SUMMARY OF THE

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

The Committee on Rules of Practice and Procedure recommends that the Judicial Conference:

1. Approve proposed amendments to Appellate Rules 21, 25, and 26 and transmit them to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law . . . . . pp. 2-4

2. Approve proposed amendments to Bankruptcy Rules 1006, 1007, 1019, 2002, 2015, 3002, 3016, 4004, 5005, 7004, 8008, and 9006 and transmit them to the Supreme Court for its consideration with the recommendation that they be adopted by the Court in accordance with the law . . . . . pp. 7-9

3. Approve proposed amendments to Civil Rules 5 and 43 and transmit them to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law . . . . . pp. 12-14

4. Approve the proposed amendments to Criminal Rules 16 and 32 and transmit them to the Supreme Court for its consideration with the recommendation that they be adopted by the Court in accordance with the law . . . . . pp. 17-21

The remainder of the report is for information and the record.

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

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

Your Committee on Rules of Practice and Procedure met on July 5-7, 1995. All the members attended. Judge William R. Wilson and Deputy Attorney General, Jamie S. Gorelick, attended part of the meeting.

Representing the advisory committees were: Judge James K. Logan, Chair, and Professor Carol Ann Mooney, Reporter, of the Advisory Committee on Appellate Rules; Judge Paul Mannes, Chair, and Professor Alan N. Resnick, Reporter, of the Advisory Committee on Bankruptcy Rules; Judge C. Roger Vinson, attending on behalf of Judge Patrick E. Higginbotham, Chair, and Professor Edward H. Cooper, Reporter, of the Advisory Committee on Civil Rules; Judge D. Lowell Jensen, Chair, and Professor David A. Schlueter, Reporter, of the Advisory Committee on Criminal Rules; and Judge Ralph K. Winter, Jr., Chair, and Professor Margaret A. Berger, Reporter, of the Advisory Committee on Evidence Rules.

Participating in the meeting were Peter G. McCabe, Secretary to the committee; Professor Daniel R. Coquillette, Reporter to the committee; John K. Rabiej, Chief, Rules Committee Support Office; Professor Mary P. Squiers, Director Local Rules Project; and Bryan A. Garner and Joseph F. Spaniol, consultants to the committee. Geoffrey M. Klineberg and Roger A. Pauley of the Department of Justice and Judith A. McKenna of the Federal Judicial Center attended the meeting. Other staff from the Administrative Office and various members of the public also attended the meeting as observers.

I. AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE

A. Rules Recommended for Approval and Transmission

The Advisory Committee on Appellate Rules submitted proposed amendments to Federal Rules of Appellate Procedure 21, 25, 26, and 27 together with Committee Notes explaining their purpose and intent. The proposed amendments had been circulated to the bench and bar for comment in September 1994. A public hearing was scheduled, but later canceled, because no request to appear was received by the committee.

Under the proposed amendments to Rule 21 (*Writ of Mandamus and Prohibition Directed to a Judge or Judges and Other Extraordinary Writs*), the trial judge would not be treated as a respondent nor be named in the petition for the writ. The judge would be permitted to appear to oppose the petition only if invited or ordered to do so by the appellate court. In light of the public comments, the draft amendments were revised by the advisory committee to require: (1) that the

petitioning party serve the trial court clerk with a copy of the petition, and (2) that the circuit clerk send to the trial court clerk a copy of the order disposing of the petition. In this way the trial judge should receive timely notice in all instances.

A member of the committee, however, urged that the proposed amendments be modified further to provide the trial judge with the right to respond to the petition. An earlier published proposal would have entitled the trial judge to respond but was altered because of strong opposition in the public comments. Concerns were raised that a judge's neutrality and objectivity might be jeopardized if the judge, after opposing the petition, continued to adjudicate the same case. The committee did not approve the recommendation. But it did revise the proposed amendments in two respects: (1) to require that a copy of the petition be sent directly to the trial judge, and (2) to state explicitly that the trial judge may request permission to respond to the petition.

The proposed amendments to Rule 25 (*Filing and Service*) provide that in order to file a brief or appendix using the "mailbox rule," the brief or appendix must be mailed by First-Class Mail or dispatched to the clerk by a commercial carrier for delivery within three calendar days. A party using the mailbox rule must certify in the proof of service that the brief or appendix was mailed or delivered to the commercial carrier on or before the last day for filing. Service on other parties by a commercial carrier would also be permitted.

Rule 25 would also be amended to authorize a court to permit, by local rule, the filing of papers by electronic means, provided such means are consistent with

technical standards, if any, established by the Judicial Conference. The amendment is part of a package of proposed uniform amendments with the Bankruptcy Rules and Civil Rules.

Rule 26 (*Computation and Extension of Time*) would be amended to provide a party with a three-day extension to act whenever delivery to the party being served occurs later than the date of service stated in the proof of service. After considering some technical difficulties with the draft, the proposed amendments were revised to make clear that the three-day extension is not provided when "the paper is delivered on the date of service." The subdivision's caption was also modified to eliminate reference to "Mail or Commercial Carrier."

Rule 27 (*Motions*) would be entirely rewritten. The proposed amendments would require that any legal argument necessary to support a motion be contained in the motion. Separate briefs would not be allowed. The amendments would set 20-page limits on motions and responses and expand the time for response from 7 to 10 days. In addition, no oral argument would be permitted unless ordered by the court. Your committee decided to defer approving the proposed amendments until final action is taken on the proposed amendments to Rule 32 (see discussion below), because they interrelate with the Rule 27 provisions.

The proposed amendments to the Federal Rules of Appellate Procedure, as recommended by your committee, appear in *Appendix A* together with an excerpt from the advisory committee report.

Recommendation: That the Judicial Conference approve proposed amendments to Appellate Rules 21, 25, and 26 and transmit them to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

B. Rules Approved for Publication and Comment

The Advisory Committee on Appellate Rules submitted proposed amendments to Appellate Rules 26.1, 28, 29, 32, 35, and 41 and recommended that they be published for public comment.

Rule 26.1 (*Corporate Disclosure Statement*) would be amended to simplify the disclosures that must be made by a corporate party by deleting the requirement that the party identify subsidiaries and affiliates that have issued shares to the public. The rule would be amended, however, to require disclosure of a parent corporation and of any stockholders that are publicly held companies owning 10% or more of the party's stock. The proposed amendments will be brought during the public comment period to the attention of the Committee on Codes of Conduct for its consideration.

Rule 29 (*Brief of an Amicus Curiae*) would be rewritten. The proposed amendments would require that the amicus brief be filed with a motion requesting permission to file the brief. The motion must also state the relevance of the matters asserted by the amicus to the disposition of the case.

A preliminary draft of proposed amendments to Rule 32 (*Form of Brief*) was published in September 1994. That draft was revised substantially in light of comments received by the committee. As revised, the proposed amendments eliminate the preference for proportionately spaced typeface, but if proportionately

spaced typeface is used, it must be 14 points or more. If monospaced typeface is used, it can produce no more than 10 1/2 characters per inch. The length of briefs is set at no more than 14,000 words and an average of 280 words per page. The provisions for a pamphlet-size brief are deleted. The amendments also require the filing of a certificate of compliance.

Your committee discussed at length the advantages and disadvantages of the proposed amendments. Several members expressed concern that the proposal was too technical and overly specific for a national rule. They favored a simple general rule that focused on the intended purposes of the proposal, which are to ensure legibility and prevent unfair violations of document length limits. Other committee members favored the comprehensive approach taken in the proposed amendments, because otherwise the local rules of the courts of appeals would (as most already have) fix specific and technical requirements that are equally as detailed, but which vary from court to court. Your committee decided to recommit the proposal to the advisory committee for further study.

Rule 28 (*Briefs*) would be amended to conform with the proposed amendments to Rule 32 dealing with document formatting and length, including the addition of a certificate of compliance under Rule 32. Your committee deferred approving publication of the proposed amendments, because they interrelate with the proposed amendments to Rule 32, whose publication for comment was deferred.

"In banc" would be changed to "en banc" in Rule 35 (*En Banc Proceedings*), because of its much wider usage among the courts. The proposed amendments to

Rule 35 would also require that each petition for a rehearing en banc demonstrate that it meets the criteria set for en banc consideration. Intercircuit conflict is given as a reason for determining that the proceeding is of exceptional importance - one of the criteria for granting an en banc hearing. As amended, a request for rehearing en banc would suspend the finality of the judgment and extend the period for filing a petition for certiorari.

Rule 41 (*Mandate*) would be amended as a companion to the proposed amendments to Rule 35 and would delay the issuance of the mandate upon filing of a petition for rehearing en banc. The proposed amendments also provide that a mandate is effective when issued.

Your committee voted to circulate the proposed amendments to Rules 26.1, 29, 35, and 41 to the bench and bar for comment.

II. AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE

A. Rules Recommended for Approval and Transmission

The Advisory Committee on Bankruptcy Rules submitted to your committee proposed amendments to Bankruptcy Rules 1006, 1007, 1019, 2002, 2015, 3002, 3016, 4004, 5005, 7004, 8008, and 9006 together with Committee Notes explaining their purpose and intent. The proposed amendments were circulated to the bench and bar for comment in September 1994. The scheduled public hearing was canceled, because no request to appear was received by the committee.

Rule 1006 (*Filing Fee*) would be amended to include within the scope of the rule any fees prescribed by the Judicial Conference that are payable to the clerk on

commencement of a case. The fees can be paid in installments.

The proposed amendments to Rule 1007 (*Lists, Schedules and Statements: Time Limits*) would provide that schedules and statements filed before conversion of a case to another chapter under the Bankruptcy Code are treated as filed in the converted case, regardless of the chapter in which the case was proceeding before conversion. Rule 1019(7) (*Conversion*) would be abrogated to conform to the abrogation of Rule 3002(c)(6).

Rule 2002 (*Notices*) would be amended in several respects. To reduce expenses in administering chapter 7 cases, the rule would be changed to eliminate the need to mail to all parties copies of the summary of the chapter 7 trustee's final account. The rule would continue to require the mailing of a summary of the trustee's final report. It would also clarify the need to send notices to certain creditors and eliminate cross references to certain abrogated provisions.

The proposed amendments to Rule 2015 (*Duty to Keep Records*) would clarify when a debtor in possession or trustee in a chapter 12 case or a debtor engaged in business in a chapter 13 case must file an inventory of the debtor's property.

Rule 3002 (*Filing Proof of Claim or Interest*) would be amended to make the rule consistent with §§ 502(b) and 726 of the Bankruptcy Code as amended by the Act, which govern the treatment of tardily filed claims.

Rule 3016(a) (*Filing of Plan and Disclosure Statement*) would be abrogated, because it could have the effect of extending the debtor's exclusive period for filing

a chapter 11 plan without the court - after notice and a hearing - finding cause for an extension as required by § 1121(d) of the Bankruptcy Code.

The proposed amendments to Rule 4004 (*Discharge*) would delay the debtor's discharge in a chapter 7 case if there is a pending motion to extend the time for filing a complaint objecting to discharge or if the filing fee has not been paid in full.

Rule 5005 (*Filing*) would be amended to permit filing by electronic means - a provision similar to changes proposed to the Appellate Rules and Civil Rules.

Proposed amendments to Rule 7004 (*Process, Service of Summons, Complaint*) would conform the rule to the 1993 amendments to Rule 4 of the Federal Rules of Civil Procedure.

Proposed amendments to Rule 8008 (*Filing and Service*) would permit district courts and, where bankruptcy appellate panels have been authorized, circuit councils to adopt local rules to allow filing, signing, or verification of documents by electronic means in the same manner and with the same limitations that are applicable to bankruptcy courts under Rule 5005, as amended.

Rule 9006 (*Time*) would be amended to conform the rule to the abrogation of Rule 2002(a)(4) and the renumbering of Rule 2002(a)(8).

The proposed amendments to the Federal Rules of Bankruptcy Procedure, as recommended by your committee, are in *Appendix B* together with an excerpt from the advisory committee report.

Recommendation: That the Judicial Conference approve proposed amendments to Bankruptcy Rules 1006, 1007, 1019, 2002, 2015, 3002, 3016, 4004, 5005, 7004, 8008, and 9006 and transmit them to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

B. Rules Approved for Publication and Comment

The advisory committee also submitted proposed amendments to Rules 1019, 2002, 2007.1, 3014, 3017, 3018, 3021, 8001, 8002, 9011, and 9035, and new Rules 1020, 3017.1, 8020, and 9015, and recommended that they be published for public comment. Many of the proposed amendments are necessary to conform the rules to the Bankruptcy Reform Act of 1994 (the Act).

The proposed amendments to Rule 1019 (*Conversion of a Chapter 11 Reorganization Case*) clarify the characterization of a case converted from one chapter to another chapter of the Bankruptcy Code.

A new Rule 1020 (*Election to be Considered a Small Business*) would be added to implement amendments to the Bankruptcy Code made by the Act, which permit a business to elect to be considered a "small business" for purposes of chapter 11.

Rule 2002 (*Notice to Creditors*) would be amended to be consistent with changes in the Bankruptcy Code made by the Act regarding the need for and content of the notice of meetings under chapter 11.

The proposed amendments to Rule 2007.1 (*Appointment of Trustee or Examiner in a Chapter 11 Reorganization Case*) would set procedures for the election of a chapter 11 trustee consistent with the Code amendments in the 1994 Act.

Rule 3014 (*Election Pursuant to § 1111*) would be amended to provide a time limit for secured creditors to make an election under the Code in a small business chapter 11 case.

Rule 3017 (*Court Consideration of Disclosure Statements*) would be amended to provide the court with discretion to fix the record date for the purpose of determining the holders of securities who are entitled to receive a disclosure statement, ballot, and other materials in connection with the solicitation of votes on a plan. Rule 3017.1 (*Court Consideration of Disclosure Statement in a Small Business Case*) would be added to provide procedures, consistent with the Act, for the conditional and final approval of a disclosure statement in a small business chapter 11 case.

The proposed amendments to Rule 3018 (*Acceptance or Rejection of a Plan*) would give a court the flexibility to fix the record date for the purpose of determining the holders of securities who may vote on a plan.

The proposed amendments to Rule 3021 (*Distribution Under Plan*) would provide flexibility to the courts in fixing the record date for purposes of determining the holders of securities who are entitled to receive distributions under a confirmed plan, to treat the holders of debt securities the same as other creditors by requiring that their claims be allowed in order to receive distribution, and to clarify that all interest holders may receive a distribution under a confirmed plan.

Rule 8001 (*Manner of Taking Appeal*) would be amended to conform to the Act, which revised 28 U.S.C. § 158 to permit an appeal as of right from an order extending or reducing the exclusivity period for filing a chapter 11 plan under 11 U.S.C. § 1121. It would also establish procedures for electing to have an appeal heard by the district court rather than the bankruptcy appellate panel.

The proposed amendments to Rule 8002 (*Time for Filing Notice of Appeal*) would clarify the time periods for extensions to file an appeal.

Rule 8020 (*Damages and Costs for Frivolous Appeal*) would be added to state specifically that a district court, or a bankruptcy appellate panel, hearing an appeal may award damages and costs for a frivolous appeal.

Rule 9011 (*Signing and Verification of Papers*) would be amended to conform with the 1993 amendments to Civil Rule 11, with certain exceptions applicable to the filing of a bankruptcy petition.

Rule 9015 (*Jury Trials*) would be added to provide procedures relating to jury trials in bankruptcy cases and proceedings, including procedures for consenting to have a jury trial conducted by a bankruptcy judge under the amendments to 28 U.S.C. § 157 made by the Act.

The proposed amendments to Rule 9035 (*Applicability of Rules in Alabama and North Carolina*) would clarify the applicability of the rules relating to bankruptcy administrators in these districts.

Your committee voted to circulate the proposed amendments to the bench and bar for comment.

III. AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

A. Rules Recommended for Approval and Transmission

The Advisory Committee on Civil Rules submitted to your committee amendments to Federal Rule of Civil Procedure 5 together with a Committee Note explaining their purpose and intent. The proposed amendments to Rule 5 were

circulated to bench and bar for comment in September 1994. No request to testify on the proposed amendments was received, and the scheduled public hearing was canceled.

The proposed amendments to Rule 5 (*Service and Filing of Pleadings and Other Papers*) are part of a package of uniform amendments with the Appellate and Bankruptcy Rules that would authorize a court, by local rule, to permit documents to be filed, signed, or verified by electronic means so long as the means were consistent with any technical standards established by the Judicial Conference.

At its January 1995 meeting, your committee approved proposed amendments to Rule 43 (*Taking of Testimony*), but delayed their transmission to the Judicial Conference until its September meeting. The proposed amendments would allow testimony at trial from a witness who is unable to communicate orally, but who is able to communicate by other means, e.g., sign language. It would also permit testimony by contemporaneous transmission from a different location (e.g., video transmission).

Concerns were raised that the absence of the physical presence of the opposing attorney during the witness' testimony could lead to abuses, including improper coaching outside the view of the camera. In most cases, video depositions of the witness taken before trial seemed feasible and would be preferable. Accordingly, the original version of the proposed amendments to Rule 43, which was published in 1993, was revised to permit testimony by contemporaneous transmission only on a showing of compelling circumstances.

The proposed amendments to Rules 5 and 43 of the Federal Rules of Civil

Procedure, as recommended by your committee, appear in *Appendix C* together with an excerpt from the advisory committee report.

> **Recommendation:** That the Judicial Conference approve proposed amendments to Civil Rules 5 and 43 and transmit them to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

B. Rules Approved for Publication and Comment

The Advisory Committee on Civil Rules also submitted proposed amendments to Federal Rules of Civil Procedure 9, 26, and 47 and recommended that they be published for public comment.

Rule 9 (*Pleading Special Matters*) would be amended to resolve the ambiguity that arises in cases that involve both admiralty and nonadmiralty claims by clarifying that "a case that includes an admiralty or maritime claim within this subdivision is an admiralty case within 28 U.S.C. § 1292(a)(3)."

The proposed amendment to Rule 26 (*Protective Orders*) was originally published for comment in October 1993. In light of public comments received by the advisory committee, the proposed amendment was revised before transmission to the Judicial Conference. At its March 1995 session, the Conference recommitted the proposal to your committee for further study after voting to modify it by striking the phrase "on stipulation of parties."

The Advisory Committee on Civil Rules reconsidered the proposed amendments. The advisory committee noted that the proposal represented a delicate balance not only of privacy and public interest in individual cases, but also

the private and public character of civil litigation in general. It was especially concerned that any change in the rule not be construed to require a trial judge to conduct an evidentiary hearing on every request for a protective order. It was persuaded that the best course was to provide for another round of public comment on the same proposal that was sent to the Judicial Conference. The advisory committee hopes that the public comments will enhance understanding of the use of protective orders and at the same time meet the concerns of some that the public did not have an adequate opportunity to comment on the revised version.

Your committee noted that the proposed amendments generated some confusion regarding their scope, particularly with regard to sealing orders. In light of this concern, the Committee Note to the proposal was revised to state explicitly that the proposal deals only with discovery orders and does not affect court orders that seal records or authorize or deny access to records.

Rule 47 (*Selection of Jurors*) would be amended to allow the parties to supplement the court's examination and question prospective jurors under reasonable limits on time, manner, and subject matter determined by the court in the trial judge's discretion. A similar proposed amendment to Criminal Rule 24 was recommended by the Advisory Committee on Criminal Rules.

The advisory committee noted concerns from the bar, including from representatives of the American College of Trial Lawyers and the Litigation Section of the American Bar Association, on the adequacy of voir dire conducted exclusively by a judge. Moreover, it noted the results of a recent Federal Judicial Center study

that showed very little difference in the total time expended on voir dire in courts where it is conducted by the judge or the attorney or by both. The advisory committee also was convinced that a trial judge could readily handle any inappropriate questioning as the court does in analogous situations, e.g., opening and closing arguments.

Numerous letters were received by the committee from judges vigorously objecting to the general concept of mandatory, even if limited, attorney questioning. The letters raised concerns that attorney questioning would be done for improper purposes and would delay proceedings.

Your committee concluded that a public airing of the issues, which would provide a forum for viewpoints from all interested individuals and organizations, would be especially helpful. Your committee also believes that the opportunity for public comment would be consistent with the spirit of the Rules Enabling Act rulemaking process, which envisions participation by the bench, bar, and public.

At its January 1995 meeting, your committee approved the request of the advisory committee to publish for public comment proposed amendments to Rule 48 (*Number of Jurors - Participation in Verdict*). The proposal would require the initial empaneling of a jury of twelve persons in all civil cases, in the absence of stipulation by counsel to a lower number. The proposed amendments would not alter the requirement of unanimity, nor provide for alternate jurors. The proposed change is supported in part by the belief that requiring twelve-member juries would positively affect the representative quality of juries and in part by more general

advantages of twelve-member juries. The advisory committee noted that many courts now routinely sit juries of eight or ten or more in all but the shortest cases.

Your committee believes that public comment would be especially helpful in assessing whether the advantages of a larger jury size, including increased minority representation and possibly moderation of unreasonable damages awards, outweigh the increased costs associated with a larger sized jury.

Your committee voted to circulate the proposed amendments to the bench and bar for comment.

IV. AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE

A. Rules Recommended for Approval and Transmission

The Advisory Committee on Criminal Rules submitted to your committee proposed amendments to Federal Rules of Criminal Procedure 16 and 32 together with Committee Notes explaining their purpose and intent. The proposed amendments were circulated to the bench and bar for comment in September 1994. A public hearing was held in Los Angeles in January 1995.

The proposed amendments to Rule 16 (*Discovery and Inspection*) would establish parallel reciprocal disclosure provisions for the prosecution and the defense regarding the testimony of an expert witness on the defendant's mental condition. The amendments would also require the government, seven days before trial, to disclose to the defense the names of government witnesses and their statements, unless it believes in good faith that pretrial disclosure of this information might threaten the safety of a person or risk the obstruction of justice.

In such a case, the government simply would file an ex parte, unreviewable statement with the court stating why it believes - under the facts of the particular case - that a safety threat or risk of obstruction of justice exists.

The comments and testimony highlighted the contrast between the ease of counsel obtaining discovery in a civil case and the difficulty of defense counsel in preparing for trial in the absence of witness disclosure in a criminal case. Although many federal prosecutors already timely disclose witnesses' names and statements, many others do not. There is no national uniform policy on disclosure. The extent of disclosure ultimately depends on the policies of local U.S. attorney offices and individual assistant U.S. attorneys, which often vary from district to district and even within an office. Other commentators stressed that the plea bargaining process would be more effective and efficient if disclosure is made timely so that the defendant understands the strength of the prosecution's case.

The proposed amendments recognize clearly that some government witnesses come forward to testify at risk to their personal safety, privacy, and economic well-being. At the same time, most cases do not involve risks to witnesses. The proposed amendments are intended to create a fairer trial by reducing the practical and inequitable hardships defendants presently face in attempting to prepare for trial without adequate discovery. Unnecessary trial delay is now incurred because once a witness is called to testify at the trial, a recess must be ordered to allow the defense time to review any previous statements made by the witness in order to effectively cross-examine the witness, which only places additional burdens on all

parties, court resources, and jurors.

Many state criminal justice systems and the military already provide pretrial disclosure of witnesses, and it is presently standard operating procedure in many federal district courts. The proposed amendments are less demanding than the amendments recommended by the Judicial Conference and approved by the Supreme Court in 1974, which required disclosure of the names and addresses of all government witnesses upon request of the defendant. If the government believed that disclosure would create an undue risk of harm to the witness it could request the court for a protective order. The amendments were rejected ultimately by Congress.

The proposed amendments, as published for comment, admittedly created a conflict with the Jencks Act in so far as they would require pretrial disclosure of witnesses' statements. But they were consistent with the Act in recognizing the importance of defense pretrial discovery while permitting the government to block it when necessary. The amendments are procedural and are similar to several other previously approved amendments that require the defense and prosecution to disclose certain information before trial.

Your committee decided to eliminate the conflict with the Jencks Act by limiting the proposed amendments to the disclosure of witnesses' names only. It also revised the time provisions by providing the court with discretion to require disclosure in less than seven days before trial to accommodate cases in which the prosecution is unable itself to prepare for the trial.

The Department of Justice continues to oppose any required pretrial

disclosure of witnesses' names. The Department believes that the proposed amendments are unnecessary because most prosecutors already disclose such information before trial. It is also concerned that the proposed amendments would: (1) impose subtle but real restraints on prosecutors who would prefer not to disclose the name of a witness based on their assessment of the potential risks, but who do not want to incur disapproval of the trial judge, (2) add new safety risks to witnesses who would otherwise never be identified in cases in which a plea was entered immediately before trial, and (3) create unnecessary satellite litigation on review. The advisory committee substantially modified earlier versions of the proposed amendments to Rule 16 over the course of several past meetings to meet the Department's concerns.

As amended, your committee voted to recommend approval of the proposed amendments with the representative of the Department of Justice and one other committee member opposed.

Rule 32 (*Sentence and Judgment*) would be amended to permit a court explicitly to conduct forfeiture proceedings after the return of a verdict, but before sentencing.

The proposed amendments to the Federal Rules of Criminal Procedure, as recommended by your committee, are in *Appendix D* together with an excerpt from the advisory committee report.

> **Recommendation:** That the Judicial Conference approve the proposed amendments to Criminal Rules 16 and 32 and transmit them to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

B. Rule Amendment for Publication and Comment

The advisory committee also submitted proposed amendments to Rule 24 and recommended that they be published for public comment.

The proposed amendments to Rule 24 (*Trial Jurors*) would provide that the parties are entitled to participate in the questioning of prospective jurors as a supplement to the court's examination and under reasonable limits on time, manner, and subject matter imposed by the trial judge. The reasons for the proposed amendments are similar to the reasons given for identical changes to Civil Rule 47. In particular, the advisory committee believed that voir dire is better and is perceived to be fairer when attorneys participate.

Your committee voted to circulate the proposed amendments to the bench and bar for comment.

V. AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE

A. Rules Approved for Publication and Comment

The Advisory Committee on Evidence Rules submitted to your committee proposed amendments to Evidence Rules 801, 803, 804, and 806 and new Rule 807, and it recommended that they be published for public comment.

The proposed amendments to Rule 801 (*Definitions*) would address the issues raised by the Supreme Court in *Bourjaily v. United States*, 483 U.S. 171 (1983). The amendments state explicitly that a court may consider the contents of a coconspirator's statement in determining "the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is

offered." The amendments also provide that the content of the declarant's statement does not alone suffice to establish a conspiracy in which the declarant and the defendant participated. The amendments also treat analogously preliminary questions relating to the declarant's authority and the agency or employment relationship.

