elizabeth V. Hallanan: Permits lawyers to ask questions during private voir dire examination of individual prospective jurors. All questions asked in the presence of the entire panel are asked by the court. This form of lawyer participation works, but it is essential to maintain judicial control lest the integrity of the jury system be eroded. The proposal is a bad idea. Judge Hallanan's response to the 4th Circuit Questionnaire, filed at p. 170 of the Administrative Office compilation, adds that the proposal risks eroding the integrity of the jury system and creating an "arena marked by confusion and noisy disorder." In a later letter to Judge Stotler, Judge Hallanan states that the procedure described in the proposed Criminal Rule 24 is very similar to the procedure she has followed for more than 11 years. But the process should not be handed over to the lawyers.

Hon. Clyde H. Hamilton: (Two letters) Addressing Criminal Rule 24(a): Voir dire can become a circus, particularly if lawyers have the opportunity to "grandstand" before cameras. Lawyers will use voir dire to present the strong points of their cases. Any attempt to limit abusive practices will create points for appeal. Every

judge of the Fourth Circuit, except for Judge Niemeyer, opposes the proposal.

Hon. Walter E. Hoffman: The judges in this division of E.D.Va. are 100% opposed. The proposed rule will foster serious invasion of juror privacy and will "invigorate[] the emerging parasite industry of jury consultants whose sole purpose is to enable attorneys to select jurors who are biased in favor of their clients' cause." The supposed ability of the judge to control lawyer abuses is illusory. As lawyers succeed in selecting jurors of extreme views, there will be more hung juries.

Hon. C. Weston Houck: (Two letters) The judges of D.S.C. unanimously oppose proposed Criminal Rule 24. "We believe it is unnecessary, unduly time consuming and difficult to control." It will lead to increased appeals. Jurors will find the process distasteful, adding to their resentment of jury service.

Hon. Harry Hupp: Lawyers are taught to misuse voir dire to adversary advantage. Their participation should remain wholly discretionary with the judge.

Hon. Richard B. Kellam: (Three letters) Under the present system, 95% of our juries in E.D.Va. are selected in less than 30 to 35 minutes. Lawyer participation will mean added costs "such as having a great number of jurors return for several days before a jury is finally selected."

Hon. John A. MacKenzie: Lawyer participation "is solely calculated to obtain as biased a jury as counsel can conjure up."

Hon. Robert E. Maxwell: (Three letters) Attorneys and jurors both appreciate having questions asked by the court. When attorneys have been permitted to ask questions, "the jurors have expressed a feeling of harassment, and implied attacks upon their integrity and were offended."

Hon. Robert R. Merhige, Jr.: "[P]articipation by lawyers will place an unnecessary and time-consuming burden on the administration of justice." [The following remarks are added by a response to the 4th Circuit Questionnaire set out at p. 169 of the Administrative Office compilation; the signature appears to be that of Judge Merhige: This would subject jurors to embarrassing questions and extend time beyond reason, indeed tenfold. Counsel would seek to ingratiate themselves. "In any number of times when I was serving on the faculty for new judges, I was reminded by Chief Justice Burger to emphasize the fact that we did not want counsel examining jurors * * *."]

Hon. James H. Michael, Jr.: The proposal will carry unintended consequences. Lawyer participation, intended to be focused and controlled, will loose all controls; the camel will be in the tent.

Hon. William T. Moore, Jr.: As a practicing lawyer, experienced no difficulty with either Rule 47 or Rule 48 as now in force.

Hon. J. Frederick Motz: The judges of D.Md. unanimously oppose proposed Criminal Rule 24. Lawyer participation lengthens voir dire. Too many lawyers improperly attempt to argue their cases or intrude unnecessarily on juror privacy. We commonly allow lawyer participation, but this is possible only because control is maintained through the power to withdraw the privilege to participate at any time.

Hon. John F. Nangle: The present rule works.

Hon. Jon O. Newman: "[D]istrict judges should not be required to allow anything like extensive lawyer-conducted voir dire."

Hon. William M. Nickerson: (Two letters) Proposed Criminal Rule 24 will turn control of voir dire over to lawyers, add to delay, and burden the courts of appeals.

Hon. Richard A. Posner: Is unalterably opposed to proposed Rule 47, and will certainly vote against it.

Hon. Morey L. Sear: The proposal is "very bad."

Hon. J. Clifford Wallace: (Two letters) The Judicial Council of the Ninth Circuit has voted unanimously to oppose the change. The burden of justification lies on the proponents of change.

Hon. H.E. Widener, Jr.: Present practice works well. The change will interfere immeasurably with the processes of district courts, and yield negligent or non-existent benefits.

Hon. Ann C. Williams: The Court Administration and Case Management Committee unanimously declined to endorse the proposal. Many committee members permit lawyer participation, but fear that lawyer behavior will change if the privilege is made a right. Judges have responded to Batson problems by becoming more flexible in voir dire examination.

Hon. Joseph H. Young: (Two letters) Experience sitting in districts that allow lawyer voir dire shows that voir dire takes approximately ten times as long. Counsel in those jurisdictions believe they win or lose as a result of voir dire.

Hon. George Ross Anderson, Jr.: Experience with attorney voir dire quickly led to abandoning it. The experience "was a near disaster. This is partially due to the ineptitude and inexperience of the lawyers participating." Jurors resent it. Lawyers seek to try their cases. Jurors give more honest answers to judges. Questionnaires work far better.

Hon. Joseph F. Anderson, Jr.: Permits attorney voir dire in complex cases and others where appropriate. They are limited to 20 minutes a side. But opposes amendment of Rule 47(a).

Hon. Richard S. Arnold: The better practice probably is to let lawyers question the jury panel, but not for too long. But is inclined to oppose the proposal.

Hon. Sol Blatt, Jr.: Concurs totally in the opposition views expressed by Judge Robert Doumar.

Hon. Charles L. Brieant: The proposal emanates from a committee dominated by practicing lawyers. "This month I selected six civil juries in six different cases during one morning * * *." That could not be done with lawyer voir dire. Opposes the proposal.

Hon. Leonie M. Brinkema: (Two letters) Batson has not created any new need for lawyer participation. Only the judge cares about selecting an impartial jury. Court-conducted voir dire sends a clear message that the judge is in control, with lasting benefits throughout trial. In a later letter to Judge Stotler, Judge Brinkema observes that: "Lawyers are partisans. Their allegiance does not lie with truth or even justice. Their job is to do everything they can to win * * *." It is the judge's job to ensure that the trial is fair. Proposed Criminal Rule 24 "will invite more pretrial disputes, inject more delay at the earliest stage of the trial and, of course, generate entirely new issues for appellate review."

Hon. W. Earl Britt: Counsel seek to select a partial jury; only the judge seeks an impartial jury.

Hon Frank W. Bullock, Jr.: Counsel questioning is too time consuming, too personal, too much inclined to seek juror commitment, and too intimidating. In a later letter to Judge Stotler, reports that the judges and magistrate judges of M.D.N.C. are unanimously opposed to the proposed change in Criminal Rule 24.

Hon. James C. Cacheris: Counsel participation will lengthen the selection process and not produce any better jurors.

Hon. B. Waugh Crigler: Two letters reflecting his correspondence with other judges in the Fourth Circuit, and opposition to the proposal.

Hon. Robert G. Doumar: (Four letters) Lawyer questions will invade privacy, voir dire will become a mini-trial, appeals will increase, and intelligent individuals will seek to further avoid jury service. The proposal may reflect fear that Congress will enact something worse; there are serious doubts whether Congress can interfere with the judiciary in this manner.

Hon. Franklin T. Dupree, Jr.: As a trial lawyer for more than thirty years, I treasured participation in voir dire as an opportunity to curry favor with the jury and create an atmosphere favorable to my client. Questioning by the judge instills in jurors the importance of their role.

Hon. T.S. Ellis, III: As an instructor at the National NITA course, I taught lawyers to use voir dire to argue their cases and to select partial juries. Practice in New York, California, and Alabama exhibits all the evils of lawyer-conducted voir dire, which "is destructive of, and repugnant to, the fair and expeditious

administration of justice."

Hon. David A. Faber: Emphatically opposes the amendment. Lawyers will use voir dire to argue the merits of the case, substantially reducing the judge's ability to control the trial process.

Hon. Claude M. Hilton: (One letter, with copies of three others) Judge questioning is the best way to obtain an impartial jury.

Hon. Raymond A. Jackson: Lawyer participation will not enhance the fairness of trial, will increase the time needed to select a jury, and will add to the charges of retained and court-appointed counsel.

Hon. Frank A. Kaufman: Too often lawyer participation means efforts to sway the jury.

Hon. Jackson L. Kiser: Lawyer participation is desirable only if it is strictly controlled by the judge.

Hon. Benson Everett Legg: The present system works well.

Hon. Peter J. Messitte: Lawyer participation takes inordinate time and yields little benefit. It may incline jurors toward or against a point of view. A jury impaneled after basic questioning by the court "is generally about as fair and impartial as a jury selected after extensive voir dire conducted by counsel would be."

Hon. Henry Coke Morgan, Jr.: Trial attorneys are primarily interested in selecting biased or prejudiced jurors. The present rule works well.

Hon. Graham C. Mullen: Uses jury questionnaire, which helps focus voir dire. Attorneys are given 15 minutes per side after a brief voir dire by the court. Attorney participation is highly desirable. As a trial lawyer, I hated the federal court because there was not a fair opportunity to interact with prospective jurors. If lawyers are given a fair shake by participating in voir dire, they will feel better, this feeling is communicated to clients, and respect for the system will be increased.

Hon. Paul V. Niemeyer: Five letters, reflecting correspondence with many Fourth Circuit district judges.

Hon. David C. Norton: A right of lawyer participation would be "a collossal waste of time." Some will want to prove the case at voir dire. Effective limits will be difficult.

Hon. Robert E. Payne: (Two letters). The court is fully able to elicit all information required for exercise of peremptory challenges. Lawyers will use voir dire to influence jurors and elicit commitment. Voir dire, and intrusive questionnaires, will be used to support the work of jury consultants who help select favorable jurors. Prospective jurors resent these invasions by the court, and the process demeans the courts and diminishes their public respect. Voir dire will be used to argue the case. Voir

dire will take more time, and will add points for appeal. There is no reason to act for fear of Congress; it is "time for the judiciary to take control of the business of the judicial branch." Judge Payne repeated these views in a later letter to Judge Stotler.

Hon. Robert D. Potter: Allows counsel voir dire in civil cases, but not criminal. In criminal cases, counsel use the process to argue the case; in multidefendant cases the process can be very tedious. Counsel ask questions that are irrelevant and duplicitous.

Hon. Dennis W. Shedd: Lawyers would use voir dire to make arguments. They would lengthen the selection process.

Hon. Frederic N. Smalkin: Counsel participation lengthens the process, and will be used to pre-argue the case.

Hon. Rebecca Beach Smith: Opposes, for the reasons expressed by Judges Brinkema, Doumar, and Payne.

