Agenda G-7
Rules of Practice
and Procedure
September 1984

ADDENDUM TO THE REPORT OF THE STANDING COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

TO THE CHIEF JUSTICE OF THE UNITED STATES, CHAIRMAN, AND THE MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES:

Since the circulation of its report last month to all Conference members the Committee has received an objection to certain language contained in the proposed amendment to Rule 45(d), Federal Rules of Civil Procedure. The objection is directed to the last paragraph of the proposed amendment, which reads as follows:

> "The clerk of the district in which the deposition is to be taken shall issue a subpoena requiring the attendance of the witness. The subpoena may be served in the same locations with reference to the place of deposition as those specified in subdivision (e) of this rule with reference to the place of a hearing or trial."

This language was added to the proposed amendment to Rule 45(d) by the Advisory Committee in response to a problem noted in In re Guthrie, ____ F. 2d ____ (4th Cir. 1984). The addition occurred after the period for public comment had expired in the belief that the change would not be controversial.

In view of the recently received objection and the lack of an opportunity for public comment, the Committee with the concurrence of the Advisory Committee Chairman desires at this time to withdraw the above quoted language to the amendment to Rule 45(d). The revised amendment to Rule 45(d) and the Committee Note, is attached.

Respectfully submitted:

For the Standing Committee on
Rules of Practice and Procedure

Edward T. Gignoux
Chairman

September 13, 1984

Agenda G-7
Rules of Practice
and Procedure
September 1984

SUMMARY

REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

This report contains the following recommendations for the consideration of the Conference:

1. Civil Rules

That the Conference approve the amendments to the Rules of Civil Procedure, set out in Appendix A, and transmit them to the Supreme Court with the recommendation that they be approved by the Court and transmitted to the Congress pursuant to law.

2. Criminal Rules

That the Conference approve the amendments to the Rules of Criminal Procedure, set out in Appendix B, and transmit them to the Supreme Court with the recommendation that they be approved by the Court and transmitted to the Congress pursuant to law.

3. Bankruptcy Rules

That the Committee be authorized to make the proposed amendments to Bankruptcy Rules 5002 and 5004 (which are currently being circulated for public comment) available to the members of the Supreme Court prior to the March session of the Conference with the notation that the Court will later be notified of final Conference action. See Appendix C.

4. Legislation

That the Conference advise the Chairman of the House Judiciary Committee that it approves the elimination of the "legislative veto" provision of 28 U.S.C. 2076, but recommends against the enactment of H.R. 5061, 98th Congress in its present form.

5. Local Rules Study

That the Chief Justice be authorized to appoint a reporter to the Standing Committee to conduct a study of local court rules.

AGENDA G-7
Rules of Practice
and Procedure
September 1984

REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

TO THE CHIEF JUSTICE OF THE UNITED STATES, CHAIRMAN; AND
MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES

Your Committee on Rules of Practice and Procedure met in Asheville, North Carolina on July 16-17, 1984. All members of the Committee attended the meeting, except Judge Carl McGowan who was unavoidably absent. The Secretary of the Committee, Mr. Joseph F. Spaniol, Jr. and Mr. Leland E. Beck, both of the Administrative Office, were also present. Judge Walter R. Mansfield and Professor Arthur R. Miller, chairman and reporter, respectively, of the Advisory Committee on Civil Rules; Professor Kenneth F. Ripple, reporter to the Advisory Committee on Appellate Rules; and Mr. Joseph Patchan, a member of the Advisory Committee on Bankruptcy Rules, attended portions of the meeting.

I. Federal Rules of Civil Procedure

The Advisory Committee on the Federal Rules of Civil Procedure has submitted to your Committee proposed amendments to Civil Rules 6, 45(d)(2), 52(a), 71A(h), and 83; Supplemental Admiralty Rules B(1), C(3), and E(4)(f); and Official Form 18-A. These proposed amendments are set out in Appendix A and are accompanied by Committee Notes explaining their purpose and intent. A separate report from the Chairman of the Advisory Committee summarizes the Advisory Committee's work.

Your Committee recommends that these proposed amendments be approved by the Conference and transmitted to the Supreme Court for its consideration with a recommendation that they be approved by the Court and transmitted to the Congress pursuant to law.

II. Federal Rules of Criminal Procedure

The Advisory Committee on the Federal Rules of Criminal Procedure has submitted to your Committee proposed amendments to Criminal Rules 6(e)(3)(A)(ii), 6(e)(3)(B) and (C), 11(c)(1), 12.1(f), 12.2(e), 35(b), 45(a), 49(e) and 57. The amendments proposed by the Advisory Committee are set out in Appendix B and are accompanied by Committee Notes explaining their purpose and intent. A summary of the work of the Advisory Committee is set out in a report from the Advisory Committee Chairman.

Your Committee recommends that these proposed amendments be approved by the Conference and transmitted to the Supreme Court for its consideration with a recommendation that they be approved by the Court and transmitted to the Congress pursuant to law.

III. Rules of Bankruptcy Procedure

Your Committee has approved the circulation of a preliminary draft of proposed amendments to Bankruptcy Rules 5002 and 5004 for comment by the bench and bar. Written comments have been requested by December 31, 1984 and a public hearing will be held in Washington, D. C. on January 17, 1985. The Advisory Committee has advised of the need to proceed with the consideration of these proposals on an expedited basis, so that they may be submittted to the Conference at its Spring session in March 1985, to the Supreme Court thereafter and, if approved by the Court, to the Congress before May 1, 1985. The Advisory Committee and your Committee will complete consideration of these proposals by January 29, 1985. To provide the Supreme Court with sufficient time to consider them, your Committee requests authority to make the proposals available to the members of the Court prior to the March session of the Conference, noting that the

Conference has not yet acted, but that final Conference action thereon will be communicated promptly.

The proposed amendments to Bankruptcy Rules 5002 and 5004 are set out in Appendix C and are accompanied by Committee Notes explaining their purpose and intent.

IV. Federal Rules of Appellate Procedure

The Advisory Committee on the Federal Rules of Appellate Procedure has completed a study of the operation of Appellate Rule 30, Appendix to the Briefs, which will soon be published. A copy is attached as Appendix D.

V. Additional Rules Amendments

At the request of the Advisory Committees on Appellate, Civil and Criminal Rules, additional proposed amendments to these rules are being circulated to the bench, bar and public for comment. Public hearings on these proposals have been scheduled. It is anticipated that, if approved by the Advisory Committees and the Standing Committee, they will be submitted to the Conference for consideration at its September 1985 session.

VI. Legislation

The Chairman of the House Judiciary Committee has requested the views of the Conference on H.R. 5061, 98th Congress, "a bill to terminate certain authority of the judicial branch of the Government which is subject to congressional review unless that authority is approved by an enactment of the Congress." See Appendix E. The apparent purpose of the bill is to eliminate from the Evidence Rules Enabling Act, 28 U.S.C. 2076, a "legislative veto" provision similar to that held unconstitutional by the Supreme Court in Immigration and Naturalization Service v. Chadha, __ U.S.__, 103 Sup. Ct. 2764 (1983).

Your Committee recommends that the Conference advise the Chairman of the House Judiciary Committee that the Conference approves the elimination of the "legislative veto" provision of 28 U.S.C. 2076. We believe, however, that the language of

the bill is unclear and does not appear to accomplish its intended purpose. We therefore recommend Conference disapproval of the bill in its present form.

VII Local Rules Study

For several years your Committee has considered the problem posed by local circuit and district court rules, which have proliferated in recent years and many of which appear to be inconsistent with the general rules of practice and procedure. We have reviewed a comprehensive local district court rules index prepared by the Administrative Office which indicates a need for an in-depth study. Because such a study would transcend the work of any one Advisory Committee, your Committee has assumed responsibility for the study and requests that the Chief Justice be authorized to appoint a reporter to the Standing Committee to prepare a plan for the study of local court rules and perhaps to conduct any study approved by the committee. The Advisory Committee on the Federal Rules of Appellate Procedure is currently studying local circuit court rules. Both studies will be coordinated.

Respectfully submitted:

Judge Edward T. Gignoux, Chairman
Judge Carl McGowan
Judge Amalya L. Kearse
Judge James S. Holden
Professor Wade H. McCree
Professor Wayne LaFave
Edward H. Hickey, Esquire
Francis N. Marshall, Esquire

August 20, 1984

APPENDIX A.

AMENDMENTS TO THE

FEDERAL RULES OF CIVIL PROCEDURE

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

TO THE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE:

I have the honor of submitting herewith our Committee's final draft of proposed amendments of Rules 6, 45(d)(2), 52(a), 71A(h), 83; Supplementary Rules B(1), C(3), and E(4)(f) for Certain Admiralty and Maritime Claims; and an amendment to Official Form 18-A, with the recommendation that they be approved and presented to the Judicial Conference for action.

These proposed amendments represent the fruits of almost two years of thorough study in the course of which our Committee has had the benefit of the views of numerous judges, lawyers and other citizens, both by letter and at public hearings in Washington, D. C., and Los Angeles, California, in response to a wide distribution of earlier drafts for criticism and comment.

The proposed changes may be summarized as follows:

Rule 6: The amendment would alleviate some of the hardship experienced under the present provision's allowance of inadequate time for response to motions because of its inclusion of Saturdays, Sundays and legal holidays when the period for response is more than 7 days and because of its failure to allow for weather or other conditions causing the office of the clerk to be inaccessible. The period has been increased from 7 to 11 days and is extended when the clerk's office is inaccessible on the last day of the period. The Birthday of Martin Luther King, Jr., which becomes a legal holiday on the third Monday of January 1986, has also been added to the list of legal holidays mentioned in the rule.

Rule 45(d)(2): The amendment would eliminate anomalous situations occurring under the present provision, which requires a person who resides, is employed or transacts business in a county to travel from one end of the county to the other, but not across county lines, for the taking of a deposition whereas a non-resident may be required to attend either in the county where served or within 40 miles from the place of service. The amendment would

eliminate this discrimination by requiring any person, resident or non-resident, to attend within 100 miles from the place of service, residence, employment or business.

Rule 52(a): The amendment would resolve confusion and conflicts between circuits as to the standard for appellate review of cases based solely on documentary evidence by providing that such cases are to be governed by the "clearly erroneous" standard.

Rule 71A: Various provisions are proposed to insure that in government land condemnation proceedings the efficiency of the "commission" method of determining just compensation will be improved. The principal changes would permit the appointment of alternate commissioners to replace any commissioner who becomes unable to continue during trial and insure that qualified persons will be appointed to serve as commissioners.

Rule 83: The amendments would enhance the local rule-making process (1) by requiring public notice and an opportunity for comment before new local rules are adopted, (2) by authorizing the judicial council of a circuit to abrogate a local rule, and (3) by obligating judges and magistrates not to regulate practice before them (e.g., by "standing orders") inconsistently with federal or local rules. Copies of local rules would be furnished to the judicial council of the circuit and to the Administrative Office rather than to the Supreme Court.

Admiralty Rules B(1), C(3), and E(4)(f): These rules have been amended to insure compliance with principles of due process enunciated in a line of Supreme Court decisions beginning with Sniadach v. Family Finance Corp., 395 U.S. 337 (1969), and developed in Fuentes v. Shevin, 407 U.S. 67 (1972), in view of questions raised by some decisions holding the present provisions to be unconstitutional.

TECHNICAL CHANGES:

The following minor changes have been made in Admiralty Rule B(1) and Form 18-A, for which the Committee does not believe that the notice and comment procedure was necessary:

(1) The last sentence of Form 18-A (Notice to be enclosed with summons and compiaint served by mail) presently requires the person mailing the summons and complaint to acknowledge incorrectly, before the mailing, that the enclosed Notice and Acknowledgment "was served" before mailing. The language is therefore changed to read "will have been mailed."

(2) The word "manner" in the third line of the Acknowledgment, which is a typographical error, has been changed to "matter."

(3) The word "complaint" in Admiralty Rule B(1), line 6, has been changed to "process" in order to eliminate a requirement for additional review of the complaint and affidavit when a garnishee is added.

We believe that the attached amendments, if adopted, will serve to improve procedural efficiency in the administration of justice by our federal courts.

We are not now seeking approval of proposed amendments of Rules 68 and 5 that were distributed in August 1983 for public comment because we have prepared a redraft of those proposals in response to public comments and now desire to obtain public reaction to our Committee's redraft. Although the earlier draft received substantial favorable support as a means of reducing litigation delay and expense, it was also opposed, mainly on the grounds that (1) it might violate the Rules Enabling Act, 28 U.S.C. §2072, by providing for shifting of attorneys' fees; (2) it might tend to weaken Congress' policy expressed in various statutes authorizing the award of attorneys' fees to prevailing parties in certain types of actions; and (3) it might inhibit the prosecution of civil litigation by impecunious and contingent-fee plaintiffs unable to finance down-side risks posed by an offer. We believe that our redraft, a copy of which will be forwarded to you shortly, with our request that it be distributed for public comment, meets these objections.

Respectfully submitted,

Walter R. Mansfield
Chairman, Advisory Committee on Civil Rules

July 18, 1984

PROPOSED AMENDMENTS
TO THE
FEDERAL RULES OF CIVIL PROCEDURE*

RULE 6. TIME

(a) COMPUTATION. In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, or, when the act to be done is the filing of a paper in court, a day on which weather or other conditions have made the office of the clerk of the district court inaccessible, in which event the period runs until the end of the next day which is not ~~a Saturday, a Sunday, or a legal holiday~~ one of the aforementioned days. When the period of time prescribed or allowed is less than ~~7~~ 11 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation. As used in this rule and in Rule 77(c), "legal holiday" includes New Year's Day, Birthday of Martin Luther King, Jr., Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day,

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

Christmas Day, and any other day appointed as a holiday by the President or the Congress of the United States, or by the state in which the district court is held.