The "residual exception" provisions in Rules 803(24) (*Other Hearsay Exceptions; Availability of Declarant Immaterial*) and Rule 804(b)(5) (*Other Hearsay Exceptions; Declarant Unavailable*) would be combined and transferred to a new, single Rule 807 (*Residual Exception*). No change in the meaning of the rules is intended.

The proposed amendments to Rule 804 (*Hearsay Exceptions; Declarant Unavailable*) would provide that a party forfeits the right to object on hearsay grounds to the admission of a declarant's prior statement when the party's deliberate wrongdoing or acquiescence therein procured the unavailability of the declarant as a witness.

Rule 806 (*Attacking and Supporting Credibility of Declarant*) would be amended to correct a miscitation. No substantive change is intended.

As noted, new Rule 807 (*Residual Exception*) would combine former Rules 803(24) and 804(b)(5).

At its January 1995 meeting, your committee approved the recommendation of the advisory committee to publish for public comment proposed amendments to Rules 103 and 407. The proposed amendments to Rule 103 (*Rulings on Evidence*)

would clarify the differing practices among the courts regarding the finality of rulings on pretrial motions concerning the admissibility of evidence. The proposed amendments explicitly establish a default rule requiring counsel to renew at trial any pretrial objection or proffer that was earlier denied to preserve the objection for appeal purposes. Renewal of the objection is unnecessary if "the court expressly states on the record, or the context clearly demonstrates" the finality of the pretrial ruling.

The proposed amendments to Rule 407 (*Subsequent Remedial Measures*) would apply the rule to product liability actions, and would clarify that the rule applies only to changes made after the occurrence that produced the damages giving rise to the action.

Your committee voted to circulate the proposed amendments to Rules 103, 407, 801, 803, 804, and 806 and a new Rule 807 to the bench and bar for comment.

B. Informational Statement Approved for Publication and Comment

The advisory committee has completed its comprehensive review of all the Evidence Rules. (It decided to defer consideration of the rules contained in Article VII until the courts have acquired adequate experience with the Supreme Court decision in *Daubert v Merrell Dow Pharmaceuticals, Inc.*, 113 S.Ct. 2786 (1993).) The committee had published a list of twenty-five rules in September 1994 that it had decided not to amend. The advisory committee now recommends that a list of the remaining twenty-four rules - which it has tentatively decided not to amend - be published, including Rules 103, 104, 408, 411, 801(a-d), 802, 803(1-23), 804 (a-b),

805, 806, 901, 902, 903, 1001-1008, 1101, 1102, and 1103.*

Your committee voted to circulate the list of rules not to be amended to the bench and bar for comment.

VI. Informational Items

A. Uniform Numbering Systems

Unless Congress acts otherwise, amendments to the Federal Rules of Appellate, Bankruptcy, and Civil Rules take effect on December 1, 1995, that will require that all local rules of court "must conform to any uniform numbering system prescribed by the Judicial Conference."

In 1988, your committee began encouraging courts to adopt uniform numbering systems based on the national rules for their local rules in civil cases and in appellate cases. And at its September 1988 session, the Judicial Conference "approved and urged each district court to adopt a Uniform Numbering System for its local rules, patterned upon the Federal Rules of Civil Procedure." JCUS-SEP 88, p. 103.

Information on uniform numbering for civil cases and appellate cases was forwarded earlier to the courts. As a result, many courts of appeals and district courts have already adopted a uniform numbering system based on the national rules. Your committee plans to provide additional information to the district courts on uniform numbering of local rules dealing with proceedings in bankruptcy cases and criminal cases.

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* Amendments to certain subdivisions of Rules 801, 803, and 804 have been proposed. See § V.A. of the report.

It is expected that at its January 1996 meeting, your committee will be in a position to recommend formally to the Judicial Conference that it prescribe a uniform numbering system for appellate, bankruptcy, civil, and criminal proceedings based on the Federal Rules of Practice and Procedure. The committee will consider recommending that the numbering systems not take effect for perhaps one year, so that the courts will have adequate time to consider and implement any necessary changes to their local rules. It intends to advise the courts in the meantime of its plans.

B. Rules Governing Attorney Conduct

The widespread differences among the federal courts and among the states in regulating attorney conduct have generated a call for uniformity - particularly from national practitioners. Rules governing attorney conduct have traditionally been prescribed locally based on state codes of professional conduct. This has led to the "balkanization" of applicable rules, and has caused particular problems in federal multi-district litigation. Your committee is sensitive to the concerns expressed by the various groups affected by this issue. It believes that a gathering of the leaders in this area may be helpful in arriving at a solution, and it decided to begin making arrangements for a conference of representatives from interested organizations to be held before its January 1996 meeting - subject to adequate funding - to discuss the advantages and disadvantages of uniform national rules governing attorney conduct. Your committee expects that the process for reaching a consensus on this controversial matter will not be attainable for several years.

C. Style Project

In March 1992, your committee advised the Judicial Conference that it had established a Style Subcommittee to review all the Federal Rules of Practice and Procedure for consistency and clarity. The consultant to the Style Subcommittee, Bryan A. Garner, has prepared a publication on Drafting Court Rules, which includes specific guidelines for good drafting. The guidelines rely on modern drafting principles and word usage.

The advisory committees have used the drafting guidelines in recommending individual proposed amendments, while at the same time undertaking a separate project stylizing the entire set of rules. Under the drafting guidelines, the word "must" is preferable to the word "shall," because of the multiple meanings associated with "shall." In modifying the proposed amendments to the Appellate Rules that were submitted to it in September 1994, the Supreme Court eliminated the use of "must" and reinstated "shall," which was chosen by the advisory committee in accordance with the style drafting guidelines. The Court noted "that terminology changes in the Federal Rules (should) be implemented in a thoroughgoing, rather than a piecemeal, way."

The Advisory Committee on Appellate Rules is planning to complete its comprehensive restylizing of the Appellate Rules at its Fall 1995 meeting and hopes to transmit the revised rules to your committee at its January 1996 meeting.

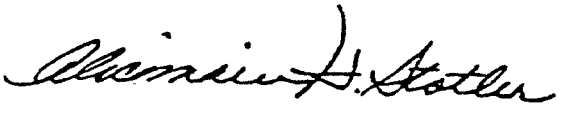
D. Report to the Chief Justice on Proposed Amendments Generating Controversy

In accordance with the standing request of the Chief Justice, a summary of issues concerning the proposed amendments generating controversy is set forth in *Appendix E*.

E. Chart Showing Status of Proposed Amendments

A chart prepared by the Administrative Office (reduced print) is attached as *Appendix F*, which shows the status of the proposed amendments to the rules.

Respectfully submitted,



Alicemarie H. Stotler
Thomas E. Baker
William O. Bertelsman
Frank H. Easterbrook
Thomas S. Ellis, III
Jamie S. Gorelick
Geoffrey C. Hazard, Jr.
Phyllis A. Kravitch
James A. Parker
Alan W. Perry
George C. Pratt
Sol Schreiber
Alan C. Sundberg
E. Norman Veasey
William R. Wilson, Jr.

Appendix A: Proposed Amendments to the Federal Rules of Appellate Procedure
Appendix B: Proposed Amendments to the Federal Rules of Bankruptcy Procedure
Appendix C: Proposed Amendments to the Federal Rules of Civil Procedure
Appendix D: Proposed Amendments to the Federal Rules of Criminal Procedure
Appendix E: Proposed Rule Amendments Generating Substantial Controversy
Appendix F: Chart Summarizing Status of Rules Amendments

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

TO: Honorable Alicemarie Stotler, Chair, and Members of the Standing Committee on Rules of Practice and Procedure

FROM: Honorable James K. Logan, Chair
Advisory Committee on Appellate Rules

DATE: June 5, 1995

The Advisory Committee on Appellate Rules submits the following items to the Standing Committee on Rules:

I. Action Items

A. Proposed amendments to Federal Rules of Appellate Procedure 21, 25, 26, and 27,* approved by the Advisory Committee on Appellate Rules at its April 17 and 18 meeting. The Advisory Committee requests that the Standing Committee approved these amended rules and forward them to the Judicial Conference.

The proposed amendments were published in September 1994. A public hearing was scheduled for January 23, 1995, in Denver, Colorado. Because there were no requests to appear, the hearing was canceled. The Advisory Committee has reviewed the written comments and, in some instances, altered the proposed amendments in light of the comments.

- Part A(1) of this Report summarizes the proposed amendments.
- Part A(2) includes the text of the amended rules.
- Part A(3) is the Gap Report, indicating the changes that have been made since publication.
- Part A(4) summarizes the comments.

* * * * *

*The Standing Committee did not approve the proposed amendment to Rule 27 for submission to the Judicial Conference.

SUMMARY OF PROPOSED RULE AMENDMENTS TO BE FORWARDED TO THE JUDICIAL CONFERENCE

1. Amendments to Rule 21 governing petitions for mandamus are proposed. The rule is amended so that the trial judge is not named in the petition and is not treated as a respondent. The trial court clerk is, however, served with a copy of both the petition and the order disposing of the petition. The judge is permitted to appear to oppose issuance of the writ only if the court of appeals invites or orders the judge to do so. The proposed amendments also permit a court of appeals to invite an amicus curiae to respond to the petition.

2. The proposed amendments to Rule 25 provide that in order to file a brief or appendix using the mailbox rule, the brief or appendix must be mailed by First-Class Mail or dispatched to the clerk by a commercial carrier for delivery within three calendar days. The amendments also require that a party using the mailbox rule must certify in the proof of service that the brief or appendix was mailed or delivered to the commercial carrier on or before the last day for filing. Subdivision (c) is also amended to permit service on other parties by commercial carrier. Amended subdivision (c) further provides that when reasonable, service on other parties should be by a manner at least as expeditious as the manner used to file the paper with the court.

3. The proposed amendment to Rule 26 makes the three-day extension for responding to a document served by mail also applicable whenever the party being served does not receive the document on the date of service recited in the proof of service.

* * * * *

GAP REPORT
CHANGES MADE AFTER PUBLICATION

1. RULE 21

Several changes have been made in Rule 21.

a. A sentence has been added at lines 15 and 16. The new language requires the party petitioning for mandamus to file a copy of the petition with the clerk of the trial court. The Advisory Committee wanted the trial court judge to have notice of the petition. To be consistent with the fact that the judge is not treated as a respondent, the copy is sent to the trial court clerk rather than directly to the judge.

b. At line 70, language was added authorizing a court of appeals to "invite" the judge's participation as well to order it.

c. A sentence has been added at lines 72-75. The new language states that the trial judge may not respond unless requested to do so by the court of appeals. In the published rule the judge's inability to participate without court of appeals authorization was implicit but not stated directly except in the Committee Note.

d. Paragraph (b)(7) is new. It requires the circuit clerk to send a copy of the order disposing of the petition to the clerk of the trial court. This change is a companion to the change requiring the petitioner to file a copy of the petition with the trial court. Filing the petition in the trial court will result in its docketing. Receipt of the order disposing of the petition will notify the trial court that the mandamus proceeding has been completed.

e. Several stylistic changes were adopted.

   i. At lines 9 and 43, "must" was changed to "shall".

   ii. At lines 10 and 11, and line 91, "clerk of the court of appeals" was changed to "circuit clerk".

   iii. Lines 26 and 27 were combined as subparagraph (A) and the words "The petition must were" were inserted at line 28 before the word "state". At line 37, the words "The petition must" were inserted before the word "include".

   iv. The numbered paragraphs of subdivision (b) were rearranged. Paragraph (4) of the new draft (beginning at line 70) had been paragraph (2) of the published draft.

   v. At line 76, the word "briefs" was changed to "briefing" and the

word "are" was changed to "is".

vi. At lines 87 and 88, the plural subject was changed to singular and the words "one of" were added.

vii. At line 90, the word "shall" was changed to "must" because the sentence is passive.

viii. At line 90, the sentence was changed so that application is not made by "petition filed" with the clerk, but by "filing a petition" with the clerk.

ix. At line 92, the words "parties named as" were deleted.

2. Rule 25

Several changes have been made in Rule 25.

a. The caption of the rule has been amended to read: "Filing, Proof of Filing, Service, and Proof of Service. This change was made to alert the reader to the fact that when the mailbox rule is used for filing a brief or appendix, a certificate reciting the date and manner of filing is required by an amendment to subdivision (d).

b. New language is added at lines 21 through 23. The language makes the mailbox rule applicable not only to First-Class Mail but also to any other class of mail that "is at least as expeditious." This makes the mailbox rule applicable if Express Mail or Priority Mail are used but does not make their use mandatory.

c. New language is added at lines 25 through 27. The published rule made the mailbox rule applicable when a party used a "reliable commercial carrier" to deliver a brief or appendix to the court. Several commentators objected to the adjective "reliable". The new language makes the mailbox rule applicable when a brief or appendix is dispatched to the clerk "for delivery within 3 calendar days by a third-party commercial carrier." The change eliminates the possibility of satellite litigation about reliability as well as the possibility of using a reliable but purposely slow carrier. Parallel language changes were made at lines 75 and 76 dealing with service by commercial carrier. The 3-calendar-day period coordinates with the amendments to Rule 26 regarding the 3-day extension of time for responding after service.

d. The sentence at lines 76 through 81 has been amended. Several commentators objected to the provision requiring that "when feasible" service should be accomplished in as expeditious a manner as the manner used to file the paper with the court. The provision now calls for comparable service "when reasonable considering such factors as the immediacy of the relief sought, distance, and cost." The

Committee believes that this language provides better guidance.

e. Subdivision (2)(B) of the published rule required a party using the mailbox rule to provide a certificate that it was mailed or delivered to a reliable commercial carrier on or before the last day for filing. That provision has been rewritten and moved to subdivision (d). The certification requirement was moved to subdivision (d) so that it could be combined with the proof of service.

f. Stylistic changes were made:
   i. At line 19, the word "was" was replaced by "is:".
   ii. At lines 20 and 21, initial caps were used for "First-Class Mail".
   iii. At line 58, the word "must" was changed to "shall".
   iv. At line 82, the words "clerk or other" were omitted.
   v. At line 86, the word "Papers" was made singular.
   vi. At line 90, the word "names" was made singular.

3. RULE 26

Several changes have been made in Rule 26.

a. The published amendment gave a party who must respond within a specified time after service of a document 3 additional days to respond when service is by "reliable commercial carrier" as well as when service is by mail. Because the distinction between personal service and other kinds of service is not always clear, the words "and the paper is served by mail" were deleted from lines 4 and 5, and new language has been added at lines 6 through 8. These changes make the 3-day extension available whenever a document is not delivered to the party being served on the same day that it is "served." The 3-day extension was created because service by mail is complete on the date of mailing. Since the party being served by mail does not receive the paper on that date, an extension is provided. Making the extension available whenever the party does not receive the document on the date it is served achieves the original objective and avoids the confusion arising from the need to know the type of service.

b. At line 5, the word "calendar" was added before the word "days." That change makes it clear that weekends and holidays are counted because the 3-day extension period is not covered by the provision in Rule 26(a) that weekends and holidays do not count when a period is less than 7 days.

c. Stylistic changes were also made:
   i. At line 2, the word "Whenever" was changed to "When".
   ii. At line 3, the words "do an" were omitted.

* * * * *

SUMMARY
COMMENTS RECEIVED ON PROPOSED AMENDMENTS

1. RULE 21 - Mandamus

Of the 14 commentators on the published rule, 7 support the rule without qualification. Three other commentators support the proposed amendments but suggest revisions. Four commentators oppose the revisions.

a. Opposition

Three of the four commentators who oppose the rule amendments do so because they believe that the trial judge should have the right to participate in a mandamus proceeding. The fourth person states that he sees no need for the change.

i. The trial judge's right to respond

Specifically, Judge Duff states that removing the trial judge may allow the parties to ignore the institutional interests of the district court, to misrepresent the facts to the appellate court, and to impugn the reputation of the trial judge. Judge Will emphasizes that the judge may be the principal or only party with an interest in opposing the mandamus. If the judge is not a party to the proceeding, Judge Will asks whether the judge will have standing to petition for certiorari in the event that mandamus is granted. Neither Judge Will nor Judge Duff object to deleting the trial judge's name from the title of the case, but they are concerned with precluding the judge from receiving notice of the filing of a petition, from responding to the petition, and from having standing to seek review of the issuance of the writ.

The arguments presented by Judges Duff and Will in opposition to the amendments are the same as those that led to the publication in October 1993 of the preceding draft. The earlier published draft required service on the judge and permitted the judge to participate whenever the judge thought it appropriate. At its April 1994 meeting, following publication of that draft and based upon the comments received at that time, the Advisory Committee -- by divided vote -- decided to publish the current draft that permits a trial judge to respond to a petition for mandamus only when ordered to do so by the court of appeals.

ii. Other issues

Professor Hoffheimer opposes even deleting the judge as a respondent. Professor Hoffheimer believes that the need to serve the judge may discourage the commencement of the proceedings, and they should be rare.

Professor Hoffheimer also states that the judge has an interest in receiving notice of the petition and that there may be a jurisdictional problem in enforcing specific relief directed against a trial judge who has not been served. Professor Hoffheimer further notes that the proposed amendments may be incompatible with the statutory grant of jurisdiction under 28 U.S.C. § 1651(b) to issue alternative writs. He asks whether an alternative writ can be granted if the party has not been joined. He believes that the changes are so radical that they would be better made by Congress.

b. Support

Seven commentators support the amendments without qualification. Three others support them but make suggestions for improvement.

The suggestions for improvement are as follows:

i. The New Jersey State Bar Association notes that the rule authorizes a court of appeals to "order" the trial judge to respond. The association recommends that the rule also authorize a court to "invite" the trial judge to participate. Such an amendment would permit a court of appeals to give the trial judge the option to participate while not requiring the judge to become involved. The association also suggests that a copy of the petition should be mailed to the trial judge so that the judge has notice of the filing.

ii. The American Bar Association (ABA) Section of Litigation supports the amendments but suggests that the rule be amended in the following ways:
- The Committee Note states that a trial judge may not respond to a petition for mandamus unless the court orders the judge to respond. The sections recommends that if such a prohibition is intended, it should be clearly stated in the text of the rule.
- A reply to a response should be permitted.
- Subdivision (b)(2) should explain:
  - the procedure for identification and invitation of an amicus

curiae;
- how and when the petitioner will be notified of the amicus' participation; and
- how the involvement of an amicus will affect the timing of the decision.

- Subdivision (b) should be amended to prohibit adoption of a local rule that requires a party to file other than 3 copies of a petition.

iii. The United States Postal Service also supports the amendment but expresses a concern similar to the ABA Litigation Section's third suggestion. The postal service states that the rule should provide guidance concerning the circumstances in which a court may appropriately invite an amicus to participate. The postal service suggests that a court should involve an amicus only in "those instances in which the respondent does not oppose issuance of the writ or does not have sufficient perspective on the issue to provide an adequate response." The postal service also suggests that the rule should address the qualifications of those who may be asked to serve as an amicus.

2. RULE 25 - Filing and Service

Of the 16 commentators on the published rule, four support the published amendments without qualification and seven generally support the amendments but suggest further revision. Only one commentator expresses general opposition to the amendments while four express opposition to the requirement that service on other parties be by a manner at least as expeditious as the manner of filing with the court.

a. Opposition

i. General

One commentator opposes extending the "mailbox rule" (applicable to the filing of a brief or appendix) to the use of a "reliable commercial carrier." The commentator believes that this and other changes to Rule 25 inappropriately place the emphasis upon the receipt of a brief by the clerk rather than upon what the commentator believes is the more critical time, the receipt of a brief by opposing counsel.

ii. Service

The published amendments to subdivision (c) permitted service by "reliable commercial carrier" in addition to the current methods -- personal service or mailing. The proposed amendments also stated that "[w]hen feasible, service on a party must be by a manner at least as expeditious as the manner of filing with the court." Four commentators oppose requiring service in as expeditious a manner as the manner of filing with the court.[2]

- One of those commentators states that the rule treats all methods of service as equivalent and there is no justification for placing a limitation on the use of any method.
- Another states that the change is unnecessary because the time for serving and filing a responding brief or motion paper runs from the time of service and is, therefore, subject to the Rule 26(c) extension whenever service is other than personal.
- A third believes that the rule is unclear; he asks if service may be accomplished by First-Class Mail on an opposing party who lives out of state when a paper is personally delivered to the clerk's office for filing. He suggests deleting the sentence.
- A fourth commentator states that there is not a sufficient problem to warrant the costs of the proposal but that if such a change is made it should be confined to instances in which the party seeks immediate action.

b. Support

Four commentators support the proposed amendments without qualification. Seven commentators are supportive of the amendments but suggest additional revisions.

i. Type of mail service

The current rule provides that a brief is treated as filed on the day of mailing "if the most expeditious form of delivery by mail, except special delivery, is used." That language was adopted before the Postal Service offered Express Mail and other expedited delivery services. The Committee wanted to make it clear that use of First-Class Mail is sufficient. The published amendment provided that a brief is timely filed if, on or before the day for filing, it is mailed by First-Class Mail. Three commentators point out that a literal reading of the rule would make the "mailbox

[2] As will be discussed below, four commentators state their specific support for the requirement.

rule" inapplicable if the party mailed its brief to the court by Express Mail. Since Express Mail and two-day mail service are generally more expeditious than First-Class Mail, the rule should not preclude their use. The United States Postal Service recommends either adding the term Express Mail to the proposed rule or replacing "First-Class Mail" with "United States Mail." Another commentator suggests making the mailbox rule applicable to First-Class Mail and "other classes of mail that are at least equally expeditious."

ii. Reliable commercial carriers

The published amendment made the mailbox rule applicable when a brief or appendix is delivered to a "reliable commercial carrier." While most of the commentators support the change, four noted that disputes about the reliability of a carrier are likely to arise. The United States Postal Service notes that the provision does not violate the Private Express Statutes but because of the satellite litigation it believes likely to arise concerning "reliability," the Postal Service suggests deleting the provision in its entirety. The other three commentators suggest either deleting the adjective "reliable" or defining it. For example, a "reliable" carrier might be one that guarantees delivery as quickly as First-Class Mail.

iii. Service

The published amendments to subdivision (c) required that "when feasible," service on a party be accomplished "by a manner at least as expeditious as the manner of filing." Four commentators expressed their support for that specific change. Although they support that amendment of subdivision (c), two of those four commentators, as well as two others, suggest refinement of that provision.

- One commentator states that the language of the rule is unclear and that it would be better to state that service must be accomplished "in the same manner" as filing with the court. The same commentator suggests deleting the word "feasible" because it can be misunderstood and misinterpreted.
- One commentator suggests that the standard should be more precise and suggests that the rule require as expeditious service not simply "when feasible" but "when feasible and reasonable, considering such things as distance and extraordinary cost . . .."
- Another commentator opposes requiring personal service when a brief or motion is filed with a clerk of court by hand delivery. The commentator points out that hand delivery on a party or attorney residing in a different state, city, or region may be both difficult and costly to arrange. The commentator suggests amending the language to make it applicable "[w]hen filing with the court is made by mail or commercial carrier, service on a party

must be by a manner at least as expeditious . . .."

- A fourth commentator does not oppose requiring personal service when a paper is filed by hand delivering it to the court but suggests amending the committee note to state that when a "brief or motion is filed with the court by hand or by overnight courier, the copies . . ."

iv. Miscellaneous

One commentator suggests that the rule should permit the consolidation of the certification of mailing with the certificate of service.

Another commentator suggests that the mailbox rule should be extended to a paper filed in connection with a motion or a petition for rehearing.

Another commentator notes that subdivision (b) requires service "on counsel" if a party is represented by counsel. The commentator suggests that if a party is represented by two or more different firms, that one of them should be designated as the "service attorney" and an opposing party need only serve the "service attorney."

The Association of the Bar of the City of New York is concerned about the proposed language in 25(a)(2)(D) authorizing local rules governing electronic filing. (The language is virtually identical to that in proposed amendments to Civil Rule 5(e), and Bankruptcy Rule 5005(a)(2).) The association is concerned that the proposed amendment does not impose any controls on the rules local courts may develop and that there is no provision for monitoring those local rules to determine which of them are most effective. The committee recommends that the rule be amended to require that any local rule must provide for such things as public access to files, accuracy of electronically stored documents, and security and integrity of the files.

3. Rule 26 - Computation and Extension of Time

The published amendment of this rule gave a party who must respond within a specified time after service of a document three additional days to respond when service is by a "reliable commercial carrier," just as a party has a 3-day extension when service is by "mail." Of the twelve commentators on the proposed amendment to Rule 26, five support the amendments without qualification and three support the amendments but suggest further refinement of them. Three commentators oppose the amendments and one suggests that the three day extension provided for a

response when service is by mail is insufficient.

a. Opposition

The United States Postal Service suggests that the Committee should delete the provision making the three-day extension applicable when a document is served by a "reliable commercial carrier." In fact, the Postal Service opposes not only the applicability of the extension but service by commercial carriers. See the preceding discussion about Rule 25. The Postal Service believes that the provision will spawn satellite litigation dealing with the "reliability" of a carrier and the relevance of a party's assumption about a carrier's reliability and that the change is not necessary. Another commentator concurs; he opposes the reference to a "reliable commercial carrier" as ambiguous and unnecessary.

A third commentator opposes the amendment stating that the proposal highlights the fact that there is no clear dividing line between personal service and other kinds of service. He uses the following example. If a lawyer uses a messenger to serve a brief or motion on a party and the messenger either signs a certification under Rule 25(d) or obtains an "acknowledgment of service," service is personal. If a lawyer gives a brief to a private courier service instructing that it be delivered the next day and, having done so, the agent signs a statement certifying that [s]he left the document at the opposing attorney's office with a "clerk or other responsible person," is not that also personal service? The commentator suggests that the real difference between "personal" service, and service by "mail" or by "commercial carrier" rests upon who signs the proof of service. In all instances someone personally delivers the paper. If it is true that the hallmark of personal service is that the proof of service is signed by the person who personally delivered the document to the opposing party or his/her counsel, the commentator asks how a recipient of the document will know whether the 3 day extension is available.