Hon. James R. Spencer: I usually seat a jury in less than an hour. I have worked in a jurisdiction with lawyer voir dire, and it takes one or two days. Lawyers are interested in selling their case and seating a partial jury.

Hon. Frederick P. Stamp, Jr.: In some cases, particularly complex cases, allows counsel participation, usually for about ten minutes a side. Does not permit questions that seek to talk a juror into disqualification or challenge for cause, or that argue the case. But as a trial lawyer, saw abuses by lawyer questioning.

Hon. William B. Traxler, Jr.: The average jury selection takes about 15 minutes; the questions asked by the court, and the questionnaires, give enough information for intelligent lawyer jury selection.

Hon. James C. Turk: Within reasonable limits, permits counsel to ask additional questions after initial questions by the court. This is desirable "if it can be done under the control of the presiding judge."

Hon. [Illegible; a response to the Fourth Circuit Questionnaire that may be by Hon. Hiram H. Ward]: Lawyer participation consumes too much time; questions by each side overlap; each side tries to develop a personal relationship with the jury.

Hon. Richard L. Williams: Counsel attempt to make closing arguments; the gifted win an advantage. With questionnaires and jury profiles, biased jurors can be picked; each side could pick six, and all cases will produce hung juries.

Hon. Henry L. Herlong, Jr.: Lawyer voir dire would take too long.

Hon. [Illegible Name on 4th Circuit Questionnaire p. 166]: Lawyers would attempt to try their cases on voir dire. States that permit this may take weeks to select a jury.

Hon. [Illegible Name on 4th Circuit Questionnaire p. 167]: The proposal would be devastating. It would hand over control of the very first thing that happens, divesting judges of the power to be in full control. It would waste time. (This judge does permit lawyers to ask follow-up questions when they are genuinely searching for material supplemental information.)

Hon. [Illegible Name on 4th Circuit Questionnaire, p. 171]: "Waste of time . . . opportunity for counsel to posture."

Hon. [No name on 4th Circuit Questionnaire, p. 172]: Lawyer participation is desirable. Attorneys are in the best position to know what information should be elicited, and to react with follow-up questions. With more than 6½ years of following this practice, has not seen excess time taken.

Hon. [No name on 4th Circuit Questionnaire, p. 174]: Refers to an attached letter, so this may be double-counting. The judge is the only participant who truly cares about getting an impartial jury. Lawyer questioning will slow down the process and add unnecessary confusion.

Hon. [No name on 4th Circuit Questionnaire, p 175]: To force this on judges will turn control over to the lawyers. Voir dire becomes an additional advocacy hearing, not a search for an unbiased jury.

Hon. [No name on 4th Circuit Questionnaire, p. 177]: Lawyer participation would significantly delay the process without significant corresponding benefit.

Hon. [No name on 4th Circuit Questionnaire, p. 178]: Allows lawyers to ask follow-up questions "under *close* scrutiny." It would be an enormous mistake to do anything but leave this to the judge's discretion "because it has become a tool to circum[vent] justice."

Hon. [No name on 4th Circuit Questionnaire, p. 179]: Strongly opposes. Lawyers seek to seat a favorable jury. Intentionally or unwittingly, as the case may be, they may ask questions that pollute an entire panel. When I have allowed lawyers to participate, they have been inefficient and taken more time than necessary. They tend to ask insensitive questions.

Hon. [No name on 4th Circuit Questionnaire, p. 180]: "Too much confusion, delay, redundancy, and inefficiency would flow" from lawyer participation.

Hon. [No name on 4th Circuit Questionnaire, p. 181]: Judge-directed questioning usually is more efficient. Lawyers generally are satisfied. I have no strong feeling for or against lawyer participation, but we should retain the present system so that each court can make its own policy.

Hon. [No name on 4th Circuit Questionnaire, p. 182]: "Fair and balanced voir dire requires that *the judge* ask the questions." Counsel will attempt to argue and influence jurors.

Hon. [No name on 4th Circuit Questionnaire, p. 183]: Lawyer participation is good. "[T]his method gives both the court and the attorneys a better sense of a juror's stance on controversial issues and possibly aids in eliminating some appeal problems."

Hon. [No name on 4th Circuit Questionnaire, p. 184]: Lawyers want to establish rapport. No lawyer wants an impartial jury. Prying and nonrelevant questions would be asked. The time required for voir dire would be tripled or quadrupled.

Hon. James H. Alesia: The proposal is counterproductive, and should be discretionary if enacted. Experience with questionnaires shows that lawyers often submit excessive numbers of questions, many of which attempt to argue the law or are very invasive of privacy.

Hon. Wayne R. Andersen: My experience with permitting attorneys to ask direct questions on voir dire "has been completely positive." It is fair to allow an attorney to attempt to establish some personal rapport. At times attorneys ask questions that need to be asked and that I had not asked. Attorneys are grateful for the privilege. Very few have even come close to abusing the privilege. But lawyer participation should not be made a right. That will expand the time required, and will inject advocacy. Some judges may operate better by asking all the questions.

Hon. Sarah Evans Barker: The current rule works perfectly well and should not be changed. Lawyers want to try their cases on voir dire. They are not sufficiently sensitive to the "run on the bank" phenomenon that arises when a juror's answer to a loaded question put by counsel prompts others to join in as a device for getting out of jury service entirely. Giving lawyers an entitlement makes it more difficult to rein them in.

Hon. Gene E. Brooks: Strongly favors lawyer participation, not because they have a right but should have an opportunity "because it enhances their representation of their client." It is a one-on-one, give-and-take that enables better assessment of prospective jurors. "I have stronger views if it is a criminal case." Experience has been very favorable. If attorneys attempt to try the case, they can be set straight with a brief bench conference. Generally a civil jury is selected in less than one hour, and a criminal jury in less than two hours. Lawyers have a legitimate complaint when they are foreclosed from the process.

Hon. Elaine E. Bucklo: For eight years, I allowed counsel to participate. I have stopped. They did not elicit additional information that brought out latent prejudice. Sometimes lawyer questions insult the jurors. Many ask loaded questions hoping to obtain statements that will support a challenge for cause. There is a potential risk that a judge will conduct an inadequate voir dire, and that counsel will be reluctant to criticize it. But appellate opinions are a better cure than a right of lawyer participation.

Hon. Barbara B. Crabb: "[P]articipation by sufferance has advantages over participation as of right." There seem to be few problems if the judge has the power to withdraw a privilege of participation. And there will be difficulties if prisoners and other pro se litigants must be allowed half an hour to flounder around asking questions.

Hon. Thomas J. Curran: With 35 years of trial practice experience, understands that lawyers feel that no one can conduct voir dire as effectively as they can. But many use it to ingratiate themselves and make opening statements. Lawyers take longer. And it is difficult for a judge to determine when counsel are making arguments framed as questions, or asserting propositions of law, or attempting to embed their viewpoints. There should not be a right of counsel participation.

Hon. S. Hugh Dillin: 25 years of state-court practice shows what happens with lawyer voir dire. "[S]uch practice is frequently a disaster. It certainly prolongs the trial of a case."

Hon. Frank H. Easterbrook: Summarizes and comments on the responses to his survey of 7th Circuit district judges. Of 30 responses received by February 28, 1995, 4 favor the Rule 47 proposal, 22 oppose it, and 4 take no position. Of the 30, 14 permit lawyers to participate, but 9 of these 14 oppose the proposal. Most judges observe that lawyers are seeking to get favorable juries. Most also agree that the court's right to cut down on time, and to deny lawyer participation entirely, is essential to management of the process. No one believes that different rules should be adopted for civil and criminal cases. Many of the judges enthusiastically participated in voir dire as practicing attorneys, or supervised it on state courts, but have changed on becoming federal judges. Those who have done it both ways prefer judge-conducted voir dire. No judge mentions dissatisfaction of lawyers. None believes that Batson requires greater counsel participation. In addition, lawyers vastly overestimate their abilities to select favorable jurors; such social science as there is shows that they are completely unable to distinguish.

Hon. Terence T. Evans: Having worked in the Wisconsin system with direct lawyer participation and in the federal system, the federal system is better. Many attorney questions "were aimed at conditioning jurors. Most had very little to do with actual fitness of a prospective juror * * *. Also, there is a considerable amount of showmanship and grandstanding * * *."

Hon. John F. Grady: For 19 years, has allowed lawyers to supplement his questioning. It has not been a problem because "I limit it very strictly." "It is rare that a lawyer will take more than five minutes with supplemental questions." Participation adds to the sense that trial has been fair; indeed, that sense of fairness is more important than any new information. But it would be a mistake to adopt the Rule 47(a) amendment. Lawyers would attempt to brainwash the jury. Judges would resist these abuses, creating

controversy in the trial court and on appeal. Most lawyers really do not know how to ingratiate themselves with the jury, and waste valuable time trying. They steer away from sensitive questions, and indeed prefer that the court ask them. Batson problems are rare, and the premise that lawyer questioning will turn up nondiscriminatory grounds for peremptory challenges or for challenges for cause is not likely to be borne out in practice. If we start down this road, the next step likely will be to set minimum times that must be permitted for attorney questioning.

Hon. William T. Hart: Permits lawyers to participate. This process seems fair. "Allowing such participation as a matter of right does not seem to be a problem if the judge retains the discretion to establish reasonable parameters."

Hon. James F. Holderman: Permits attorneys 5 to 10 minutes per party to participate. They are advised that "counsel may not argue their case, attempt to indoctrinate the prospective jurors or attempt to obtain a commitment from the prospective jurors." But the rule should not be changed; in its present form, it supports the effort to see that counsel do not go beyond proper questions.

Hon. Harry D. Leinenweber: My normal practice is to permit attorney participation; the opportunity is often wasted, but is not abused. On a number of occasions, attorneys have obtained answers different from the answers I obtained by asking a question in a slightly different manner. But I oppose the amendment; I want to be able to deny participation if it would be a waste of time because the attorneys are not competent or the case is open and shut.

Hon. George W. Lindberg: Increasingly, has allowed counsel to participate on a limited basis and has had no negative experiences. But if this were a right, "I would expect some counsel would, though guile, ignorance or aggressiveness abuse the office of voir dire."

Hon. Joe Billy McDade: Allows counsel a limited time, usually 10 minutes per party. Rarely do they use the full 10 minutes. But if this privilege becomes a right, selection will take longer. "Inevitably, counsel, like children, will attempt to stretch the boundaries."

Hon. Michael M. Mihm: On first coming to the bench, allowed counsel to participate. "The experiment was a dismal failure in each case. It failed because the attorneys were either unwilling or unable to limit their questions to the areas I had identified or because the questions were an attempt to indoctrinate the jury * * *." A prosecutor is at a disadvantage in a "posturing" contest with defense counsel. It is extremely difficult to control.

Hon. Richard Mills: The Rule 47(a) amendment would be a disaster. As a new state-court judge in 1966, I allowed supplemental questioning, but even that was abused. "Counsel don't want an impartial jury at all."

<u>Hon James T. Moody</u>: No strong feelings. Experience with lawyer voir dire in Indiana state courts was favorable, but in 13 years as a federal jduge has not allowed lawyer participation.