* * *

COMMITTEE NOTE

Rule 6(a) is amended to acknowledge that weather conditions or other events may render the clerk's office inaccessible one or more days. Parties who are obliged to file something with the court during that period should not be penalized if they cannot do so. The amendment conforms to changes made in Federal Rule of Criminal Procedure 45(a), effective August 1, 1982.

The Rule also is amended to extend the exclusion of intermediate Saturdays, Sundays, and legal holidays to the computation of time periods less than 11 days. Under the current version of the Rule, parties bringing motions under rules with 10-day periods could have as few as 5 working days to prepare their motions. This hardship would be especially acute in the case of Rules 50(b) and (c)(2), 52(b), and 59(b), (d), and (e), which may not be enlarged at the discretion of the court. See Rule 6(b). If the exclusion of Saturdays, Sundays, and legal holidays will operate to cause excessive delay in urgent cases, the delay can be obviated by applying to the court to shorten the time. See Rule 6(b).

The Birthday of Martin Luther King, Jr., which becomes a legal holiday effective in 1986, has been added to the list of legal holidays enumerated in the Rule.

RULE 45. SUBPOENA

* * *

(d) SUBPOENA FOR TAKING DEPOSITIONS; PLACE OF EXAMINATION.

* * *

(2) A ~~resident of the district in which the deposition is to be taken may be required to attend an examination only in the county wherein he resides or is employed or transacts his business in person, or at such other convenient place as is fixed by an order of court.~~ A ~~nonresident of the district may be required to attend only in the~~

~~county wherein he is served with a subpoena, or within 40 miles from the place of service, or at such other convenient place as is fixed by an order of court.~~ A person to whom a subpoena for the taking of a desposition is directed may be required to attend at any place within 100 miles from the place where that person resides, is employed or transacts business in person, or is served, or at such other convenient place as is fixed by an order of court.

The clerk of the district in which the deposition is to be taken shall issue a subpoena requiring the attendance of the witness. The subpoena may be served in the same locations with reference to the place of deposition as those specified in subdivision (e) of this rule with reference to the place of a hearing or trial.

* * *

COMMITTEE NOTE

Present Rule 45(d)(2) has two sentences setting forth the territorial scope of deposition subpoenas. The first sentence is directed to depositions taken in the judicial district in which the deponent resides; the second sentence addresses situations in which the deponent is not a resident of the district in which the deposition is to take place. The Rule, as currently constituted, creates anomalous situations that often cause logistical problems in conducting litigation.

The first sentence of the present Rule states that a deponent may be required to attend only in the county wherein that person resides or is employed or transacts business in person, that is, where the person lives or works. Under this provision a deponent can be compelled, without court order, to travel from one end of that person's home county to the other, no matter how far that may be. The second sentence of the Rule is somewhat more flexible, stating that someone who does not reside in the district in which the deposition is to be taken can be required to attend in the county where the person is served with the subpoena, or within 40 miles from the place of service.

Under today's conditions there is no sound reason for distinguishing between residents of the district or county in which a deposition is to be taken and non-residents, and the Rule is amended to provide that any person may be subpoenaed to attend a deposition within a specified radius from that person's residence, place of business, or where the person was served. The 40-mile radius has been increased to 100 miles.

The second sentence has been added to make Rule 45(d)(2) parallel Rule 45(e)(1) with regard to service of subpoenas for depositions, hearings, and trials. It also fills the gap in Rule 45(d)(2) for service of a subpoena outside the district for the taking of a deposition noted by the court in In re Guthrie, __F. 2d __ (4th Cir. 1984).

RULE 52. FINDINGS BY THE COURT

(a) EFFECT. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and

conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

* * *

COMMITTEE NOTE

Rule 52(a) has been amended (1) to avoid continued confusion and conflicts among the circuits as to the standard of appellate review of findings of fact by the court, (2) to eliminate the disparity between the standard of review as literally stated in Rule 52(a) and the practice of some courts of appeals, and (3) to promote nationwide uniformity. See Note, Rule52(a): Appellate Review of Findings of Fact Based on Documentary or Undisputed Evidence, 49 Va. L. Rev. 506, 536 (1963).

Some courts of appeal have stated that when a trial court's findings do not rest on demeanor evidence and evaluation of a witness' credibility, there is no reason to defer to the trial court's findings and the appellate court more readily can find them to be clearly erroneous. See, e.g., Marcum v. United States, 621 F.2d 142, 144-45 (5th Cir. 1980). Others go further, holding that appellate review may be had without application of the "clearly erroneous" test since the appellate court is in as good a position as the trial court to review a purely documentary record. See, e.g., Atari, Inc. v. North American Philips Consumer Electronics Corp., 672 F.2d 607, 614 (7th Cir.), cert. denied, 459 U.S. 880 (1982); Lydle v. United States, 635 F.2d 763, 765, n. 1 (6th Cir. 1981); Swanson v. Baker Indus., Inc., 615 F.2d 479, 483 (8th Cir. 1980); Taylor v. Lombard, 606 F.2d 371, 372 (2d Cir. 1979), cert. denied, 445 U.S. 946 (1980); Jack Kahn Music Co. v. Baldwin Piano & Organ Co., 604 F.2d 755, 758 (2d Cir. 1979); John R. Thompson Co. v. United States, 477 F.2d 164, 167 (7th Cir. 1973).

A third group has adopted the view that the "clearly erroneous" rule applies in all nonjury cases even when findings are based solely on documentary evidence or on inferences from undisputed facts. See, e.g., Maxwell v. Sumner, 673 F.2d 1031, 1036 (9th Cir.), cert. denied, 459 U. S. 976 (1982); United States v. Texas Education Agency, 647 F.2d 504, 506-07 (5th Cir. 1981), cert. denied, 454 U. S. 1143 (1982); Constructora Maza, Inc. v. Banco de Ponce, 616 F.2d 573, 576 (1st Cir. 1980); In re Sierra Trading Corp., 482 F.2d 333, 337 (10th Cir. 1973); Case v. Morrisette, 475 F.2d 1300, 1306-07 (D.C. Cir. 1973).

The commentators also disagree as to the proper interpretation of the Rule. Compare Wright, The Doubtful Omniscience of Appellate Courts, 41 Minn. L. Rev. 751, 769-70 (1957) (language and intent of Rule support view that "clearly erroneous" test should apply to all forms of evidence), and 9

C. Wright & A. Miller, Federal Practice and Procedure: Civil §2587, at 740 (1971) (language of the Rule is clear), with 5A J. Moore, Federal Practice ¶52.04, 2687-88 (2d ed. 1982) (Rule as written supports broader review of findings based on non-demeanor testimony).

The Supreme Court has not clearly resolved the issue. See, Bose Corporation v. Consumers Union of United States, Inc., ___ L. Ed. __, 52 U.S.L.W. 4513, 4517 (May 1, 1984); Pullman Standard v. Swint, 456 U.S. 273, 293 (1982); United States v. General Motors Corp., 384 U.S. 127, 141 n. 16 (1966); United States v. United States Gypsum Co., 333 U.S. 364, 394-96 (1948).

The principal argument advanced in favor of a more searching appellate review of findings by the district court based solely on documentary evidence is that the rationale of Rule 52(a) does not apply when the findings do not rest on the trial court's assessment of credibility of the witnesses but on an evaluation of documentary proof and the drawing of inferences from it, thus eliminating the need for any special deference to the trial court's findings. These considerations are outweighed by the public interest in the stability and judicial economy that would be promoted by recognizing that the trial court, not the appellate tribunal, should be the finder of the facts. To permit courts of appeals to share more actively in the fact-finding function would tend to undermine the legitimacy of the district courts in the eyes of litigants, multiply appeals by encouraging appellate retrial of some factual issues, and needlessly reallocate judicial authority.

RULE 71A. CONDEMNATION OF PROPERTY

* * *

(h) TRIAL. If the action involves the exercise of the power of eminent domain under the law of the United States, any tribunal specially constituted by an Act of Congress governing the case for the trial of the issue of just compensation shall be the tribunal for the determination of that issue; but if there is no such specially constituted tribunal any party may have a trial by jury of the issue of just compensation by filing a demand therefor within the time allowed for answer or within such further time as the court may fix,

unless the court in its discretion orders that, because of the character, location, or quantity of the property to be condemned, or for other reasons in the interest of justice, the issue of compensation shall be determined by a commission of three persons appointed by it.

In the event that a commission is appointed the court may direct that not more than two additional persons serve as alternate commissioners to hear the case and replace commissioners who, prior to the time when a decision is filed, are found by the court to be unable or disqualified to perform their duties. An alternate who does not replace a regular commissioner shall be discharged after the commission renders its final decision. Before appointing the members of the commission and alternates the court shall advise the parties of the identity and qualifications of each prospective commissioner and alternate and may permit the parties to examine each such designee. The parties shall not be permitted or required by the court to suggest nominess. Each party shall have the right to object for valid cause to the appointment of any person as a commissioner or alternate. If a commission is appointed it shall have the powers of a master provided in subdivision (c) of Rule 53 and proceedings before it shall be governed by the provisions of paragraphs (1) and (2) of subdivision (d) of Rule 53. Its action and report shall be determined by a majority and its findings and report

shall have the effect, and be dealt with by the court in accordance with the practice, prescribed in paragraph (2) of subdivision (e) of Rule 53. Trial of all issues shall otherwise be by the court.

* * *

COMMITTEE NOTE

Rule 71A(h) provides that except when Congress has provided otherwise, the issue of just compensation in a condemnation case may be tried by a jury if one of the parties so demands, unless the court in its discretion orders the issue determined by a commission of three persons. In 1980, the Comptroller General of the United States in a Report to Congress recommended that use of the commission procedure should be encouraged in order to improve and expedite the trial of condemnation cases. The Report noted that long delays were being caused in many districts by such factors as crowded dockets, the precedence given criminal cases, the low priority accorded condemnation matters, and the high turnover of Assistant United States Attorneys. The Report concluded that revising Rule 71A to make the use of the commission procedure more attractive might alleviate the situation.

Accordingly, Rule 71A(h) is being amended in a number of respects designed to assure the quality and utility of a Rule 71A commission. First, the amended Rule will give the court discretion to appoint, in addition to the three members of a commission, up to two additional persons as alternate commissioners who would hear the case and be avaliable, at any time up to the filing of the decision by the three-member commission, to replace any commissioner who becomes unable or disqualified to continue. Prior to replacing a commissioner an alternate would not be present at, or participate in, the commission's deliberations.

The discretion to appoint alternate commissioners can be particularly useful in protracted cases, avoiding expensive retrials that have been required in some cases because of the death or disability of a commissioner. Second, the amended Rule requires the court, before appointment, to advise the parties of the identity and qualifications of each prospective commissioner and alternate. The court may then authorize the examination of prospective appointees by the parties and each party has the right to challenge for cause. The objective is to insure that unbiased and competent commissioners are appointed.

The amended Rule does not prescribe a qualification standard for appointment to a commission, although it is understood that only persons

possessing background and ability to appraise real estate valuation testimony and to award fair and just compensation on the basis thereof would be appointed. In most situations the chairperson should be a lawyer and all members should have some background qualifying them to weigh proof of value in the real estate field and, when possible, in the particular real estate market embracing the land in question.

The amended Rule should give litigants greater confidence in the commission procedure by affording them certain rights to participate in the appointment of commission members that are roughly comparable to the practice with regard to jury selection. This is accomplished by giving the court permission to allow the parties to examine prospective comissioners and by recognizing the right of each party to object to the appointment of any person for cause.

RULE 83. RULES BY DISTRICT COURTS

Each district court by action of a majority of the judges thereof may from time to time, after giving appropriate public notice and an opportunity to comment, make and amend rules governing its practice not inconsistent with these rules. A local rule so adopted shall take effect upon the date specified by the district court and shall remain in effect unless amended by the district court or abrogated by the judicial council of the circuit in which the district is located. Copies of rules and amendments so made by any district court shall upon their promulgation be furnished to the ~~Supreme Court of the United States~~ judicial council and the Administrative Office of the United States Courts and be made available to the public. In all cases not provided for by rule, the district ~~courts~~ judges and magistrates may regulate their practice in any manner not inconsistent with these rules or those of the district in which they act.

COMMITTEE NOTE

Rule 83, which has not been amended since the Federal Rules were promulgated in 1938, permits each district to adopt local rules not inconsistent with the Federal Rules by a majority of the judges. The only other requirement is that copies be furnished to the Supreme Court.

The widespread adoption of local rules and the modest procedural prerequisites for their promulgation have led many commentators to question the soundness of the process as well as the validity of some rules. See 12 Wright & Miller, Federal Practice and Procedure: Civil §3152, at 217 (1973); Caballero, Is There an Over-Exercise of Local Rule-Making Powers by the United States District Courts?, 24 Fed. Bar News 325 (1977). Although the desirability of local rules for promoting uniform practice within a district is widely accepted, several commentators also have suggested reforms to increase the quality, simplicity, and uniformity of the local rules. See, Note, Rule 83 and the Local Federal Rules, 67 Colum. L. Rev. 1251 (1967), and Comment, The Local Rules of Civil Procedure in the Federal District Courts--A Survey, 1966 Duke L.J. 1011.

The amended Rule attempts, without impairing the procedural validity of existing local rules, to enhance the local rulemaking process by requiring appropriate public notice of proposed rules and an opportunity to comment on them. Although some district courts apparently consult the local bar before promulgating rules, many do not, which has led to criticism of a process that has district judges consulting only with each other. See 12 *Wright & Miller, supra, §3152, at 217; Blair, The New Local Rules for* Federal Practice in Iowa, 23 Drake L. Rev. 517 (1974). The new language subjects local rulemaking to scrutiny similar to that accompanying the Federal Rules, administrative rulemaking, and legislation. It attempts to assure that the expert advice of practitioners and scholars is made available to the district court before local rules are promulgated. See Weinstein, Reform of Court Rule-Making Procedures 84-87, 127-37, 151 (1977).

