

COMMITTEE ON RULES  
OF  
PRACTICE AND PROCEDURE

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R E P O R T

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TO THE JUDICIAL CONFERENCE OF THE UNITED STATES:

The standing Committee on Rules of Practice and Procedure met in Washington on June 28, 29 and 30, 1965. All nine members of the committee were present. Hon. Dean Acheson, chairman, and Prof. Benjamin Kaplan, reporter, of the Advisory Committee on Civil Rules, Judge Walter L. Pope, chairman, and Prof. Brainerd Currie, reporter, of the Advisory Committee on Admiralty Rules, Judge John C. Pickett, chairman, and Dean Edward L. Barrett, Jr., reporter, of the Advisory Committee on Criminal Rules, Judge E. Barrett Prettyman, chairman, and Prof. Bernard J. Ward, reporter, of the Advisory Committee on Appellate Rules, Judge Phillip Forman, chairman, and Prof. Frank R. Kennedy, reporter, of the Advisory Committee on Bankruptcy Rules, Mr. Albert E. Jenner, Jr., chairman of the Advisory Committee on Rules of Evidence, and Prof. Maurice Rosenberg, director of the Columbia University Project for Effective Justice, were also present by invitation.

### Appointment of Secretary

The standing committee accepted the resignation as secretary of Will Shafroth who has retired as Deputy Director of the Administrative Office of the United States Courts and elected William E. Foley who has succeeded Mr. Shafroth as Deputy Director, as secretary of the standing committee and, ex officio, as secretary of each of the six advisory committees. The committee expressed its gratitude to Mr. Shafroth for his excellent service in behalf of the committees during the past two years.

### Amendments to Federal Rules of Civil Procedure Unification of Civil and Admiralty Procedure

The Advisory Committee on Admiralty Rules submitted with its favorable recommendation and with the approval of the Advisory Committee on Civil Rules a definitive draft of proposed amendments to certain of the Federal Rules of Civil Procedure designed to effect the unification of the admiralty and civil procedure. The draft was accompanied by a draft of proposed supplemental rules dealing with certain unique admiralty procedures which the Advisory Committee believes should be preserved for maritime claims. Likewise the Advisory Committee on Civil Rules submitted with its favorable recommendation and with the approval of the Advisory Committee on Admiralty Rules a definitive

draft of certain other amendments to the Federal Rules of Civil Procedure designed to improve the civil procedure. Also the reporter of the Advisory Committee on Appellate Rules, at the request of the chairman of the standing committee submitted a draft of proposed amendments to Civil Rules 73, 74, 75 and 81 designed to incorporate therein certain improvements in appellate procedure which his advisory committee has approved.

All these proposals had been further considered by the respective advisory committees and a number of them had been modified and improved in the light of comments and suggestions received from the bench and bar since they were published and circulated in March 1964. They were all accompanied by full explanatory notes by the respective advisory committees. In addition the Advisory Committees on Admiralty and Civil Rules each presented general explanatory statements regarding their respective proposals, copies of which are annexed hereto as Exhibits A and B, respectively. Professors Currie, Kaplan, and Ward made oral explanation of their respective proposals and all were fully discussed and considered by the standing committee. With a few modifications largely of a clarifying nature and with the exception of the proposed amendments to Rules 43(a), 65(f) and the rescission of the Copyright Rules all the proposals to amend the Federal Rules of Civil Procedure were approved by the standing committee.

Largely clarifying modifications were made by the standing committee in Rules 23.1, 23.2, 59(d) and 73 and appear in the text of those rules proposals in Appendix C. The proposed amendment to Rule 43(a), Evidence, was deferred by the standing committee in view of the work in that field now being undertaken by the Advisory Committee on Rules of Evidence. The standing committee disapproved the addition to Rule 65, Injunctions, of proposed subdivision (f), providing for Impounding under the Copyright Law, and the proposal to rescind Copyright Rules 3 to 13, inclusive, relating to impounding of infringing works, since it believes that further study should be given to this subject in view of the revision of the Copyright Act now being considered by Congress. The standing committee, however, approved the rescission of Copyright Rule 2 relating to the form of the complaint in copyright infringement cases, since it agreed with the advisory committee that the general rules of pleading in civil cases should be made applicable to copyright cases also. The standing committee also approved rescinding Civil Rule 6(c) relating to the effect of the expiration of terms of court since it has been rendered wholly obsolete and unnecessary by the amendment of 28 U.S.C. § 138 made by the Act of Oct. 16, 1963, P.L. 88-139, which abolished formal terms of the district courts altogether.



A draft of the proposed amendments to the Federal Rules of Civil Procedure, as thus approved by the standing committee, together in each instance with the advisory committee's note, is annexed hereto as Exhibit C. Included in Exhibit C are appropriate forms of Supreme Court orders for the rescission of Civil Rule 6(c), Copyright Rule 2, and the existing Admiralty Rules. The amendments designed to unify the civil and admiralty procedure represent a momentous step in the direction of simplifying and improving federal judicial procedure. Likewise the other amendments, especially to Rule 19 relating to joinder of parties and Rule 23 relating to class actions, represent real advances in modernizing the procedure and making it more responsive to the practical problems of litigation. The standing committee recommends that these proposals be approved by the Judicial Conference and submitted to the Supreme Court with the recommendation that they be adopted.

The Advisory Committee on Civil Rules is continuing its study of other areas of civil procedure, particularly the field of depositions and discovery. The Advisory Committee on Admiralty Rules is continuing the study of the distinctive maritime procedures which have been included in the supplemental admiralty rules.

## Federal Rules of Criminal Procedure

The Advisory Committee on Criminal Rules submitted with its favorable recommendation a definitive draft of proposed amendments to certain of the Federal Rules of Criminal Procedure designed to improve the criminal procedure and bring the rules into line with the Criminal Justice Act of 1964 and recent decisions of the Supreme Court. Alternative drafts of a proposed amendment to paragraph (2) of Rule 32(c), relating to the use of presentence investigation reports, on which the advisory committee was equally divided, were also submitted. In addition, the reporter of the Advisory Committee on Appellate Rules, at the request of the chairman of the standing committee, submitted a draft of proposed amendments to Criminal Rules 37 and 45 designed to incorporate therein certain improvements in appellate procedure which his committee has approved.

All these proposals had been further considered by the respective advisory committees and a number of them had been modified and improved in the light of the comments and suggestions received from the bench and bar since they were published and circulated in March, 1964. They were all accompanied by full explanatory notes by the respective advisory committees. In addition an explanatory letter of transmittal was received from the chairman of the Advisory Committee on Criminal Rules, a copy of which is annexed hereto as Exhibit D. Dean Barrett and Professor Ward made oral

explanations of their respective proposals and all of them were fully discussed and considered by the standing committee. With some modifications largely of a clarifying nature and with the exception of the proposed new Rule 12.1 and the proposed amendments to Rules 15 and 23(b) all the proposals recommended by the advisory committees to amend the Federal Rules of Criminal Procedure were approved by the standing committee.

Largely clarifying modifications were made by the standing committee in Rules 11, 16(a), 20(d), 21(b), 28(a) and 37(a) and appear in the text of those rules proposals in Appendix E. The second alternative proposal to amend paragraph (2) of Rule 32(c) relating to the disclosure of pre-sentence investigation reports and which authorizes the court to disclose to the defendant all or part of such a report, in his discretion, was approved by the standing committee after lengthy discussion and full consideration of the alternative draft which would have made such disclosure mandatory. The approved draft appears in the text of that paragraph in Appendix E. The proposed Rule 12.1 relating to notice of insanity and the proposed amendments to Rule 15 relating to depositions were referred back to the advisory committee for further study. Likewise the proposed amendment to Rule 23(b) which would authorize replacing a disabled juror by an alternate juror after the jury has retired to deliberate

was deferred for further study of the constitutionality and propriety of the proposal. The standing committee also approved the rescission of Criminal Rule 45(c) relating to the effect of the expiration of terms of court since as in the case of Civil Rule 6(c) it has been rendered wholly obsolete and unnecessary by the amendment of 28 U.S.C. § 138 made by the Act of October 16, 1963, P.L. 88-139, which abolished formal terms of the district courts altogether.

A draft of the proposed amendments to the Federal Rules of Criminal Procedure, as thus approved by the standing committee, together in each instance, with the advisory committee's note, is annexed hereto as Exhibit E. Included in Exhibit E is an appropriate form of Supreme Court order for the rescission of Criminal Rules 19 and 45(c) as recommended. The standing committee recommends that these proposals be approved by the Judicial Conference and submitted to the Supreme Court with the recommendation that they be adopted.

The Advisory Committee on Criminal Rules is continuing its study of other areas of the criminal procedure.

## Uniform Rules of Federal Appellate Procedure

The Advisory Committee on Appellate Rules is engaged in the final stage of modifying and perfecting its draft of uniform rules for the courts of appeals which were published and circulated to the bench and bar in March 1964 but is not yet ready to recommend a definitive draft to the standing committee. However, those of its recommendations which involve the initial stage of the appellate process, i.e., between filing the notice of appeal in the district court and lodging the record in the court of appeals, have been incorporated in the proposed amendments to the Federal Rules of Civil and Criminal Procedure which the standing committee has approved, as noted above.

## Rules of Bankruptcy Procedure

By the Act of October 3, 1964, P.L. 88-623, Congress added section 2075 to title 28, U.S.C. conferring upon the Supreme Court full authority to promulgate rules of procedure under the Bankruptcy Act which may supersede the procedural provisions of the Act. Previously the Advisory Committee on Bankruptcy Rules had been engaged in preparing proposed revisions of the General Orders and Official Forms in bankruptcy. In view of the enactment of the new statute which makes possible a very different and much more comprehensive approach to the formulation

of procedural rules in bankruptcy, the advisory committee has now undertaken the formulation of a complete set of rules to govern the procedure which is unique to bankruptcy together with such amendments to the Federal Rules of Civil Procedure as may be appropriate to bring bankruptcy litigation into the civil procedure to the greatest extent feasible. It is obvious that this task will take some time

Federal Rules of Evidence

The Advisory Committee on Rules of Evidence has been appointed and held its first meeting on June 18, 1965. Professor Edward W. Cleary, of the University of Illinois Law School, has been appointed reporter for the committee and has already begun his work. The work will, of course, take a good deal of time but a fruitful start has been made and we look forward to a most useful result.

On behalf of the standing Committee  
on Rules of Practice and Procedure

*Albert B. Maris*

Chairman

July 12, 1965

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE  
OF THE  
JUDICIAL CONFERENCE OF THE UNITED STATES  
SUPREME COURT BUILDING  
WASHINGTON 25, D. C.

William E. Foley  
~~XXXXXXXXXXXX~~  
SECRETARY

ALBERT B. MARIS  
CHAIRMAN

March, 1964  
(Revised August, 1965)

MEMBERS OF ADVISORY COMMITTEES

DEAN ACHESON  
CIVIL RULES

PHILLIP FORMAN  
BANKRUPTCY RULES

JOHN C. PICKETT  
CRIMINAL RULES

WALTER L. POPE  
ADMIRALTY RULES

E. BARRETT PRETTYMAN  
APPELLATE RULES

TO THE CHAIRMAN AND MEMBERS OF THE COMMITTEE ON RULES  
OF PRACTICE AND PROCEDURE:

At your first meeting, December 22, 1959, you unanimously resolved to "request the Advisory Committee on Admiralty Rules to conduct a preliminary study with respect to the advisability of adopting the proposal that the admiralty procedure be integrated into the civil procedure and to report thereon before proceeding to draft admiralty rules." On August 13, 1962, we reported to you "that it is the sense of this Committee that unification is both feasible and desirable, with the inclusion of certain rules for dealing with special admiralty proceedings." We now recommend the adoption of certain amendments to the Federal Rules of Civil Procedure necessary to effectuate a plan of unification, together with a set of Supplemental Rules for Certain Admiralty and Maritime Claims.

The Rules of Practice in Admiralty and Maritime Cases, dating from 1845, have never been a comprehensive code of procedure. Yet those rules, supplemented by case law and by tradition, formed the core of a practice which in the federal courts was long and justly cherished for its relative liberality, flexibility, and adaptation to the ends of substantial justice. With the promulgation of the Federal

Rules of Civil Procedure in 1938, however, the relative position of the admiralty practice in federal civil litigation was materially altered. The distinction between actions at law and suits in equity was abolished, and a modern, comprehensive system of procedure, designed above all "to secure the just, speedy, and inexpensive determination of every action," was established. In the light of the Civil Rules the need for modernization and supplementation of the Admiralty Rules became apparent. Some of the notably successful procedures established by the Civil Rules were formally incorporated into the Admiralty Rules; others were adopted for the admiralty practice by exercise of the rulemaking power of the district courts; still others provided an analogy to be employed by judges in admiralty cases to fill gaps in, or to improve upon, the admiralty practice. In 1950, Attorney General McGrath reported to the Judicial Conference:

In the field of admiralty, I would like to direct your attention to the urgent need for revision of admiralty practice to bring it into accord with modern Federal practice. Specifically, it is the view of my Department, as the chief litigant in admiralty cases, that the time is now ripe for appropriate action by the Supreme Court to make available to the district courts in their admiralty practice the modern procedural advantages of the Federal Rules of Civil Procedure. (Report of the Judicial Conference of the United States, 1950, p. 32)

In 1953, the Maritime Law Association of the United States, in its Document 375, proposed a new admiralty rule to the effect that "The Federal Rules of Civil Procedure shall be applicable to cases in Admiralty as near as may be," subject to a number of exceptions. In this proposal the American Bar Association concurred. See 78 Rep. A.B.A. 188 (1953). Thus for twelve years there has been general agreement that the Civil Rules should be made applicable to admiralty cases in so far as practicable.

Our recommendation goes beyond this and similar proposals to superimpose the Civil Rules on the existing



Admiralty Rules. Not only is there need for a modern and comprehensive set of rules for practice in admiralty cases. There is also need to abolish the formal distinction between civil actions and suits in admiralty, and to provide for one form of civil action, just as the distinction between actions at law and suits in equity was abolished in 1938. This is not a novel proposal. The great conception that resulted in the Federal Rules of Civil Procedure was originally not confined to the merger of law and equity, but included admiralty as well. The late Chief Justice Taft, speaking to the Chicago Bar Association in 1921, said:

The second step that should be taken is a simplification of the procedure in all cases in the Federal trial courts. We still retain in those courts the distinction between suits at law, suits in equity, and suits in admiralty. The Constitution refers specifically to them, and in deference to that separation in the Constitution, the distinction is preserved in the Federal practice. It seems to me that there is no reason why this distinction, so far as actual practice is concerned, should not be wholly abolished, and what are now suits in law, in equity and in admiralty, should not be conducted in the form of one civil action, just as is done in the code states. Of course it will be necessary in such a system to preserve the substantial differences in procedure and right which are insured by the Constitution and are of the utmost value in the administration of justice. (Taft, Three Needed Steps of Progress, 8 A.B.A.J. 34, 35 (1922).)

The beneficial effects of the merger of law and equity will hardly be questioned. We believe that comparable effects will follow the merger of suits in admiralty and civil actions, in accordance with the original conception. In 1962, on recommendation of the Board of Governors, the House of Delegates of the American Bar Association adopted the following resolution:

That the American Bar Association favors unification of the rules of practice of the

Supreme Court of the United States in Civil and Admiralty matters, in so far as practicable; and authorizes the Standing Committee on Admiralty and Maritime Law of this Association to co-operate with the Advisory Committee on Admiralty Rules of Practice of the Supreme Court toward that end. (87 Rep. A.B.A. 155 (1962)).

In March 1964, at the request of the Advisory Committee on Admiralty Rules, concurred in by the Advisory Committees on Civil and Appellate Rules, the Committee on Rules of Practice and Procedure submitted a plan of unification to the bench and bar at large for comment and criticism. In November 1964 the Maritime Law Association of the United States, on the recommendation of its Committee on Supreme Court Admiralty Rules, acquiesced in this plan with certain reservations. In May 1965, the Advisory Committee having reviewed and revised its plan in the light of these reservations, the Maritime Law Association, without modifying its expressed preference for a separate set of admiralty rules, approved the plan of unification.

Our reasons for recommending unification, or merger, apart from the need to make available in admiralty cases the modern and comprehensive provisions of the Civil Rules, may be briefly summarized. It will be recognized that they are basically similar to the reasons underlying the merger of law and equity:

1. In the words of the late Arnold W. Knauth, a charter member of this Committee, "The near approach of the common law-equity procedure to the relatively simple and untechnical state of the traditional Admiralty practice has produced a new series of traps and pit-falls consisting of the remaining differences, frequently subtle in their nature, to trap the unwary . . . ." (2 Benedict on Admiralty iii-iv (6th ed. (Knauth) 1940)). Mr. Knauth went on to note that differences between the admiralty and civil practices must persist so long as the Supreme Court lacked, with respect to admiralty rules, the power to supersede inconsistent statutes that it exercised with respect to civil rules. Needless to say, that obstacle to uniformity has been removed by the present enabling legislation. (28 U.S.C. § 2073.)

2. To the extent that admiralty procedure differs from civil procedure, it is a mystery to most trial and

appellate judges, and to the nonspecialist lawyer who finds himself--sometimes to his surprise--involved in a case cognizable only on the admiralty "side" of the court. "Admiralty practice," said Mr. Justice Jackson, "is a unique system of substantive law and procedure with which members of this Court are singularly deficient in experience." Black Diamond S.S. Corp. v. Stewart & Sons, 336 U.S. 386, 403 (1949) (dissenting opinion). The comment applies generally to all levels of the judiciary. The distinctiveness of substantive maritime law is a matter beyond the competence of this Committee, even if we were disposed to concern ourselves with it; indeed, it is probably too much to hope that we can ever be spared the necessity of more or less recondite bodies of substantive law, whether they relate to maritime affairs, or patents, or copyrights, or combinations in restraint of trade. It is multiplying the burden of the bench and bar, however, to require mastery of unnecessarily distinctive systems of practice and procedure.

3. Procedural differences constitute the main bulwark of a type of thinking that has built a wall of separation into the district court, dividing it into two compartments, or "sides," as if there were two separate courts. Such thinking at worst results in palpably unjust dismissals, and at best in wasteful disputations, amendments, and transfers between dockets. The situation is reminiscent of the practice of dismissing suits brought in equity when they should have been brought at law, and vice versa. See Clark & Moore, A New Federal Procedure: I. The Background, 44 Yale L. J. 387 (1935). For example in 1955 an action at law for wrongful death, based on diversity of citizenship, was dismissed for lack of jurisdiction because the court held it should have been brought as a suit in admiralty. Transfer to the admiralty docket was refused although the action would be time-barred on refiling. Higa v. Transocean Airlines, 230 F. 2d 780 (9th Cir. 1955). As recently as November 2, 1962, a district court dismissed "for lack of jurisdiction" a complaint based on unseaworthiness because the court construed the complaint as asserting a civil action, and diversity of citizenship was not alleged. Transfer to the admiralty docket was denied. Walker v. Dravo Corp., 210 F. Supp. 386 (W.D. Pa. 1962). Compare Beeler v. United States, 338 F. 2d 687 (3d Cir. 1965),

reversing 224 F. Supp. 973 (W.D. Pa. 1964). See generally Currie, The Silver Oar and All That: A Study of the Romero Case, 27 U. Chi. L. Rev. 1 (1959); 5 Moore's Federal Practice 67-70 (2d ed. 1951); Verleger, On the Need for Procedural Reform in Admiralty, 35 Tul. L. Rev. 61 (1960); Comment, Admiralty Procedure and Proposals for Revision, 61 Yale L. J. 204 (1952).

4. Similarly, the maintenance of separate procedures, and the attendant compartmentalization of the court, prevents full utilization of some of the most fundamental principles of modern procedure. Many a claim that, on principle, ought to be joined with another cannot be so joined if one is cognizable only in admiralty. Many a claim that, on principle, ought to be asserted as a counter-claim cannot be so asserted if one of the claims is cognizable only in admiralty. The same is true of cross-claims and third-party claims. It is ironical that the separation of admiralty should lead to such a result, since it was admiralty, along with equity, that provided the model for liberalization of the strict joinder rules of the common law, and it was specifically Admiralty Rule 56 that provided the model for FRCP 14 on third-party practice. For present purposes one illustration must suffice: In a well-known and complex suit in admiralty, the owners of vessels recovered demurrage from the consignee of coal, but the consignee was denied the right to seek indemnity from the seller because the contract of sale was nonmaritime. Yet there was plainly diversity of citizenship between seller and consignee. Yone Suzuki v. Central Argentine Ry., 27 F. 2d 795 (2d Cir. 1928). "In matters of justice . . . the benefactor is he who makes one lawsuit grow where two grew before." Wright, Joinder of Claims and Parties under Modern Pleading Rules, 33 Minn. L. Rev. 580 (1952). See also Millar, Civil Procedure of the Trial Court in Historical Perspective 8, 10 (1952).

Unification does not mean complete uniformity. There are certain distinctively maritime remedies that must be preserved, as distinctively equitable remedies were preserved in the merger of 1938. In addition, history or the exigencies

of maritime litigation occasionally require procedures different from those now provided by the Civil Rules. The problems of unification and the methods employed for resolving them may be briefly summarized:

1. A number of the Admiralty Rules are already identical, or substantially identical, with Civil Rules.
2. A large number of the Civil Rules are appropriate without modification for application to what are now suits in admiralty.
3. In several instances modifications of the Civil Rules recommended by this Committee have been found appropriate for application to what are now civil actions.
4. In a few instances special provision has been made in the Civil Rules for what are now proceedings in admiralty, the distinction being drawn, usually, in terms of the jurisdictional basis for the claim.
5. The distinctively maritime remedies (attachment and garnishment, actions in rem, possessory, petitory and partition actions, and limitation of liability) are treated in a set of Supplemental Rules.

Of necessity, our recommendations are based primarily on the Civil Rules as amended July 1, 1963. However, we have considered also the currently proposed amendments, first approved by the Advisory Committee on Civil Rules at its meeting October 31-November 2, 1963, and those proposed amendments have our approval as unified rules.

The amendments to the Federal Rules of Civil Procedure here proposed have been approved by the Advisory Committee on Civil Rules.

We therefore recommend that the Rules of Civil Procedure for the United States District Courts be amended:

- (1) By making the changes in Rules 1, 8, 9, 14, 17, 18, 20, 26, 38, 42, 53, 65, 68, 73, 81, and 82,

and Forms 2 and 15, set forth in Appendix I;

(2) By adding thereto a new Rule 65.1, as set forth in Appendix I;

(3) By adding thereto the Supplemental Rules for Certain Admiralty and Maritime Cases set forth in Appendix II.

Respectfully submitted,

Walter L. Pope,  
Chairman, Advisory Committee  
on Admiralty Rules

Brainerd Currie,  
Reporter, Advisory Committee  
on Admiralty Rules.

June 10, 1965

To the Chairman and Members of the Standing Committee on  
Practice and Procedure of the Judicial Conference of the  
United States:

STATEMENT ON BEHALF OF THE  
ADVISORY COMMITTEE ON CIVIL RULES

- I. The Advisory Committee Recommends Adoption of the  
Amendments Appearing as Part II of "Preliminary  
Draft of Proposed Amendments to Rules of Civil  
Procedure of the United States District Courts" (March  
1964), as Revised

The Standing Committee on Rules of Practice and Procedure in March 1964 published and circulated to the bench and bar a Preliminary Draft of various Civil Rules amendments, inviting comments and criticisms which were to be submitted by April 1, 1965. Part II of the Preliminary Draft set forth amendments originated by the Advisory Committee on Civil Rules. At its meeting on May 14, 15, and 17, 1965, the Advisory Committee considered the communications received from the bench and bar and also reexamined various points at the suggestion of members of the Committee. After full discussion, the Advisory Committee voted a number of changes of text and notes.

The Advisory Committee now recommends to the Standing Committee the adoption of Part II of the March 1964 Preliminary Draft, as revised. This material appears as Exhibit "A" annexed hereto.

For the further information of the Standing Committee, circular letters from the reporters to the Advisory Committee, dated April 21

and April 28, 1965 (with enclosures), commenting on communications received,<sup>1</sup> are also presented. These are annexed hereto as Exhibits "B" and "C." Also annexed, marked Exhibit "D," is a statement by Mr. John P. Frank, a member of the Committee, dissenting from the proposal on Rule 19, and from part of the proposal on Rule 23.

Summary Statement of the Civil Rules  
Amendments Recommended for Adoption<sup>2</sup>

(A) Amendments Regarding Joinder of Parties and Claims

Conscious of the increased frequency and importance of multi-party, multiclaim litigation, the Advisory Committee shortly after its organization in 1960 commenced a review of the relevant Rules. The proposals set forth below are the result of extended consideration by the Committee.

1. Joinder of Persons Needed for Just Adjudication [Rule 19; also Rule 4(f), 12(f), 13(h), 41]. Present Rule 19 (necessar y joinder) is improved to meet two major criticisms, namely, that the Rule has a number of textual deficiencies or traps, and that it is cast in an abstract style not expressive of the functional problems encountered. The revision eliminates the textual difficulties, and approaches the problems more realistically.

New subdivision (a) describes by reference to stated criteria the persons who ought to be brought into the action if they are subject to service of process and their joinder will not destroy subject-matter jurisdiction. If a person whose joinder would otherwise be required

<sup>1</sup>Additional communications were received after April 28, 1965.

<sup>2</sup>The summary omits various particulars and matters of detail.



under (a) cannot be made a party because he is not amenable to service or his joinder would deprive the court of subject-matter jurisdiction or would make the venue improper (assuming objection on that ground), then the court is to consider the factors set forth in new subdivision (b) as a basis for determining whether the action can fairly be retained, or should rather be dismissed. The criteria of (a) and the factors mentioned in (b) are drawn from the better-reasoned decisions.

The revision has taken advantage of an important scholarly literature running back for almost a decade. The substance of the revision has already been adopted in New York and Michigan. It has been accepted as the correct approach in the recent work of the ALI study of the division of jurisdiction between State and Federal courts.

The draft circulated to the public caused some misunderstanding because of the introduction of a new term, "contingently necessary." That term has been eliminated in the interest of greater clarity. The term "indispensable" now appears in the revision in a conclusory sense: a person is regarded as indispensable when he cannot be made a party and, upon consideration of the factors listed in (b), it is determined that in his absence the action should be dismissed.

Comment: The dissenting view objects to the revised Rule on the ground that there is no abundance of cases which have been wrongly decided under the present Rule. As the present Rule does not pose the cogent questions, it is hard by reference to the Rule to judge of the correctness of the decisions under it. When the proper questions are

addressed to the cases, a number appear presumptively erroneous or questionable, as the analytical writing shows at length -- we say "presumptively" because the opinions often do not come forward with the crucial facts. There is every reason to believe that litigants as well as courts will do a more efficient job when the Rule puts the proper questions and establishes standards for their decision.

As above noted, "indispensability" is not discarded in the revised Rule but is expressly recognized. Under the better-reasoned decisions, the holding that a person is "indispensable" is a conclusion reached upon an assessment of the factors which are referred to in subdivision (b) of the revised Rule.

The problem of joinder could be made less troublesome by increasing the territorial range of service, and by relaxation of requirements of subject-matter jurisdiction and venue, for then more persons would become amenable to joinder in an action. But it is not known when, if ever, such changes (which must in part be made legislatively) will come; and even under a relaxed system, such as that advocated by the ALI, a Rule on the lines proposed remains essential -- as indeed the ALI proposal itself indicates.

2. Class Actions; Derivative Actions; Actions Relating to Unincorporated Associations. -- (a) Class actions [Rule 23]. The present provision on class actions relies on such terms as "joint" right, "common," etc. to define its component categories. These terms have been found increasingly unsatisfactory. The revision uses a more

practical set of definitions. It also pays more attention to problems of management and procedural fairness, including questions of notice to the class.

Subdivision (a) states the requisites of any class action, including the requirement that the representative parties will fairly and adequately protect the interests of the class.

Subdivision (b) goes on to describe three categories of class actions.

Illustrative of the first category [(b) (1) (A) and (B)] is an action against a municipality to declare a bond issue invalid or to condition or limit it (where separate actions by individuals would create a risk of inconsistent adjudications establishing incompatible standards for the defendant); or an action by policy holders against a fraternal benefit association attacking a financial reorganization of the society (where in case of individual litigation it would be impractical, and perhaps impossible, to confine the effects of an adjudication to the particular plaintiff).

Illustrative of the second category [(b)(2)] is the typical civil-rights litigation (where the party opposing the class has acted or refused to act on grounds generally applicable to the class, making appropriate final injunctive, or corresponding declaratory relief with respect to the class).

The third category [(b)(3)] is a relatively flexible one. It envisages numerous persons who have been affected in a more or less similar way by the acts of another; typically these persons have less cohesiveness as

a group than the persons constituting the classes in the prior categories. Under the revised Rule, it depends on the particular facts whether a class action promises such advantages, on balance, that it ought to be maintained -- advantages of achieving economies of money, time, and effort, of promoting uniformity of decision, and, in some instances, of enabling small people with small claims to vindicate their rights when they could not otherwise do so.

The stated requirements of the (b) (3) category are that the court shall find that the questions common to the members of the class predominate over questions affecting only individual members, and that a class action is superior to other available devices for the adjudication of the controversy. Matters pertinent to the findings are then listed including the interest of members of the class in controlling their own litigations, and the desirability or undesirability of concentrating the litigation of the claims in the particular forum.

Illustrative of the (b) (3) class action would be some (but not all) cases of fraud perpetrated on a group; some (but not all) cases of anti-trust violations injuring a group. As the Note states, "mass" personal injury situations would ordinarily not be appropriate for handling by class action.

If the court determines that a (b)(3) class action is to be maintained, it is still required under subdivision (c)(2) to direct to members of the class the best practicable notice, including individual notice to all

members who can be identified through reasonable effort, advising them of their right to be excluded from the scope of the action upon request, and, if they should not request exclusion, of their right to enter an appearance through counsel and of the fact that the judgment will embrace them.

The judgment in a class action in any of the categories, whether or not favorable to the class, embraces the membership as defined pursuant to subdivision (c)(3). In a (b)(3) action the judgment includes those to whom the notice was directed, excepting those who requested exclusion or who are ultimately found not to be members of the class. The present "spurious" category is eliminated and with it the anomaly of a so-called "class" action in which the judgment theoretically includes only the specific parties and intervenors.

Although the new Rule regulates the content of the judgment to be entered in the action, it does not attempt to predetermine the res judicata effect of the judgment, which, according to established principle, can be tested only in a subsequent action.

Subdivision (d) provides for various orders in the conduct and management of a class action including discretionary orders for notice to the class during the proceedings. Subdivision (e) covers mandatory notice and court approval upon dismissal or compromise of a class action.

The more significant changes of the published draft voted by the Advisory Committee at its May meeting improve and tighten the (b)(3)

provision, and clarify the notice procedure in initiating a class action of that type. Members of such a class are now given an unqualified right to "opt out" of the action, in contrast to the qualified right given them in the published draft.

Comment: The proposed (b)(3) class action is located at a growing point in the law. It is intended as one possible means of dealing effectively with litigation involving large numbers of persons. Apart from the standard cases covered by (b)(1) and (b)(2), is this kind of litigation always to be carried out in separate units, or can it in some instances and under appropriate safeguards be carried out under the umbrella of a single action? If separate litigations are always required, then access to the courts may be put out of reach for those whose individual stakes are low or who by reason of poverty or ignorance will not go it alone.

At this moment, the response to this whole problem is the "spurious" class action which is objectionable because it does not distinguish cases suitable for class treatment from those unsuitable, and because it has the anomalous feature of the confinement of the judgment mentioned above. The Committee has tried to use the experience with the "spurious" action to develop something better.

The dissenting view would accept (b)(1) and (b)(2) and leave it at that, eliminating (b)(3). This would destroy altogether the growing point in the law. It would be a step backward from the existing position. It would be a retreat, in the face of an insistent demand and need for going forward to develop improved methods of handling disputes affecting groups.

This retrogressive view goes on the mistaken assumption that (b)(3) is merely the "spurious" action by another name with the judgment extending more broadly. Thus it is assumed that mass accident and other personal injury cases would automatically qualify under (b)(3).<sup>3</sup> But (b)(3) is far more restrictive than the present "spurious" provision; as already indicated, the accident and like cases in all likelihood would not qualify -- among other reasons, the individuals' interests in controlling their own litigations and in pressing their claims in forums of their own choice would be found dominant. A case of "fraud by prospectus" might be quite another thing, as would a case of small individual interests where there could be little concern for separate control of lawsuits. Subdivision (b)(3) directs attention to the question, Is the class action device superior to other procedural possibilities for this particular state of facts?, and only when the court makes findings in the affirmative does a class action lie.

The dissenting view acknowledges that the revision "greatly improves the devices to protect the class from abuse," but suggests that somehow this will not apply to (b)(3) cases. But major protective devices in the Rule (see subdivision (d)) apply to all categories, and there are further protective devices applicable to the (b)(3) class (see subdivision (c)(2)). The alleged "corruption potential" and possibilities for improper solicitation under (b)(3) are not materially different from the abuses that

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<sup>3</sup>Reference is also made to "wage hour" cases but these are covered by special legislation having a special history. See 52 Stat. 1060, 1069 (1938); 61 Stat. 84, 87-88 (1947); 29 U. S. C. §216(b); Sen. Rep. No. 48, 80th Cong., 1st Sess. (1947), pp. 49-51.

can arise in standard class actions, shareholders' derivative actions, and today's "spurious" actions; the Committee believes that such abuses could be checked if they should occur, and that fear of them should not stand in the way of the reform.

Finally it is claimed that the liberties of class members are being invaded. Consider the case which is supposed of a class member who receives the initial notice that action has been brought on behalf of the class. If he requests exclusion for the purpose of bringing his own action or otherwise, he will be excluded. He may, if he chooses, appear in the class suit by counsel. If he does nothing, having been advised by the notice of the consequences, he will still fare better than he does today when he does not act -- he will get fair representation in the action. Throughout he has a better range of choices than class members in the standard, well-accepted class actions. As to the possibility that notice, will not be received, (c)(2) requires the best practicable notice, and in the end constitutional standards of due process must be complied with or the member will not be bound by the judgment. Again we are dealing with a member who has not acted on his own, and who today might be left entirely in the cold without any representation.

(b) Derivative actions [Rule 23.1]. The published draft carried forward the present provisions of Rule 23(b) with certain additional material. The correspondence showed the need for corrections in this material. Instead of stating as the published draft did, that the derivative plaintiff must adequately represent the corporation (inapposite because the corporation is represented separately in the action), the improved



draft says that the plaintiff must adequately represent the interests of shareholders similarly situated. The reference back to new Rule 23(d) (class actions: orders in conduct of action) has been eliminated because much of 23(d) is not relevant and the rest is subject to misconstruction as applied to a derivative action. Instead the Note calls attention to the court's inherent power to provide for the conduct of the proceedings and to require any appropriate notice to shareholders.

(c) Actions relating to unincorporated associations are covered by Rule 23.2.

3. Intervention of Right [Rule 24]. The main purpose of this amendment is to correct a paradoxical situation created by reading "is or may be bound" appearing in present Rule 24(a)(2) as referring to res judicata in the strict sense. On this reading, if a member of the class demanded intervention in a class action on the ground of inadequacy of representation, he might be met with the argument that if the representation was in fact inadequate, he would not be technically "bound" by the class judgment, whereas, if the representation was adequate, there was no basis at all for intervention. But if the class member could establish inadequacy of representation with sufficient probability, he should not be put to the risk of a judgment which included him by its terms, and be obliged to test the judgment by collateral attack. The effect of the amendment is to provide that if a person who would be affected in a practical sense by the disposition of an action is not joined as a party, he has a right to intervene unless he is adequately represented by an existing party.

4. Joinder of Claims in Multiparty Cases [Rule 18(a); also Rule 20(a)].

Present Rule 18(a) governing joinder of claims contains a confusing internal reference to other Rules dealing with joinder of parties. The amendment restores the principle of pleading that -- whether or not there are multiple parties in the action -- a party asserting a claim may join with it any claim, legal, equitable, or maritime, that he may have against the opposed party. (The amendment treats only of pleading: claims properly joined as a matter of pleading may still be separated for purposes of trial. Also, the amendment is without prejudice to the problems of subject-matter jurisdiction or venue which may arise as to particular claims.)