The third commentator notes that adding 3 days will discourage the use of overnight service. He suggests adding one 1 day and requiring use of one-day service, or measuring the time for responding from the date of receipt if some reliable indication of such receipt can be obtained. He asks whether dropping a package in a private carrier's pick-up box counts as "delivery to the carrier" or whether the package must be taken to the carrier's office. He also suggests clarifying the interrelationship of subdivisions (a) and (c).

b. Support

Five commentators support the proposed amendments without qualification and three others expressly support the amendments but suggest additional refinements. Many of the commentators note that even though it is not authorized by the existing rules, service by commercial carriers is common.

The commentators who support the change but offer suggestions for further revision suggest the following:

i. The adjective "reliable" should be dropped from the reference to commercial carriers as it can be misunderstood and misinterpreted.
ii. That it is unnecessary to add 3 days rather than 1 or 2 if service is made by overnight or second-day carrier.
iii. The rule should define "reliable commercial carrier."

c. Miscellaneous

One commentator suggests that the 3-day extension is not enough time to add to the deadline for responding to a paper that is served by mail. The commentator states that mail from the west coast to Washington often takes five days.

* * * * *

LIST OF COMMENTATORS
SUMMARY OF THEIR INDIVIDUAL COMMENTS

1. RULE 21

The rule is amended so that the trial judge is not named in the petition and is not treated as a respondent. The judge is permitted to appear to oppose issuance of the writ only if the court of appeals orders the judge to do so. The proposed amendments also permit a court of appeals to invite an amicus curiae to respond to the petition.

1. American Bar Association
Section of Litigation
750 North Lake Shore Drive
Chicago, Illinois 60611

The section supports the proposed amendment which conforms the rule to actual mandamus practice in many circuits. The section, however, makes several suggestions and observations.

a. Neither subdivision (b)(2) nor the Committee Note explains the procedure for the identification and invitation of an amicus curiae, nor how or when the petitioner will be notified of the amicus' participation, nor how the involvement of an amicus will affect the timing of the decision. The section recommends amendment of subdivision (b) to make the procedures clear.
b. The Committee Note states that the trial judge may not respond unless the court orders the judge to respond, but the text of the rule does not contain any such express prohibition. The section recommends that if such a prohibition is intended, it should be clearly stated in the text of the rule.
c. The section recommends that a reply to a response should be allowed in the same manner as in proposed rule 27(a)(4).
d. The section also recommends that subdivision (b) be amended to delete the ability of a circuit to change the 3 copies requirement by local rule.

2. State Bar of Arizona
111 West Monroe, Suite 1800
Phoenix, Arizona 85003-1742

The State Bar of Arizona has no objections to and foresees no particular difficulties with the proposed amendments.

3. The State Bar of California
The Committee on Appellate Courts
555 Franklin Street
San Francisco, California 94102-4498

The committee supports the proposed change.

4. The State Bar of California
The Committee on Federal Courts
555 Franklin Street
San Francisco, California 94102-4498

The committee endorses the amendments.

5. District of Columbia Bar
Section on Courts, Lawyers and the Administration of Justice
Anthony C. Epstein, Co-chair
Jenner & Block
601 Thirteenth Street, N.W., Suite 1200
Washington, D. C. 20005

The section supports the amendments. The section agrees that a trial judge should not be given the option to participate and that if an appellate court believes that the prevailing party below cannot adequately defend the challenged decision, the court should appoint an amicus.

6. Honorable Brian Barnett Duff
United States District Judge
219 South Dearborn Street
Chicago, Illinois 60604

Judge Duff opposes the change that would deprive a trial court judge of the right to participate in a mandamus proceeding to which the court is a party. He cited two instances illustrating that removing the trial judge may allow the

parties to ignore the institutional interests of the district court, to misrepresent to the appellate court facts leading to the mandamus proceeding, and to impugn the reputation of the trial judge.

7. Mary S. Elcano, Esquire
Senior Vice President, General Counsel
United States Postal Service
475 L'Enfant Plaza, S.W.
Washington, D.C. 20260-1100

The postal service is concerned about the lack of guidance concerning the circumstances under which a court should invite participation by an amicus and about the qualifications or limitation upon who should serve as an amicus. The postal service suggests that a invitation to an amicus should be limited to "those instances in which respondent does not oppose issuance of the writ or does not have sufficient perspective on the issue to provide an adequate response."

8. Bruce Comly French, Esquire
165 Tolowa Trail
Lima, Ohio 45805-4124

Mr. French believes that the trial judge should be named in the petition. He sees no need for the change.

9. Associate Professor Michael H. Hoffheimer
Law Center
The University of Mississippi
University, Mississippi 38677

Professor Hoffheimer disagrees with removing the trial judge from mandamus and prohibition proceedings for the following reasons:

1. Such proceedings are disfavored. Treating the trial judge as a respondent who must be served, etc., may indirectly, and appropriately, discourage the commencement of such proceedings.
2. Because relief in such proceedings is normally predicated upon a showing that the trial court has refused to do some ministerial act, a trial judge has an interest in receiving notice of such allegation.
3. There may be a jurisdictional problem in enforcing specific relief directed against a trial judge who has not been served.
4. The proposed amendment may be incompatible with the statutory

grant of jurisdiction, under 28 U.S.C. § 1651(b), to issue alternative writs. He asks whether an alternative writ can be granted if the party has not been joined.

Professor Hoffheimer suggests that the amendments so radically alter practices followed since the Judiciary Act of 1789 that they may exceed the scope of rulemaking authority and that it would be better for the proposed change to be enacted by Congress.

10. Los Angeles County Bar Association
Appellate Courts Committee
617 South Olive Street
Los Angeles, California 90014-1605

The Appellate Courts Committee of the Los Angeles County Bar Association unanimously approves the proposed amendments.

11. National Association of Criminal Defense Lawyers
1627 K Street, N.W.
Washington, D. C. 20006

The association supports the amendments.

12. New Jersey State Bar Association
One Constitution Square
New Brunswick, New Jersey 08901-1500

The association approves the amendment that eliminates the naming of the district judge as a respondent but recommends that the rule be modified to permit a court of appeals to "invite" the trial court judge to respond as well as to order the judge to respond. In other words, the court of appeals should be permitted to give the district judge the option to provide additional information while not requiring the judge to become involved. The association also suggests that a copy of the petition should be mailed to the trial court judge so that the judge has notice of the filing. (Draft language is provided.)

13. Ninth Circuit Senior Advisory Board
comments forwarded by Mr. Mark Mendenhall
Assistant Circuit Executive
United States Courts for the Ninth Circuit
121 Spear Street, Suite 204
Post Office Box 193846
San Francisco, California 94119-3846

The Senior Advisory Board is a body of distinguished, experienced senior counsel who provide advice and guidance to the Ninth Circuit Judicial Council and the Ninth Circuit Judicial Conference. The board had no stated objections or concerns.

14. Honorable Hubert L. Will
Senior Judge
United States District Court
219 South Dearborn Street
Chicago, Illinois 60604

Judge Will is concerned about the proposed change that would preclude a district judge from participating as a party in a mandamus proceeding brought against him or her and that the judge will not even be served with a copy of the petition. Judge Will recounts his experience in two mandamus cases that were ultimately decided by the Supreme Court, Will v. United States, 389 U.S. 90 (1967) and Will v. Calvert Fire Insurance Co., 437 U.S. 655 (1978). In the latter case he was the principal or only party with an interest in opposing the mandamus. He states that in some instances "judicial prerogatives and process may have more interest in the mandamus proceedings than the non-petitioning nominal parties." Judge Will questions whether the judge would have standing under the proposed rule to petition for certiorari, as he did in the Calvert Insurance case because the judge would not be a party.

Judge Will does not object to deleting the judge's name from the title of the case, but he does object to precluding the judge from receiving notice of the filing of a petition, from responding to the petition, and from having standing to appeal the issuance of the writ.

2. RULE 25

The proposed amendments provide that in order to file a brief or appendix using the mailbox rule, the brief or appendix must be mailed by first-class mail or delivered to a "reliable commercial carrier." The amendments also require a certificate stating that the document was mailed or delivered to the carrier on or before the last day for filing. Subdivision (c) is also amended to permit service on other parties by a "reliable commercial carrier." Amended subdivision (c) further provides that whenever feasible, service on other parties shall be by a manner at least as expeditious as the manner of filing.

1. American Bar Association
Section of Litigation
750 North Lake Shore Drive
Chicago, Illinois 60611

The section supports the recognition that most lawyers use commercial carriers.

The section supports and encourages the adoption of local rules to permit filing by electronic means.

The section supports the requirement that, when feasible, service be by a manner at least as expeditious as the manner of filing with the court.

2. State Bar of Arizona
111 West Monroe, Suite 1800
Phoenix, Arizona 85003-1742

The State Bar of Arizona has no objections to and foresees no particular difficulties with the proposed amendments.

3. The State Bar of California
The Committee on Appellate Courts
555 Franklin Street
San Francisco, California 94102-4498

The committee supports the proposed change.

4. The State Bar of California
The Committee on Federal Courts
555 Franklin Street
San Francisco, California 94102-4498

The committee endorses the amendments including the requirement that service be by a manner at least as expeditious as the manner of filing. The committee suggests, however, that subdivision (c) set a more precise standard and state that "when feasible and reasonable, considering such things as distance and extraordinary cost, service on a party must be by a manner at least as expeditious ...."

5. Mary S. Elcano, Esquire
Senior Vice President, General Counsel
United States Postal Service
475 L'Enfant Plaza, S.W.
Washington, D.C. 20260-1100

The postal service notes that inasmuch as 39 C.F.R. § 310.1(a)(7)(iii) excludes "papers filed in lawsuits . . . and orders of courts" from the definition of "letter," the private carriage proposed by the amendments would not violate the Private Express Statutes. The service states however, that a literal reading of the rule would give litigants only two choices: First-Class Mail or a "reliable commercial carrier," making Express Mail an unsafe option. The service suggests either adding the term Express Mail to the proposed rule or replacing "First-Class Mail" with "United States Mail." The service states that the second option would eliminate confusion as to whether Priority Mail service could be used. Priority Mail service literally is First-Class Mail but public perception is that it is a distinct service and may lead some litigants to erroneously conclude that the rule does not permit use of Priority Mail.

The postal service, however, suggests deleting the change relating to the use of a "reliable commercial carrier." The service believes that collateral litigation will arise concerning whether a particular carrier should be considered "reliable" and also about the relevance of a filer's assumption that a particular carrier is "reliable."

The service also notes that the proposed rule uses the term "first-class mail" but that correct usage calls for initial caps: i.e. "First-Class Mail."

6. Joseph W. Halpern, Elizabeth A. Phelan, & Heather R. Hanneman, Esquires
Holland & Hart
555 Seventeenth Street, Suite 2900
Denver, Colorado 80202-3979

Mr. Halpern, Ms. Phelan, and Ms. Hanneman agree that when a party files a brief or motion with a court by overnight courier that service on an opposing party should be by a method that is at least as expeditious as overnight delivery. They oppose requiring service by hand delivery when a brief or motion is filed with a clerk of court by hand delivery. Hand delivery on parties or attorneys residing in different states, cities, or regions may be both difficult and costly to arrange. They suggest that the second sentence of 25(c) should state: "When filing with the court is made by mail or commercial carrier, service on a party must be by a manner at least as expeditious as the manner of filing with the court whenever feasible."

7. Honorable Paul J. Kelly, Jr.
United States Circuit Judge
P.O. Box 10113
Santa Fe, New Mexico 87504-6113

Judge Kelly is troubled by the provision that "when feasible, service on a party must be by a manner at least as expeditious as the manner of filing with the court." He believes that the language creates ambiguity. He asks whether personal delivery of papers to the clerk's office for filing may be followed by first-class mail to the opposing party who lives out of state? If a document is hand delivered to the clerk's office for filing, is personal delivery to lawyers within the same city required? He states that there should not be litigation over what was "feasible." He suggests deleting the sentence.

8. Honorable Cornelia G. Kennedy
United States Circuit Judge
U.S. Courthouse
Detroit, Michigan 48226

Judge Kennedy questions the need to have service effected in at least as expeditious a manner as that used to file with the court. Having once decided that all the methods of service should be allowed because they are equivalent, she sees no justification for placing this limitation on the use of one method or the other.

9. Los Angeles County Bar Association
Appellate Courts Committee
617 South Olive Street
Los Angeles, California 90014-1605

The Appellate Courts Committee unanimously approves the proposed amendment but recommends deleting the adjectives "reliable" and "feasible" because they can be misunderstood or misinterpreted. The committee also suggests that the language requiring that service "be by a manner at least as expeditious as the manner of filing with the court" is unclear. It would be more clear to say that service must be in the same manner as filing with the court. At a minimum, the committee suggests that the committee note should provide some illustration of how the rule should be applied.

10. Gordon P. MacDougall, Esquire
1025 Connecticut Avenue, N.W.
Washington, D.C. 20036

Mr. MacDougall sees no need to permit delivery by "reliable commercial carrier." He also opposes the revision because it places "emphasis on receipt of briefs by the Clerk, when it is receipt of briefs by opposing counsel which is more critical." Mr. MacDougall also opposes the style revisions because he believes they make "filing" paramount to "service"; he believes that under the current rule the primary emphasis is on "service" and that "filing" has a lesser role. He states that there is not a good reason for separate subsections on electronic filing or inmate filing.

11. John S. Moore, Esquire
Valikanje, Moore & Shore, Inc., P.S.
405 East Lincoln Avenue
P.O. Box C2550
Yakima, Washington 98907

Mr. Moore approves of the proposed amendments without further comment.

12. National Association of Criminal Defense Lawyers
1627 K Street, N.W.
Washington, D. C. 20006

The association supports the amendments. The association points out, however, that in addition to first class mail, the rule should authorize priority

mail and express mail. Although first class mail is "sufficient," the rule seems to preclude "other classes of mail that are at least equally expeditious." The section suggests that the Advisory Committee consider adding the last quoted language to the rule.

The association states that the certification requirement is better than the last proposal's reliance upon the postmark. The association suggests that the rule should permit consolidation of the certification of mailing with the certificate of service under 25(d).

The association supports the requirement that service be made, when feasible, in a manner at least as expeditious as that used for filing. The association says that such a requirement is a "welcome response to petty gamesmanship." The association recommends amending the committee note to state that when a "brief or motion is filed with the court by hand or by overnight courier, the copies .... [etc.]"

The association supports the progress toward electronic filing.

13. Association of the Bar of the City of New York
Committee on Federal Courts
Patricia M. Hynes, Chair
Milberg Weiss Bershad Hynes & Lerach
One Pennsylvania Plaza
New York, New York 10119-0165

The committee comments on the proposed 25(a)(2)(D), specifically on the provision allowing local rules governing electronic filing without prior approval by the Judicial Conference and without any requirement that the Conference first develop standards to govern the rules. Given the minimal experience that state and federal courts have had with electronic filing and the developing state of technology, the committee agrees that a period of experimentation and at least some temporary diversity is justified. The committee is concerned, however, that the proposed amendment does not impose any controls on the rules local courts may develop. The committee makes several recommendations many of which are based upon the assumption that electronic filing will be used to reduce the courts' burden of document storage and will result, therefore, in electronic filing of documents that will not be subsequently embodied in an officially filed hard copy. The committee recommends that the rule require that any local rule must provide

a) reasonable access to court files by both parties and non-party members

of the public;

b) assurance of the identity of filers and accuracy of the electronically stored document;

c) compatibility with generally available systems for electronic transmission and retrieval of data; and

d) maintenance of the security and integrity of the files.

The committee urges that some form of monitoring of the local experiments be undertaken with the goal of deriving meaningful and objective data as to the experience of the various courts using different systems and procedures.

14. Ninth Circuit Senior Advisory Board
comments forwarded by Mr. Mark Mendenhall
Assistant Circuit Executive
United States Courts for the Ninth Circuit
121 Spear Street, Suite 204
Post Office Box 193846
San Francisco, California 94119-3846

The Senior Advisory Board is a body of distinguished, experienced senior counsel who provide advice and guidance to the Ninth Circuit Judicial Council and the Ninth Circuit Judicial Conference. The board suggests that defining the term "reliable commercial carrier" could help avoid ambiguity and disputes between counsel, particularly with regard to "reliability."

15. Public Citizen Litigation Group
2000 P. Street, N.W., Suite 700
Washington, D.C. 20036

Public Citizen suggests that the mailbox rule in 25(a)(2)(B) should extend to a paper filed in connection with motion or a petition for rehearing.

With regard to 24(a)(2)(B)(ii), Public Citizen suggests that the rule should allow use of any mail service that guarantees delivery as quickly as first-class mail. That would permit use of Express Mail or two-day mail and limit use of commercial carriers to those that deliver at least that fast. Public Citizen states that use of the term "reliable" is likely to produce more disputes than it will resolve and should be deleted.

With regard to 25(c) (the service provision) Public Citizen states that there is not a sufficient problem to warrant the costs of the proposal. If filing is accomplished by over-night mail, service must be by overnight mail regardless

of whether the party being served is likely to, or even has a right to, file a response. Public Citizen states that expeditious service should be required only with respect to matters on which the party filing a paper seeks immediate action or for post-argument submissions (such as letters citing supplemental authority under Rule 28(j), when the court may rule at any time. Public Citizen states that a cautionary note in the Committee Note may be sufficient but that if a rule change is made it should be confined to cases in which an immediate decision has been sought.

16. Michael E. Rosman, Esquire
Associate General Counsel
Center for Individual Rights
1300 Nineteenth Street, N.W.
Suite 260
Washington, D.C. 20036

Mr. Rosman supports the extension of the "mailbox rule" (under which a brief is deemed filed on the day of mailing) to delivery to a reliable commercial carrier. He also "heartily support[s]" the proposal to permit service by a reliable commercial carrier noting that the limitation in current Rule 25(c) which only permits service by mail or personal service is routinely ignored by both practitioners and the courts.

Mr. Rosman objects to the statement that "[w]hen feasible, service on a party must be by a manner at least as expeditious as the manner of filing with the court." He does not see any legitimate reason for the rule because the time for serving and filing a responding brief or motion paper runs from the time of service and is, therefore, subject to the Rule 26(c) extension when service is other than personal.

Mr. Rosman suggests that the committee incorporate the following additional amendments:

a. Subdivision (b) requires service "on counsel" if a party is represented by counsel. If a party is represented by two or more different firms, Mr. Rosman suggests that one of them must be designated as the "service attorney" and the opposing attorney need only serve papers on the "service attorney."

b. He suggests that electronic service should be permitted; i.e. service by facsimile, modem transfer of files, or other electronic means.

3. RULE 26

The proposed amendment makes the three-day extension for responding to a document served by mail also applicable when the document is served by a commercial carrier.

1. American Bar Association
Section of Litigation
750 North Lake Shore Drive
Chicago, Illinois 60611

The section supports the proposed amendment as a practical recognition of the widespread use of commercial carriers.

2. State Bar of Arizona
111 West Monroe, Suite 1800
Phoenix, Arizona 85003-1742

The State Bar of Arizona has no objections to and foresees no particular difficulties with the proposed amendments.

3. The State Bar of California
The Committee on Appellate Courts
555 Franklin Street
San Francisco, California 94102-4498

The committee supports the proposed change.

4. The State Bar of California
The Committee on Federal Courts
555 Franklin Street
San Francisco, California 94102-4498

The committee endorses the amendments.

5. Mary S. Elcano, Esquire
Senior Vice President, General Counsel
United States Postal Service
475 L'Enfant Plaza, S.W.
Washington, D.C. 20260-1100

The postal service suggests deleting the change relating to the use of a "reliable commercial carrier." The service believes that collateral litigation will arise concerning whether a particular carrier should be considered "reliable" and also about the relevance of a filer's assumption that a particular carrier is "reliable."

6. Los Angeles County Bar Association
Appellate Courts Committee
617 South Olive Street
Los Angeles, California 90014-1605

The Appellate Courts Committee unanimously approves the proposed amendment but recommends deleting the adjective "reliable" because it can be misunderstood or misinterpreted.

7. Gordon P. MacDougall, Esquire
1025 Connecticut Avenue, N.W.
Washington, D.C. 20036

Mr. MacDougall opposes the reference to "reliable commercial carrier" as ambiguous and unnecessary.

8. John S. Moore, Esquire
Valikanje, Moore & Shore, Inc., P.S.
405 East Lincoln Avenue
P.O. Box C2550
Yakima, Washington 98907

Mr. Moore approves of the proposed amendments without further comment.

9. National Association of Criminal Defense Lawyers
1627 K Street, N.W.
Washington, D. C. 20006

The association does not oppose the rule but does not see why 3 days should be added, rather than 1 (or 2) if delivery is made by overnight (or second-day) carrier.

10. Ninth Circuit Senior Advisory Board
comments forwarded by Mr. Mark Mendenhall
Assistant Circuit Executive
United States Courts for the Ninth Circuit
121 Spear Street, Suite 204
Post Office Box 193846
San Francisco, California 94119-3846

The Senior Advisory Board is a body of distinguished, experienced senior counsel who provide advice and guidance to the Ninth Circuit Judicial Council and the Ninth Circuit Judicial Conference. The board supports the amendment but reiterates its suggestion that the rule should define "reliable commercial carrier."

11. Public Citizen Litigation Group
2000 P. Street, N.W., Suite 700
Washington, D.C. 20036

Public Citizen suggests that the 3-day extension may not be enough time to add to the deadline for responding to a paper that is served by mail -- mail from the West Coast to Washington, D.C., often takes five days. With motion, a party may have only 7 days or 3 days to file an opposition or a reply, and the three day extension can be insufficient.

12. Michael E. Rosman, Esquire
Associate General Counsel
Center for Individual Rights
1300 Nineteenth Street, N.W.
Suite 260
Washington, D.C. 20036

Mr. Rosman opposes the amendment that would add three days to the time for responding to a brief or motion if it is served by a reliable commercial carrier. Mr. Rosman notes that permitting service by "reliable commercial carrier" makes it clear that there is no clear dividing line between personal service and other kinds of service. Service is "personal" if a lawyer sends a messenger down the block to serve a brief or motion and the messenger obtains an "acknowledgment of service" or signs a certification pursuant to Rule 25(d). Isn't service personal if a brief is given to a Federal Express agent who is instructed to deliver the brief the next day and the Federal Express agent signs a statement certifying that [s]he left the documents at an

attorney's office with a "clerk or other responsible person" (Rule 25(c)? isn't that also personal service? Commercial carriers, in their competitive effort to obtain business, might be willing to sign such forms.

Mr. Rosman suggests that the difference between "personal" service or service "by mail" or "by commercial carrier" rests upon who signs the certificate of service. In all instances someone personally delivers the paper.

The amendment gives a party three additional days to respond to a document served by commercial carrier. Mr. Rosman asks how the attorney receiving the paper will know whether the clerk who gave the brief to the Federal Express or UPS agent has signed the statement certifying service, or whether the Fed Ex or UPS deliverer is going to sign it. Mr. Rosman additionally asks whether the recipient's signing for the package may be used as an acknowledgment of service?

He further notes that adding 3 days will discourage the use of overnight service because it will provide an opponent with 2 more days to respond than if service had been personal.

He suggests either:

a. adding only one (1) day to the time permitted and requiring use of one-day service; or

b. measuring the time for responding from the date of receipt when some reliable indication of such receipt can be obtained, as it frequently can with commercial carriers.

He notes that there is an ambiguity in the proposed rule. The amendment states that "[s]ervice by mail or by commercial carrier is complete upon mailing or delivery to the carrier." Does dropping a package in a Federal Express pick-up box count as "delivery to the carrier" or must the package be taken to the carrier's office?

Mr. Rosman also suggests that the rule should clarify the interrelationship of subdivisions (a) and (c).

* * * * *

Rule 21. Writs of Mandamus and Prohibition, ~~Directed to a Judge or Judges~~ and Other Extraordinary Writs*

(a) ~~*Mandamus or prohibition to a judge or judges; petition for writ; service and filing.*~~ *Mandamus or Prohibition to a Court: Petition, Filing, Service, and Docketing.*

(1) ~~Application for a writ of mandamus or of prohibition directed to a judge or judges shall be made by filing~~ A party petitioning for a writ of mandamus or prohibition directed to a court shall file a petition ~~therefor~~ with the circuit clerk ~~of the court of appeals~~ with proof of service on ~~the respondent judge or judges and on~~ all parties to the ~~action~~ proceeding in the

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

trial court. The party shall also provide a copy to the trial court judge. All parties to the proceeding in the trial court other than the petitioner are respondents for all purposes.

(2) ~~The petition shall contain a statement of the facts necessary to an understanding of the issues presented by the application; a statement of the issues presented and of the relief sought; a statement of the reasons why the writ should issue; and~~

(A) The petition shall be titled "In re [name of petitioner]."

(B) The petition shall state:

(i) the relief sought;

(ii) the issues presented;

(iii) the facts necessary to

understand the issues presented by the petition; and

(iv) the reasons why the writ should issue.

(C) The petition shall include copies of any order or opinion or parts of the record ~~which~~ that may be essential to ~~an~~ understand~~ing of~~ the matters set forth in the petition.

(3) ~~Upon receipt of~~ When the clerk receives the prescribed docket fee, the clerk shall docket the petition and submit it to the court.

(b) *Denial; Order Directing Answer; Briefs; Precedence.* ~~If the court is of the opinion that the writ should~~

~~not be granted, it shall deny the petition. Otherwise, it shall order that an answer to the petition be filed by the respondents within the time fixed by the order. The order shall be served by the clerk on the judge or judges named respondents and on all other parties to the action in the trial court. All parties below other than the petitioner shall also be deemed respondents for all purposes. Two or more respondents may answer jointly. If the judge or judges named respondents do not desire to appear in the proceeding, they may so advise the clerk and all parties by letter, but the petition shall not thereby be taken as admitted.~~

(1) The court may deny the petition without an answer. Otherwise, it shall order the respondent, if any, to answer within a

fixed time.

(2) The clerk shall serve the order to respond on all persons directed to respond.

(3) Two or more respondents may answer jointly.

(4) The court of appeals may invite or order the trial court judge to respond or may invite an amicus curiae to do so. The trial court judge may request permission to respond but may not respond unless invited or ordered to do so by the court of appeals.

(5) If briefing or oral argument is required, ~~T~~ the clerk shall advise the parties, and when appropriate, the trial court judge or amicus curiae. ~~of the dates on which briefs are to be filed, if briefs are required, and~~

~~of the date of oral argument.~~

(6) The proceeding shall be given preference over ordinary civil cases.

(7) The circuit clerk shall send a copy of the final disposition to the trial court judge.