The amended Rule does not detail the procedure for giving notice and an opportunity to be heard since conditions vary from district to district. Thus, there is no explicit requirement for a public hearing, although a district may consider that procedure appropriate in all or some rulemaking situations. See generally, Weinstein, supra, at 117-37, 151. The new Rule does not foreclose any other form of consultation. For example, it can be accomplished through the mechanism of an "Advisory Committee" similar to that employed by the Supreme Court in connection with the Federal Rules themselves.

The amended Rule provides that a local rule will take effect upon the date specified by the district court and will remain in effect unless amended by the district court or abrogated by the judicial council. The effectiveness of a local rule should not be deferred until approved by the judicial council because that might unduly delay promulgation of a local rule that should become effective immediately, especially since some councils do not meet frequently. Similarly, it was thought that to delay a local rule's effectiveness for a fixed period of time would be arbitrary and that to require the judicial council to abrogate a local rule within a specified time would be inconsistent with its power under 28 U.S.C. §332 (1976) to nullify a local rule at any time. The expectation is that the judicial council will examine all local rules, including those currently in effect, with an eye toward determining whether they are valid and consistent with the Federal Rules, promote inter-district uniformity and efficiency, and do not undermine the basic objectives of the Federal Rules.

The amended Rule requires copies of local rules to be sent upon their promulgation to the judicial council and the Administrative Office of the United States Courts rather than to the Supreme Court. The Supreme Court was the appropriate filing place in 1938, when Rule 83 originally was promulgated, but the establishment of the Administrative Office makes it a more logical place to develop a centralized file of local rules. This procedure is consistent with both the Criminal and the Appellate Rules. See Fed. R. Crim. P. 57(a); Fed. R. App. P. 47. The Administrative Office also will be able to provide improved utilization of the file because of its recent development of a Local Rules Index.

The practice pursued by some judges of issuing standing orders has been controversial, particularly among members of the practicing bar. The last sentence in Rule 83 has been amended to make certain that standing orders are not inconsistent with the Federal Rules or any local district court rules. Beyond that, it is hoped that each district will adopt procedures, perhaps by local rule, for promulgating and reviewing single-judge standing orders.

PROPOSED AMENDMENTS TO THE SUPPLEMENTAL RULES FOR CERTAIN ADMIRALTY AND MARITIME CLAIMS

Committee's Explanatory Statement

Since their promulgation in 1966, the Supplemental Rules for Certain Admiralty and Maritime Claims have preserved the special procedures of arrest and attachment unique to admiralty law. In recent years, however, these Rules have been challenged as violating the principles of procedural due process enunciated in the United States Supreme Court's decision in Sniadach v. Family Finance Corp., 395 U.S. 337 (1969), and later developed in Fuentes v. Shevin, 407 U. S. 67 (1972); Mitchell v. W. T. Grant Co., 416 U. S. 600 (1974); and North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U. S. 601 (1975). These Supreme Court decisions provide five basic criteria for a constitutional seizure of property: (1) effective notice to persons having interests in the property seized, (2) judicial review prior to attachment, (3) avoidance of conclusory allegations in the complaint, (4) security posted by the plaintiff to protect the owner of the property under attachment, and (5) a meaningful and timely hearing after attachment.

Several commentators have found the Supplemental Rules lacking on some or all five grounds. E.g., Batiza & Partridge, The Constitutional Challenge to Martime Seizures, 26 Loy. L. Rev. 203 (1980); Morse, The Conflict Between the Supreme Court Admiralty Rules and Sniadach-Fuentes: A Collision Course?, 3 Fla. St. U.L. Rev. 1 (1975). The federal courts have varied in their disposition of challenges to the Supplemental Rules. The Fourth and Fifth Circuits have affirmed the constitutionality of Rule C. Amstar Corp. v. S/S Alexandros T., 664 F.2d 904 (4th Cir. 1981); Merchants National Bank of Mobile v. The Dredge General G. L. Gillespie, 663 F.2d 1338 (5th Cir. 1981), cert. dismised, 456 U.S. 966 (1982). However, a district court in the Ninth Circuit found Rule C unconstitutional. Alyeska Pipeline Service Co. v. The Vessel Bay Ridge, 509 F. Supp. 1115 (D. Alaska 1981), appeal dismissed, 703 F.2d 381 (9th Cir. 1983). Rule B(1) has received similar inconsistent treatment. The Ninth and Eleventh Circuits have upheld its constitutionality. Polar Shipping, Ltd. v. Oriental Shipping Corp., 680 F.2d 627 (9th Cir. 1982); Schiffahartsgesellschaft Leonhardt & Co. v. A. Bottacchi S. A. de Navegacion, 732 F.2d 1543 (11th Cir. 1984). On the other hand, a Washington district court has found it to be constitutionally deficient. Grand Bahama Petroleum Co. v. Canadian Transportation Agencies, Ltd., 450 F. Supp. 447 (W.D. Wash. 1978). The constitutionality of both rules was questioned in Techem Chem Co. v. M/T Choyo Maru, 416 F. Supp. 960 (D. Md. 1976). Thus, there is uncertainty as to whether the current rules prescribe constitutionally sound procedures for guidance of courts and counsel. See generally Note, Due Process in Admiralty Arrest and Attachment, 56 Tex. L. Rev. 1091 (1978).

Due to the controversy and uncertainty that have surrounded the Supplemental Rules, local admiralty bars and the Maritime Law Association of the United States have sought to strengthen the constitutionality of maritime arrest and attachment by encourgaging promulgation of local admiralty rules providing for prompt post-seizure hearings. Some districts also adopted rules calling for judicial scrutiny of applications for arrest or attachment. Nonetheless, the result has been a lack of uniformity and continued concern over the constitutionality of the existing practice. The amendments that follow are intended to provide rules that meet the requirements prescribed by the Supreme Court and to develop uniformity in the admiralty practice.

RULE B. ATTACHMENT AND GARNISHMENT: SPECIAL PROVISIONS

(1) WHEN AVAILABLE; COMPLAINT, AFFIDAVIT, JUDICIAL AUTHORIZATION, AND PROCESS. With respect to any admiralty or maritime claim in personam a verified complaint may contain a prayer for process to attach the defendant's goods and chattels, or credits and effects in the hands of garnishees to be named in the ~~complaint~~ process to the amount sued for, if the defendant shall not be found within the district. Such a complaint shall be accompanied by an affidavit signed by the plaintiff or his attorney that, to the affiant's knowledge, or to the best of his information and belief, the defendant cannot be found within the district. The verified complaint and affidavit shall be reviewed by the court and, if the conditions set forth in this rule appear to exist, an order so stating and authorizing process of attachment and garnishment shall issue. ~~When a verified complaint is supported by such an affidavit the clerk shall forthwith issue a summons and process of attachment and garnishment.~~ Supplemental process enforcing the court's order may be issued by the clerk upon application without further order of the court. If the plaintiff or his attorney certifies that exigent

circumstances make review by the court impracticable, the clerk shall issue a summons and process of attachment and garnishment and the plaintiff shall have the burden on a post-attachment hearing under Rule E(4)(f) to show that exigent circumstances existed. In addition, or in the alternative, the plaintiff may, pursuant to Rule 4(e), invoke the remedies provided by state law for attachment and garnishment or similar seizure of the defendant's property. Except for Rule E(8) these Supplemental Rules do not apply to state remedies so invoked.

* * *

COMMITTEE NOTE

Rule B(1) has been amended to provide for judical scrutiny before the issuance of any attachment or garnishment process. Its purpose is to eliminate doubts as to whether the Rule is consistent with the principles of procedural due process enunciated by the Supreme Court in Sniadach v. Family Finance Corp., 395 U. S. 337 (1969); and later developed in Fuentes v. Shevin, 407 U.S. 67 (1972); Mitchell v. W. T. Grant Co., 416 U. S. 600 (1974); and North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U. S. 601 (1975). Such doubts were raised in Grand Bahama Petroleum Co. v. Canadian Transportation Agencies, Ltd., 450 F. Supp. 447 (W.D. Wash. 1978); and Schiffahartsgesellschaft Leonhardt & Co. v. A. Bottacchi S.A. de Navegacion, 552 F. Supp. 771 (S.D. Ga. 1982), which was reversed, 732 F.2d 1543 (11th Cir. 1984). But compare Polar Shipping Ltd. v. Oriental Shipping Corp., 680 F.2d 627 (9th Cir. 1982), in which a majority of the panel upheld the constitutionality of Rule B because of the unique commercial context in which it is invoked. The practice described in Rule B(1) has been adopted in some districts by local rule. E.g., N.D. Calif. Local Rule 603.3; W.D. Wash. Local Admiralty Rule 15(d).

The rule envisions that the order will issue when the plaintiff makes a prima facie showing that he has a maritime claim against the defendant in the amount sued for and the defendant is not present in the district. A simple order with conclusory findings is contemplated. The reference to review by the "court" is broad enough to embrace review by a magistrate as well as by a district judge.

The new provision recognizes that in some situations, such as when the judge is unavailable and the ship is about to depart from the jurisdiction, it will be impracticable, if not impossible, to secure the judicial review contemplated by Rule B(1). When "exigent circumstances" exist, the rule enables the plaintiff to secure the issuance of the summons and process of attachment and garnishment, subject to a later showing that the necessary circumstances actually existed. This provision is intended to provide a safety valve without undermining the requirement of pre-attachment scrutiny. Thus, every effort to secure judicial review, including conducting a hearing by telephone, should be pursued before resorting to the exigent-circumstances procedure.

Rule B(1) also has been amended so that the garnishee shall be named in the "process" rather than in the "complaint." This should solve the problem presented in Filia Compania Naviera, S.A. v. Petroship, S.A., 1983 A.M.C. 1 (S.D.N.Y. 1982), and eliminate any need for an additional judicial review of the complaint and affidavit when a garnishee is added.

RULE C. ACTION IN REM: SPECIAL PROVISIONS

* * *

(3) JUDICIAL AUTHORIZATION AND PROCESS. Except in actions by the United States for forfeitures for federal statutory violations, the verified complaint and any supporting papers shall be reviewed by the court and, if the conditions for an action in rem appear to exist, an order so stating and authorizing a warrant ~~Upon the filing of the complaint the clerk shall forthwith issue a warrant~~ for the arrest of the vessel or other property that is the subject of the action shall issue and be delivered to the clerk who shall prepare the warrant and deliver it to the marshal for service. If the property that is the subject of the action consists in whole or in part of freight, or the proceeds of property sold, or other intangible property, the clerk shall issue a summons directing any person having control of the funds to show cause why they should not be paid into court to abide the judgment. Supplemental process

enforcing the court's order may be issued by the clerk upon application without further order of the court. If the plaintiff or his attorney certifies that exigent circumstances make review by the court impracticable, the clerk shall issue a summons and warrant for the arrest and the plaintiff shall have the burden on a post-arrest hearing under Rule E(4)(f) to show that exigent circumstances existed. In actions by the United States for forfeitures for federal statutory violations the clerk, upon filing of the complaint, shall forthwith issue a summons and warrant for the arrest of the vessel or other property without requiring a certification of exigent circumstances.

* * *

COMMITTEE NOTE

Rule C(3) has been amended to provide for judicial scrutiny before the issuance of any warrant of arrest. Its purpose is to eliminate any doubt as to the rule's constitutionality under the Sniadach line of cases. Sniadach v. Family Finance Corp., 395 U.S. 337 (1969); Fuentes v. Shevin, 407 U.S. 67 (1972); Mitchell v. W. T. Grant Co., 416 U. S. 600 (1974); and North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U. S. 601 (1975). This was thought desirable even though both the Fourth and the Fifth Circuits have upheld the existing rule. Amstar Corp. v. S/S Alexandros T., 664 F.2d 904 (4th Cir. 1981); Merchants National Bank of Mobile v. The Dredge General G. L. Gillespie, 663 F.2d 1338 (5th Cir. 1981), cert. dismissed, 456 U. S. 966 (1982). A contrary view was taken by Judge Tate in the Merchants National Bank case and by the district court in Alyeska Pipeline Service Co. v. The Vessel Bay Ridge, 509 F. Supp. 1115 (D. Alaska 1981), appeal dismissed, 703 F.2d 381 (9th Cir. 1983).

The rule envisions that the order will issue upon a prima facie showing that the plaintiff has an action in rem against the defendant in the amount sued for and that the property is within the district. A simple order with conclusory findings is contemplated. The reference to review by the "court" is broad enough to embrace a magistrate as well as a district judge.

The new provision recognizes that in some situations, such as when a judge is unavailable and the vessel is about to depart from the jurisdiction, it will be impracticable, if not impossible, to secure the judicial review contemplated by Rule C(3). When "exigent circumstances" exist, the rule enables the plaintiff to secure the issuance of the summons and warrant of arrest, subject to a later showing that the necessary circumstances actually existed. This provision is intended to provide a safety valve without undermining the requirement of pre-arrest scrutiny. Thus, every effort to secure judicial review, including conducting a hearing by telephone, should be pursued before invoking the exigent-circumstances procedure.

The foregoing requirements for prior court review or proof of exigent circumstances do not apply to actions by the United States for forfeitures for federal statutory violations. In such actions a prompt hearing is not constitutionally required, United States v. Eight Thousand Eight Hundred and Fifty Dollars, 103 S.Ct. 2005 (1983); Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974), and could prejudice the government in its prosecution of the claimants as defendants in parallel criminal proceedings since the forfeiture hearing could be misused by the defendants to obtain by way of civil discovery information to which they would not otherwise be entitled and subject the government and the courts to the unnecessary burden and expense of two hearings rather than one.

RULE E. ACTIONS IN REM AND QUASI IN REM: GENERAL PROVISIONS

* * *

(4) EXECUTION OF PROCESS; MARSHAL'S RETURN; CUSTODY OF PROPERTY; PROCEDURES FOR RELEASE.