(B) "Foreign" Amendments<sup>4</sup>

1. Proof of Official Record [Rule 44]. The chief purpose of this revision is to set up a procedure for qualifying foreign official records for admission in evidence which will accommodate to the practical and legal situations found in the foreign countries from which the records emanate. For example, the present rule assumes that the foreign official having custody of the record is empowered to attest it: in some foreign countries that is not so. The present rule assumes that U. S. consular officials have data available from which they can easily certify the authority of the foreign attesting official: sometimes that is not the

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<sup>4</sup>Developed collaboratively by the Advisory Committee on Civil Rules, the Commission and Advisory Committee on International Rules of Judicial Procedure, and the Columbia Law School Project on International Procedure.

case. The revised rule takes better account of the actual conditions. It parallels Article V of the Uniform Interstate and International Procedure Act adopted by the Commissioners on Uniform State Laws.

2. Determination of Foreign-Country Law [Rule 44.1]. This new rule, which is similar to Article IV of the Uniform Act, clarifies and codifies in brief compass the pleading, proof, and determination of foreign-country law.

(C) Miscellaneous Amendments

1. Trial Court's Power to Grant New Trial Motion on Ground Not Stated in Motion [Rule 59(d)]. There is authority construing Rule 59(b) and (d) narrowly and holding that the trial court may not grant a new trial motion, timely served, on a ground not stated in the motion but believed to be sound by the court, if the court's order is made more than ten days after entry of judgment. These authorities are overruled by the amendment, and the court's power is confirmed. The amendment supplements present subdivision (d) which empowers the court to grant a new trial on its own initiative within the ten days.

As published, the proposal would also have permitted the moving party to apply to the court for permission to amend a pending new-trial motion after the tenth day to include new or different grounds. The need for this change in the Rule is minimized by the change described in the preceding paragraph. (See also the proposal of the Advisory Committee on Appellate Rules to amend Rule 73(a), second sentence, to codify recent

Supreme Court cases and prevent "entrapment" of a party who relies on the trial court's assurance that he has made a timely post-verdict motion which would terminate the running of the time for taking an appeal.)

2. Waiver of Dilatory Defenses Omitted from Pre-Answer Motion, etc. [Rule 12(g), (h)]. This amendment resolves a doubt in the interpretation of the Rule. Where a defendant prior to answer makes a Rule 12 motion (e.g., to dismiss for failure to state a claim) and fails to join any "dilatory" defense (improper venue, lack of personal jurisdiction, insufficiency of process or of service thereof) which is then available to him, it is now made clear that the omitted dilatory defense is waived and out of the case; it cannot be raised anew in the answer. Consonant with this is the further provision that if a dilatory defense is not waived in the manner just indicated, it is nevertheless waived if not made by motion, or in the answer, or in an amendment of the answer allowed as a matter of course under Rule 15(a). The amendment thus aims at consolidated, early assertion and consideration of defenses not going to the merits.

3. Practice on Preliminary Injunctions and Temporary Restraining Orders [Rule 65(a), (b)]. In line with sound equity practice, it is provided that the court may order the trial on the merits to be advanced and consolidated with the hearing of an application for a preliminary injunction; even apart from consolidation, evidence received in the preliminary injunction becomes part of the trial record and need not be

repeated at the trial. With regard to temporary restraining orders, it is indicated that informal notice is preferable to none; and that such an order is not to be granted without some notice unless it appears that irreparable injury will result before a hearing can be held and counsel for the applicant certifies the efforts he has made to give notice and the reasons why notice should not be required.

4. Relation Back of Amendment Changing Party Defendant [Rule 15(c)]. Injustice has arisen in cases where a plaintiff names the wrong party defendant and the mistake is not discovered until the limitations period has run, for it has been held that an amendment introducing the proper defendant does not relate back. Under carefully guarded conditions of fairness to the party introduced by amendment, relation-back is now provided for. There is a special paragraph dealing with situations in which mistakes are made in naming Government agencies as defendants.

5. Interpreters [Rule 43(f)]. The amendment authorizes the court to appoint interpreters (including interpreters for the deaf), to fix the compensation, and to direct its payment and ultimate taxation as costs.

6. Alternate Jurors [Rule 47(b)]. In harmony with a proposed change in the Criminal Rules, this amendment would authorize as many as six alternate jurors in civil cases.

It is understood that the Advisory Committee on Criminal Rules is suggesting that the Government and defendant shall be permitted to agree on a jury of less than twelve. This possibility already exists in civil cases under Civil Rule 48.

Further, the Advisory Committee on Criminal Rules suggests that, by agreement, alternate jurors be permitted to replace jurors who are disabled or disqualified after the jury retires. The feeling in the Civil Committee is that such a provision will be availed of so infrequently in civil cases as not to warrant inclusion in the Civil Rules.

7. Application of Rules in U. S. District Court for District of Columbia [Rule 81(a)(1)]. Extension of the application of the Rules to probate proceedings in the U. S. D. C. D. C. is proposed by the Advisory Committee in response to a request by the judges of that court. Other changes reflect the fact that adoption proceedings are no longer within the court's jurisdiction, and "lunacy" proceedings are now called "mental health."

8. Rescission of Special Copyright Rules [Rule 65(f), 81(a)(1); Proposed Order of Court]. Under the Copyright Law of 1909, the Supreme Court was given a special rulemaking power regarding actions for copyright infringement. This statutory provision was repealed in 1948, in the light of the general rulemaking power conferred on the Court by the Rules Enabling Act of 1934.

The Special Copyright Rules as promulgated by the Court in 1909 (with an amendment of 1939) still exist, although in all other respects the practice in copyright cases is governed by the Civil Rules. The Special Rules contain, first, a peculiar pleading requirement about annexing the works in suit to the pleadings. This, it is agreed, is unnecessary; the Civil Rules cover the matter of exhibits adequately.

Second, the Special Rules set forth a procedure implementing the provision of the Copyright Law which permits impounding of allegedly infringing works and other things as an interlocutory remedy. The procedure laid down is objectionable: it is rigid and virtually eliminates discretion in the court; it does not require the plaintiff to make any showing of irreparable injury as a condition of securing the interlocutory relief; nor does it require the plaintiff to give notice to the defendant of an application for impounding even when an opportunity for hearing could feasibly be provided.

Accordingly it is proposed to rescind the Special Copyright Rules, and to treat impounding under the Copyright Law as a form of provisional injunctive relief under Rule 65 with the discretion and safeguards there provided. The copyright bar is insistent that the procedure for impounding be uniform throughout the country and that a way be open to deal with fly-by-night defendants who may disappear if given advance notice. Rule 65 is a uniform national regulation and in appropriate cases permits temporary relief without advance notice to the defendant.

Note. A bill for the general revision of the Copyright Law has been introduced in the present session of Congress and hearings on it have begun.

## II. The Advisory Committee is Continuing Work on Revision of the Discovery Rules

The most important piece of business now engaging the attention of the Advisory Committee is revision of the Rules on discovery including the Rule governing the pretrial conference. One meeting of the Committee

was wholly devoted to this subject, and part of the last meeting was also given over to it. It will be recalled that in aid of the Committee's work an extensive empirical study has been carried out by the Columbia Law School's Project for Effective Justice.

B. K.

A. M. S.



EXHIBIT C

PROPOSED AMENDMENTS TO RULES OF CIVIL PROCEDURE  
FOR THE UNITED STATES DISTRICT COURTS\*

Rule 1. Scope of Rules

These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty, with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy, and inexpensive determination of every action.

Advisory Committee's Note

This is the fundamental change necessary to effect unification of the civil and admiralty procedure. Just as the 1938 rules abolished the distinction between actions at law and suits in equity, this change would abolish the distinction between civil actions and suits in admiralty. See also Rule 81.

Rule 4. Process

(f) TERRITORIAL LIMITS OF EFFECTIVE SERVICE.  
All process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held, and, when authorized by a statute of the United States or by these rules, beyond the territorial limits of that state. In addition, persons who are brought in as parties pursuant to ~~Rule 13(h)~~ or Rule 14, or as additional parties to a pending action or a counter-claim or cross-claim therein pursuant to Rule 19, may be served in the manner stated in paragraphs (1)-(6) of subdivision (d) of this rule at all places outside the state but within the United States that are not more than 100 miles from the place in which the action is commenced, or to which it is assigned

\* New matter is shown in italics; matter to be omitted is lined through.

or transferred for trial; and persons required to respond to an order of commitment for civil contempt may be served at the same places. A subpoena may be served within the territorial limits provided in Rule 45.

#### Advisory Committee's Note

The wording of Rule 4(f) is changed to accord with the amendment of Rule 13(h) referring to Rule 19 as amended.

#### Rule 8. General Rules of Pleading

##### (e) PLEADING TO BE CONCISE AND DIRECT; CONSISTENCY

(2) A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as he has regardless of consistency and whether based on legal, ~~or on equitable grounds or on both equitable, or maritime grounds.~~ All statements shall be made subject to the obligations set forth in Rule 11.

#### Advisory Committee's Note

The change here is consistent with the broad purposes of unification.

#### Rule 9. Pleading Special Matters

(h) ADMIRALTY AND MARITIME CLAIMS. A pleading or count setting forth a claim for relief within the admiralty and maritime jurisdiction that is also within the jurisdiction of the district court on some other ground may contain a statement identifying the claim as an admiralty or maritime claim for the purposes of Rules 14(c), 26(a), 38(e), 73(h), 82, and the Supplemental Rules for Certain Admiralty and Maritime Claims. If the claim is cognizable only in admiralty it is an admiralty or maritime claim for those purposes whether so identified or not. The amendment of a pleading to add or withdraw an identifying statement is governed by the principles of Rule 15.

### Advisory Committee's Note

Certain distinctive features of the admiralty practice must be preserved for what are now suits in admiralty. This raises the question: After unification, when a single form of action is established, how will the counterpart of the present suit in admiralty be identifiable? In part the question is easily answered. Some claims for relief can only be suits in admiralty, either because the admiralty jurisdiction is exclusive or because no nonmaritime ground of federal jurisdiction exists. Many claims, however, are cognizable by the district courts whether asserted in admiralty or in a civil action, assuming the existence of a nonmaritime ground of jurisdiction. Thus at present the pleader has power to determine procedural consequences by the way in which he exercises the classic privilege given by the saving-to-suitors clause (28 U.S.C. § 1333) or by equivalent statutory provisions. For example, a longshoreman's claim for personal injuries suffered by reason of the unseaworthiness of a vessel may be asserted in a suit in admiralty or, if diversity of citizenship exists, in a civil action. One of the important procedural consequences is that in the civil action either party may demand a jury trial, while in the suit in admiralty there is no right to jury trial except as provided by statute.

It is no part of the purpose of unification to inject a right to jury trial into those admiralty cases in which that right is not provided by statute. Similarly, as will be more specifically noted below, there is no disposition to change the present law as to interlocutory appeals in admiralty, or as to the venue of suits in admiralty; and, of course, there is no disposition to inject into the civil practice as it now is the distinctively maritime remedies

(maritime attachment and garnishment, actions in rem, possessory, petitory, and partition actions and limitation of liability). The unified rules must therefore provide some device for preserving the present power of the pleader to determine whether these historically maritime procedures shall be applicable to his claim or not; the pleader must be afforded some means of designating his claim as the counterpart of the present suit in admiralty, where its character as such is not clear.

The problem is different from the similar one concerning the identification of claims that were formerly suits in equity. While that problem is not free from complexities, it is broadly true that the modern counterpart of the suit in equity is distinguishable from the former action at law by the character of the relief sought. This mode of identification is possible in only a limited category of admiralty cases. In large numbers of cases the relief sought in admiralty is simple money damages, indistinguishable from the remedy afforded by the common law. This is true, for example, in the case of the longshoreman's action for personal injuries stated above. After unification has abolished the distinction between civil actions and suits in admiralty, the complaint in such an action would be almost completely ambiguous as to the pleader's intentions regarding the procedure invoked. The allegation of diversity of citizenship might be regarded as a clue indicating an intention to proceed as at present under the saving-to-suitors clause; but this, too, would be ambiguous if there were also reference to the admiralty jurisdiction, and the pleader ought not to be required to forgo mention of all available jurisdictional grounds.

Other methods of solving the problem have been carefully explored, but the Advisory Committee has concluded that the preferable solution is to allow the pleader who now has power to determine procedural consequences by filing a suit in admiralty to exercise

that power under unification, for the limited instances in which procedural differences will remain, by a simple statement in his pleading to the effect that the claim is an admiralty or maritime claim.

The choice made by the pleader in identifying or in failing to identify his claim as an admiralty or maritime claim is not an irrevocable election. The rule provides that the amendment of a pleading to add or withdraw an identifying statement is subject to the principles of Rule 15.

Rule 12. Defenses and Objections--When and How Presented--By Pleading or Motion--Motion for Judgment on the Pleadings

(b) HOW PRESENTED. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join an indispensable a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in

Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(g) CONSOLIDATION OF DEFENSES IN MOTION. A party who makes a motion under this rule may join with it any other motions herein provided for and then available to him. If a party makes a motion under this rule but ~~does not include therein all defenses and objections~~ omits therefrom any defense or objection then available to him which this rule permits to be raised by motion, he shall not thereafter make a motion based on any of the defenses or objections the defense or objection so omitted, except a motion as provided in subdivision (h)(2) of this rule hereof on any of the grounds there stated.

(h) WAIVER OR PRESERVATION OF CERTAIN DEFENSES. A party waives ~~all defenses and objections~~ which he does not present either by motion as hereinbefore provided or; if he has made no motion; in his answer or reply; except (1) that the defense of failure to state a claim upon which relief can be granted; the defense of failure to join an indispensable party; and the objection of failure to state a legal defense to a claim may also be made by a later pleading; if one is permitted; or by motion for judgment on the pleadings or at the trial on the merits; and except (2) that; whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter; the court shall dismiss the action: The objection or defense; if made at the trial; shall be disposed of as provided in Rule 15(b) in the light of any evidence that may have been received: (1) A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived (A) if omitted from a motion in the circumstances described in subdivision (g), or (B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course.

(2) A defense of failure to state a claim upon which relief can be granted, a defense of failure to join a party indispensable under Rule 19, and an objection of failure to state a legal defense to a claim may be made in any pleading permitted or ordered under Rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits.

(3) Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

#### Advisory Committee's Note

Subdivision (b)(7). The terminology of this subdivision is changed to accord with the amendment of Rule 19. See the Advisory Committee's Note to Rule 19, as amended, especially the third paragraph therein before the caption "Subdivision (c)."

Subdivision (g). Present subdivision (g) forbids a defendant who makes a preanswer motion under this rule from making a further motion presenting any defense or objection which was available to him at the time he made the first motion and which he could have included, but did not in fact include therein. Thus if the defendant moves before answer to dismiss the complaint for failure to state a claim, he is barred from making a further motion presenting the defense of improper venue, if that defense was available to him when he made his original motion. Amended subdivision (g) is to the same effect. This required consolidation of defenses and objections in a Rule 12 motion is salutary in that it works against piecemeal consideration of a case. For exceptions to the requirement of consolidation, see the last clause of subdivision (g), referring to new subdivision (h)(2).

Subdivision (h). The question has arisen whether an omitted defense which cannot be made the basis

of a second motion may nevertheless be pleaded in the answer. Present subdivision (h) calls for waiver of ". . . defenses and objections which he [defendant] does not present . . . by motion . . . or, if he has made no motion, in his answer . . ." If the clause "if he has made no motion," is read literally, it seems that the omitted defense is waived and cannot be pleaded in the answer. On the other hand, the clause may be read as adding nothing of substance to the preceding words; in that event it appears that a defense is not waived by reason of being omitted from the motion and may be set up in the answer. The decisions are divided. Favoring waiver, see Keefe v. Derounian, 6 F.R.D. 11 (N.D. Ill. 1946); Elbinger v. Precision Metal Workers Corp., 18 F.R.D. 467 (E.D. Wis. 1956); see also Rensing v. Turner Aviation Corp., 166 F. Supp. 790 (N.D. Ill. 1958); P. Beiersdorf & Co. v Duke Laboratories, Inc., 10 F.R.D. 282 (S.D.N.Y. 1950); Neset v. Christensen, 92 F.Supp. 78 (E.D.N.Y. 1950). Opposing waiver, see Phillips v. Baker, 121 F.2d 752 (9th Cir. 1941); Crum v. Graham, 32 F.R.D. 173 (D.Mont. 1963) (regretfully following the Phillips case); see also Birnbaum v. Birrell, 9 F.R.D. 72 (S.D.N.Y. 1948); Johnson v. Joseph Schlitz Brewing Co., 33 F.Supp. 176 (E.D. Tenn. 1940); cf. Carter v. American Bus Lines, Inc., 22 F.R.D. 323 (D. Neb. 1958).

Amended subdivision (h)(1)(A) eliminates the ambiguity and states that certain specified defenses which were available to a party when he made a preanswer motion, but which are omitted from the motion, are waived. The specified defenses are lack of jurisdiction over the person, improper venue, insufficiency of process, and insufficiency of service of process (see Rule 12(b)(2)-(5)). A party who by motion invites the court to pass upon a threshold defense should bring forward all the specified defenses he then has and thus allow the court to do a reasonably complete job. The waiver reinforces the policy of subdivision (g) forbidding successive motions.

By amended subdivision (h)(1)(B), the specified defenses, even if not waived by the operation of (A), are waived by the failure to raise them by a motion under Rule 12 or in the responsive pleading or any amendment thereof to which the party is entitled as a matter of course. The specified defenses are of such a character that they should not be delayed and brought up for the first time by means of an application to the court to amend the responsive pleading.



Since the language of the subdivisions is made clear, the party is put on fair notice of the effect of his actions and omissions and can guard himself against unintended waiver. It is to be noted that while the defenses specified in subdivision (a)(1) are subject to waiver as there provided, the more substantial defenses of failure to state a claim upon which relief can be granted, failure to join a party indispensable under Rule 19, and failure to state a legal defense to a claim (see Rule 12(b), (6), (7), (f)), as well as the defense of lack of jurisdiction over the subject matter (see Rule 12(b)(1)), are expressly preserved against waiver by amended subdivision (h) (2) and (3).

### Rule 13. Counterclaim and Cross-Claim

(h) ADDITIONAL-PARTIES-MAY-BE-BROUGHT-IN JOINDER OF ADDITIONAL PARTIES. When the presence of parties other than those to the original action is required for the granting of complete relief in the determination of a counterclaim or cross-claim; the court shall order them to be brought in as defendants as provided in these rules; if jurisdiction of them can be obtained and their joinder will not deprive the court of jurisdiction of the action; Persons other than those made parties to the original action may be made parties to a counterclaim or cross-claim in accordance with the provisions of Rules 19 and 20.

#### Advisory Committee's Note

Present Rule 13(h), dealing with the joinder of additional parties to a counterclaim or cross-claim, partakes of some of the textual difficulties of present Rule 19 on necessary joinder of parties. See Advisory Committee's Note to Rule 19, as amended; cf. 3 Moore's Federal Practice, para. 13.39 (2d ed. 1963), and Supp. thereto; 1A Barron & Holtzoff, Federal Practice and Procedure § 399 (Wright ed. 1960). Rule 13(h) is also inadequate in failing to call attention to the fact that a party pleading a counterclaim or cross-claim may join additional persons when the conditions for permissive joinder of parties under Rule 20 are satisfied.

The amendment of Rule 13(h) supplies the latter omission by expressly referring to Rule 20, as amended, and also incorporates by direct reference the revised criteria and procedures of Rule 19, as amended. Hereafter, for the purpose of determining who must or may be joined as additional parties to a counterclaim or cross-claim, the party pleading the claim is to be regarded as a plaintiff and the additional parties as plaintiffs or defendants as the case may be, and amended Rules 19 and 20 are to be applied in the usual fashion. See also Rules 13(a) (compulsory counterclaims) and 22 (interpleader).

The amendment of Rule 13(h), like the amendment of Rule 19, does not attempt to regulate Federal jurisdiction or venue. See Rule 82. It should be noted, however, that in some situations the decisional law has recognized "ancillary" Federal jurisdiction over counterclaims and cross-claims and "ancillary" venue as to parties to these claims.

#### Rule 14. Third-Party Practice

##### (a) WHEN DEFENDANT MAY BRING IN THIRD PARTY.

At any time after commencement of the action a defendant defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. The third-party plaintiff need not obtain leave to make the service if he files the third-party complaint not later than 10 days after he serves his original answer. Otherwise he must obtain leave on motion upon notice to all parties to the action. The person served with the summons and third-party complaint, hereinafter called the third-party defendant, shall make his defenses to the third-party plaintiff's claim as provided in Rule 12 and his counterclaims against the third-party plaintiff and cross-claims against other third-party defendants as provided in Rule 13. The third-

party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert his defenses as provided in Rule 12 and his counterclaims and cross-claims as provided in Rule 13. Any party may move to strike the third-party claim, or for its severance or separate trial. A third-party defendant may proceed under this rule against any person not a party to the action who is or may be liable to him for all or part of the claim made in the action against the third-party defendant. The third-party complaint, if within the admiralty and maritime jurisdiction, may be in rem against a vessel, cargo or other property subject to admiralty or maritime process in rem, in which case references in this rule to the summons include the warrant of arrest, and references to the third-party plaintiff or defendant include, where appropriate, the claimant of the property arrested.

(c) ADMIRALTY AND MARITIME CLAIMS. When a plaintiff asserts an admiralty or maritime claim within the meaning of Rule 9(h), the defendant or claimant, as a third-party plaintiff, may bring in a third-party defendant who may be wholly or partly liable, either to the plaintiff or to the third-party plaintiff, by way of remedy over, contribution or otherwise on account of the same transaction, occurrence or series of transactions or occurrences. In such a case the third-party plaintiff may also demand judgment against the third-party defendant in favor of the plaintiff, in which event the third-party defendant shall make his defenses to the claim of the plaintiff as well

as to that of the third-party plaintiff in the manner provided in Rule 12 and the action shall proceed as if the plaintiff had commenced it against the third-party defendant as well as the third-party plaintiff.

#### Advisory Committee's Note

Rule 14 was modeled on Admiralty Rule 56. An important feature of Admiralty Rule 56 is that it allows impleader not only of a person who might be liable to the defendant by way of remedy over, but also of any person who might be liable to the plaintiff. The importance of this provision is that the defendant is entitled to insist that the plaintiff proceed to judgment against the third-party defendant. In certain cases this is a valuable implementation of a substantive right. For example, in a case of ship collision where a finding of mutual fault is possible, one shipowner, if sued alone, faces the prospect of an absolute judgment for the full amount of the damage suffered by an innocent third party; but if he can implead the owner of the other vessel, and if mutual fault is found, the judgment against the original defendant will be in the first instance only for a moiety of the damages; liability for the remainder will be conditioned on the plaintiff's inability to collect from the third-party defendant.

This feature was originally incorporated in Rule 14, but was eliminated by the amendment of 1946, so that under the present rule a third party may not be impleaded on the basis that he may be liable to the plaintiff. One of the reasons for the amendment was that the Civil Rule, unlike the Admiralty Rule, did not require the plaintiff to go to judgment against the third-party defendant. Another reason was that where jurisdiction depended on diversity of citizenship the impleader of an adversary having the same citizenship as the plaintiff was not considered possible.

Retention of the admiralty practice in those cases that will be counterparts of the present suit in admiralty is clearly desirable.

Rule 15. Amended and Supplemental Pleadings

(c) RELATION BACK OF AMENDMENTS. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

The delivery or mailing of process to the United States Attorney, or his designee, or the Attorney General of the United States, or an agency or officer who would have been a proper defendant if named, satisfies the requirement of clauses (1) and (2) hereof with respect to the United States or any agency or officer thereof to be brought into the action as a defendant.

Advisory Committee's Note

Rule 15(c) is amplified to state more clearly when an amendment of a pleading changing the party against whom a claim is asserted (including an amendment to correct a misnomer or misdescription of a defendant) shall "relate back" to the date of the original pleading.

The problem has arisen most acutely in certain actions by private parties against officers or agencies of the United States. Thus an individual denied social security benefits by the Secretary of Health, Education, and Welfare may secure review of the decision by bringing a civil action against that officer within sixty days, 42 U.S.C. § 405(g) (Supp. III, 1962). In several recent cases the claimants instituted timely action but mistakenly named as defendant the United States, the Department of HEW, the "Federal Security Administration" (a non-existent agency), and a Secretary who had retired from the office nineteen days before. Discovering their mistakes, the claimants moved to amend their complaints to name the proper defendant; by this time the statutory sixty-day period had expired. The motions were denied on the ground that the amendment "would amount to the commencement of a new proceeding and would not relate back in time so as to avoid the statutory provision . . . that suit be brought within sixty days, . . ." Cohn v. Federal Security Adm., 199 F. Supp. 884, 885 (W.D.N.Y. 1961); see also Cunningham v. United States, 199 F. Supp. 541 (W.D. Mo. 1958); Hall v. Department of HEW, 199 F. Supp. 833 (S.D. Tex. 1960); Sandridge v. Folsom, Secretary of HEW, 200 F. Supp. 25 (M.D. Tenn. 1959). [The Secretary of Health, Education and Welfare has approved certain ameliorative regulations under 42 U.S.C. § 405(g). See 29 Fed. Reg. 8209 (June 30, 1964); Jacoby, The Effect of Recent Changes in the Law of "Nonstatutory" Judicial Review, 53 Geo. L.J. 19, 42-43 (1964); see also Simmons v. United States Dept. HEW, 328 F. 2d 86 (3d Cir. 1964).]

Analysis in terms of "new proceeding" is traceable to Davis v. L. L. Cohen & Co., 268 U.S. 638 (1925), and Mellon v. Arkansas Land & Lumber Co., 275 U.S. 460 (1928), but those cases antedate the adoption of the Rules which import different criteria for determining when an amendment is to "relate back". As lower courts have continued to rely on the Davis and Mellon cases despite the contrary intent of the Rules, clarification of Rule 15(c) is considered advisable.

Relation back is intimately connected with the policy of the statute of limitations. The policy of the statute limiting the time for suit against the Secretary of HEW would not have been offended by allowing relation back in the situations described above. For the government was put on notice of the claim within the stated period--in the particular instances, by means of the initial delivery of process to a responsible government official (see Rule 4(d) (4) and (5)). In these circumstances, characterization of the amendment as a new proceeding is not responsive to the reality, but is merely question-begging; and to deny relation back is to defeat unjustly the claimant's opportunity to prove his case. See the full discussion by Byse, Suing the "Wrong" Defendant in Judicial Review of Federal Administrative Action: Proposals for Reform, 77 Harv. L. Rev. 40 (1963); see also Ill. Civ. P. Act §46(4).

Much the same question arises in other types of actions against the government (see Byse, supra, at 45 n. 15). In actions between private parties, the problem of relation back of amendments changing defendants has generally been better handled by the courts, but incorrect criteria have sometimes been applied, leading sporadically to doubtful results. See 1A Barron & Holtzoff, Federal Practice & Procedure § 451 (Wright ed. 1960); 1 id. § 186 (1960); 2 id. § 543 (1961); 3 Moore's Federal Practice, para. 15.15 (Cum. Supp. 1962); Annot., Change in Party After Statute of Limitations Has Run, 8 A.L.R. 2d 6 (1949). Rule 15(c) has been amplified to provide a general solution. An amendment changing the party against whom a claim is asserted relates back if the amendment satisfies the usual condition of Rule 15(c) of "arising out of the conduct . . . set forth . . . in the original pleading," and if, within the applicable limitations period, the party brought in by amendment, first, received such notice of the institution of the action--the notice need not be formal--that he would not be prejudiced in defending the action, and, second, knew or should have known that the action would have been brought against him initially had there not been a mistake concerning the identity of the proper party. Revised Rule 15(c) goes on to provide specifically in the government cases that the first

and second requirements are satisfied when the government has been notified in the manner there described (see Rule 4(d) (4) and (5)). As applied to the government cases, revised Rule 15(c) further advances the objectives of the 1961 amendment of Rule 25(d) (substitution of public officers).

The relation back of amendments changing plaintiffs is not expressly treated in revised Rule 15(c) since the problem is generally easier. Again the chief consideration of policy is that of the statute of limitations, and the attitude taken in revised Rule 15(c) toward change of defendants extends by analogy to amendments changing plaintiffs. Also relevant is the amendment of Rule 17(a) (real party in interest) proposed by the Advisory Committee on Admiralty Rules. To avoid forfeitures of just claims, revised Rule 17(a) would provide that no action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed for correction of the defect in the manner there stated.

Rule 17. Parties Plaintiff and Defendant;  
Capacity

(a) REAL PARTY IN INTEREST. Every action shall be prosecuted in the name of the real party in interest; ~~but~~ <sup>an</sup> executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought; and when a statute of the United States so provides, an action for the use or benefit of another shall be brought in the name of the United States. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the



real party in interest; and such ratification, joinder or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

#### Advisory Committee's Note

The minor change in the existing text of the rule is designed to make it clear that the specific instances enumerated are not exceptions to, but illustrations of, the rule. These illustrations, of course, carry no negative implication to the effect that there are not other instances of recognition as the real party in interest of one whose standing as such may be in doubt. The enumeration is simply of cases in which there might be substantial doubt as to the issue but for the specific enumeration. There are other potentially arguable cases that are not excluded by the enumeration. For example, the enumeration states that the promisee in a contract for the benefit of a third party may sue as real party in interest; it does not say, because it is obvious, that the third-party beneficiary may sue (when the applicable law gives him that right.)

The proposed rule adds to the illustrative list of real parties in interest a bailee--meaning, of course, a bailee suing on behalf of the bailor with respect to the property bailed. (When the possessor of property other than the owner sues for an invasion of the possessory interest he is the real party in interest.) The word "bailee" is added primarily to preserve the admiralty practice whereby the owner of a vessel as bailee of the cargo, or the master of the vessel as bailee of both vessel and cargo, sues for damage to either property interest or both. But there is no reason to limit such a provision to maritime situations. The owner of a warehouse in which household furniture is stored is equally entitled to sue on behalf of the numerous owners of the furniture stored. Cf. Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947).

The provision that no action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed, after the objection has been raised, for ratification, substitution, etc., is added simply in the interests of justice. In its origin the rule concerning the real party in interest was permissive in purpose: it was designed to allow an assignee to sue in his own name. That having been accomplished, the modern function of the rule in its negative aspect is simply to protect the defendant against a subsequent action by the party actually entitled to recover, and to insure generally that the judgment will have its proper effect as res judicata.

This provision keeps pace with the law as it is actually developing. Modern decisions are inclined to be lenient when an honest mistake has been made in choosing the party in whose name the action is to be filed--in both maritime and nonmaritime cases. See Levinson v. Deupree, 345 U.S. 648 (1953); Link Aviation, Inc. v. Downs, 325 F. 2d 613 (D.C. Cir. 1963). The provision should not be misunderstood or distorted. It is intended to prevent forfeiture when determination of the proper party to sue is difficult or when an understandable mistake has been made. It does not mean, for example, that, following an airplane crash in which all aboard were killed, an action may be filed in the name of John Doe (a fictitious person), as personal representative of Richard Roe (another fictitious person), in the hope that at a later time the attorney filing the action may substitute the real name of the real personal representative of a real victim, and have the benefit of suspension of the limitation period. It does not even mean, when an action is filed by the personal representative of John Smith, of Buffalo, in the good faith belief that he was aboard the flight, that upon discovery that Smith is alive and well, having missed the fatal flight, the representative of James Brown, of San Francisco, an actual victim, can be substituted to take advantage of the suspension of the limitation period. It is, in cases of this sort, intended to insure against forfeiture and injustice--in short, to codify in broad terms the salutary principle of Levinson v. Deupree, 345 U.S. 648 (1953), and Link Aviation, Inc. v. Downs, 325 F.2d 613 (D.C. Cir. 1963).

Rule 18. Joinder of Claims and Remedies

(a) JOINDER OF CLAIMS. The plaintiff in his complaint or in a reply setting forth a counterclaim may join either as independent or as alternate claims as many claims either legal or equitable or both as he may have against an opposing party. There may be a like joinder of claims when there are multiple parties if the requirements of Rules 19; 20; and 22 are satisfied. There may be a like joinder of cross-claims or third-party claims if the requirements of Rules 13 and 14 respectively are satisfied. A party asserting a claim to relief as an original claim, counterclaim, cross-claim, or third-party claim, may join, either as independent or as alternate claims, as many claims, legal, equitable, or maritime, as he has against an opposing party.

Advisory Committee's Note

The Rules "proceed upon the theory that no inconvenience can result from the joinder of any two or more matters in the pleadings, but only from trying two or more matters together which have little or nothing in common." Sunderland, The New Federal Rules, 45 W. Va. L. Q. 5, 13 (1938); see Clark, Code Pleading 58 (2d ed. 1947). Accordingly, Rule 18(a) has permitted a party to plead multiple claims of all types against an opposing party, subject to the court's power to direct an appropriate procedure for trying the claims. See Rules 42(b), 20(b), 21.

The liberal policy regarding joinder of claims in the pleadings extends to cases with multiple parties. However, the language used in the second sentence of Rule 18(a)--"if the requirements of Rules 19 [necessary joinder of parties], 20 [permissive joinder of parties], and 22 [interpleader] are satisfied"--has led some courts to infer that the rules regulating joinder of parties are intended to carry back to Rule 18(a) and to impose some special limits on joinder of claims in multiparty cases. In particular, Rule 20(a) has been read as restricting the operation of Rule 18(a) in certain situations in which a number of parties have been

permissively joined in an action. In Federal Housing Admr. v. Christianson, 26 F. Supp. 419 (D. Conn. 1939), the indorsee of two notes sued the three co-makers of one note, and sought to join in the action a count on a second note which had been made by two of the three defendants. There was no doubt about the propriety of the joinder of the three parties defendant, for a right to relief was being asserted against all three defendants which arose out of a single "transaction" (the first note) and a question of fact or law "common" to all three defendants would arise in the action. See the text of Rule 20(a). The court, however, refused to allow the joinder of the count on the second note, on the ground that this right to relief, assumed to arise from a distinct transaction, did not involve a question common to all the defendants but only two of them. For analysis of the Christianson case and other authorities, see 2 Barron & Holtzoff, Federal Practice & Procedure, § 533.1 (Wright ed. 1961); 3 Moore's Federal Practice, para. 18,04 [3] (2d ed. 1963).

If the court's view is followed, it becomes necessary to enter at the pleading stage into speculations about the exact relation between the claim sought to be joined against fewer than all the defendants properly joined in the action, and the claims asserted against all the defendants. Cf. Wright, Joinder of Claims and Parties Under Modern Pleading Rules, 36 Minn.L. Rev. 580, 605-06 (1952). Thus if it could be found in the Christianson situation that the claim on the second note arose out of the same transaction as the claim on the first or out of a transaction forming part of a "series," and that any question of fact or law with respect to the second note also arose with regard to the first, it would be held that the claim on the second note could be joined in the complaint. See 2 Barron & Holtzoff, supra, at 199; see also id. at 198 n. 60.4; cf. 3 Moore's Federal Practice, supra, at 1811. Such pleading niceties provide a basis for delaying and wasteful maneuver. It is more compatible with the design of the Rules to allow the claim to be joined in the pleading, leaving the question of possible separate trial of that claim to be later decided. See 2 Barron & Holtzoff, supra, § 533.1;

Wright, supra, 36 Minn. L. Rev. at 604-11; Developments in the Law--Multiparty Litigation in the Federal Courts, 71 Harv. 874, 970-71 (1958); Commentary, Relation Between Joinder of Parties and Joinder of Claims, 5 F.R. Serv. 822 (1942). It is instructive to note that the court in the Christianson case, while holding that the claim on the second note could not be joined as a matter of pleading, held open the possibility that both claims would later be consolidated for trial under Rule 42(a). See 26 F. Supp. 419.

Rule 18(a) is now amended not only to overcome the Christianson decision and similar authority, but also to state clearly, as a comprehensive proposition, that a party asserting a claim (an original claim, counterclaim, cross-claim, or third-party claim) may join as many claims as he has against an opposing party. See Noland Co., Inc. v. Graver Tank & Mfg. Co., 301 F. 2d 43, 49-51 (4th Cir. 1962); but cf. C. W. Humphrey Co. v. Security Alum. Co., 31 F.R.D. 41 (E.D. Mich. 1962). This permitted joinder of claims is not affected by the fact that there are multiple parties in the action. The joinder of parties is governed by other rules operating independently.

It is emphasized that amended Rule 18(a) deals only with pleading. As already indicated, a claim properly joined as a matter of pleading need not be proceeded with together with the other claims if fairness or convenience justifies separate treatment.

Amended Rule 18(a), like the rule prior to amendment, does not purport to deal with questions of jurisdiction or venue which may arise with respect to claims properly joined as a matter of pleading. See Rule 82.

See also the amendment of Rule 20(a) and the Advisory Committee's Note thereto.

Free joinder of claims and remedies is one of the basic purposes of unification of the admiralty and civil procedure. The Advisory Committee on Admiralty Rules accordingly recommends the inclusion

in the rule of maritime claims as well as those which are legal and equitable in character.