(c) *Other Extraordinary Writs.* Application for an extraordinary writs other than one of those provided for in subdivisions (a) and (b) of this rule shall be made by filing a petition ~~filed~~ with the circuit clerk ~~of the court of appeals~~ with proof of service on the ~~parties named as~~ respondents. Proceedings on such application shall conform, so far as is practicable, to the procedure prescribed in subdivisions (a) and (b) of this rule.

(d) *Form of Papers; Number of Copies.* All papers may be typewritten. An original and three copies

shall ~~must~~ be filed unless the court requires the filing of a different number by local rule or by order in a particular case.

Committee Note

In most instances, a writ of mandamus or prohibition is not actually directed to a judge in any more personal way than is an order reversing a court's judgment. Most often a petition for a writ of mandamus seeks review of the intrinsic merits of a judge's action and is in reality an adversary proceeding between the parties. See, *e.g., Walker v. Columbia Broadcasting System, Inc.*, 443 F.2d 33 (7th Cir. 1971). In order to change the tone of the rule and of mandamus proceedings generally, the rule is amended so that the judge is not treated as a respondent. The caption and subdivision (a) are amended by deleting the reference to the writs as being "directed to a judge or judges."

Subdivision (a). Subdivision (a) applies to writs of mandamus or prohibition directed to a court, but it is amended so that a petition for a writ of mandamus or prohibition does not bear the name of the judge. The amendments to subdivision (a) speak, however, about mandamus or prohibition "directed to a court." This language is inserted to distinguish subdivision (a) from subdivision (c). Subdivision (c) governs all other extraordinary writs, including a writ of mandamus or prohibition directed to an administrative agency rather than to a court and a writ of habeas corpus.

The amendments require the petitioner to provide a

copy of the petition to the trial court judge. This will alert the judge to the filing of the petition. This is necessary because the trial court judge is not treated as a respondent and, as a result, is not served. A companion amendment is made in subdivision (b). It requires the circuit clerk to send a copy of the disposition of the petition to the trial court judge.

Subdivision (b). The amendment provides that even if relief is requested of a particular judge, although the judge may request permission to respond, the judge may not do so unless the court invites or orders a response.

The court of appeals ordinarily will be adequately informed not only by the opinions or statements made by the trial court judge contemporaneously with the entry of the challenged order but also by the arguments made on behalf of the party opposing the relief. The latter does not create an attorney-client relationship between the party's attorney and the judge whose action is challenged, nor does it give rise to any right to compensation from the judge.

If the court of appeals desires to hear from the trial court judge, however, the court may invite or order the judge to respond. In some instances, especially those involving court administration or the failure of a judge to act, it may be that no one other than the judge can provide a thorough explanation of the matters at issue. Because it is ordinarily undesirable to place the trial court judge, even temporarily, in an adversarial posture with a litigant, the rule permits a court of appeals to invite an *amicus curiae* to provide a response to the petition. In those instances in which the respondent does not oppose issuance of the writ or does not have sufficient perspective on the issue to provide an adequate response, participation of an *amicus* may avoid the need for the trial judge to participate.

Subdivision (c). The changes are stylistic only. No substantive changes are intended.

Rule 25. Filing, Proof of Filing, ~~and~~ Service, and Proof of Service

(a) *Filing.*

(1) *Filing with the Clerk.* A paper required or permitted to be filed in a court of appeals shall ~~must~~ be filed with the clerk.

(2) *Filing: Method and Timeliness.*

(A) *In general.* Filing may be accomplished by mail addressed to the clerk, but filing is not timely unless the clerk receives the papers within the time fixed for filing. ~~, except that~~

(B) *A brief or appendix.* ~~briefs and appendices are treated as filed on the day of mailing if the most~~

~~expeditious form of delivery by mail, except special delivery, is used~~ A brief or appendix is timely filed, however, if on or before the last day for filing, it is:

(i) mailed to the clerk by First-Class Mail, or other class of mail that is at least as expeditious, postage prepaid; or

(ii) dispatched to the clerk for delivery within 3 calendar days by a third-party commercial carrier.

(C) *Inmate filing.* ~~Papers~~ A paper filed by an inmate confined in an institution ~~are~~ is timely filed if

deposited in the institution's internal mail system on or before the last day for filing. Timely filing of ~~papers~~ a paper by an inmate confined in an institution may be shown by a notarized statement or declaration (in compliance with 28 U.S.C. § 1746) setting forth the date of deposit and stating that first-class postage has been prepaid.

(D) *Electronic filing.* A court of appeals may by local rule permit papers to be filed, signed, or verified by electronic means that are consistent with technical standards, if any, that the Judicial

Conference of the United States establishes. A paper filed by electronic means in compliance with a local rule constitutes a written paper for the purpose of applying these rules.

(3) *Filing a Motion with a Judge.* If a motion requests relief that may be granted by a single judge, the judge may permit the motion to be filed with the judge~~,~~; ~~in which event~~ the judge shall note ~~thereon~~ the filing date on the motion and ~~thereafter~~ give it to the clerk. ~~A court of appeals may, by local rule, permit papers to be filed by facsimile or other electronic means, provided such means are authorized by and consistent with~~

~~standards established by the Judicial Conference of the United States.~~

(4) *Clerk's Refusal of Documents.* The clerk shall ~~must~~ not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by these rules or by any local rules or practices.

* * * * *

(c) *Manner of Service.* Service may be personal, ~~or~~ by mail, or by third-party commercial carrier for delivery within 3 calendar days. When reasonable considering such factors as the immediacy of the relief sought, distance, and cost, service on a party shall be by a manner at least as expeditious as the manner used to file the paper with the court. Personal service includes

delivery of the copy to a ~~clerk or other~~ responsible person at the office of counsel. Service by mail or by commercial carrier is complete on mailing or delivery to the carrier.

(d) *Proof of Service; Filing.* A paper ~~Papers~~ presented for filing shall ~~must~~ contain an acknowledgment of service by the person served or proof of service in the form of a statement of the date and manner of service, of the names of the persons served, and of the addresses to which the papers were mailed or at which they were delivered, certified by the person who made service. Proof of service may appear on or be affixed to the papers filed. When a brief or appendix is filed by mailing or dispatch in accordance with Rule 25(a)(2)(B), the proof of service shall also state the date and manner by

which the document was mailed or dispatched to the clerk.

* * * * *

Committee Note

Subdivision (a). The amendment deletes the language requiring a party to use "the most expeditious form of delivery by mail, except special delivery" in order to file a brief using the mailbox rule. That language was adopted before the Postal Service offered Express Mail and other expedited delivery services. The amendment makes it clear that it is sufficient to use First-Class Mail. Other equally or more expeditious classes of mail service, such as Express Mail, also may be used. In addition, the amendment permits the use of commercial carriers. The use of private, overnight courier services has become commonplace in law practice. Expedited services offered by commercial carriers often provide faster delivery than First-Class Mail; therefore, there should be no objection to the use of commercial carriers as long as they are reliable. In order to make use of the mailbox rule when using a commercial carrier, the amendment requires that the filer employ a carrier who undertakes to deliver the document in no more than three calendar days. The three-calendar-day period coordinates with the three-day extension provided by Rule 26(c).

Subdivision (c). The amendment permits service by commercial carrier if the carrier is to deliver the paper to the party being served within three days of the carrier's receipt of

the paper. The amendment also expresses a desire that when reasonable, service on a party be accomplished by a manner as expeditious as the manner used to file the paper with the court. When a brief or motion is filed with the court by hand delivering the paper to the clerk's office, or by overnight courier, the copies should be served on the other parties by an equally expeditious manner -- meaning either by personal service, if distance permits, or by overnight courier, if mail delivery to the party is not ordinarily accomplished overnight. The reasonableness standard is included so that if a paper is hand delivered to the clerk's office for filing but the other parties must be served in a different city, state, or region, personal service on them ordinarily will not be expected. If use of an equally expeditious manner of service is not reasonable, use of the next most expeditious manner may be. For example, if the paper is filed by hand delivery to the clerk's office but the other parties reside in distant cities, service on them need not be personal but in most instances should be by overnight courier. Even that may not be required, however, if the number of parties that must be served would make the use of overnight service too costly. A factor that bears upon the reasonableness of serving parties expeditiously is the immediacy of the relief requested.

Subdivision (d). The amendment adds a requirement that when a brief or appendix is filed by mail or commercial carrier, the certificate of service state the date and manner by which the document was mailed or dispatched to the clerk. Including that information in the certificate of service avoids the necessity for a separate certificate concerning the date and manner of filing.

Rule 26. Computation and Extension of Time

* * * * *

(c) *Additional Time after Service*. When~~ever~~ a party is required or permitted to ~~do an~~ act within a prescribed period after service of a paper upon that party, ~~and the paper is served by mail,~~ 3 calendar days ~~shall be~~ are added to the prescribed period unless the paper is delivered on the date of service stated in the proof of service.

Committee Note

The amendment is a companion to the proposed amendments to Rule 25 that permit service on a party by commercial carrier. The amendments to subdivision (c) of this rule make the three-day extension applicable not only when service is accomplished by mail, but whenever delivery to the party being served occurs later than the date of service stated in the proof of service. When service is by mail or commercial carrier, the proof of service recites the date of mailing or delivery to the commercial carrier. If the party being served receives the paper on a later date, the three-day extension applies. If the party being served receives the paper on the same date as the date of service recited in the proof of service,

the three-day extension is not available.

The amendment also states that the three-day extension is three calendar days. Rule 26(a) states that when a period prescribed or allowed by the rules is less than seven days, intermediate Saturdays, Sundays, and legal holidays do not count. Whether the three-day extension in Rule 26(c) is such a period, meaning that three-days could actually be five or even six days, is unclear. The D.C. Circuit recently held that the parallel three-day extension provided in the Civil Rules is not such a period and that weekends and legal holidays do count. *CNPq v. Inter-Trade, 50 F.3d 56 (D.C.Cir. 1995).* The Committee believes that is the right result and that the issue should be resolved. Providing that the extension is three calendar days means that if a period would otherwise end on Thursday but the three-day extension applies, the paper must be filed on Monday. Friday, Saturday, and Sunday are the extension days. Because the last day of the period as extended is Sunday, the paper must be filed the next day, Monday.

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

FROM: Paul Mannes, Chair
Advisory Committee on Bankruptcy Rules

DATE: June 1, 1995

RE: Report of the Advisory Committee on Bankruptcy Rules

Introduction

The Advisory Committee on Bankruptcy Rules met on March 30-31, 1995, in Lafayette, Louisiana. The Committee considered public comments regarding the proposed amendments to the Bankruptcy Rules that were published in September, 1994. After making several changes to the proposed amendments, the Committee approved them for presentation to the Standing Committee for final approval. The Committee then approved another package of proposed amendments for presentation to the Standing Committee with a request for publication for comment by the bench and bar. Most of the proposed amendments presented with a request for publication are designed to implement provisions of the Bankruptcy Reform Act of 1994. Both packages of proposed amendments are discussed in the section of this report on "Action Items."

I. Action Items

A. Proposed Amendments to Bankruptcy Rules 1006, 1007, 1019, 2002, 2015, 3002, 3016, 4004, 5005, 7004, 8008, and 9006 Submitted for Approval by the Standing Committee and Transmittal to the Judicial Conference.

These proposed amendments were published for comment by the bench and bar in September 1994. Letters were received from eleven commentators (nine letters were received prior to the March meeting; two were received after the March meeting because they were mailed to the House Judiciary Committee). Eight letters commented on particular rules (Rules 2002, 3002, 5005, and 7004) and are discussed below following the text of the relevant proposed amendment. The following three letters contain only general statements regarding all published rules:

(1) Robert L. Jones III, President of the Arkansas Bar Association commented that "[w]e agree with the proposed amendments to the Federal Rules of Bankruptcy Procedure."

(2) Lee Ann Huntington, Chair of the Committee on Federal Courts of the State Bar of California, wrote that the Committee on Federal Courts "enthusiastically support the proposed amendments."

(3) Raymond A. Noble, Esq., Director of Legal Affairs, New Jersey State Bar Association, dated February 24, 1995, informed the Advisory Committee that the Bankruptcy Practice Section of the State Bar Association "concluded that the changes that affect bankruptcy practice are ministerial and do not require comment."

Bryan Garner, consultant on style, also suggested certain stylistic improvements. These suggestions were considered by the Advisory Committee at its March 1995 meeting and, as a result, a number of Mr. Garner's suggestions have been implemented.

1. Synopsis of Proposed Amendments

(a) Rule 1006(a) is amended to include within the scope of the rule any fees prescribed by the Judicial Conference of the United States pursuant to 28 U.S.C. § 1930(b) that is payable to the clerk upon commencement of a case. This fee will be payable in installments in the same manner that the filing fee prescribed by 28 U.S.C. § 1930(a) is payable in installments pursuant to Rule 1006(b).

(b) Rule 1007(c) is amended to provide that schedules and statements filed prior to conversion of a case to another chapter are treated as filed in the converted case, regardless of the chapter the case was in prior to conversion. The rule now provides that schedules and statements filed prior to conversion are treated as filed in the converted case only if the case was in chapter 7 prior to conversion. Since 1991, the same official forms for schedules and statements have been used in all cases and, therefore, limiting this provision to cases that were in chapter 7 prior to conversion is no longer necessary.

(c) Rule 1019(7) is abrogated. Subdivision (7) provides that, in a case converted to chapter 7, an extension of time to file claims against a surplus granted pursuant to Rule 3002(c)(6) shall be applicable to postpetition, pre-conversion claims. This subdivision is abrogated to conform to the abrogation of Rule 3002(c)(6).

(d) Rule 2002, which governs notices, is amended in several respects. Subdivision (a)(4) -- requiring notice of the time for filing claims against a surplus in a chapter 7 case -- is abrogated to conform to the abrogation of Rule 3002(c)(6) (see below). To reduce expenses in administering chapter 7 cases, subdivision (f)(8) is amended to eliminate the need to mail to all parties copies of the summary of the chapter 7 trustee's final account. Subdivision (h), which permits the court to eliminate the need to send notices to creditors who have failed to file claims, is revised in several ways: (1) to clarify that such an order may not be issued if creditors still have time to file claims because it is a "no asset" case and a "notice of no dividend" has been sent; (2) to clarify that an order under this subdivision does not affect notices that must be sent to parties who are not creditors; (3) to provide that a creditor who is an infant, an incompetent person, or a governmental unit is entitled to receive notices if the time for that creditor to file a claim has been extended under Rule 3002(c)(1) or (c)(2); and (4) to delete cross-references to Rule 2002(a)(4) and Rule 3002(c)(6), which are being abrogated.

(e) Rule 2015(b) and (c) are amended to clarify that a debtor in possession or trustee in a chapter 12 case, or a debtor engaged in business in a chapter 13 case, does not have to file an inventory of the debtor's property unless the court so directs.

(f) Rule 3002 is amended to conform to the new section 502(b)(9) that was added to the Code by the Bankruptcy Reform Act of 1994 and which governs objections to tardily filed claims. Rule 3002(c)(1) is amended to conform to the new section 502(b)(9) to the extent that it provides that a proof of claim filed by a governmental unit is timely if it is filed not later than 180 days after the order for relief. Rule 3002(c)(1) is also amended to delete any distinction between domestic and foreign governmental units. Rule 3002(c)(6) is abrogated to make the rule consistent with section 726 of the Bankruptcy Code which provides that, under certain circumstances, a creditor holding a claim that has been tardily filed may be entitled to receive a distribution in a chapter 7 case.

(g) Rule 3016(a) is abrogated because it could have the effect of extending the debtor's exclusive period for filing a chapter 11 plan without the court, after notice and a hearing, finding cause for an extension as is required by section 1121(d) of the

Bankruptcy Code.

(h) Rule 4004(c) is amended to delay the debtor's discharge in a chapter 7 case if there is a pending motion to extend the time for filing a complaint objecting to discharge or if the filing fee has not been paid in full.

(i) Rule 5005(a) is amended to authorize local rules that permit documents to be filed, signed. or verified by electronic means, provided that such means are consistent with technical standards, if any, established by the Judicial Conference. The rule also provides that a document filed by electronic means constitutes a "written paper" for the purpose of applying the rules and constitutes a public record open to examination. The purpose of these amendments is to facilitate the filing, signing, or verification of documents by computer-to-computer transmission without the need to reduce them to paper form in the clerk's office.

(k) Rule 7004 is amended to conform to the 1993 amendments to Rule 4 of the Federal Rules of Civil Procedure. First, cross-references to subdivisions of F.R.Civ.P. 4 are changed to conform to the new structure of the Civil Rule. Second, substantive changes to Rule 4 F.R.Civ.P. that became effective in 1993 are implemented in Rule 7004 to the extent that they are consistent with the continuing availability under Rule 7004 of service by first class mail as an alternative to the methods of personal service provided under Rule 4 F.R.Civ.P.

(l) Rule 8008 is amended to permit district courts and, where bankruptcy appellate panels have been authorized, circuit councils to adopt local rules to allow filing, signing, or verification of documents by electronic means in the same manner and with the same limitations that are applicable to bankruptcy courts under Rule 5005(a), as amended.

(m) Rule 9006 is amended to conform to the abrogation of Rule 2002(a)(4) and the renumbering of Rule 2002(a)(8).

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

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE*

Rule 1006. Filing Fee

(a) GENERAL REQUIREMENT. Every petition shall be accompanied by the ~~prescribed~~ filing fee except as provided in subdivision (b) of this rule. For the purpose of this rule, "filing fee" means the filing fee prescribed by 28 U.S.C. § 1930(a)(1)-(a)(5) and any other fee prescribed by the Judicial Conference of the United States under 28 U.S.C. § 1930(b) that is payable to the clerk upon the commencement of a case under the Code.

* * * * *

COMMITTEE NOTE

The Judicial Conference prescribes miscellaneous fees pursuant to 28 U.S.C.

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

§ 1930(b). In 1992, a $30 miscellaneous administrative fee was prescribed for all chapter 7 and chapter 13 cases. The Judicial Conference fee schedule was amended in 1993 to provide that an individual debtor may pay this fee in installments.

Subdivision (a) of this rule is amended to clarify that every petition must be accompanied by any fee prescribed under 28 U.S.C. § 1930(b) that is required to be paid when a petition is filed, as well as the filing fee prescribed by 28 U.S.C. § 1930(a). By defining "filing fee" to include Judicial Conference fees, the procedures set forth in subdivision (b) for paying the filing fee in installments will also apply with respect to any Judicial Conference fee required to be paid at the commencement of the case.

Public Comments on Rule 1006. None.

GAP Report on Rule 1006. No changes since publication, except for a stylistic change in subdivision (a).

Rule 1007. Lists, Schedules and Statements; Time Limits

* * * * *

(c) TIME LIMITS. The schedules and statements, other than the statement of

intention, shall be filed with the petition in a voluntary case, or if the petition is accompanied by a list of all the debtor's creditors and their addresses, within 15 days thereafter, except as otherwise provided in subdivisions (d), (e), and (h) of this rule. In an involuntary case the schedules and statements, other than the statement of intention, shall be filed by the debtor within 15 days after entry of the order for relief. Schedules and statements ~~previously~~ filed prior to the conversion of a case to another chapter ~~in a pending chapter 7 case~~ shall be deemed filed in ~~a superseding~~ the converted case unless the court directs otherwise. Any extension of time for the filing of the schedules and statements may be granted only on motion

for cause shown and on notice to the United States trustee and to any committee elected ~~pursuant to~~ under § 705 or appointed ~~pursuant to~~ under § 1102 of the Code, trustee, examiner, or other party as the court may direct. Notice of an extension shall be given to the United States trustee and to any committee, trustee, or other party as the court may direct.

* * * * *

COMMITTEE NOTE

Subdivision (c) is amended to provide that schedules and statements filed prior to the conversion of a case to another chapter shall be deemed filed in the converted case, whether or not the case was a chapter 7 case prior to conversion. This amendment is in recognition of the 1991 amendments to the Official Forms that abrogated the Chapter 13 Statement and made the same forms for schedules and statements applicable in all cases.

This subdivision also contains a

technical correction. The phrase "superseded case" creates the erroneous impression that conversion of a case results in a new case that is distinct from the original case. The effect of conversion of a case is governed by § 348 of the Code.

Public Comments on Rule 1007(c). None.

GAP Report on Rule 1007(c). No changes since publication, except for stylistic changes.

Rule 1019. Conversion of Chapter 11 Reorganization Case, Chapter 12 Family Farmer's Debt Adjustment Case, or Chapter 13 Individual's Debt Adjustment Case to Chapter 7 Liquidation Case

When a chapter 11, chapter 12, or chapter 13 case has been converted or reconverted to a chapter 7 case:

* * * * *

~~(7) EXTENSION OF TIME TO FILE CLAIMS AGAINST SURPLUS. Any extension of time for the filing of claims against a surplus granted pursuant to Rule~~

~~3002(c)(6), shall apply to holders of claims who failed to file their claims within the time prescribed, or fixed by the court pursuant to paragraph (6) of this rule, and notice shall be given as provided in Rule 2002.~~

COMMITTEE NOTE

Subdivision (7) is abrogated to conform to the abrogation of Rule 3002(c)(6).

Public Comments on Rule 1019. None.

GAP Report on Rule 1019. No changes were made to the text of the rule. The Committee Note was changed to conform to the proposed changes to Rule 3002 (see GAP Report on Rule 3002 below).

Rule 2002. Notices to Creditors, Equity Security Holders, United States, and United States Trustee

(a) TWENTY-DAY NOTICES TO PARTIES IN INTEREST. Except as provided in

subdivisions (h), (i), and (l) of this rule, the clerk, or some other person as the court may direct, shall give the debtor, the trustee, all creditors and indenture trustees ~~not less than 20 days~~ at least 20 days' notice by mail of:

(1) the meeting of creditors ~~pursuant to~~ under § 341 of the Code;

(2) a proposed use, sale, or lease of property of the estate other than in the ordinary course of business, unless the court for cause shown shortens the time or directs another method of giving notice;

(3) the hearing on approval of a compromise or

settlement of a controversy other than approval of an agreement pursuant to Rule 4001(d), unless the court for cause shown directs that notice not be sent;

~~(4) the date fixed for the filing of claims against a surplus in an estate as provided in Rule 3002(c)(6);~~

~~(5)~~ (4) in a chapter 7 liquidation, a chapter 11 reorganization case, and a chapter 12 family farmer debt adjustment case, the hearing on the dismissal of the case,

unless the hearing is ~~pursuant to~~ under § 707(b) of the Code, or the conversion of the case to another chapter;

~~(6)~~ (5) the time fixed to accept or reject a proposed modification of a plan;

~~(7)~~ (6) hearings on all applications for compensation or reimbursement of expenses ~~totalling~~ totaling in excess of $500;

~~(8)~~ (7) the time fixed for filing proofs of claims pursuant to Rule 3003(c); and

~~(9)~~ (8) the time fixed for filing objections and the hearing to consider confirmation of a chapter 12 plan.

* * * * *

(c) CONTENT OF NOTICE.

* * * * *

(2) *Notice of Hearing on Compensation.* The notice of a hearing on an application for compensation or reimbursement of expenses required by subdivision ~~(a)(7)~~ (a)(6) of this rule shall identify the applicant and the amounts requested.

* * * * *

(f) OTHER NOTICES. Except as provided in subdivision (l) of this rule, the clerk, or some other person as

the court may direct, shall give the debtor, all creditors, and indenture trustees notice by mail of: (1) the order for relief;

* * * * *

and (8) a summary of the trustee's final report ~~and account~~ in a chapter 7 case if the net proceeds realized exceed $1,500. Notice of the time fixed for accepting or rejecting a plan pursuant to Rule 3017(c) shall be given in accordance with Rule 3017(d).

* * * * *

(h) NOTICES TO CREDITORS WHOSE CLAIMS ARE FILED. In a chapter 7 case, ~~the court may,~~ after 90 days following the first date set for the meeting of creditors ~~pursuant to~~ under § 341 of the Code, the court may direct that all notices required by subdivision (a) of

this rule~~, except clause (4) thereof,~~ be mailed only to the debtor, the trustee, all indenture trustees, creditors ~~whose claims~~ that hold claims for which proofs of claim have been filed, and creditors, if any, ~~who~~ that are still permitted to file claims by reason of an extension granted ~~under Rule 3002(c)(6)~~ pursuant to Rule 3002(c)(1) or (c)(2). In a case where notice of insufficient assets to pay a dividend has been given to creditors pursuant to subdivision (e) of this rule, after 90 days following the mailing of a notice of the time for filing claims pursuant to Rule 3002(c)(5), the court may direct that notices be mailed only to the entities specified in the preceding sentence.

(i) NOTICES TO COMMITTEES. Copies of all notices required to be mailed

~~under~~ pursuant to this rule shall be mailed to the committees elected ~~pursuant to~~ under § 705 or appointed ~~pursuant to~~ under § 1102 of the Code or to their authorized agents. Notwithstanding the foregoing subdivisions, the court may order that notices required by subdivision (a)(2), (3) and ~~(7)~~ (6) of this rule be transmitted to the United States trustee and be mailed only to the committees elected ~~pursuant to~~ under § 705 or appointed ~~pursuant to~~ under § 1102 of the Code or to their authorized agents and to the creditors and equity security holders who serve on the trustee or debtor in possession and file a request that all notices be mailed to them. A committee appointed ~~pursuant to~~ under § 1114 shall receive copies of all

notices required by subdivisions (a)(1), ~~(a)(6)~~ (a)(5), (b), (f)(2), and (f)(7), and such other notices as the court may direct.

* * * * *

(k) NOTICES TO UNITED STATES TRUSTEE. Unless the case is a chapter 9 municipality case or unless the United States trustee ~~otherwise~~ requests otherwise, the clerk, or some other person as the court may direct, shall transmit to the United States trustee notice of the matters described in subdivisions (a)(2), (a)(3), ~~(a)(5)~~ (a)(4), ~~(a)(9)~~ (a)(8), (b), (f)(1), (f)(2), (f)(4), (f)(6), (f)(7), and (f)(8) of this rule and notice of hearings on all applications for compensation or reimbursement of expenses. Notices to the United States

trustee shall be transmitted within the time prescribed in subdivision (a) or (b) of this rule. The United States trustee shall also receive notice of any other matter if such notice is requested by the United States trustee or ordered by the court. Nothing in these rules ~~shall require~~ requires the clerk or any other person to transmit to the United States trustee any notice, schedule, report, application or other document in a case under the Securities Investor Protection Act, 15 U.S.C. § 78aaa et seq.