* * *

(f) PROCEDURE FOR RELEASE FROM ARREST OR ATTACHMENT. Whenever property is arrested or attached, any person claiming an interest in it shall be entitled to a prompt hearing at which the plaintiff shall be required to show why the arrest or attachment should not be vacated or other relief granted consistent with these rules. This subdivision shall have no application to suits for seamen's wages when process is issued upon a

certification of sufficient cause filed pursuant to Title 46, U.S.C. §§603 and 604 or to actions by the United States for forfeitures for violation of any statute of the United States.

* * *

COMMITTEE NOTE

Rule E(4)(f) makes available the type of prompt post-seizure hearing in proceedings under Supplemental Rules B and C that the Supreme Court has called for in a number of cases arising in other contexts. See North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U. S. 601 (1975); Mitchell v. W. T. Grant Co., 416 U.S. 600 (1974). Although post-attachment and post-arrest hearings always have been available on motion, an explicit statement emphasizing promptness and elaborating the procedure has been lacking in the Supplemental Rules. Rule E(4)(f) is designed to satisfy the constitutional requirement of due process by guaranteeing to the shipowner a prompt post-seizure hearing at which he can attack the complaint, the arrest, the security demanded, or any other alleged deficiency in the proceedings. The amendment also is intended to eliminate the previously disparate treatment under local rules of defendants whose property has been seized pursuant to Supplemental Rules B and C.

The new Rule E(4)(f) is based on a proposal by the Maritime Law Association of the United States and on local admiralty rules in the Eastern, Northern, and Southern Districts of New York. E.D.N.Y. Local Rule 13; N.D.N.Y. Local Rule 13; S.D.N.Y. Local Rule 12. Similar provisions have been adopted by other maritime districts. E.g., N.D. Calif. Local Rule 603.4; W.D. La. Local Admiralty Rule 21. Rule E(4)(f) will provide uniformity in practice and reduce constitutional uncertainties.

Rule E(4)(f) is triggered by the defendant or any other person with an interest in the property seized. Upon an oral or written application similar to that used in seeking a temporary restraining order, see Rule 65(b), the court is required to hold a hearing as promptly as possible to determine whether to allow the arrest or attachment to stand. The plaintiff has the burden of showing why the seizure should not be vacated. The hearing also may determine the amount of security to be granted or the propriety of imposing counter-security to protect the defendant from an improper seizure.

The foregoing requirements for prior court review or proof of exigent circumstances do not apply to actions by the United States for forfeitures for federal statutory violations. In such actions a prompt hearing is not

constitutionally required, United States v. Eight Thousand Eight Hundred and Fifty Dollars, 103 S.Ct. 2005 (1983); Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974), and could prejudice the government in its prosecution of the claimants as defendants in parallel criminal proceedings since the forfeiture hearing could be misused by the defendants to obtain by way of civil discovery information to which they would not otherwise be entitled and subject the government and the courts to the unnecessary burden and expense of two hearings rather than one.

Form 18-A.

NOTICE AND ACKNOWLEDGMENT FOR SERVICE BY MAIL

United States District Court for the Southern District of New York

Civil Action, File Number_____

A. B., Plaintiff	)	Notice and Acknowledgment of Receipt of Summons and Compiaint
v.	)	
C. D., Defendant	)	

NOTICE

To: (insert the name and address of the person to be served.)

The enclosed summons and complaint are served pursuant to Rule 4(c)(2)(C)(ii) of the Federal Rules of Civil Procedure.

You must complete the acknowledgment part of this form and return one copy of the completed form to the sender within 20 days.

You must sign and date the acknowledgment. If you are served on behalf of a corporation, unincorporated association (including a partnership), or other entity, you must indicate under your signature your relationship to that entity. If you are served on behalf of another person and you are authorized to receive process, you must indicate under your signature your authority.

If you do not complete and return the form to the sender within 20 days, you (or the party on whose behalf you are being served) may be required to pay any expenses incurred in serving a summons and complaint in any other manner permitted by law.

If you do complete and return this form, you (or the party on whose behalf you are being served) must answer the complaint within 20 days. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

I declare, under penalty of perjury, that this Notice and Acknowledgment of Receipt of Summons and Complaint was will have been mailed on (insert date).

_____
Signature

_____
Date of Signature

ACKNOWLEDGMENT OF RECEIPT OF
SUMMONS AND COMPLAINT

I declare, under penalty of perjury, that I received a copy of the summons and of the complaint in the above-captioned ~~manner~~ matter at (insert address).

_____
Signature

_____
Relationship to Entity/
Authority to Receive Service of Process

_____
Date of Signature

APPENDIX B.

AMENDMENTS TO THE

FEDERAL RULES OF CRIMINAL PROCEDURE

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

TO THE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE:

On behalf of the Advisory Committee on Criminal Rules, I transmit herewith proposals to amend Rules 6, 11, 12.1, 12.2, 35, 45, 49 and 57 of the Federal Rules of Criminal Procedure.

Except where otherwise specifically noted, these proposed amendments were circulated to the bench and bar in September 1983, and were the subject of public hearings in Washington, D. C., and San Francisco, California, on February 14, 1984. Transcripts of the public hearings have been made available to all members of our Committee, and all written comments from interested persons have been similarly reviewed by the Committee.

At the meeting of the Advisory Committee on June 18, 1984, the aforementioned rules were approved either as circulated or with changes as noted herein. Certain other proposals also circulated to the bench and bar were, upon reconsideration by the Advisory Committee, not approved at this time.

I. PROPOSALS RECOMMENDED FOR APPROVAL

Rule 6

Rule 6(e)(3)(A)(ii). The proposed amendment was adopted as circulated.

Rule 6(e)(3)(B). This proposed amendment, not circulated, was added by the Committee in response to expressions of concern that, especially as to disclosure to state officials, the persons receiving the information might be unaware of the grand jury secrecy obligation under Rule 6. The amendment requires the attorney for the government to advise of that obligation and certify that he has done so.

Rule 6(e)(3)(C). This proposed amendment was adopted as circulated. Additions have been made to the Committee Note emphasizing the cautious approach contemplated here on behalf of the Justice Department and the supervising district court.

Rule 11

Rule 11(c)(1). The proposed amendment was adopted as circulated.

Rule 12.1

Rule 12.1(f). The proposed amendment was adopted as circulated.

Rule 12.2

Rule 12.2(e). The proposed amendment was adopted as circulated.

Rule 35

Rule 35(b). The proposed amendment was adopted as circulated. The Committee Note has been revised to reflect a split of authority on the jurisdictional issue.

Rule 45

Rule 45(a). This proposal, approved by the Committee, has not been circulated to bench and bar. We believe circulation is unnecessary, as the intention is to conform this rule to Fed.R.Civ.P. 6(a), including the pending amendment. The changes are (1) lengthening the period of time from 7 to 11 days and (2) adding the Birthday of Martin Luther King, Jr. to the list of holidays.

Rule 49

Rule 49(e). This proposed amendment was adopted with a modification recognizing that a United States magistrate may also receive the dangerous offender notice when the chief judge is the presiding judge in the case.

Rule 57

Rule 57 has been reformulated to conform to Fed.R.Civ.P. 83, including the pending amendments thereto, in order to emphasize that the procedure for adoption of local rules is the same for both criminal and civil rules. This amendment has not been circulated to the bench and bar, but we believe circulation is unnecessary in light of the recent circulation of similar language by the civil rules committee.

II. OTHER PROPOSALS CIRCULATED TO BENCH AND BAR

Rule 6

Rule 6(a). The proposed amendment to the rule which would have provided for selection of alternate grand jurors was not adopted. The

Advisory Committee was not convinced there was a need for such a provision.

Rule 29

Rule 29(c). The proposed amendment allowing reservation of decision on a motion for judgment of acquittal made at the close of the government's case was not adopted. The Advisory Committee was not convinced there was suffficient need for such a change to protect the government's right to appeal.

Rule 30

The proposed amendment, which would allow the court to instruct the jury either before or after final arguments, has been tabled pending circulation of a similar proposal by the civil rules committee.

III. RULES 9(a) FOR SECTION 2254 CASES AND SECTION 2255 PROCEEDINGS IN THE DISTRICT COURTS

Upon the advice of the Standing Committee, the proposals to amend Rules 9(a) of the Rules Governing Section 2254 Cases and the Rules Governing Section 2255 Proceedings in the District Courts, which were originally circulated, have been withdrawn. A new proposal will be submitted for circulation to the bench and bar.

Respectfully submitted,

Walter E. Hoffman
Chairman, Advisory Committee on
Criminal Rules

July 18, 1984

PROPOSED AMENDMENTS
TO THE
FEDERAL RULES OF CRIMINAL PROCEDURE*

Rule 6. The Grand Jury

* * *

(e) RECORDING AND DISCLOSURE OF PROCEEDINGS.

* * *

(3) Exceptions.

(A) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than its deliberations and the vote of any grand juror, may be made to —

(i) an attorney for the government for use in the performance of such attorney's duty; and

(ii) such government personnel (including personnel of a state or subdivision of a state) as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law.

(B) Any person to whom matters are disclosed under

---

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

subparagraph (A)(ii) of this paragraph shall not utilize that grand jury material for any purpose other than assisting the attorney for the government in the performance of such attorney's duty to enforce federal criminal law. An attorney for the government shall promptly provide the district court, before which was impaneled the grand jury whose material has been so disclosed, with the names of the persons to whom such disclosure has been made, and shall certify that he has advised such persons of their obligation of secrecy under this rule.

(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made —

(i) when so directed by a court preliminarily to or in connection with a judicial proceeding;

(ii) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury; or

(iii) when the disclosure is made by an attorney for the government to another federal grand jury; or

(iv) when permitted by a court at the request of an attorney for the government, upon a showing that

such matters may disclose a violation of state criminal law, to an appropriate official of a state or subdivision of a state for the purpose of enforcing such law.

If the court orders disclosure of matters occurring before the grand jury, the disclosure shall be made in such manner, at such time, and under such conditions as the court may direct.

* * *

COMMITTEE NOTE

Rule 6(e)(3)(A)(ii)

Rule 6(e)(3)(A)(ii) currently provides that an attorney for the government may disclose grand jury information, without prior judicial approval, to other government personnel whose assistance the attorney for the government deems necessary in conducting the grand jury investigation. Courts have differed over whether employees of state and local governments are "government personnel" within the meaning of the rule. Compare In re Miami Federal Grand Jury No. 79-9, 478 F.Supp. 490 (S.D. Fla. 1979), and In re Grand Jury Proceedings, 445 F.Supp. 349 (D.R.I. 1978) (state and local personnel not included); with In re 1979 Grand Jury Proceedings, 479 F.Supp. 93 (E.D.N.Y. 1979) (state and local personnel included). The amendment clarifies the rule to include state and local personnel.

It is clearly desirable that federal and state authorities cooperate, as they often do, in organized crime and racketeering investigations, in public corruption and major fraud cases, and in various other situations where federal and state criminal jurisdictions overlap. Because of such cooperation, government attorneys in complex grand jury investigations frequently find it necessary to enlist the help of a team of government agents. While the agents are usually federal personnel, it is not uncommon in certain types of investigations that federal prosecutors wish to obtain the assistance of state law enforcement personnel, which could be uniquely beneficial. The amendment permits disclosure to those personnel in the circumstances stated.

It must be emphasized that the disclosure permitted is limited. The disclosure under this subdivision is permissible only in connection with the attorney for the government's "duty to enforce federal criminal law" and only to those personnel "deemed necessary . . . to assist" in the performance of that duty. Under subdivision (e)(3)(B), the material disclosed may not be used for any other purpose, and the names of persons to whom disclosure is made must be promptly provided to the court.

Rule 6(e)(3)(B)

The amendment to subdivision (e)(3)(B) imposes upon the attorney for the government the responsibility to certify to the district court that he has advised those persons to whom disclosure was made under subdivision (e)(3)(A)(ii) of their obligation of secrecy under Rule 6. Especially with the amendment of subdivision (e)(3)(A)(ii) to include personnel of a state or subdivision of a state, who otherwise would likely be unaware of this obligation of secrecy, the giving of such advice is an important step in ensuring against inadvertent breach of grand jury secrecy. But because not all federal government personnel will otherwise know of this obligation, the giving of the advice and certification thereof is required as to all persons receiving disclosure under subdivision (e)(3)(A)(ii).

Rule 6(e)(3)(C)

It sometimes happens that during a federal grand jury investigation evidence will be developed tending to show a violation of state law. When this occurs, it is very frequently the case that this evidence cannot be communicated to the appropriate state officials for further investigation. For one thing, any state officials who might seek this information must show particularized need. Illinois v. Abbott & Associates, 103 S.Ct. 1356 (1983). For another, and more significant, it is often the case that the information relates to a state crime outside the context of any pending or even contemplated state judicial proceeding, so that the "preliminarily to or in connection with a judicial proceeding" requirement of subdivision (e)(3)(C)(i) cannot be met.

This inability lawfully to disclose evidence of a state criminal violation — evidence legitimately obtained by the grand jury — constitutes an unreasonable barrier to the effective enforcement of our two-tiered system of criminal laws. It would be removed by new subdivision (e)(3)(C)(iv), which would allow a court to permit disclosure to a state or local official for the purpose of enforcing state law when an attorney for the government so requests and makes the requisite showing.

The federal court has been given control over any disclosure which is authorized, for subdivision (e)(3)(C) presently states that "the disclosure shall be made in such manner, at such time, and under such conditions as

the court may direct." The Committee is advised that it will be the policy of the Department of Justice under this amendment to seek such disclosure only upon approval of the Assistant Attorney General in charge of the Criminal Division. There is no intention, by virtue of this amendment, to have federal grand juries act as an arm of the state.