**Rule 19: Necessary Joinder of Parties**

(a) **NECESSARY JOINDER:** Subject to the provisions of Rule 23 and of subdivision (b) of this rule; persons having a joint interest shall be made parties and be joined on the same side as plaintiffs or defendants. When a person who should join as a plaintiff refuses to do so; he may be made a defendant or; in proper cases; an involuntary plaintiff.

(b) **EFFECT OF FAILURE TO JOIN:** When persons who are not indispensable; but who ought to be parties if complete relief is to be accorded between those already parties; have not been made parties and are subject to the jurisdiction of the court as to both service of process and venue and can be made parties without depriving the court of jurisdiction of the parties before it; the court shall order them summoned to appear in the action. The court in its discretion may proceed in the action without making such persons parties; if its jurisdiction over them as to either service of process or venue can be acquired only by their consent or voluntary appearance or if; though they are subject to its jurisdiction; their joinder would deprive the court of jurisdiction of the parties before it; but the judgment rendered therein does not affect the rights or liabilities of absent persons.

(c) **- SAME+ NAMES OF OMITTED PERSONS AND-REASONS FOR NON JOINDER TO BE PLEADED.** In any pleading in which relief is asked; the pleader shall set forth the names; if known to him; of persons who ought to be parties if complete relief is to be accorded between those already parties; but who are not joined; and shall state why they are omitted.

Rule 19. Joinder of Persons Needed for  
Just Adjudication

(a) PERSONS TO BE JOINED IF FEASIBLE. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

(b) DETERMINATION BY COURT WHENEVER JOINDER NOT FEASIBLE. If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

(c) PLEADING REASONS FOR NONJOINER. A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in subdivision (a)(1)-(2) hereof who are not joined, and the reasons why they are not joined.

(d) EXCEPTION OF CLASS ACTIONS. This rule is subject to the provisions of Rule 23.

#### Advisory Committee's Note

##### General Considerations

Whenever feasible, the persons materially interested in the subject of an action--see the more detailed description of these persons in the discussion of new subdivision (a) below--should be joined as parties so that they may be heard and a complete disposition made. When this comprehensive joinder cannot be accomplished--a situation which may be encountered in Federal courts because of limitations on service of process, subject matter jurisdiction, and venue--the case should be examined pragmatically and a choice made between the alternatives of proceeding with the action in the absence of particular interested persons, and dismissing the action.

Even if the court is mistaken in its decision to proceed in the absence of an interested person, it does not by that token deprive itself of the power to adjudicate as between the parties already before it through proper service of process. But the court can make a legally binding adjudication only between the parties actually joined in the action. It is true that an adjudication between the parties before the court may on occasion adversely affect the absent person as a practical matter, or leave a party exposed to a later inconsistent recovery by the absent person. These are factors which should be considered in deciding whether the action should proceed, or should rather be dismissed; but they do not themselves negate the court's power to adjudicate as between the parties who have been joined.



Defects in the Present Rule

The foregoing propositions were well understood in the older equity practice, see Hazard, Indispensable Party: The Historical Origin of a Procedural Phantom, 61 Colum. L. Rev. 1254 (1961), and Rule 19 in its present form can be and often has been applied in consonance with them. But experience has shown that the rule is defective in its phrasing and does not point clearly to the proper basis of decision.

Textual defects. (1) The expression "persons . . . who ought to be parties if complete relief is to be accorded between those already parties," appearing in present subdivision (b), was apparently intended as a description of the persons whom it would be desirable to join in the action, all questions of feasibility of joinder being put to one side; but it is not adequately descriptive of those persons.

(2) The word "indispensable," appearing in present subdivision (b), was apparently intended as an inclusive reference to the interested persons in whose absence it would be advisable, all factors having been considered, to dismiss the action. Yet the sentence implies that there may be interested persons, not "indispensable," in whose absence the action ought also to be dismissed. Further, it seems at least superficially plausible to equate the word "indispensable" with the expression "having a joint interest," appearing in present subdivision (a). See United States v. Washington Inst. of Tech., Inc., 138 F.2d 25, 26 (3d Cir. 1943); cf. Chidester v. City of Newark, 162 F.2d 598 (3d Cir. 1947). But persons holding an interest technically "joint" are not always so related to an action that it would be unwise to proceed without joining all of them, whereas persons holding an interest not technically "joint" may have this relation to an action. See Reed, Compulsory Joinder of Parties in Civil Actions, 55 Mich. L. Rev. 327, 356 ff., 483 (1957).

(3) The use of "indispensable" and "joint interest" in the context of present Rule 19 directs attention to the technical or abstract character of the rights or obligations of the persons whose joinder is in question, and correspondingly distracts attention from the pragmatic considerations which should be controlling.

(4) The rule, in dealing with the feasibility of joining a person as a party to the action, besides referring to whether the person is "subject to the jurisdiction of the court as to both service of process and venue," speaks of whether the person can be made a party "without depriving the court of jurisdiction of the parties before it." The second quoted expression uses "jurisdiction" in the sense of the competence of the court over the subject matter of the action, and in this sense the expression is apt. However, by a familiar confusion, the expression seems to have suggested to some that the absence from the lawsuit of a person who is "indispensable" or "who ought to be [a] part[y]" itself deprives the court of the power to adjudicate as between the parties already joined. See Samuel Goldwyn, Inc. v. United Artists Corp., 113 F.2d 703, 707 (3d Cir. 1940); McArthur v. Rosenbaum Co. of Pittsburgh, 180 F.2d 617, 621 (3d Cir. 1949); cf. Calcote v. Texas Pac. Coal & Oil Co., 157 F.2d 216 (5th Cir. 1946), cert. denied, 329 U.S. 782 (1946), noted in 56 Yale L. J. 1088 (1947); Reed, supra, 55 Mich. L. Rev. at 332-34.

Failure to point to correct basis of decision.  
The present rule does not state affirmatively what factors are relevant in deciding whether the action should proceed or be dismissed when joinder of interested persons is infeasible. In some instances courts have not undertaken the relevant inquiry or have been misled by the "jurisdiction" fallacy. In other instances there has been undue preoccupation with abstract classifications of rights or obligations, as against consideration of the particular consequences of proceeding with the action and the ways by which these consequences might be ameliorated by the shaping of final relief or other precautions.

Although these difficulties cannot be said to have been general, analysis of the cases shows that there is good reason for attempting to strengthen the rule. The literature also indicates how the rule should be reformed. See Reed, supra (discussion of the important case of Shields v. Barrow, 17 How. (58 U.S.) 130 (1854), appears at 55 Mich.L. Rev., p. 340 ff.); Hazard, supra; N.Y. Temporary Comm. on Courts, First Preliminary Report, Legis. Doc. 1957, No. 6(b), pp. 28, 233; N.Y. Judicial Council, Twelfth Ann. Rep., Legis. Doc. 1946, No. 17, p. 163; Joint Comm. on Michigan Procedural Revision, Final Report, Pt. III, p. 69 (1960); Note, Indispensable Parties in the Federal Courts, 65 Harv. L. Rev. 1050 (1952); Developments in the Law--Multiparty Litigation in the Federal Courts, 71 Harv. L. Rev. 874, 879 (1958); Mich. Gen. Court Rules, R. 205 (effective Jan. 1, 1963); N.Y. Civ. Prac. Law & Rules, § 1001 (effective Sept. 1, 1963).

#### The Amended Rule

New subdivision (a) defines the persons whose joinder in the action is desirable. Clause (1) stresses the desirability of joining those persons in whose absence the court would be obliged to grant partial or "hollow" rather than complete relief to the parties before the court. The interests that are being furthered here are not only those of the parties, but also that of the public in avoiding repeated lawsuits on the same essential subject matter. Clause (2)(i) recognizes the importance of protecting the person whose joinder is in question against the practical prejudice to him which may arise through a disposition of the action in his absence. Clause (2)(ii) recognizes the need for considering whether a party may be left, after the adjudication, in a position where a person not joined can subject him to a double or otherwise inconsistent liability. See Reed, supra, 55 Mich. L. Rev. at 330, 338; Note, supra, 65 Harv. L. Rev. at 1052-57; Developments in the Law, supra, 71 Harv. L. Rev. at 881-85.

The subdivision (a) definition of persons to be joined is not couched in terms of the abstract nature of their interests-- "joint," "united," "separable," or the like. See N.Y. Temporary Comm. on Courts, First Preliminary Report, supra; Developments in the Law, supra, at 880. It should be noted particularly, however, that the description is not at variance with the settled authorities holding that a tortfeasor with the usual "joint-and-several" liability is merely a permissive party to an action against another with like liability. See 3 Moore's Federal Practice 2153 (2d ed. 1963); 2 Barron & Holtzoff, Federal Practice & Procedure §513.8 (Wright ed. 1961). Joinder of these tortfeasors continues to be regulated by Rule 20; compare Rule 14 on third-party practice.

If a person as described in subdivision (a)(1)-(2) is amenable to service of process and his joinder would not deprive the court of jurisdiction in the sense of competence over the action, he should be joined as a party; and if he has not been joined, the court should order him to be brought into the action. If a party joined has a valid objection to the venue and chooses to assert it, he will be dismissed from the action.

Subdivision (b). When a person as described in subdivision (a)(1)-(2) cannot be made a party, the court is to determine whether in equity and good conscience the action should proceed among the parties already before it, or should be dismissed. That this decision is to be made in the light of pragmatic considerations has often been acknowledged by the courts. See Roos v. Texas Co., 23 F.2d 171 (2d Cir. 1927), cert. denied, 277 U.S. 587 (1928); Niles-Bement-Pond Co. v. Iron Moulders' Union, 254 U.S. 77,80 (1920). The subdivision sets out four relevant considerations drawn from the experience revealed in the decided cases. The factors are to a certain extent overlapping, and they are not intended to exclude other considerations which may be applicable in particular situations.

The first factor brings in a consideration of what a judgment in the action would mean to the absentee. Would the absentee be adversely affected in a practical sense, and if so, would the prejudice be immediate and serious, or remote and minor? The possible collateral consequences of the judgment upon the parties already joined are also to be appraised. Would any party be exposed to a fresh action by the absentee, and if so, how serious is the threat? See the elaborate discussion in Reed, supra; cf. A. L. Smith Iron Co. v. Dickson, 141 F.2d 3 (2d Cir. 1944); Caldwell Mfg. Co. v. Unique Balance Co., 18 F.R.D. 258 (S.D.N.Y. 1955).

The second factor calls attention to the measures by which prejudice may be averted or lessened. The "shaping of relief" is a familiar expedient to this end. See, e.g., the award of money damages in lieu of specific relief where the latter might affect an absentee adversely. Ward v. Deavers, 203 F.2d 72 (D.C. Cir. 1953); Miller & Lux, Inc. v. Nickel, 141 F. Supp. 41 (N.D. Calif. 1956). On the use of "protective provisions," see Roos v. Texas Co., supra; Atwood v. Rhode Island Hosp. Trust Co., 275 Fed. 513, 519 (1st Cir. 1921), cert. denied, 257 U.S. 661 (1922); cf. Stumpf v. Fidelity Gas Co., 294 F.2d 886 (9th Cir. 1961); and the general statement in National Licorice Co. v. Labor Board, 309 U.S. 350, 363 (1940).

Sometimes the party is himself able to take measures to avoid prejudice. Thus a defendant faced with a prospect of a second suit by an absentee may be in a position to bring the latter into the action by defensive interpleader. See Hudson v. Newell, 172 F.2d 848, 852, mod., 176 F.2d 546 (5th Cir. 1949); Gauss v. Kirk, 198 F.2d 83, 86 (D.C. Cir. 1952); Abel v. Brayton Flying Service, Inc., 248 F.2d 713, 716 (5th Cir. 1957) (suggestion of possibility of counterclaim under Rule 13(h)); cf. Parker Rust-Proof Co. v. Western Union Tel. Co., 105 F.2d 976 (2d Cir. 1939), cert. denied, 308 U.S. 597 (1939). So also the absentee may sometimes be able to avert prejudice to himself by voluntarily appearing in the action or intervening on an ancillary basis. See Developments in the Law, supra, 71 Harv. L. Rev. at 882; Annot.,

Intervention or Subsequent Joinder of Parties as Affecting Jurisdiction of Federal Court Based on Diversity of Citizenship, 134 A.L.R. 335 (1941); Johnson v. Middleton, 175 F.2d 535 (7th Cir. 1949); Kentucky Nat. Gas Corp. v. Duggins, 165 F.2d 1011 (6th Cir. 1948); McComb v. McCormack, 159 F.2d 219 (5th Cir. 1947). The court should consider whether this, in turn, would impose undue hardship on the absentee. (For the possibility of the court's informing an absentee of the pendency of the action, see comment under subdivision (c) below.)

The third factor--whether an "adequate" judgment can be rendered in the absence of a given person--calls attention to the extent of the relief that can be accorded among the parties joined. It meshes with the other factors, especially the "shaping of relief" mentioned under the second factor. Cf. Kroese v. General Steel Castings Corp., 179 F.2d 760 (3d Cir. 1949), cert. denied, 339 U.S. 983 (1950).

The fourth factor, looking to the practical effects of a dismissal, indicates that the court should consider whether there is any assurance that the plaintiff, if dismissed, could sue effectively in another forum where better joinder would be possible. See Fitzgerald v. Haynes, 241 F.2d 417, 420 (3d Cir. 1957); Fouke v. Schenewerk, 197 F.2d 234, 236 (5th Cir. 1952); cf. Warfield v. Marks, 190 F.2d 178 (5th Cir. 1951).

The subdivision uses the word "indispensable" only in a conclusory sense, that is, a person is "regarded as indispensable" when he cannot be made a party and, upon consideration of the factors above-mentioned, it is determined that in his absence it would be preferable to dismiss the action, rather than to retain it.

A person may be added as a party at any stage of the action on motion or on the court's initiative (see Rule 21); and a motion to dismiss, on the ground that a person has not been joined and justice

requires that the action should not proceed in his absence, may be made as late as the trial on the merits (see Rule 12(h)(2), as amended; cf. Rule 12(b)(7), as amended). However, when the moving party is seeking dismissal in order to protect himself against a later suit by the absent person (subdivision (a)(2)(ii)), and is not seeking vicariously to protect the absent person against a prejudicial judgment (subdivision (a)(2)(i)), his undue delay in making the motion can properly be counted against him as a reason for denying the motion. A joinder question should be decided with reasonable promptness, but decision may properly be deferred if adequate information is not available at the time. Thus the relationship of an absent person to the action, and the practical effects of an adjudication upon him and others, may not be sufficiently revealed at the pleading stage; in such a case it would be appropriate to defer decision until the action was further advanced. Cf. Rule 12(d).

The amended rule makes no special provision for the problem arising in suits against subordinate Federal officials where it has often been set up as a defense that some superior officer must be joined. Frequently this defense has been accompanied by or intermingled with defenses of sovereign immunity or lack of consent of the United States to suit. So far as the issue of joinder can be isolated from the rest, the new subdivision seems better adapted to handle it than the predecessor provision. See the discussion in Johnson v. Kirkland, 290 F.2d 440, 446-47 (5th Cir. 1961) (stressing the practical orientation of the decisions); Shaughnessy v. Pedreiro, 349 U.S. 48, 54 (1955). Recent legislation, P.L. 87-748, 76 Stat. 744, approved October 5, 1962, adding §§ 1361, 1391(e) to Title 28, U.S.C., vests original jurisdiction in the District Courts over actions in the nature of mandamus to compel officials of the United States to perform their legal duties, and extends the range of service of process and liberalizes venue in these actions. If, then, it is found that a particular official should be joined in the action, the legislation will make it easy to bring him in.

Subdivision (c) parallels the predecessor subdivision (c) of Rule 19. In some situations it may be desirable to advise a person who has not been joined of the fact that the action is pending, and in particular cases the court in its discretion may itself convey this information by directing a letter or other informal notice to the absentee.

Subdivision (d) repeats the exception contained in the first clause of the predecessor subdivision (a).

#### Rule 20. Permissive Joinder of Parties

(a) PERMISSIVE JOINDER. All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them these persons will arise in the action. All persons (and any vessel, cargo or other property subject to admiralty process in rem) may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them defendants will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities.

#### Advisory Committee's Note

See the amendment of Rule 18(a) and the Advisory Committee's Note thereto. It has been thought that a lack of clarity in the antecedent of the word "them," as it appears in two places in Rule 20(a), has contributed to the view, taken by some courts, that this rule limits the joinder of claims in certain



situations of permissive party-joinder. Although the amendment of Rule 18(a) should make clear that this view is untenable, it has been considered advisable to amend Rule 20(a) to eliminate any ambiguity. See 2 Barron & Holtzoff, Federal Practice & Procedure 202 (Wright ed. 1961).

A basic purpose of unification of admiralty and civil procedure is to reduce barriers to joinder; hence the reference to "any vessel," etc.

### Rule 23: Class Actions

(a) REPRESENTATION: If persons constituting a class are so numerous as to make it impracticable to bring them all before the court; such of them; one or more; as will fairly insure the adequate representation of all may; on behalf of all; sue or be sued; when the character of the right sought to be enforced for or against the class is

(1) joint or common; or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;

(2) several; and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or

(3) several; and there is a common question of law or fact affecting the several rights and a common relief is sought;

(b) SECONDARY ACTION BY SHAREHOLDERS: In an action brought to enforce a secondary right on the part of one or more shareholders in an association; incorporated or unincorporated; because the association refuses to enforce rights which may properly be asserted by it; the complaint shall be verified by oath and shall aver (1) that the plaintiff was a shareholder at the time of the transaction of which he complains or that his share thereafter devolved

on him by operation of law and (2) that the action is not a collusive one to confer on a court of the United States jurisdiction of any action of which it would not otherwise have jurisdiction. The complaint shall also set forth with particularity the efforts of the plaintiff to secure from the managing directors or trustees and, if necessary, from the shareholders such action as he desires; and the reasons for his failure to obtain such action or the reasons for not making such effort.

(c) **DISMISSAL OR COMPROMISE:** A class action shall not be dismissed or compromised without the approval of the court. If the right sought to be enforced is one defined in paragraph (1) of subdivision (a) of this rule notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs. If the right is one defined in paragraphs (2) or (3) of subdivision (a) notice shall be given only if the court requires it.

### Rule 23. Class Actions

(a) PREREQUISITES TO A CLASS ACTION. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) CLASS ACTIONS MAINTAINABLE. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) DETERMINATION BY ORDER WHETHER CLASS ACTION TO BE MAINTAINED; NOTICE; JUDGMENT; ACTIONS CONDUCTED PARTIALLY AS CLASS ACTIONS.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so

maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) ORDERS IN CONDUCT OF ACTIONS. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or

otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) DISMISSAL OR COMPROMISE. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

#### Advisory Committee's Note

Difficulties with present rule. The present categories of class actions are defined in terms of the abstract nature of the rights involved: the so-called "true" category is defined as involving "joint, common, or secondary rights"; the "hybrid" category, as involving "several" rights related to "specific property"; the "spurious" category, as involving "several" rights affected by a common question and related to common relief. It was thought that the definitions accurately described the situations amenable to the class-suit device, and also would indicate the proper extent of the judgment in each category, which would in turn help to determine the res judicata effect of the judgment if questioned in a later action. Thus the judgments in "true" and "hybrid" class actions would extend to the class (although in somewhat different ways); the judgment in a "spurious" class action would extend only to the parties including intervenors. See Moore, Federal

Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft, 25 Geo. L. J. 551, 570-76 (1937).

In practice the terms "joint," "common," etc., which are used as the basis of the Rule 23 classification have proved obscure and uncertain. See Chafee, Some Problems of Equity 245-46, 256-57 (1950); Kalven & Rosenfield, The Contemporary Function of the Class Suit, 8 U. of Chi. L. Rev. 684, 707 & n. 73 (1941); Keefe, Levy & Donovan, Lee Defeats Ben Hur, 33 Corn. L. Q. 327, 329-36 (1948); Developments in the Law: Multiparty Litigation in the Federal Courts, 71 Harv. L. Rev. 874, 931 (1958); Advisory Committee's Note to Rule 19, as amended. The courts have had considerable difficulty with these terms. See, e.g., Gullo v. Veterans' Coop. H. Assn., 13 F.R.D. 11 (D.D.C. 1952); Shipley v. Pittsburgh & L.E.R. Co., 70 F. Supp. 870 (W.D. Pa. 1947); Deckert v. Independence Shares Corp., 27 F. Supp. 763 (E.D. Pa. 1939), rev'd, 108 F.2d 51 (3d Cir. 1939), rev'd, 311 U.S. 282 (1940), on remand, 39 F. Supp. 592 (E.D. Pa. 1941), rev'd sub nom. Pennsylvania Co. for Ins. on Lives v. Deckert, 123 F.2d 979 (3d Cir. 1941) (see Chafee, supra, at 264-65).

Nor has the rule provided an adequate guide to the proper extent of the judgments in class actions. First, we find instances of the courts classifying actions as "true" or intimating that the judgments will be decisive for the class where these results seem appropriate but are reached by dint of depriving the word "several" of coherent meaning. See, e.g., System Federation No. 91 v. Reed, 180 F.2d 991 (6th Cir. 1950); Wilson v. City of Paducah, 100 F. Supp. 116 (W.D. Ky. 1951); Citizens Banking Co. v. Monticello State Bank, 143 F.2d 261 (8th Cir. 1944); Redmond v. Commerce Trust Co., 144 F.2d 140 (8th Cir. 1944), cert. denied, 323 U.S. 776 (1944); United States v. American Optical Co., 97 F. Supp. 66 (N.D. Ill. 1951); National Hairdressers' & C. Assn. v. Philad Co., 34 F. Supp. 264 (D. Del. 1940); 41 F. Supp. 701 (D. Del. 1940), aff'd mem., 129 F.2d 1020 (3d Cir. 1942). Second, we find cases classified by

the courts as "spurious" in which, on a realistic view, it would seem fitting for the judgments to extend to the class. See, e.g., Knapp v. Bankers Sec. Corp., 17 F.R.D. 245 (E.D. Pa. 1954), aff'd, 230 F. 2d 717 (3d Cir. 1956); Giesecke v. Denver Tramway Corp., 81 F. Supp. 957 (D. Del. 1949); York v. Guaranty Trust Co., 143 F. 2d 503 (2d Cir. 1944), rev'd on grounds not here relevant, 326 U.S. 99 (1945) (see Chafee, supra, at 208); cf. Webster Eisenlohr, Inc. v. Kalodner, 145 F. 2d 316, 320 (3d Cir. 1944), cert. denied, 325 U.S. 867 (1945). But cf. the early decisions, Duke of Bedford v. Ellis, [1901] A.C. 1; Sheffield Waterworks v. Yeomans, L.R. 2 Ch. App. 8 (1866); Brown v. Vermuden, 1 Ch. Cas. 272, 22 Eng. Rep. 796 (1676).

The "spurious" action envisaged by present Rule 23 is in any event an anomaly because, although denominated a "class" action and pleaded as such, it is supposed not to adjudicate the rights or liabilities of any person not a party. It was believed to be an advantage of the "spurious" category that it would invite decisions that a member of the "class" could, like a member of the class in a "true" or "hybrid" action, intervene on an ancillary basis without being required to show an independent basis of Federal jurisdiction, and have the benefit of the date of the commencement of the action for purposes of the statute of limitations. See 3 Moore's Federal Practice paras. 23.10[1], 23.12 (2d ed. 1963). These results have been attained in some instances but not in others. On the statute of limitations, see Union Carbide & Carbon Corp. v. Nisley, 300 F. 2d 561 (10th Cir. 1961), pet. cert. dismissed, 371 U.S. 801 (1963); but cf. P.W. Husserl, Inc. v. Newman, 25 F.R.D. 264 (S.D.N.Y. 1960); Athas v. Day, 161 F. Supp. 916 (D. Colo. 1958). On ancillary intervention, see Amen v. Black, 234 F. 2d 12 (10th Cir. 1956), cert. granted, 352 U.S. 888 (1956), dismissed on stip., 355 U.S. 600 (1958); but cf. Wagner v. Kemper, 13 F.R.D. 128 (W.D. Mo. 1952). The results, however, can hardly depend upon the mere appearance of a "spurious" category in the rule; they should turn on more basic considerations. See discussion of subdivision (c)(1) below.

Finally, the present rule does not squarely address itself to the question of the measures that may be taken during the course of the action to assure procedural fairness, particularly giving notice to members of the class, which may in turn be related in some instances to the extension of the judgment to the class. See Chafee, supra, at 230-31; Keefe, Levy & Donovan, supra; Developments in the Law, supra, 71 Harv. L. Rev. at 937-38; Note, Binding Effect of Class Actions, 67 Harv. L. Rev. 1059, 1062-65 (1954); Note, Federal Class Actions: A Suggested Revision of Rule 23, 46 Colum. L. Rev. 818, 833-36 (1946); Mich. Gen. Court R. 208.4 (effective Jan. 1, 1963); Idaho R. Civ. P. 23(d); Minn. R. Civ. P. 23.04; N. Dak. R. Civ. P. 23(d).

The amended rule describes in more practical terms the occasions for maintaining class actions; provides that all class actions maintained to the end as such will result in judgments including those whom the court finds to be members of the class, whether or not the judgment is favorable to the class; and refers to the measures which can be taken to assure the fair conduct of these actions.

Subdivision (a) states the prerequisites for maintaining any class action in terms of the numerosness of the class making joinder of the members impracticable, the existence of questions common to the class, and the desired qualifications of the representative parties. See Weinstein, Revision of Procedure: Some Problems in Class Actions, 9 Buffalo L. Rev. 433, 458-59 (1960); 2 Barron & Holtzoff, Federal Practice & Procedure § 562, at 265, § 572, at 351-52 (Wright ed. 1961). These are necessary but not sufficient conditions for a class action. See, e.g., Giordano v. Radio Corp. of Am., 183 F. 2d 558, 560 (3d Cir. 1950); Zachman v. Erwin, 186 F. Supp. 681 (S.D. Tex. 1959); Baim & Blank, Inc. v. Warren-Connelly Co., Inc., 19 F.R.D. 108 (S.D.N.Y. 1956). Subdivision (b) describes the additional elements which in varying situations justify the use of a class action.



Subdivision (b)(1). The difficulties which would be likely to arise if resort were had to separate actions by or against the individual members of the class here furnish the reasons for, and the principal key to, the propriety and value of utilizing the class-action device. The considerations stated under clauses (A) and (B) are comparable to certain of the elements which define the persons whose joinder in an action is desirable as stated in Rule 19(a), as amended. See amended Rule 19(a)(2) (i) and (ii), and the Advisory Committee's Note thereto; Hazard, Indispensable Party: The Historical Origin of a Procedural Phantom, 61 Colum. L. Rev. 1254, 1259-60 (1961); cf. 3 Moore, supra, para. 23.08, at 3435.

Clause (A): One person may have rights against, or be under duties toward, numerous persons constituting a class, and be so positioned that conflicting or varying adjudications in lawsuits with individual members of the class might establish incompatible standards to govern his conduct. The class action device can be used effectively to obviate the actual or virtual dilemma which would thus confront the party opposing the class. The matter has been stated thus: "The felt necessity for a class action is greatest when the courts are called upon to order or sanction the alteration of the status quo in circumstances such that a large number of persons are in a position to call on a single person to alter the status quo, or to complain if it is altered, and the possibility exists that [the] actor might be called upon to act in inconsistent ways." Louisell & Hazard, Pleading and Procedure: State and Federal 719 (1962); see Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356, 366-67 (1921). To illustrate: Separate actions by individuals against a municipality to declare a bond issue invalid or condition or limit it, to prevent or limit the making of a particular appropriation or to compel or invalidate an assessment, might create a risk of inconsistent or varying determinations. In the same way, individual litigations of the rights and duties of riparian owners,

or of landowners' rights and duties respecting a claimed nuisance, could create a possibility of incompatible adjudications. Actions by or against a class provide a ready and fair means of achieving unitary adjudication. See Maricopa County Mun. Water Con. Dist. v. Looney, 219 F.2d 529 (9th Cir. 1955); Rank v. Krug, 142 F. Supp. 1, 154-59 (S.D. Calif. 1956), on app., State of California v. Rank, 293 F.2d 340, 348 (9th Cir. 1961); Gart v. Cole, 263 F.2d 244 (2d Cir. 1959), cert. denied, 359 U.S. 978 (1959); cf. Martinez v. Maverick Cty. Water Con. & Imp. Dist., 219 F.2d 666 (5th Cir. 1955); 3 Moore, supra, para. 23.11[2], at 3458-59.

Clause (B): This clause takes in situations where the judgment in a nonclass action by or against an individual member of the class, while not technically concluding the other members, might do so as a practical matter. The vice of an individual action would lie in the fact that the other members of the class, thus practically concluded, would have had no representation in the lawsuit. In an action by policy holders against a fraternal benefit association attacking a financial reorganization of the society, it would hardly have been practical, if indeed it would have been possible, to confine the effects of a validation of the reorganization to the individual plaintiffs. Consequently a class action was called for with adequate representation of all members of the class. See Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356 (1921); Waybright v. Columbian Mut. Life Ins. Co., 30 F. Supp. 885 (W.D.Tenn. 1939); cf. Smith v. Swormstedt, 16 How. (57 U.S.) 288 (1853). For much the same reason actions by shareholders to compel the declaration of a dividend, the proper recognition and handling of redemption or pre-emption rights, or the like (or actions by the corporation for corresponding declarations of rights), should ordinarily be conducted as class actions, although the matter has been much obscured by the insistence that each shareholder has an individual claim. See Knapp v. Bankers Securities Corp., 17 F.R.D. 245 (E.D.Pa. 1954), aff'd, 230 F.2d 717 (3d Cir. 1956); Gliesecke v. Denver Tramway Corp., 81 F. Supp. 957

(D. Del. 1949); Zahn v. Transamerica Corp., 162 F. 2d 36 (3d Cir. 1947); Speed v. Transamerica Corp., 100 F. Supp. 461 (D. Del. 1951); Sobel v. Whittier Corp., 95 F. Supp. 643 (E.D. Mich. 1951), app. disp., 195 F. 2d 361 (6th Cir. 1952); Goldberg v. Whittier Corp., 111 F. Supp. 382 (E.D. Mich. 1953); Dann v. Studebaker-Packard Corp., 288 F. 2d 201 (6th Cir. 1961); Edgerton v. Armour & Co., 94 F. Supp. 549 (S.D. Calif. 1950); Ames v. Mengel Co., 190 F. 2d 344 (2d Cir. 1951).

(These shareholders' actions are to be distinguished from derivative actions by shareholders dealt with in new Rule 23.1). The same reasoning applies to an action which charges a breach of trust by an indenture trustee or other fiduciary similarly affecting the members of a large class of security holders or other beneficiaries, and which requires an accounting or like measures to restore the subject of the trust. See Boesenberg v. Chicago T. & T. Co., 128 F. 2d 245 (7th Cir. 1942); Citizens Banking Co. v. Monticello State Bank, 143 F. 2d 261 (8th Cir. 1944); Redmond v. Commerce Trust Co., 144 F. 2d 140 (8th Cir. 1944), cert. denied, 323 U.S. 776 (1944); cf. York v. Guaranty Trust Co., 143 F. 2d 503 (2d Cir. 1944), rev'd on grounds not here relevant, 326 U.S. 99 (1945).

In various situations an adjudication as to one or more members of the class will necessarily or probably have an adverse practical effect on the interests of other members who should therefore be represented in the lawsuit. This is plainly the case when claims are made by numerous persons against a fund insufficient to satisfy all claims. A class action by or against representative members to settle the validity of the claims as a whole, or in groups, followed by separate proof of the amount of each valid claim and proportionate distribution of the fund, meets the problem. Cf. Dickinson v. Burnham, 197 F. 2d 973 (2d Cir. 1952), cert. denied, 344 U.S. 875 (1952); 3 Moore, supra, at para. 23.09. The same reasoning applies to an action by a creditor to set aside a fraudulent conveyance by the debtor and to appropriate the property to his claim, when the debtor's assets are insufficient to pay all creditors' claims. See Heffernan v. Bennett & Armour, 110 Cal.

App. 2d 564, 243 P. 2d 846 (1952); cf. City & County of San Francisco v. Market Street Ry., 95 Cal. App. 2d 648, 213 P. 2d 780 (1950). Similar problems, however, can arise in the absence of a fund either present or potential. A negative or mandatory injunction secured by one of a numerous class may disable the opposing party from performing claimed duties toward the other members of the class or materially affect his ability to do so. An adjudication as to movie "clearances and runs" nominally affecting only one exhibitor would often have practical effects on all the exhibitors in the same territorial area. Cf. United States v. Paramount Pictures, Inc., 66 F. Supp. 323, 341-46 (S.D.N.Y. 1946); 334 U.S. 131, 144-48 (1948). Assuming a sufficiently numerous class of exhibitors, a class action would be advisable. (Here representation of subclasses of exhibitors could become necessary; see subdivision (c)(3)(B).)

Subdivision (b)(2). This subdivision is intended to reach situations where a party has taken action or refused to take action with respect to a class, and final relief of an injunctive nature or of a corresponding declaratory nature, settling the legality of the behavior with respect to the class as a whole, is appropriate. Declaratory relief "corresponds" to injunctive relief when as a practical matter it affords injunctive relief or serves as a basis for later injunctive relief. The subdivision does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages. Action or inaction is directed to a class within the meaning of this subdivision even if it has taken effect or is threatened only as to one or a few members of the class, provided it is based on grounds which have general application to the class.

Illustrative are various actions in the civil-rights field where a party is charged with discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration. See Potts v. Flax, 313 F.2d 284 (5th Cir. 1963); Bailey v. Patterson, 323 F.2d 201 (5th Cir. 1963), cert.

denied, 377 U.S. 972 (1964); Brunson v. Board of Trustees of School District No. 1, Clarendon Cty., S.C., 311 F.2d 107 (4th Cir. 1962), cert. denied, 373 U.S. 933 (1963); Green v. School Bd. of Roanoke, Va., 304 F.2d 118 (4th Cir. 1962); Orleans Parish School Bd. v. Bush, 242 F.2d 156 (5th Cir. 1957), cert. denied, 354 U.S. 921 (1957); Mannings v. Board of Public Inst. of Hillsborough County, Fla., 277 F.2d 370 (5th Cir. 1960); Northcross v. Board of Ed. of City of Memphis, 302 F.2d 818 (6th Cir. 1962), cert. denied, 370 U.S. 944 (1962); Frasier v. Board of Trustees of Univ. of N.C., 134 F. Supp. 589 (M.D.N.C. 1955, 3-judge court), aff'd, 350 U.S. 979 (1956). Subdivision (b)(2) is not limited to civil-rights cases. Thus an action looking to specific or declaratory relief could be brought by a numerous class of purchasers, say retailers of a given description, against a seller alleged to have undertaken to sell to that class at prices higher than those set for other purchasers, say retailers of another description, when the applicable law forbids such a pricing differential. So also a patentee of a machine, charged with selling or licensing the machine on condition that purchasers or licensees also purchase or obtain licenses to use an ancillary unpatented machine, could be sued on a class basis by a numerous group of purchasers or licensees, or by a numerous group of competing sellers or licensors of the unpatented machine, to test the legality of the "tying" condition.

Subdivision (b)(3). In the situations to which this subdivision relates, class-action treatment is not as clearly called for as in those described above, but it may nevertheless be convenient and desirable depending upon the particular facts. Subdivision (b)(3) encompasses those cases in which a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results. Cf. Chafee, supra, at 201.

The court is required to find, as a condition of holding that a class action may be maintained under this subdivision, that the questions common to the class predominate over the questions affecting individual members. It is only where this predominance exists that economies can be achieved by means of the class-action device. In this view, a fraud perpetrated on numerous persons by the use of similar misrepresentations may be an appealing situation for a class action, and it may remain so despite the need, if liability is found, for separate determination of the damages suffered by individuals within the class. On the other hand, although having some common core, a fraud case may be unsuited for treatment as a class action if there was material variation in the representations made or in the kinds or degrees of reliance by the persons to whom they were addressed. See Oppenheimer v. F. J. Young & Co., Inc., 144 F.2d 387 (2d Cir. 1944); Miller v. National City Bank of N.Y., 166 F.2d 723 (2d Cir. 1948); and for like problems in other contexts, see Hughes v. Encyclopaedia Britannica, 199 F.2d 295 (7th Cir. 1952); Sturgeon v. Great Lakes Steel Corp., 143 F.2d 819 (6th Cir. 1944). A "mass accident" resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses to liability, would be present, affecting the individuals in different ways. In these circumstances an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried. See Pennsylvania R.R. v. United States, 111 F. Supp. 80 (D.N.J. 1953); cf. Weinstein, supra, 9 Buffalo L. Rev. at 469. Private damage claims by numerous individuals arising out of concerted antitrust violations may or may not involve predominating common questions. See Union Carbide & Carbon Corp. v. Nisley, 300 F.2d 561 (10th Cir. 1961), pet. cert. dismissed, 371 U.S. 801 (1963); cf. Weeks v. Bareco Oil Co., 125 F.2d 84 (7th Cir. 1941); Kainz v. Anheuser-Busch, Inc., 194 F.2d 737 (7th Cir. 1952); Hess v. Anderson, Clayton & Co., 20 F.R.D. 466 (S.D. Calif. 1957).