* * * * *

COMMITTEE NOTE

Paragraph (a)(4) is abrogated to conform to the abrogation of Rule 3002(c)(6). The remaining paragraphs of subdivision (a) are renumbered, and references to these paragraphs contained in other subdivisions of this rule are amended accordingly.

Paragraph (f)(8) is amended so that a summary of the trustee's final account, which is prepared after distribution of property, does not have to be mailed to the debtor, all creditors, and indenture trustees in a chapter 7 case. Parties are sufficiently protected by receiving a summary of the trustee's final report that informs parties of the proposed distribution of property.

Subdivision (h) is amended (1) to provide that an order under this subdivision may not be issued if a notice of no dividend is given pursuant to Rule 2002(e) and the time for filing claims has not expired as provided in Rule 3002(c)(5); (2) to clarify that notices required to be mailed by subdivision (a) to parties other than creditors must be mailed to those entities despite an order issued pursuant to subdivision (h); (3) to provide that if the court, pursuant to Rule 3002(c)(1) or 3002(c)(2), has granted an extension of time to file a proof of claim, the creditor for whom the extension has been granted must continue to receive notices despite an order issued pursuant to subdivision (h); and (4) to delete references to subdivision (a)(4) and Rule 3002(c)(6), which have been abrogated.

Other amendments to this rule are stylistic.

Public Comments on Rule 2002.

(1) Susan J. Lewis, Legal Editor at Matthew Bender & Company, Inc., in her letter of January 23, 1995, pointed out a typographical error in the committee note.

(2) Glenn Gregorcy, Chief Deputy Clerk, United States Bankruptcy Court for the District of Utah, in his letter of December 5, 1994, commented that the proposed amendment to Rule 2002(f) (8) (deleting the words "and account" from the requirement that the trustee send creditors "a summary of the trustee's final report and account in a chapter 7 case if the net proceeds realized exceed $1,500") "does nothing whatsoever" because "in a vast majority of the districts" only one notice (not two) are being sent under the present rule. That is, in most districts, the final report and the final account are the same document. He also recommends that Rule 2002(f) (8) be amended to provide that the summary of the trustee's final report be sent only to creditors who have previously filed claims in the case.

(3) James T. Watkins, Esq., of Becket & Watkins, Malvern, Pa., which represents "ten of the top twenty-five national issuers of credit cards in their bankruptcy cases nationwide," in his letter dated February 28, 1995, urged the Committee to abandon the proposed amendments to Rule 2002(f)(8). His firm regularly reviews the trustee's

final reports and accounts to verify that distributions stated have been received. "In this process, we occasionally identify cases where Proofs of Claim were timely filed but not reflected in the trustee's account, or, far less often, the amounts of the claims, and thus the distributions, are incorrect." If the proposed amendment is not abandoned, he suggests that the summary of the trustee's final report should include the creditor's allowed claim amount and address.

(4) Richard M. Kremen, on behalf of the Maryland Bar Association Committee on Creditors' Rights, Bankruptcy and Insolvency, in his letter dated February 23, 1995, offered stylistic improvements to the proposed amendments to Rule 2002(h).

(5) Mary S. Elcano, Senior Vice President, General Counsel, of the United States Postal Service, in her letter dated February 24, 1995, suggests that Rule 2002 be amended to require that the notice of dismissal of the case be served on the debtor's employer to make sure that the employer does not erroneously reject a subsequent garnishment request.

GAP Report on Rule 2002. No changes since publication, except for stylistic changes and the correction of a typographical error in the committee note.

Rule 2015. Duty to Keep Records, Make Reports, and Give Notice of Case

* * * * *

(b) CHAPTER 12 TRUSTEE AND DEBTOR IN POSSESSION. In a chapter 12 family farmer's debt adjustment case, the debtor in possession shall perform the duties prescribed in clauses ~~(1)-(4)~~ (2)-(4) of subdivision (a) of this rule and, if the court directs, shall file and transmit to the United States trustee a complete inventory of the property of the debtor within the time fixed by the court. If the debtor is removed as debtor in possession, the trustee shall perform the duties of the debtor in possession prescribed in this paragraph.

(c) CHAPTER 13 TRUSTEE AND DEBTOR.

(1) *Business Cases.* In a chapter 13 individual's debt

adjustment case, when the debtor is engaged in business, the debtor shall perform the duties prescribed by clauses ~~(1)-(4)~~ (2)-(4) of subdivision (a) of this rule and, if the court directs, shall file and transmit to the United States trustee a complete inventory of the property of the debtor within the time fixed by the court.

* * * * *

COMMITTEE NOTE

Subdivision (a)(1) provides that the trustee in a chapter 7 case and, if the court directs, the trustee or debtor in possession in a chapter 11 case, is required to file and transmit to the United States trustee a complete inventory of the debtor's property within 30 days after qualifying as trustee or debtor in possession, unless such an inventory has already been filed. Subdivisions (b) and (c) are amended to clarify that a debtor in possession and trustee in a chapter 12 case, and a debtor in a chapter 13 case where the debtor is engaged in business,

are not required to file and transmit to the United States trustee a complete inventory of the property of the debtor unless the court so directs. If the court so directs, the court also fixes the time limit for filing and transmitting the inventory.

Public Comments on Rule 2015. None.

GAP Report on Rule 2015. No changes since publication, except for a stylistic change in the first sentence of the committee note.

Rule 3002. Filing Proof of Claim or Interest

(a) NECESSITY FOR FILING. An unsecured creditor or an equity security holder must file a proof of claim or interest ~~in accordance with this rule~~ for the claim or interest to be allowed, except as provided in Rules 1019(3), 3003, 3004, and 3005.

* * * * *

(c) TIME FOR FILING. In a chapter 7 liquidation, chapter 12 family

farmer's debt adjustment, or chapter 13 individual's debt adjustment case, a proof of claim ~~shall be filed within~~ is timely filed if it is filed not later than 90 days after the first date set for the meeting of creditors called under ~~pursuant to~~ § 341(a) of the Code, except as follows:

(1) A proof of claim filed by a governmental unit is timely filed if it is filed not later than 180 days after the date of the order for relief. On motion of ~~the United States, a state, or subdivision thereof~~ a governmental unit before the expiration of such period and for cause shown, the court may extend the time for filing of a claim by the ~~United States, state or subdivision~~

~~thereof~~ governmental unit.

* * * * *

~~(6) In a chapter 7 liquidation case, if a surplus remains after all claims allowed have been paid in full, the court may grant an extension of time for the filing of claims against the surplus not filed within the time herein above prescribed.~~

COMMITTEE NOTE

The amendments are designed to conform to §§ 502(b)(9) and 726(a) of the Code as amended by the Bankruptcy Reform Act of 1994.

The Reform Act amended § 726(a)(1) and added § 502(b)(9) to the Code to govern the effects of a tardily filed claim. Under § 502(b)(9), a tardily filed claim must be disallowed if an objection to the proof of claim is filed, except to the extent that a holder of a tardily filed claim is entitled to distribution under § 726(a)(1), (2), or (3).

The phrase "in accordance with this rule" is deleted from Rule 3002(a) to clarify that the effect of filing a proof of claim after the expiration of the time prescribed in Rule 3002(c) is governed by § 502(b)(9) of the Code, rather than by this rule.

Section 502(b)(9) of the Code provides that a claim of a governmental unit shall be timely filed if it is filed "before 180 days after the date of the order for relief" or such later time as the Bankruptcy Rules provide. To avoid any confusion as to whether a governmental unit's proof of claim is timely filed under § 502(b)(9) if it is filed on the 180th day after the order for relief, paragraph (1) of subdivision (c) provides that a governmental unit's claim is timely if it is filed not later than 180 days after the order for relief.

References to "the United States, a state, or subdivision thereof" in paragraph (1) of subdivision (c) are changed to "governmental unit" to avoid different treatment among foreign and domestic governments.

Public Comments on Rule 3002.

(1) Richard M. Kremen, on behalf of the Maryland Bar Association Committee on Creditors' Rights, Bankruptcy and Insolvency, in his letter dated February 23, 1995, suggested changes to the published draft designed to implement

amendments to § 502(b)(9) of the Bankruptcy Code resulting from the Bankruptcy Reform Act of 1994.

(2) Jon M. Waage, Esq., of Denton, Texas, in his letter dated February 21, 1995 (sent to the House Judiciary Committee and received by the Advisory Committee after its March meeting), recommended another amendment to require a creditor who files a proof of claim to serve a copy thereof on the debtor and the debtor's attorney.

(3) Donald Ross Patterson, Esq., of Tyler, Texas, in his letter dated March 6, 1995 (sent to the House Judiciary Committee and received by the Advisory Committee after its March meeting), makes the same recommendation as that made by Mr. Waage.

[At the March 1995 meeting, the Advisory Committee decided to postpone until the September 1995 meeting a Committee member's recommendation that notice of a tardily filed claim be served on the debtor and the trustee together with a copy of the proof of claim. The Advisory Committee will also consider at the September 1995 meeting the similar recommendations of Mr. Waage and Mr. Patterson]

GAP Report on Rule 3002. After publication of the proposed amendments, the Bankruptcy Reform Act of 1994 amended sections 726 and 502(b) of the Code to clarify the rights of creditors who tardily file a proof of claim. In

view of the Reform Act, proposed new subdivision (d) of Rule 3002 has been deleted from the proposed amendments because it is no longer necessary. In addition, subdivisions (a) and (c) have been changed after publication to clarify that the effect of tardily filing a proof of claim is governed by § 502 (b) (9) of the Code, rather than by this rule.

The amendments to § 502(b) also provide that a governmental unit's proof of claim is timely filed if it is filed before 180 days after the order for relief. Proposed amendments to Rule 3002(c)(1) were added to the published amendments to conform to this statutory change and to avoid any confusion as to whether a claim by a governmental unit is timely if it is filed on the 180th day.

The committee note has been re-written to explain the rule changes designed to conform to the Reform Act.

Rule 3016. Filing of Plan and Disclosure Statement in Chapter 9 Municipality and Chapter 11 Reorganization Cases

~~(a) TIME FOR FILING PLAN. A party in interest, other than the debtor, who is authorized to file a plan under~~

~~§ 1121(c) of the Code may not file a plan after entry of an order approving a disclosure statement unless confirmation of the plan relating to the disclosure statement has been denied or the court otherwise directs.~~

~~(b)~~ (a) IDENTIFICATION OF PLAN. Every proposed plan and any modification thereof shall be dated and, in a chapter 11 case, identified with the name of the entity or entities submitting or filing it.

~~(c)~~ (b) DISCLOSURE STATEMENT. In a chapter 9 or 11 case, a disclosure statement ~~pursuant to~~ under § 1125 or evidence showing compliance with § 1126(b) of the Code shall be filed with the plan or within a time fixed by the court.

COMMITTEE NOTE

Section 1121(c) gives a party in interest the right to file a chapter 11 plan after expiration of the period when only the debtor may file a plan. Under § 1121(d), the exclusive period in which only the debtor may file a plan may be extended, but only if a party in interest so requests and the court, after notice and a hearing, finds cause for an extension. Subdivision (a) is abrogated because it could have the effect of extending the debtor's exclusive period for filing a plan without satisfying the requirements of § 1121(d). The abrogation of subdivision (a) does not affect the court's discretion with respect to the scheduling of hearings on the approval of disclosure statements when more than one plan has been filed.

The amendment to subdivision (c), redesignated as subdivision (b), is stylistic.

Public Comments on Rule 3016. None.

GAP Report on Rule 3016. No changes since publication, except for a stylistic change.

Rule 4004. Grant or Denial of Discharge

* * * * *

(c) GRANT OF DISCHARGE.

(1) In a chapter 7 case, on expiration of the time fixed for filing a complaint objecting to discharge and the time fixed for filing a motion to dismiss the case pursuant to Rule 1017(e), the court shall forthwith grant the discharge unless:

~~(1)~~ (a) the debtor is not an individual,

~~(2)~~ (b) a complaint objecting to the discharge has been filed,

~~(3)~~ (c) the debtor has filed a waiver under § 727(a)(10), ~~or~~

~~(4)~~ (d) a motion to dismiss the case ~~under~~ pursuant to Rule 1017(e) is pending,

(e) a motion to extend the

time for filing a complaint objecting to discharge is pending, or

(f) the debtor has not paid in full the filing fee prescribed by 28 U.S.C. § 1930(a) and any other fee prescribed by the Judicial Conference of the United States under 28 U.S.C. § 1930(b) that is payable to the clerk upon the commencement of a case under the Code.

(2) Notwithstanding ~~the foregoing~~ Rule 4004(c)(1), on motion of the debtor, the court may defer the entry of an order granting a discharge for 30 days and, on motion within ~~such~~ that

period, the court may defer entry of the order to a date certain.

* * * * *

COMMITTEE NOTE

Subsection (c) is amended to delay entry of the order of discharge if a motion pursuant to Rule 4004(b) to extend the time for filing a complaint objecting to discharge is pending. Also, this subdivision is amended to delay entry of the discharge order if the debtor has not paid in full the filing fee and the administrative fee required to be paid upon the commencement of the case. If the debtor is authorized to pay the fees in installments in accordance with Rule 1006, the discharge order will not be entered until the final installment has been paid.

The other amendments to this rule are stylistic.

Public Comments on Rule 4004. None.

GAP Report on Rule 4004. No changes have been made since publication, except for stylistic changes.

Rule 5005. Filing and Transmittal of Papers

(a) FILING.

(1) *Place of Filing*. The lists, schedules, statements, proofs of claim or interest, complaints, motions, applications, objections and other papers required to be filed by these rules, except as provided in 28 U.S.C. § 1409, shall be filed with the clerk in the district where the case under the Code is pending. The judge of that court may permit the papers to be filed with the judge, in which event the filing date shall be noted thereon, and they shall be forthwith transmitted to the clerk. The clerk shall not refuse to accept for filing any petition or other paper presented for the purpose of filing solely because it is not presented in proper form as required by these rules or any local rules or

practices.

(2) *Filing by Electronic Means.* A court may by local rule permit documents to be filed, signed, or verified by electronic means that are consistent with technical standards, if any, that the Judicial Conference of the United States establishes. A document filed by electronic means in compliance with a local rule constitutes a written paper for the purpose of applying these rules, the Federal Rules of Civil Procedure made applicable by these rules, and § 107 of the Code.

* * * * *

COMMITTEE NOTE

The rule is amended to permit, but not require, courts to adopt local rules that allow filing, signing, or verifying of documents by electronic means. However, such local rules must be consistent with technical standards, if

any, promulgated by the Judicial Conference of the United States.

An important benefit to be derived by permitting filing by electronic means is that the extensive volume of paper received and maintained as records in the clerk's office will be reduced substantially. With the receipt of electronic data transmissions by computer, the clerk may maintain records electronically without the need to reproduce them in tangible paper form.

Judicial Conference standards governing the technological aspects of electronic filing will result in uniformity among judicial districts to accommodate an increasingly national bar. By delegating to the Judicial Conference the establishment and future amendment of national standards for electronic filing, the Supreme Court and Congress will be relieved of the burden of reviewing and promulgating detailed rules dealing with complex technological standards. Another reason for leaving to the Judicial Conference the formulation of technological standards for electronic filing is that advances in computer technology occur often, and changes in the technological standards may have to be implemented more frequently than would be feasible by rule amendment under the Rules Enabling Act process.

It is anticipated that standards established by the Judicial Conference will govern technical specifications for

electronic data transmission, such as requirements relating to the formatting of data, speed of transmission, means to transmit copies of supporting documentation, and security of communication procedures. In addition, before procedures for electronic filing are implemented, standards must be established to assure the proper maintenance and integrity of the record and to provide appropriate access and retrieval mechanisms. These matters will be governed by local rules until system-wide standards are adopted by the Judicial Conference.

Rule 9009 requires that the Official Forms shall be observed and used "with alterations as may be appropriate." Compliance with local rules and any Judicial Conference standards with respect to the formatting or presentation of electronically transmitted data, to the extent that they do not conform to the Official Forms, would be an appropriate alteration within the meaning of Rule 9009.

These rules require that certain documents be in writing. For example, Rule 3001 states that a proof of claim is a "written statement." Similarly, Rule 3007 provides that an objection to a claim "shall be in writing." Pursuant to the new subdivision (a)(2), any requirement under these rules that a paper be written may be satisfied by filing the document by electronic means, notwithstanding the fact that the clerk

neither receives nor prints a paper reproduction of the electronic data.

Section 107(a) of the Code provides that a "paper" filed in a case is a public record open to examination by an entity at reasonable times without charge, except as provided in § 107(b). The amendment to subdivision (a)(2) provides that an electronically filed document is to be treated as such a public record.

Although under subdivision (a)(2) electronically filed documents may be treated as written papers or as signed or verified writings, it is important to emphasize that such treatment is only for the purpose of applying these rules. In addition, local rules and Judicial Conference standards regarding verification must satisfy the requirements of 28 U.S.C. § 1746.

Public Comments on Rule 5005.

(1) Patricia M. Hynes, Esq., Chair of the Committee on Federal Courts of the Association of the Bar of the City of New York, together with her letter dated February 27, 1995, submitted comments of the Committee on Federal Courts that are specifically addressed to proposed amendments to Civil Rule 5(e) regarding electronic filing. She suggested that these comments also be considered in connection with the proposed amendments to Bankruptcy Rule 5005(a) that are similar, but not the

same, as Civil Rule 5(e). The Federal Courts Committee is concerned that the proposed rule on electronic filing would leave to each district an uncontrolled discretion to adopt local rules that may not adequately take into consideration the following "potentially serious problems:" Access to electronically filed documents; system compatibility; authenticity and accuracy; and security of court files.

Although these issues are mentioned in the Advisory Committee note, the concern is that the note is too general to provide sufficient guidance to local courts without any oversight over local experimentation. To address these concerns, they suggest one of two alternatives: (1) include in the rule itself a specific reference to the need for adequate consideration of these problems in any local rule, or (2) address these concerns more explicitly in the Committee Note. The final recommendation is to put in place some effort for ongoing monitoring, possibly by the Judicial Conference, of local rules governing electronic filing.

GAP Report on Rule 5005. No changes since publication.

Rule 7004. Process; Service of Summons, Complaint

(a) SUMMONS; SERVICE; PROOF OF SERVICE. Rule ~~4(a), (b), (c)(2)(C)(i),~~

~~(d), (e) and (g)-(j)~~ 4(a), (b), (c)(1), (d)(1), (e)-(j), (l), and (m) F.R.Civ.P. applies in adversary proceedings. Personal service pursuant to Rule ~~4(d)~~ 4(e)-(j) F.R.Civ.P. may be made by any person ~~not less than~~ at least 18 years of age who is not a party, and the summons may be delivered by the clerk to any such person.

(b) SERVICE BY FIRST CLASS MAIL. Except as provided in subdivision (h), in addition to the methods of service authorized by Rule ~~4(c)(2)(C)(i) and (d)~~ 4(e) -(j) F.R.Civ.P., service may be made within the United States by first class mail postage prepaid as follows:

(1) Upon an individual other than an infant or incompetent, by mailing a copy of the summons and complaint to the individual's

dwelling house or usual place of abode or to the place where the individual regularly conducts a business or profession.

(2) Upon an infant or an incompetent person, by mailing a copy of the summons and complaint to the person upon whom process is prescribed to be served by the law of the state in which service is made when an action is brought against such a defendant in the courts of general jurisdiction of that state. The summons and complaint in that ~~such~~ case shall be addressed to the person required to be served at that person's dwelling house or usual place of abode or at the place where the person regularly conducts a

business or profession.

(3) Upon a domestic or foreign corporation or upon a partnership or other unincorporated association, by mailing a copy of the summons and complaint to the attention of an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant.

(4) Upon the United States, by mailing a copy of the summons and complaint addressed to the civil process clerk at the office of the United States attorney for the

district in which the action is brought and by mailing a copy of the summons and complaint to ~~also~~ the Attorney General of the United States at Washington, District of Columbia, and in any action attacking the validity of an order of an officer or an agency of the United States not made a party, by also mailing a copy of the summons and complaint to that ~~such~~ officer or agency. The court shall allow a reasonable time for service pursuant to this subdivision for the purpose of curing the failure to mail a copy of the summons and complaint to multiple officers, agencies, or corporations of the United States if the plaintiff has mailed a copy of the summons and

complaint either to the civil process clerk at the office of the United States attorney or to the Attorney General of the United States.

(5) Upon any officer or agency of the United States, by mailing a copy of the summons and complaint to the United States as prescribed in paragraph (4) of this subdivision and also to the officer or agency. If the agency is a corporation, the mailing shall be as prescribed in paragraph (3) of this subdivision of this rule. The court shall allow a reasonable time for service pursuant to this subdivision for the purpose of curing the failure to mail a copy of the summons and complaint to

multiple officers, agencies, or corporations of the United States if the plaintiff has mailed a copy of the summons and complaint either to the civil process clerk at the office of the United States attorney or to the Attorney General of the United States. If the United States trustee is the trustee in the case and service is made upon the United States trustee solely as trustee, service may be made as prescribed in paragraph (10) of this subdivision of this rule.

(6) Upon a state or municipal corporation or other governmental organization thereof subject to suit, by mailing a copy of the summons and complaint to the person or office upon whom process is

prescribed to be served by the law of the state in which service is made when an action is brought against such a defendant in the courts of general jurisdiction of that state, or in the absence of the designation of any such person or office by state law, then to the chief executive officer thereof.

(7) Upon a defendant of any class referred to in paragraph (1) or (3) of this subdivision of this rule, it is also sufficient if a copy of the summons and complaint is mailed to the entity upon whom service is prescribed to be served by any statute of the United States or by the law of the state in which service is made when an action is brought against such a defendant in

the court of general jurisdiction of that state.

(8) Upon any defendant, it is also sufficient if a copy of the summons and complaint is mailed to an agent of such defendant authorized by appointment or by law to receive service of process, at the agent's dwelling house or usual place of abode or at the place where the agent regularly carries on a business or profession and, if the authorization so requires, by mailing also a copy of the summons and complaint to the defendant as provided in this subdivision.

(9) Upon the debtor, after a petition has been filed by or served upon the debtor and until the case is dismissed or closed, by

mailing ~~copies~~ a copy of the summons and complaint to the debtor at the address shown in the petition or statement of affairs or to such other address as the debtor may designate in a filed writing and, if the debtor is represented by an attorney, to the attorney at the attorney's post-office address.

(10) Upon the United States trustee, when the United States trustee is the trustee in the case and service is made upon the United States trustee solely as trustee, by mailing a copy of the summons and complaint to an office of the United States trustee or another place designated by the United States trustee in the district where the case under the Code is

pending.

(c) SERVICE BY PUBLICATION. If a party to an adversary proceeding to determine or protect rights in property in the custody of the court cannot be served as provided in Rule ~~4(d) or (i)~~ 4(e)-(j) F.R.Civ.P. or subdivision (b) of this rule, the court may order the summons and complaint to be served by mailing copies thereof by first class mail, postage prepaid, to the party's last known address, and by at least one publication in such manner and form as the court may direct.

(d) NATIONWIDE SERVICE OF PROCESS. The summons and complaint and all other process except a subpoena may be served anywhere in the United States.

~~(e) SERVICE ON DEBTOR AND OTHERS IN FOREIGN COUNTRY. The summons and~~

~~complaint and all other process except a subpoena may be served as provided in Rule 4(d)(1) and (d)(3) F.R.Civ.P. in a foreign country (A) on the debtor, any person required to perform the duties of a debtor, any general partner of a partnership debtor, or any attorney who is a party to a transaction subject to examination under Rule 2017; or (B) on any party to an adversary proceeding to determine or protect rights in property in the custody of the court; or (C) on any person whenever such service is authorized by a federal or state law referred to in Rule 4(c)(2)(C)(i) or (e) F.R.Civ.P.~~

~~(f)~~ (e) SUMMONS: TIME LIMIT FOR SERVICE. If service is made pursuant to Rule ~~4(d)(1)-(6)~~ 4(e)-(j) F.R.Civ.P. it shall be made by delivery of the summons

and complaint within 10 days following issuance of the summons. If service is made by any authorized form of mail, the summons and complaint shall be deposited in the mail within 10 days following issuance of the summons. If a summons is not timely delivered or mailed, another summons shall be issued and served.

(f) PERSONAL JURISDICTION. If the exercise of jurisdiction is consistent with the Constitution and laws of the United States, serving a summons or filing a waiver of service in accordance with this rule or the subdivisions of Rule 4 F.R.Civ.P. made applicable by these rules is effective to establish personal jurisdiction over the person of any defendant with respect to a case under the Code or a civil proceeding

arising under the Code, or arising in or related to a case under the Code.

(g) ~~EFFECT OF AMENDMENT TO RULE 4 F.R.CIV.P. The subdivisions of Rule 4 F.R.Civ.P. made applicable by these rules shall be the subdivisions of Rule 4 F.R.Civ.P. in effect on January 1, 1990, notwithstanding any amendment to Rule 4 F.R.Civ.P. subsequent thereto.~~ [Abrogated]

(h) SERVICE OF PROCESS ON AN INSURED DEPOSITORY INSTITUTION. -- Service on an insured depository institution (as defined in section 3 of the Federal Deposit Insurance Act) in a contested matter or adversary proceeding shall be made by certified mail addressed to an officer of the institution unless --

(1) the institution has

appeared by its attorney, in which case the attorney shall be served by first class mail;

(2) the court orders otherwise after service upon the institution by certified mail of notice of an application to permit service on the institution by first class mail sent to an officer of the institution designated by the institution; or

(3) the institution has waived in writing its entitlement to service by certified mail by designating an officer to receive service.

COMMITTEE NOTE

The purpose of these amendments is to conform the rule to the 1993 revisions of Rule 4 F.R.Civ.P. and to make stylistic improvements. Rule 7004,

as amended, continues to provide for service by first class mail as an alternative to the methods of personal service provided in Rule 4 F.R.Civ.P., except as provided in the new subdivision (h).

Rule 4(d)(2) F.R.Civ.P. provides a procedure by which the plaintiff may request by first class mail that the defendant waive service of the summons. This procedure is not applicable in adversary proceedings because it is not necessary in view of the availability of service by mail pursuant to Rule 7004(b). However, if a written waiver of service of a summons is made in an adversary proceeding, Rule 4(d)(1) F.R.Civ.P. applies so that the defendant does not thereby waive any objection to the venue or the jurisdiction of the court over the person of the defendant.