<u>Hon. James B. Moran</u>: Always asks all the questions. "I do not recall in the last sixteen years any party indicating dissatisfaction with the scope of the examination."

<u>Hon. Paul E. Plunkett</u>: The proposed amendment is good. For eight years I have allowed lawyers to ask follow-up questions. Only occasionally to they actually ask questions, and when they do the questions are short and to the point. "[I]t is their jury and they know significantly more about the case than the trial judge." And this builds support for defending a peremptory challenge against Batson attack. "Of coure, my practice is based on sufferance, not right," and I have refused lawyer participation in a few cases that "involve lawyers who are windbags or lawyers who have demonstrated that they simply will not follow my rules in jury selection."

<u>Hon. Rudolph T. Randa</u>: Opposes the proposal."[A] change would subject the process to the negatives that are now precluded * * *."

<u>Hon. Philip G. Reinhard</u>: Experience with lawyer participation in state court shows that the process will take longer. Attorneys will seek to ingratiate themselves. They will not add anything positive toward selecting a fair jury. Jurors are more impressed with the importance of truthful answers when the judge asks the questions.

<u>Hon. Paul E. Riley</u>: Permits each side a reasonable opportunity to participate. "I feel very strongly that lawyers should try their own cases; and an essential element in trying the case is the selection of the jury." "I think the practice is a very positive impression on the potential jurors * * *."

<u>Hon. Stanley J. Roszkowski</u>: Experience with lawyer participation in state court and with no lawyer participation in federal court shows that the best system is to have the court do the questioning. Lawyers seek jurors partial to their side. Most lawyer time is used in selling the jury.

<u>Hon. John C. Shabaz</u>: The proposal is ill-advised and unnecessary. "We need no state court circuses nor further wastes of time and judicial resources * * *."

<u>Hon. Milton I. Shadur</u>: Strongly opposes the proposal. Jury selection should be neutral, not the occasion for advocacy. Jurors are less likely to be offended by questions from the judge; I have never seen even a hint to support the assertion in the Committee Note that jurors may be less forthcoming in responding to the judge. Other judges may prefer to allow lawyer participation. But it would be a mistake to fashion a procrustean bed that forces all judges to follow the same course.

<u>Hon. Allen Sharp</u>: Experience in state court, with rather passive

trial judges, showed "a great propensity to go as far as possible in trying one's case and indeed wringing commitments and promises out of jurors." My practice is to require lawyers to make opening statements during the voir dire process. This enables them to speak to the juror, and spares the judge from having to explain the details of the case. Lawyer questioning is time-wasting. In the hands of some judges, it will get completely out of hand. If the Rule 47(a) proposal is adopted, it should "be controlled by district judges with a wide use of discretion to avoid a waste of time."

Hon. Hubert L. Will: Would not change the present system. Lawyers hope to pick a favorable jury, to establish rapport, and to plant the seed of their theories.

Hon. James B. Zagel: As a trial lawyer, I asked questions designed to establish rapport. The federal system is good because it diminishes the effects of lawyer charm, taking away the opportunity for *individual* communication with jurors. If ingratiating tricks fail, the result is also undesirable because jurors dislike the lawyer for trying. I ask orally questions that many courts put through questionnaires, because it is useful to observe the juror's demeanor in answering. The fact that lawyers know the case better only means that they should be allowed to submit questions to the judge. Although there may be a few jurors who are intimidated by judges, there are many more who neither like nor trust lawyers and who will be less candid in responding to lawyer questions. Under the proposed rule, I would set time limits — and lawyers would use them fully. I would preclude commitment questions, jokes, compliments, and conveying information about the lawyers themselves. All of this will be extra hard work in the effort to maintain control. There will be more appeals on all these issues, and perhaps even more game-playing by lawyers.

Hon. Anthony A. Alaimo: Expresses complete concurrence with the views of Judge John Nangle, described above.

Hon. Lawrence J. Piersol: Supports the change. Commonly conducts initial voir dire, and then allows at least 15 minutes per side for direct questioning. "I am sometimes pleasantly surprised with approaches that are better than mine." "[A]t that point in the trial the lawyers know more about the case than the Judge and this assists them in the voir dire." And "the Court is in a much better position to rule on the Batson challenge when the lawyers conducted at least part of the examination."

Hon. Joseph E. Stevens, Jr.: Expresses complete accord with the views of Judge John Nangle, described above. "[A]s a trial lawyer I used my opportunity to conduct part of the voir dire examination * * * to woo the jury almost to a shameful extent, my questions and comments * * * being replete with argumentative and solicitous suggestions." Lawyers still do this.

Hon. David Warner Hagen: "[J]ury and juror conditioning have become

a fine art in the state courts. It is taught at seminars all over the country. * * * Because the state system allowed us, it became my duty and my opponent's to use voir dire to obtain jurors as favorable to our cases as possible, conditioning them all the while." This does not serve justice. The amendment would bring only improper questions to supplement the proper questions asked by the court.

Hon. Michael A. Ponsor: "The new proposals, if implemented, will complicate the process of jury selection, encourage manipulative tactics by counsel and generate endless appeals unrelated to the merits of the cases." It requires uniform practice, ignoring "the unique legal cultures of our various districts and the practices of various judges."

Public Comments

95-CV-94: Hon. Edward Rafeedie: Offers an example of an inappropriate voir dire question "suggested by counsel in a breach of contract case."

95-CV-98: John Wiggins, Esq.: Lawyers in Washington State shy away from federal court because they cannot participate in voir dire. There will be strong support from the bar for the proposal.

95-CV-99: Hon. Edwin F. Hunter: Was Rules Committee member 20 years ago; they considered and rejected attorney voir dire. His first federal trial, in 1953, involved an outrageous play for sympathy by plaintiffs' counsel; he has put all questions himself ever since.

95-CV-101: Hon. Stanwood R. Duval, Jr.: Regularly allows 10 minutes per side for counsel voir dire. But it should not be made mandatory. What is a "reasonable time" will become a point of contention.

95-CV-102: Charles W. Daniels, Esq.: Attorney participation will not increase time requirements. Has participated in trials after judge-conducted voir dire in which there were "mentally ill, probably incompetent, jurors"; if allowed to participate in voir dire, would have tried to get at least a few sentences of response from each juror "to exhibit whether they were oriented in the proper spheres." Generally, judges do not know cases well enough to do as good a job as counsel.

95-CV-103: Hon. Wayne R. Anderson: Invariably allows attorneys to participate in voir dire, but this works only "because of the power given to us under the current rule." Change the rule, and attorneys will use voir dire for advocacy.

95-CV-104: Hon. Robert Holmes Bell: My practice is to permit attorney participation. But why dilute control and generate appeals by allowing only "reasonable" limits in the judge's "discretion"? The amendment would create a tool "designed to enable lawyers to secure jurors of their philosophical and

sociological persuasion."

95-CV-107: Hon. Martin L.C. Feldman: The Note to Criminal Rule 24 refers to a presumptive right to participate in oral questioning; it should be made to conform to the Note to Civil Rule 47(a), which has no such reference.

95-CV-108: Hon. Robert B. Propst: Lawyers do not want impartial jurors; they want to participate in voir dire to ask improper questions and establish "rapport." If there is to be any change, it should be limited to follow-up questions directed to individual jurors who have given questionable responses to questions by the judge.

95-CV-110: Lester C. Hess, Jr., Esq.: (The numbering is obscure) Lawyer participation in jury voir dire in state court involves "blatant attempts to influence the jury [that] disgust me as an officer of the court." Judge-directed questioning in federal court works better. Rule 47 should not be changed.

95-CV-110: Bertram W. Eisenberg, Esq.: In New York state courts, lawyer-conducted voir dire works rather smoothly when there is a judge in the room. The proposed change is good.

95-CV-111: Frank E. Tolbert, Esq.: Lawyers are more familiar with the case and can frame better questions. Judges too often come too close to the facetious description that they ask the jurors whether they know their names and where they are, leaving no basis for intelligent challenges.

95-CV-112: Hon. Jackson L. Kiser: In W.D.Va., all judges permit counsel to participate in oral questioning. But in pro se cases, judges do the questioning themselves because it is too difficult to cabin pro-se litigants, who "want to make speeches."

95-CV-113: Hon. Judith N. Keep, for the unanimous judges of the Southern District of California: All are strongly opposed. "Faced with the prospect of committing reversible error * * *, it will be very difficult for the court *in fact* to control voir dire. Because personal voir dire is not a right now, we do have control." Lawyers who now enthusiastically accept 15-minute question periods will demand more. Fearful of malpractice, attorneys will push the limits in exercising voir dire, and fear of reversal will restrain judges from attempting control.

95-CV-114: Hon. John B. Bissell: Lawyers can suggest questions for questionnaires or voir dire. That works. Voir dire is expedited, particularly in complex cases with many parties, each of which would seek to participate. Judge-framed questions can reduce the risk of tainting answers.

95-CV-114(second): Hon. A. Andrew Hauk: The judge should be in control. Counsel should be allowed to engage in reasonable and nonrepetitive voir dire. These interests can be reconciled by approving proposed Criminal Rule 24(a) and Civil Rule 47(a)

"provided it is clear that the court, at all times, must be in control of the supplemental examination by parties and counsel * * *."

95-CV-115: Hon. Richard L. Williams: Attorneys are tempted to use voir dire to curry favor or influence the jury. Judges are more efficient, and there is no disadvantage to the parties, who have opportunity to suggest further questions.

95-CV-115(second): Hon. Harry L. Hupp: Twelve years on the California Superior Court bench with mandatory lawyer voir dire and eleven years on the federal bench show the superiority of present Rule 47(a). A judge who does the job properly will elicit all the information needed for challenges for cause and intelligent use of peremptories. "Experience tells me that the lawyers will try to cheat on the voir dire rules and that this is taught as the way to do it in all of the advocacy schools." And most federal practitioners do not know how to do it properly.

95-CV-118: Richard C. Watters, Esq.: Lawyers should be given a specified amount of time to orally question prospective jurors.

95-CV-119: Richard A. Sayles, Esq.: Judge-conducted voir dire varies greatly, but most judges are more interested in preserving the panel than in digging out bias or prejudice and do not ask probing questions. Attorney participation does not lengthen the trial process in any meaningful way.

95-CV-122: Allen L. Smith, Jr., Esq.: Lawyer participation will ensure neutral jurors, or jurors evenly balanced bewteen the parties. And it enables the lawyer to assess the unspoken communications that occur.

95-CV-123: Hon. Arthur D. Spatt, for all the judges of the Eastern District of New York with one abstention: The present Rule works well. The object of most lawyers is to ingratiate themselves and select a favorable jury. Changes are unnecessary.

95-CV-125: Alex Stephen Keller, Esq.: Lawyers know the case best. The process of suggesting questions and then follow-up questions to be asked by the judge is difficult. Judges will be able to control counsel. The proposal will improve the administration of justice.

95-CV-127: Daniel A. Ruley, Jr., Esq.: Judge-directed voir dire is "virtually sterile and of little meaning." Questions submitted in advance by counsel present an impossible task, because the answers may require several follow-up questions. (See also 95-CV-165.)