That common questions predominate is not itself sufficient to justify a class action under subdivision (b)(3), for another method of handling the litigious situation may be available which has greater practical advantages. Thus one or more actions agreed to by the parties as test or model actions may be preferable to a class action; or it may prove feasible and preferable to consolidate actions. Cf. Weinstein, supra, 9 Buffalo L. Rev. at 438-54. Even when a number of separate actions are proceeding simultaneously, experience shows that the burdens on the parties and the courts can sometimes be reduced by arrangements for avoiding repetitious discovery or the like. Currently the Coordinating Committee on Multiple Litigation in the United States District Courts (a subcommittee of the Committee on Trial Practice and Technique of the Judicial Conference of the United States) is charged with developing methods for expediting such massive litigation. To reinforce the point that the court with the aid of the parties ought to assess the relative advantages of alternative procedures for handling the total controversy, subdivision (b)(3) requires, as a further condition of maintaining the class action, that the court shall find that that procedure is "superior" to the others in the particular circumstances.

Factors (A)-(D) are listed, non-exhaustively, as pertinent to the findings. The court is to consider the interests of individual members of the class in controlling their own litigations and carrying them on as they see fit. See Weeks v. Bareco Oil Co., 125 F.2d 84,88-90, 93-94 (7th Cir. 1941) (anti-trust action); see also Pentland v. Dravo Corp., 152 F.2d 851 (3d Cir. 1945), and Chafee, supra, at 273-75, regarding policy of Fair Labor Standards Act of 1938, § 16(b), 29 U.S.C. § 216(b), prior to amendment by Portal-to-Portal Act of 1947, § 5(a). [The present provisions of 29 U.S.C. § 216(b) are not intended to be affected by Rule 23, as amended.] In this connection the court should inform itself of any litigation actually pending by or against the individuals. The interests of individuals in conducting separate lawsuits may be so strong as to call for denial of a

class action. On the other hand, these interests may be theoretic rather than practical: the class may have a high degree of cohesion and prosecution of the action through representatives would be quite unobjectionable, or the amounts at stake for individuals may be so small that separate suits would be impracticable. The burden that separate suits would impose on the party opposing the class, or upon the court calendars, may also fairly be considered. (See the discussion, under subdivision (c)(2) below, of the right of members to be excluded from the class upon their request.)

Also pertinent is the question of the desirability of concentrating the trial of the claims in the particular forum by means of a class action, in contrast to allowing the claims to be litigated separately in forums to which they would ordinarily be brought. Finally, the court should consider the problems of management which are likely to arise in the conduct of a class action.

Subdivision (c)(1). In order to give clear definition to the action, this provision requires the court to determine, as early in the proceedings as may be practicable, whether an action brought as a class action is to be so maintained. The determination depends in each case on satisfaction of the terms of subdivision (a) and the relevant provisions of subdivision (b).

An order embodying a determination can be conditional; the court may rule, for example, that a class action may be maintained only if the representation is improved through intervention of additional parties of a stated type. A determination once made can be altered or amended before the decision on the merits if, upon fuller development of the facts, the original determination appears unsound. A negative determination means that the action should be stripped of its character as a class action. See subdivision (d)(4). Although an action thus becomes a nonclass



action, the court may still be receptive to interventions before the decision on the merits so that the litigation may cover as many interests as can be conveniently handled; the questions whether the intervenors in the nonclass action shall be permitted to claim "ancillary" jurisdiction or the benefit of the date of the commencement of the action for purposes of the statute of limitations are to be decided by reference to the laws governing jurisdiction and limitations as they apply in particular contexts.

Whether the court should require notice to be given to members of the class of its intention to make a determination, or of the order embodying it, is left to the court's discretion under subdivision (d) (2).

Subdivision (c)(2) makes special provision for class actions maintained under subdivision (b)(3). As noted in the discussion of the latter subdivision, the interests of the individuals in pursuing their own litigations may be so strong here as to warrant denial of a class action altogether. Even when a class action is maintained under subdivision (b)(3), this individual interest is respected. Thus the court is required to direct notice to the members of the class of the right of each member to be excluded from the class upon his request. A member who does not request exclusion may, if he wishes, enter an appearance in the action through his counsel; whether or not he does so, the judgment in the action will embrace him.

The notice, setting forth the alternatives open to the members of the class, is to be the best practicable under the circumstances, and shall include individual notice to the members who can be identified through reasonable effort. (For further discussion of this notice, see the statement under subdivision (d)(2) below.)

Subdivision (c)(3). The judgment in a class action maintained as such to the end will embrace the class, that is, in a class action under subdivision (b)(1) or (b)(2), those found by the court to be class members; in a class action under subdivision (b)(3), those to whom the notice prescribed by subdivision (c)(2) was directed, excepting those who requested exclusion or who are ultimately found by the court not to be members of the class. The judgment has this scope whether it is favorable or unfavorable to the class. In a (b)(1) or (b)(2) action the judgment "describes" the members of the class, but need not specify the individual members; in a (b)(3) action the judgment "specifies" the individual members who have been identified and describes the others.

Compare subdivision (c)(4) as to actions conducted as class actions only with respect to particular issues. Where the class-action character of the lawsuit is based solely on the existence of a "limited fund," the judgment, while extending to all claims of class members against the fund, has ordinarily left unaffected the personal claims of nonappearing members against the debtor. See 3 Moore, supra, para. 23.11[4].

Hitherto, in a few actions conducted as "spurious" class actions and thus nominally designed to extend only to parties and others intervening before the determination of liability, courts have held or intimated that class members might be permitted to intervene after a decision on the merits favorable to their interests, in order to secure the benefits of the decision for themselves, although they would presumably be unaffected by an unfavorable decision. See, as to the propriety of this so-called "one-way" intervention in "spurious" actions, the conflicting views expressed in Union Carbide & Carbon Corp. v. Nisley, 300 F.2d 561 (10th Cir. 1961), pet. cert. dismissed, 371 U.S. 801 (1963); York v. Guaranty Trust Co., 143 F.2d 503, 529 (2d Cir. 1944), rev'd on grounds not here relevant, 326 U.S. 99 (1945); Pentland v. Dravo Corp., 152 F.2d 851, 856 (3d Cir.

1945); Speed v. Transamerica Corp., 100 F. Supp. 461, 463 (D. Del. 1951); State Wholesale Grocers v. Great Atl. & Pac. Tea Co., 24 F.R.D. 510 (N.D.Ill. 1959); Alabama Ind. Serv. Stat. Assn. v. Shell Pet. Corp., 28 F. Supp. 386, 390 (N.D.Ala. 1939); Tolliver v. Cudahy Packing Co., 39 F. Supp. 337, 339 (E.D. Tenn. 1941); Kalven & Rosenfield, supra, 8 U. of Chi. L. Rev. 684 (1941); Comment, 53 Nw. U.L. Rev. 627, 632-33 (1958); Developments in the Law, supra, 71 Harv. L. Rev. at 935; 2 Barron & Holtzoff, supra, § 568 but cf. Lockwood v. Hercules Powder Co., 7 F.R.D. 24, 28-29 (W.D.Mo. 1947); Abram v. San Joaquin Cotton Oil Co., 46 F. Supp. 969, 976-77 (S.D. Calif. 1942); Chafee, supra, at 280, 285; 3 Moore, supra, para. 23.12, at 3476. Under proposed subdivision (c)(3), one-way intervention is excluded; the action will have been early determined to be a class or nonclass action, and in the former case the judgment, whether or not favorable, will include the class, as above stated.

Although thus declaring that the judgment in a class action includes the class, as defined, subdivision (c)(3) does not disturb the recognized principle that the court conducting the action cannot predetermine the res judicata effect of the judgment; this can be tested only in a subsequent action. See Restatement, Judgments § 86, comment (h), § 116 (1942). The court, however, in framing the judgment in any suit brought as a class action, must decide what its extent or coverage shall be, and if the matter is carefully considered, questions of res judicata are less likely to be raised at a later time and if raised will be more satisfactorily answered. See Chafee, supra, at 294; Weinstein, supra, 9 Buffalo L. Rev. at 460.

Subdivision (c)(4). This provision recognizes that an action may be maintained as a class action as to particular issues only. For example, in a fraud or similar case the action may retain its "class" character only through the adjudication of liability to the class; the members of the class may thereafter be required to come in individually and prove the amounts of their respective claims.

Two or more classes may be represented in a single action. Where a class is found to include subclasses divergent in interest, the class may be divided correspondingly, and each subclass treated as a class.

Subdivision (d) is concerned with the fair and efficient conduct of the action and lists some types of orders which may be appropriate.

The court should consider how the proceedings are to be arranged in sequence, and what measures should be taken to simplify the proof and argument. See subdivision (d)(1). The orders resulting from this consideration, like the others referred to in subdivision (d), may be combined with a pretrial order under Rule 16, and are subject to modification as the case proceeds.

Subdivision (d)(2) sets out a non-exhaustive list of possible occasions for orders requiring notice to the class. Such notice is not a novel conception. For example, in "limited fund" cases, members of the class have been notified to present individual claims after the basic class decision. Notice has gone to members of a class so that they might express any opposition to the representation, see United States v. American Optical Co., 97 F. Supp. 66 (N.D. Ill. 1951), and 1950-51 CCH Trade Cases 64573-74 (para. 62869); cf. Weeks v. Bareco Oil Co., 125 F. 2d 84, 94 (7th Cir. 1941), and notice may encourage interventions to improve the representation of the class. Cf. Oppenheimer v. F. J. Young & Co., 144 F.2d 387 (2d Cir. 1944). Notice has been used to poll members on a proposed modification of a consent decree. See record in Sam Fox Publishing Co. v. United States, 366 U.S. 683 (1961).

Subdivision (d)(2) does not require notice at any stage, but rather calls attention to its availability and invokes the court's discretion. In the degree that there is cohesiveness or unity in the

class and the representation is effective, the need for notice to the class will tend toward a minimum. These indicators suggest that notice under subdivision (d)(2) may be particularly useful and advisable in certain class actions maintained under subdivision (b)(3), for example, to permit members of the class to object to the representation. Indeed, under subdivision (c)(2), notice must be ordered, and is not merely discretionary, to give the members in a subdivision (b)(3) class action an opportunity to secure exclusion from the class. This mandatory notice pursuant to subdivision (c)(2), together with any discretionary notice which the court may find it advisable to give under subdivision (d)(2), is designed to fulfill requirements of due process to which the class action procedure is of course subject. See Hansberry v. Lee, 311 U.S. 32 (1940); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950); cf. Dickinson v. Burnham, 197 F.2d 973, 979 (2d Cir. 1952), and studies cited at 979 n. 4; see also All American Airways, Inc. v. Elderd, 209 F.2d 247, 249 (2d Cir. 1954); Gart v. Cole, 263 F.2d 244, 248-49 (2d Cir. 1959), cert. denied, 359 U.S. 978 (1959).

Notice to members of the class, whenever employed under amended Rule 23, should be accommodated to the particular purpose but need not comply with the formalities for service of process. See Chafee, supra, at 230-31; Brendle v. Smith, 7 F.R.D. 119 (S.D.N.Y. 1946). The fact that notice is given at one stage of the action does not mean that it must be given at subsequent stages. Notice is available fundamentally "for the protection of the members of the class or otherwise for the fair conduct of the action" and should not be used merely as a device for the undesirable solicitation of claims. See the discussion in Cherner v. Transitron Electronic Corp., 201 F. Supp. 934 (D. Mass. 1962); Hormel v. United States, 17 F.R.D. 303 (S.D.N.Y. 1955).

In appropriate cases the court should notify interested government agencies of the pendency of the action or of particular steps therein.

Subdivision (d)(3) reflects the possibility of conditioning the maintenance of a class action, e.g., on the strengthening of the representation, see subdivision (c)(1) above; and recognizes that the imposition of conditions on intervenors may be required for the proper and efficient conduct of the action.

As to orders under subdivision (d)(4), see subdivision (c)(1) above.

Subdivision (e) requires approval of the court, after notice, for the dismissal or compromise of any class action.

Rule 23.1 [New]. Derivative Actions by Shareholders

In a derivative action brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association, the corporation or association having failed to enforce a right which may properly be asserted by it, the complaint shall be verified and shall allege (1) that the plaintiff was a shareholder or member at the time of the transaction of which he complains or that his share or membership thereafter devolved on him by operation of law, and (2) that the action is not a collusive one to confer jurisdiction on a court of the United States which it would not otherwise have. The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors or comparable authority and, if necessary, from the shareholders or members, and the reasons for his failure to obtain the action or for not making the effort. The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association. The action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to shareholders or members in such manner as the court directs.

### Advisory Committee's Note

A derivative action by a shareholder of a corporation or by a member of an unincorporated association has distinctive aspects which require the special provisions set forth in the proposed rule. The next-to-the-last sentence recognizes that the question of adequacy of representation may arise when the plaintiff is one of a group of shareholders or members. Cf. 3 Moore's Federal Practice, para. 23.08 (2d ed. 1963).

The court has inherent power to provide for the conduct of the proceedings in a derivative action, including the power to determine the course of the proceedings and require that any appropriate notice be given to shareholders or members.

#### Rule 23.2 [New]. Actions Relating to Unincorporated Associations

An action brought by or against the members of an unincorporated association as a class by naming certain members as representative parties may be maintained only if it appears that the representative parties will fairly and adequately protect the interests of the association and its members. In the conduct of the action the court may make appropriate orders corresponding with those described in Rule 23(d), and the procedure for dismissal or compromise of the action shall correspond with that provided in Rule 23(e).

### Advisory Committee's Note

Although an action by or against representatives of the membership of an unincorporated association has often been viewed as a class action, the real or main purpose of this characterization has been to give "entity treatment" to the association when for formal reasons it cannot sue or be sued as a jural person under Rule 17(b). See Louisell & Hazard, Pleading and Procedure: State and Federal 718 (1962); 3

Moore's Federal Practice, para. 23.08 (2d ed. 1963); Story, J. in West v. Randall, 29 Fed. Cas. 718, 722-23, No. 17,424 (C.C.D.R.I. 1820); and, for examples, Gibbs v. Buck, 307 U.S. 66 (1939); Tunstall v. Brotherhood of Locomotive F. & E., 148 F.2d 403 (4th Cir. 1945); Oskoian v. Canuel, 269 F.2d 311 (1st Cir. 1959). Rule 23.2 deals separately with these actions, referring where appropriate to Rule 23.

#### Rule 24. Intervention

(a) INTERVENTION OF RIGHT. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of the court or an officer thereof, applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

#### Advisory Committee's Note

In attempting to overcome certain difficulties which have arisen in the application of present Rule 24(a)(2) and (3), this amendment draws upon the proposals for revision of the related Rules 19 (joinder of persons needed for just adjudication) and 23 (class actions), and the reasoning underlying those proposals.

Present Rule 24(a)(3) provides for intervention of right where the applicant establishes that he will be adversely affected by the distribution or disposition of property involved in an action to which he



has not been made a party. Significantly, some decided cases have virtually disregarded the language of this provision. Thus Professor Moore states: "The concept of a fund has been applied so loosely that it is possible for a court to find a fund in almost any in personam action." 4 Moore's Federal Practice para. 24.09[3], at 55 (2d ed. 1962), and see, e.g., Formulabs, Inc. v. Hartley Pen Co., 275 F.2d 52 (9th Cir. 1960). This development is quite natural, for Rule 24(a)(3) is unduly restricted. If an absentee would be substantially affected in a practical sense by the determination made in an action, he should, as a general rule, be entitled to intervene, and his right to do so should not depend on whether there is a fund to be distributed or otherwise disposed of. Intervention of right is here seen to be a kind of counterpart to Rule 19(a)(2)(i) on joinder of persons needed for a just adjudication: where, upon motion of a party in an action, an absentee should be joined so that he may protect his interest which as a practical matter may be substantially impaired by the disposition of the action, he ought to have a right to intervene in the action on his own motion. See Louisell & Hazard, Pleading and Procedure: State and Federal 749-50 (1962).

The general purpose of present Rule 24(a)(2) is to entitle an absentee, purportedly represented by a party, to intervene in the action if he can establish with fair probability that the representation is inadequate. Thus, where an action is being prosecuted or defended by a trustee, a beneficiary of the trust should have a right to intervene if he can show that the trustee's representation of his interest probably is inadequate; similarly a member of a class should have the right to intervene in a class action if he can show the inadequacy of the representation of his interest by the representative parties before the court.

Present Rule 24(a)(2), however, makes it a condition of intervention that "the applicant is or may be bound by a judgment in the action," and this has recently created difficulties with intervention in

class actions. If the "bound" language is read literally in the sense of res judicata, it can defeat intervention in some meritorious cases. A member of a class to whom a judgment in a class action extends by its terms (see Rule 23(c)(3), as amended) may be entitled to show in a later action, when the judgment in the class action is claimed to operate as res judicata against him, that the "representative" in the class action had not in fact adequately represented him. If he can make this showing, the class-action judgment may be held not to bind him. See Hansberry v. Lee, 311 U.S. 32 (1940). Now if a class member seeks to intervene in the class action proper, while it is still pending, on grounds of inadequacy of representation, he can be met with the argument: if the representation is in fact inadequate, he will not be "bound" by the judgment when it is subsequently asserted against him as res judicata, hence he is not entitled to intervene; if the representation is in fact adequate, there is no occasion or ground for intervention. See Sam Fox Publishing Co. v. United States, 366 U.S. 683 (1961); cf. Sutphen Estates, Inc. v. United States, 342 U.S. 19 (1951). This reasoning may be linguistically justified by present Rule 24(a)(2); but it can lead to poor results. Compare the discussion in International M. & I. Corp. v. Von Clemm, 301 F. 2d 857 (2d Cir. 1962); Atlantic Refining Co. v. Standard Oil Co., 304 F. 2d 387 (D.C. Cir. 1962). A class member who claims that his "representative" does not adequately represent him, and is able to establish that proposition with sufficient probability, should not be put to the risk of having a judgment entered in the action which by its terms extends to him, and be obliged to test the validity of the judgment as applied to his interest by a later collateral attack. Rather he should, as a general rule, be entitled to intervene in the action.

The amendment provides that an applicant is entitled to intervene in an action when his position is comparable to that of a person under Rule 19(a)(2)(i), as amended, unless his interest is already adequately represented in the action by existing parties. The Rule 19(a)(2)(i) criterion imports practical considerations, and the deletion of the

"bound" language similarly frees the rule from undue preoccupation with strict considerations of res judicata.

The representation whose adequacy comes into question under the amended rule is not confined to formal representation like that provided by a trustee for his beneficiary or a representative party in a class action for a member of the class. A party to an action may provide practical representation to the absentee seeking intervention although no such formal relationship exists between them, and the adequacy of this practical representation will then have to be weighed. See International M. & I. Corp. v. Von Clemm, and Atlantic Refining Co. v. Standard Oil Co., both supra; Wolpe v. Poretsky, 144 F.2d 505 (D.C. Cir. 1944), cert. denied, 323 U.S. 777 (1944); cf. Ford Motor Co. v. Bisanz Bros., 249 F. 2d. 22 (8th Cir. 1957); and generally, Annot., 84 A.L.R. 2d 1412 (1962).

An intervention of right under the amended rule may be subject to appropriate conditions or restrictions responsive among other things to the requirements of efficient conduct of the proceedings.

#### Rule 26. Depositions Pending Action

(a) WHEN DEPOSITIONS MAY BE TAKEN. Any party may take the testimony of any person, including a party, by deposition upon oral examination or written interrogatories for the purpose of discovery or for use as evidence in the action or for both purposes. After commencement of the action the deposition may be taken without leave of court, except that leave, granted with or without notice, must be obtained if notice of the taking is served by the plaintiff within 20 days after commencement of the action. The attendance of witnesses may be compelled by the use of subpoena as provided in Rule 45. Depositions shall be taken only in accordance with these rules, except that in admiralty and maritime claims within the meaning of Rule 9(h) depositions may also be

taken under and used in accordance with sections 863, 864, and 865 of the Revised Statutes (see note preceding 28 U.S.C. § 1781). The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.

#### Advisory Committee's Note

The requirement that the plaintiff obtain leave of court in order to serve notice of taking of a deposition within 20 days after commencement of the action gives rise to difficulties when the prospective deponent is about to become unavailable for examination. The problem is not confined to admiralty, but has been of special concern in that context because of the mobility of vessels and their personnel. When Rule 26 was adopted as Admiralty Rule 30A in 1961, the problem was alleviated by permitting depositions de bene esse, for which leave of court is not required. See Advisory Committee's Note to Admiralty Rule 30A (1961).

Efforts have been made to devise a modification of the 20-day rule acceptable to both the Civil and Admiralty Committees, to the end that Rule 26(a) might state a uniform rule applicable alike to what are now civil actions and suits in admiralty. These efforts have so far been unsuccessful; and the Admiralty Committee has concluded that the exigencies of maritime litigation require preservation, for the time being at least, of the traditional de bene esse procedure for the post-unification counterpart of the present suit in admiralty. Accordingly, the draft provides for continued availability of that procedure in admiralty and maritime claims within the meaning of Rule 9(h). The possibility of a uniform rule will be further explored when current studies of the actual operation of the discovery rules have been completed.

Rule 38. Jury Trial of Right

(e) ADMIRALTY AND MARITIME CLAIMS. These rules shall not be construed to create a right to trial by jury of the issues in an admiralty or maritime claim within the meaning of Rule 9(h).

Advisory Committee's Note

See Note to Rule 9(h), supra.

Rule 41. Dismissal of Actions

(b) INVOLUNTARY DISMISSAL: EFFECT THEREOF. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, or for improper venue, or for lack of an indispensable party failure to join a party under Rule 19, operates as an adjudication upon the merits.

Advisory Committee's Note

The terminology is changed to accord with the amendment of Rule 19. See that amended rule and the Advisory Committee's Note thereto.

Rule 42. Consolidation; Separate Trials.

(b) SEPARATE TRIALS. The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues, always preserving in-violate the right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States.

Advisory Committee's Note

In certain suits in admiralty separation for trial of the issues of liability and damages (or of the extent of liability other than damages, such as salvage and general average) has been conducive to expedition and economy, especially because of the statutory right to interlocutory appeal in admiralty cases (which is of course preserved by these Rules). While separation of issues for trial is not to be routinely ordered, it is important that it be encouraged where experience has demonstrated its worth. Cf. Weinstein, Routine Bifurcation of Negligence Trials, 14 Vand. L. Rev. 831 (1961).

In cases (including some cases within the admiralty and maritime jurisdiction) in which the parties have a Constitutional or statutory right of trial by jury, separation of issues may give rise to problems. See, e.g., United Air Lines, Inc. v. Wiener, 286 F. 2d 302 (9th Cir. 1961). Accordingly, the proposed change in Rule 42 reiterates the mandate of Rule 38 respecting preservation of the right to jury trial.

Rule 43. Evidence

(f) INTERPRETERS. The court may appoint an interpreter of its own selection and may fix his reasonable compensation. The compensation shall be paid out of funds provided by law or by one or more of the parties as the court may direct, and may be taxed ultimately as costs, in the discretion of the court.

Advisory Committee's Note

This new subdivision authorizes the court to appoint interpreters (including interpreters for the deaf), to provide for their compensation, and to tax the compensation as costs. Compare proposed subdivision (b) of Rule 28 of the Federal Rules of Criminal Procedure.

Rule 44. Proof of Official Record\*

(a) AUTHENTICATION OF COPY.

(1) DOMESTIC. An official record kept within the United States, or any state, district, commonwealth, territory, or insular possession thereof, or within the Panama Canal Zone, the Trust Territory of the Pacific Islands, or the Ryukyu Islands, or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by the officer having the legal custody of the record, or by his deputy, and accompanied by a certificate that such officer has the custody. If the office in which the record is

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\* These amendments were developed collaboratively by the Advisory Committee on Civil Rules, the Commission and Advisory Committee on International Rules of Judicial Procedure (see Act of September 2, 1958, 72 Stat. 1743), and the Columbia Law School Project on International Procedure.

kept is within the United States or within a territory or insular possession subject to the dominion of the United States; the The certificate may be made by a judge of a court of record of the district or political subdivision in which the record is kept, authenticated by the seal of the court, or may be made by any public officer having a seal of office and having official duties in the district or political subdivision in which the record is kept, authenticated by the seal of his office. If the office in which the record is kept is in a foreign state or country; the certificate may be made by a secretary of embassy or legation; consul general; consul; vice consul; or consular agent or by any officer in the foreign service of the United States stationed in the foreign state or country in which the record is kept; and authenticated by the seal of his office.

(2) FOREIGN. A foreign official record, or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof; or a copy thereof, attested by a person authorized to make the attestation, and accompanied by a final certification as to the genuineness of the signature and official position (i) of the attesting person, or (ii) of any foreign official whose certificate of genuineness of signature and official position relates to the attestation or is in a chain of certificates of genuineness of signature and official position relating to the attestation. A final certification may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of the documents, the court may, for good cause shown, (i) admit an attested copy without final certification or (ii) permit the foreign official record to be evidenced by an attested summary with or without a final certification.



(b) PROOF OF LACK OF RECORD. A written statement signed by an officer having the custody of an official record or by his deputy that after diligent search no record or entry of a specified tenor is found to exist in the records of his office, designated by the statement, accompanied by a certificate as above provided; authenticated as provided in subdivision (a)(1) of this rule in the case of a domestic record, or complying with the requirements of subdivision (a)(2) of this rule for a summary in the case of a foreign record, is admissible as evidence that the records of his office contain no such record or entry.

(c) OTHER PROOF. This rule does not prevent the proof of official records or of entry or lack of entry therein by any other method authorized by law. any applicable statute or by the rules of evidence at common law.

#### Advisory Committee's Note

Subdivision (a)(1). These provisions on proof of official records kept within the United States are similar in substance to those heretofore appearing in Rule 44. There is a more exact description of the geographical areas covered. An official record kept in one of the areas enumerated qualifies for proof under subdivision (a)(1) even though it is not a United States official record. For example, an official record kept in one of these areas by a government in exile falls within subdivision (a)(1). It also falls within subdivision (a)(2) which may be availed of alternatively. Cf. Banco de Espana v. Federal Reserve Bank, 114 F.2d 438 (2d Cir. 1940).

Subdivision (a)(2). Foreign official records may be proved, as heretofore, by means of official publications thereof. See United States v. Aluminum Co. of America, 1 F.R.D. 71 (S.D.N.Y. 1939). Under this rule, a document that, on its face, appears to be an official publication, is admissible, unless a party opposing its admission into evidence shows that it lacks that character.

The rest of subdivision (a)(2) aims to provide greater clarity, efficiency, and flexibility in the procedure for authenticating copies of foreign official records.

The reference to attestation by "the officer having the legal custody of the record," hitherto appearing in Rule 44, has been found inappropriate for official records kept in foreign countries where the assumed relation between custody and the authority to attest does not obtain. See 2B Barron & Holtzoff, Federal Practice & Procedure §992 (Wright ed. 1961). Accordingly it is provided that an attested copy may be obtained from any person authorized by the law of the foreign country to make the attestation without regard to whether he is charged with responsibility for maintaining the record or keeping it in his custody.

Under Rule 44 a United States foreign service officer has been called on to certify to the authority of the foreign official attesting the copy as well as the genuineness of his signature and his official position. See Schlesinger, Comparative Law 57 (2d ed. 1959); Smit, International Aspects of Federal Civil Procedure, 61 Colum. L. Rev. 1031, 1063 (1961); 22 C.F.R. § 92.41 (a), (e) (1958). This has created practical difficulties. For example, the question of the authority of the foreign officer might raise issues of foreign law which were beyond the knowledge of the United States officer. The difficulties are met under the amended rule by eliminating the element of the authority of the attesting foreign official from the scope of the certifying process, and by specifically permitting use of the chain-certificate method. Under this method, it is sufficient if the original attestation purports to have been issued by an authorized person and is accompanied by a certificate of another foreign official whose certificate may in turn be followed by that of a foreign official of higher rank. The process continues until a foreign official is reached as to whom the United States foreign service official (or a diplomatic or consular officer of the foreign country assigned or accredited to the United States) has adequate information upon which

to base a "final certification." See New York Life Ins. Co. v. Aronson, 38 F. Supp. 687 (W.D. Pa. 1941); 22 C.F.R. § 92.37 (1958).

The final certification (a term used in contradistinction to the certificates prepared by the foreign officials in a chain) relates to the incumbency and genuineness of signature of the foreign official who attested the copy of the record or, where the chain-certificate method is used, of a foreign official whose certificate appears in the chain, whether that certificate is the last in the chain or not. A final certification may be prepared on the basis of material on file in the consulate or any other satisfactory information.

Although the amended rule will generally facilitate proof of foreign official records, it is recognized that in some situations it may be difficult or even impossible to satisfy the basic requirements of the rule. There may be no United States consul in a particular foreign country; the foreign officials may not cooperate; peculiarities may exist or arise hereafter in the law or practice of a foreign country. See United States v. Grabina, 119 F. 2d 863 (2d Cir. 1941); and, generally, Jones, International Judicial Assistance: Procedural Chaos and a Program for Reform, 62 Yale L. J. 515, 548-49 (1953). Therefore the final sentence of subdivision (a)(2) provides the court with discretion to admit an attested copy of a record without a final certification, or an attested summary of a record with or without a final certification. See Rep. of Comm. on Comparative Civ. Proc. & Prac., Proc. A.B.A., Sec. Int'l & Comp. L. 123, 130-31 (1952); Model Code of Evidence §§ 517, 519 (1942). This relaxation should be permitted only when it is shown that the party has been unable to satisfy the basic requirements of the amended rule despite his reasonable efforts. Moreover it is specially provided that the parties must be given a reasonable opportunity in these cases to examine into the authenticity and accuracy of the copy or summary.

Subdivision (b). This provision relating to proof of lack of record is accommodated to the changes made in subdivision (a).

Subdivision (c). The amendment insures that international agreements of the United States are unaffected by the rule. Several consular conventions contain provisions for reception of copies or summaries of foreign official records. See, e.g., Consular Conv. with Italy, May 8, 1878, art. X, 20 Stat. 725, T.S. No. 178 (Dept. State 1878). See also 28 U.S.C. §§ 1740-42, 1745; Fakouri v. Cadais, 149 F.2d 321 (5th Cir. 1945), cert. denied, 326 U.S. 742 (1945); 5 Moore's Federal Practice, para. 44.05 (2d ed. 1951).

Rule 44.1 [New]. Determination of Foreign Law\*

A party who intends to raise an issue concerning the law of a foreign country shall give notice in his pleadings or other reasonable written notice. The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under Rule 43. The court's determination shall be treated as a ruling on a question of law.

Advisory Committee's Note

Rule 44.1 is added by amendment to furnish Federal courts with a uniform and effective procedure for raising and determining an issue concerning the law of a foreign country.

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\* This rule was developed collaboratively by the Advisory Committee on Civil Rules, the Commission and Advisory Committee on International Rules of Judicial Procedure (see Act of Sept. 2, 1958, 72 Stat. 1743), and the Columbia Law School Project on International Procedure.

To avoid unfair surprise, the first sentence of the proposed rule requires that a party who intends to raise an issue of foreign law shall give notice thereof. The existing uncertainty under Rule 8(a) about whether foreign law must be pleaded--compare Siegelman v. Cunard White Star, Ltd., 221 F.2d 189 (2d Cir 1955), and Pedersen v. United States, 191 F. Supp. 95 (D. Guam 1961), with Harrison v. United Fruit Co., 143 F. Supp. 598 (S.D.N.Y. 1956)--is eliminated by the provision that the notice shall be "written" and "reasonable." It may, but need not be, incorporated in the pleadings. In some situations the pertinence of foreign law is apparent from the outset; accordingly the necessary investigation of that law will have been accomplished by the party at the pleading stage, and the notice can be given conveniently in the pleadings. In other situations the pertinence of foreign law may remain doubtful until the case is further developed. A requirement that notice of foreign law be given only through the medium of the pleadings would tend in the latter instances to force the party to engage in a peculiarly burdensome type of investigation which might turn out to be unnecessary; and correspondingly the adversary would be forced into a possibly wasteful investigation. The liberal provisions for amendment of the pleadings afford help if the pleadings are used as the medium of giving notice of the foreign law; but it seems best to permit a written notice to be given outside of and later than the pleadings, provided the notice is reasonable.

The rule does not attempt to set any definite limit on the party's time for giving the notice of an issue of foreign law; in some cases the issue may not become apparent until the trial, and notice then given may still be reasonable. The stage which the case has reached at the time of the notice, the reason proffered by the party for his failure to give earlier notice, and the importance to the case as a whole of the issue of foreign law sought to be raised, are among the factors which the court should consider in deciding a question of the reasonableness of a notice. If notice is given by one party it need not

be repeated by any other and serves as a basis for presentation of material on the foreign law by all parties.

The second sentence of the proposed rule describes the materials to which the court may resort in determining an issue of foreign law. At present the district courts, applying Rule 43(a), are looking in certain cases to State law to find the rules of evidence by which the content of foreign-country law is to be established. The State laws vary; some embody procedures which are inefficient, time consuming, and expensive. See, generally, Nussbaum, Proving the Law of Foreign Countries, 3 Am. J. Comp. L. 60 (1954). In all events the ordinary rules of evidence are often inapposite to the problem of determining foreign law and have in the past prevented examination of material which could have provided a proper basis for the determination. The proposed rule permits consideration by the court of any relevant material, including testimony, without regard to its admissibility under Rule 43. Cf. N.Y. Civ. Prac. Law & Rules, R. 4511 (effective Sept. 1, 1963); 2 Va. Code Ann. tit. 8, § 8-273; 2 W. Va. Code Ann. § 5711.

In further recognition of the peculiar nature of the issue of foreign law, the proposed rule provides that in determining this law the court is not limited by material presented by the parties; it may engage in its own research and consider any relevant material thus found. The court may have at its disposal better foreign law materials than counsel have presented, or may wish to reexamine and amplify material that has been presented by counsel in partisan fashion or in insufficient detail. On the other hand, the court is free to insist on a complete presentation by counsel.

There is no requirement that the court give formal notice to the parties of its intention to engage in its own research on an issue of foreign law which has been raised by them, or of its intention to raise and determine independently an issue not

raised by them. Ordinarily the court should inform the parties of material it has found diverging substantially from the material which they have presented; and in general the court should give the parties an opportunity to analyze and counter new points upon which it proposes to rely. See Schlesinger, Comparative Law 142 (2d ed. 1959); Wyzanski, A Trial Judge's Freedom and Responsibility, 65 Harv. L. Rev. 1281, 1296 (1952); cf. Siegelman v. Cunard White Star, Ltd., supra, 221 F.2d at 197. To require, however, that the court give formal notice from time to time as it proceeds with its study of the foreign law would add an element of undesirable rigidity to the procedure for determining issues of foreign law.

The proposed rule refrains from imposing an obligation on the court to take "judicial notice" of foreign law because this would put an extreme burden on the court in many cases; and it avoids use of the concept of "judicial notice" in any form because of the uncertain meaning of that concept as applied to foreign law. See, e.g., Stern, Foreign Law in the Courts: Judicial Notice and Proof, 45 Calif. L. Rev. 23, 43 (1957). Rather the rule provides flexible procedures for presenting and utilizing material on issues of foreign law by which a sound result can be achieved with fairness to the parties.

Under the third sentence, the court's determination of an issue of foreign law is to be treated as a ruling on a question of "law," not "fact," so that appellate review will not be narrowly confined by the "clearly erroneous" standard of Rule 52(a). Cf. Uniform Judicial Notice of Foreign Law Act § 3; Note, 72 Harv. L. Rev. 318 (1958).