Subdivisions (b)(4) and (b)(5) are amended to conform to the 1993 amendments to Rule 4(i)(3) F.R.Civ.P., which protect the plaintiff from the hazard of losing a substantive right because of failure to comply with the requirements of multiple service when the United States or an officer, agency, or corporation of the United States is a defendant. These subdivisions also are amended to require that the summons and complaint be addressed to the civil process clerk at the office of the United States attorney.

Subdivision (e), which has governed service in a foreign country, is

abrogated and Rule 4(f) and (h)(2) F.R.Civ.P., as substantially revised in 1993, are made applicable in adversary proceedings.

The new subdivision (f) is consistent with the 1993 amendments to F.R.Civ.P. 4(k)(2). It clarifies that service or filing a waiver of service in accordance with this rule or the applicable subdivisions of F.R.Civ.P. 4 is sufficient to establish personal jurisdiction over the defendant. See the committee note to the 1993 amendments to Rule 4 F.R.Civ.P.

Subdivision (g) is abrogated. This subdivision was promulgated in 1991 so that anticipated revisions to Rule 4 F.R.Civ.P. would not affect service of process in adversary proceedings until further amendment to Rule 7004.

Subdivision (h) and the first phrase of subdivision (b) were added by § 114 of the Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106.

Public Comments on Rule 7004.

(1) Mary S. Elcano, Senior Vice President, General Counsel, of the United States Postal Service, in her letter dated February 24, 1995, suggested that Rule 7004 be amended to require service on "the particular department, office, or unit of an agency out of which the debt in question

arose." The reason for this suggestion is explained by relating the experience of the Postal Service. "It is not always clear why the Postal Service is listed as a creditor in a particular action. The debtor, for example, may have written a bad check to cover a mailing, postage put on a meter machine, a stamp-on-consignment debt, or a delinquent Express Mail account at any one of a number of post offices. Without service on the office out of which the debt arose, counsel is hard-pressed to locate the source of the debt in order to file a proof of claim."

GAP Report on Rule 7004. After publication of the proposed amendments, Rule 7004(b) was amended and Rule 7004 (h) was added by the Bankruptcy Reform Act of 1994 to provide for service by certified mail on an insured depository institution. The above draft includes those statutory amendments (without underlining new language or striking former language). No other changes have been made since publication, except for stylistic changes.

Rule 8008. Filing and Service

(a) FILING. Papers required or permitted to be filed with the clerk of the district court or the clerk of the bankruptcy appellate panel may be filed

by mail addressed to the clerk, but filing ~~shall not be~~ is not timely unless the papers are received by the clerk within the time fixed for filing, except that briefs ~~shall be~~ are deemed filed on the day of mailing. An original and one copy of all papers shall be filed when an appeal is to the district court; an original and three copies shall be filed when an appeal is to a bankruptcy appellate panel. The district court or bankruptcy appellate panel may require that additional copies be furnished. Rule 5005(a)(2) applies to papers filed with the clerk of the district court or the clerk of the bankruptcy appellate panel if filing by electronic means is authorized by local rule promulgated pursuant to Rule 8018.

* * * * *

COMMITTEE NOTE

This rule is amended to permit, but not require, district courts and, where bankruptcy appellate panels have been authorized, circuit councils to adopt local rules that allow filing of documents by electronic means, subject to the limitations contained in Rule 5005(a)(2). See the committee note to the amendments to Rule 5005. Other amendments to this rule are stylistic.

Public Comments on Rule 8008. None.

GAP Report on Rule 8008. No changes since publication, except for stylistic changes.

Rule 9006. Time

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(c) REDUCTION.

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(2) *Reduction Not Permitted.* The court may not reduce the time for taking action ~~under~~ pursuant to Rules ~~2002(a)(4) and (a)(8)~~ 2002(a)(7), 2003(a), 3002(c), 3014, 3015, 4001(b)(2), (c)(2), 4003(a),

4004(a), 4007(c), 8002, and 9033(b).

* * * * *

COMMITTEE NOTE

Subdivision (c)(2) is amended to conform to the abrogation of Rule 2002(a)(4) and the renumbering of Rule 2002(a)(8) to Rule 2002(a)(7).

Public Comments on Rule 9006. None.

GAP Report on Rule 9006. No changes since publication, except for a stylistic change.

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

June 2, 1995

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

Dear Colleagues:

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

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

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

* * * * *

Rule 5(e)

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

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

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

may make for requiring supplemental filings in tangible form.

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

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

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

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

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

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

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

December 13, 1994

TO: Committee on Rules of Practice and Procedure
Standing Committee

Re: Report of Advisory Committee on Civil Rules

Dear Colleagues:

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

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

I.

Five items require action by the Standing Committee:

* * * * *

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

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Rule 43(a)

A revision of Rule 43(a) was published for comment in October, 1993. The revision was considered in light of the comments at the April, 1994 meeting of the Committee. No difficulty was caused by the first revision, which strikes the requirement that testimony be taken "orally." This revision makes it clear that testimony can be taken in open court from a witness who is unable to communicate orally but is able to communicate by other means.

The other revision added a new provision that the court may, for good cause, permit testimony "by contemporaneous transmission from a different location." This provision provoked substantial discussion and uncertainty. Doubts were expressed about moving toward "the courtroom of the future" in which everyone participates by remote electronic means from many scattered locations. A motion to send the revised rule forward to the Standing Committee for recommendation to the Judicial Conference failed by even division of the Committee.

Reconsideration of the Rule 43(a) proposals again produced no disagreement as to deletion of the requirement that testimony be given orally.

Discussion of the provision for transmitting testimony from a different location began with a protest that this device can appeal only to those anxious to be "trendy," "with it," and adept with "all the new toys." A lawyer confronted with a proposal to transmit testimony must face the choice of trusting to unseen arrangements made by others or of arranging to be present with the witness in person or by representative. Only physical presence with the witness can ensure that there is no improper coaching. If testimony is needed from a witness who cannot be present, the party desiring the testimony should arrange a video deposition after notice that ensures the opportunity to be present.

These concerns were met with various reassurances. Transmission of testimony could be useful in prisoner cases. State courts have substantial experience with conducting arraignments in this way. Transmission of testimony works well in admiralty proceedings. The lawyers for other parties can choose between participating through the system used to transmit the tesimony or participating by arranging for someone to be present with the witness.

Facing these concerns, it was moved that the draft be amended for purposes of further discussion by retaining the requirement of good cause and adding a requirement that compelling circumstances justify transmission of testimony. This amendment was adopted without dissent.

Further discussion of the amended proposal provoked new expressions of doubt whether available technology is yet sufficiently reliable to support transmission of testimony. It was observed again that it works in admiralty. Another illustration offered was the need to take formal authenticating testimony from the custodian of records in a remote location; this illustration was met by the response that ready resort to deposition or other means should show that there is no compelling need in such circumstances.

The next illustration was the witness who has an accident, a death in the family, or like calamity. Transmission is better than a "deposition" during trial. It is not a response that an earlier deposition should have been taken – the party calling a witness often will not seek to frame a deposition, no matter by whom taken, in the shape of expected trial testimony.

It was moved to delete the entire sentence providing for contemporaneous transmission of testimony from a remote location. The motion failed by vote of 5 in favor, 7 against.

The proposal, as amended to require "good cause shown in compelling circumstances," was then adopted with a recommendation that the Standing Committee recommend its adoption to the Judicial Conference. It was concluded that since the only change from the published version is to narrow the availability of transmission, there is no need to republish the proposal for an additional period of comment. It also was concluded that the Committee Note should be revised to make clear that remote transmission should be permitted only for truly compelling reasons.

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PROPOSED AMENDMENTS TO RULES OF CIVIL PROCEDURE*

Rule 5. Service and Filing of Pleadings and Other Papers

* * * * *

(e) Filing with the Court Defined. The filing of papers with the court as required by these rules shall be made by filing them with the clerk of court, except that the judge may permit the papers to be filed with the judge, in which event the judge shall note thereon the filing date and forthwith transmit them to the office of the clerk. A court may~~,~~ by local rule~~,~~ permit papers to be filed, signed, or verified by ~~facsimile or other~~ electronic means ~~if such means are authorized by and~~ that are consistent with technical standards, if any, ~~established by~~ that the Judicial Conference of the United States establishes. A paper

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

filed by electronic means in compliance with a local rule constitutes a written paper for the purpose of applying these rules. The clerk shall not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by these rules or any local rules or practices.

Committee Note

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

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

The role of Judicial Conference standards is clarified by specifying that the standards are to govern technical

matters. Technical standards can provide nationwide uniformity, enabling ready use of electronic filing without pausing to adjust for the otherwise inevitable variations among local rules. Judicial Conference adoption of technical standards should prove superior to specification in these rules. Electronic technology has advanced with great speed. The process of adopting Judicial Conference standards should prove speedier and more flexible in determining the time for the first uniform standards, in adjusting standards at appropriate intervals, and in sparing the Supreme Court and Congress the need to consider technological details. Until Judicial Conference standards are adopted, however, uniformity will occur only to the extent that local rules deliberately seek to copy other local rules.

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

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

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

Rule 43. Taking of Testimony

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

* * * * *

Committee Note

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

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

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

The most persuasive showings of good cause and compelling circumstances are likely to arise when a witness is unable to attend trial for unexpected reasons, such as accident or illness, but remains able to testify from a different place. Contemporaneous transmission may be better than an attempt to reschedule the trial, particularly if there is a risk that other — and perhaps more important — witnesses might not be available at a later time.

Other possible justifications for remote transmission must be approached cautiously. Ordinarily depositions, including video depositions, provide a superior means of

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

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

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

No attempt is made to specify the means of transmission that may be used. Audio transmission without video images may be sufficient in some circumstances, particularly as to less important testimony. Video

transmission ordinarily should be preferred when the cost is reasonable in relation to the matters in dispute, the means of the parties, and the circumstances that justify transmission. Transmission that merely produces the equivalent of a written statement ordinarily should not be used.

Safeguards must be adopted that ensure accurate identification of the witness and that protect against influence by persons present with the witness. Accurate transmission likewise must be assured.

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

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

ALICEMARIE H. STOTLER
CHAIR

PETER G. McCABE
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CRIMINAL RULES

RALPH K. WINTER, JR.
EVIDENCE RULES

TO: **Hon. Alicemarie H. Stotler, Chair**
Standing Committee on Rules of Practice and Procedure

FROM: **Hon. D. Lowell Jensen, Chair**
Advisory Committee on Federal Rules of Criminal Procedure

SUBJECT **Report of Advisory Committee on Rules of Criminal Procedure**

DATE: **May 23, 1995**

I. INTRODUCTION.

At its meeting on April 10, 1995, the Advisory Committee on the Rules of Criminal Procedure considered proposed or pending amendments to several Rules of Criminal Procedure. This report addresses those proposals. The minutes of that meeting, a GAP Report, and a proposed amendment to Rule 24(a) are attached.

II. ACTION ITEMS

A. Action on Rules Published for Public Comment: Rules 16 and 32

At its June 1994 meeting the Standing Committee approved for publication for public comment amendments to Rule 16 and 32. The deadline for those comments was February 28, 1995 and at its April 1995 meeting the Advisory Committee considered the comments, made several minor changes to the rules and now presents them to the Standing Committee. The amended Rules and Committee Notes are included in the attached GAP Report.

1. Action on Proposed Amendments to Rules 16(a)(1)(E) & (b)(1)(D). Disclosure of Expert Witnesses.

Minor stylistic changes were made to the proposed amendments to Rules 16(a)(1)(E) and (b)(1)D) which address the issue of disclosure of the names and statements of expert witnesses who may be called to testify about the defendant's mental condition.

The Advisory Committee recommends that the Standing Committee approve the amendments to Rule 16(a)(1)(E) and (b)(1)(C) and forward them to the Judicial Conference for approval.

2. Action on Proposed Amendments to Rule 16(a)(1)(F) and (b)(1)(D). Pretrial Disclosure of Witness Names and Statements.

As noted in the attached GAP Report, the Committee made several minor changes to the proposed amendment and the accompanying Committee Note. The Committee considered again the view that the amendments are inconsistent with the Jencks Act; it continues to believe that forwarding the proposed changes to Congress is appropriate under the Rules Enabling Act.

The Advisory Committee recommends that the Standing Committee approve the amendments to Rule 16(a)(1)(F) and (b)(1)D) and forward them to the Judicial Conference for approval.

3. Action on Proposed Amendments to Rule 32(d). Forfeiture Proceedings Before Sentencing

The Advisory Committee made a number of changes to Rule 32(d) after publication. Those changes which are discussed more fully in the attached GAP Report, do not in the Committee's view require additional publication and comment.

The Advisory Committee recommends that the Standing Committee approve the amendments to Rule 32(d) and forward them to the Judicial Conference for approval.

* * * * *

TO: Hon. Alicemarie H. Stotler, Chair
Standing Committee on Rules of Practice and Procedure

FROM: Hon. D. Lowell Jensen, Chair
Advisory Committee on Federal Rules of Criminal Procedure

SUBJECT: GAP REPORT: Explanation of Changes Made Subsequent to the Circulation for Public Comment of Rules 16 and 32.

DATE: May 23, 1995

At its June 1994 meeting the Standing Committee approved the circulation for public comment of proposed amendments to Rules 16 and 32.

Both rules were published in September 1994, with a deadline of February 28, 1995 for any comments. At a hearing on January 27, 1995 representatives of the Committee heard the testimony of several witnesses regarding the amendments to Rule 16. At its meeting in Washington, D.C. on April 10, 1995, the Advisory Committee considered the writtent submissions of members of the public as well as the testimony of the witnesses.

Summaries of the any comments on each Rule, the Rules, and the accompanying Committee Notes are attached.

The Advisory Committee's actions on the amendments subsequent to the circulation for public comment are as follows:

1. Rule 16(a)(1)(E) & (b)(1)(C). Disclosure of Expert Witnesses.

The Committee made only minor stylistic changes to the proposed amendments to Rule 16(a)(1)(E) and 16(b)(1)(C). Very few comments were received on these particular provisions in Rule 16.

2. Rule 16(a)(1)(F) & (b)(1)(D). Pretrial Disclosure of Witness Names and Statements

After considering the numerous written submissions and oral testimony on the proposed amendments to Rule 16(a)(1)(F) and (b)(1)(D). the Committee made several minor amendments to the Rule and the accompanying Note. The Committee changed the Rule to limit the disclosure requirements to *felony*, non-capitol cases. It also clarified language in Rule 16(a)(1)(F) concerning the content of the nonreviewable statement by the attorney for the government. As rewritten, the rule explicitly recognizes that the government may decline to disclose either the name or the statement, or both, of a particular witness. Finally, the Committee made stylistic changes consistent with Mr. Garner's suggestions at the June 1994 Standing Committee meeting.

The changes to the Committee Note accompanying Rule 16 sharpen the Committee's position that the proposed amendment is consistent with other amendments to the Rules of Criminal Procedure, already approved by Congress, which technically violate the Jencks Act. Those amendments provide for some limited *pretrial* disclosure of a government witness' statement before the witness testifies on direct examination at trial, as provided in the Jencks Act.

3. Rule 32(d). Forfeiture Proceedings.

Five commentators, including the Department of Justice, which had proposed the amendment, supported the proposed amendment to Rule 32(d) which permits the trial court to enter a forfeiture order prior to sentencing. The Department of Justice's comments suggested changes which might have been considered significant enough to require republication for public comment. Ultimately, the Committee changed the rule in the following respects: (1) the amendment now provides that the procedures in Rule 32(d) may be applied where the defendant has entered a plea of guilty subjecting property to forfeiture; (2) the Committee eliminated any reference to specific timing requirements; and (3) the Committee added the last sentence which recognizes the authority of the court to include conditions in its final order which preserve the value of the property pending any appeals.

Given the relatively minor nature of these changes and the low number of public comments on the published version, the Committee believes that republication of this amendment is unnecessary.

Attachments:

Rule 16 and Committee Note; Summary of Comments and Testimony
Rule 32 and Committee Note; Summary of Comments

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO RULE 16

I. SUMMARY OF COMMENTS: Rule 16

The Committee received 23 written submissions and heard testimony from three witnesses; two of those witnesses also supplied written comments. While several were statements filed by organizations, most of those commenting were in private practice. No current federal prosecutor filed a statement. Several were members of the judiciary.

With one exception (who declined to make any comments) all those submitting comments were in favor of the general expansion of federal criminal discovery in Rule 16. Most favored the amendments as published with one or two suggested changes. Beyond that, there were various levels of support for the key features in the amendment: One specifically favored the 7-day provision; four were opposed to it as being too short. With regard to the provision for an ex parte statement by the prosecution, 8 were opposed to it and two explicitly stated that the procedure was appropriate. Three specifically stated that the concern about danger to witnesses was overstated. One commentator stated that the Jencks Act should not be a problem. Several encouraged the Committee to extend production to FBI 302's. Three were in favor of requiring production of addresses of the witnesses. Several mentioned the issue of reciprocal discovery; one was opposed to it altogether and several indicated that the defense should have the opportunity to also refuse to disclose its witnesses under a procedure similar to that available for the prosecution.

II. LIST OF COMMENTATORS: Rule 16

CR-01 Graham C. Mullen, Federal District Judge, Charlotte, N.C., 9-19-94.

CR-02 Robert L. Jones, III, Arkansas Bar Assoc., Fort Smith, Ark., 10-7-94.

CR-03 Prentice H. Marshall, Federal District Judge, Chicago, IL., 9-30-94.

CR-04 James E. Seibert, United States Magistrate Judge, Wheeling, W.V.,11-4-94.

CR-05 David A. Schwartz, Esq., San Francisco, CA, 11-8-94.

CR-06 Edward F. Marek, Esq., Cleveland, OH, 11-16-94.

CR-07 William H. Jeffress, Jr., Esq., Wash. D.C., 12-6-94.

CR-08 Norman Sepenuk, Esq., Portland, OR, 12-16-94.

CR-09 Michael Leonard, Alexandria, VA, 1-18-95.

CR-10 John Witt, City of San Diego, CA., 1-6-95

CR-11 Akron Bar Assoc. (Jane Bell), Akron, OH., 1-27-95

CR-12 New Jersey Bar Assoc.(Raymond Noble), 2-24-95

CR-13 Irvin B. Nathan, Esq., Wash. D.C., 2-7-94.

CR-14 Patrick D. Otto, Mohave Community College, Kingman, AZ, 2-15-95.

CR-15 Paul M. Rosenberg, United States Magistrate Judge, Baltimore, MD, 2-17-95.

CR-16 Federal Public and Community Defenders, Chicago, IL, 2-21-95.

CR-17 Lee Ann Huntington, State Bar of CA, San Francisco, CA, 2-24-95.

CR-18 Federal Bar Association, Philadelphia Chapter, Philadelphia, PA, 2-27-95.

CR-19 ABA Section of Criminal Justice, Wash., D.C., 2-27-95.

CR-20 Maryland State Bar Association, Roger W. Titus, Rockville, MD, 2-21-95.

CR-21 Leslie R. Weatherhead, Esq., Spokane, WA, 2-28-95.

CR-22 Section on Courts, Lawyers and Administration of Justice of D.C. Bar, Anthony C. Epstein, Wash., D.C., 2-28-95.

CR-23 National Association of Criminal Defense Lawyers, Wash., D.C., 2-28-95.

III. LIST OF WITNESSES (Hearing in Los Angeles, Jan. 27, 1995) -- Rule 16

1. Norman Sepenuk, Esq., Attorney at Law

2. David A. Schwartz, Esq., Attorney at Law

3. Maria E. Stratton, Esq., Federal Public Defender

IV. COMMENTS: Rule 16

Hon. Graham C. Mullen (CR-01)
Federal District Judge, Western District of North Carolina
Charlotte, N.C.
Sept. 19, 1994

Judge Mullen believes the proposed new Rule 16 is long overdue. His only concern is that the requirement of seven days before trial for disclosure of witnesses may be too close to trial date to benefit anyone. Additionally, Judge Mullen feels that although objections will arise concerning witness safety, the committee has correctly concluded that such is confined to the minority of cases and has provided an appropriate mechanism to afford confidentiality.

Robert L. Jones, III (CR-02)
President, Arkansas Bar Association
Fort Smith, Ark.
Oct. 7, 1994

Mr. Jones, commenting on behalf of the Arkansas Bar Association, agrees with the proposed changes to Rule 16 of the Federal Rules of Criminal Procedure.

Hon. Prentice H. Marshall (CR-03)
Federal District Judge, Northern District of Illinois
Chicago, IL.
Sept. 30, 1994

Judge Marshall urges the Committee to adopt the language of Rule 26(a)(2) of the Rules of Civil Procedure in the proposed amendment to Criminal Rule 16 relating to anticipated expert testimony. Additionally, in addressing the amendments regarding witness disclosure, he agrees with the Committee that risk to witnesses is greatly exaggerated by prosecutors, citing one minor incident in his 41 years of criminal trial experience. He concludes that knowledge of witnesses and their pretrial statements expedites cross-examination.

Hon. James E. Seibert (CR-04)
United States Magistrate Judge, Northern District of West Virginia
Wheeling, W.V..
Nov. 4, 1994

Judge Seibert strongly supports the proposed amendments and believes there exists an adequate safety valve in those limited cases where a witness list would not be appropriate. He notes that for the past four years he has required witness lists seven days prior to trial and that such has come to be accepted by the practicing U.S. Attorneys and defense bar (an initial scheduling order containing the requirements for witness lists is enclosed). He comments that a witness list allows the defense some reasonable assistance in trial preparation and that until a defendant has knowledge of the witnesses against him, it is difficult to properly decide whether to plead or go to trial.

David A. Schwartz (CR-05)
Private Practice
San Francisco, CA
Nov. 8, 1994

Mr. Schwartz supports the proposed amendment dealing with witness statements and names and suggests several changes. First, in support of the proposed amendments, he suggests that more liberal pretrial disclosure of witness information will advance the search for truth and cause of justice. Along these lines, he adds that the present practice of revealing witness information under the *Jencks* standards is unconscionable. Second, in support of the Rule 16 proposal, Mr. Schwartz explains that such alterations to the Rule will aid in negotiating plea agreements. Third, in support of the proposed amendments, Mr.

Schwartz suggests that such will cause the entire system to run more efficiently and force prosecutors to confront weaknesses in their case. Fourth, in support, he explains that forcing the government to reveal more information is consistent with due process and fundamental fairness. Finally, in support of the amendments, Mr. Schwartz comments that the arguments made by the Department of Justice regarding witness safety are inflated. He suggest several changes to the proposed amendments. First, he suggests that the seven day rule may be of little use to the defendant and that such should be expanded to thirty or sixty days prior to trial. Second, he suggests that prosecutors should not be given unreviewable carte blanche to deny discovery by claiming witness intimidation. He favors judicial intervention, through hearing, to determine the validity of the claim of witness intimidation. In the alternative, absent *pro se* representation, he suggests that undisclosed information be made available to defense counsel as an officer of the court under the stipulation that the defendant will not be privy to this information absent further court order.

Edward F. Marek (CR-06)
Private Practice
Cleveland, OH
Nov. 16, 1994

Mr. Marek (a former member of the Advisory Committee) supports the proposed amendments to Rule 16. He argues that such amendments should not be defeated because they may conflict with the Jencks Act. Mr. Marek explains that one can point to a number of amendments enacted through the rules enactment process which conflict with the Jencks Act but which Congress has seen fit to approve. For example, Rules 412 and 413 of the Federal Rules of Evidence as contained in the Violent Crime Control and Law Enforcement Act of 1994 represent Congress' belief that in sexual assault and child molestation cases government witness disclosure prior to trial is necessary. Mr. Marek suggests that these new evidence rules clearly show that Congress believes that the Jencks Act should not stand as a barrier to more enlightened discovery in Federal Courts. Mr. Marek points out that proposed amendments to Rule 16 are modest compared to Federal Rules of Evidence 412 and 413. Finally, he adds that the proposed Advisory Committee Note is important in that it provides that the prosecutor's *ex parte* statement must contain facts concerning witness safety or evidence which relate to the individual case. This language, Mr. Marek suggests, properly represents the Committee's intention that any argument, for example, that danger to safety of witnesses exists in all drug cases, would not be sufficient showing to block production of statements.

William H. Jeffress, Jr. (CR-07)
Private Practice
Washington, D.C.
Dec. 6, 1994

Although Mr. Jeffress is Chair of the ABA's Criminal Justice Standards Committee, the views stated in his comments are personal. Mr. Jeffress supports the proposed amendments to Rule 16. Mr. Jeffress does believe three aspects of the amendments could be and should be improved. First, he believes that the Committee's proposed amendment to Rule 16 does not require the prosecution to disclose witnesses it may call in rebuttal at trial, yet requires the defense to disclose all witnesses even if solely to be used to impeach. To Mr. Jeffress this seems an inappropriate balance of obligations. Second, Mr. Jeffress believes the Committee's accommodation of the witness safety concern goes so far that it undermines the utility and fairness of the Rule. Third, he argues that any rule giving the government the absolute right to refuse disclosure, without incurring significant adverse consequences for so refusing, is unsound. He suggests that the prosecutor's ability to refuse pretrial disclosure of names and statements of witnesses should depend on judicial approval, based upon *ex parte* submission, in accordance with Rule 16(d)(1). Mr. Jeffress disagrees with the Committee Note suggesting a hearing on this matter requires vast judicial resources. For the Committee's information he encloses a copy of the Third Edition Discovery Standards approved by the ABA of which he makes reference to in his comments.

Norman Sepenuk (CR-08)
Private Practice
Portland, OR
Dec. 16, 1994

Mr. Sepenuk favors the proposed amendments to Rule 16. He comments that complete disclosure of the government's case prior to trial is the best tool to facilitation of case disposition and to loosening up the criminal trial dockets. Mr. Sepenuk explains that such facilitation will be in the form of plea dispositions due to knowledge of the government case and the reaching of stipulations in advance of trial. He believes that the proposed Rule 16(a)(1)(F) should be amended to provide for pretrial disclosure of names and statements no later than ten days after arraignment. He also suggests amendment to Rule 26.2(f) to expand the definition of a "statement" required to be disclosed in advance of trial. Additionally, he believes that FBI memoranda of interview and similar interview statements should be explicitly made available under the Rules, and federal agents' reports should be subject to discovery to the extent they present a factual recitation of events, much like that of expert reports, which under the rules need not be produced.