95-CV-128: Mike Milligan, Esq.: In 22 years of experience, judges have shown no interest in detecting juror bias; they seek only to select a jury as quickly as possible. In the local federal court, all judges permit some lawyer questioning; it is most helpful. Particularly in combination with a return to 12-member juries, this can make more difficult the continuing use of peremptory challenges. As a plaintiff's employment discrimination lawyer, I

usually can find some acceptable reason to excuse the only middle-aged white male on the voir dire panel; this will be more difficult if defendants can ask supportive questions and the panel is enlarged to include more of this type.

95-CV-132: Hon Robert B. Propst: (See also 95-CV-108): The Committee should consider eliminating peremptory challenges. Lawyers usually challenge the best-qualified jurors because they do not want jurors who will understand the issues.

95-CV-133: Hon. John W. Sedwick: (1) Lawyer voir dire is "aimed at obtaining a jury composed of people whose psychological profiles suggest to the lawyer (or her consultant) that a verdict in favor of the lawyer's client will be likely." This modern model demeans our system as "each litigant is seen to be engaged in strenuous efforts to obtain a jury predisposed to a particular outcome." And there are substantial and unjustified invasions of juror privacy. Opposing lawyers will not right the balance, because often they are as interested in the answer as the inquiring lawyer. (2) I work hard in preparing for voir dire; often I think of important questions — and sometimes they are obvious — that are not in the questions submitted by lawyers who are too busy inquiring into reading and television habits to think of the serious grounds for challenges for cause. If, as lawyers say, some judges do not do an adequate job, the cure is "education, peer pressure, and admonitions from chief judges." (3) A whole new body of appellate law of procedure will develop. "The system does not need another body of procedural law with which trial judges, trial lawyers, and appellate judges must become familiar." The new rule would be "a grave error."

95-CV-134: Professor Michael H. Hoffheimer: The dangers of lawyer voir dire outweigh any advantages. There are special problems when parties appear without counsel. And there may be "a disproportionate forensic advantage to more experienced counsel."

95-CV-137: Hon. Philip M. Pro: When direct examination by counsel is appropriate, the vast majority of judges will permit it now. The mandatory language of the proposal goes too far in addressing the legitimate concerns expressed in the Note.

95-CV-139: Hon. Joseph M. Hood: Shares Judge Bertelsman's concern that the object of most attorneys is to select a favorable jury, not an impartial one. (See 95-CV-145, below.)

95-CV-140: Michael E. Oldham, Esq., and Heather Fox Vickles, Esq.: Most district judges permit attorney voir dire, and have no difficulty controlling it. The lawyers are in the best position to elicit information relevant to for-cause and peremptory challenges.

95-CV-141: Brent W. Coon, Esq.: Supports the proposal.

95-CV-142: Hon. Alan A. McDonald: Few lawyers are proficient in voir dire. Argument is common. Disparate skills and aptitudes can tilt the process. Deficient lawyer performance may offend the

entire panel and prevent a fair trial. I have regretted most of the occasions when, prompted by complex issues or familiarity with the abilities of counsel, I have permitted direct participation. "I have a concerned curiosity" about the source of the Rules 47 and 48 proposals.

95-CV-143: Hon Fred Van Sickle: Contrary to the draft Note, jurors respond more readily to the court than to counsel. It is better that embarrassing questions be put by the court, to avoid offense at counsel. A right to participate will increase appeals. Counsel seek to seat a partial jury, not an impartial one. Fifteen years on the state trial bench in Washington showed that counsel participation is contrary to the efficient, wise and fair use of jurors. The Chief Judges of the Ninth Circuit have voted unanimous opposition to the proposal.

95-CV-144: William F. Dow, III, Esq.: The commentary to the proposal articulates the reasons for support. In the few cases in which D.Conn. has permitted lawyer participation, the process has been "edifying, intelligent, and consistent with the desire to obtain selection of a fair jury." And the perception of fairness is increased.

95-CV-145: Hon. William O. Bertelsman: I regularly permit 10 minutes of voir dire for each side. But the proposal will encourage lengthy voir dire, particularly in sections of the country where that is common in state courts. Most lawyers seek a partial jury, and are encouraged by training programs to establish rapport and psychoanalyze prospective jurors. And they invade juror privacy. There is no reason to adopt this proposal.

95-CV-146: Hon. Lewis A. Kaplan: Advance submission of proposed questions, and suggestions for additional questions after initial voir dire, afford ample opportunity to take advantage of counsel's knowledge of the case. If the judge does it right, there is nothing left for counsel but to brainwash the jury.

95-CV-148: Hon. Peter C. Dorsey: Flexible use of the present rule works, preserving the court's necessary control of the voir dire process. Experience in Connecticut state courts shows an expenditure of time that federal courts cannot afford.

95-CV-149: Thomas D. Allen, Esq.: The lawyers know the case better and will ask important questions the judge may overlook. And they can get a "feel" for jurors that facilitates elimination of biased jurors at both ends of the spectrum. In addition to this proposal, the Committee should consider requiring use of questionnaires.

95-CV-151: Hon. J. Frederick Motz for the unanimous judges of D. Md.: Whatever surveys may show, lawyer voir dire will consume more time. Lawyers will attempt to argue their cases, and will intrude on juror privacy. We now permit supplemental questions by lawyers seeking legitimate information, but this works because lawyers know this is a privilege that will be revoked as soon as it is abused.

The attempt to assure continuing judge control will not work well.

95-CV-1252: Richard W. Nichols, Esq.: Framed as a comment on Rule 48, but observes that lawyer participation in voir dire can help achieve the goal of representative juries.

95-CV-153: Hon. Thomas C. Platt: I have attempted to permit lawyer participation. New York state practice has ruined them. They are incapable of asking "unloaded" questions. We have "an unruly and litigious bar" and the proposed rule will simply add new grounds for appeal. There is no reason to compel new practices by judges who achieve sound jury selection by asking the proper questions submitted by counsel.

95-CV-154: Ira B. Brudberg, Esq.: 35 years of experience show that judge voir dire "is seriously deficient." Only modest extra time will be required for lawyer participation, and it "would improve greatly the ability to get impartial jurors."

95-CV-155: J. Houston Gordon, Esq.: Judge voir dire makes it seem the judge's jury, not the parties' jury; party voir dire makes the results more acceptable. Public perception is that judge questions intimidate the jurors, who are reluctant to answer honestly. The parties know the case and can find the crucial questions. The court can control potential abuse.

95-CV-157: Hon. Joanna Seybert: As trial lawyer and judge in New York State court as well as federal court, has found that "the majority of judge voir dires were fairer." Jurors take judge questions more seriously, and lawyers are left free to evaluate juror responses rather than plan the next questions. Jurors are embarrassed to confess their inner secrets in front of people with whom they may serve. Mandatory provisions generate senseless appeals. We should concentrate on training judges on the means of conducting proper, meaningful voir dire examination.

95-CV-158: Hon. Samuel B. Kent: Pro se litigants pose a great risk of abuse. Many lawyers are woefully inadequate, and many have participated in state systems that are remarkably intrusive and abusive. I typically spend two to three hours on voir dire, and permit supplemental questioning by lawyers both of the entire panel and of individual jurors; experienced lawyers can contribute well, but the inexperienced and "frankly incomptent" do not. The courts simply cannot afford anything that will consume additional trial time. (The same statement appears again as 95-CV-196.)

95-CV-159: Hon. B. Avant Edenfield: Most judges permit limited lawyer participation now; lawyers behave because they know the privilege can be withdrawn. Lawyer participation will lead to the great waste of time we see in state courts. (Judge Edenfield renewed his comments in 95-CV-272.)

95-CV-162: J. Richard Caldwell, Jr., Esq.: Some judges conduct thorough voir dire inquiries; some do not. Abuses by counsel can be controlled. Excessive time will not be required.

95-CV-163: Hon. Prentice H. Marshall: As written earlier, wholeheartedly supports.

95-CV-164: Hon. Donald D. Alsop: Lawyers use voir dire to attempt to educate the jury. Their participation will have an effect opposite the Committee's expected improvement in the appearance and reassurance of fairness.

95-CV-165: Daniel A. Ruley, Jr., Esq.: Counsel rarely abuse the voir dire privilege when it is extended. They are more effective at follow-up questions than the process of suggesting questions to the judge after initial voir dire by the judge.

95-CV-166: Hon. Lucius D. Bunton: A poll of all 10 active judges in W.D. Texas shows all oppose any change. Some allow attorney participation now, but none should be forced to. Federal courts try cases quicker and better than state courts; one reason is that not much time is taken to select a jury.

95-CV-167: Professor Bruce Comly French: Attorney voir dire "is particularly important in light of new Supreme Court decisions relating to gender and racial bias."

95-CV-168: Daniel E. Monnat, Esq., on behalf of Kansas Assn. of Criminal Defense Lawyers: Practical experience confirms the studies: jurors tend to be less candid when answering questions put by the judge rather than counsel. Judges are not in a good position to follow up on juror responses. Active give-and-take between counsel and prospective jurors is essential.

95-CV-170: Kenneth J. Sherk, Esq., for the Federal Rules of Civil Procedure Committee of the American College of Trial Lawyers: The race- and gender-bias limits on peremptory challenges make lawyer participation essential. But even more important are the advantages lawyers have in uncovering grounds for for-cause challenges. The empirical data suggest that little extra time will be used by voir dire. As Judge Lay has written, experienced lawyers know that attempts to abuse the system are more likely to offend jurors than persuade them, and in any event judges can control any potential for abuse.

95-CV-171: John S. Gilmore, Esq.: Judges shy away from the open-ended questions that allow jurors to talk, revealing their mental processes and providing insights into potential biases. But it is important to protect juror privacy rights.

95-CV-172: Hon. Jerry Buchmeyer: Generally I permit lawyer voir dire, but not in multiple-defendant criminal cases, nor by attorneys who have shown that they will simply waste the time or abuse the panel members.

95-CV-173: Hon. Sam R. Cummings: Registers opposition.

95-CV-174: Hon. Virginia M. Morgan for the Federal Magistrate Judges Assn.: There is no compelling need for the amendment, and no need for nationally uniform practice. Privacy interests must be

protected. Lawyer voir dire would be an inefficient use of judge and juror time. Parties without counsel will conduct inappropriate voir dire examinations, and will be at a disadvantage. If some judges do not do the job well, the remedy should be judicial training in the importance and techniques of voir dire. (The same statement has been given number 95-CV-202.)

95-CV-175: Stephen M. Dorvee, Esq.: Supplementing statement as a witness. Judges can control attorney voir dire effectively. One value is that attorneys can observe juror reaction to counsel, to test whether something about an attorney offends a prospective juror.

95-CV-176: Hon. W. Earl Britt, adding Resolution of Executive Committee, Federal Judges Assn.: Judge Britt observes that attorneys are advocates; advocacy should begin after an impartial jury is selected, not as part of an attempt to select a favorable jury. Continued judge control is the best means to check the pervasive influence of "jury science." Lawyer participation will waste time, particularly in multi-defendant criminal cases. The Resolution, unanimously adopted by the Executive Committee of the Federal Judges Association, recites the dedication of the Association to preserving the independence of the Federal Judiciary and concludes that the determination whether attorneys should be allowed to participate in voir dire should be left to the discretion of the judge.