The proposed rule parallels Article IV of the Uniform Interstate and International Procedure Act, approved by the Commissioners on Uniform State Laws in 1962, except that section 4.03 of Article IV states that "[t]he court, not the jury" shall determine

foreign law. The proposed rule does not address itself to this problem, since the Rules refrain from allocating functions as between the court and the jury. See Rule 38(a). It has long been thought, however, that the jury is not the appropriate body to determine issues of foreign law. See, e.g., Story, Conflict of Laws § 638 (1st ed. 1834, 8th ed. 1883); 1 Greenleaf, Evidence § 486 (1st ed. 1842, 16th ed. 1899); 4 Wigmore, Evidence § 2558 (1st ed. 1905); 9 id. § 2558 (3d ed. 1940). The majority of the States have committed such issues to determination by the court. See Article 5 of the Uniform Judicial Notice of Foreign Law Act, adopted by twenty-six states, 9A U.L.A. 318 (1957) (Supp. 1961, at 134); N.Y. Civ. Prac. Law & Rules, R. 4511 (effective Sept. 1, 1963); Wigmore, loc. cit. And Federal courts that have considered the problem in recent years have reached the same conclusion without reliance on statute. See Jansson v. Swedish American Line, 185 F.2d 212, 216 (1st Cir. 1950); Bank of Nova Scotia v. San Miguel, 196 F.2d 950, 957 n. 6 (1st Cir. 1952); Liechti v. Roche, 198 F.2d 174 (5th Cir. 1952); Daniel Lumber Co. v. Empresas Hondurenas, S.A., 215 F.2d 465 (5th Cir. 1954).

#### Rule 47. Jurors

(b) ALTERNATE JURORS. The court may direct that one or two not more than six jurors in addition to the regular ~~panel~~ jury be called and impanelled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath, and shall have the same functions, powers, facilities, and privileges as the principal regular jurors. An alternate juror who does not replace a principal regular juror shall be discharged



after the jury retires to consider its verdict. If one or two alternate jurors are called each party is entitled to one peremptory challenge in addition to those otherwise allowed by law. Each side is entitled to 1 peremptory challenge in addition to those otherwise allowed by law if 1 or 2 alternate jurors are to be impanelled, 2 peremptory challenges if 3 or 4 alternate jurors are to be impanelled, and 3 peremptory challenges if 5 or 6 alternate jurors are to be impanelled. The additional peremptory challenges may be used only against an alternate juror only, and the other peremptory challenges allowed by law shall not be used against the alternates an alternate juror.

#### Advisory Committee's Note

The revision of this subdivision brings it into line with a revision of Rule 24(c) of the Federal Rules of Criminal Procedure proposed by the Advisory Committee on Criminal Rules. Rule 24(c) now allows four alternate jurors, as contrasted with the two allowed in civil cases, and it is proposed to increase the number to a maximum of six in all cases. The Note of the Advisory Committee on Criminal Rules points to experience demonstrating that four alternates may not be enough in some lengthy criminal trials; and the same may be said of civil trials. The Note adds:

"The words 'or are found to be' are added to the second sentence to make clear that an alternate juror may be called in the situation where it is first discovered during the trial that a juror was unable or disqualified to perform his duties at the time he was sworn."

#### Rule 53. Masters

(a) APPOINTMENT AND COMPENSATION. Each district court with the concurrence of a majority of all the judges thereof may appoint one or more standing

masters for its district, and the court in which any action is pending may appoint a special master therein. As used in these rules the word "master" includes a referee, an auditor, and an examiner; a commissioner, and an assessor. The compensation to be allowed to a master shall be fixed by the court, and shall be charged upon such of the parties or paid out of any fund or subject matter of the action, which is in the custody and control of the court as the court may direct. The master shall not retain his report as security for his compensation; but when the party ordered to pay the compensation allowed by the court does not pay it after notice and within the time prescribed by the court, the master is entitled to a writ of execution against the delinquent party.

(b) REFERENCE. A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account; and of difficult computation of damages, a reference shall be made only upon a showing that some exceptional condition requires it.

#### Advisory Committee's Note

These changes are designed to preserve the admiralty practice whereby difficult computations are referred to a commissioner or assessor, especially after an interlocutory judgment determining liability. As to separation of issues for trial see Rule 42(b).

#### Rule 59. New Trials; Amendment of Judgments

(d) ON INITIATIVE OF COURT. Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party; and in the order shall specify the grounds therefor. After giving the parties notice and an opportunity to be heard on the matter, the court may

grant a motion for a new trial, timely served, for a reason not stated in the motion. In either case, the court shall specify in the order the grounds therefor.

Advisory Committee's Note

By narrow interpretation of Rule 59(b) and (d), it has been held that the trial court is without power to grant a motion for a new trial, timely served, by an order made more than 10 days after the entry of judgment, based upon a ground not stated in the motion but perceived and relied on by the trial court sua sponte. Freid v. McGrath, 133 F.2d 350 (D.C. Cir. 1942); National Farmers Union Auto & Cas. Co. v. Wood, 207 F.2d 659 (10th Cir. 1953); Bailey v. Slentz, 189 F.2d 406 (10th Cir. 1951); Marshall's U.S. Auto Supply, Inc. v. Cashman, 111 F.2d 140 (10th Cir. 1940), cert. denied, 311 U.S. 667 (1940); but see Steinberg v. Indemnity Ins. Co., 36 F.R.D. 253 (E.D.La. 1964).

The result is undesirable. Just as the court has power under the present text of Rule 59(d) to grant a new trial of its own initiative within the 10 days, so it should have power, when an effective new trial motion has been made and is pending, to decide it on grounds thought meritorious by the court although not advanced in the motion. The second sentence added by amendment to Rule 59(d) confirms the court's power in the latter situation, with provision that the parties be afforded a hearing before the power is exercised. See 6 Moore's Federal Practice, para. 59.09[2] (2d ed. 1953).

In considering whether a given ground has or has not been advanced in the motion made by the party, it should be borne in mind that the particularity called for in stating the grounds for a new-trial motion is the same as that required for all motions by Rule 7(b)(1). The latter rule does not require ritualistic detail but rather a fair indication to court and counsel of the substance of the grounds relied on. See Lebeck v. William A. Jarvis Co., 250 F.2d 285 (3d Cir. 1957); Tsai v. Rosenthal, 297 F.2d 614 (8th Cir. 1961); General Motors Corp. v.

Perry, 303 F.2d 544 (7th Cir. 1962); cf. Grimm v. California Spray-Chemical Corp., 264 F.2d 145 (9th Cir. 1959); Cooper v. Midwest Feed Products Co., 271 F.2d 177 (8th Cir. 1959).

Rule 65. Injunctions

(a) PRELIMINARY; NOTICE INJUNCTION.

(1) NOTICE. No preliminary injunction shall be issued without notice to the adverse party.

(2) CONSOLIDATION OF HEARING WITH TRIAL ON MERITS. Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial. This subdivision (a)(2) shall be so construed and applied as to save to the parties any rights they may have to trial by jury.

(b) TEMPORARY RESTRAINING ORDER; NOTICE; HEARING; DURATION.. No A temporary restraining order shall may be granted without written or oral notice to the adverse party or his attorney unless only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss or damage will result to the applicant before notice can be served and a hearing had thereon, the adverse party or his attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting his claim that notice should not be required. Every temporary restraining order granted without notice shall be indorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered

of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record. In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence of all matters except older matters of the same character; and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if he does not do so, the court shall dissolve the temporary restraining order. On 2 days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

(c) SECURITY. No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of the United States or of an officer or agency thereof.

A surety upon a bond or undertaking under this rule submits himself to the jurisdiction of the court and irrevocably appoints the clerk of the court as his agent upon whom any papers affecting his liability on the bond or undertaking may be served. His liability may be enforced on motion without the necessity of an independent action. The motion and

such notice of the motion as the court prescribes may be served on the clerk of the court who shall forthwith mail copies to the persons giving the security if their addresses are known: The provisions of Rule 65 apply to a surety upon a bond or undertaking as this rule.

#### Advisory Committee's Note

Subdivision (a)(2). This new subdivision provides express authority for consolidating the hearing of an application for a preliminary injunction with the trial on the merits. The authority can be exercised with particular profit when it appears that a substantial part of the evidence offered on the application will be relevant to the merits and will be presented in such form as to qualify for admission on the trial proper. Repetition of evidence is thereby avoided. The fact that the proceedings have been consolidated should cause no delay in the disposition of the application for the preliminary injunction, for the evidence will be directed in the first instance to that relief, and the preliminary injunction, if justified by the proof, may be issued in the course of the consolidated proceedings. Furthermore, to consolidate the proceedings will tend to expedite the final disposition of the action. It is believed that consolidation can be usefully availed of in many cases.

The subdivision further provides that even when consolidation is not ordered, evidence received in connection with an application for a preliminary injunction which would be admissible on the trial on the merits forms part of the trial record. This evidence need not be repeated on the trial. On the other hand, repetition is not altogether prohibited. That would be impractical and unwise. For example, a witness testifying comprehensively on the trial who has previously testified upon the application for a preliminary injunction might sometimes be hamstrung in telling his story if he could not go over some part of his

prior testimony to connect it with his present testimony. So also, some repetition of testimony may be called for where the trial is conducted by a judge who did not hear the application for the preliminary injunction. In general, however, repetition can be avoided with an increase of efficiency in the conduct of the case and without any distortion of the presentation of evidence by the parties.

Since an application for a preliminary injunction may be made in an action in which, with respect to all or part of the merits, there is a right to trial by jury, it is appropriate to add the caution appearing in the last sentence of the subdivision. In such a case the jury will have to hear all the evidence bearing on its verdict, even if some part of the evidence has already been heard by the judge alone on the application for the preliminary injunction.

The subdivision is believed to reflect the substance of the best current practice and introduces no novel conception.

Subdivision (b). In view of the possibly drastic consequences of a temporary restraining order, the opposition should be heard, if feasible, before the order is granted. Many judges have properly insisted that, when time does not permit of formal notice of the application to the adverse party, some expedient, such as telephonic notice to the attorney for the adverse party, be resorted to if this can reasonably be done. On occasion, however, temporary restraining orders have been issued without any notice when it was feasible for some fair, although informal, notice to be given. See the emphatic criticisms in Pennsylvania Rd. Co. v. Transport Workers Union, 278 F.2d 693, 694 (3d Cir. 1960); Arvida Corp. v. Sugarman, 259 F.2d 428, 429 (2d Cir. 1958); Lummus Co. v. Commonwealth Oil Ref. Co., Inc., 297 F.2d 80, 83 (2d Cir. 1961), cert. denied, 368 U.S. 986 (1962).

Heretofore the first sentence of subdivision (b), in referring to a notice "served" on the "adverse party" on which a "hearing" could be held, perhaps invited the interpretation that the order might be granted without notice if the circumstances did not permit of a formal hearing on the basis of a formal notice. The subdivision is amended to make it plain that informal notice, which may be communicated to the attorney rather than the adverse party, is to be preferred to no notice at all.

Before notice can be dispensed with, the applicant's counsel must give his certificate as to any efforts made to give notice and the reasons why notice should not be required. This certificate is in addition to the requirement of an affidavit or verified complaint setting forth the facts as to the irreparable injury which would result before the opposition could be heard.

The amended subdivision continues to recognize that a temporary restraining order may be issued without any notice when the circumstances warrant.

Subdivision (c). Rules 65 and 73 contain substantially identical provisions for summary proceedings against sureties on bonds required or permitted by the rules. There is fragmentary coverage of the same subject in the Admiralty Rules. Clearly, a single comprehensive rule is required, and is proposed as Rule 65.1.

Rule 65.1. [New] Security: Proceedings  
Against Sureties

Whenever these rules, including the Supplemental Rules for Certain Admiralty and Maritime Claims, require or permit the giving of security by a party, and security is given in the form of a bond or stipulation or other undertaking with one or more sureties, each surety submits himself to the jurisdiction of the court and irrevocably appoints the clerk of the court as his agent upon whom any papers affecting his liability on the bond or



undertaking may be served. His liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as the court prescribes may be served on the clerk of the court, who shall forthwith mail copies to the sureties if their addresses are known.

Advisory Committee's Note

See Note to Rule 65(c).

Rule 68. Offer of Judgment

At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability.

Advisory Committee's Note

This logical extension of the concept of offer of judgment is suggested by the common admiralty practice of determining liability before the amount of liability is determined.

Rule 73. Appeal to a Court of Appeals.

(a) WHEN AND HOW AND WHEN TAKEN. ~~When an~~ appeal ~~is~~ permitted by law from a district court to a court of appeals ~~the time within which an appeal may be taken shall be taken by filing a notice of appeal with the district court within 30 days from the entry of the judgment appealed from unless a shorter time is provided by law, except that: (1) in any action in which the United States or an officer or agency thereof is a party, the time as to all parties shall be notice of appeal may be filed by any party within 60 days from such entry; (2) and except that upon a showing of excusable neglect based on a failure of a party to learn of the entry of the judgment the district court in any action may extend the time for filing the notice of appeal not exceeding 30 days from the expiration of the original time herein prescribed; (3) if a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days of the date on which the first notice of appeal was filed, or within the time otherwise herein prescribed, whichever period last expires; (4) an appeal by permission of a court of appeals obtained under 28 U.S.C. § 1292(b) shall be taken in accordance with the rules of the court of appeals. The running of the time for appeal is terminated as to all parties by a timely motion made by any party pursuant to any of the rules hereinafter enumerated, and the full time for appeal fixed in this subdivision commences to run and is to be computed from the entry of any of the following orders made upon a timely motion under such rules: granting or denying a motion for judgment under Rule 50(b); or granting or denying a motion under Rule 52(b) to amend or make additional findings of~~

fact, whether or not an alteration of the judgment would be required if the motion is granted; or granting or denying a motion under Rule 59 to alter or amend the judgment; or denying a motion for a new trial under Rule 59.

A party may appeal from a judgment by filing with the district court a notice of appeal. Failure of the an appellant to take any of the further steps to secure the review of the judgment appealed from other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such remedies as are specified in this rule or; when no remedy is specified; for such action as the appellate court of appeals deems appropriate, which may include dismissal of the appeal. If an appeal has not been docketed, the parties, with the approval of the district court, may dismiss the appeal by stipulation, filed in that court, or that court may dismiss the appeal upon motion and notice by the appellant.

(b) NOTICE OF APPEAL. The notice of appeal shall specify the parties taking the appeal; shall designate the judgment or part thereof appealed from; and shall name the court to which the appeal is taken. Notification of The clerk shall serve notice of the filing of the notice of appeal shall be given by the clerk by mailing copies thereof to all the parties to the judgment other than the party or parties taking the appeal; but his failure so to do does not affect the validity of the appeal. The notification to a party shall be given by mailing a copy of the notice of appeal thereof to his the attorney of record of each party other than the appellant, or, if the a party is not represented by an attorney, then to the party at his last known address, but his failure to do so does not affect the validity of the appeal, and such notification is sufficient notwithstanding the death of the party or of his attorney prior to the giving of the notification. The clerk shall note on each copy thus served the date on which the notice of appeal was

filed, and shall note in the civil docket the names of the parties to whom he mails the copies, with date of mailing.

(c) BOND ON APPEAL. Unless an ~~party~~ appellant is exempted by law, or has filed a supersedeas bond or other undertaking which includes security for the payment of costs on appeal, he shall file a bond for such costs on appeal shall be filed or deposit equivalent security therefor with the notice of appeal, but security shall not be required of an appellant who is not subject to costs. The bond or equivalent security shall be in the sum of two hundred and fifty dollars, unless the court fixes a different amount, or unless a supersedeas bond is filed, in which event no separate bond on appeal is required. The bond on appeal shall have sufficient surety and shall be conditioned to secure the payment of costs if the appeal is dismissed or the judgment affirmed, or of such costs as the ~~appellate~~ court of appeals may award if the judgment is modified. If a bond on appeal or equivalent security in the sum of two hundred and fifty dollars is given, no approval thereof is necessary. After a bond on appeal is filed an appellee may raise objections to the form of the bond or to the sufficiency of the surety for determination by the clerk.

(d) SUPERSEDEAS BOND. Whenever an appellant entitled thereto desires a stay on appeal, he may present to the court for its approval a supersedeas bond which shall have such surety or sureties as the court requires. The bond shall be conditioned for the satisfaction of the judgment in full together with costs, interest, and damages for delay, if for any reason the appeal is dismissed or if the judgment is affirmed, and to satisfy in full such modification of the judgment and such costs, interest, and damages as the appellate court may adjudge and award. When the judgment is for the recovery of money not otherwise secured, the amount of the bond shall be fixed at such sum

as will cover the whole amount of the judgment remaining unsatisfied, costs on the appeal, interest, and damages for delay, unless the court after notice and hearing and for good cause shown fixes a different amount or orders security other than the bond. When the judgment determines the disposition of the property in controversy as in real actions, replevin, and actions to foreclose mortgages or when such property is in the custody of the marshal or when the proceeds of such property or a bond for its value is in the custody or control of the court, the amount of the supersedeas bond shall be fixed at such sum only as will secure the amount recovered for the use and detention of the property, the costs of the action, costs on appeal, interest, and damages for delay. A separate supersedeas bond need not be given, unless otherwise ordered, when the appellant had already filed in the district court security including the event of appeal, except for the difference in amount, if any.

(f) JUDGMENTS AGAINST SURETY. By entering into an appeal or supersedeas bond given pursuant to subdivisions (c) and (d) of this rule, the surety submits himself to the jurisdiction of the court and irrevocably appoints the clerk of the court as his agent upon whom any papers affecting his liability on the bond may be served. His liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as the court prescribes may be served on the clerk of the court who shall forthwith mail copies to the surety if his address is known. The provisions of Rule 65.1 apply to a surety upon an appeal or supersedeas bond given pursuant to subdivisions (c) and (d) of this rule.

(g) DOCKETING AND THE APPEAL; FILING OF THE RECORD ON APPEAL. The appellant shall cause the record on appeal as provided for in Rules 75 and 76 shall to be filed with the appellate court of appeals and the appeal shall to be docketed there within 40 days from the date of filing the notice of appeals. The record will be filed and the appeal docketed upon receipt by the clerk of the court of appeals, within the 40 days herein provided or within such shorter or longer period as the court may prescribe, of the record on appeal and, unless the appellant is authorized to proceed without prepayment of fees, of the docket fee fixed by the Judicial Conference of the United States.

except that ~~w~~When more than one appeal is taken from the same judgment to the same appellate court of appeals, the district court may prescribe the time for filing and docketing, which in no event shall be less than 40 days from the date of filing the first notice of appeal. In all cases the district court ~~in its discretion and with or without motion or notice~~ may extend the time for filing the record on appeal and docketing the appeal if its order for extension is made before the expiration of the upon motion of an appellant made within the period for filing and docketing as originally prescribed or as extended by a previous order; or upon its own motion by order entered within such period; but the district court shall not extend the time to a day more than 90 days from the date of filing the first notice of appeal. The motion of an appellant for an extension shall show that his inability to effect timely filing and docketing is due to causes beyond his control or to circumstances which may be deemed excusable neglect. The district court or the court of appeals may require the record to be filed and the appeal to be docketed at any time within the time otherwise provided or fixed.

(h) INTERLOCUTORY APPEALS IN ADMIRALTY AND MARITIME CASES. These rules do not affect the appealability of interlocutory judgments in admiralty cases pursuant to Title 28, U.S.C., § 1292(a)(3). The reference in that statute to admiralty cases shall be construed to mean admiralty and maritime claims within the meaning of Rule 9(h).

Advisory Committee's Note

Subdivision (a). The exceptions numbered (2) and (3) in the first sentence effect significant changes in the present rule on the time for appeal.

The rule presently authorizes the district court to extend the time for appeal for a period not to exceed 30 days from the expiration of the time

otherwise prescribed "upon a showing of excusable neglect based upon a failure of a party to learn of the entry of the judgment. . . ." The exception numbered (2) eliminates the phrase "based upon a failure of a party to learn of the entry of the judgment" and thus empowers the district court to extend the time upon a showing of excusable neglect of any kind. In view of the ease with which an appeal may be perfected, no reason other than failure to learn of the entry of judgment should ordinarily excuse a party from the requirement that the notice be timely filed. But the district court should have authority to permit the notice to be filed out of time in extraordinary cases where injustice would otherwise result.

The exception numbered (3) in the first sentence affords additional time for appeal to all parties other than an initial appellant whenever the first appeal taken from a judgment is taken within the 14 days preceding expiration of the time for appeal. Additional time for appeals by other parties following an initial appeal taken shortly before expiration of the time for appeal is common in state practice. Rules of Civil Procedure for the Superior Courts of Arizona, Rule 73(b); Illinois Supreme Court Rule 35 (S.H.A. Chapter 110, § 101.35); New Jersey Revised Rules 1:3-2; New York Civil Practice Law and Rules, Sec. 5513(b). The added time which may be made available by the operation of the provision is not restricted to cross appeals in the technical sense, i.e., to appeals by parties made appellees by the nature of the initial appeal. The exception permits any party to the action who is entitled to appeal within the time ordinarily prescribed to appeal within such added time as the sentence affords. Bertman v. J. A. Kirch Co., 377 U.S. 995 (1964), Schildhaus v. Moe, 335 F.2d 529 (2d Cir. 1964) and Whitehead v. American Security and Trust Co., 285 F.2d 282 (D.C.Cir. 1960) are illustrative of the desirability of a change in the present rule.

The exception numbered (4) in the first sentence results from the Interlocutory Appeals Act of 1958, 28 U.S.C. § 1292(b). An appeal under the Act is "(a)n appeal permitted by law", although it may be taken only by permission of the court of appeals. The Act requires that an application for permission to appeal must be made to the court of appeals within 10 days after entry of the order in the district court.

Exception (4) in no way affects that requirement. It provides only that, following the grant of permission by the court of appeals, subsequent procedure, including the time for filing the notice of appeal, if a notice of appeal is required, is governed by the rules of the court of appeals to which the appeal is to be taken.

The clause "unless a shorter time is provided by law" is deleted from the first sentence for the reasons assigned in the Note accompanying the proposed amendment to Rule 81(a)(3).

The addition of the phrases "as to all parties" and "by any part" to the second sentence of the first paragraph incorporates the result reached in Polara v. Trans World Airlines, Inc., 284 F.2d 34 (2d Cir. 1960), Phinney v. Houston Oil Field Material Company, Inc., 252 F. 2d 360 (5th Cir. 1958) and Atlantic Coast Line RR Co. v. Shields, 220 F. 2d 242 (5th Cir. 1955). Cf. Continental Casualty Company v. United States for use of Schaefer, 167 F. 2d 107 (9th Cir. 1948).

Other changes made in subdivision (a) are in the interest of added directness and clarity.

Subdivision (b). The requirement that the clerk note the date of filing on copies of the notice of appeal to be served on the parties is for the convenience of counsel. Other changes are merely clarifying.

Subdivision (c). The additions to the first sentence permit the deposit of security other than a bond and eliminate the requirement of security in cases in which the appellant has already given security covering the total cost of litigation at an earlier stage in the proceeding (a common occurrence in admiralty cases) and in cases in which an appellant, though not exempted by law, is nevertheless not subject to costs under the rules of the courts of appeals.

Subdivision (d). The added sentence reflects a practice common in distinctively maritime proceedings.

Subdivision (f). See Note to Rule 65, supra.



Subdivision (g). The amendments clarify the appellant's duties in connection with filing the record and docketing the appeal: he must insure that the record is transmitted within whatever time is allowed for its filing, and he must pay the docket fee, unless he is exempt from its payment. The change in the present final sentence and the addition of a new sentence oblige the appellant to show cause for the grant of an extension of the time for filing and docketing, permit the district court to grant such an extension as long as the application therefor is made before the expiration of the time originally prescribed or an extension thereof, and authorize both the district court and the court of appeals to shorten the time otherwise allowed or fixed for filing and docketing.

Subdivision (h). See Note to Rule 9(h), supra.

Rule 74. ~~Joint or Several Appeals to the Supreme Court or to a Court of Appeals; Summons and Severance Abolished~~

Parties interested jointly, severally, or otherwise in a judgment may join in an appeal therefrom; or, without summons and severance, anyone or more of them may appeal separately or any two or more of them may join in an appeal. If two or more persons are entitled to appeal from a judgment or order and their interests are such as to make joinder practicable, they may file a joint notice of appeal, or may join in appeal after filing separate notices of appeal, and they may thereafter proceed on appeal as a single appellant.

Advisory Committee's Note

The changes are clarifying. The former practice of summons and severance is now sufficiently obsolete as not to require pointed abolition.

Rule 75. Record on Appeal to a Court of Appeals\*

(a) COMPOSITION OF THE RECORD ON APPEAL. The original papers and exhibits filed in the district court, the transcript of proceedings, if any, and a certified copy of the docket entries prepared by the clerk of the district court shall constitute the record on appeal in all cases. The parties may agree by written stipulation filed in the district court that designated parts of the record need not be transmitted to the court of appeals, in which event the parts shall be retained in the district court unless thereafter the court of appeals shall order or any party shall request their transmission, but the parts thus designated shall nevertheless be a part of the record on appeal for all purposes.

(b) THE TRANSCRIPT OF PROCEEDINGS; DUTY OF APPELLANT TO ORDER; NOTICE TO APPELLEE IF PARTIAL TRANSCRIPT IS ORDERED. Within 10 days after filing the notice of appeal the appellant shall order from the reporter a transcript of such parts of the proceedings not already on file as he deems necessary for inclusion in the record. Unless the entire transcript is to be included, the appellant shall, within the time above provided, file and serve on the appellee a description of the parts of the transcript which he intends to include in the record and a statement of the issues he intends to present on the appeal. If an appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or contrary to the evidence, he shall include in the record a transcript of all evidence relevant to such finding or conclusion. If the appellee deems a transcript of other parts of the proceedings to be necessary he shall, within 10 days after the service of the statement of the issues by the appellant, order such parts from the reporter or procure an order from the district court requiring the appellant to do so. At the time of ordering, a party must make satisfactory arrangements with the reporter for payment of the cost of the transcript.

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\* The text which follows completely supersedes the present Rule 75.

(c) STATEMENT OF THE EVIDENCE OR PROCEEDINGS WHEN NO REPORT WAS MADE OR WHEN THE TRANSCRIPT IS UNAVAILABLE. If no report of the evidence or proceedings at a hearing or trial was made, or if a transcript is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including his recollection. The statement shall be served on the appellee, who may serve objections or propose amendments thereto within 10 days after service. Thereupon the statement and any objections or proposed amendments shall be submitted to the district court for settlement and approval and as settled and approved shall be included by the clerk of the district court in the record on appeal.

(d) CORRECTION OR MODIFICATION OF THE RECORD. If any difference arises as to whether the record truly discloses what occurred in the district court, the difference shall be submitted to and settled by that court and the record made to conform to the truth. If anything material to either party is omitted from the record by error or accident or is misstated therein, the parties by stipulation, or the district court, either before or after the record is transmitted to the court of appeals, or the court of appeals, on proper suggestion or of its own initiative, may direct that the omission or misstatement be corrected, and if necessary that a supplemental record be certified and transmitted. All other questions as to the form and content of the record shall be presented to the court of appeals.

(e) TRANSMISSION OF THE RECORD. Within the time provided or fixed under the provisions of Rule 73(g) for filing the record and docketing the appeal, the clerk of the district court shall transmit the record to the clerk of the court of appeals. The appellant shall comply with the provisions of subdivision (b) of this rule and shall take any other action necessary to enable the clerk to assemble and transmit the record. If

more than one appeal is taken, each appellant shall comply with the provisions of subdivision (b) and of this subdivision, and a single record shall be transmitted. Documents of unusual bulk or weight and physical exhibits other than documents shall not be transmitted by the clerk unless he is directed to do so by a party or by the clerk of the court of appeals. A party must make advance arrangements with the clerks of each court for the transportation and receipt of bulky or weighty exhibits.

Upon stipulation of the parties, or by order of the district court at the request of any party, the clerk shall retain the record for use by the parties in preparing appellate papers. In that event, the appellant shall cause the record to be filed and the appeal to be docketed in the court of appeals within the time provided or fixed under the provisions of Rule 73(g) by presenting to the clerk of the court of appeals a partial record in the form of a copy of the docket entries, accompanied by a certificate of counsel for the appellant, or of the appellant if he is without counsel, reciting that the record, including the transcript or parts thereof designated for inclusion and all necessary exhibits, is complete for purposes of the appeal. Upon receipt of the brief of the appellee, or at such earlier time as the parties may agree, or as the court may order, the appellant shall request the clerk of the district court to transmit the record.

(f) RETENTION OF THE RECORD IN THE DISTRICT COURT BY ORDER OF COURT. The court of appeals may provide by rule or order that a certified copy of the docket entries shall be transmitted in lieu of the record, subject to the right of any party to request at any time during the pendency of the appeal that designated parts of the record be transmitted. If the record is required in the district court for use there pending the appeal, the district court may make an order to that effect, and the clerk shall retain the record and shall transmit a copy of the order and of the docket entries together with such

parts of the record as the district court shall allow and copies of such parts as the parties may designate. If the record is retained in the district court by order of either court, the clerk shall retain it subject to the order of the court of appeals, and transmission of the copy of the docket entries shall constitute transmission of the record.

(g) RECORD FOR PRELIMINARY HEARING IN THE COURT OF APPEALS. If prior to the time the record is transmitted a party desires to make in the court of appeals a motion for dismissal, for admission to bail, for a stay pending appeal, for additional security on the bond on appeal or on a supersedeas bond, or for any intermediate order, the clerk at the request of any party shall transmit to the court of appeals such parts of the original record as the parties shall designate.

(h) RETURN OF THE RECORD TO THE DISTRICT COURT. After an appeal has been disposed of, the original papers comprising the record on appeal shall be returned to the custody of the district court.

#### Advisory Committee's Note

General Note. Since 1962 all courts of appeals have provided for the use of the original trial court record as the official record on appeal in the place of a certified record consisting of copies of the parts of the original record designated by the parties. The provisions of present rules 75(a)-(g), (i), (k) and (m), which regulate the former designation-copy method of preparing the record on appeal, are now obsolete. Rule 75(1) no longer describes the practice in a majority of the courts of appeals. These subdivisions have been eliminated. The new rule builds upon the provisions of Rule 75(o), which regulates the procedure in those courts of appeals--now all eleven--which provide for the use of the original trial record as the record on appeal.

Subdivision (b). The appellant is required to serve a statement of the issues which he intends to present on appeal if only a part of the proceedings is transcribed solely to allow the appellee to determine whether the partial transcript will be adequate for the determination of those issues. Such a statement is not the equivalent of an assignment of errors, which was specifically declared to be unnecessary by the terms of former rule 75(d) (the former provision dispensing with the assignment of errors is omitted from the proposed rule only because the requirement of an assignment is deemed sufficiently obsolete as not to require pointed abolition), and the statement should not result in limiting the issues on appeal. The precise statement of the issues presented by the appeal is to be made in the brief. An appellee who can show that he was misled by the statement required by this subdivision and in consequence failed to designate for transcription material parts of the reported proceedings may seek relief under subdivision (d) of this rule. Similar relief should be available to an appellant with respect to parts of the transcript made material by matter presented in the appellee's brief.

Subdivision (c). This is present rule 75(n), with the addition of "or if a transcript is unavailable" to permit use of a court approved statement in cases where a report was made but cannot be transcribed.

Subdivision (d). This is present rule 75(h) with minor changes. The practice of having the district court approve the record is now sufficiently obsolete as not to require pointed abolition.

Subdivision (e). The second paragraph permits retention of the record in the district court for the convenience of counsel in preparation of appellate papers. While the record itself is not ordinarily needed in the court of appeals in advance of the hearing of the case, it is nonetheless necessary that the record be completed within 40 days of the filing of the notice of appeal or within such extension of that period as the appellant may for cause shown secure, in order to avoid delay in the preparation

of the briefs. It is for that reason that the rule requires that the record, in the form of a copy of the docket entries and of a certificate of completeness, be filed and the appeal be docketed notwithstanding retention of the record in the district court.

Rule 81. Applicability in General

(a) TO WHAT PROCEEDINGS APPLICABLE.

(1) These rules do not apply to prize proceedings in admiralty governed by Title 10, U.S.C., §§ 7651-81. They do not apply to proceedings in bankruptcy or proceedings in copyright under Title 17, U.S.C., except in so far as they may be made applicable thereto by rules promulgated by the Supreme Court of the United States. They do not apply to probate, adoption, or lunacy mental health proceedings in the United States District Court for the District of Columbia except to appeals therein.

(2) In the following proceedings appeals are governed by these rules, but they are not applicable otherwise than on appeal except to the extent that the practice in such proceedings is not set forth in statutes of the United States and has heretofore conformed to the practice in actions at law or suits in equity: admission to citizenship, habeas corpus, and quo warranto,; and forfeiture of property for violation of a statute of the United States: The requirements of Title 28, U.S.C., § 2253, relating to certification of probable cause in certain appeals in habeas corpus cases remain in force.

(3) In proceedings under Title 9, U.S.C. relating to arbitration, or under the Act of May 20, 1926, ch. 347, § 9 (44 Stat. 585), U.S.C., Title 45, § 159, relating to boards of arbitration of railway labor disputes, these rules apply ~~to appeals, but~~ otherwise only to the extent that matters of procedure are not provided for in those statutes. These rules apply (1) to proceedings to compel the giving of testimony or production of documents in accordance with a subpoena issued by an officer or agency of the United States under any statute of the United States except as otherwise provided by statute or by rules of the

district court or by order of the court in the proceedings, and (2) to appeals in such proceedings.

Advisory Committee's Note

See Note to Rule 1, supra.

Statutory proceedings to forfeit property for violation of the laws of the United States, now governed by the admiralty rules, should be governed by the unified and supplemental rules. See Supplemental Rule A.

Upon the recommendation of the judges of the United States District Court for the District of Columbia, it is proposed that the Federal Rules of Civil Procedure be made applicable to probate proceedings in that court. The exception with regard to adoption proceedings is removed because the court no longer has jurisdiction of those matters; and the words "mental health" are substituted for "lunacy" to conform to the current characterization in the District.

The purpose of the amendment to paragraph (3) is to permit the deletion from Rule 73(a) of the clause "unless a shorter time is provided by law." The 10 day period fixed for an appeal under 45 U.S.C. § 159 is the only instance of a shorter time provided for appeals in civil cases. Apart from the unsettling effect of the clause, it ought to be eliminated in unified civil-admiralty rules because its retention would preserve the 15 day period now allowed by 28 U.S.C. § 2107 for appeals from interlocutory decrees in admiralty, which is contrary to the recommendation of the Advisory Committee on Admiralty Rules that the time for appeals in civil and admiralty cases be made uniform under unified rules.

The amendment makes no change in present law. The unique statutory provisions respecting appeals in 45 U.S.C. § 159 cases (an appeal is to be taken within 10 days after the decision and before the entry of judgment) are now in effect by virtue of the aforementioned unless clause of Rule 73(a), unless the time for appeal fixed by 45 U.S.C. § 159



was repealed by the enactment of 28 U.S.C. § 2107 in 1948. See 7 Moore's Federal Practice, para. 73.09[2] (2d ed. F), 1955. Neither present Rule 73(a) nor this amendment takes a side in that argument. The amendment has no effect on proceedings under Title 9, U.S.C., because the provisions of that title do not regulate matters of appellate procedure.

## Rule 82. Jurisdiction and Venue Unaffected

These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein. An admiralty or maritime claim within the meaning of Rule 9(h) shall not be treated as a civil action for the purposes of Title 28, U.S.C., §§ 1391-93.

### Advisory Committee's Note

Title 28, U.S.C., § 1391(b) provides: "A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, except as otherwise provided by law." This provision cannot appropriately be applied to what are now suits in admiralty. The rationale of decisions holding it inapplicable rests largely on the use of the term "civil action": i.e., a suit in admiralty is not a "civil action" within the statute. It is proposed, however, that Rule 2 will convert suits in admiralty into civil actions. The added sentence is necessary to avoid an undesirable change in existing law.

## Form 2. Allegation of Jurisdiction

(a) Jurisdiction founded on diversity of citizenship and amount.

Plaintiff is a [ citizen of the State of Connecticut] <sup>1</sup> [ corporation incorporated under the laws of the State of Connecticut having its

principal place of business in the State of Connecticut] and defendant is a corporation incorporated under the laws of the State of New York having its principal place of business in a State other than the State of Connecticut. The matter in controversy exceeds, exclusive of interest and costs, the sum of ten thousand dollars.

(b) Jurisdiction founded on the existence of a Federal question and amount in controversy.

The action arises under [the Constitution of the United States, Article \_\_\_\_, Section \_\_\_\_]; [the \_\_\_\_ Amendment to the Constitution of the United States, Section \_\_\_\_]; [the Act of \_\_\_\_, \_\_ Stat. \_\_\_\_; U.S.C., Title \_\_\_\_, § \_\_\_\_]; [the Treaty of the United States (here describe the treaty)],<sup>2</sup> as hereinafter more fully appears. The matter in controversy exceeds, exclusive of interest and costs, the sum of ten thousand dollars.

(c) Jurisdiction founded on the existence of a question arising under particular statutes.

The action arises under the Act of \_\_\_\_, \_\_ Stat. \_\_\_\_; U.S.C., Title \_\_\_\_, § \_\_\_\_, as hereinafter more fully appears.