Michael Leonard (CR-09)
Military Counsel
Alexandria, VA
Jan. 18, 1995

Mr. Leonard offers the views of someone who has been associated with the military criminal justice system for seven years and provides an overview of the discovery procedures in the military. In his experience, disclosure of the prosecution's witnesses takes place well in advance of trial, including any copies of witnesses' statements. The rules, he notes, are intended to reduce gamesmanship. Those interests, he asserts, are the same in federal practice. If the Committee is looking for a middle ground, he states, a review of the discovery rules followed by "other" federal prosecutors on a daily basis in military criminal practice my assist the Committee.

John Witt (CR-10)
City of San Diego
San Diego, CA
Jan 6, 1995

Mr. Witt thanks the Committee for an opportunity to provide input on the proposed amendments and notes that his counsel have informed him that nothing the amendments will have enough impact to justify any comments.

Ms Jane Bell (CR-11)
Akron Bar Assoc.
Akron, Ohio
Jan. 27, 1995

The Akron Bar Assoc. supports the proposed amendments to Rule 16. But it objects to the fact that the government may file an "unreviewable" statement for not providing the information. The Bar Assoc. suggests that provision be made for ex parte review of the government's reasons. No hearing would be necessary on that statement. The Assoc. also recommends substitute language for accomplishing that proposal. It also supports the provisions for discovery concerning experts.

The New Jersey Bar Assoc. (CR-12)
Raymond Noble
New Brunswick, NJ
Feb. 24, 1995

While the New Jersey Bar Assoc. supports the amendments to Rule 16, it recommends that the word "unreviewable" be removed from the amendment.

Mr. Irvin B. Nathan (CR-13)
Private Practice
Washington, D.C.
Feb. 7, 1995

Mr. Nathan (former Associate Deputy Attorney General who appeared before the Standing Committee on this issue at its January 1994 meeting) supports the proposed amendments to Rule 16 and requests incorporation of his article published in the New York Times endorsing the Committee's proposal. He points to state rules of discovery such as in California as examples of the growing sentiment of legislative bodies that fairness, efficiency and elimination of trial by ambush are better served by broader criminal discovery concerning witnesses. Mr. Nathan urges that the Justice Department withdraw its opposition to the proposed amendments.

Mr. Patrick D. Otto (CR-14)
Mohave Community College
Kingman, AZ
Feb. 15, 1995

Mr. Otto agrees with the proposed amendments to Rule 16 concerning witness names and statements. Mr. Otto further concurs on letting the trial court rule on the amount of defense discovery and the proposals regarding witness safety and risk of obstruction of justice.

Judge Paul M. Rosenberg (CR-15)
United States Magistrate Judge
Baltimore, MD
Feb. 17, 1995

Judge Rosenberg suggests that the proposed amendments concerning witness names and statements be modified to exclude misdemeanor and petty offenses. He explains that the requirement of supplying witness information seven days in advance of trial would be unduly burdensome in these cases especially in light of the fact that many U.S. Magistrate Judges handle large misdemeanor and petty offense dockets.

Federal Public and Community Defenders (CR-16)
Carol A. Brook and Lee T. Lawless
Chicago, IL
Feb. 21, 1995

The comments submitted are an expanded version of those provided the Committee prior to testifying in Los Angeles. The comments fall into two main categories. First, support is given to the proposed Rule 16 amendments as much needed and an improvement in the administration of justice. Second, comments are submitted on specific parts of the proposed amendments that the Federal Defenders feel will lead to unfair results not intended by the Committee. It is believed that disclosure of witness names and statements will enhance the ability to seek the truth, will provide information necessary to the decision of pleading guilty or going to trial, will contribute to the exercise of confrontation and compulsory process rights, and will save time and money. It is suggested that witness intimidation and perjury are exceptions to the rule and that ex parte, unreviewable proceedings are contrary to the adversary system of justice. Additionally, concern is expressed regarding the lack of reciprocity in the proposed amendment to Rule 16(b)(1)(D) which states that the court may limit the government's right to obtain disclosure if it has filed an ex parte statement. Also, concern is expressed over the requirement of defense witness disclosure prior to trial as such witnesses are not always known beforehand. Finally, it is suggested that witness addresses be disclosed.

Ms. Lee Ann Huntington (CR-17)
Chair, Committee on Federal Courts, State Bar of California
San Francisco, CA
Feb. 24, 1995

The Committee on Federal Courts of the State Bar of California supports the proposed amendments to Rule 16 in their aim to make reciprocal prosecution and defense discovery obligations. The Committee on Federal Courts suggests one further amendment to Rule 16. It is proposed that defendants be afforded the reciprocal right to refuse disclosure of witnesses who fear testifying and their statements (i.e., because of community harassment or pressure from victims' families) and that they be allowed to file a similar nonreviewable, ex parte statement under seal.

Criminal Law Committee, Federal Bar Association (CR-18)
James M. Becker, James A. Backstrom and Anna M. Durbin
Philadelphia Chapter
Philadelphia, PA
Feb. 27, 1995

The Committee supports reform of Rule 16, but suggests modification to what it deems to be two unwise elements of the proposed Rule change. First, the Committee suggests that the unreviewable nature of the government's decision to withhold disclosure should be made reviewable. Second, the Committee believes there should be no reciprocal duty on the defense to disclose any witness or statements before trial because the prosecution and the defense are not in like positions vis-a-vis the burden of proof or resources for investigation. The Committee feels there is no reason to obligate defendants beyond the present Rules.

ABA Criminal Justice Section (CR-19)
Arthur L. Burnett, Sr.
Washington, D.C.
Feb. 27, 1995

Judge Burnett, writing on behalf of the American Bar Association, expresses the Association's strong support for the proposed amendments to Rule 16. Although, in the Association's view, the proposed amendments to Rule 16 do not go as far as the ABA approved Third Edition Criminal Discovery Standards, the Association believes the changes are a step forward in more open discovery. The Association, in addressing disclosure of defense impeachment witnesses and statements, does suggest that the Committee

commentary recognize that reciprocal obligations of disclosure must be consistent with the constitutional rights of the defendant and the differing burdens on each side in criminal cases. The Association feels that the proposed changes would not substantially conflict with the Jencks Act and that where conflict may arise, Congressional approval would act as a partial amendment of the Act.

Criminal Law and Practice Section (CR-20)
Maryland State Bar Association
Mr. Roger Titus
Rockville, MD
Feb. 21, 1995

The Maryland State Bar Association endorses the adoption of the proposed amendments to Rule 16. The Association does express concern over the government's veto power of defense requests for pre-trial witnesses and statement disclosure through use of an unreviewable, ex parte statement under seal of the court. Additionally, the Association believes that the language of Rule 16(b)(1)(D) should not be discretionary. Where the government has avoided discovery by resort to the ex parte statement, it should thereby lose its right of reciprocal discovery.

Leslie R. Weatherhead (CR-21)
Witherspoon, Kelley, Davenport and Toole
Spokane, WA
Feb. 28, 1995

Ms. Weatherhead applauds the proposed amendments to Rule 16 as a small step in the right direction. Ms. Weatherhead strongly opposes the provision allowing for government refusal to disclose certain witnesses and statements through an unreviewable, ex parte statement.

Section on Courts, Lawyers and the Administration of Justice (CR-22)
District of Columbia Bar
Anthony C. Epstein, Cochair
Washington, D.C.
Feb. 28, 1995

The Section agrees with the basic premise of the proposed amendments to Rule 16. In general, these amendments make trials fairer and more efficient and facilitate appropriate

resolutions before trial. Specifically, the Section agrees with the Committee's decision to recommend the unreviewable, ex parte statement method of government non-disclosure. The Section believes it is appropriate to try this approach and to determine how it works in practice. Additionally, the Section seeks clarification on the Committee's "good faith" requirement for refusal to disclose and suggests that the defense be required to provide reciprocal discovery no more than three days prior to trial.

National Association of Criminal Defense Lawyers (CR-23)
Gerald H. Goldstein, William J. Genego & Peter Goldberger
Washington, D.C.
Feb. 28, 1995

Citing its long standing support of extensive broadening of the scope of criminal discovery, the NACDL supports what it terms the Committee's modest step in this direction. The NACDL suggests several changes to expand the Committee's movement towards more liberal discover. First, the NACDL believes that addresses of witnesses should be included in the disclosure. Second, the NACDL suggests that the seven day requirement does not afford enough time and that the three day rule for capital defendants is inadequate. Third, the NACDL believes that the definition of statement in Rule 26.1(f) must be amended to include such reports as DEA 6's and FBI 302's. Such amendment would also require modification to Rule 16(a)(2). Fourth, The NACDL expresses concern over the unreviewable, ex parte statement veto power of the government. Fifth, the NACDL suggests that no reciprocal disclosure requirement should be placed in the defendant and that if any duty is to exist that the time limit should be no earlier than when the government informs the defense that it is calling its final witness. In any event, the NACDL feels that the wording of Rule 16(b)(1)(D) should be amended to alleviate the discretionary language and should impose no duty on defense disclosure where the government withholds.

V. TESTIMONY

Three witnesses testified at a public hearing on the proposed amendments to Rule 16 at the Federal Courthouse in Los Angeles, California on January 27, 1995. Present were Hon. D. Lowell Jensen, Chair, Mr. Henry Martin, member, Professor Dave Schlueter, Reporter, and Mr. John Rabiej, Administrative Office.

Norman Sepenuk, Esq.
Attorney at Law
Portland, Oregon

Mr Sepenuk (who also submitted written comments which are summarized supra) indicated that as a former federal prosecutor he believed in an open file system, which in his view, expedited plea bargains and stipulations and provided for cleaner and crisper trials.. He stated that the 7-day provision is too short and proposes that the Committee change the amendment to provide for disclosure 10 days before trial. He pointed out that the prosecutors should be pushing for full and early disclosure to encourage plea bargaining. In return the defense should be required to turn over its names well before trial. He added that the definition of statement should include a specific reference to "302's" and require production of the witness's address. He would also require the government to show good faith for its belief that disclosure would harm an individual. Mr. Sepenuk also stated that he did not believe that it would be necessary to differentiate between types of cases vis a vis threats to witnesses; he believes that the prosecution and defense should be able to work it out. He noted that he had personal experience with delays resulting from failure of the government to make timely disclosure of a witness.

Mr. David A. Schwartz, Esq.
Attorney at Law
San Francisco, California

Mr. Schwartz (who had submitted written comments summarized, supra) testified that in his opinion the amendment does not coddle defendants. Nor does it have any effect on victims' rights. In his experience he often received witness statements the day before they testified. He is also aware of office policy to turn witness statements over on the Friday before the trial begins. In his experience, the public is aghast that federal criminal defendants do not receive more discovery. While he recognizes that there is a problem with witness intimidation and harassment, he has heard from friends who are prosecutors that they do not want to turn over too much information which may give the defense something to work with in the case. He does not believe that the Jencks act is reasonable and is unsure whether seven days is sufficient time. He noted that in his experience with white collar crime cases that the defendants often knew who the witnesses were but did not know what they would say. Mr. Schwartz also testified that he had some witnesses tell him that government investigators had discouraged them from talking to the defense. He stated that he was opposed to the provision for ex parte reasons being filed by the prosecutor; he stated that in California, defense counsel are precluded from disclosing the names and addresses of the government witnesses to the defendant. He proposes some sort of evidentiary hearing to determine the propriety of disclosure -- or at least to have the opportunity to refute the

government's reasons for nondisclosure. In his experience, he did know of cases which had been postponed because of delays in disclosing witnesses to the defense. It was also his experience in various state courts that the defense was provided an open file and that that often induced plea bargaining at an early stage. He does not object to reciprocal discovery although he does believe that there may be self-incrimination problems. And while he could live with an amendment which deleted reference to witness statements, he would want as much as he could get in discovery.

Ms. Maria Elena Stratton, Esq.
Federal Public Defender
Los Angeles, California

Ms. Statton testified that she works in a district with the second largest US Attorney's Office -- 170 assistants in the criminal division -- and that there is no uniform discovery policy. She noted that there are three areas of problems: First, the rogue agents and rogue prosecutors who operate in bad faith. Because these seem to be rare the amendment should not be geared to those situations. Second, there are inexperienced investigators and prosecutors who make uninformed decisions. Third, there are situations where the cases are weak and the prosecutors do not want to turn over information helpful to the defense. In her view, a real problem with the amendment is the lack of review of the prosecutor's ex parte statements. She noted that similar problems arise with regard to disclosing informants and that that procedure should work. She also suggested that the defense should also be permitted to decline to produce its witness' names. Just as there are dangers that the defendant may harass the government witness, she has experience the reverse situation; agents were harassing defense witnesses. Ms Stratton noted that there may be a problem with a note on page 124 of the booklet which indicates that the amendment does not address discovery of memoranda and other documents. She also expresses concern about the seven day requirement; she would move up the time to 14 or 21 days. She testified that she has had experience with continuances being granted because of last minute discovery. Ms. Stratton also stated that she has heard US attorneys candidly admit that the amendment is a good amendment; in that regard she indicated that she did not believe that the folks in Washington were really aware of what was happening in the field. With regard to the Jencks Act issue, she noted that in the Los Angeles federal courthouse there were no judges who enforces that Act. At arraignments, the judges indicate to the prosecutors indirectly that they would like to see the information disclosed. She also expressed some concern about the fact that the judge who sees the ex parte statement by the prosecutor may also sentence the defendant -- and the defense may not know what was in that statement which might otherwise affect the sentence.

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO RULE 32(d)

I. SUMMARY OF COMMENTS: Rule 32(d)

The Committee received 4 written submissions on the proposed amendment to Rule 32(d). The commentators were in accord in their view that the amendment is necessary and clarifies the procedures for entering forfeiture orders before sentencing.

II. LIST OF COMMENTATORS: Rule 32(d)

CR-12 New Jersey Bar Assoc.(Raymond Noble), 2-24-95

CR-14 Patrick D. Otto, Mohave Community College, Kingman, AZ, 2-15-95.

CR-17 Lee Ann Huntington, State Bar of CA, San Francisco, CA, 2-24-95.

CR-23 National Association of Criminal Defense Lawyers, Wash., D.C., 2-28-95

Mr. Roger Pauley, Department of Justice, Wash. D.C., 3-3-95

III. COMMENTS: Rule 32(d)

Mr. Raymond Noble (CR-12)
New Jersey Bar Assoc.
New Brunswick, N.J.
Feb. 24, 1995

Mr. Noble, on behalf of the New Jersey Bar Association. briefly notes that the proposed amendment is a sensible response to procedural problems which have arisen.

Mr. Patrick D. Otto (CR-14)
Mohave Community College
Kingman, AZ
Feb. 2-1995

Mr. Patrick Otto of Mohave Community College registers agreement with the Committee's proposed amendment; trial courts should have jurisdiction for the third party protection weighted more for "them" than for the government.

Lee Ann Huntington (CR-17)
State Bar of California
San Francisco, CA
Feb.24, 1995

Writing on behalf of the Committee on Federal Courts, State Bar of California, Ms. Huntington endorses the proposal, noting that the amendment recognizes the penal aspects of forfeiture and that it codifies double jeopardy concerns.

Mr. G. Goldstein, Mr. W. Genego & Mr. P. Goldberger
National Association of Criminal Defense Lawyers
Wash., D.C.,
Feb. 28, 1995

The National Assoc. of Criminal Defense Lawyers (Mr. Goldstein, Mr. Genego & Mr. Goldberger) welcomes and endorse the amendment to the extent that it clarifies procedure for turning a verdict of forfeiture into an order. The commentators also are glad to see that the rule encourages judges to hold separate hearings on criminal forfeitures. But two aspects of the amendment trouble them. First, they are concerned that the early entry of an order may interfere with the trial court's duty under the Eighth Amendment to determine that the forfeiture is proportional.. And second, they have not noticed the government's ability to conduct investigations into the defendant's potential forfeitable property. They believe that the amendment should include language to show that an order of forfeiture may be modified at any time until formal entry of the judgment. Also, the rule or the note should indicate that the court has the power under Rule 38(e) to stay enforcement of the order.

Mr. Roger Pauley
Department of Justice
Washington, D.C.
March 3, 1995

Finally, Mr.Roger Pauley has indicated that the Justice Department has modified its proposed changes to Rule 32(d) and wishes to have that change considered as a comment. The submitted revision would make three changes to the rule. The first is the elimination of the 8-day time limit in the published version.. The Department believes that there may well be cases where courts will have made up their minds that they will not grant new trials, etc. and they should be permitted to begin the proceedings as soon as possible after the verdict. Second, the new draft eliminates the absolute requirement for notice and a hearing as to the timing and form of the order of forfeiture. While a court would clearly have the discretion to hold a hearing, the very narrowness of the contemplated hearing that is contemplated indicates that a hearing is not necessary in every case and will normally serve no purpose. Third, the newer version seens to place greater emphasis on the fact that the court should enter the order. The Department, Mr. Pauley notes, believes that the newer version is simplified.

Rule 16. Discovery and Inspection[1]

(a) GOVERNMENTAL DISCLOSURE OF EVIDENCE.

(1) Information Subject to Disclosure.

* * * * *

(E) EXPERT WITNESSES. At the defendant's request, the government shall disclose to the defendant a written summary of testimony that the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence during its case-in-chief at trial. If the government requests discovery under subdivision (b)(1)(C)(ii) of this rule and the defendant complies, the government shall, at the defendant's request, disclose to the defendant a written summary of testimony the government intends to use under Rules 702, 703, and 705 as evidence at trial on the issue of the defendant's mental condition. ~~This~~ The summary provided under this subdivision shall

[1] New matter is underlined and matter to be omitted is lined through.

~~must~~ describe the witnesses' opinions, the bases and the reasons for those opinions ~~therefor~~, and the witnesses' qualifications.

(F) NAMES OF WITNESSES. At the defendant's request in a noncapital felony case, the government shall, no later than seven days before trial unless the court orders a time closer to trial, disclose to the defendant the names of the witnesses that the government intends to call during its case-in-chief. But disclosure of that information is not required if the attorney for the government believes in good faith that pretrial disclosure of this information might threaten the safety of any person or might lead to an obstruction of justice. If the attorney for the government submits to the court, ex parte and under seal, a written statement indicating why the government believes in good faith that the name of a witness cannot be disclosed, then the witness's

name shall not be disclosed. Such a statement is not reviewable.

(2) *Information Not Subject to Disclosure*. Except as provided in paragraphs (A), (B), (D), ~~and~~ (E), and (F) of subdivision (a)(1), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by the attorney for the government or any other government agent ~~agents in connection with the investigation or prosecution of~~ investigating or prosecuting the case. Nor does the rule authorize the discovery or inspection of statements made by government witnesses or prospective government witnesses except as provided in 18 U.S.C. § 3500.

* * * * *

(b) THE DEFENDANT'S DISCLOSURE OF EVIDENCE.

(1) *Information Subject to Disclosure*.

* * * * *

(C) EXPERT WITNESSES. Under the following circumstances, the defendant shall, at the government's request, disclose to the government a written summary of testimony that the defendant intends to use under Rules 702, 703, and 705 of the Federal Rules of Evidence as evidence at trial: (i) if ~~If~~ the defendant requests disclosure under subdivision (a)(1)(E) of this rule and the government complies, or (ii) if the defendant has given notice under Rule 12.2(b) of an intent to present expert testimony on the defendant's mental condition. ~~the defendant, at the government's request, must disclose to the government a written summary of testimony the defendant intends to use under Rules 702, 703 and 705 of the Federal Rules of Evidence as evidence at trial.~~ This summary ~~must~~ shall describe the witnesses' opinions ~~of the witnesses~~, the bases and reasons for those opinions ~~therefor~~, and the witnesses' qualifications.

(D) NAMES OF WITNESSES. If the defendant requests disclosure under subdivision (a)(1)(F) of this

rule, and the government complies, the defendant shall, at the government's request, disclose to the government before trial the names of witnesses that the defense intends to call during its case-in-chief. The court may limit the government's right to obtain disclosure from the defendant if the government has filed an ex parte statement under subdivision (a)(1)(F).

* * * * *

COMMITTEE NOTE

The amendments to Rule 16 cover two issues. The first addresses the ability of the government to require, upon request, the defense to provide pretrial disclosure of information concerning its expert witnesses on the issue of the defendant's mental condition. The amendment also requires the government to provide reciprocal pretrial disclosure of information about its expert witnesses when the defense has complied. The second amendment provides for pretrial disclosure of witness names.

Subdivision (a)(1)(E). Under Rule 16(a)(1)(E), as amended in 1993, the defense is entitled to disclosure of certain information about expert witnesses which the government intends to call during the trial as well as reciprocal pretrial disclosure by the government upon defense disclosure. This amendment is a parallel reciprocal disclosure provision which is triggered by a government request for information concerning defense expert witnesses as to the defendant's mental condition, which is provided for in an amendment to (b)(1)(C), *infra*.

Subdivision (a)(1)(F). No subject has generated more controversy in the Rules Enabling Act process over many years than pretrial discovery of the witnesses the government intends to call at trial. In 1974, the Supreme Court approved an amendment to Rule 16 that would have provided pretrial disclosure to a defendant of the names of government witnesses, subject to the government's right to seek a protective order. Congress, however, refused to approve the rule in the face of vigorous opposition by the Department of Justice. In recent years, a number of proposals have been made to the Advisory Committee to reconsider the rule approved by the Supreme Court. The opposition of the Department of Justice has remained constant, however, as it has argued that the threats of harm to witnesses and obstruction of justice have increased over the years along with the increase in narcotics offenses, continuing criminal enterprises, and other crimes committed by criminal organizations.

Notwithstanding the absence of an amendment to Rule 16, the federal courts have continued to confront the issue of whether the rule, read in conjunction with the Jencks Act, permits a court to order the government to disclose its witnesses before they have testified at trial. *See United States v. Price*, 448 F.Supp. 503 (D. Colo. 1978)(circuit by circuit summary of whether government is required to disclose names of its witnesses to the defendant).

The Committee has recognized that government witnesses often come forward to testify at risk to their personal safety, privacy, and economic well-being. The Committee recognized, at the same time, that the great majority of cases do not involve any such risks to witnesses.

The Committee shares the concern for safety of witnesses and third persons and the danger of obstruction of justice. But it is also concerned with the burden faced by defendants in attempting to prepare for trial without adequate discovery, as well as the burden placed on court resources and on jurors by unnecessary trial delay. The Federal Rules of Criminal Procedure recognize the importance of discovery in situations in which the government might be unfairly surprised or disadvantaged without it. In several

amendments -- approved by Congress since its rejection of the proposed 1974 amendment to Rule 16 regarding pretrial disclosure of witnesses -- the rules now provide for defense disclosure of certain information. *See, e.g.*, Rule 12.1, Notice of Alibi; Rule 12.2, Notice of Insanity Defense or Expert Testimony of Defendant's Mental Condition; and Rule 12.3, Notice of Defense Based Upon Public Authority. The Committee notes also that both Congress and the Executive Branch have recognized for years the value of liberal pretrial discovery for defendants in military criminal prosecutions. *See* D. Schlueter, *Military Criminal Justice: Practice and Procedure*, § 10-4(A) (3d ed. 1992)(discussing automatic prosecution disclosure of government witnesses and statements). Similarly, pretrial disclosure of prosecution witnesses is provided for in many State criminal justice systems where the caseload and the number of witnesses are much greater than that in the federal system. *See generally* Clennon, *Pre-Trial Discovery of Witness Lists: A Modest Proposal to Improve the Administration of Criminal Justice in the Superior Court of the District of Columbia*, 38 Cath. U. L. Rev. 641, 657-674 (1989)(citing State practices). Moreover, the vast majority of cases involving charges of violence against persons are tried in State courts.

The arguments against similar discovery for defendants in federal criminal trials seem unpersuasive and ignore the fact that the defendant is presumed innocent and therefore is presumptively as much in need of information to avoid surprise as is the government. The fact that the government bears the burden of proving all elements of the charged offense beyond a reasonable doubt is not a compelling reason for denying a defendant adequate means for responding to government evidence. In providing for enhanced discovery for the defense, the Committee believes that the danger of unfair surprise to the defense and the burden on courts and jurors will be reduced in many cases, and that trials in those cases will be fairer and more efficient.

The Committee regards the addition of Rule 16(a)(1)(F) as a reasonable, measured, step forward. In this regard it is noteworthy that the amendment rests on the following three assumptions. First, the government will act in good faith, and there

will be cases in which the information available to the government will support a good faith belief as to danger although it does not constitute "hard" evidence to prove the actual existence of danger. Second, in most cases judges will not be in a better position than the government to gauge potential danger to witnesses. And third, post-trial litigation as to the sufficiency of government reasons in every case of an *ex parte* submission under seal would result in an unacceptable drain on judicial resources.

The Committee considered several approaches to discovery of witness names. In the end, it adopted a middle ground between complete disclosure and the existing Rule 16. The amendment requires the government to provide pretrial disclosure of names of witnesses unless the attorney for the government submits, *ex parte* and under seal, to the trial court written reasons, based upon the facts relating to the individual case, why this information cannot be disclosed. The amendment adopts an approach of presumptive disclosure that is already used in a significant number of United States Attorneys offices. While the amendment recognizes the importance of discovery in all cases, it protects witnesses when the government has a good faith basis for believing that disclosure will pose a threat to the safety of a person or will lead to an obstruction of justice.

The provision that the government provide the names no later than seven days before trial should eliminate some concern about the safety of witnesses and some fears about possible obstruction of justice. The seven-day provision extends only to noncapital felony cases. Currently, in capital cases the government is required to disclose the names of its witnesses at least three days before trial. The Committee believes that the difference in the timing requirements is justified in light of the fact that any danger to witnesses would be greater in capital cases. The rule also recognizes, however, that the trial court may permit the government to disclose the names of its witnesses at a time closer to trial.

The amendment provides that the government's *ex parte* submission of reasons for not disclosing the requested information

will not be reviewed, either by the trial or the appellate court. The Committee considered, but rejected, a mechanism for post-trial review of the government's statement. It was concerned that such *ex parte* statements could become a subject of collateral litigation in every case in which they are made. Although it is true that under the rule the government could refuse to disclose a witness' name even though it lacks sufficient evidence for doing so in an individual case, the Committee found no reason to assume that bad faith on the part of the prosecutor would occur. The Committee was certain, however, that it would require an investment of significant judicial resources to permit post-trial review of all submissions. Thus, the amendment provides for no review of government submissions. No defendant will be worse off under the amended rule than under the current version of Rule 16, because the current version of Rule 16 allows the government to keep secret the information covered by the amended rule whether or not it has a good faith reason for doing so.