95-CV-178: Gordon S. Rather, Jr., for American Board of Trial Advocates: The National Board unanimously supports the Rule 47 proposal, believing that lawyer participation is essential to a fair trial by jury. (The same letter has been assigned number 95-CV-223 also.)

95-CV-179 Illinois State Bar Association Board of Governors: Supports Rule 47 amendments on the "clear and concise rationale" provided in the Committee Note.

95-CV-181: Hon. Thomas P. Griesa for the unanimous judges of S.D.N.Y.: The concerns voiced in the Committee Note are significant, but they can be dealt with under the current rules. Counsel seek to use voir dire to indoctrinate the jury. In S.D.N.Y. we have special problems. Counsel who practice in state court will see the new rule as an invitation to engage in the abuses the state courts are struggling to overcome. We do not have a small, cohesive, collegial bar; there has been "an increase in the number of lawyers whose conduct lies regularly at the outer edge of propriety," and whose participation in voir dire would generate added problems. A torrent of satellite litigation will grow up over the attempt to clarify what are reasonable limits; the attempt to bolster district court discretion will not be effective. (The same statement was forwarded by Judge John F. Keenan, and numbered as 95-CV-195.)

95-CV-182: Hon. Kenneth M. Hoyt: "I write * * * to cast my vote for

the maintenance of the trial judge's discretion that is inherent in the commission that trial judges hold." Experience in state court shows that more than 90% of trial lawyers lack the communication skills needed for effective jury selection; often a case is won or lost in the jury selection process because of the differences in skills. Trial judges, on the other hand, have good sense. (The same letter also is numbered as 95-CV-194.)

95-CV-183: Hon. Fred Biery: Concurs with Judge Bunton, 95-CV-166. Permits lawyers to ask follow-up questions, but would not want to be forced to do this.

95-CV-184: Paul W. Mollica, Esq., for the Federal Courts Committee of the Chicago Council of Lawyers: Supports the proposal because "only advocates can make the fair but focused inquiry necessary." But there is a risk that abusive behavior will not be objected to; the proposal should explicitly state that the court may "on its own initiative" terminate examination.

95-CV-185: Hon. Clarence A. Brimmer: I allow attorneys to conduct voir dire, but oppose the amendment.

95-CV-186: Hon. Sam Sparks: Years of experience with both systems show that present Rule 47(a) has it right. Lawyers seek to persuade or precommit jurors. Judges do voir dire faster.

95-CV-187: Hon. Filemon B. Vela: Experience with lawyer voir dire as a Texas state judge and selecting more than 400 juries as a federal judge shows there is no difference in the fairness of the juries selected. But in state court the process takes days and weeks, where in federal courts it takes hours or days.

95-CV-188: Hon. Edward C. Prado, for the District Judges Assn. of the 5th Circuit: A poll of the 94 5th Circuit district judges had, as of the writing, produced 73 responses. 61 judges oppose the proposal, 11 favor it, and one abstained.

95-CV-189: Hon. Barefoot Sanders: Attorney voir dire is likely to increase time. It is likely to reduce the prospects of sitting an impartial jury; it is too late to correct the damage after abusive questions are asked. Written questionnaires can be used to good effect. Not all attorneys are eager to participate, but will feel obliged to do so. Reasonable limits will become issues for appeal.

95-CV-190: Robert R. Sheldon, Esq., on behalf of the Connecticut Trial Lawyers Association: The Association is dedicated principally to preserving the rights of injury victims. Attorney voir dire is the best way to assure a fair and unbiased jury. The Committee Note should emphasize that the power to set reasonable limits should not prevent meaningful examination in a manner likely to illuminate issues of personal bias, prejudice, or improper preconcpetions. (An excerpt of an attorney voir dire is attached.)

95-CV-193: Carolyn B. Witherspoon, Esq., for the Federal Legislation and Procedures Committee, Arkansas Bar Assn.: No

objection of Rule 47; endorses the change to Criminal Rule 24.

95-CV-197: Hon. George P. Kazen: The proposal will open up a new and fertile field of litigation over what is reasonable. All current proposals are to streamline trial, not add time. There is no compelling reason to change.

95-CV-198: Hon. John D. Rainey: As Texas state judge and federal judge, finds present federal system better. Lawyers seek to argue the case. Jurors prefer the federal system. Allows lawyers to ask follow-up questions; often they do not ask any.

95-CV-199: Hon. Melinda Harmon: "Although I am greatly in favor of attorney voir dire, I do not believe it would be wise to make attorney voir dire mandatory." Experience as a Texas state judge shows lawyers seek to try the case at voir dire, believing the case must be won at that stage. If they fear the outcome, they seek to "bust" the jury by convincing all of the panel that they could not be fair in this case, or by doing something to force a mistrial. Discretionary limits will not always work — a record must be made, and damage may be done (by "throw[ing] a skunk in the jury box") before the judge can intervene. And pro se litigants cannot be controlled effectively.

95-CV-200: Hon. David Hittner: Experience as a Texas state judge shows that lawyers conduct arguments, not jury selection. Almost always permits attorney participation in federal court, admonishing that a lawyer who purposely causes a mistrial will never again select a jury in this court and may be subject to sanctions. This works, but it works because of the power to deny any participation. Pro se litigants also would be a problem under the proposal.

95-CV-201: Hon. Lynn N. Hughes: As a Texas state judge found lawyers arguing the case at voir dire. Questionnaires can give far more information than hours of questioning. The rule "will develop its own complex jurisprudence after the appeals courts are through with it."

95-CV-203: Hon. John F. Nangle: My own practice with attorney voir dire varies from case to case, according to evident needs. Judges should be left free to adapt to individual case circumstances.

95-CV-204: Thomas D. Rutledge, Esq.: The proposal will help lawyers determine the predisposition and bias of prospective jurors.

95-CV-206: Dean M. Harris, Esq., for Atlantic Richfield Co.: Lawyer participation provides the appearance and reassurance of fairness, making jury verdicts more acceptable. The safeguards in the proposal make the risk small in relation to the benefits.

95-CV-207: Hon. Gerald Bard Tjoflat: Appellate courts will be forced to review by a standard of presumed error, because it will not be possible to know what questions would have been asked to follow up on the questions that were prohibited by the trial court. There will be no identifiable standard of review at all, making

trial judges reluctant to curtail voir dire. And all of this will increase appellate workloads by adding new claims of error.

95-CV-208: Hon. Richard G. Stearns: "I am puzzled by the anachronistic consideration of this baleful practice. Citizen jurors are not clamoring for an inquisition by lawyers into their personal lives." Lawyers want biased jurors. "I am often dumbstruck at the inappropriateness of many of the questions lawyers want me to ask prospective jurors." And lawyer participation will waste precious time.

95-CV-209: Gerald Maltz, Esq.: "[L]awyer voir dire is essential if we are serious about identifying bias and prejudice." Jurors are reluctant to answer judges' questions; I have experienced countless times very different answers to the same question when put by counsel a second time. Judges vary greatly in the ability to conduct voir dire. Lawyers know more about the case. Good lawyers are not tempted to abuse the system, and good judges can control lawyers who succumb to temptation.

95-CV-211: Hon. Joseph A. DiClerico, Jr.: As state and federal judge has used different methods; this experience shows that attorney voir dire will take more time. The proposal is unnecessary micromanagement. It will generate new appeal issues. Counsel can get sufficient information through questionnaires and questions submitted to the court for consideration. And it is better to provide a means for jurors to answer sensitive questions out of the hearing of other jurors (as by addressing questions to the array by number; each juror then is asked if there is any problem with any question, and is allowed to approach the bench to identify any question and the problem).

95-CV-214: Kathleen L. Blaner, Esq., for Litigation Section, D.C. Bar: Because participation in voir dire will support better-informed challenges for cause, it will reduce the use of peremptory challenges and help reduce impermissible discrimination.

95-CV-215: Hon. Terry C. Kern: I allow attorney voir dire, but some attorneys consistently attempt to abuse the procedure. If attorney participation is mandated, I will lose the leverage I now have to control behavior by warning that the privilege will be stripped if it is abused. And appeals will further erode the necessary judicial control.

95-CV-220: Terry D. Tubb, M.D.: Attaches a Wall Street Journal article describing a $100,000,000 compensatory and $400,000,000 punitive damages award growing out of a failed transaction to buy two funeral homes. See WSJ, Feb. 14, 1996, p A-15. At the end of the "Rule of Law" piece, by Walter Olson, it is stated: "Amazingly, a federal advisory panel is actually proposing rules * * * that could bring such state-court abuses to the federal courts by ensuring lawyers there a right to grill prospective jurors directly * * *."

95-CV-221: Norbert F. Bergholtz, Esq.: Most courts permit party participation. It is important that this be preserved, to support party faith in the basic fairness of the system.

95-CV-222: Gilbert Adams, Esq.: Attorney participation is essential.

95-CV-226: Debbie Alexander, RPh: As a sales person, "I can assure you that a lawyer can prejudice and obligate jurors prior to ever trying a case without conscious awareness by the juror." Lawyer participation will undermine justice, as it does not in state courts.

95-CV-227: Bernard M. Susman: The proposal would "bring to the federal courts state court abuses."

95-CV-230: Gordon R. Broom, Esq., for Illinois Assn. of Defense Trial Counsel: Firsthand attorney involvement in all phases of trial is important, including jury selection. This is less cumbersome and supports follow-up questions. But the Note should be amended by dropping the statement about protection against unwarranted invasions of privacy. "Questions about what a prospective juror reads, does for recreation and watches on television are often quite probative of the juror's perspective and should be freely allowed. In certain cases, even political and religious subjects may be appropriate."

95-CV-231: J.P. Economos, DDS: "It would be better to leave the system as is rather than let it be pillaged by attorneys as is often done at the state level." We should change to professional juries for complex cases.

95-CV-232: E. Lawrence Hull, CFP: "To allow such a procedure to infect the federal courts would be totally unconscionable and flies in the face of public sentiment that favors limiting outlandish and egregious jury awards as seen in state courts * * *."

95-CV-233: Roger D. Hughey, Esq., for Wichita Bar Assn.: "The opportunity for counsel in a case to interact directly with prospective jurors is critical to counsel's evaluation of each juror's ability to perceive and understand the proceedings, and to discover potential grounds for challenge."

95-CV-234: James A. Strain, Esq., for Seventh Cir. Bar Assn.: There are no apparent serious problems with the present rule in Seventh Circuit districts, but the change appears salutary.

95-CV-236: Malcolm B. Blankenship, Jr., Esq.: Attorney participation would create problems "by elements of the various bars whose motives are contrary to what I believe is very necessary tort reform * * *."

95-CV-238: Hon. Lawrence P. Zatkoff: Lawyers will attempt to select favorable juries, and will begin to try their cases at voir dire. They will take too long. The FJC survey shows that most federal judges agree.