(d) Jurisdiction founded on the admiralty or maritime character of the claim.

This is a case of admiralty and maritime jurisdiction, as hereinafter more fully appears. [If the pleader wishes to invoke the distinctively maritime procedures referred to in Rule 9(h), add the following or its substantial equivalent: This is an admiralty or maritime claim within the meaning of Rule 9(h).]

1. Form for natural person.
2. Use the appropriate phrase or phrases. The general allegation of the existence of a Federal question is ineffective unless the matters constituting the claim for relief as set forth in the complaint raise a Federal question.

### Advisory Committee's Note

Since the Civil Rules have not heretofore been applicable to proceedings in Admiralty (Rule 81(a)(1)), Form 2 naturally has not contained a provision for invoking the admiralty jurisdiction. The form has never purported to be comprehensive, as making provision for all possible grounds of jurisdiction; but a provision for invoking the admiralty jurisdiction is particularly appropriate as an incident of unification.

Certain distinctive features of the admiralty practice must be preserved in unification, just as certain distinctive characteristics of equity were preserved in the merger of law and equity in 1938. Rule 9(h) provides the device whereby, after unification, with its abolition of the distinction between civil actions and suits in admiralty, the pleader may indicate his choice of the distinctively maritime procedures, and designates those features that are preserved. This form illustrates an appropriate way in which the pleader may invoke those procedures. Use of this device is not necessary if the claim is cognizable only by virtue of the admiralty and maritime jurisdiction, nor if the claim is within the exclusive admiralty jurisdiction of the district court.

Omission of a statement such as this from the pleading indicates the pleader's choice that the action proceed as a conventional civil action, if that is jurisdictionally possible, without the distinctive maritime remedies and procedures. It should be remembered, however, that Rule 9(h) provides that a pleading may be amended to add or withdraw such an identifying statement subject to the principles stated in Rule 15.

#### Form 15. Complaint for Damages Under Merchant Marine Act

1. Allegation of jurisdiction. [If the pleader wishes to invoke the distinctively maritime procedures referred to in Rule 9(h), add the following or its substantial equivalent: This is an admiralty or maritime claim within the meaning of Rule 9(h).]

2. During all the times herein mentioned defendant was the owner of the steamship \_\_\_\_\_ and used it in the transportation of freight for hire by water in interstate and foreign commerce.

3. During the first part of (month and year) at \_\_\_\_\_ plaintiff entered the employ of defendant as an able seaman on said steamship under seamen's articles of customary form for a voyage from \_\_\_\_\_ ports to the Orient and return at a wage of \_\_\_\_\_ dollars per month and found, which is equal to a wage of \_\_\_\_\_ dollars per month as a shore worker.

4. On June 1, 1936, said steamship was about \_\_\_\_\_ days out of the port of \_\_\_\_\_ and was being navigated by the master and crew on the return voyage to \_\_\_\_\_ ports. (Here describe weather conditions and the condition of the ship and state as in an ordinary complaint for personal injuries the negligent conduct of defendant.)

5. By reason of defendant's negligence in thus (brief statement of defendant's negligent conduct) and the unseaworthiness of said steamship, plaintiff was (here describe plaintiff's injuries).

6. Prior to these injuries, plaintiff was a strong, able-bodied man, capable of earning and actually earning \_\_\_\_\_ dollars per day. By these injuries he has been made incapable of any gainful activity; has suffered great physical and mental pain, and has incurred expense in the amount of \_\_\_\_\_ dollars for medicine, medical attendance, and hospitalization.

7. Plaintiff elects to maintain this action under the provisions of section 33 of the act of June 5, 1920; ch. 250; 41 Stat. 1007.

Wherefore plaintiff demands judgment against defendant in the sum of \_\_\_\_\_ dollars and costs.

Advisory Committee's Note.

See Advisory Committee's Note to Form 2.

PROPOSED SUPPLEMENTAL RULES FOR CERTAIN ADMIRALTY  
AND MARITIME CLAIMS

Rule A. Scope of Rules

These Supplemental Rules apply to the procedure in admiralty and maritime claims within the meaning of Rule 9(h) with respect to the following remedies:

- (1) Maritime attachment and garnishment;
- (2) Actions in rem;
- (3) Possessory, petitory, and partition actions;
- (4) Actions for exoneration from or limitation of liability.

These rules also apply to the procedure in statutory condemnation proceedings analogous to maritime actions in rem, whether within the admiralty and maritime jurisdiction or not. Except as otherwise provided, references in these Supplemental Rules to actions in rem include such analogous statutory condemnation proceedings.

The general Rules of Civil Procedure for the United States District Courts are also applicable to the foregoing proceedings except to the extent that they are inconsistent with these Supplemental Rules.

Advisory Committee's Note

Certain distinctively maritime remedies must be preserved in unified rules. The commencement of an action by attachment or garnishment has heretofore been practically unknown in federal jurisprudence except in admiralty, although the amendment of Rule 4(e) effective July 1, 1963, makes available that procedure in accordance with state law. The maritime proceeding in rem is unique, except as it has been emulated by statute, and is closely related to the substantive maritime law relating to liens. Arrest of the vessel or other maritime property is an historic remedy in controversies over title or right to possession, and in disputes among co-owners over the vessel's employment. The statutory right to

limit liability is limited to owners of vessels, and has its own complexities. While the unified federal rules are generally applicable to these distinctive proceedings, certain special rules dealing with them are needed.

Arrest of the person and imprisonment for debt are not included because these remedies are not peculiarly maritime. The practice is not uniform but conforms to state law. See 2 Benedict § 286; 28 U.S.C., § 2007; FRCP 64, 69. The relevant provisions of Admiralty Rules 2, 3 and 4 are unnecessary or obsolete.

No attempt is here made to compile a complete and self-contained code governing these distinctively maritime remedies. The more limited objective is to carry forward the relevant provisions of the Rules of Practice for Admiralty and Maritime Cases, modernized and revised to some extent but still in the context of history and precedent. Accordingly, these Rules are not to be construed as limiting or impairing the traditional power of a district court, exercising the admiralty and maritime jurisdiction, to adapt its procedures and its remedies in the individual case, consistently with these rules, to secure the just, speedy, and inexpensive determination of every action. (See Swift & Co. Packers v. Compania Columbiana Del Caribe, S/A, 339 U.S. 684 (1950); Rule 1). In addition, of course, the district courts retain the power to make local rules not inconsistent with these rules. See Rule 83; cf. Admiralty Rule 44.

Rule B. Attachment and Garnishment:  
Special Provisions

(1) WHEN AVAILABLE; COMPLAINT, AFFIDAVIT, AND PROCESS.  
With respect to any admiralty or maritime claim in personam a verified complaint may contain a prayer for process to attach the defendant's goods and chattels, or credits and effects in the hands of garnishees named in the complaint to the amount sued for, if the defendant shall not be found within the district.  
Such a complaint shall be accompanied by an affidavit

signed by the plaintiff or his attorney that, to the affiant's knowledge, or to the best of his information and belief, the defendant cannot be found within the district. When a verified complaint is supported by such an affidavit the clerk shall forthwith issue a summons and process of attachment and garnishment. In addition, or in the alternative, the plaintiff may, pursuant to Rule 4(e), invoke the remedies provided by state law for attachment and garnishment or similar seizure of the defendant's property. Except for Rule E(8) these Supplemental Rules do not apply to state remedies so invoked.

#### Advisory Committee's Note

This preserves the traditional maritime remedy of attachment and garnishment, and carries forward the relevant substance of Admiralty Rule 2. In addition, or in the alternative, provision is made for the use of similar state remedies made available by the amendment of Rule 4(e) effective July 1, 1963. *On the effect of appearance to defend against attachment see Rule E(8).*

The draft follows closely the language of Admiralty Rule 2. No change is made with respect to the property subject to attachment. No change is made in the condition that makes the remedy available. The rules have never defined the clause, "if the defendant shall not be found within the district," and no definition is attempted here. The subject seems one best left for the time being to development on a case-by-case basis. The proposal does shift from the marshal (on whom it now rests in theory) to the plaintiff the burden of establishing that the defendant cannot be found in the district.

A change in the context of the practice is brought about by Rule 4(f), which will enable summons to be served throughout the state instead of, as heretofore, only within the district. The Advisory Committee has considered whether the rule on attachment and garnishment should be correspondingly changed to permit those remedies only when the defendant cannot be found within the state. It has concluded that the remedy should not be so limited.

The effect is to enlarge the class of cases in which the plaintiff may proceed by attachment or garnishment although jurisdiction of the person of the defendant may be independently obtained. This is possible at the present time where, for example, a corporate defendant has appointed an agent within the district to accept service of process but is not carrying on activities there sufficient to subject it to jurisdiction (Seawind Compania, S.A. v. Crescent Line, Inc., 320 F. 2d 580 (2d Cir. 1963)), or where, though the foreign corporation's activities in the district are sufficient to subject it personally to the jurisdiction, there is in the district no officer on whom process can be served (United States v. Cia. Naviera Continental, S.A., 178 F. Supp. 561 (S.D.N.Y. 1959)).

Process of attachment or garnishment will be limited to the district. See Rule E(3)(a).

(2) NOTICE TO DEFENDANT. No judgment by default shall be entered except upon proof, which may be by affidavit, (a) that the plaintiff or the garnishee has given notice of the action to the defendant by mailing to him a copy of the complaint, summons, and process of attachment or garnishment, using any form of mail requiring a return receipt, or (b) that the complaint, summons, and process of attachment or garnishment have been served on the defendant in a manner authorized by Rule 4(d) or (i), or (c) that the plaintiff or the garnishee has made diligent efforts to give notice of the action to the defendant and has been unable to do so.

#### Advisory Committee's Note

The Admiralty Rules do not provide for notice to the defendant in attachment and garnishment proceedings. None is required by the principles of due process, since it is assumed that the garnishee or custodian of the property attached will either notify the defendant or be deprived of the right to plead the judgment as a defense in an action against him by the defendant. Harris v. Balk, 198 U.S. 215 (1905):



Pennoyer v. Neff, 95 U.S. 714 (1878). Modern conceptions of fairness, however, dictate that actual notice be given to persons known to claim an interest in the property that is the subject of the action where that is reasonably practicable. In attachment and garnishment proceedings the persons whose interests will be affected by the judgment are identified by the complaint. No substantial burden is imposed on the plaintiff by a simple requirement that he notify the defendant of the action by mail.

In the usual case the defendant is notified of the pendency of the proceedings by the garnishee or otherwise, and appears to claim the property and to make his answer. Hence notice by mail is not routinely required in all cases, but only in those in which the defendant has not appeared prior to the time when a default judgment is demanded. The draft therefore provides only that no default judgment shall be entered except upon proof of notice, or of inability to give notice despite diligent efforts to do so. Thus the burden of giving notice is further minimized.

In some cases the plaintiff may prefer to give notice by serving process in the usual way instead of simply by mail. (Rule 4(d).) In particular, if the defendant is in a foreign country the plaintiff may wish to utilize the modes of notice recently provided to facilitate compliance with foreign laws and procedures (Rule 4(i)). The draft provides for these alternatives.

The draft does not provide for notice by publication because there is no problem concerning unknown claimants, and publication has little utility in proportion to its expense where the identity of the defendant is known.

(3) ANSWER.

(a) By Garnishee. The garnishee shall serve his answer, together with answers to any interrogatories

served with the complaint, within 20 days after service of process upon him. Interrogatories to the garnishee may be served with the complaint without leave of court. If the garnishee refuses or neglects to answer on oath as to the debts, credits, or effects of the defendant in his hands, or any interrogatories concerning such debts, credits and effects that may be propounded by the plaintiff, the court may award compulsory process against him. If he admits any debts, credits, or effects, they shall be held in his hands or paid into the registry of the court, and shall be held in either case subject to the further order of the court.

(b) By Defendant. The defendant shall serve his answer within 30 days after process has been executed, whether by attachment of property or service on the garnishee.

#### Advisory Committee's Note

Subdivision (a) incorporates the substance of Admiralty Rule 36.

The Admiralty Rules are silent as to when the garnishee and the defendant are to answer. See also 2 Benedict ch. XXIV.

The draft proceeds on the assumption that uniform and definite periods of time for responsive pleadings should be substituted for return days (see the discussion under Rule C(6), below). Twenty days seems sufficient time for the garnishee to answer (cf. FRCP 12(a)), and an additional 10 days should suffice for the defendant. When allowance is made for the time required for notice to reach the defendant this gives the defendant in attachment and garnishment approximately the same time that defendants have to answer when personally served.

Rule C. Actions in Rem: Special Provisions

(1) WHEN AVAILABLE, An action in rem may be brought:

(a) To enforce any maritime lien;

(b) Whenever a statute of the United States provides for a maritime action in rem or a proceeding analogous thereto.

Except as otherwise provided by law a party who may proceed in rem may also, or in the alternative, proceed in personam against any person who may be liable.

Statutory provisions exempting vessels or other property owned or possessed by or operated by or for the United States from arrest or seizure are not affected by this rule. When a statute so provides, an action against the United States or an instrumentality thereof may proceed on in rem principles.

Advisory Committee's Note

This rule is designed not only to preserve the proceeding in rem as it now exists in admiralty cases, but to preserve the substance of Admiralty Rules 13-18. The general reference to enforcement of any maritime lien is believed to state the existing law, and is an improvement over the enumeration in the admiralty rules, which is repetitious and incomplete (e.g., there is no reference to general average). The reference to any maritime lien is intended to include liens created by state law which are enforceable in admiralty.

The main concern of Admiralty Rules 13-18 is with the question whether certain actions may be brought in rem or also, or in the alternative, in personam. Essentially, therefore, these rules deal with questions of substantive law, for in general an action in rem may be brought to enforce any maritime

lien, and no action in personam may be brought when the substantive law imposes no personal liability.

These rules may be summarized as follows:

1. Cases in which the plaintiff may proceed in rem and/or in personam:

- a. Suits for seamen's wages;
- b. Suits by materialmen for supplies, repairs, etc.;
- c. Suits for pilotage;
- d. Suits for collision damages;
- e. Suits founded on mere maritime hypothecation;
- f. Suits for salvage.

2. Cases in which the plaintiff may proceed only in personam:

- a. Suits for assault and beating.

3. Cases in which the plaintiff may proceed only in rem:

- a. Suits on bottomry bonds.

The coverage is incomplete, since the rules omit mention of many cases in which the plaintiff may proceed in rem or in personam. The draft proceeds on the principle that it is preferable to make a general statement as to the availability of the remedies, leaving out conclusions on matters of substantive law. Clearly it is not necessary to enumerate the cases listed under Item 1, above, nor to try to complete the list.

The draft eliminates the provision of Admiralty Rule 15 that actions for assault and beating may be brought only in personam. A preliminary study fails

to disclose any reason for the rule. It is subject to so many exceptions that it is calculated to deceive rather than to inform. A seaman may sue in rem when he has been beaten by a fellow member of the crew so vicious as to render the vessel unseaworthy, The Rolph, 293 Fed. 269, aff'd 299 Fed. 52 (9th Cir. 1923), or where the theory of the action is that a beating by the master is a breach of the obligation under the shipping articles to treat the seaman with proper kindness, The David Evans, 187 Fed. 775 (D. Hawaii 1911); and a passenger may sue in rem on the theory that the assault is a breach of the contract of passage, The Western States, 159 Fed. 354 (2d Cir. 1908). To say that an action for money damages may be brought only in personam seems equivalent to saying that a maritime lien shall not exist; and that, in turn, seems equivalent to announcing a rule of substantive law rather than a rule of procedure. Dropping the rule will leave it to the courts to determine whether a lien exists as a matter of substantive law.

The specific reference to bottomry bonds is omitted because, as a matter of hornbook substantive law, there is no personal liability on such bonds.

(2) COMPLAINT. In actions in rem the complaint shall be verified on oath or solemn affirmation. It shall describe with reasonable particularity the property that is the subject of the action and state that it is within the district or will be during the pendency of the action. In actions for the enforcement of forfeitures for violation of any statute of the United States the complaint shall state the place of seizure and whether it was on land or on navigable waters, and shall contain such allegations as may be required by the statute pursuant to which the action is brought.

#### Advisory Committee's Note

This incorporates the substance of Admiralty Rules 21 and 22.

(3) PROCESS. Upon the filing of the complaint the clerk shall forthwith issue a warrant for the arrest of the vessel or other property that is the subject of the action and deliver it to the marshal for service. If the property that is the subject of the action consists in whole or in part of freight, or the proceeds of property sold, or other intangible property, the clerk shall issue a summons directing any person having control of the funds to show cause why they should not be paid into court to abide the judgment.

Advisory Committee's Note

Derived from Admiralty Rules 10 and 37. The provision that the warrant is to be issued by the clerk is new, but is assumed to state existing law.

There is remarkably little authority bearing on Rule 37, although the subject would seem to be an important one. The rule appears on its face to provide for a sort of ancillary process, and this may well be the case when tangible property, such as a vessel, is arrested, and intangible property such as freight is incidentally involved. It can easily happen, however, that the only property against which the action may be brought is intangible, as where the owner of a vessel under charter has a lien on subfreights. See 2 Benedict § 299 and cases cited. In such cases it would seem that the order to the person holding the fund is equivalent to

original process, taking the place of the warrant for arrest. That being so, it would also seem that (1) there should be some provision for notice, comparable to that given when tangible property is arrested, and (2) it should not be necessary, as Rule 37 now provides, to petition the court for issuance of the process, but that it should issue as of course. Accordingly the substance of Rule 37 is included in the rule covering ordinary process, and notice will be required by Rule C(4). Presumably the rules omit any requirement of notice in these cases because the holder of the funds (e.g., the cargo owner) would be required on general principles (cf. Harris v. Balk, 198 U.S. 215 (1905)) to notify his obligee (e.g., the charterer); but in actions in rem such notice seems plainly inadequate because there may be adverse claims to the fund (e.g., there may be liens against the subfreights for seamen's wages, etc.). Compare Admiralty Rule 9.

(4). NOTICE. No notice other than the execution of the process is required when the property that is the subject of the action has been released in accordance with Rule E(5). If the property is not released within 10 days after execution of process, the plaintiff shall promptly or within such time as may be allowed by the court cause public notice of the action and arrest to be given in a newspaper of general circulation in the district, designated by order of the court. Such notice shall specify the time within which the answer is required to be filed as provided by subdivision (6) of this Rule. This rule does not affect the requirements of notice in actions to foreclose a preferred ship mortgage pursuant to the Act of June 5, 1920, ch. 250, § 30, as amended.

Advisory Committee's Note

This carries forward the notice provision of Admiralty Rule 10, with one modification. Notice by publication is too expensive and ineffective a formality to be routinely required. When, as usually happens, the vessel or other property is released on bond or otherwise there is no point in publishing notice; the vessel is freed from the claim of the plaintiff and no other interest in the vessel can be affected by the proceedings. If, however, the vessel is not released, general notice is required in order that all persons, including unknown claimants, may appear and be heard, and in order that the judgment in rem shall be binding on all the world.

(5) ANCILLARY PROCESS. In any action in rem in which process has been served as provided by this rule, if any part of the property that is the subject of the action has not been brought within the control of the court because it has been removed or sold, or because it is intangible property in the hands of a person who has not been served with process, the court may, on motion, order any person having possession or control of such property or its proceeds to show cause why it should not be delivered into the custody of the marshal or paid into court to abide the judgment; and, after hearing, the court may enter such judgment as law and justice may require.

Advisory Committee's Note

This incorporates the substance of Admiralty Rule 9.

There are remarkably few cases dealing directly with the rule. In The George Prescott, 10 Fed. Cas. 222 (No. 5,339) (E.D.N.Y. 1865), the master and crew of a vessel libeled her for wages, and other lienors also filed libels. One of the lienors suggested to the court that prior to the arrest of the vessel the master had removed the sails, and asked that he be ordered



to produce them. He admitted removing the sails and selling them, justifying on the ground that he held a mortgage on the vessel. He was ordered to pay the proceeds into court. Cf. United States v. The Zarko, 187 F. Supp. 371 (S.D. Cal. 1960), where an armature belonging to a vessel subject to a preferred ship mortgage was in possession of a repairman claiming a lien.

It is evident that, though the rule has had a limited career in the reported cases, it is a potentially important one. It is also evident that the rule is framed in terms narrower than the principle that supports it. There is no apparent reason for limiting it to ships and their appurtenances (2 Benedict § 299). Also, the reference to "third parties" in the existing rule seems unfortunate. In The George Prescott, the person who removed and sold the sails was a plaintiff in the action, and relief against him was just as necessary as if he had been a stranger.

Another situation in which process of this kind would seem to be useful is that in which the principal property that is the subject of the action is a vessel, but her pending freight is incidentally involved. The warrant of arrest, and notice of its service, should be all that is required by way of original process and notice; ancillary process without notice should suffice as to the incidental intangibles.

The distinction between Admiralty Rules 9 and 37 is not at once apparent, but seems to be this: Where the action is against property that cannot be seized by the marshal because it is intangible, the original process must be similar to that issued against a garnishee, and general notice is required (though not provided for by the present rule; cf. Advisory Committee's Note to Rule C(3)). Under Admiralty Rule 9 property has been arrested and general notice has been given, but some of the property has been removed or for some other reason cannot be arrested. Here no further notice is necessary.

The draft also makes provision for this kind of situation: The proceeding is against a vessel's pending freight only; summons has been served on the person supposedly holding the funds, and general notice has been given; it develops that another person holds all or part of the funds. Ancillary process should be available here without further notice.

(6) CLAIM AND ANSWER; INTERROGATORIES. The claimant of property that is the subject of an action in rem shall file his claim within 10 days after process has been executed, or within such additional time as may be allowed by the court, and shall serve his answer within 20 days after the filing of the claim. The claim shall be verified on oath or solemn affirmation, and shall state the interest in the property by virtue of which the claimant demands its restitution and the right to defend the action. If the claim is made on behalf of the person entitled to possession by an agent, bailee, or attorney, it shall state that he is duly authorized to make the claim. At the time of answering the claimant shall also serve answers to any interrogatories served with the complaint. In actions in rem interrogatories may be so served without leave of court.

#### Advisory Committee's Note

Adherence to the practice of return days seems unsatisfactory. The practice varies significantly from district to district. A uniform rule should be provided so that any claimant or defendant can readily determine when he is required to file or serve a claim or answer.

A virtue of the return-day practice is that it requires claimants to come forward and identify themselves at an early stage of the proceedings--before they could fairly be required to answer. The draft is designed to preserve this feature of the present practice by requiring early filing of the claim. The time schedule contemplated in the draft is closely comparable to the present practice in the Southern District of New

York, where the claimant has a minimum of 8 days to claim and three weeks thereafter to answer.

This rule also incorporates the substance of Admiralty Rule 25. The present rule's emphasis on "the true and bona fide owner" is omitted, since anyone having the right to possession can claim (2 Benedict §324).

Rule D. Possessory, Petitory, and  
Partition Actions

In all actions for possession, partition, and to try title maintainable according to the course of the admiralty practice with respect to a vessel, in all actions so maintainable with respect to the possession of cargo or other maritime property, and in all actions by one or more part owners against the others to obtain security for the return of the vessel from any voyage undertaken without their consent, or by one or more part owners against the others to obtain possession of the vessel for any voyage on giving security for its safe return, the process shall be by a warrant of arrest of the vessel, cargo, or other property, and by notice in the manner provided by Rule B(2) to the adverse party or parties.

Advisory Committee's Note

This carries forward the substance of Admiralty Rule 19.

Rule 19 provides the remedy of arrest in controversies involving title and possession in general. See The Tilton, 23 Fed. Cas. 1277 (No. 14,054) (C.C.D. Mass. 1830). In addition it provides that remedy in controversies between co-owners respecting the employment of a vessel. It does not deal comprehensively with controversies between co-owners, omit-

ting the remedy of partition. Presumably the omission is traceable to the fact that, when the rules were originally promulgated, concepts of substantive law (sometimes stated as concepts of jurisdiction) denied the remedy of partition except where the parties in disagreement were the owners of equal shares. See The Steamboat Orleans, 36 U.S. (11 Pet.) 175 (1837). The Supreme Court has now removed any doubt as to the jurisdiction of the district courts to partition a vessel, and has held in addition that no fixed principle of federal admiralty law limits the remedy to the case of equal shares. Madruga v. Superior Court, 346 U.S. 556 (1954). It is therefore appropriate to include a reference to partition in the rule.

Rule E. Actions in Rem and Quasi in Rem: General Provisions

(1) APPLICABILITY. Except as otherwise provided, this Rule applies to actions in personam with process of maritime attachment and garnishment, actions in rem, and petitory, possessory, and partition actions, supplementing Rules B, C, and D.

(2) COMPLAINT; SECURITY.

(a) COMPLAINT. In actions to which this Rule is applicable the complaint shall state the circumstances from which the claim arises with such particularity that the defendant or claimant will be able, without moving for a more definite statement, to commence an investigation of the facts and to frame a responsive pleading.

(b) SECURITY FOR COSTS. Subject to the provisions of Rule 54(d) and of relevant statutes, the court may, on the filing of the complaint or on the appearance of any defendant, claimant, or any other party, or at any later time, require the plaintiff, defendant, claimant, or other party to give security, or additional security, in such sum as the court shall direct to pay all costs and expenses that shall be awarded against him by any interlocutory order or by the final judgment, or on appeal by any appellate court.

Advisory Committee's Note

Adapted from Admiralty Rule 24. The draft is based on the assumption that there is no more need for security for costs in maritime personal actions than in civil cases generally, but that there is reason to retain the requirement for actions in which property is seized. As to proceedings for limitation of liability see Rule F(1).

(3) PROCESS.

(a) Territorial Limits of Effective Service.  
Process in rem and of maritime attachment and garnishment shall be served only within the district.

(b) Issuance and Delivery. Issuance and delivery of process in rem, or of maritime attachment and garnishment, shall be held in abeyance if the plaintiff so requests.

Advisory Committee's Note

The Advisory Committee has concluded for practical reasons that process requiring seizure of property should continue to be served only within the geographical limits of the district. Compare Rule B(1), continuing the condition that process of attachment and garnishment may be served only if the defendant is not found within the district.

The provisions of Admiralty Rule 1 concerning the persons by whom process is to be served will be superseded by FRCP 4(c).

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

(a) In General. Upon issuance and delivery of the process, or, in the case of summons with process of attachment and garnishment, when it appears that the defendant cannot be found within the district, the marshal shall forthwith execute the process in accordance with this subdivision (4), making due and prompt return.

(b) Tangible Property. If tangible property is to be attached or arrested, the marshal shall take it into his possession for safe custody. If the character or situation of the property is such that the taking of actual possession is impracticable, the marshal shall execute the process by affixing a copy thereof to the property in a conspicuous place and by leaving a copy of the complaint and process with the person having possession or his agent. In furtherance of his custody of any vessel the marshal is authorized to make a written request to the collector of customs not to grant clearance to such vessel until notified by the marshal or his deputy or by the clerk that the vessel has been released in accordance with these rules.

(c) Intangible Property. If intangible property is to be attached or arrested the marshal shall execute the process by leaving with the garnishee or other obligor a copy of the complaint and process requiring him to answer as provided in Rules B(3)(a) and C(6); or he may accept for payment into the registry of the court the amount owed to the extent of the amount claimed by the plaintiff with interest and costs, in which event the garnishee or other obligor shall not be required to answer unless alias process shall be served.

(d) Directions with Respect to Property in Custody. The marshal may at any time apply to the court for directions with respect to property that has been attached or arrested, and shall give notice of such application to any or all of the parties as the court may direct.

(e) Expenses of Seizing and Keeping Property; Deposit. These rules do not alter the provisions of Title 28, U.S.C., §1921, as amended, relative to the expenses of seizing and keeping property attached or arrested and to the requirement of deposits to cover such expenses.

Advisory Committee's Note

This rule is intended to preserve existing provisions of Admiralty Rules 10 and 36 relating to execution of process, custody of property seized by the marshal, and the marshal's return. It is also designed to supplement the existing rules by making express provision for matters not now covered.

The provision relating to clearance in subdivision (b) is suggested by Admiralty Rule 44 of the District of Maryland.

Subdivision (d) is suggested by English Rule 12, Order 75.

28 U.S.C., § 1921 as amended in 1962 contains detailed provisions relating to the expenses of seizing and preserving property attached or arrested.

(5) RELEASE OF PROPERTY.

(a) Special Bond. Except in cases of seizures for forfeiture under any law of the United States, whenever process of maritime attachment and garnishment or process in rem is issued the execution of such process shall be stayed, or the property released, on the giving of security, to be approved by the court or clerk, or by stipulation of the parties, conditioned to answer the judgment of the court or of any appellate court. The parties may stipulate the amount and nature of such security. In the event of the inability or refusal of the parties so to stipulate the court shall fix the principal sum of the bond or stipulation at an amount sufficient to cover the amount of the plaintiff's claim fairly stated with accrued interest and costs; but the principal sum shall in no event exceed (i) twice the amount of the plaintiff's claim or (ii) the value of the property on due appraisal, whichever is smaller. The bond or stipulation shall be conditioned for the payment of the principal sum and interest thereon at 6 per cent per annum.

(b) General Bond. The owner of any vessel may file a general bond or stipulation, with sufficient surety, to be approved by the court, conditioned to answer the judgment of such court in all or any actions that may be brought thereafter in such court in which the vessel is attached or arrested. Thereupon the execution of all such process against such vessel shall be stayed so long as the amount secured by such bond or stipulation is at least double the aggregate amount claimed by plaintiffs in all actions begun and pending in which such vessel has been attached or arrested. Judgments and remedies may be had on such bond or stipulation as if a special bond or stipulation had been filed in each of such actions. The district court may make necessary orders to carry this rule into effect, particularly as to the giving of proper notice of any action against or attachment of a vessel for which a general bond has been filed. Such bond or stipulation shall be indorsed by the clerk with a minute of the actions wherein process is so stayed. Further security may be required by the court at any time.

If a special bond or stipulation is given in a particular case, the liability on the general bond or stipulation shall cease as to that case.

(c) Release by Consent or Stipulation; Order of Court or Clerk; Costs. Any vessel, cargo, or other property in the custody of the marshal may be released forthwith upon his acceptance and approval of a stipulation, bond, or other security, signed by the party on whose behalf the property is detained or his attorney and expressly authorizing such release, if all costs and charges of the court and its officers shall have first been paid. Otherwise no property in the custody of the marshal or other officer of the court shall be released without an order of the court; but such order may be entered as of course by the clerk, upon the giving of approved security as provided by



law and these rules, or upon the dismissal or discontinuance of the action; but the marshal shall not deliver any property so released until the costs and charges of the officers of the court shall first have been paid.

(d) Possessory, Petitory, and Partition Actions. The foregoing provisions of this subdivision (5) do not apply to petitory, possessory, and partition actions. In such cases the property arrested shall be released only by order of the court, on such terms and conditions and on the giving of such security as the court may require.

#### Advisory Committee's Note

In addition to Admiralty Rule 11 (see Rule E(9)), the release of property seized on process of attachment or in rem is dealt with by Admiralty Rules 5, 6, 12, and 57, and 28 U.S.C., §2464 (formerly Rev. Stat. §941). An attempt is made in the draft to consolidate these provisions and to make them uniformly applicable to attachment and garnishment and actions in rem.

The draft restates the substance of Admiralty Rule 5. Admiralty Rule 12 deals only with ships arrested on in rem process. Since the same ground appears to be covered more generally by 28 U.S.C. §2464, Rule 12 is omitted. The substance of Admiralty Rule 57 is retained. 28 U.S.C., §2464 is incorporated with changes of terminology, and with a substantial change as to the amount of the bond. See 2 Benedict 395 n. 1a; The Lotosland, 2 F. Supp. 42 (S.D.N.Y. 1933). The provision for general bond is enlarged to include the contingency of attachment as well as arrest of the vessel.

(6) REDUCTION OR IMPAIRMENT OF SECURITY.

Whenever security is taken the court may, on motion and hearing, for good cause shown, reduce the amount of security given; and if the surety shall be or become insufficient, new or additional sureties may be required on motion and hearing.

Advisory Committee' Note

Adapted from Admiralty Rule 8.

(7) SECURITY ON COUNTERCLAIM.

Whenever there is asserted a counterclaim arising out of the same transaction or occurrence with respect to which the action was originally filed, and the defendant or claimant in the original action has given security to respond in damages, any plaintiff for whose benefit such security has been given shall give security in the usual amount and form to respond in damages to the claims set forth in such counterclaim, unless the court, for cause shown, shall otherwise direct; and proceedings on the original claim shall be stayed until such security is given, unless the court otherwise directs. When the United States or a corporate instrumentality thereof as defendant is relieved by law of the requirement of giving security to respond in damages it shall nevertheless be treated for the purposes of this subdivision E(7) as if it had given such security if a private person so situated would have been required to give it.

Advisory Committee's Note

Derived from Admiralty Rule 50.

Title 46, U.S.C., § 783 extends the principle of Rule 50 to the Government when sued under the Public Vessels Act, presumably on the theory that the credit

of the Government is the equivalent of the best security. The draft adopts this principle and extends it to all cases in which the Government is defendant although the Suits in Admiralty Act contains no parallel provisions.

(8) RESTRICTED APPEARANCE. An appearance to defend against an admiralty and maritime claim with respect to which there has issued process in rem, or process of attachment and garnishment whether pursuant to these Supplemental Rules or to Rule 4(e), may be expressly restricted to the defense of such claim, and in that event shall not constitute an appearance for the purposes of any other claim with respect to which such process is not available or has not been served.

#### Advisory Committee's Note

Under the liberal joinder provisions of unified rules the plaintiff will be enabled to join with maritime actions in rem, or maritime actions in personam with process of attachment and garnishment, claims with respect to which such process is not available, including nonmaritime claims. Unification should not, however, have the result that, in order to defend against an admiralty and maritime claim with respect to which process in rem or quasi in rem has been served, the claimant or defendant must subject himself personally to the jurisdiction of the court with reference to other claims with respect to which such process is not available or has not been served, especially when such other claims are nonmaritime. So far as attachment and garnishment are concerned this principle holds true whether process is issued according to admiralty tradition and the Supplemental Rules or according to Rule 4(e) as incorporated by Rule B(1).

A similar problem may arise with respect to civil actions other than admiralty and maritime claims within the meaning of Rule 9(h). That is to say, in

an ordinary civil action, whether maritime or not, there may be joined in one action claims with respect to which process of attachment and garnishment is available under state law and Rule 4(e) and claims with respect to which such process is not available or has not been served. The general Rules of Civil Procedure do not specify whether an appearance in such cases to defend the claim with respect to which process of attachment and garnishment has issued is an appearance for the purposes of the other claims. In that context the question has been considered best left to case-by-case development. Where admiralty and maritime claims within the meaning of Rule 9(h) are concerned, however, it seems important to include a specific provision to avoid an unfortunate and unintended effect of unification. No inferences whatever as to the effect of such an appearance in an ordinary civil action should be drawn from the specific provision here and the absence of such a provision in the general Rules.

(9) DISPOSITION OF PROPERTY; SALES.

(a) Actions for Forfeitures. In any action in rem to enforce a forfeiture for violation of a statute of the United States the property shall be disposed of as provided by statute.

(b) Interlocutory Sales. If property that has been attached or arrested is perishable, or liable to deterioration, decay, or injury by being detained in custody pending the action, or if the expense of keeping the property is excessive or disproportionate, or if there is unreasonable delay in securing the release of property, the court, on application of any party or of the marshal, may order the property or any portion thereof to be sold; and the proceeds, or so much thereof as shall be adequate to satisfy any judgment, may be ordered brought into court to abide the event of the action; or the court may, on motion of the defendant or claimant, order delivery of the property to him, upon the giving of security in accordance with these Rules.

(c) Sales; Proceeds. All sales of property shall be made by the marshal or his deputy, or other proper officer assigned by the court where the marshal is a party in interest; and the proceeds of sale shall be forthwith paid into the registry of the court to be disposed of according to law.

#### Advisory Committee's Note

Adapted from Admiralty Rules 11, 12, and 40. Subdivision (a) is necessary because of various provisions as to disposition of property in forfeiture proceedings. In addition to particular statutes, note the provisions of 28 U.S.C., §§ 2461-65.

The provision of Admiralty Rule 12 relating to unreasonable delay is now limited to ships but should have broader application. See 2 Benedict 404. Similarly, both rules are now limited to actions in rem, but should equally apply to attached property.

#### Rule F. Limitation of Liability

(1) TIME FOR FILING COMPLAINT; SECURITY. Not later than six months after his receipt of a claim in writing, any vessel owner may file a complaint in the appropriate district court, as provided in subdivision (9) of this Rule, for limitation of liability pursuant to statute. The owner (a) shall deposit with the court, for the benefit of claimants, a sum equal to the amount or value of his interest in the vessel and pending freight, or approved security therefor, and in addition such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of the statutes as amended; or (b) at his option shall transfer to a trustee to be appointed by the court, for the benefit of claimants, his interest in the vessel and pending freight, together with such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of the statutes as amended. The plaintiff

shall also give security for costs and, if he elects to give security, for interest at the rate of 6 per cent per annum from the date of the security.