Rule 11. Pleas

* * *

(c) ADVICE TO DEFENDANT. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform him of, and determine that he understands, the following:

(1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law, including the effect of any special parole term and, when applicable, that the court may also order him to make restitution to any victim of the offense; and

* * *

COMMITTEE NOTE

Rule 11(c)(1)

Section 5 of the Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, 96 Stat. 1248 (1982), adds 18 U.S.C. § 3579, providing that when sentencing a defendant convicted of a Title 18 offense or of violating various subsections of the Federal Aviation Act of 1958, the court "may order, in addition to or in lieu of any other penalty authorized by law, that the defendant make restitution to any victim of the offense." Under this law restitution is favored; if the court "does not order restitution, or orders only partial restitution, . . . the court shall state on the record the reasons therefor." Because this restitution is deemed an aspect of the defendant's

sentence, S. Rept. No. 97-532, 97th Cong., 2d Sess., 30-33 (1982), it is a matter about which a defendant tendering a plea of guilty or nolo contendere should be advised.

Because this new legislation contemplates that the amount of the restitution to be ordered will be ascertained later in the sentencing process, this amendment to Rule 11(c)(1) merely requires that the defendant be told of the court's power to order restitution. The exact amount or upper limit cannot and need not be stated at the time of the plea. Failure of a court to advise a defendant of the possibility of a restitution order would constitute harmless error under subdivision (h) if no restitution were thereafter ordered.

Rule 12.1. Notice of Alibi

* * *

(f) INADMISSIBILITY OF WITHDRAWN ALIBI. Evidence of an intention to rely upon an alibi defense, later withdrawn, or of statements made in connection with such intention, is not, ~~admissible~~ in any civil or criminal proceeding, admissible against the person who gave notice of the intention.

COMMITTEE NOTE

Rule 12.1(f)

This clarifying amendment is intended to serve the same purpose as a comparable change made in 1979 to similar language in Rule 11(e)(6). The change makes it clear that evidence of a withdrawn intent or of statements made in connection therewith is thereafter inadmissible against the person who gave the notice in any civil or criminal proceeding, without regard to whether the proceeding is against that person.

Rule 12.2. Notice of Insanity Defense or Expert Testimony of Defendant's Mental Condition

* * *

(e) INADMISSIBILITY OF WITHDRAWN INTENTION. Evidence of an intention as to which notice was given under subdivision (a) or

(b), later withdrawn, is not, ~~admissible~~ in any civil or criminal proceeding, admissible against the person who gave notice of the intention.

COMMITTEE NOTE

Rule 12.2(e)

This clarifying amendment is intended to serve the same purpose as a comparable change made in 1979 to similar language in Rule 11(e)(6). The change makes it clear that evidence of a withdrawn intent is thereafter inadmissible against the person who gave the notice in any civil or criminal proceeding, without regard to whether the proceeding is against that person.

Rule 35. Correction or Reduction of Sentence

* * *

(b) REDUCTION OF SENTENCE. ~~The court may~~ A motion to reduce a sentence may be made, or the court may reduce a sentence without motion, within 120 days after the sentence is imposed or probation is revoked, or within 120 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 120 days after entry of any order or judgment of the Supreme Court denying review of, or having the effect of upholding, a judgment of conviction or probation revocation. The court shall determine the motion within a reasonable time. Changing a sentence from a sentence of incarceration to a grant of probation shall constitute a permissible reduction of sentence under this subdivision.

COMMITTEE NOTE

Rule 35(b)

This amendment to Rule 35(b) conforms its language to the nonliteral interpretation which most courts have already placed upon the rule, namely, that it suffices that the defendant's motion was made within the 120 days and that the court determines the motion within a reasonable time thereafter. United States v. DeMier, 671 F.2d 1200 (8th Cir. 1982); United States v. Smith, 650 F.2d 206 (9th Cir. 1981); United States v. Johnson, 634 F.2d 94 (3d Cir. 1980); United States v. Mendoza, 581 F.2d 89 (5th Cir. 1978); United States v. Stollings, 516 F.2d 1287 (4th Cir. 1975). Despite these decisions, a change in the language is deemed desirable to remove any doubt which might arise from dictum in some cases, e.g., United States v. Addonizio, 442 U.S. 178, 189 (1979), that Rule 35 only "authorizes District Courts to reduce a sentence within 120 days" and that this time period "is jurisdictional, and may not be extended." See United States v. Kajevic, 711 F.2d 767 (7th Cir. 1983), following the Addonizio dictum.

As for the "reasonable time" limitation, reasonableness in this context "must be evaluated in light of the policies supporting the time limitations and the reasons for the delay in each case." United States v. Smith, supra, at 209. The time runs "at least for so long as the judge reasonably needs time to consider and act upon the motion." United States v. Stollings, supra, at 1288.

In some instances the court may decide to reduce a sentence even though no motion seeking such action is before the court. When that is the case, the amendment makes clear, the reduction must actually occur within the time specified.

Rule 45. Time

(a) COMPUTATION. In computing any period of time the day of the act or event from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, or, when the act to be done is the filing of some paper in court, a day on which weather or other conditions have made the office of the clerk of the district court inaccessible, in which event

the period runs until the end of the next day which is not one of the aforementioned days. When a period of time prescribed or allowed is less than ~~7~~ 11 days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation. As used in these rules, "legal holiday" includes New Year's Day, Birthday of Martin Luther King, Jr., Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, Christmas Day, and any other day appointed as a holiday by the President or the Congress of the United States, or by the state in which the district court is held.

* * *

COMMITTEE NOTE

The rule is amended to extend the exclusion of intermediate Saturdays, Sundays, and legal holidays to the computation of time periods less than 11 days. Under the current version of the Rule, parties bringing motions under rules with 10-day periods could have as few as 5 working days to prepare their motions. This change corresponds to the change being made in the comparable provision in Fed.R.Civ.P. 6(a).

The Birthday of Martin Luther King, Jr., which becomes a legal holiday effective January 1986, has been added to the list of legal holidays enumerated in the Rule.

Rule 49. Service and Filing of Papers

* * *

(e) FILING OF DANGEROUS OFFENDER NOTICE. A filing with the court pursuant to 18 U.S.C. § 3575(a) or 21 U.S.C. § 849(a) shall be made by filing the notice with the clerk of the court. The clerk shall transmit the notice to the chief judge or, if the chief

judge is the presiding judge in the case, to another judge or United States magistrate in the district, except that in a district having a single judge and no United States magistrate, the clerk shall transmit the notice to the court only after the time for disclosure specified in the aforementioned statutes and shall seal the notice as permitted by local rule.

COMMITTEE NOTE

18 U.S.C. § 3575(a) and 21 U.S.C. § 849(a), dealing respectively with dangerous special offender sentencing and dangerous special drug offender sentencing, provide for the prosecutor to file notice of such status "with the court" and for the court to "order the notice sealed" under specified circumstances, but also declare that disclosure of this notice shall not be made "to the presiding judge without the consent of the parties" before verdict or plea of guilty or nolo contendere. It has been noted that these provisions are "regrettably unclear as to where, in fact, such notice is to be filed" and that possibly filing with the chief judge is contemplated. United States v. Tramunti, 377 F.Supp. 6 (S.D.N.Y. 1974). But such practice has been a matter of dispute when the chief judge would otherwise have been the presiding judge in the case, United States v. Gaylor, No. 80-5016 (4th Cir. 1981), and "it does not solve the problem in those districts where there is only one federal district judge appointed," United States v. Tramunti, supra.

The first sentence of subdivision (e) clarifies that the filing of such notice with the court is to be accomplished by filing with the clerk of the court, which is generally the procedure for filing with the court; see subdivision (d) of this rule. Except in a district having a single judge and no United States magistrate, the clerk will then, as provided in the second sentence, transmit the notice to the chief judge or to some other judge or a United States magistrate if the chief judge is scheduled to be the presiding judge in the case, so that the determination regarding sealing of the notice may be made without the disclosure prohibited by the aforementioned statutes. But in a district having a single judge and no United States magistrate this prohibition means the clerk may not disclose the notice to the court at all until the time specified by statute. The last sentence of subdivision (e) contemplates that in such instances the clerk will seal the notice if the case falls within the local rule describing when "a public record may prejudice fair consideration of a pending criminal matter," the determination called for by the aforementioned statutes. The local rule

might provide, for example, that the notice is to be sealed upon motion by any party.

Rule 57. Rules ~~of~~ by District Courts

~~(a)~~ RULES BY ~~DISTRICT COURTS.~~ ~~Rules made by district courts for the conduct of criminal proceedings shall not be inconsistent with these rules. Copies of all rules made by a district court shall upon their promulgation be furnished to the Administrative Office of the United States Courts. The clerk shall make appropriate arrangements, subject to the approval of the Director of the Administrative Office of the United States Courts, to the end that all rules made as provided herein be published promptly and that copies of them be available to the public.~~

~~(b)~~ PROCEDURE NOT OTHERWISE SPECIFIED. ~~If no proceedure is specifically prescribed by rule, the court may proceed in any lawful manner not inconsistent with these rules or with any applicable statute.~~

Each district court by action of a majority of the judges thereof may from time to time, after giving appropriate public notice and an opportunity to comment, make and amend rules governing its practice not inconsistent with these rules. A local rule so adopted shall take effect upon the date specified by the district court and shall remain in effect unless amended by the district court or abrogated by the judicial council of the circuit in which the district is located. Copies of the rules and amendments so made by

any district court shall upon their promulgation be furnished to the judicial council and the Administrative Office of the United States Courts and be made available to the public. In all cases not provided for by rule, the district judges and magistrates may regulate their practice in any manner not inconsistent with these rules or those of the district in which they act.

COMMITTEE NOTE

Rule 57 has been reformulated to correspond to Fed.R.Civ.P. 83, including the proposed amendments thereto. The purpose of the reformulation is to emphasize that the procedures for adoption of local rules by a district court are the same under both the civil and the criminal rules. In particular, the major purpose of the reformulation is to enhance the local rulemaking process by requiring appropriate public notice of proposed rules and an opportunity to comment on them. See Committee Note to Fed.R.Civ.P. 83.

APPENDIX C.

PROPOSED AMENDMENTS TO

BANKRUPTCY RULES 5002 AND 5004

PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO BANKRUPTCY RULES 5002 AND 5004

Public hearings will be held
on January 17, 1985 in
Washington, D. C.

COMMITTEE ON RULES OF PRACTICE
AND PROCEDURE

OF THE

JUDICIAL CONFERENCE OF THE
UNITED STATES

AUGUST 1984

STANDING COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

JUDGE EDWARD T. GIGNOUX, *Chairman*

JUDGE CARL MCGOWAN

JUDGE JAMES S. HOLDEN

PROF. WADE H. MCCREE, JR.

PROF. WAYNE LAFAVE

JUDGE AMALYA L. KEARSE

EDWARD H. HICKEY, ESQ.

FRANCIS N. MARSHALL, ESQ.

JOSEPH F. SPANIOL, JR., *Secretary*

ADVISORY COMMITTEE ON BANKRUPTCY RULES

JUDGE RUGGERO J. ALDISERT, *Chairman*

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RICHARD L. LEVINE, ESQ.

NORMAN H. NACHMAN, ESQ.

JOSEPH PATCHAN, ESQ.

PROF. LAWRENCE P. KING

PROFESSOR WALTER J. TAGGART, *Reporter*

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

TO THE BENCH AND BAR:

The Judicial Conference Advisory Committee on Bankruptcy Rules has proposed amendments to Bankruptcy Rules 5002 and 5004 and has requested that the proposed amendments be circulated to the bench and bar and to the public generally for comment. Committee Notes, prepared by the Advisory Committee and accompanying the proposed amendments, explain their intent and purpose.

The Judicial Conference Standing Committee on Rules of Practice and Procedure **has not yet approved these proposed amendments,** but submits them herewith for public comment. We request that all comments be placed in the hands of our Committee as soon as convenient and, in any event, no later than January 1, 1985.

All communications with respect to the proposed amendments to Bankruptcy Rules 5002 and 5004 should be addressed to the Commmittee on Rules of Practice and Procedure, Administrative Office of the United States Courts, Washington, D. C. 20544.

In order that persons and oganizations wishing to do so may comment orally on these proposals, hearings on them will be held at the National Courts Building in Washington, D. C. on Thursday January 17, 1985. Those wishing to testify should contact the Secretary to the Committee at the above address prior to January 1, 1985.

These proposed amendments have not been submitted to nor considered by the Judicial Conference of the United States or the Supreme Court.

Edward T. Gignoux
Chairman, Standing Committee on Rules of Practice and Procedure

Joseph F. Spaniol, Jr., *Secretary*

August 1, 1984
Washington, D. C.

PRELIMINARY DRAFT
OF PROPOSED AMENDMENTS TO
BANKRUPTCY RULES 5002 AND 5004*

Rule 5002. ~~Prohibited Appointments.~~ Restrictions on Appointments

No ~~person~~ m[illegible]e ~~appointed as a trustee or examiner or be employed as an attorney, accountant, appraiser, auctioneer, or other professional person pursuant to § 327 or § 1103 of the Code if (1) the person is a relative of any judge of the court making the appointment or approving the employment or (2) the person is or has been so connected with any judge of the court making the appointment or approving the employment as to render such appointment or employment improper. Whenever under this rule a person is ineligible for appointment or employment, the person's firm, partnership, corporation, or any other form of business association or relationship, and all members, associates and professional employees thereof are also ineligible for appointment or employment.~~

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

(a) Appointment of Relatives Prohibited. No individual may be appointed as a trustee or examiner or be employed as an attorney, accountant, appraiser, auctioneer, or other professional person pursuant to § 327 or § 1103 of the Code if the individual is a relative of the bankruptcy judge making the appointment or approving the employment. Whenever under this subdivision an individual is ineligible for appointment or employment, the individual's firm, partnership, corporation, or any other form of business association or relationship, and all members, associates and professional employees thereof are also ineligible for appointment or employment.