95-CV-239: Richard A. Rossman, Esq., for U.S. Courts Committee, Michigan State Bar: Attorneys know the case better, and can explore the subtle factors that may influence juror perceptions and abilities to decide fairly. Several federal judges in Michigan have expanded the role of attorney voir dire following the urgent recommendation of lawyers participating in a 1990 Federal Bench/Bar Conference.

95-CV-240: Hon. T.F. Gilroy Daly: Lawyers will seek to influence the jury, and will increase the time required. No empirical data suggest that court-conducted voir dire results in unfair juries; the Committee's expressed concerns are not persuasive.

95-CV-241: Philip Allen Lacovara, Esq.: This "is a terrible idea," and "perversely ironic" at a time when state law reform efforts aim at adopting the present federal practice. Lawyers will seek to manipulate the jury by means that never would be permitted at trial, and to distort the randomness of the panel. Lawyer participation works when allowed under the present rule because it is a matter of grace. Attempting to make it a right, controlled as a matter of discretion, "would spark a new issue of partisan wrangling and inject still another new issue for appeal."

95-CV-242: John Frondorf: Opposes, but "would favor any changes that will reform our runaway tort system * * *."

95-CV-245: Robert F. Wise, Jr., Esq., for Commercial and Federal Litigation Section, N.Y. State Bar Assn.: It may not be wise to mandate attorney participation. There is substantial criticism of New York state practice; the difficulties encountered there and in other states do not bode well. Lawyer questions could be used to provide a pretext for supporting challenges in fact rested on antipathy toward minorities. There are special reasons to be cautious as to districts in states that have experienced "certain abuses" in lawyer voir dire. This is a step backward at a time when court involvement is credited with streamlining jury selection. A less drastic remedy would be to require the court to ask questions submitted in writing by counsel, subject to the same limits as set out in the proposal. Criminal cases may warrant direct attorney participation, but not civil.

95-CV-247: Don W. Martens, Esq., for American Intellectual Property Law Assn.: Attorney voir dire is good. The amendment should not require that the judge do any of the questioning. The Note reference to invasion of privacy goes too far. Inquiries into such matters as reading, recreational, and television habits are desirable – that a juror reads Popular Mechanics or Scientific American, for example, might be relevant in a technical case.

95-CV-248: Michael A. Pope, Esq., for Lawyers For Civil Justice: Too often, lawyers believe that judges are more intent on a perfunctory voir dire than on achieving meanginful voir dire. Simply asking jurors whether they can be fair and impartial is inadequate. Jurors are less likely to be forthright when

questioned by judges. Lawyers know the cases better; the opportunity to submit questions in advance does not respond to the need for follow-up questions. The extra time required "is surprisingly short."

95-CV-249: Hugh F. Young, Jr., Executive Director, Product Liability Council: Lawyer voir dire will improve the quality of justice. It will reduce reliance on peremptory challenges in favor of challenges based on cause, reducing impermissible bias. Litigants will gain confidence in the system.

95-CV-251: C. Rollins Hanlon, M.D.: Disastrous experiences in state courts speak strongly against extending to federal courts the right to grill prospective jurors directly.

95-CV-253: William B. Poff, Esq., for Executive Committee, Nat. Assn. of Railroad Trial Counsel: Approves.

95-CV-257: Brian T. Mahon, Esq., for Connecticut Bar Assn.: Endorses. Lawyer participation is particularly necessary to establish cause for excusing jurors in light of recent restrictions on peremptory challenges.

95-CV-258: Hon. Robert N. Chatigny: The proposed amendment codifies my practice, but it may encourage lawyers to engage in the tactics that make it so difficult to seat a jury in the Connecticut state courts where lawyer voir dire is protected by the state constitution. If the rule must be changed, the Note should state that it is common and proper to limit the time for supplemental questions to 15 minutes or less.

95-CV-262: John DeQ. Briggs, Esq.; Donald R. Dunner, Esq.; Walter H. Beckham III, Esq., for ABA Sections of Antitrust Law, Intellectual Property Law, and Tort and Insurance Practice: Fully agree with the Committee's reasons for the proposed changes. Attorney participation will result in less jury bias and prejudice because lawyers know the case better and can be more specific in uncovering bias, and because better information will reduce reliance on stereotypes. There also will be a greater sense of due process. There will be no undue demand on judicial resources. The lack of effective opportunities for appellate review means that now there is virtually no recourse for incomplete or ineffective court questioning. (The Section of Intellectual Property Law would welcome discussion of the reasons for requiring the court to participate in the examination. And they are concerned about allowing all pro se litigants and counsel to participate even in routine cases; the amendment should be modified to allow the court, for good cause on its own motion or on motion of a party, to deny the right to participate in voir dire.)

95-CV-267: Hon. A. Joe Fish: Experience as a Texas state trial judge, under a rule that allows counsel to conduct all voir dire questioning, shows that attorneys on each side always try to seat a jury predisposed to their side. The present rule works well and

should not be changed.

<u>95-CV-269: James R. Jeffery, Esq., for Ohio State Bar Assn. Bd. of Governors</u>: Supports the proposal, which "would enhance jury selection without causing undue delay or inconvenience."

<u>95-CV-271: Hon. Paul A. Magnuson</u>: Attorney participation "would destroy the impartiality and efficacy of the trial. * * * By definition, the parties' interrogation of the jury panel is adversary, biased, and opportunistic." The trial-judge discretion established by the present rule "ensures a level playing field for the litigants."

<u>95-CV-273: Pamela Anagnos Liapakis, Esq., for Association of Trial Lawyers of America</u>: The proposal is too limited, because the trial judge retains the preeminent role in voir dire. The Committee should "draft a new rule which would equalize the roles of judge and attorneys."

<u>95-CV-274: Kent S. Hofmeister, Esq., for Federal Bar Assn., (1) by Mark Laponsky, Esq., for Labor Law Section; (2) by Marvin H. Morse, Esq., for the Association</u>: (1) Mr. Laponsky comments on Rule 47(a): it incorporates a "sensible process." (2) Mr. Morse comments at length on Criminal Rule 24(a), strongly supporting the proposed amendments. Finds "real substance to the view that jurors give shorter and more concise answers to a judge's question, especially if that question is so phrased as to embarrass a juror to answer in a way to reveal a bias or prejudice * * *." Lawyers can do it better. A right of participation need not lead down a slippery slope that will erode judicial control of voir dire. Questioning by counsel may be necessary to provide race- or gender-neutral reasons for exercising a peremptory challenge. Finally, lawyer participation gives the appearance of greater democracy in jury selection; a rushed or expedited judge-conducted voir dire "may lead a jury to conclude that a court is more concerned with time and efficiency than the rights of the litigants * * *."

<u>95-CV-281: Hon. Dean Whipple</u>: I permit attorneys to participate in voir dire after I begin the questions. There is no need to amend the rule; this is a step toward all voir dire being conducted by attorneys. "A seasoned attorney or attorneys who can use jury experts will easily out perform an inexperienced attorney in getting their biased jury," fulfilling the universal desire of attorneys "to pick the most biased jury they can for their client."

<u>95-CV-283: Terisa E. Chaw, Executive Director, for National Employment Lawyers Assn.</u>: In urging adoption of 12-person juries coupled with provision for nonunaimous verdicts, observes that if juries return to 12 members, "it is essential to expand voir dire * * *. [W]ith the minimal voir dire currently permitted by the federal courts, it is extremely hard if not impossible to discern biased attitudes of prospective jurors. If the jury panel is enlarged to twelve, it is more likely that biased jurors will be seated unless lawyers have a reasonable opportunity to eliminate

them * * *."

95-CV-284: Michael W. Unger, Esq., for Court Rules & Administration Comm., Minn. State Bar Assn.: "[T]he fairness of jury selection is substantially improved and * * * juror bias is more effectively detected when attorneys are permitted to participate in the voir dire."

95-CV-285: Hon. Dudley H. Bowen, Jr.: Adopts the views of Chief Judge Tjoflat, 95-CV-207, opposing the amendment.

95-CV-286: U.S. Atty. Harry D. Dixon, Jr.: Supports the proposal as "prudent * * * as it would make the selection of a jury more meaningful."

95-CV-287: Barry F. McNeil, Esq., and Christine E. Sherry, Esq., for ABA Section of Litigation: This comment supplements the testimony of Section members at the public hearings. It reflects a nonscientific survey of practices and experiences in 9 federal districts that could readily be explored by Litigation Section leaders. Practices varied widely across the 9 districts, and to some extent within individual districts. (1) Where attorney voir dire is permitted, "lawyers not surprisingly consider that the process is a fairer one for all parties." Court-conducted voir dire too often furnishes little information and makes it difficult to select a jury intelligently. (2) Both in districts that routinely permit attorney voir dire and in districts that permit it on a limited basis, there do not appear to be complaints of abuse. "[T]he supervisory authority of a trial judge is unquestioned" in these matters. (3) There is "no obvious reason" that explains the refusal of some courts to permit attorney voir dire. (4) Federal courts should be encouraged to use jury questionnaires.

95-CV-288: Hon. Frederick P. Stamp, Jr.: Thirty years of practice in West Virginia state courts showed that even the most competent judges "found it difficult to properly control what frequently developed into a rather freewheeling phase of the initial part of the trial." Counsel attempted to argue the evidence, submit legal theories, and persuade jurors to remove themselves from service. The present federal rule works well; the amendment would "bring a measure of disorder and undue delay to federal jury trials."

95-CV-289: Anthony C. Epstein, for D.C. Bar Section on Courts, etc.: The amendment will promote the confidence of litigants and the public in jury trial. Social scientists have shown that jurors may respond more candidly and completely to questions by lawyers. It may be difficult for the judge to formulate questions to elicit bias or prejudice without appearing to favor one party; the resulting leading questions evoke little information. Lawyers can ask more open-ended questions that are more effective. Courts can maintain effective control. Although the proposal is supported by the need to support effective use of peremptory challenges, it will be important even if peremptory challenges are eliminated — peremptory challenges often are used to strike jurors who would be

stricken for cause if more effective voir dire were had.

95-CV-291: Hon Joe Kendall: More than five years of experience as a Texas state judge shows the superiority of federal practice. After literally hundreds of state trials, saw no more than five in which lawyers failed to turn voir dire into opening statements. The use of the word "reasonable" will subject every limit on voir dire to armchair quarterbacking by an appellate court. I permit participation by lawyers who want it; many do not want it, but would feel compelled to participate for fear of criticism later on.

95-CV-292: Nanci L. Clarence, Esq., for Executive Committee, Litigation Section, State Bar of California: "We wholeheartedly endorse and support the proposed amendment as it would ensure that the parties are given an opportunity to participate in the critical stage of jury selection."