#### Advisory Committee's Note

The amendments of 1936 to the Limitation Act supersede to some extent the provisions of Admiralty Rule 51, especially with respect to the time of filing the complaint and with respect to security. The draft here incorporates in substance the 1936 amendment of the Act (46 U.S.C., § 185) with a slight modification to make it clear that the complaint may be filed at any time not later than six months after a claim has been lodged with the owner.

(2) COMPLAINT. The complaint shall set forth the facts on the basis of which the right to limit liability is asserted, and all facts necessary to enable the court to determine the amount to which the owner's liability shall be limited. The complaint may demand exoneration from as well as limitation of liability. It shall state the voyage, if any, on which the demands sought to be limited arose, with the date and place of its termination; the amount of all demands including all unsatisfied liens or claims of lien, in contract or in tort or otherwise, arising on that voyage, so far as known to the plaintiff, and what actions and proceedings, if any, are pending thereon; whether the vessel was damaged, lost, or abandoned, and, if so, when and where; the value of the vessel at the close of the voyage or, in case of wreck, the value of her wreckage, strippings, or proceeds, if any, and where and in whose possession they are; and the amount of any pending freight recovered or recoverable. If the plaintiff elects to transfer his interest in the vessel to a trustee, the complaint must further show any prior paramount liens thereon, and what voyages or trips, if any, she has made since the voyage or trip on which the claims sought to be limited arose, and any existing

liens arising upon any such subsequent voyage or trip, with the amounts and causes thereof, and the names and addresses of the lienors, so far as known; and whether the vessel sustained any injury upon or by reason of such subsequent voyage or trip.

Advisory Committee's Note

Derived from Admiralty Rules 51 and 53.

(3) CLAIMS AGAINST OWNER; INJUNCTION. Upon compliance by the owner with the requirements of subdivision (1) of this Rule all claims and proceedings against the owner or his property with respect to the matter in question shall cease. On application of the plaintiff the court shall enjoin the further prosecution of any action or proceeding against the plaintiff or his property with respect to any claim subject to limitation in the action.

Advisory Committee's Note

This is derived from the last sentence of 46 U.S.C. §185 and the last paragraph of Admiralty Rule 51.

(4) NOTICE TO CLAIMANTS. Upon the owner's compliance with subdivision (1) of this Rule the court shall issue a notice to all persons asserting claims with respect to which the complaint seeks limitation, admonishing them to file their respective claims with the clerk of the court and to serve on the attorneys for the plaintiff a copy thereof on or before a date to be named in the notice. The date so fixed shall not be less than 30 days after issuance of the notice. For cause shown, the court may enlarge the time within which claims may be filed. The notice shall be published in such newspaper or newspapers as the court may direct once a week for four successive weeks prior

to the date fixed for the filing of claims. The plaintiff not later than the day of second publication shall also mail a copy of the notice to every person known to have made any claim against the vessel or the plaintiff arising out of the voyage or trip on which the claims sought to be limited arose. In cases involving death a copy of such notice shall be mailed to the decedent at his last known address, and also to any person who shall be known to have made any claim on account of such death.

Advisory Committee's Note

Derived from Admiralty Rule 51.

(5) CLAIMS AND ANSWER. Claims shall be filed and served on or before the date specified in the notice provided for in subdivision (4) of this Rule. Each claim shall specify the facts upon which the claimant relies in support of his claim, the items thereof, and the dates on which the same accrued. If a claimant desires to contest either the right to exoneration from or the right to limitation of liability he shall file and serve an answer to the complaint unless his claim has included an answer.

Advisory Committee's Note

Derived from Admiralty Rules 52 and 53.

(6) INFORMATION TO BE GIVEN CLAIMANTS. Within 30 days after the date specified in the notice for filing claims, or within such time as the court thereafter may allow, the plaintiff shall mail to the attorney for each claimant (or if the claimant has no attorney to the claimant himself) a list setting forth (a) the name of each claimant, (b) the name and address of his attorney (if he is known to have one), (c) the nature of his claim, i.e., whether property loss, property damage, death, personal injury, etc., and (d) the amount thereof.



Advisory Committee's Note

Derived from Admiralty Rule 52.

(7) INSUFFICIENCY OF FUND OR SECURITY.  
Any claimant may by motion demand that the funds deposited in court or the security given by the plaintiff be increased on the ground that they are less than the value of the plaintiff's interest in the vessel and pending freight. Thereupon the court shall cause due appraisement to be made of the value of the plaintiff's interest in the vessel and pending freight; and if the court finds that the deposit or security is either insufficient or excessive it shall order its increase or reduction. In like manner any claimant may demand that the deposit or security be increased on the ground that it is insufficient to carry out the provisions of the statutes relating to claims in respect of loss of life or bodily injury; and, after notice and hearing, the court may similarly order that the deposit or security be increased or reduced.

Advisory Committee's Note

Derived from Admiralty Rule 52 and 46 U.S.C., §185.

(8) OBJECTIONS TO CLAIMS: DISTRIBUTION OF FUND. Any interested party may question or controvert any claim without filing an objection thereto. Upon determination of liability the fund deposited or secured, or the proceeds of the vessel and pending freight, shall be divided pro rata, subject to all relevant provisions of law, among the several claimants in proportion to the amounts of their respective claims, duly proved, saving, however, to all parties any priority to which they may be legally entitled.

Advisory Committee's Note

Derived from Admiralty Rule 52.

(9) VENUE: TRANSFER. The complaint shall be filed in any district in which the vessel has been attached or arrested to answer for any claim with respect to which the plaintiff seeks to limit liability; or, if the vessel has not been attached or arrested, then in any district in which the owner has been sued with respect to any such claim. When the vessel has not been attached or arrested to answer the matters aforesaid, and suit has not been commenced against the owner, the proceedings may be had in the district in which the vessel may be, but if the vessel is not within any district and no suit has been commenced in any district, then the complaint may be filed in any district. For the convenience of parties and witnesses, in the interest of justice, the court may transfer the action to any district; if venue is wrongly laid the court shall dismiss or, if it be in the interest of justice, transfer the action to any district in which it could have been brought. If the vessel shall have been sold, the proceeds shall represent the vessel for the purposes of these rules.

Advisory Committee's Note

Derived from Admiralty Rule 54. The provision for transfer is revised to conform closely to the language of 28 U.S.C. §§ 1404(a) and 1406(a), though it retains the existing rule's provision for transfer to any district for convenience. The revision also makes clear what has been doubted: that the court may transfer if venue is wrongly laid.

O R D E R

Ordered:

That (a) Subdivision (c) of Rule 6 of the Rules of Civil Procedure for the United States District Courts promulgated by this Court on December 20, 1937, effective September 16, 1938; (b) Rule 2 of the Rules for Practice and Procedure under section 25 of An Act To amend and consolidate the Acts respecting copyright, approved March 4, 1909, promulgated by this Court on June 1, 1909, effective July 1, 1909; and (c) the Rules of Practice in Admiralty and Maritime Cases, promulgated by this Court on December 6, 1920, effective March 7, 1921, as revised, amended and supplemented, are hereby rescinded, effective \_\_\_\_\_.

ADVISORY COMMITTEE'S NOTE

(a) P.L. 88-139, § 1, 77 Stat. 248, approved on October 16, 1963, amended 28 U.S.C. § 138 to read as follows: "The district court shall not hold formal terms." Thus Rule 6(c) is rendered unnecessary, and it is proposed to be rescinded.

(b) Special Copyright Rules governing certain procedures in actions under the Copyright Act were promulgated by the Supreme Court in 1909, pursuant to a limited rulemaking power conferred upon the Court by section 25(e) of the Copyright Act of 1909, 35 Stat. 1075, 1082. In 1934 the Court was granted general rulemaking power by the Rules Enabling Act, 48 Stat. 1064 (now, as amended, 28 U.S.C. § 2072). Rule 81(a)(1) of the Federal Rules of Civil Procedure, promulgated in 1938, stated that the Federal Rules of Civil Procedure should not apply to proceedings under the Copyright Act except as they might be made applicable by later rules to be promulgated by the Court. Rule 1 of the Copyright Rules was thereafter amended to state that proceedings under the Copyright Act should be governed by the Federal Rules of Civil Procedure to the extent not inconsistent with the Copyright Rules.

When the Copyright Act was codified in 1947 as Title 17 of the United States Code, section 25(e) of the Act was carried forward as 17 U.S.C. § 101(f). The Act of June 25, 1948, 62 Stat. 869, thereafter repealed § 101(f) on the ground that it was unnecessary in the light of the Rules Enabling Act.

Rule 2 of the Copyright Rules requires, with certain exceptions, that copies of the allegedly infringing and infringed works accompany the complaint, presumably as annexes or exhibits. This is a special rule of pleading unsupported by any unique justification. The question of annexing copies of the works to the pleading should be dealt with like the similar question of annexing a copy of a contract sued on. The Federal Rules of Civil Procedure permit but do not require the pleader to annex the copy. A party can readily compel the production of a copy of any relevant work if it is not already available to him. Accordingly, Copyright Rule 2 is proposed to be rescinded.

The Copyright Act contains a general provision (17 U.S.C. § 101 (c)) authorizing "impounding" during the pendency of an infringement action. Copyright Rules 3-13 supplement the statute by setting out a detailed procedure available during the action for the seizing and impounding under bond, and also for the releasing under bond, of copies of works alleged to infringe copyright, as well as plates, matrices, and other means of making infringing copies.

The Advisory Committee has serious doubts as to the desirability of retaining Copyright Rules 3-13 for they appear to be out of keeping with the general attitude of the Federal Rules of Civil Procedure toward remedies anticipating decision on the merits, and objectionable for their failure to require notice or a showing of irreparable injury to the same extent as is customarily required for threshold injunctive relief. However, in view of the fact that Congress is

at present examining proposals to revise the Copyright Act, the Advisory Committee refrains from making any recommendation regarding Copyright Rules 3-13, and will keep the problem under study.

(c) The amendments proposed to the Federal Rules of Civil Procedure to unify the civil and admiralty procedure, together with the proposed Supplemental Rules for Certain Admiralty and Maritime Claims, will completely supersede the existing Admiralty Rules. Accordingly, the latter are proposed to be rescinded.

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CIRCUIT JUDGES

UNITED STATES COURT OF APPEALS  
TENTH CIRCUIT

Cheyenne, Wyoming  
May 28, 1965

Honorable Albert B. Maris  
United States Circuit Judge  
United States Court House  
Philadelphia, Pennsylvania

Dear Judge:

I transmit herewith to you for presentation to the Committee on Rules of Practice and Procedure a series of amendments (with accompanying Advisory Committee's Notes) to the Rules of Criminal Procedure for the United States District Court as recommended by the Advisory Committee on Criminal Rules.

The Advisory Committee on Criminal Rules has met seven times since its formation in 1960. It has canvassed all of the Rules and has circulated both a Preliminary Draft and a Second Preliminary Draft of proposed amendments to the Rules. Widespread comment has been received from members of the bench and the bar which has been most helpful to the Committee in its deliberations.

The Advisory Committee is submitting to you all proposals for change upon which the Committee has thus far agreed. Many suggestions were rejected by the Committee and are not reflected in its report. Other proposals require further study and it is anticipated that the Committee will have amendments to propose to your Committee in the future.

Two comments are necessary to explain specific portions of the attached draft of amendments:

(1) Alternative formulations of an amendment to Rule 32(c)(2) are presented. The Committee was evenly divided and voted to send both formulations forward so that your Committee could choose between them.

(2) Amendments to Rule 37 are submitted incorporating changes proposed by the Appellate Rules Committee in order that action may be taken on them pending final action on the Uniform Rules of Appellate

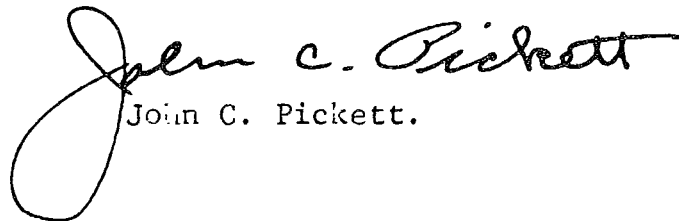
Honorable Albert B. Maris

Page Two

May 28, 1965

Procedure. These amendments were developed in collaboration between the two advisory committees with the draft as presented coming from Professor Ward, Reporter for the Appellate Rules Committee. Amendments relating to appeals are also presented for Rules 45, 49 and 55. When the Uniform Rules of Appellate Procedure are put into effect, a number of conforming amendments to the Criminal Rules will be necessary.

Sincerely yours,

A handwritten signature in cursive script that reads "John C. Pickett". The signature is written in dark ink and is positioned above the typed name. The first letter 'J' is large and loops around the first part of the name.

John C. Pickett.

PROPOSED AMENDMENTS TO RULES OF CRIMINAL PROCEDURE  
FOR THE UNITED STATES DISTRICT COURTS\*

## Rule 4. Warrant or Summons Upon Complaint

(a) Issuance. If it appears from the complaint, or from an affidavit or affidavits filed with the complaint, that there is probable cause to believe that an offense has been committed and that the defendant has committed it, a warrant for the arrest of the defendant shall issue to any officer authorized by law to execute it. Upon the request of the attorney for the government a summons instead of a warrant shall issue. More than one warrant or summons may issue on the same complaint. If a defendant fails to appear in response to the summons, a warrant shall issue.

## Advisory Committee's Note

In Giordenello v. United States, 357 U.S. 480 (1958) it was held that to support the issuance of a warrant the complaint must contain in addition to a statement "of the essential facts constituting the offense" (Rule 3) a statement of the facts relied upon by the complainant to establish probable cause. The amendment permits the complainant to state the facts constituting probable cause in a separate affidavit in lieu of spelling them out in the complaint. See also Jaben v. United States, 381 U.S. 214 (1965).

## Rule 5. Proceedings Before the Commissioner

(b) Statement by the Commissioner. The commissioner shall inform the defendant of the complaint against him and of any affidavit filed therewith, of his right to retain counsel, of his right to request the assignment of counsel if he is unable to obtain counsel, and of his right to have a preliminary examination. He shall also

\* New matter is shown in italics; matter to be omitted is lined through.



inform the defendant that he is not required to make a statement and that any statement made by him may be used against him. The commissioner shall allow the defendant reasonable time and opportunity to consult counsel and shall admit the defendant to bail as provided in these rules.

#### Advisory Committee's Note

The first change is designed to insure that under the revision made in Rule 4(a) the defendant arrested on a warrant will receive the same information concerning the basis for the issuance of the warrant as would previously have been given him by the complaint itself.

The second change obligates the commissioner to inform the defendant of his right to request the assignment of counsel if he is unable to obtain counsel. Cf. the amendment to Rule 44, and the Advisory Committee's Note thereon.

#### Rule 6. The Grand Jury

(d) Who May Be Present. Attorneys for the government, the witness under examination, interpreters when needed and, for the purpose of taking the evidence, a stenographer or operator of a recording device may be present while the grand jury is in session, but no person other than the jurors may be present while the grand jury is deliberating or voting.

(e) Secrecy of Proceedings and Disclosure. Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter, ~~or~~ stenographer, operator of a recording device, or any typist who transcribes recorded testimony may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that

grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No obligation of secrecy may be imposed upon any person except in accordance with this rule. The court may direct that an indictment shall be kept secret until the defendant is in custody or has given bail, and in that event the clerk shall seal the indictment and no person shall disclose the finding of the indictment except when necessary for the issuance and execution of a warrant or summons.

(f) Finding and Return of Indictment. An indictment may be found only upon the concurrence of 12 or more jurors. The indictment shall be returned by the grand jury to a judge in open court. ~~If the defendant has been held to answer~~ If the defendant is in custody or has given bail and 12 jurors do not concur in finding an indictment, the foreman shall so report to the court in writing forthwith.

#### Advisory Committee's Note

Subdivision (d). The amendment makes it clear that recording devices may be used to take evidence at grand jury sessions.

Subdivision (e). The amendment makes it clear that the operator of a recording device and a typist who transcribes recorded testimony are bound to the obligation of secrecy.

Subdivision (f). A minor change conforms the language to what doubtless is the practice. The need for a report to the court that no indictment has been found may be present even though the defendant has not been "held to answer." If the defendant is in custody or has given bail, some official record should be made of the grand jury action so that the defendant can be released or his bail exonerated.

## Rule 7. The Indictment and the Information

(f) Bill of Particulars. The court ~~for cause~~ may direct the filing of a bill of particulars. A motion for a bill of particulars may be made only before arraignment or within ten days after arraignment or at such other later time before or after arraignment as may be prescribed by rule or order as the court may permit. A bill of particulars may be amended at any time subject to such conditions as justice requires.

### Advisory Committee's Note

The amendment to the first sentence eliminating the requirement of a showing of cause is designed to encourage a more liberal attitude by the courts toward bills of particulars without taking away the discretion which courts must have in dealing with such motions in individual cases. For an illustration of wise use of this discretion see the opinion by Justice Whittaker written when he was a district judge in United States v. Smith, 16 F.R.D. 372 (W.D.Mo. 1954).

The amendment to the second sentence gives discretion to the court to permit late filing of motions for bills of particulars in meritorious cases. Use of late motions for the purpose of delaying trial should not, of course, be permitted. The courts have not been agreed as to their power to accept late motions in the absence of a local rule or a previous order. See United States v. Miller, 217 F. Supp. 760 (E.D. Pa. 1963); United States v. Taylor, 25 F.R.D. 225 (E.D. N.Y. 1960); United States v. Sterling, 122 F. Supp. 81 (E.D. Pa. 1954) (all taking a limited view of the power of the court). But cf. United States v. Brown, 179 F. Supp. 893 (E.D. N.Y. 1959) (exercising discretion to permit an out of time motion).

## Rule 11. Pleas

A defendant may plead not guilty, guilty or, with the consent of the court, nolo contendere. The court may refuse to accept a plea of guilty,

and shall not accept the such plea or a plea of nolo contendere without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.

#### Advisory Committee's Note

The great majority of all defendants against whom indictments or informations are filed in the federal courts plead guilty. Only a comparatively small number go to trial. See United States Attorneys Statistical Report, Fiscal Year 1964, p. 1. The fairness and adequacy of the procedures on acceptance of pleas of guilty are of vital importance in according equal justice to all in the federal courts.

Three changes are made in the second sentence. The first change makes it clear that before accepting either a plea of guilty or nolo contendere the court must determine that the plea is made voluntarily with understanding of the nature of the charge. The second change expressly requires the court to address the defendant personally in the course of determining that the plea is made voluntarily and with understanding of the nature of the charge. The reported cases reflect some confusion over this matter. Compare United States v. Diggs, 304 F.2d 929 (6th Cir. 1962); Domenica v. United States, 292 F.2d 483 (1st Cir. 1961); Gundlach v. United States, 262 F.2d 72 (4th Cir. 1958), cert. den., 360 U.S. 904 (1959); and Julian v. United States, 236 F.2d 155 (6th Cir. 1956), which contain the implication that personal interrogation of the defendant is the better practice even when he is represented by counsel, with Meeks v. United States, 298 F.2d 204 (5th Cir. 1962); Nunley v. United States, 294 F.2d 579 (10th Cir. 1961), cert. den., 368 U.S. 991 (1962); and United

States v. Von der Heide, 169 F. Supp. 560 (D.D.C. 1959).

The third change in the second sentence adds the words "and the consequences of his plea" to state what clearly is the law. See e.g., Von Moltke v. Gillies, 332 U.S. 708, 724 (1948); Kerchevel v. United States, 274 U.S. 220, 223 (1927); Munich v. United States, 337 F.2d 356 (9th Cir. 1964); Pilkington v. United States, 315 F.2d 204 (4th Cir. 1963); Smith v. United States, 324 F.2d 436 (D.C. Cir. 1963); but cf. Marvel v. United States, 335 F.2d 101 (5th Cir. 1964).

A new sentence is added at the end of the rule to impose a duty on the court in cases where the defendant pleads guilty to satisfy itself that there is a factual basis for the plea before entering judgment. The court should satisfy itself, by inquiry of the defendant or the attorney for the government, or by examining the presentence report, or otherwise, that the conduct which the defendant admits constitutes the offense charged in the indictment or information or an offense included therein to which the defendant has pleaded guilty. Such inquiry should, e.g., protect a defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge. For a similar requirement see Mich. Stat. Ann § 28.1058 (1954); Mich. Sup. Ct. Rule 35A; In re Valle, 364 Mich. 471, 110 N.W. 2d 673 (1961); People v. Barrows, 358 Mich. 267, 99 N.W. 2d 347 (1959); People v. Bumpus, 355 Mich. 374, 94 N.W. 2d 854 (1959); People v. Coates, 337 Mich. 56, 59 N.W. 2d 83 (1953). See also Stinson v. United States, 316 F.2d 554 (5th Cir. 1963). The normal consequence of a determination that there is not a factual basis for the plea would be for the court to set aside the plea and enter a plea of not guilty.

For a variety of reasons it is desirable in some cases to permit entry of judgment upon a plea of nolo contendere without inquiry into the factual

basis for the plea. The new third sentence is not, therefor, made applicable to pleas of nolo contendere. It is not intended by this omission to reflect any view upon the effect of a plea of nolo contendere in relation to a plea of guilty. That problem has been dealt with by the courts. See, e.g., Lott v. United States, 367 U.S. 421, 426 (1961).

#### Rule 14. Relief From Prejudicial Joinder

If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver to the court for inspection in camera any statements or confessions made by the defendants which the government intends to introduce in evidence at the trial.

#### Advisory Committee's Note

A defendant may be prejudiced by the admission in evidence against a co-defendant of a statement or confession made by that co-defendant. This prejudice cannot be dispelled by cross-examination if the co-defendant does not take the stand. Limiting instructions to the jury may not in fact erase the prejudice. While the question whether to grant a severance is generally left within the discretion of the trial court, recent Fifth Circuit cases have found sufficient prejudice involved to make denial of a motion for severance reversible error. See Schaffer v. United States, 221 F.2d 17 (5th Cir. 1955); Barton v. United States, 263 F.2d 894 (5th Cir. 1959). It has even been suggested that when the confession of the co-defendant comes as a surprise at the trial, it may be error to deny a motion for a mistrial. See Belvin v. United States, 273 F.2d 583 (5th Cir. 1960).

The purpose of the amendment is to provide a procedure whereby the issue of possible prejudice can be resolved on the motion for severance. The judge may direct the disclosure of the confessions or statements of the defendants to him for in camera inspection as an aid to determining whether the possible prejudice justifies ordering separate trials. Cf. note, Joint and Single Trials Under Rules 8 and 14 of the Federal Rules of Criminal Procedure, 74 Yale L.J. 551, 565 (1965).

#### Rule 16. Discovery and Inspection

Upon motion of a defendant at any time after the filing of the indictment or information; the court may order the attorney for the government to permit the defendant to inspect and copy or photograph designated books; papers; documents or tangible objects; obtained from or belonging to the defendant or obtained from others by seizure or by process; upon a showing that the items sought may be material to the preparation of his defense and that the request is reasonable. The order shall specify the time; place and manner of making the inspection and of taking the copies or photographs and may prescribe such terms and conditions as are just:

(a) Defendant's Statements; Reports of Examinations and Tests; Defendant's Grand Jury Testimony. Upon motion of a defendant the court may order the attorney for the government to permit the defendant to inspect and copy or photograph any relevant (1) written or recorded statements or confessions made by the defendant, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government, (2) results or reports of

physical or mental examinations, and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government, and (3) recorded testimony of the defendant before a grand jury.

(b) Other Books, Papers, Documents, or Tangible Objects or Places. Upon motion of a defendant the court may order the attorney for the government to permit the defendant to inspect and copy or photograph books, papers, documents, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, upon a showing of materiality to the preparation of his defense and that the request is reasonable. Except as provided in subdivision (a)(2), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by government agents in connection with the investigation or prosecution of the case, or of statements made by government witnesses or prospective government witnesses (other than the defendant) to agents of the government except as provided in 18 U.S.C. § 3500.

(c) Discovery by the Government. If the court grants relief sought by the defendant under subdivision (a)(2) or subdivision (b) of this rule, it may, upon motion of the government, condition its order by requiring that the defendant permit the government to inspect and copy or photograph scientific or medical reports, books, papers, documents, tangible objects, or copies or portions thereof, which the defendant intends to produce at the trial and which are within his possession, custody or control, upon a showing of materiality to the preparation of the government's case and that the request is reasonable. Except as to scientific or medical reports, this subdivision does not



authorize the discovery or inspection of reports, memoranda, or other internal defense documents made by the defendant, or his attorneys or agents in connection with the investigation or defense of the case, or of statements made by the defendant, or by government or defense witnesses, or by prospective government or defense witnesses, to the defendant, his agents or attorneys.

(d) Time, Place and Manner of Discovery and Inspection. An order of the court granting relief under this rule shall specify the time, place and manner of making the discovery and inspection permitted and may prescribe such terms and conditions as are just.

(e) Protective Orders. Upon a sufficient showing the court may at any time order that the discovery or inspection be denied, restricted or deferred, or make such other order as is appropriate. Upon motion by the government the court may permit the government to make such showing, in whole or in part, in the form of a written statement to be inspected by the court in camera. If the court enters an order granting relief following a showing in camera, the entire text of the government's statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal by the defendant.

(f) Time of Motions. A motion under this rule may be made only within 10 days after arraignment or at such reasonable later time as the court may permit. The motion shall include all relief sought under this rule. A subsequent motion may be made only upon a showing of cause why such motion would be in the interest of justice.

(g) Continuing Duty to Disclose; Failure to Comply. If, subsequent to compliance with an order issued pursuant to this rule, and prior to or during trial, a party discovers additional material previously requested or ordered which is subject to discovery or inspection under the rule, he shall promptly notify the other party or his attorney or the court of the existence of the additional material. If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or with an order issued pursuant to this rule, the court may order such party to permit the discovery or inspection of materials not previously disclosed, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may enter such other order as it deems just under the circumstances.

#### Advisory Committee's Note

The extent to which pretrial discovery should be permitted in criminal cases is a complex and controversial issue. The problems have been explored in detail in recent legal literature, most of which has been in favor of increasing the range of permissible discovery. See, e.g. Brennan, The Criminal Prosecution: Sporting Event or Quest for Truth, 1963 Wash. U.L.Q. 279; Everett, Discovery in Criminal Cases - In Search of a Standard, 1964 Duke L.J. 477; Fletcher, Pretrial Discovery in State Criminal Cases, 12 Stan.L.Rev. 293 (1960); Goldstein, The State and the Accused: Balance of Advantage in Criminal Procedure, 69 Yale L.J. 1149, 1172-1198 (1960); Krantz, Pretrial Discovery in Criminal Cases: A Necessity for Fair and Impartial Justice, 42 Neb. L. Rev. 127 (1962); Louisell, Criminal Discovery, Dilemma Real or Apparent, 49 Calif. L. Rev. 56 (1961); Louisell, The Theory of Criminal Discovery and the Practice of Criminal Law, 14 Vand. L. Rev. 921 (1961); Moran, Federal Criminal Rules Changes: Aid or Illusion for the Indigent Defendant?, 51 A.B.A.J. 64 (1965);

Symposium, Discovery in Federal Criminal Cases, 33 F.R.D. 47-128 (1963); Traynor, Ground Lost and Found in Criminal Discovery, 39 N.Y.U.L.Rev. 228 (1964); Developments in the Law--Discovery, 74 Harv. L.Rev. 940, 1051-1063. Full judicial exploration of the conflicting policy considerations will be found in State v. Tune, 13 N.J. 203, 98 A.2d 881 (1953) and State v. Johnson, 28 N.J. 133, 145 A.2d 313 (1958); cf. State v. Murphy, 36 N.J. 172, 175 A.2d 622 (1961); State v. Moffa, 36 N.J. 219, 176 A.2d 1 (1961). The rule has been revised to expand the scope of pretrial discovery. At the same time provisions are made to guard against possible abuses.

Subdivision (a). The court is authorized to order the attorney for the government to permit the defendant to inspect and copy or photograph three different types of material:

(1) Relevant written or recorded statements or confessions made by the defendant, or copies thereof. The defendant is not required to designate because he may not always be aware that his statements or confessions are being recorded. The government's obligation is limited to production of such statements as are within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government. Discovery of statements and confessions is in line with what the Supreme Court has described as the "better practice" (Cicenia v. LaGay, 357 U.S. 504, 511 (1958)), and with the law in a number of states. See, e.g., Del. Rules Crim. Proc., Rule 16; Ill. Stat. Ch. 38, § 729; Md. Rules Proc., Rule 728; State v. McGee, 91 Ariz. 101, 370 P.2d 261 (1962); Cash v. Superior Court, 53 Cal. 2d 72, 346 P.2d 407 (1959); State v. Bickham, 239 La. 1094, 121 So.2d 207, cert. den. 364 U.S. 874 (1960); People v. Johnson, 356 Mich. 619, 97 N.W.2d 739 (1959); State v. Johnson, supra; People v. Stokes, 24 Misc.2d 755, 204 N.Y.Supp.2d 827 (Ct. Gen. Sess. 1960). The amendment also makes it clear that discovery extends to recorded as well as written statements.

For state cases upholding the discovery of recordings, see, e.g., People v. Cartier, 51 Cal. 2d 590, 335 P.2d 114 (1959); State v. Minor, 177 A.2d 215 (Del. Super.Ct. 1962).

(2) Relevant results or reports of physical or mental examinations, and of scientific tests or experiments (including fingerprint and handwriting comparisons) made in connection with the particular case, or copies thereof. Again the defendant is not required to designate but the government's obligation is limited to production of items within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government. With respect to results or reports of scientific tests or experiments the range of materials which must be produced by the government is further limited to those made in connection with the particular case. Cf. Fla. Stats, § 909.18; State v. Superior Court, 90 Ariz. 133, 367 P.2d 6 (1961); People v. Cooper, 53 Cal. 2d 755, 770, 3 Cal. Rptr. 148, 157, 349 P.2d 964, 973 (1960); People v. Stokes, supra, at 762, 204 N.Y.Supp.2d at 835.

(3) Relevant recorded testimony of a defendant before a grand jury. The policy which favors pre-trial disclosure to a defendant of his statements to government agents also supports, pretrial disclosure of his testimony before a grand jury. Courts, however, have tended to require a showing of special circumstances before ordering such disclosure. See, e.g., United States v. Johnson, 215 F.Supp. 300 (D.Md. 1963). Disclosure is required only where the statement has been recorded and hence can be transcribed.

Subdivision (b). This subdivision authorizes the court to order the attorney for the government to permit the defendant to inspect and copy or photograph all other books, papers, documents, tangible objects, buildings or places, or copies or portions thereof, which are within the possession,

custody or control of the government. Because of the necessarily broad and general terms in which the items to be discovered are described, several limitations are imposed:

(1) While specific designation is not required of the defendant, the burden is placed on him to make a showing of materiality to the preparation of his defense and that his request is reasonable. The requirement of reasonableness will permit the court to define and limit the scope of the government's obligation to search its files while meeting the legitimate needs of the defendant. The court is also authorized to limit discovery to portions of items sought.

(2) Reports, memoranda, and other internal government documents made by government agents in connection with the investigation or prosecution of the case are exempt from discovery. Cf. Palermo v. United States, 360 U.S. 343 (1959); Ogden v. United States, 303 F.2d 724 (9th Cir. 1962).

(3) Except as provided for reports of examinations and tests in subdivision (a)(2), statements made by government witnesses or prospective government witnesses to agents of the government are also exempt from discovery except as provided by 18 U.S.C. § 3500. The Advisory Committee concludes that if any change is to be made with respect to this subject matter, it should be made by Congress.

Subdivision (c). This subdivision permits the court to condition a discovery order under subdivision (a)(2) and subdivision (b) by requiring the defendant to permit the government to discover similar items which the defendant intends to produce at the trial and which are within his possession, custody or control under restrictions similar to those placed in subdivision (b) upon discovery by the defendant. While the government normally has resources adequate to secure the information necessary for trial, there are some situations in which mutual

disclosure would appear necessary to prevent the defendant from obtaining an unfair advantage. For example, in cases where both prosecution and defense have employed experts to make psychiatric examinations, it seems as important for the government to study the opinions of the experts to be called by the defendant in order to prepare for trial as it does for the defendant to study those of the government's witnesses. Or in cases (such as anti-trust cases) in which the defendant is well represented and well financed, mutual disclosure so far as consistent with the privilege against self-incrimination would seem as appropriate as in civil cases. State cases have indicated that a requirement that the defendant disclose in advance of trial materials which he intends to use on his own behalf at the trial is not a violation of the privilege against self-incrimination. See Jones v. Superior Court, 58 Cal. 2d 56, 22 Cal. Rptr. 879, 372 P.2d 919 (1962); People v. Lopez, 60 Cal. 2d 223, 32 Cal. Rptr. 424, 384 P.2d 16 (1963); Traynor, Ground Lost and Found in Criminal Discovery, 39 N.Y.U. L. Rev. 228, 246 (1964); Comment, The Self-Incrimination Privilege: Barrier to Criminal Discovery, 51 Calif. L. Rev. 135 (1963); Note, 76 Harv. L. Rev. 838 (1963).

Subdivision (d). This subdivision is substantially the same as the last sentence of the existing rule.

Subdivision (e). This subdivision gives the court authority to deny, restrict or defer discovery upon a sufficient showing. Control of the abuses of discovery is necessary if it is to be expanded in the fashion proposed in subdivisions (a) and (b). Among the considerations to be taken into account by the court will be the safety of witnesses and others, a particular danger of perjury or witness intimidation, the protection of information vital to the national security, and the protection of business enterprises from economic reprisals. For an example of a use of a protective order in state practice, see People v. Lopez, 60 Cal.2d 223, 32 Cal. Rptr. 424, 384 P.2d 16 (1963). See also Brennan, Remarks on Discovery, 33 F.R.D. 56, 65 (1963); Traynor,

Ground Lost and Found in Criminal Discovery, 39  
N.Y.U. L. Rev. 228, 244, 250.

In some cases it would defeat the purpose of the protective order if the government were required to make its showing in open court. The problem arises in its most extreme form where matters of national security are involved. Hence a procedure is set out where upon motion by the government the court may permit the government to make its showing, in whole or in part, in a written statement to be inspected by the court in camera. If the court grants relief based on such showing, the government's statement is to be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal by the defendant. Cf. 18 U.S.C. § 3500.

Subdivision (f). This subdivision is designed to encourage promptness in making discovery motions and to give the court sufficient control to prevent unnecessary delay and court time consequent upon a multiplication of discovery motions. Normally one motion should encompass all relief sought and a subsequent motion permitted only upon a showing of cause. Where pretrial hearings are used pursuant to Rule 17.1, discovery issues may be resolved at such hearings.

Subdivision (g). The first sentence establishes a continuing obligation on a party subject to a discovery order with respect to material discovered after initial compliance. The duty provided is to notify the other party, his attorney or the court of the existence of the material. A motion can then be made by the other party for additional discovery and, where the existence of the material is disclosed shortly before or during the trial, for any necessary continuance.

The second sentence gives wide discretion to the court in dealing with the failure of either party to comply with a discovery order. Such discretion will permit the court to consider the reasons why disclosure was not made, the extent of the prejudice, if any, to the opposing party, the feasibility of rectifying that prejudice by a continuance, and any other relevant circumstances.

Rule 17. Subpoena

(b) Indigent Defendants Unable to Pay. The court or a judge thereof may shall order at any time that a subpoena be issued for service on a named witness upon an ex parte application upon motion or request of an indigent a defendant upon a satisfactory showing that the defendant is financially unable to pay the fees of the witness and that the presence of the witness is necessary to an adequate defense. The motion or request shall be supported by affidavit in which the defendant shall state the name and address of each witness and the testimony which he is expected by the defendant to give if subpoenaed; and shall show that the evidence of the witness is material to the defense; that the defendant cannot safely go to trial without the witness and that the defendant does not have sufficient means and is actually unable to pay the fees of the witness. If the court or judge orders the subpoena to be issued the costs incurred by the process and the fees of the witness so subpoenaed shall be paid in the same manner in which similar costs and fees are paid in case of a witness subpoenaed in behalf of the government.

(d) Service. A subpoena may be served by the marshal, by his deputy or by any other person who is not a party and who is not less than 18 years of age. Service of a subpoena shall be made by delivering a copy thereof to the person named and by tendering to him the fee for 1 day's attendance and the mileage allowed by law. Fees and mileage need not be tendered to the witness upon service of a subpoena issued in behalf of the United States or an officer or agency thereof.