(b) Judicial Determination that Appointment or Employment Is Improper. A bankruptcy judge may not appoint a person as a trustee or examiner or approve the employment of a person as an attorney, accountant, appraiser, auctioneer, or other professional person pursuant to § 327 or § 1103 of the Code if that person is or has been so connected with such judge as to render the appointment or employment improper.

COMMITTEE NOTE

The amended rule is divided into two subdivisions. Subdivision (a) applies to relatives of bankruptcy judges and subdivision (b) applies to persons who are or have been connected with bankruptcy judges. Subdivision (a) permits no judicial discretion; subdivision (b) allows judicial discretion. In both subdivisions of the amended rule "bankruptcy judge" has been substituted for "judge." The amended rule makes clear that it only applies to relatives of, or persons connected with, the bankruptcy judge. See In re Hilltop Sand and Gravel, Inc., 35 B.R. 412 (N.D. Ohio 1983).

Subdivision (a). The original rule prohibited all bankruptcy judges in a district from appointing or approving the employment of (i) a relative of any bankruptcy judge serving in the district, (ii) the firm or business association of any ineligible relative and (iii) any member or professional employee of the firm or business association of an ineligible relative. In addition, the definition of relative, the third degree relationship under the common law, is quite broad. The restriction on the employment opportunities of relatives of bankruptcy judges was magnified by the fact that many law and accounting firms have practices and offices spanning the nation.

Relatives are not eligible for appointment or employment when the bankruptcy judge to whom they are related makes the appointment or approves the employment. Canon 3(b)(4) of the Code of Judicial Conduct, which provides that the judge "shall exercise his power of appointment only on the basis of merit, avoiding nepotism and favoritism," should guide a bankruptcy judge when a relative of a judge of the same bankruptcy court is considered for appointment or employment.

Subdivision (b), derived from clause (2) of the original rule, makes a person ineligible for appointment or employment if the person is so connected with a bankruptcy judge making the appointment or approving the employment as to render the appointment or approval of employment improper. The caption and text of the subdivision emphasize that application of the connection test is committed to the sound discretion of the bankruptcy judge who is to make the appointment or approve the employment. All relevant circumstances are to be taken into account by the court. The most important of those circumstances include: the nature and duration of the connection with the bankruptcy judge; whether the connection still exists, and, if not, when it was terminated; and the

type of appointment or employment. These and other considerations must be carefully evaluated by the bankruptcy judge.

The policy underlying subdivision (b) is essentially the same as the policy embodied in the Code of Judicial Conduct. Canon 2 of the Code of Judicial Conduct instructs a judge to avoid impropriety and the appearance of impropriety, and Canon 3(b)(4) provides that the judge "should exercise his power of appointment only on the basis of merit, avoiding nepotism and favoritism." Subdivision (b) alerts the potential appointee or employee and party seeking approval of employment to consider the possible relevance or impact of subdivision (b) and indicates to them that appropriate disclosure must be made to the bankruptcy court before accepting appointment or employment. The information required may be made a part of the application for approval of employment. See Rule 2014(a).

Subdivision (b) departs from the former rule in an important respect: a firm or business association is not prohibited from appointment or employment merely because an individual member or employee of the firm or business association is ineligible under subdivision (b).

The emphasis given to the bankruptcy court's judicial discretion in applying subdivision (b) and the absence of a per se extension of ineligibility to the firm or business association or any ineligible individual complement the amendments to subdivision (a). The change is intended to moderate the prior limitation on the employment opportunities of attorneys, accountants and other professional persons who are or who have been connected in some way with the bankruptcy judge. For example, in all but the most unusual situations service as a law clerk to a bankruptcy judge is not the type of connection which alone precludes appointment or employment. Even if a bankruptcy judge determines that it is improper to appoint or approve the employment of a former law clerk in the period immediately after completion of the former law clerk's service with the judge, the firm which employs the former law clerk will, absent other circumstances, be eligible for employment. In each instance all the facts must be considered by the bankruptcy judge.

Subdivision (b) applies to persons connected with a bankruptcy judge. "Person" is defined in § 101 of the Bankruptcy Code to include an "individual, partnership and corporation." A partnership or corporation may be appointed or employed to serve in a bankruptcy case. If a bankruptcy judge is connected in some way with a partnership or corporation, it is necessary for the court to determine

whether the appointment or employment of that partnership or corporation is proper.

The amended rule does not regulate professional relationships which do not require approval of a bankruptcy judge. Disqualification of the bankruptcy judge pursuant to 28 U.S.C. § 455 may, however, be appropriate. Under Rule 5004(a), a bankruptcy judge may find that disqualification from only some aspect of the case, rather than the entire case, is necessary. A situation may also arise in which the disqualifying circumstance only comes to light after services have been performed. Rule 5004(b) provides that if compensation from the estate is sought for these services, the bankuptcy judge is disqualified from awarding compensation.

Rule 5004. Disqualification

(a) Disqualification of Judge. When a judge is disqualified from acting by 28 U.S.C. § 455, he shall disqualify himself from presiding over the adversary proceeding or contested matter in which the disqualifying circumstance arises or, if appropriate, he shall disqualify himself from presiding over the case.

(b) Disqualification of Judge from Allowing Compensation. A judge shall disqualify himself from allowing compensation to a person who is a relative or with whom he is so ~~associated~~ connected as to render it improper for him to authorize such compensation.

COMMITTEE NOTE

The word "associated" in subdivision (b) has been changed to "connected" in order to conform with Rule 5002(b).

APPENDIX D.

REPORT OF THE ADVISORY COMMITTEE ON THE FEDERAL APPELLATE RULES ON THE OPERATION OF RULE 30.

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

EDWARD T GIGNOUX
CHAIRMAN

JOSEPH F SPANIOL, JR
SECRETARY

Post Office Box 1226
Danville, Kentucky

CHAIRMEN OF ADVISORY COMMITTEES
WALTER R MANSFIELD
CIVIL RULES
WALTER E HOFFMAN
CRIMINAL RULES
RUGGERO J ALDISERT
BANKRUPTCY RULES
PIERCE LIVELY
APPELLATE RULES

May 9, 1984

The Honorable Edward T. Gignoux
United States District Court
Post Office Box 8
Portland, Maine 04112

Dear Ed:

On a number of occasions we have discussed briefly the long-term project of the Advisory Committee on the Federal Rules of Appellate Procedure dealing with Rule 30, the appendix. As you heard at the last meeting of the FRAP Committee, we have completed our study and have prepared a report which sets forth in some detail the purpose, methodology and conclusions of the study. The report has been approved by the Committee, and I am enclosing the original thereof for filing with the Standing Committee.

You will recall that this study was undertaken by the Committee at the suggestion of the Chief Justice. His primary concern in suggesting this project to the Committee was with the escalating costs of litigation. Among other things we sought to determine whether the appendix requirement of the Appellate Rules was contributing significantly to the rising costs of appeals. One question which the Committee necessarily considered was whether bench and bar would be well served by recommending the elimination of the appendix requirement from the Rules.

The study was carried on in depth and the Committee learned of actual practices under Rule 30 from judges, clerks of courts of appeals and practicing attorneys. As an examination of the report reveals, the Committee concluded that Rule 30 as now applied does not contribute significantly to the costs of appeals and that only minor changes in the Rules are desirable at this time. The three rule changes recommended on page 23 of the report have been adopted in principle by the Committee and will be approved in final form and submitted to the Standing Committee in the near future.

Though the enclosed report is somewhat different from the sort of recommendation which the Advisory Committee normally submits to the Standing Committee, it is felt that the report should be filed with the Standing Committee and retained in its records.

If you have any questions about the report or the procedures followed, please feel free to contact the Reporter, Kenneth Ripple, or me.

With best regards, I am

Sincerely yours,

Pierce Lively

enc.
cc: Kenneth Ripple

Report of the Advisory Committee on the Federal Appellate Rules on the Operation of Rule 30

Report of the Advisory Committee on the Federal Appellate Rules on the Operation of Rule 30

I. Background

At the first meeting of the newly-reconstituted Advisory Committee on the Federal Appellate Rules, the Chief Justice invited the Committee's attention to the problem of ever-spiraling costs of litigation. He noted in particular the growing amount of unnecessary documentation which was becoming accepted as standard practice in appellate litigation. More specifically, he asked the Committee to investigate whether the present requirements of Rule 30[1] contribute to the unnecessary expense and, if so, to recommend a solution to the problem.[2]

In general terms, Rule 30 requires that counsel prepare and file a separate appendix to the brief that contains: (1) the relevant docket entries in the proceeding below; (2) those portions of the pleadings, charge, findings, or opinion of the Court below that are relevant to the appeal; (3) the judgment, order or decision of the lower court; and (4) "any other parts of the record to which the parties wish to direct the particular attention of the Court."[3] It is this last requirement which has the potential for inflating litigation costs. Although the record on appeal is already before the Court,[4] segments of it are included in multiple copies of this separate appendix.[5] Overdesignation[6] of those segments can considerably increase overall litigation costs.

II. The Committee's Investigation

In fulfilling the mandate of the Chief Justice,[7] the Committee undertook the following inquiries:

1) In order to understand the rationale of the present rule, it undertook an investigation of its history. The present rule was a deliberate choice from among several options considered by the original Advisory Committee. Therefore, respect for the work of its predecessors required that the present Committee, in reevaluating the rule, begin by understanding the reasons for that conscious choice. A summary of that investigation is set forth in Part III.

2) The Committee undertook an extensive survey of local circuit practice with respect to the separate appendix. In his dissenting opinion in New State Ice Company v. Liebmann, 285 U.S. 262, 311 (1932), Justice Brandeis described how a state may play the role of a laboratory in the development of a solution to a social or economic problem. Within the federal judiciary, the circuits often perform the same function as they try new approaches to judicial administration problems. Rule 30 affords a particularly good opportunity for such experimentation. Under subsection (f) of Rule 30, a circuit may "by rule applicable to all cases, to classes of cases, or by order in specific cases, dispense with the requirement of an appendix and permit appeals to be

heard on the original record, with such copies of the record, or relevant parts thereof, as the court may require." Most circuits have exercised this option and the Committee believed that their experimentation could contribute significantly to its understanding of the role of the appendix in federal appellate litigation and to possible solutions. The value of this experimentation was enhanced by the fact that some of the most radical departures from the separate appendix system had taken place in circuits with heavy caseloads, complex litigation, and wide geographic dispersion of judges. The results of this study of local rules are set forth in Part IV.

3) Since cost savings measures must be evaluated in light of their impact on the appellate process, the Committee next solicited the views of all active United States Circuit Judges. The judges were asked to evaluate their present system and the principal alternative approaches used in other circuits. This survey is described in Part V.

4) With the assistance of the Clerks of the Courts of Appeals, the Committee, through its Reporter, surveyed the costs and administrative burdens associated with each circuit's approach to the separate appendix. The results of this study were discussed with the Clerks by the Chairman and the Reporter and then discussed at a subsequent meeting of

the Committee. The results of this inquiry are contained in Part VI.

III. A Brief History of the Development of Federal Rule of Appellate Procedure 30

A. Introduction

In undertaking its review of FRAP 30, the Committee believed that respect for the long and careful work of its predecessor committees required that the origin of the Rule be identified and the reasons for its present form appreciated. This approach was especially important in the case of FRAP 30. Its present form is the product of a conscious choice after long and thoughtful consideration of several options.

B. Practice Before the Adoption of FRAP

Before the adoption of the Federal Rules of Appellate Procedure, most circuits (7) used an appendix. In six of these circuits, the appellant filed this document at the time of the filing of his brief. It contained those parts of the record which he deemed essential to an understanding of the questions presented in the brief. The appellee, if he believed that additional parts of the record were necessary for a fair consideration of the case, had to include those additional parts in a separate appendix to his brief.

A printed record was required in three circuits (5, 8, 10), although the Advisory Committee found that practice in those circuits made the difference between a printed record and the appendix "largely nominal."[8] The Ninth Circuit permitted litigants, if they wished, to proceed on the original record and two copies.[9]

C. The Advisory Committee's First Draft

The Preliminary Draft of the Advisory Committee, issued in March 1964, called for a "deferred appendix" to be constructed after the submission of both briefs.[10] In the opinion of the Committee, this system was preferable to the fragmentation which resulted when each party submitted its own appendix. Appellants had a tendency, noted the Committee, to underestimate what was necessary for a determination of the issues presented. The "no appendix" approach of the Ninth Circuit was rejected since the Committee decided against "any general dispensation from the requirement of submitting an appendix."[11] The Draft Rule did permit, however, an individual court to dispense with the requirement of submitting an appendix.[12]

D. Subsequent Drafts by the Advisory Committee

The Advisory Committee's initial draft met a good deal of opposition. Consequently, in December 1966, the Standing Committee on Rules of Practice and Procedure circulated three other drafts for comment:

1. Draft A[13] called for the use of a single appendix which would contain all the record material "which it is deemed by the parties essential for the judges to read."[14] Normally, this document was to be filed with the appellant's brief. By stipulation or order, it could be filed by the appellant within 21 days of service of the appellee's brief. Any circuit could opt to proceed on the original record.

The Advisory Committee, in a "special note," expressed its clear preference for this option:

> "[O]f all the methods suggested for the presentation to the several members of a court of material in a record, the one thus devised would best serve the purposes of accurate and expeditious disposition of cases."[15]

It also stressed that the deferred appendix option would produce "economy and clarity" because "the necessary parts of a record can be designated more certainly and easily after the legal points at issue have been defined."[16]

2. Draft B[17]- This option was the separate appendix system then employed in most circuits. The draft gave the circuits the option of requiring a joint appendix or of

dispensing with the appendix altogether by rule, order, or stipulation.