95-CV-295: Thomas F. Clauss, Jr., for "certain members of the Federal Rules Revision Subcommittee of the Pre-Trial Practice and Discovery Committee of the Litigation Section of the ABA": The strongest argument for the change is the need to justify the exercise of peremptory challenges. Lawyer participation may ensure an impartial jury. Attorneys elicit more truthful responses than do judges. Although attorneys are motivated to select a favorable jury, the adversary process cancels this out. There may be problems with "lawyer theatrics," but the safeguards in the proposed rule are adequate. If there is some cost in "efficiency," it is outweighed by the benefits in selecting impartial juries. And jury questionnaires should be considered because they help save judicial resources.

95-CV-297: David K. Hardy, Esq.: Attorney participation in voir dire "is often critical to the selection of an objective, fair-minded jury; and I strongly support the proposed amendment * * *."

95-CV-298: Hon. Ernest C. Torres: The proposal is a mistake. Legitimate needs are met under the current rule. Counsel will seek to undercut selection of an impartial jury. They will feel compelled to participate even when they would prefer not to participate, particularly when the adversary chooses to participate. Disputes over limits imposed by the court will protract voir dire and generate issues for appeal.

95-CV-299: Hon. James K. Singleton: For the unanimous judges of the District of Alaska. Three of the judges have experience with Alaska state-court voir dire by lawyers, and others have experience with it as lawyers. Routine participation by lawyers, endemic to the local culture, is undesirable. "It is simply unreasonable to assume that skilled advocates can be kept within reasonable bounds by judicial admonitions." Judges give up in disgust. Voir dire often becomes an opening argument. If the judge does attempt to maintain control, "tempers flair, unfortunate comments are made, the jury is bewildered, and the appearance of justice suffers." The current rule is a fix; the proposal would break it.

Testimony on Rule 47(a)

W. Reece Bader, Esq., December 15: Tr 17 to 30: A former member of Civil Rules Advisory Committee and Standing Committee. A similar Rule 47 amendment was proposed in 1984. We were too concerned with lawyer conduct and Rule 68 then; I should have pushed for the amendment then. I support it now. Where active lawyer voir dire is regularly utilized, in general lawyers have not sought to use it to ingratiate themselves or indoctrinate jurors. The trial bar is responsible. Judges can control efforts to misuse the process, and the proposed rule ensures that power. A lawyer knows the case better than the judge, and can spend more time thinking about voir dire questions appropriate to the case. It is important to have as much information as possible to support peremptory and for-cause challenges. I have been involved in only one Batson-type situation; the opportunity to ask questions myself would have been valuable. The adversary process can work to negate attempts to gain advantage. The amount of time spent on voir dire need not unnecessarily delay the process; much can be done in a relatively short time. It is proper to require that some types of questions be directed to the panel as a whole. If a questionnaire has been used, voir dire questions can be narrowed accordingly. Having the judge pose questions requested by counsel does not work as well; in 30% to 40% of my cases this has an adverse impact. It may be urged that the right to participate is particularly important in capital cases, but that simply reflects the fact that participation makes the process work better. The same values are gained in other cases.

Peter Hinton, Esq., December 15: Tr 29 to 49: I have tried more than 150 jury cases to verdict. In every case I wanted a role in voir dire. Judges cannot put jurors in the same place as counsel can. Judges are more intimidating, and jurors are not as inclined to give honest answers to an authority figure. Sue Jones did a doctoral dissertation that demonstrates this difference. Lawyers — at least good lawyers — no longer "try to do the kind of mind-bending snow job that was de rigueur 30 years ago." Instead they ask open-ended questions "and try to do the most difficult thing an attorney has ever tried to do, which is listen to the answer." They are interested in orderly and effective voir dire. Courts can control any effort at abuse; California, after great study, has reconfirmed the practice of lawyer voir dire, and state judges exercise effective control. Code of Civil Procedure § 222.5 defines improper questions as those that attempt to precondition or indoctrinate the jury, or that ask jurors about the applicable law. One sanction judges use is to require a lawyer who has gone too far to submit all questions in writing to the court before asking them of the jury. Lawyers, moreover, do not really "select" a jury; they can only "deselect" the most obviously biased members of the panel. The need for deselection is increased by the increasingly firm views many people hold on subjects involved in litigation, views that may be entrenched by public debate that has been called

jury tampering on a national scale. Arbitrary time limits cannot be defined, and California practice forbids them; the time required need not be great, and whatever is required is worth it. Questionnaires are encouraged, and reduce the time needed for voir dire. They also encourage honest answers to questions that might be embarrassing, particularly if assurance is given that follow-up questions will not be dealt with in front of the group.

Hon. Michael R. Hogan: December 15: Tr 49 to 63: Every judge in D. Ore. allows some attorney voir dire. My own practice is to receive proposed questions a week before trial, sort through them, meet again before trial, and then begin the voir dire. Then I ask the lawyers for follow-up questions and ask them. Then I invite the lawyers to ask questions themselves; usually they are satisfied and do not follow up. This works well. "If I do a good job, then I don't really have to exercise any controls." I encounter few efforts to take advantage of the process. When an effort is made, it can be controlled. But to make it a right is to invite appellate review, and appellate judges removed from the scene of trial may impose untoward restrictions. Attorneys want to seat favorable juries, not impartial juries.

Dr. Judy Rothschild: December 15: Tr 63 to 87: Dr. Rothschild is a research sociologist with the National Jury Project West, and also works as a trial consultant. She is a visiting scholar at the University of California, Berkeley, in the Institute of the Study of Social Change, where she is studying jury decisionmaking in complex cases. Lawyer participation in voir dire is important. (1) Jurors are terribly intimidated by the courtroom. They bring many television-derived misconceptions to their task. (2) Social science research shows that people seek to portray themselves in socially desirable ways, and are quite sensitive to verbal and nonverbal clues indicating the desired "correct" answer to questions. A wide range of factors affect the candor of answers to questions. (3) One important factor is the fundamental difference of status between judge and juror, a difference enhanced by the symbols and practice of the courtroom. A screening process goes on in responding to judge-put questions. When a judge asks whether panel members can be fair, "it's pretty clear that there's one right answer to that question. * * * It's far easier * * * for that question to be answered more honestly and candidly and comfortably when the question is not propounded from an authority figure sitting up high." Attorneys are literally on the same level in the courtoom, and this encourages candor. The judges who are good at voir dire are those who are aware of the obstacles they face because of their status. (4) The need to speak publicly also exacerbates the problem. "People tend to avoid embarrassing themselves, and one way to do that is by providing minimal responses." "People's responses tend in the direction of conformity. One doesn't want to seek out attention" in the trial setting. Questionnaires have real advantages, including privacy, in eliciting information. (5) Jurors do come to the courtroom with

real biases and disagreements with the law. In criminal cases, for example, many jurors believe that a person brought to trial is probably guilty, that defendants should be required to prove their innocence, and that defendants should be required to testify. (6) Global questioning of a panel is less effective because "people have a reluctance to raise their hands. * * * [I]t's easier to avoid answering a question. The best voir dire is that in which jurors do most of the talking. (7) Some lawyers are not good at voir dire, even hate it.

James Farragher Campbell, Esq., Dec. 15: Tr 88 to 97: Appeared on behalf of the National Association for Defense Lawyers, California Attorneys for Criminal Justice, and the Executive Committee of the Litigation Section of the [California] State Bar. Testified only as to Criminal Rule 24. Attorney voir dire is important to discover bias and prejudice in prospective jurors, and has become more important because of limits on stereotyped use of peremptory challenges. It need not pit lawyers against judges, nor result in attorneys taking over the courtroom. The power of control built into the proposed rule is adequate. The vision of silver-tongued orators using voir dire to try the case is out-of-date. Lawyers now are interested in using voir dire to search out bias. Reasonable time limits can be set, although it is not possible to adopt a single period of time that is appropriate for all cases. Judges should be reassured on these points by the experience of the many judges who now permit attorney participation. Yes, to Judge Wilson: attorney voir dire works in practice, and the time has come to stop worrying whether it will work in theory. The opportunity to participate is important to give the appearance of fairness as well as the reality.

George J. Koelzer, Esq., December 15: Tr 98 to 113: Was asked to testify by the ABA Litigation Section. Supports attorney voir dire. In more than 30 years of trial experience has tried jury cases in many state and federal courts, working with all the different modes of voir dire. Over that time, judges have taken over more of the voir dire — perhaps in part because the general level of trial bar skills has declined. But judge-conducted voir dire "is not acceptable in the adversary system." Judges are interested in ferreting out matters that would support for-cause challenges, but not matters that will inform peremptory challenges. Peremptory challenges are "inherent" in the Seventh Amendment right to jury trial. Batson has made the selection process more complicated. There is no realistic recourse in appellate review; the prospect of reversal for inadequate voir dire inquiry is too remote to be of real value. And any competent federal judge will deal quickly and effectively with any abuse by counsel. There have been problems with inadequate judge-conducted voir dire in personal experience, commonly involving refusal to ask suggested questions, and usually involving "a younger, less experienced judge without a lot of courtroom experience."

Robert Aitken, Esq., December 15: Tr 113 to 125: Lawyer voir dire

facilitates selection of a fair and unbiased jury, and increases lawyer comfort with the jury. It does not work as well to have an intermediary – the judge – ask the questions. Any competent judge can control any prospect of lawyer abuse. There are some questions that counsel would prefer to have addressed by the court – for example in a case against a mental hospital, whether any prospective juror had had mental problems. General preliminary questions also are appropriate for court inquiry.

Christine Sherry, Esq., December 15: Tr. 125 to 133: Was asked to testify by the chair-elect of the ABA Litigation Section. Has begun inquiries among lawyers in N.D.Cal. about varying practices and experiences. This testimony is preliminary. Lawyers who have been able to conduct their own voir dire have found it very helpful. Preliminary questionnaires encourage people to provide information that might not come out on oral examination, and can be followed up to great effect. A number of lawyers have reported that 20 to 25 minutes of follow-up questioning can produce great benefits.

Robert B. Pringle, Esq., December 15: Tr. 133 to 142: Current chair, Intellectual Property Litigation Committee, ABA Litigation Section: Experience with voir dire is mostly with extensive lawyer participation in California state courts and limited participation in N.D.Cal. Lawyers do it better. I know more about the evidence and witnesses. My clients generally are able to afford extensive jury studies, and in some cases I have done several mock juries before trial. I and my adversaries have studied prospective jury behavior, deliberations and reactions to the evidence. We come to court equipped to assess jury bias. To deny the opportunity for thorough voir dire is to cut off the most effective means of inquiry. Lawyer abuse need not be feared; a competent judge will control voir dire.

Elia Weinbach, Esq., December 15: Tr 142 to 151: The amendment is desirable. I have had experience where "the judge's handling of the voir dire was ineffective and where we had problem juries simply because the judge was more interested in proceeding expeditiously * * *." "Most federal judges with whom I've dealt in the voir dire process really go through the process solely for the purpose of getting through the process * * *." It should be recognized that so many people avoid jury service that juries are not representative, and will not be – professionals, small business people, and the like do not serve. This makes it more important to preserve peremptory challenges.