It should also be noted that the amendment does not preclude either the defendant or the government from seeking protective or modifying orders or sanctions from the court under subdivision (d) of this rule.

Subdivision (b)(1)(C). Amendments in 1993 to Rule 16 included provisions for pretrial disclosure of information, including names and expected testimony of both defense and government expert witnesses. Those disclosures are triggered by defense requests for the information. If the defense makes such requests and the government complies, the government is entitled to similar, reciprocal discovery. The amendment to Rule 16(b)(1)(C) provides that if the defendant has notified the government under Rule 12.2 of an intent to rely on expert testimony to show the defendant's mental condition, the government may request the defense to disclose information about its expert witnesses. Although Rule 12.2 insures that the government will not be surprised by the nature of the defense or that the defense intends to call an expert witness, that rule makes no provision for discovery of the identity, the expected testimony, or the qualifications of the expert witness. The amendment provides the government with the limited right to

respond to the notice provided under Rule 12.2 by requesting more specific information about the expert. If the government requests the specified information, and the defense complies, the defense is entitled to reciprocal discovery under an amendment to subdivision (a)(1)(E), *supra*.

Subdivision (b)(1)(D). The amendment, which provides for reciprocal discovery of defense witness names, is triggered by compliance with a defense request made under subdivision (a)(1)(F). If the government withholds any information requested under that provision, the court in its discretion may limit the government's right to disclosure under this subdivision. The amendment provides no specific deadline for defense disclosure, as long as it takes place before trial starts.

Rule 32. Sentence and Judgment

(d) JUDGMENT.

* * * * *

(2) *Criminal Forfeiture.* ~~When a verdict contains a finding of criminal forfeiture, the judgment must authorize the Attorney General to seize the interest or property subject to forfeiture on terms that the court considers proper.~~ If a verdict contains a finding that property is subject to a criminal forfeiture, or if a defendant enters a guilty plea subjecting property to such forfeiture, the court may enter a preliminary order of forfeiture after providing notice to the defendant and a reasonable opportunity to be

heard on the timing and form of the order. The order of forfeiture shall authorize the Attorney General to seize the property subject to forfeiture, to conduct any discovery that the court considers proper to help identify, locate, or dispose of the property, and to begin proceedings consistent with any statutory requirements pertaining to ancillary hearings and the rights of third parties. At sentencing, a final order of forfeiture shall be made part of the sentence and included in the judgment. The court may include in the final order such conditions as may be reasonably necessary to preserve the value of the property pending any appeal.

COMMITTEE NOTE

Subdivision (d)(2). A provision for including a verdict of criminal forfeiture as a part of the sentence was added in 1972 to Rule 32. Since then, the rule has been interpreted to mean that any forfeiture order is a part of the judgment of conviction and cannot be entered before sentencing. *See, e.g., United States v. Alexander*, 772 F. Supp. 440 (D. Minn. 1990).

Delaying forfeiture proceedings, however, can pose real problems, especially in light of the implementation of the Sentencing Reform Act in 1987 and the resulting delays between verdict and sentencing in complex cases. First, the government's statutory right to discover the location of property subject to forfeiture is triggered by entry of an order of forfeiture. *See* 18 U.S.C. § 1963(k) and 21 U.S.C. § 853(m). If that order is delayed

until sentencing, valuable time may be lost in locating assets which may have become unavailable or unusable. Second, third persons with an interest in the property subject to forfeiture must also wait to petition the court to begin ancillary proceedings until the forfeiture order has been entered. *See* 18 U.S.C. § 1963(l) and 21 U.S.C. § 853(m). And third, because the government cannot actually seize the property until an order of forfeiture is entered, it may be necessary for the court to enter restraining orders to maintain the status quo.

The amendment to Rule 32 is intended to address these concerns by specifically recognizing the authority of the court to enter a preliminary forfeiture order before sentencing. Entry of an order of forfeiture before sentencing rests within the discretion of the court, which may take into account anticipated delays in sentencing, the nature of the property, and the interests of the defendant, the government, and third persons.

The amendment permits the court to enter its order of forfeiture at any time before sentencing. Before entering the order of forfeiture, however, the court must provide notice to the defendant and a reasonable opportunity to be heard on the question of timing and form of any order of forfeiture.

The rule specifies that the order, which must ultimately be made a part of the sentence and included in the judgment, must contain authorization for the Attorney General to seize the property in question and to conduct appropriate discovery and to begin any necessary ancillary proceedings to protect third parties who have an interest in the property.

Agenda F-18
(Appendix E)
Rules
September 1995

PROPOSED RULES AMENDMENTS GENERATING SUBSTANTIAL CONTROVERSY

At its meeting on July 5-7, 1995, the Committee on Rules of Practice and Procedure (Standing Committee) reviewed the proposed amendments submitted by the five advisory committees, and with a few exceptions voted unanimously to recommend their adoption. A summary of the proposals generating substantial controversy is set forth below.

I. Federal Rules of Criminal Procedure

The proposed amendments to Rule 16 of the Federal Rules of Criminal Procedure (*Discovery and Inspection*) generated substantial controversy.

The proposed amendments, as revised, would require the government, seven days before trial (unless the court orders a shorter period), to disclose to the defense the names of the government's witnesses, unless it believes in good faith that pretrial disclosure of this information might threaten the safety of a person or risk obstruction of justice. In such a case, the government simply would file a nonreviewable, *ex parte* statement with the court stating why it believes - under the facts of the particular case - that a safety threat or risk of obstruction of justice exists. The amendments would require reciprocal pretrial disclosure by the defense to the government.

The comments and testimony highlighted the contrast between the ease of counsel obtaining discovery in a civil case and the difficulty of defense counsel in preparing for trial in the absence of witness disclosure in a criminal case. Although many prosecutors already disclose witnesses' names and statements, many others do not. There is no national uniform policy on disclosure. The extent of disclosure ultimately depends on the policies of local U.S. attorney offices and individual assistant U.S. attorneys, which vary from district to district and even within an office. Other commentators stressed that the plea bargaining process would be more efficient and effective if disclosure were made before trial so that the defendant understands the strength of the prosecution's case.

The proposed amendments clearly recognize that government witnesses come forward to testify at risk to their personal safety, privacy, and economic well-being. But at the same time, most cases in federal court do not involve risks to witnesses.

The proposed amendments are intended to create a fairer trial by reducing the present practical and inequitable hardships defendants face in attempting to prepare for trial without adequate discovery. They are also intended to eliminate unnecessary trial delay and expense - which is now incurred because once a witness is called to testify at the trial a recess must be ordered to allow the defense time to review any previous statements made by the witness in order to effectively cross-examine the witness. The delay only places additional burdens on all parties, court resources, and jurors.

Many state criminal justice systems and the military already provide pretrial disclosure of witnesses' names and statements, and it is presently standard operating procedures in many federal district courts. Moreover, the proposed amendments are less demanding than the amendments prescribed by the Supreme Court in 1974, which required disclosure of the names and addresses of all government witnesses upon request of the defendant. If the government believed that disclosure would create an undue risk of harm to the witness it could request the court for a protective order. The amendments were ultimately rejected by the Congress.

The published version of the proposed amendments had also required pretrial disclosure of witnesses' statements, which admittedly created a conflict with the *Jencks Act*. The advisory committee noted, however, that the amendments were similar to several other previously approved amendments that require the defense and prosecution to disclose certain information before trial. The advisory committee had already substantially modified earlier versions of the proposed amendment to Rule 16 over the course of several past meetings to meet other concerns expressed by the Department of Justice. The Department opposed publication of those proposed amendments, as drafted, for public comment.

The Standing Committee decided to eliminate the conflict with the *Jencks Act* by limiting the scope of disclosure under the proposed amendments to witnesses' names. In addition, the Committee approved the revision of the published version so as to limit the disclosure to felony, noncapital cases.

The Standing Committee voted to send the proposed amendments to the Judicial Conference. The Department of Justice and one other member of the committee voted to oppose it. Although the report of the committee to the Judicial Conference accurately summarizes the Department's position, for the sake of completeness, a copy of a letter from the Department is attached setting forth their opposition.

II. Federal Rules of Appellate Procedure

A. Proposed Amendments to Rule 21

The proposed amendments to Rule 21 (*Writs of Mandamus*) of the Federal Rules

of Appellate Procedure generated substantial controversy. The primary issue was whether a trial judge should be named as a respondent in every petition for a writ of mandamus. In most instances, a petition for the writ represents an adversary proceeding only between the parties. In a small number of cases, however, a trial judge may have a personal interest in the outcome of the matter or be privy to certain facts known only to the trial judge.

Two versions of the proposed amendments to Rule 21 were published for public comment. Under an earlier version, a trial judge would be entitled to respond to the petition. The proposal was strongly opposed in the comments, primarily because the trial judge's neutrality and objectivity might be challenged if the judge later continued to adjudicate the same case. In addition, naming the judge as a respondent mischaracterized the action in the majority of petitions.

Under the later version, Rule 21 would be amended so that the trial judge is not named in the petition for a writ of mandamus and is not treated as a respondent. The trial judge would be permitted to appear and oppose issuance of the writ only if the appellate court ordered the judge to do so.

After the second comment period, the advisory committee made several changes to the proposed amendments, including requiring the party petitioning for mandamus to file a copy of the petition with the clerk of the trial court. This change was made because the advisory committee wanted to accommodate the trial judge who wished to respond to the petition in the small number of cases where it seemed necessary. A new subdivision was also added to require the circuit clerk to notify the clerk of the trial court of the disposition of the petition.

To ensure that the trial judge is informed of the pending petition for the writ of mandamus the amendments were revised later by the Standing Committee to require that a copy of the petition be sent directly to the trial judge. Likewise, the circuit clerk must notify the trial judge of the disposition of the petition. The proposed amendments were also changed to state explicitly that the trial judge may request permission to respond to the petition. The trial judge must still be invited or ordered to participate by the appellate court.

One committee member opposed the proposed amendments and believed that the trial judge should be entitled to respond to the petition. This right would be important in situations where both parties file a joint petition and oppose the actions of the trial judge(e.g. setting time limits for trial). If the trial judge does not respond, the petition could go uncontested.

The committee believed, however, that an appellate court would recognize that in the few cases where it was necessary for the trial judge to respond, the appellate

court would invite the trial judge to do so. Moreover, the changes made by the Standing Committee requiring direct notice to the trial judge of the petition and providing an opportunity to request permission to respond to it should go far in allaying concerns that facts known only to the trial judge would remain unknown.

The Standing Committee voted 11-1 to send the proposed amendments to the Judicial Conference.

B. Style Project

In March 1992, the Standing Committee established a Style Subcommittee to review all the Federal Rules of Practice and Procedure for consistency and clarity. Over the years, the Federal Rules of Practice and Procedure have been revised periodically by various drafters using different style conventions and different words intended to mean the same thing. As a result, there are many individual rules that could be significantly improved.

As part of the style undertaking, the Standing Committee appointed a consultant who prepared specific guidelines for good drafting. The guidelines rely on modern drafting principles and word usages. The advisory committees have used the drafting guidelines in recommending proposed amendments to individual rules, while at the same time undertaking separate projects to restylize each complete set of rules.

Under the guidelines, the word "must" is preferable to the word "shall," because of the multiple meanings associated with "shall." Accordingly, the word "must" was used in the proposed amendments to the Appellate Rules, which were transmitted to the Supreme Court in April 1995. The Court eliminated the use of "must" and reinstated "shall," noting "that terminology changes in the Federal Rules [should] be implemented in a thoroughgoing, rather than a piecemeal, way." In accordance with the Court's action, all references to "must" have been changed to "shall" in the proposed amendments to the Appellate Rules now submitted for approval to the Judicial Conference.

The Advisory Committee on Appellate Rules is planning to complete its comprehensive restylizing of the Appellate Rules at its Fall 1995 meeting and hopes to transmit the revised rules to the Standing Committee at its January 1996 meeting. The other advisory committees are in various stages of completing their respective restylizing.

Office of the Deputy Attorney General
Washington, D.C. 20530

July 17, 1995

The Honorable Alicemarie H. Stotler
United States District Judge
751 West Santa Ana Boulevard
Santa Ana, CA 92701

re: Proposed Amendments to Rule 16

Dear Judge Stotler:

As a member of the Judicial Conference's Committee on Rules of Practice and Procedure, I am writing to present the views of the Department of Justice concerning the amendments to Rule 16 of the Federal Rules of Criminal Procedure that have been forwarded to the Judicial Conference for approval. As you know, with one exception,[1] the Department strongly opposes the proposed amendments.

The Department's principal concerns fall into three broad categories: First, we believe the proposed amendments will interfere with our law enforcement responsibilities. Second, we believe they will lead to an increase in collateral litigation and will otherwise delay trials. Finally, we believe these amendments are unnecessary, insofar as there is no systemic problem with criminal discovery in the federal courts.

First, the Department believes these amendments will undermine its law enforcement mission and frustrate its ability to protect the interests of witnesses and victims of crime.

- If we could know with certainty whenever a witness' safety is likely to be threatened or that an obstruction of justice will occur, we would have greater confidence in the procedures provided for in the proposed amendment. But prosecutors are fallible, and we do not always know or even have what could be called a "good faith" belief that the disclosure might threaten someone's safety or lead to an obstruction of justice sufficient to justify the ex parte

[1]The Department supports the amendments to Rule 16(a)(1)(E) and 16(b)(1)(C) governing the disclosure of a written summary of expert testimony on the issue of the defendant's mental condition.

filing. The costs to witnesses and to victims if we misapprehend the nature of the threat are simply too high.[2]

- In addition, witness names will be disclosed needlessly. The vast majority of federal criminal defendants plead guilty, and many of them do so within a week of the scheduled trial date. The proposal's requirement that witness names be provided no later than 7 days before trial (unless a court orders a shorter period) will mean that many witnesses will be exposed even though they will never be called to testify, yet may be subjected to a range of repercussions that are wholly unjustified, reducing the likelihood of cooperation.

- Finally, the exceptions for withholding witness names are too narrow to capture many of the legitimate concerns of reluctant witnesses. Witnesses are often unwilling to cooperate with the government for reasons that fall short of physical safety concerns. The proposal will, we believe, lead to a greater reluctance on the part of many witnesses to cooperate with the government, with significant effect on the Department's law enforcement efforts.

Second, we believe these amendments will increase collateral litigation. One of the avowed purposes of the proposed amendments is to expedite trials by avoiding the recesses that are occasionally necessary to provide defense counsel with an opportunity to prepare for cross-examination. But these amendments will likely slow trials down. Although the rule provides that the prosecutor's ex parte filing is not reviewable, disputes will inevitably arise concerning the nature of these filings, and courts will have to devote resources to resolving them. For example, because prosecutors often learn of a witness' identity within 7 days of trial, they will not be able to submit their filing as the rule requires. Even though there may be a valid explanation for the delay, courts will be forced to resolve claims that prosecutors deliberately avoided the terms of the rule. Every occasion could give rise to such a challenge by defendants seeking to keep a particular witness from testifying.

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[2] Furthermore, although under the proposed amendment the ex parte statement will not be reviewable, and therefore district judges may not properly second-guess the prosecutor's determinations, the Department is concerned that some judges will conclude that -- if the requirement of a statement is imposed for a reason -- it is their responsibility to act on it; prosecutors may be urged to reveal names that ought to be protected.

Third, as we have previously pointed out, there is no systemic problem with criminal discovery in federal court. All of our surveys and discussions with U.S. Attorneys' Offices throughout the country reveal that the general practice in most districts is to disclose witness names in advance of trial. We also do not resist disclosure in advance of that required by the Jencks Act, unless there is reason to do so in a particular case. While there may be particular prosecutors who, without justification, withhold all discovery until the last possible moment, everyone agrees that these are exceptions to the general rule. As we have said to the Advisory Committee and to the Standing Committee, we are committed to addressing any problems in particular districts, and both the Attorney General and I have asked judges around the country to contact us or their U.S. Attorneys when discovery problems arise. Rather than proceed with a general rule change, the Department continues to believe that the most effective means of resolving the few problems that may exist is to address those problems directly. We are committed to working with the judicary toward that end.

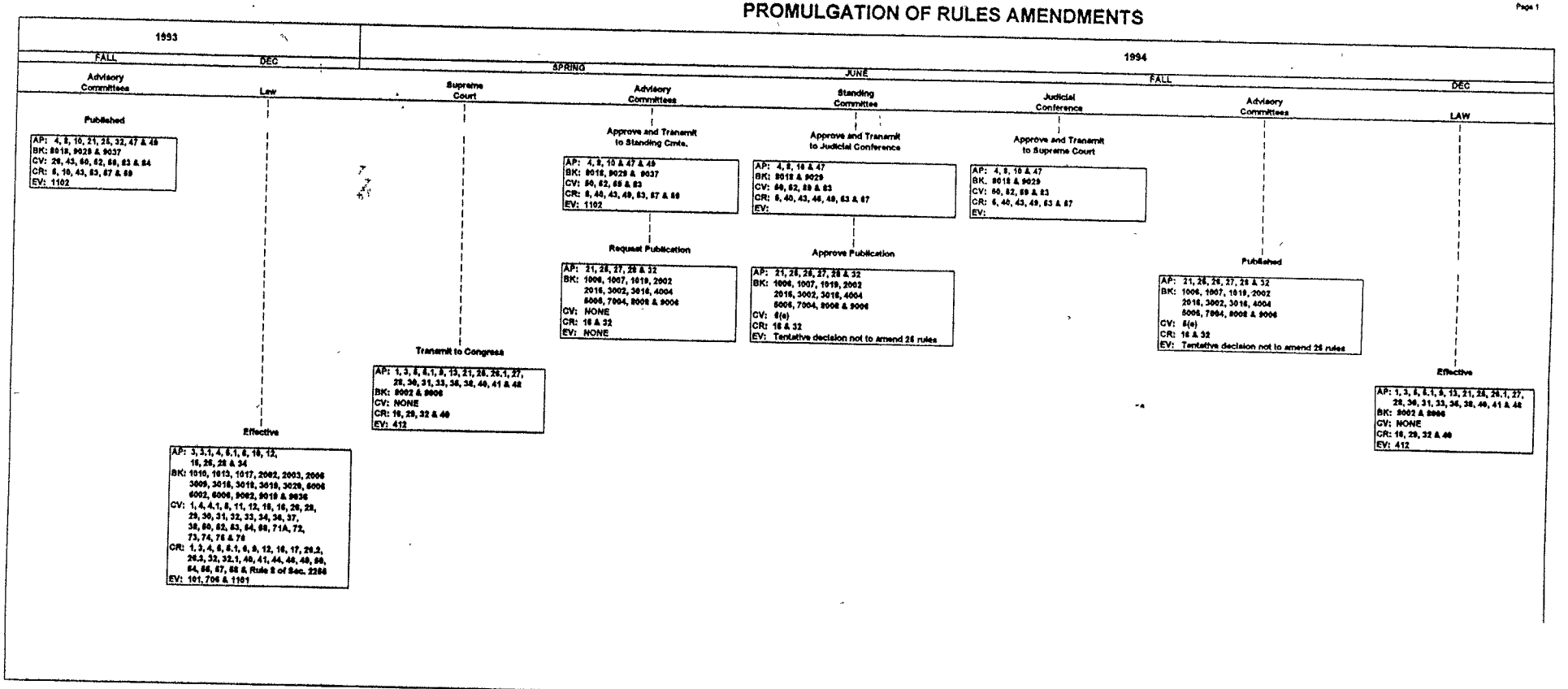
For the foregoing reasons, I will urge the Judicial Conference to oppose the Standing Committee's recommendation to approve the proposed amendments.

Sincerely,

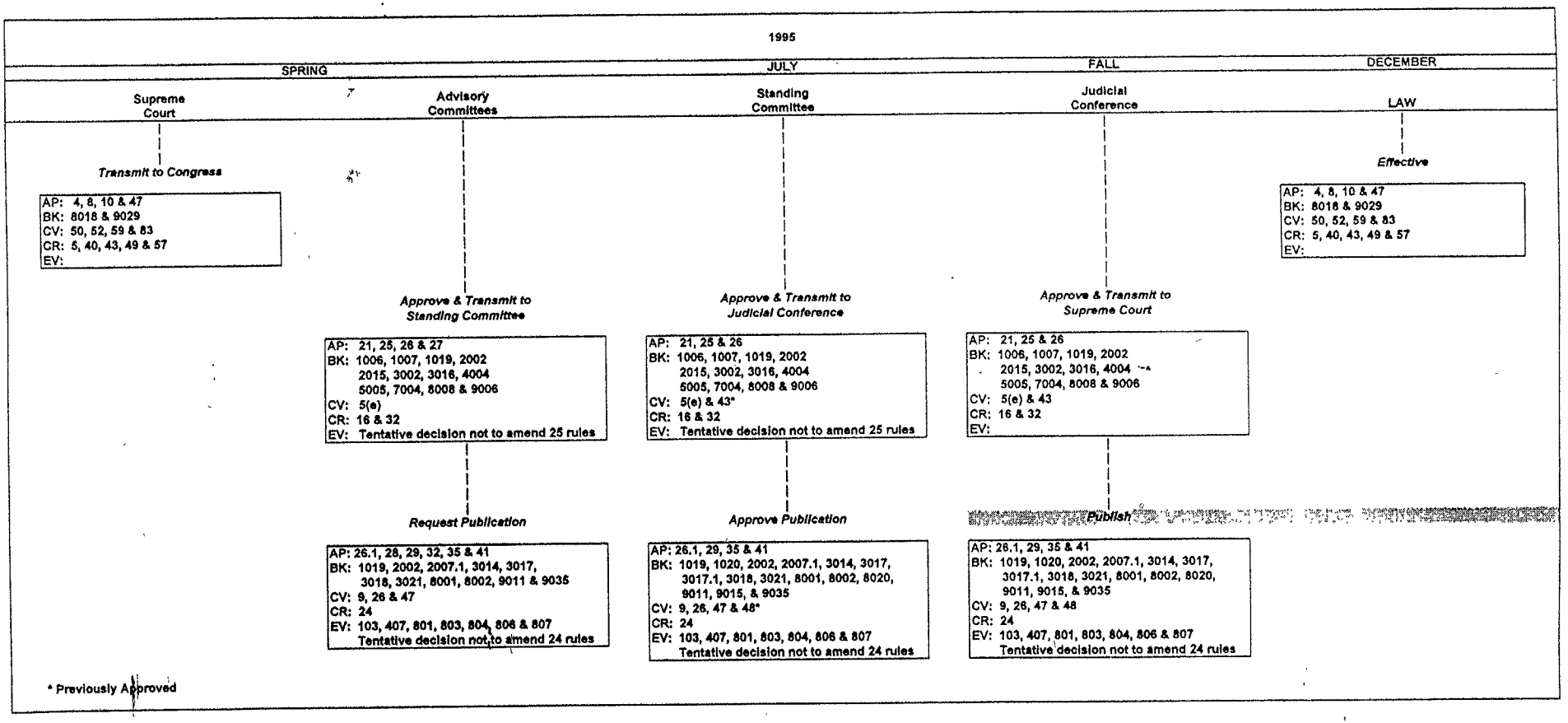
Jamie S. Gorelick
Deputy Attorney General

August 14, 1995

PROMULGATION OF RULES AMENDMENTS



PROMULGATION OF RULES AMENDMENTS



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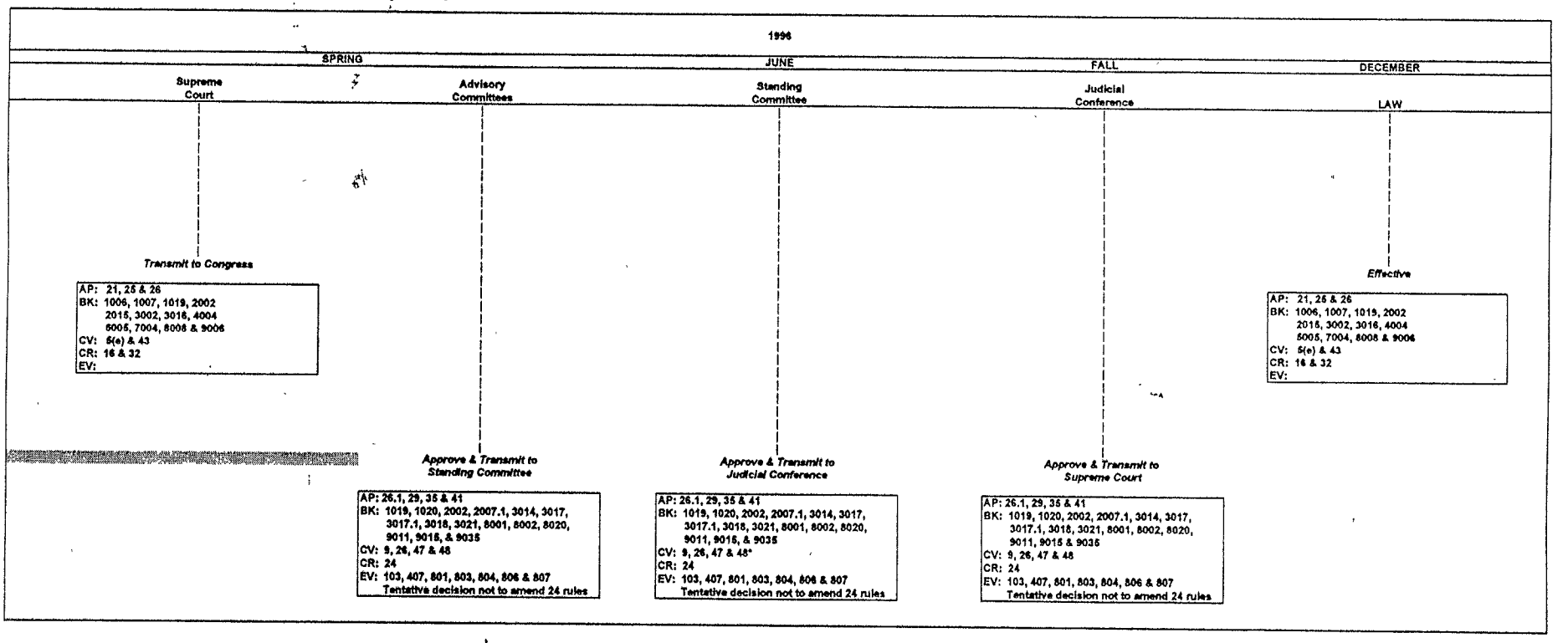

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