In an accompanying comment, the Advisory Committee noted that this "individual appendix" approach, while permitting each attorney to concern himself only with his own selection of the record, required the appellate judge to work with a fragmented presentation of the record.[18]

3. Draft C[19]- This approach was modeled on the Ninth Circuit approach of proceeding on the original record and two copies. Each circuit could dispense with the requirement for filing copies and "direct that the appeal be heard on the original record alone."[20]

The Advisory Committee gave the following reasons against adopting this procedure as a national rule:[21]

1) a busy court is entitled to the help of lawyers in finding those parts of the record essential to the disposition of the case;
2) selecting parts of the record will help lawyers in their own presentation;
3) the size of the original record will create problems in its transmittal;
4) insufficient copies will be available for simultaneous use by judges, law clerks and for deposit in law libraries.

The Committee did note, however, that this approach might

be appropriate "in certain types of appeals, particularly those with voluminous transcripts of which large portions require appellate consideration as when convictions are attacked as being without sufficient evidence or in appeals in forma pauperis."[22]

E. Final Adoption and Subsequent Amendments

The present FRAP 30 was based principally on "Draft A," although subsection (f) gave the circuits the option of adopting "Draft C" and proceeding on the original record.

In 1970, FRAP 30(a) was amended to shorten the time for filing the appendix when the Court of Appeals shortens the time for the filing of briefs under FRAP 31(a). FRAP 30(c) was also amended to permit deferral of the appendix only if the Court should provide by order or local rule. The litigants could no longer choose this option themselves. The purpose of the amendment was to prevent the practice of electing to defer filing of the appendix simply to obtain a 21 day delay. However, the Advisory Committee notes state specifically that this amendment "should not cause use of the deferred appendix to be viewed with disfavor."[23]

IV. Current Circuit Practice

The promulgation of Rule 30 hardly put an end to the diversity of views on the separate appendix issue. Over the years, the circuits have employed a variety of techniques to

formulate the appellate record and to deal with the problem of costs. The following subsections describe briefly the current practice.

A. The Local Rules Dealing Directly With The Separate Appendix

In examining current circuit practice under Rule 30, the local rules provide a logical and helpful starting point. The approaches of the circuits can roughly be divided as follows:

1. The "Separate Appendix" Circuit

The Fourth Circuit is the only circuit without a local rule on the matter of the separate appendix.

2. The "Specific Exception" Circuits

The First,[24] Second,[25] Third,[26] Sixth,[27] District of Columbia[28] and Federal Circuits,[29] while generally adhering to the requirement for a separate appendix, have eliminated the requirement in certain types of cases or have provided by local rule that the requirement may be waived in a given case. In many of these circuits, in forma pauperis cases are heard on the original record. In some, social security cases are treated in similar fashion.

3. The "Record Excerpt" Circuits

The Fifth,[30] Seventh,[31] Ninth[32] and Eleventh[33] Circuits have adopted a "record excerpt" method. The "record excerpt" is an abbreviated appendix.

There are significant variations in each circuit's rule.However, the basic approach is the same. The appeal is heard on the original appellate record as defined in FRAP 10. However, an additional document is prepared for the judges. It contains those parts of the appellate record which, by consensus, the judges of that circuit deem essential. The most abbreviated version appears to be that of the Fifth Circuit which contains: 1) the docket sheet; 2) the judgment or interlocutory order appealed from; 3) any other orders or rulings sought to be reviewed; 4) any supporting opinion, findings of fact or conclusions of law filed or delivered orally by the district court.[34] The Circuit's internal operating procedures permit the appellant to add "the pleadings, charge, transcript, or exhibits if they are essential to an understanding of the issues raised."[35] The Seventh Circuit rule, by comparison, requires that the document also contain "any other short excerpts from the record . . . important to a consideration of the issues raised on appeal."[36]

4. The "Original Record" Circuit

The Tenth Circuit hears most cases on the original record. Local Rules 10 and 11 provide that, with the exception of civil cases containing a transcript of 300 pages or more, the appeal will

proceed on the original record. All criminal appeals proceed on the original record.

5. The Eighth Circuit Approach

The Eighth Circuit has adopted another and somewhat unique approach.[37] Unless the parties agree to proceed on agreed statement of facts under FRAP 10(d), the appeal is on the appellate record (referred to as the "designated record"). The parties may choose between two methods of preparing the "designated record:"

a. the parties may prepare the "designated record" in accordance with FRAP 30(b). This form is called "the appendix."

b. the parties may request the district court clerk to compile and transmit to the Court of Appeals those portions of the original record on appeal which they designate.

Thus, the Eighth Circuit has combined the "appendix" and "original record" approach.

B. Other Rule Provisions Relating to the Appendix

In addition to describing the basic form of the separate appendix, other local rules further shape practice in this area.

1. Material for Inclusion in the Appendix

A few local rules contain additional guidance for counsel aimed at reducing the material contained in the appendix.

Two local rules set forth explicitly the material which ought not be included in the appendix.[38] The Second Circuit has admonished counsel not to include in the appendix extraneous material such as memoranda of counsel to the trial court.[39] One rule assures counsel that, if reference to such material is necessary in the decision of the case, the original record will be consulted.[40] By contrast, a First Circuit rule warns counsel that "notwithstanding the provisions of FRAP Rule 30 the court may decline to refer to portions of the record omitted from the Appendix, except by inadvertence, unless leave is granted prior to argument."[41]

Two other circuits affirmatively urge counsel to enter into stipulations which will reduce costs by reducing the size of the transcripts.[42]

2. Number of Copies

Several circuits have, by local rule, reduced the number of copies required.[43]

3. Method of Copying

Some circuits have explicit rules governing the method of copying the record and the amount recoverable for such copying.[44]

4. Sanctions for Over-Inclusion of Material

Some circuits have also reiterated and made more explicit the provision of FRAP 30(b) permitting the court to disallow

costs for the inclusion of unnecessary material in the record.[45] Two circuits now explicitly provide for the imposition of costs against counsel pursuant to 28 U.S.C. § 1927.[46] These rules also explicitly note that counsel can be subject to disciplinary proceedings for unreasonably and vexatiously increasing costs.

5. Leaving Record in District Court

Several circuits have also adopted the practice, either on a temporary or experimental basis, of leaving the appellate record in the District Court.[47] The Court of Appeals decides the appeal on the basis of the material in the appendix (or its equivalent) or by requesting that the appellate record, or parts of it, be forwarded to the Court of Appeals. While this procedure may well simplify the administrative burdens of the Court of Appeals, it would appear, at first glance, to have the potential of inducing counsel to include more material within the appendix. Knowing that the record is not immediately on hand during the consideration of the appeal, counsel could well decide not to rely on a busy court's taking the time to procure the necessary documentation. This supposition is not easy to verify. Moreover, the Committee's repeated inquiries have produced no evidence that overdesignation in appendices is attributable to this administrative practice.

V. Survey of the Judges of the Courts of Appeals

In Fall 1981, the Reporter, at the direction of the Committee, invited every active United States Circuit Judge to submit to the Committee a statement on the operation of Rule 30. Each judge was asked to comment on the practice currently in use in his or her circuit. Each was also afforded an opportunity to comment on the practices of the other circuits.

The responses received from the various judges demonstrated no clear nation-wide preference for any single approach to the separate appendix question. To the extent that any "trend" could be perceived, it was a tendency to preserve the status quo in each circuit. However, the responses - often quite long and thoughtful - were extremely helpful to the Committee because they revealed a good deal about the various roles which an appendix or its alternative plays in the methodology of appellate judges.

The most important message of the survey is that judges - like the judges at the time of the original formulation of Rule 30 - do not regard the question of the separate appendix as a simple "administrative" matter, but as quite central to the process of deciding cases. There are many styles of judging on the appellate bench and the question of what kind of appendix will be required is worked out among the judges, sometimes through trial and error. While most circuits have

achieved a fairly stable consensus on the matter, there is, beneath the surface, a significant disparity of views.

A. The "Pros and Cons"

1. - In Favor of the Separate Appendix

Those judges preferring the separate appendix tended to be more forceful in their answers to the survey. They stressed that the quality and quantity of judicial productivity were to be weighed against cost savings to the litigants. Their arguments may be summarized as follows:

a. A separate appendix is needed at oral argument to permit easy access to the record when questioning counsel.

b. Preparation of an appendix requires counsel to focus at an early stage on the essential points in the case.

c. The separate appendix permits earlier identification of those cases in which summary disposition is appropriate.

d. The separate appendix permits the judge to cast the tentative, but crucial, vote at conference immediately after argument on the basis of more of the record than would be available under a "record excerpt" approach.

e. A separate appendix permits more thorough preargument preparation. The non-resident judge or the judge who works at home can take a good deal of

the record along if he has an appendix. More than one judge must prepare for oral argument at the same time and often a judge and his law clerk must use the materials separately.

f. An appendix can also act as a check on attorney hyperbole in the brief and at oral argument since any member of the court can check the accuracy of a statement easily.

2. In Favor of the Record Excerpt

Judges in circuits using some variation of the "record excerpt" approach generally believe that their system also fulfills the objectives set forth by those who favor the appendix method. When the record excerpt does not suffice, the appendix will not suffice either is an oft-repeated claim.

Responses from these judges also exhibit a marked tendency to emphasize that the record excerpt must be flexible to the needs of the case and include material necessary for a resolution of the issues raised. Most frequently suggested additions are the inclusion of pertinent parts of the transcript and, when applicable, the jury charge.

Interestingly, most judges using the record excerpt method (and those where the case is heard on the original record) do not seem bothered by the necessity of transmitting

the record in the mail. On the other hand, judges in circuits which use the separate appendix often cite this problem as a major reason for not adopting the "record excerpt" method.

B. Common Ground

The survey also suggested some areas where there is a general consensus among the judges:

1. There is no disagreement on goals: 1) the quality and quantity of judicial productivity; 2) the reduction of litigant costs.
2. The difference of opinion between the "separate appendix" method and the "record excerpt" method centers on the pre-oral argument and oral argument stages of the appellate process. There is little dissent from the position that the entire record must be used in writing the opinion for the court.
3. There are certain cases which, because of their voluminous records or complex issues, need an appendix. (There is no unanimity, however, on how to describe this category.)

VI. Survey of the Clerks of the Courts of Appeals

In 1982, the Reporter, working with Mr. John Hehman, Clerk of the United States Court of Appeals for the Sixth Circuit, and Mr. Gilbert Gannucheau, Clerk of the United States Court of Appeals for the Fifth Circuit, formulated a

survey for the clerks of all the federal circuits designed to elicit information on the impact of the separate appendix requirement on their offices and upon counsel appearing before their courts. The Chairman and the Reporter later discussed the results of this survey with the Clerks at their annual meeting at the Federal Judicial Center. Mr. Leonard Green, Chief Deputy Clerk of the Sixth Circuit summarized the results for the Committee as follows:

> The survey suggests that the following conclusions can fairly be drawn:
>
> Each of the circuits has its own alternative to Rule 30. In that sense, the Rule plays an important role; it defines a document to serve as a supplement to the briefs, in which is to be distilled from the larger record on appeal only those items necessary to the adjudicative process. Rule 30, then, serves as a fixed point of reference for the circuits to use in fashioning for themselves that vehicle which will respond to their needs.
>
> There is a wide variation among the local alternatives, ranging from the "record excerpt" system in use in several circuits to the full-blown FRAP 30 appendix or something very closely akin to it, in use in other circuits.

Use of the deferred appendix procedure of 30(c) is negligible, even where use of that arrangement is given some encouragement.

There are several categories of cases, collectively comprising a significant portion of the docket, in which the appendix requirement is commonly waived. These categories include prisoner cases, especially without counsel, CJA cases, in forma pauperis cases, and social security cases.

The principal distinction among the courts as far as what parts of the record need to be included in the appendix is the transcript. The differences among the courts in this respect reflect differences and different judicial approaches to the adjudicative process.

Because of the nearly universal use of photocopy as the preferred method of reproduction, rather than costly printing, the actual cost of preparing the appendix is not high, certainly not when compared with other costs associated with litigation. The average

number of pages reported in an appendix range from seven to seven-hundred, but most commonly seems to be in the two-hundred to three-hundred page range; from four to ten copies of the appendix are required in the various courts.

The cost of the appendix requirement to the Clerks' offices is not great. Neither the investment of man hours required nor the storage requirements would seem to represent a significant burden to the offices.

All of the circuits except the Third and, in some cases, the Eighth, require that the district court proceedings be filed with the Court of Appeals.

There is a wide variation among the practices of the courts in circulating the record or parts of it to the court. Some will send the record automatically to the lead judge of the hearing panel or the writing judge while other courts will send the record only in response to a specific request from a judge.

VII. Conclusions and Recommendations

On the basis of the foregoing study, the Committee makes the following conclusions and recommendations:

1. Today, as at the time of the formulation of the Rules, most judges do not consider the form of the separate appendix a simple "administrative" matter. There are many styles of judging. On any Court, arriving at a decision as to the most appropriate form of appendix is a collegial decision aimed at accomodating the particular judging styles of the bench in question and, consequently, at maximizing the efficiency of the Court and the quality of its workproduct. While considerations of uniformity are important and doubtless will be taken into account by the judges of the respective circuits, the committee concludes that at this time the form of the separate appendix is not an appropriate subject for rigid national regulation.

2. Litigation costs remain, however, a significant concern. Each court has a responsibility to consider such costs in formulating its approach to the separate appendix issue. In this respect, current circuit practice evidences a general, although somewhat uneven, acknowledgment of this responsibility. Over recent years, there has been, even in many of those circuits which adhere to the "separate appendix approach," a "natural shrinkage" of the appendix or at least of its costs. Exceptions to the appendix requirement in many

cases and the replacement of "hot lead" printing by much less expensive copying methods have been the principal improvements. Other avenues must be explored more fully, however:

a. Local rules and internal operating procedures must articulate more precisely how the Court uses the separate appendix. It must be emphasized that the appendix is used principally in evaluating the briefs and in preparing for oral argument and that the entire record is normally used in writing an opinion. Furthermore, counsel must be assured that, throughout the appellate process, the Court will consult the entire record whenever it becomes necessary.