Louise A. La Mothe, Esq., December 15: Tr 153 to 168: California state judges allow attorney participation. C.D.Cal. judges generally do not, and their "questions have a tendency to be perfunctory and pretty superficial. * * * [T]he judge does not have the same interest in getting out the information as the lawyers do. And I think that the judge obviously is looking for the most obvious types of bias, but frankly it doesn't always come out." A

number of judges, as a matter of speed, want to impanel the first six in the box. Lawyers can do it better because they know the case better. "Not every client can afford extensive jury research"; it can cost fifteen to twenty-five thousand dollars, or more, including trials to mock juries. Abuse by lawyers does occur, and judges may prefer to do voir dire themselves because it is easier than controlling the lawyers. But it is better for the judge to ride herd on the lawyers than to cut them off. They can and do control lawyers in California state courts.

Professor Charles Weisselberg, December 15: Tr 168 to 185: Attorney voir dire is essential to support challenges for cause and to enable use of peremptory challenges not based on group stereotypes. Denial of participation is not suited to the Batson era — challenges based on individual characteristics require knowing more about jurors than is revealed by judge-conducted voir dire. My experience in C.D.Cal. is like that of Ms. La Mothe: voir dire is "fairly routinized." Judges tend to ask close-ended questions. No juror is going to respond to a question: "You can be fair, can't you"? Nor to questions asking them to raise their hands if they would have trouble following instructions, or would not afford a presumption of innocence. In two cases I was allowed about 15 minutes for voir dire, and discovered that it was possible to learn a lot in 15 minutes — even though the regular local practice meant that I had not had much experience with direct voir dire. The goal will be to focus on jurors who need further questions, not detailed inquiry of all. I have not had the experience, asked about by Judge Dowd, that civil plaintiffs and criminal defendants seek to "dumb down" juries. As a federal public defender I had the benefit of selecting juries with the aid of a full-time psychologist on our staff; we lawyers learned to be more sophisticated with her help. Judges will set limits, and as the limits become known there will be fewer attempts to argue the case on voir dire. These efforts may spur additional appeals in the beginning, but these problems should disappear as practice becomes firmly established.

Hon. Duross Fitzpatrick, January 26: Tr. 3 to 15, 21 to 22: Having practiced in Georgia state courts, took lawyer voir dire to the federal bench. Lawyers file their written questions before voir dire, and serve each other. Usually there are no objections; if there are objections, they can be ironed out in a few minutes. Reasonable follow-up questions are allowed. Voir dire never lasts longer than about an hour. If a lawyer comes in from out of town and engages in grueling voir dire, the local lawyer may well announce that there are no questions, the jury will do the right thing, "and it almost always works." Lawyers learn not to wear out a jury with foolish questions. Perhaps peremptory challenges will be abolished one day, "but as long as we have them, I think lawyers ought to have an opportunity to ask the questions." We have a 3- or 4-page questionnaire that is used in every case, civil and criminal. Lawyers love it. We are revising it now to eliminate questions that are "kind of silly," such as what magazines jurors

read, and questions that are unnecessary invasions of privacy. We treat the answers as confidential, and require lawyers to certify that they will destroy the questionnaires.

<u>John T. Marshall, Esq., January 26</u>: Tr. 15 to 21: In N.D.Ga., questions are outlined in the pretrial order and the judge asks them. Lawyers are permitted follow-up. I would prefer, as the lawyer, to go first. Juror answers to the judge are wooden, tainted by the formality with which the first question is put. It is better for a lawyer to open a conversation "because most jurors are very, very intimidated by the judge." Georgia state courts let lawyers do the voir dire. There are attempts to abuse the system. One abuse is an attempt to ask jurors to prejudge the case; judges promptly prevent that. Totally irrelevant or impermissible questions also are stopped short. Voir dire is not extended to the two- or three-day ordeal that people fear. Jury questionnaires are very helpful. They get away from perfunctory questions. And they make it possible to avoid "the land mine," the question and answer that taint the entire panel. They also allow a juror to say things about the difficulty of jury service that may not be said in voir dire.

<u>Frank C. Jones, Esq., January 26</u>: Tr 22 to 31: for Product Liability Advisory Council. "I have never seen a serious problem with lawyer-conducted voir dire where the judge is clearly in control of the courtroom." And I have had very few experiences in which the judge did fail to control. There is a need for lawyer participation to establish a dialogue, to find out whether jurors are proper for the case. And as peremptory challenges are increasingly limited, it becomes more important to enable intelligent challenges for cause.

<u>Michael A. Pope, Esq., January 26</u>: Tr 76 to 80: "There are some judges who don't have that much experience at trying cases and, therefore, they don't do that good a job at voir dire, it's as simple as that. * * * [T]o open up the door and allow the process where the lawyers can actually talk to the jurors is really important * * *."

<u>Kenneth Sherk, Esq., January 26</u>: Tr 80 to 86: The Federal Rules of Civil Procedure Committee of the American College of Trial Lawyers (a Committee of some 230 members) is unanimously in favor of the proposal. It is more limited and restricted than the Committee would prefer. Long experience with lawyer voir dire has not shown any problem of abuse in Arizona state courts. With Batson and related restrictions on the use of peremptory challenges, lawyer participation is all the more important. The Advisory Committee Note sets out the reasons for the amendment. Lawyers and judges cooperate in every phase of the case, and there is no reason why cooperation cannot extend into the voir dire process with the lawyer being allowed to ask some questions. The many judges who now do a good job on voir dire will find that lawyers' supplemental questions will not be extensive at all.

J. Richard Caldwell, Jr., Esq., January 26: Tr 86 to 93: The proposal is good. Questionnaires "can be extremely useful in many, many ways. Either avoiding the dynamite question, saving time." As compared to the judge, the lawyer can initiate a conversation. And, standing close to the prospective jurors, can detect little quivers or hesitations that suggest the need for follow-up questions. The amendment makes it clear that this is limited voir dire, and that the court remains in control.

John A. Chandler, Esq., January 26: Tr 93 to 100: Georgia statutes give lawyers a broad voir dire right. Most federal courts in Georgia permit follow-up questions by lawyers. We have a lot of experience. It seems to work well, to be very helpful. The lawyer gets a better feeling for the jury by asking questions and listening to the answers. Their better understanding of the jury may lead to more mid-trial settlements. Some judges ask questions well; some do not. Judges are concerned to keep the case moving. Lawyers pace the questions better; they wait for the answers, and listen to the answers.

Stephen M. Dorvee, Esq., January 26: Tr 100 to 105: Judge-conducted voir dire "is somewhat inadequate." The judge does not know the case as well as trial counsel. The problem of overreaching counsel is not significant. "As long as a judge can control his courtroom, then he can control voir dire." In the working of the adversarial process, each side usually strikes the jurors the other side most wants and the result is a fair, balanced jury. It is not so important that the lawyer be the one to initiate the conversation as that there be a conversation. A lawyer needs to evaluate the juror's reaction to the lawyer — at the most direct level, to learn whether the juror can understand the lawyer. There may not be much time, but even 15 minutes of examination is enough to get a feel for the jury.

Hon. Hayden W. Head, February 9: Tr 3 to 15: The judges of S.D. Tex. are unanimously opposed to proposed Rule 47(a). A poll of the 94 judges in the 5th circuit District Judges Association garnered 73 responses; 63 oppose the proposal, and 10 support it. It is the judge's responsibility to select an impartial jury, and the adequacy of voir dire is not easily reviewed on appeal. An attorney seeks a partial jury, not an impartial jury. There are no more than a few, if any, district judges who fail to do adequate voir dire examinations; the cure is in part appellate review, as a recent Fifth Circuit decision shows, and in part education through judge workshops. No matter what discretionary authority seems to be written into the proposal, "the whole ability to control changes. * * * [W]hat will develop is a practice of the most generous or tentative district judge, as affirmed by the most generous panel in the United States." The idea that the adversary system will balance out, with each side preventing the other side from winning a favorable jury, does not work out. Some lawyers are better at jury selection than others. It takes the balance of a judge "to control the flow of the jury selection."

Hon. Virginia M. Morgan, February 9: Tr 43 to 49: President, Federal Magistrate Judges Association. Joins the opposition to attorney voir dire. There are special problems with pro se litigants, both in prisoner cases, employment cases, and others. Is the judge to help the pro se litigant, departing from a position of neutrality? Appoint counsel from the pro bono panel? What should be done in districts that handle pro se prisoner cases with video-conferencing? Will there be new issues for appeal?

Robert Glass, Esq., February 9: Tr 49 to 56: for the National Association of Criminal Defense Lawyers. Spoke only to Criminal Rule 24. "With a little training [of lawyers], the attorney-conducted voir dire is enormously productive. It airs views." "[M]ost judges are afraid of the lawyer-conducted voir dire because it can get out of hand. Well, that's true, but the judges, under the amended rule, would have the power to control the lawyers." An obnoxious lawyer is shut down in the same way as an obnoxious lawyer is shut down on cross-examination. A brief period of time can be set; there is no reason to let it get out of control. Involving attorneys as a matter of right "will force judges to rethink and to be reeducated on how to do it. It is easy once you learn. It doesn't take much time to learn." In criminal cases there is no significant problem with pro se defendants; perhaps there should be a special rule in civil cases, but that is not the subject of this testimony.

Hon. John F. Keenan, February 9: Tr 56 to 64: For all the judges, S.D.N.Y. The judges of S.D.N.Y. include many who practiced in New York state courts, and some who were judges there. Their experience with attorney participation in voir dire is extensive. We unanimously oppose the proposed amendment. "The state experience has not been a pleasant one, nor has it been a successful one." The time it takes to select a jury is mind-boggling. "New York City does not have a particularly collegial bar." Requiring lawyer participation would reduce judge control, and do so at the beginning of trial, setting the tone and mood for the whole trial. The attempt to authorize reasonable limits will open a new array of satellite litigation, and spawn a new publication market for voir dire manuals. Appellate courts would set the limits of discretion. The knowledge lawyers have of their cases can be utlized through questions they suggest to the judge.

Hon. John M. Roper, February 9: Tr 64 to 80: Appearing for the Economy Subcommittee, Budget Committee, Judicial Conference. All testimony is directed toward budget implications, not policy. Estimates of the cost of lawyer voir dire are based on estimates of the increased time needed to sit a jury. If indeed judges find it difficult to control the time spent by lawyers, costs will increase more than otherwise. To be sure, time can be saved by jury questionnaires — my own experience has been favorable — but it is difficult to know how much time. Nor do we know how much time must be devoted to voir dire by pro se litigants. The costs will escalate still further if this is coupled with 12-person juries.

Of course these estimates do not account for the time that may be saved when, for example, improved voir dire excludes a juror who would have forced a mistrial later. And, more important, the cost estimates that have been made so far are based on fully distributed costs, not the relevant measure of marginal costs incurred by adding lawyer voir dire. There are likely to be additional costs as well, arising form the need to train panel attorneys and federal defenders. Lawyers also will need to be compensated for the time spent to prepare for voir dire — at least in criminal cases, that can be a direct expense. Our main request is that there be more careful study of costs before embarking on a procedure that may have a significant impact on already-strained judicial budgets.

<u>Al Cortese, Esq., February 9</u>: Tr 98 to 109: The National Chamber Litigation Center supports the proposal.