In addition to making such information available to the bar through local rules, the Court and its Clerk ought to communicate more informally and more regularly with the bar regarding the proper role of the appendix.

b. Through local rule and informal contact with the bar, the Court ought to communicate its continuing concern with litigation costs. Each circuit ought to have in its local rules a specific provisions fixing the maximum recoverable costs for copying of appendix material and noting the availability of sanctions for overdesignation of appendix material.

c. The application of sanctions against the litigant or counsel for abuse of the appendix process ought to be given sufficient dissemination to have a deterrent effect.

3. While the Committee believes that, at this time, no particular form of separate appendix ought to be mandated in a rule of national application, several changes to FRAP are desirable:

a. Rule 30(a) should be amended to specify that memoranda of law in the trial court are not to be included in the separate appendix. See United States v. Noall, 587 F.2d 123 (2d Cir. 1978).

b. Rule 30(b) ought to be amended to require that each circuit have a local rule specifically noting that, in addition to sanctions against the litigant, the court may, in an appropriate case, impose sanctions against counsel.

c. Rule 39(c) ought to be amended to require each circuit to fix by local rule the maximum allowable costs for copying appendix material.

4. Cost to the litigants must remain a matter for continuous and careful monitoring by the circuits. It is especially important that, in assessing innovations aimed at increasing administrative efficiency, the Court identify and weigh any resulting increase in costs to the litigants.

Advisory Committee on Federal Appellate Rules

Honorable Pierce Lively, Chairman
E. Milton Farley, III, Esquire
Honorable J. Smith Henley
Honorable Rex E. Lee
Honorable Edward D. Re
Ira C. Rothgerber, Esquire
Honorable Edward A. Tamm
Honorable Eugene A. Wright

Professor Kenneth F. Ripple, Reporter

Footnotes

[1]Fed. R. App. P. 30 provides in pertinent part:

(a) DUTY OF APPELLANT TO PREPARE AND FILE; CONTENT OF APPENDIX; TIME FOR FILING; NUMBER OF COPIES. The appellant shall prepare and file an appendix to the briefs which shall contain: (1) the relevant docket entries in the proceeding below; (2) any relevant portions of the pleadings, charge, findings or opinion; (3) the judgment, order or decision in question; and (4) any other parts of the record to which the parties wish to direct the particular attention of the court. The fact that parts of the record are not included in the appendix shall not prevent the parties or the court from relying on such parts.

. . . .

(b) DETERMINATION OF CONTENTS OF APPENDIX; COST OF PRODUCING. The parties are encouraged to agree as to the contents of the appendix. In the absence of agreement, the appellant shall, not later than 10 days after the date on which the record is filed, serve on the appellee a designation of the parts of the record which he intends to include in the appendix and a statement of the issues which he intends to present for review. If the appellee deems it necessary to direct the particular attention of the court to parts of the record not designated by the appellant, he shall, within 10 days after receipt of the designation, serve upon the appellant a designation of those parts. The

appellant shall include in the appendix the parts thus designated. In designating parts of the record for inclusion in the appendix, the parties shall have regard for the fact that the entire record is always available to the court for reference and examination and shall not engage in unnecessary designation.

Unless the parties otherwise agree, the cost of producing the appendix shall initially be paid by the appellant, but if the appellant considers that parts of the record designated by the appellee for inclusion are unnecessary for the determination of the issues presented he may so advise the appellee and the appellee shall advance the cost of including such parts. The cost of producing the appendix shall be taxed as costs in the case, but if either party shall cause matters to be included in the appendix unnecessarily the court may impose the cost of producing such parts on the party.

. . . .

(f) HEARING OF APPEALS ON THE ORIGINAL RECORD WITHOUT THE NECESSITY OF AN APPENDIX. A court of appeals may by rule applicable to all cases, or to classes of cases, or by order in specific cases, dispense with the requirement of an appendix and permit appeals to be heard on the original record, with such copies of the record, or relevant parts thereof, as the court may require.

[2]See Burger, Annual Report on the State of the Judicary - 1980, Midyear Meeting of the American Bar Association (Feb. 3, 1980), 66 A.B.A.J. 295 (1980).

[3]Fed. R. App. P. 30(a)(4).

[4]Fed. R. App. P. 10, 11.

[5]Fed. R. App. P. 30 reads in pertinent part:

(a). . . Unless filing is to be deferred pursuant to the provisions of subdivision (c) of this rule, the appellant shall serve and file the appendix with his brief. Ten copies of the appendix shall be filed with the clerk, and one copy shall be served on counsel for each party separately represented, unless the court shall by rule or order direct the filing or service of a lesser number. . . .

(e) REPRODUCTION OF EXHIBITS. Exhibits designated for inclusion in the appendix may be contained in a separate volume, or volumes, suitably indexed. Four copies thereof shall be filed with the appendix and one copy shall be served on counsel for each party separately represented. The transcript of a proceeding before an administrative agency, board, commission or officer used in an action in the district court shall be regarded as an exhibit for the purpose of this subdivision.

[6]See, e.g., Drewett v. Aetna Cas. & Sur. Co., 539 F.2d 496, 498-501 (5th Cir. 1976) (reproduction of entire trial transcript); Bernard v. Omaha Hotel, Inc. 482 F.2d 1222, 1225-26 (8th Cir. 1973)(inclusion of complete medical testimony that was totally irrelevant to appeal).

[7]For a description of the Committee's early work see Ainsworth and Ripple, The Separate Appendix in Federal Appellate Practice - Necessary Tool or Costly Luxury?, 34 S.L.J. 1159 (1981).

[8]Prop. Fed. R. App. P. 30, advisory committee note, March 1964 Preliminary Draft [hereinafter cited as Preliminary Draft], reprinted in 9 J. Moore, B. Ward and J. Lucas, Moore's Federal Practice § 100.01, at 9-10 (2d ed. 1983).

[9]J. Moore, B. Ward and J. Lucas, supra note 8, at 10. The Eighth Circuit dispensed with its printed record in criminal, habeas corpus, and 28 U.S.C. § 2255 cases.

[10]Id. at 7.

[11]Preliminary Draft, supra note 8, at 10.

[12]Prop. Fed. R. App. P. 30(a)(March 1964 Draft).

[13]J. Moore, B. Ward and J. Lucas, supra note 8, at 12-16.

[14]Letter from Judge Maris, Chairman of the Standing Committee, to the bench and bar (Dec. 20, 1966), reprinted in J. Moore, B. Ward and J. Lucas, supra note 8, at 10.

[15]Special Note to the December 30, 1966, Proposed Draft A by the Advisory Committee on Appellate Rules, reprinted in J. Moore, B. Ward and J. Lucas, supra note 8, at 18-20 [hereinafter cited as Special Note].

[16]Id. at 19.

[17]J. Moore, B. Ward and J. Lucas, supra note 8, at 20-23.

[18]Special Note, supra note 15, at 19.

[19]J. Moore, B. Ward and J. Lucas, supra note 8, at 25-27.

[20]Id. at 27.

[21]Special Note, supra note 15, at 20.

[22]Id. at 19-20.

[23]Fed. R. App. P. 30, advisory committee note to 1970 amendment.

[24]The First Circuit generally uses a separate appendix. However, 1st Cir. R. 11(i) provides that, absent order of the court, all in forma pauperis cases shall be considered on the record on appeal as certified by the district court without the necessity of filing an appendix.

[25]In the Second Circuit, 2d Cir. R. 30.2 authorizes appeals on the original record without printed appendix in: (1) all appeals under CJA; (2) all other in forma pauperis proceedings; (3) all appeals involving a social security decision. In such cases, the appellant files three legible copies of those portions of the transcript that he wants the court to read. To avoid additional expense, application may be made to file less than three copies.

[26]In the Third Circuit, 3d Cir. R. 10 permits hearing on original papers in applications for writs of habeas corpus and for relief under 28 U.S.C.§ 2255 when permission has been granted to proceed in forma pauperis. The appeal is heard on the original record, three copies of the opinion (if any), and the order from which the appeal is taken. In any other case, the court may dispense with the requirement of a record and proceed on the original record.

[27]In the Sixth Circuit, 6th Cir. R. 11 requires that only five (5) copies of the appendix be filed. When the entire record is 100 pages or less, three copies of the record may be filed. In Social Security Law cases, the United States Attorney files four (4) copies of the administrative record provided that the appellant files with his brief copies of the opinion and order of the District Court and the recommendation of the magistrate if the District Court relied upon it.

[28]D.C. Cir. R. 17(c)(3) permits in forma pauperis appeals on the original record without the necessity of an appendix. The appellant furnishes two copies of the relevant parts of the transcript with a list of the page numbers of the transcript so furnished. The findings of fact and conclusions of law and the opinion, if any, of the district court must always be included. The appellee furnishes two copies of any pages of the transcript to which he wishes to

call the court's attention and that were not furnished by the appellant.

[29] Fed. Cir. R. 12(j) provides that the Court may dispense with the requirement of an appendix on motion or sua sponte.

[30] 5th Cir. Rule 30.1 (described in text accompanying note 34 infra.).

[31] 7th Cir. R. 12 states that a full appendix is not required. The appellant files, either bound with his brief or as a separate document, an appendix containing the judgment or order under review, and any opinion, memorandum, findings of fact, or conclusions of law of the trial court or the administrative agency. The local rule also states that the court prefers that the brief appendix contain "any other short excerpts from the record . . . important to a consideration of the issues raised on appeal." The rule declares that "costs for a lengthy appendix will not be awarded." It is apparently fairly rare for these "other short excerpts" to exceed 15 pages.

[32] 9th Cir. R. 13 provides that the appellant file five (5) copies of the following documents:

(a) the complaint and answer(s) and, in criminal cases, the indictment;

(b) the pretrial order, if any;

(c) the judgment or interlocutory order from which the appeal is taken;

(d) other orders sought to be reviewed, if any;

(e) any supporting opinion, findings of fact or conclusions of law filed or delivered orally by the trial court (citations if opinion is published);

(f) the motion and response upon which the court rendered judgment, if any;

(g) the notice of appeal;

(h) the trial court docket sheet, and

(i) the parties' stipulation to a direct appeal to the U.S. Court of Appeals if the appeal is taken directly from a decision of the U.S. Bankruptcy Court.

With respect to administrative proceedings, the same rule requires the petitioner to file five copies of any order to be reviewed and of any supporting opinion, findings of fact or conclusions of law filed by the agency, board, commission, or officer.

33 11th Cir. Rule 22(a) requires that the following material be included in the "record excerpt:"

(1) the docket sheet;

(2) the indictment, information, or complaint as amended;

(3) the answer, counterclaim, cross-claim, and replies thereto;

(4) those parts of any pretrial order relative to the issues on appeal;

(5) the judgment or interlocutory order appealed from;

(6) any other order or orders sought to be reviewed;

(7) any supporting opinion, findings of fact and conclusions of law filed or delivered orally by the court, and

(8) if the correctness of a jury instruction is in issue, the instruction in question and any other relevant part of the jury charge.

[34] 5th Cir. R. 30.1

[35] 5th Cir. R. 30.1, internal operating procedures commentary.

[36] 7th Cir. R. 12(a).

[37] 8th Cir. R. 7.

[38] 8th Cir. R. 7(c)(2); Fed. Cir. R. 12(a).

[39] United States v. Noall, 587 F.2d 123 (2d Cir. 1978).

[40] 8th Cir. R. 7(c)(2).

[41] 1st Cir. R. 11(c).

[42] 1st Cir. R. 7; 10th Cir. R. 7(a).

[43] 1st Cir. R. 11(f); 3d Cir. R. 10(1); 5th Cir. R. 13.1; 6th Cir. R. 11(c),(f); 8th Cir. R. 7(d)(3); 9th Cir. R. 13(a)(1); 11th Cir. R. 22(a); D.C. Cir. R. 9(a)(1); Fed. Cir. R. 12(f).

[44] 4th Cir. R. 12; 5th Cir. R. 39; 6th Cir. R. 26(a); 8th Cir. R. 7 (f); 9th Cir. R. 14(b) & (d); 10th Cir. R. 18; 11th Cir. R. 28; D.C. Cir. R. 15(b).

[45] 6th Cir. R. 11(h); 7th Cir. R. 12(a); 8th Cir. R. 7(c)(2); D.C. Cir. R. 9(a)(3).

[46] 6th Cir. R. 11(h); 8th Cir. R. 7(c)(2).

[47] 3d Cir. R. 14(1); 8th Cir. R. 6(a). Two circuits urge counsel to endeavor to enter into stipulations that will avoid or reduce transcripts. 1st Cir. R. 7; 10th Cir. R. 7(a).

APPENDIX E.

H.R. 5061, 98th CONGRESS, TO TERMINATE CERTAIN AUTHORITY OF THE JUDICIAL BRANCH OF THE GOVERNMENT WHICH IS SUBJECT TO CONGRESSIONAL REVIEW UNLESS THAT AUTHORITY IS APPROVED BY AN ENACTMENT OF CONGRESS.

98TH CONGRESS
2D SESSION

H. R. 5061

To terminate certain authority of the judicial branch of the Government which is subject to congressional review unless that authority is approved by an enactment of the Congress.

IN THE HOUSE OF REPRESENTATIVES

MARCH 7, 1983

Mr. LEVITAS introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To terminate certain authority of the judicial branch of the Government which is subject to congressional review unless that authority is approved by an enactment of the Congress.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the authority of the Supreme Court of the United States under section 2076 of title 28, United States Code, the exercise of which, under the terms of that section, is subject to disapproval by the Congress, shall terminate one hundred and eighty days after the date of the enactment of this Act unless the exercise of that authority is approved by an enactment of the Congress before the end of that one-hundred-and-eighty-day period.

○