Advisory Committee's Note.

Subdivision (b). Criticism has been directed at the requirement that an indigent defendant disclose



in advance the theory of his defense in order to obtain the issuance of a subpoena at government expense while the government and defendants able to pay may have subpoenas issued in blank without any disclosure. See Report of the Attorney General's Committee on Poverty and the Administration of Criminal Justice (1963) p. 27. The Attorney General's Committee also urged that the standard of financial inability to pay be substituted for that of indigency. Id. at 40-41. In one case it was held that the affidavit filed by an indigent defendant under this subdivision could be used by the government at his trial for purposes of impeachment. Smith v. United States, 312 F.2d 867 (D.C.Cir. 1962). There has also been doubt as to whether the defendant need make a showing beyond the face of his affidavit in order to secure issuance of a subpoena. Greenwell v. United States, 317 F.2d 108 (D.C.Cir. 1963).

The amendment makes several changes. The references to a judge are deleted since applications should be made to the court. An ex parte application followed by a satisfactory showing is substituted for the requirement of a request or motion supported by affidavit. The court is required to order the issuance of a subpoena upon finding that the defendant is unable to pay the witness fees and that the presence of the witness is necessary to an adequate defense.

Subdivision (d). The subdivision is revised to bring it into conformity with 28 U.S.C. § 1825.

#### Rule 17.1. Pretrial Conference

At any time after the filing of the indictment or information the court upon motion of any party or upon its own motion may order one or more conferences to consider such matters as will promote a fair and expeditious trial. At the conclusion of a conference the court shall prepare and file a memorandum of the matters agreed upon. No admissions

made by the defendant or his attorney at the conference shall be used against the defendant unless the admissions are reduced to writing and signed by the defendant and his attorney. This rule shall not be invoked in the case of a defendant who is not represented by counsel.

#### Advisory Committee's Note

This new rule establishes a basis for pretrial conferences with counsel for the parties in criminal cases within the discretion of the court. Pretrial conferences are now being utilized to some extent even in the absence of a rule. See, generally, Brewster, Criminal Pre-Trials--Useful Techniques, 29 F.R.D. 442 (1962); Estes, Pre-Trial Conferences in Criminal Cases, 23 F.R.D. 560 (1959); Kaufman, Pre-Trial in Criminal Cases, 23 F.R.D. 551 (1959); Kaufman, Pre-Trial in Criminal Cases, 42 J. Am. Jud. Soc. 150 (1959); Kaufman, The Appalachian Trial: Further Observations on Pre-Trial in Criminal Cases, 44 J. Am. Jud. Soc. 53 (1960); West, Criminal Pre-Trials--Useful Techniques, 29 F.R.D. 436 (1962); Handbook of Recommended Procedures for the Trial of Protracted Cases, 25 F.R.D. 399-403, 468-470 (1960). Cf. Mo. Sup. Ct. Rule 25.09; Rules Governing the N.J. Courts, § 3:5-3.

The rule is cast in broad language so as to accommodate all types of pretrial conferences. As the third sentence suggests, in some cases it may be desirable or necessary to have the defendant present. See Committee on Pretrial Procedure of the Judicial Conference of the United States, Recommended Procedures in Criminal Pretrials, 37 F.R.D. 95 (1965).

#### Rule 18. District and Division Place of Prosecution and Trial

Except as otherwise permitted by statute or by these rules, the prosecution shall be had in a district in which the offense was committed, but if the district consists of two or more divisions the

trial shall be had in a division in which the offense was committed; The court shall fix the place of trial within the district with due regard to the convenience of the defendant and the witnesses.

#### Advisory Committee's Note

The amendment eliminates the requirement that the prosecution shall be in a division in which the offense was committed and vests discretion in the court to fix the place of trial at any place within the district with due regard to the convenience of the defendant and his witnesses.

The Sixth Amendment provides that the defendant shall have the right to a trial "by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law. \* \* \*" There is no constitutional right to trial within a division. See United States v. Anderson, 328 U.S. 699, 704, 705 (1946); Barrett v. United States, 169 U.S. 218 (1898); Lafoon v. United States, 250 F.2d 958 (5th Cir. 1958); Carrillo v. Squier, 137 F.2d 648 (9th Cir. 1943); McNealey v. Johnston, 100 F.2d 280, 282 (9th Cir. 1938). Cf. Platt v. Minnesota Mining and Manufacturing Co., 376 U.S. 240 (1964).

The existing requirement for venue within the division operates in an irrational fashion. Divisions have been created in only half of the districts, and the differentiation between those districts with and those without divisions often bears no relationship to comparative size or population. In many districts a single judge is required to sit in several divisions and only brief and infrequent terms may be held in particular divisions. As a consequence there is often undue delay in the disposition of criminal cases--delay which is particularly serious with respect to defendants who have been unable to secure release on bail pending the holding of the next term of court.

If the court is satisfied that there exists in the place fixed for trial prejudice against the defendant so great as to render the trial unfair, the court may, of course, fix another place of trial within the district (if there be such) where such prejudice does not exist. Cf. Rule 21 dealing with transfers between districts.

Rule 20. Transfer From the District For  
Plea and Sentence

(a) Indictment or Information Pending. A defendant arrested or held in a district other than that in which the indictment or information is pending against him may state in writing; after receiving a copy of the indictment or information; that he wishes to plead guilty or nolo contendere, to waive trial in the district in which the indictment or information is pending and to consent to disposition of the case in the district in which he was arrested or is held, subject to the approval of the United States attorney for each district. Upon receipt of the defendant's statement and of the written approval of the United States attorneys, the clerk of the court in which the indictment or information is pending shall transmit the papers in the proceeding or certified copies thereof to the clerk of the court for the district in which the defendant is held and the prosecution shall continue in that district.

(b) Indictment or Information Not Pending. A defendant arrested on a warrant issued upon a complaint in a district other than the district of arrest may state in writing that he wishes to plead guilty or nolo contendere, to waive trial in the district in which the warrant was issued and to consent to disposition of the case in the district in which he was arrested, subject to the approval of the United States attorney for each district. Upon receipt of the defendant's statement and of the written approval of the United States attorneys and upon the filing of an information or the return

of an indictment, the clerk of the court for the district in which the warrant was issued shall transmit the papers in the proceeding or certified copies thereof to the clerk of the court for the district in which the defendant was arrested and the prosecution shall continue in that district. When the defendant is brought before the court to plead to an information filed in the district where the warrant was issued, he may at that time waive indictment as provided in Rule 7, and the prosecution may continue based upon the information originally filed.

(c) Effect of Not Guilty Plea. If after the proceeding has been transferred pursuant to subdivision (a) or (b) of this rule the defendant pleads not guilty, the clerk shall return the papers to the court in which the prosecution was commenced and the proceeding shall be restored to the docket of that court. The defendant's statement that he wishes to plead guilty or nolo contendere shall not be used against him unless he was represented by counsel when it was made.

(d) Juveniles. A juvenile (as defined in 18 U.S.C. § 5031) who is arrested or held in a district other than that in which he is alleged to have committed an act in violation of a law of the United States not punishable by death or life imprisonment may, after he has been advised by counsel and with the approval of the court and the United States attorney, consent to be proceeded against as a juvenile delinquent in the district in which he is arrested or held. The consent shall be given in writing before the court but only after the court has apprised the juvenile of his rights, including the right to be returned to the district in which he is alleged to have committed the act, and of the consequences of such consent.

(e) Summons. For the purpose of initiating a transfer under this rule a person who appears in response to a summons issued under Rule 4 shall be treated as if he had been arrested on a warrant in the district of such appearance.

Advisory Committee's Note

Present Rule 20 has proved to be most useful. In some districts, however, literal compliance with the procedures spelled out by the rule has resulted in unnecessary delay in the disposition of cases. This delay has been particularly troublesome where the defendant has been arrested prior to the filing of an indictment or information against him. See e.g., the procedure described in Donovan v. United States, 205 F.2d 557 (10th Cir. 1953). Furthermore, the benefit of the rule has not been available to juveniles electing to be proceeded against under 18 U.S.C. §§ 5031-5037. In an attempt to clarify and simplify the procedure the rule has been recast into four subdivisions.

Subdivision (a). This subdivision is intended to apply to the situation in which an indictment or information is pending at the time at which the defendant indicates his desire to have the transfer made. Two amendments are made to the present language of the rule. In the first sentence the words "or held" and "or is held" are added to make it clear that a person already in state or federal custody within a district may request a transfer of federal charges pending against him in another district. See 4 Barron, Federal Practice and Procedure 146 (1951). The words "after receiving a copy of the indictment or information" are deleted. The defendant should be permitted, if he wishes, to initiate transfer proceedings under the Rule without waiting for a copy of the indictment or information to be obtained. The defendant is protected against prejudice by the fact that under subdivision (c) he can, in effect, rescind his action by pleading not guilty after the transfer has been completed.

Subdivision (b). This subdivision is intended to apply to the situation in which no indictment or information is pending but the defendant has been arrested on a warrant issued upon a complaint in another district. Under the procedure set out he may initiate the transfer proceedings without waiting for the filing of an indictment or information in the district where the complaint is pending.

Also it is made clear that the defendant may validate an information previously filed by waiving indictment in open court when he is brought before the court to plead. See United States v. East, 5 F.R.D. 389 (N.D. Ind. 1946); Potter v. United States, 36 F.R.D. 394 (W.D.Mo. 1965). Here again the defendant is fully protected by the fact that at the time of pleading in the transferee court he may then refuse to waive indictment and rescind the transfer by pleading not guilty.

Subdivision (c). The last two sentences of the existing rule are included here. The last sentence is amended to forbid use against the defendant of his statement that he wishes to plead guilty or nolo contendere whether or not he was represented by counsel when it was made. Since under the amended rule the defendant may make his statement prior to receiving a copy of the indictment or information, it would be unfair to permit use of that statement against him.

Subdivision (d). Under 18 U.S.C. § 5033 a juvenile who has committed an act in violation of the law of the United States in one district and is apprehended in another must be returned to the district "having cognizance of the alleged violation" before he can consent to being proceeded against as a juvenile delinquent. This subdivision will permit a juvenile after he has been advised by counsel and with the approval of the court and the United States attorney to consent to be proceeded against in the district in which he is arrested or held. Consent is required only of the United States attorney in the district of the arrest in order to permit expeditious handling of juvenile cases. If it is necessary to recognize special interests of particular districts where offenses are committed--e.g., the District of Columbia with its separate Juvenile Court (District of Columbia Code § 11-1551(a))--the Attorney General may do so through his administrative control over United States Attorneys.

Subdivision (e). This subdivision is added to make it clear that a defendant who appears in one district in response to a summons issued in the district where the offense was committed may initiate transfer proceedings under the rule.

Rule 21. Transfer From the District or Division  
for Trial

(a) For Prejudice in the District or Division. The court upon motion of the defendant shall transfer the proceeding as to him to another district or division whether or not such district is specified in the defendant's motion if the court is satisfied that there exists in the district or division where the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial at any place fixed by law for holding court in that district or division.

(b) Transfer in Other Cases. Offense Committed in Two or More Districts or Divisions. For the convenience of parties and witnesses, and in the interest of justice, the court upon motion of the defendant may shall transfer the proceeding as to him or any one or more of the counts thereof to another district or division, if it appears from the indictment or information or from a bill of particulars that the offense was committed in more than one district or division and if the court is satisfied that in the interest of justice the proceeding should be transferred to another district or division in which the commission of the offense is charged.

(c) Proceedings on Transfer. When a transfer is ordered the clerk shall transmit to the clerk of the court to which the proceeding is transferred all papers in the proceeding or duplicates thereof and any bail taken, and the prosecution shall continue in that district or division.



Advisory Committee's Note

Subdivision (a). All references to divisions are eliminated in accordance with the amendment to Rule 18 eliminating division venue. The defendant is given the right to a transfer only when he can show that he cannot obtain a fair and impartial trial at any place fixed by law for holding court in the district. Transfers within the district to avoid prejudice will be within the power of the judge to fix the place of trial as provided in the amendments to Rule 18. It is also made clear that on a motion to transfer under this subdivision the court may select the district to which the transfer may be made. Cf. United States v. Parr, 17 F.R.D. 512, 519 (S.D. Tex. 1955); Parr v. United States, 351 U.S. 513 (1956).

Subdivision (b). The existing rule limits change of venue for reasons other than prejudice in the district to those cases where venue exists in more than one district. Upon occasion, however, convenience of the parties and witnesses and the interest of justice would best be served by trial in a district in which no part of the offense was committed. See, e.g., Travis v. United States, 364 U.S. 631 (1961), holding that the only venue of a charge of making or filing a false non-Communist affidavit required by § 9(h) of the National Labor Relations Act is in Washington, D.C. even though all the relevant witnesses may be located at the place where the affidavit was executed and mailed. See also Barber, Venue in Federal Criminal Cases: A Plea for Return to Principle, 42 Tex.L.Rev. 39 (1963); Wright, Proposed Changes in Federal Civil, Criminal and Appellate Procedure, 35 F.R.D. 317, 329 (1964). The amendment permits a transfer in any case on motion of the defendant on a showing that it would be for the convenience of parties and witnesses, and in the interest of justice. Cf. 28 U.S.C.

§ 1404(a), stating a similar standard for civil cases. See also Platt v. Minnesota Min. & Mfg. Co., 376 U.S.C. 240 (1964). Here, as in subdivision (a), the court may select the district to which the transfer is to be made. The amendment also makes it clear that the court may transfer all or part of the offenses charged in a multi-count indictment or information. Cf. United States v. Choate, 276 F.2d 724 (5th Cir. 1960). References to divisions are eliminated in accordance with the amendment to Rule 18.

Subdivision (c). The reference to division is eliminated in accordance with the amendment to Rule 18.

#### Rule 23. Trial by Jury or by the Court

(c) Trial Without a Jury. In a case tried without a jury the court shall make a general finding and shall in addition on request find the facts specially. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact appear therein.

#### Advisory Committee's Note

This amendment adds to the rule a provision added to Civil Rule 52(a) in 1946.

#### Rule 24. Trial Jurors

(c) Alternate Jurors. The court may direct that not more than 4 6 jurors in addition to the regular jury be called and impanelled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath and shall have the same functions, powers,

facilities and privileges as the regular jurors. An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict. Each side is entitled to 1 peremptory challenge in addition to those otherwise allowed by law if 1 or 2 alternate jurors are to be impanelled, ~~and~~ 2 peremptory challenges if 3 or 4 alternate jurors are to be impanelled, and 3 peremptory challenges if 5 or 6 alternate jurors are to be impanelled. The additional peremptory challenges may be used against an alternate juror only, and the other peremptory challenges allowed by these rules may not be used against an alternate juror.

#### Advisory Committee's Note

Experience has demonstrated that four alternate jurors may not be enough for some lengthy criminal trials. See, e.g., United States v. Bentvena, 288 F.2d 442 (2d Cir. 1961); Reports of the Proceedings of the Judicial Conference of the United States, 1961, p. 104. The amendment to the first sentence increases the number authorized from four to six. The fourth sentence is amended to provide an additional peremptory challenge where a fifth or sixth alternate juror is used.

The words "or are found to be" are added to the second sentence to make clear that an alternate juror may be called in the situation where it is first discovered during the trial that a juror was unable or disqualified to perform his duties at the time he was sworn. See United States v. Goldberg, 330 F.2d 30 (3rd Cir. 1964), cert. den. 377 U.S. 953 (1964).

The Committee has also been concerned with the problems which arise in lengthy criminal trials when a juror becomes disqualified or unable to perform his duties after the jury retires to consider its verdict. The constitutionality and feasibility of substituting an alternate juror under such circumstances is under continuing study.

Rule 25. Judge; Disability

(a) During Trial. If by reason of death, sickness or other disability the judge before whom a jury trial has commenced is unable to proceed with the trial, any other judge regularly sitting in or assigned to the court, upon certifying that he has familiarized himself with the record of the trial, may proceed with and finish the trial.

(b) After Verdict or Finding of Guilt. If by reason of absence from the district, death, sickness or other disability the judge before whom the defendant has been tried is unable to perform the duties to be performed by the court after a verdict or finding of guilt, any other judge regularly sitting in or assigned to the court may perform those duties; but if such other judge is satisfied that he cannot perform those duties because he did not preside at the trial or for any other reason, he may in his discretion grant a new trial.

Advisory Committee's Note

In September, 1963, the Judicial Conference of the United States approved a recommendation of its Committee on Court Administration that provision be made for substitution of a judge who becomes disabled during trial. The problem has become serious because of the increase in the number of long criminal trials. See 1963 Annual Report of the Director of the Administrative Office of the United States Courts, p. 114, reporting a 25% increase in criminal trials lasting more than one week in fiscal year 1963 over 1962.

Subdivision (a). The amendment casts the rule into two subdivisions and in subdivision (a) provides for substitution of a judge during a jury trial upon his certification that he has familiarized himself with the record of the trial. For similar provisions see Alaska Rules of Crim. Proc., Rule 25; California Penal Code, § 1053.

Subdivision (b). The words "from the district" are deleted to permit the local judge to act in those situations where a judge who has been assigned from within the district to try the case is, at the time for sentence, etc., back at his regular place of holding court which may be several hundred miles from the place of trial. It is not intended, of course, that substitutions shall be made where the judge who tried the case is available within a reasonable distance from the place of trial.

Rule 26.1. Determination of Foreign Law

A party who intends to raise an issue concerning the law of a foreign country shall give reasonable written notice. The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under Rule 26. The court's determination shall be treated as a ruling on a question of law.

Advisory Committee's Note

At present, the Federal Rules of Criminal Procedure do not contain a provision explicitly regulating the determination of foreign law. The resolution of issues of foreign law, when relevant in federal criminal proceedings, falls within the general compass of Rule 26 which provides for application of "the [evidentiary] principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." See Green, Preliminary Report on the Advisability and Feasibility of Developing Uniform Rules of Evidence for the United States District Courts 6-7, 17-18 (1962). Although traditional "common-law" methods for determining foreign-country law have proved inadequate, the courts have not developed more appropriate practices on the basis of this flexible rule. Cf. Green, op. cit. supra at 26-28. On the inadequacy of common-law procedures for determining foreign law, see e.g., Nussbaum, Proving the Law of Foreign Countries, 3 Am. J. Comp. L. 60 (1954).

Problems of foreign law that must be resolved in accordance with the Federal Rules of Criminal Procedure are most likely to arise in places such as Washington, D.C., the Canal Zone, Guam, and the Virgin Islands, where the federal courts have general criminal jurisdiction. However, issues of foreign law may also arise in criminal proceedings commenced in other federal districts. For example, in an extradition proceeding, reasonable ground to believe that the person sought to be extradited is charged with, or was convicted of, a crime under the laws of the demanding state must generally be shown. See Factor v. Laubheimer, 290 U.S. 276 (1933); Fernandez v. Phillips, 268 U.S. 311 (1925); Bishop, International Law: Cases and Materials (2d ed. 1962). Further, foreign law may be invoked to justify non-compliance with a subpoena duces tecum, Application of Chase Manhattan Bank, 297 F.2d 611 (2nd Cir. 1962), and under certain circumstances, as a defense to prosecution. Cf. American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909). The content of foreign law may also be relevant in proceedings arising under 18 U.S.C. §§-1201, 2312-2317.

The Advisory Committee on Civil Rules, the Commission and Advisory Committee on International Rules of Judicial Procedure (see Act of Sept. 2, 1958, 72 Stat. 1743) and the Columbia Law School Project on International Procedure developed collaboratively a proposed Civil Rule 44.1 governing Determination of Foreign Law. The Advisory Committee on Criminal Rules was consulted during this development. The rule proposed here is substantially the same as proposed Civil Rule 44.1. A full explanation of the merits and practicability of the rule will be contained in the Advisory Committee's Note to Civil Rule 44.1.

It is necessary here to add only one comment to the explanations made in connection with the civil rule. The second sentence of the criminal rule proposed here frees the court from the restraints of the ordinary rules of evidence in

determining foreign law. This freedom, made necessary by the peculiar nature of the issue of foreign law, should not constitute an unconstitutional deprivation of the defendant's rights to confrontation of witnesses. The issue is essentially one of law rather than of fact. Furthermore, the cases have held that the Sixth Amendment does not serve as a rigid barrier against the development of reasonable and necessary exceptions to the hearsay rule. See Kay v. United States, 255 F.2d 476, 480 (4th Cir. 1958), cert. den., 358 U.S. 825 (1958); Matthews v. United States, 217 F.2d 400, 418 (5th Cir. 1954); United States v. Leathers, 135 F.2d 507 (2d Cir. 1943); and cf., Painter v. Texas, 85 S.Ct. 1065 (1965); Douglas v. Alabama, 85 S. Ct. 1074 (1965).

Rule 28. Expert Witnesses and Interpreters

(a) Expert Witnesses. The court may order the defendant or the government or both to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint witnesses of its own selection. An expert witness shall not be appointed by the court unless he consents to act. A witness so appointed shall be informed of his duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of his findings, if any, and may thereafter be called to testify by the court or by any party. He shall be subject to cross-examination by each party. The court may determine the reasonable compensation of such a witness and direct its payment out of such funds as may be provided by law. The parties also may call expert witnesses of their own selection.

(b) Interpreters. The court may appoint an interpreter of its own selection and may fix the

reasonable compensation of such interpreter. Such compensation shall be paid out of funds provided by law or by the government, as the court may direct.

Advisory Committee's Note

Subdivision (a). The existing rule is made a separate subdivision. The amendment permits the court to inform the witness of his duties in writing since it often constitutes an unnecessary inconvenience and expense to require the witness to appear in court for such purpose.

Subdivision (b). This new subdivision authorizes the court to appoint and provide for the compensation of interpreters. General language is used to give discretion to the court to appoint interpreters in all appropriate situations. Interpreters may be needed to interpret the testimony of non-English speaking witnesses or to assist non-English speaking defendants in understanding the proceedings or in communicating with assigned counsel. Interpreters may also be needed where a witness or a defendant is deaf.

Rule 29. Motion for Judgment of Acquittal

(a) Motion Before Submission to Jury. ~~Motion for Judgment of Acquittal.~~ Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is heard if the evidence is insufficient to sustain a conviction of such offense or offenses. If the defendant's motion for judgment of acquittal is granted at the close of the evidence offered by the government is not granted, the defendant may offer evidence without having reserved the right.



(b) Reservation of Decision on Motion. If a motion for judgment of acquittal is made at the close of all the evidence, the court may reserve decision on the motion, submit the case to the jury and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict. ~~If the motion is denied and the case is submitted to the jury, the motion may be renewed within 5 days after the jury is discharged and may include in the alternative a motion for a new trial. If a verdict of guilty is returned the court may on such motion set aside the verdict and order a new trial or enter judgment of acquittal. If no verdict is returned the court may order a new trial or enter judgment of acquittal.~~

(c) Motion After Discharge of Jury. If the jury returns a verdict of guilty or is discharged without having returned a verdict, a motion for judgment of acquittal may be made or renewed within 7 days after the jury is discharged or within such further time as the court may fix during the 7-day period. If a verdict of guilty is returned the court may on such motion set aside the verdict and enter judgment of acquittal. If no verdict is returned the court may enter judgment of acquittal. It shall not be necessary to the making of such a motion that a similar motion has been made prior to the submission of the case to the jury.

#### Advisory Committee's Note

Subdivision (a). A minor change has been made in the caption.

Subdivision (b). The last three sentences are deleted with the matters formerly covered by them transferred to the new subdivision (c).

Subdivision (c). The new subdivision makes several changes in the existing procedure. A motion for judgment of acquittal may be made after discharge of the jury whether or not a motion was made before submission to the jury. It is believed that no

legitimate interest of the government will be prejudiced by permitting the court to direct an acquittal on a post-verdict motion. The constitutional requirement of a jury trial in criminal cases is primarily a right accorded to the defendant. Cf. Adams v. United States, ex rel. McCann, 317 U.S. 269 (1942); Singer v. United States, 380 U.S. 24 (1965 ); Note, 65 Yale L. J. 1032 (1956).

The time in which the motion may be made has been changed to 7 days in accordance with the amendment to Rule 45(a) which by excluding Saturday from the days to be counted when the period of time is less than 7 days would make 7 days the normal time for a motion required to be made in 5 days. Also the court is authorized to extend the time as is provided for motions for new trial (Rule 33) and in arrest of judgment (Rule 34).

References in the existing rule to the motion for a new trial as an alternate to the motion for judgment of acquittal and to the power of the court to order a new trial have been eliminated. Motions for new trial are adequately covered in Rule 33. Also the existing wording is subject to the interpretation that a motion for judgment of acquittal gives the court power to order a new trial even though the defendant does not wish a new trial and has not asked for one.

#### Rule 30. Instructions

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed.

No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury: and, on request of any party, out of the presence of the jury.

#### Advisory Committee's Note

The amendment requires the court, on request of any party, to require the jury to withdraw in order to permit full argument of objections to instructions.

#### Rule 32. Sentence and Judgment

##### (a) Sentence.

(1) Imposition of Sentence. Sentence shall be imposed without unreasonable delay. Pending sentence the court may commit the defendant or continue or alter the bail. Before imposing sentence the court shall afford the defendant counsel an opportunity to speak on behalf of the defendant and shall address the defendant personally and ask him if he wishes to make a statement in his own behalf and to present any information in mitigation of punishment.

(2) Notification of Right to Appeal. After imposing sentence in a case which has gone to trial, on a plea of not guilty the court shall advise the defendant of his right to appeal and of the right of a person who is unable to pay the cost of an appeal to apply for leave to appeal in forma pauperis. If the defendant so requests, the clerk of the court shall prepare and file forthwith a notice of appeal on behalf of the defendant.

(c) Presentence Investigation.

(2) Report. The report of the presentence investigation shall contain any prior criminal record of the defendant and such information about his characteristics, his financial condition and the circumstances affecting his behavior as may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant, and such other information as may be required by the court. The court before imposing sentence may disclose to the defendant or his counsel all or part of the material contained in the report of the presentence investigation and afford an opportunity to the defendant or his counsel to comment thereon. Any material disclosed to the defendant or his counsel shall also be disclosed to the attorney for the government.

(f) Revocation of Probation. The court shall not revoke probation except after a hearing at which the defendant shall be present and apprised of the grounds on which such action is proposed. The defendant may be admitted to bail pending such hearing.

Advisory Committee's Note

Subdivision (a)(1). The amendment writes into the rule the holding of the Supreme Court that the court before imposing sentence must afford an opportunity to the defendant personally to speak in his own behalf. See Green v. United States, 365 U.S. 301 (1961); Hill v. United States, 368 U.S. 424 (1962). The amendment also provides an opportunity for counsel to speak on behalf of the defendant.

Subdivision (a)(2). This amendment is a substantial revision and a relocation of the provision now found in Rule 37(a)(2): "When a court after trial imposes sentence upon a defendant not represented by counsel, the defendant shall be advised of his right to appeal and if he so requests, the clerk shall prepare and file forthwith a notice of appeal on

behalf of the defendant." The court is required to advise the defendant of his right to appeal in all cases which have gone to trial after plea of not guilty because situations arise in which a defendant represented by counsel at the trial is not adequately advised by such counsel of his right to appeal. Trial counsel may not regard his responsibility as extending beyond the time of imposition of sentence. The defendant may be removed from the courtroom immediately upon sentence and held in custody under circumstances which make it difficult for counsel to advise him. See, e.g., Hodges v. United States, 368 U.S. 139 (1961). Because indigent defendants are most likely to be without effective assistance of counsel at this point in the proceedings, it is also provided that defendants be notified of the right of a person without funds to apply for leave to appeal in forma pauperis. The provision is added here because this rule seems the most appropriate place to set forth a procedure to be followed by the court at the time of sentencing.

Subdivision (c)(2). It is not a denial of due process of law for a court in sentencing to rely on a report of a presentence investigation without disclosing such report to the defendant or giving him an opportunity to rebut it. Williams v. New York, 337 U.S. 241 (1949); Williams v. Oklahoma, 358 U.S. 576 (1959). However, the question whether as a matter of policy the defendant should be accorded some opportunity to see and refute allegations made in such reports has been the subject of heated controversy. For arguments favoring disclosure, see Tappan, Crime, Justice, and Correction, 558 (1960); Model Penal Code, 54-55 (Tent. Draft No. 2, 1954); Thomsen, Confidentiality of the Presentence Report: A Middle Position, 28 Fed. Prob., March 1964, p. 8; Wyzanski, A Trial Judge's Freedom and Responsibility, 65 Harv. L. Rev. 1281, 1291-2 (1952); Note, Employment of Social Investigation Reports in Criminal and Juvenile Proceedings, 58 Colum. L. Rev. 702 (1958); cf. Kadish, The Advocate and the Expert: Counsel in the Peno-Correctional Process, 45 Minn. L. Rev. 803, 806, (1961). For arguments opposing disclosure, see

Barnett and Gronewold, Confidentiality of the Presentence Report, 26 Fed. Prob. March 1962, p. 26; Judicial Conference Committee on Administration of the Probation System, Judicial Opinion on Proposed Change in Rule 32(c) of the Federal Rules of Criminal Procedure - a Survey (1964); Keve, The Probation Officer Investigates, 6-15 (1960); Parsons, The Presentence Investigation Report Must be Preserved as a Confidential Document, 28 Fed. Prob. March 1964, P. 3; Sharp, The Confidential Nature of Presentence Reports, 5 Cath. U. L. Rev. 127 (1955); Wilson, A New Arena is Emerging to Test the Confidentiality of Presentence Reports, 25 Fed. Prob. Dec. 1961, p. 6; Federal Judge's Views on Probation Practices, 24 Fed. Prob. March 1960, p. 10.

In a few jurisdictions the defendant is given a right of access to the presentence report. In England and California a copy of the report is given to the defendant in every case. English Criminal Justice Act of 1948, 11 & 12 Geo. 6, c. 58, § 43; Cal. Pen. C. § 1203. In Alabama the defendant has a right to inspect the report. Ala. Code. Title 42, § 23. In Ohio and Virginia the probation officer reports in open court and the defendant is given the right to examine him on his report. Ohio Rev. Code, § 2947.06; Va. Code, § 53-278.1. The Minnesota Criminal Code of 1963, § 609.115(4), provides that any presentence report "shall be open for inspection by the prosecuting attorney and the defendant's attorney prior to sentence and on the request of either of them a summary hearing in chambers shall be held on any matter brought in issue, but confidential sources of information shall not be disclosed unless the court otherwise directs." Cf. Model Penal Code § 7.07(5) (P.O.D. 1962): "Before imposing sentence, the Court shall advise the defendant or his counsel of the factual contents and the conclusions of any presentence investigation or psychiatric examination and afford fair opportunity, if the defendant so requests, to controvert them. The sources of confidential information need not, however, be disclosed."

Practice in the federal courts is mixed, with a substantial minority of judges permitting disclosure while most deny it. See the recent survey prepared for the Judicial Conference of the District of Columbia by the Junior Bar Section of the Bar Association of the District of Columbia, reported in Conference Papers on Discovery in Federal Criminal Cases, 33 F.R.D. 101, 125-127 (1963). See also Gronewold, Presentence Investigation Practices in the Federal Probation System, Fed. Prob. Sept. 1958, pp. 27, 31. For divergent judicial opinions see Smith v. United States, 223 F.2d 750, 754 (5th Cir. 1955) (supporting disclosure); United States v. Durham, 181 F. Supp. 503 (D.D.C. 1960) (supporting secrecy).

Substantial objections to compelling disclosure in every case have been advanced by federal judges, including many who in practice often disclose all or parts of presentence reports. See Judicial Conference Committee on the Administration of the Probation System, Judicial Opinion on Proposed Change in Rule 32(c) of the Federal Rules of Criminal Procedure - A Survey (1964). Hence, the amendment goes no further than to make it clear that courts may disclose all or part of the presentence report to the defendant or to his counsel. It is hoped that courts will make increasing use of their discretion to disclose so that defendants generally may be given full opportunity to rebut or explain facts in presentence reports which will be material factors in determining sentences. For a description of such a practice in one district, see Thomsen, Confidentiality of the Presentence Report: A Middle Position, 28 Fed. Prob., March 1964, p. 8.

It is also provided that any material disclosed to the defendant or his counsel shall be disclosed to the attorney for the government. Such disclosure will permit the government to participate in the resolution of any factual questions raised by the defendant.

Subdivision (f). This new subdivision writes into the rule the procedure which the cases have derived from the provision in 18 U.S.C. § 3653 that a person arrested for violation of probation "shall be taken before the court" and that thereupon the court may revoke the probation. See Escoe v. Zerbst, 295 U.S. 490 (1935); Brown v. United States, 236 F.2d 253 (9th Cir. 1956), cert. den. 356 U.S. 922 (1958). Compare Model Penal Code § 301.4 (P.O.D. 1962); Hink, The Application of Constitutional Standards of Protection to Probation, 29 U. Chi. L. Rev. 483 (1962).

### Rule 33. New Trial

The court on motion of a defendant may grant a new trial to a defendant him if required in the interest of justice. If trial was by the court without a jury the court on motion of a defendant for a new trial may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 5 7 days after verdict or finding of guilty or within such further time as the court may fix during the 5 7-day period.

### Advisory Committee's Note

The amendments to the first two sentences are designed to make it clear that a judge has no power to order a new trial on his own motion, that he can act only in response to a motion timely made by a defendant. Problems of double jeopardy arise when the court acts on its own motion. See United States v. Smith, 331 U.S. 469 (1947). These amendments will not, of course, change the power which the court has in certain circumstances prior to verdict or finding of guilty to declare a mistrial and order a new trial on its own motion. See e.g., Gori v. United States, 367 U.S. 364 (1961); Downum v.



United States, 372 U.S. 734 (1963); United States v. Tateo, 377 U.S. 463 (1964). The amendment to the last sentence changes the time in which the motion may be made to 7 days. See the Advisory Committee's Note to Rule 29.

#### Rule 34. Arrest of Judgment

The court on motion of a defendant shall arrest judgment if the indictment or information does not charge an offense or if the court was without jurisdiction of the offense charged. The motion in arrest of judgment shall be made within 5 7 days after determination of guilt verdict or finding of guilty, or after plea of guilty or nolo contendere, or within such further time as the court may fix during the 5 7-day period.

#### Advisory Committee's Note

The words "on motion of a defendant" are added to make clear here, as in Rule 33, that the court may act only pursuant to a timely motion by the defendant.

The amendment to the second sentence is designed to clarify an ambiguity in the rule as originally drafted. In Lott v. United States, 367 U.S. 421 (1961) the Supreme Court held that when a defendant pleaded nolo contendere the time in which a motion could be made under this rule did not begin to run until entry of the judgment. The Court held that such a plea was not a "determination of guilt." No reason of policy appears to justify having the time for making this motion commence with the verdict or finding of guilt but not with the acceptance of the plea of nolo contendere or the plea of guilty. The amendment will change the result in the Lott case and make the periods uniform. The amendment also changes the time in which the motion may be made to 7 days. See the Advisory Committee's Note to Rule 29.

Rule 35. Correction or Reduction of Sentence

The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence. The court may reduce a sentence within ~~60~~ 120 days after the sentence is imposed, or within ~~60~~ 120 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within ~~60~~ 120 days after ~~receipt of an~~ entry of any order or judgment of the Supreme Court ~~denying an application for a writ of certiorari~~ denying an application for a writ of certiorari review of, or having the effect of upholding, a judgment of conviction. The court may also reduce a sentence upon revocation of probation as provided by law.

The Advisory Committee's Note

The amendment to the first sentence gives the court power to correct a sentence imposed in an illegal manner within the same time limits as those provided for reducing a sentence. In Hill v. United States, 368 U.S. 424 (1962) the Court held that a motion to correct an illegal sentence was not an appropriate way for a defendant to raise the question whether when he appeared for sentencing the court had afforded him an opportunity to make a statement in his own behalf as required by Rule 32(a). The amendment recognizes the distinction between an illegal sentence, which may be corrected at any time, and a sentence imposed in an illegal manner, and provides a limited time for correcting the latter.

The second sentence has been amended to increase the time within which the court may act from 60 days to 120 days. The 60-day period is frequently too short to enable the defendant to obtain and file the evidence, information and argument to support a reduction in sentence. Especially where a defendant has been committed to an institution at a distance from the sentencing court, the delays involved in institutional mail inspection procedures and the time required to contact relatives, friends and counsel may result in the 60-day period passing before the court is able to consider the case.

(Rev. 9-14-65)

The other amendments to the second sentence are designed to clarify ambiguities in the timing provisions. In those cases in which the mandate of the court of appeals is issued prior to action by the Supreme Court on the defendant's petition for certiorari, the rule created problems in three situations: (1) If the writ were denied, the last phrase of the rule left obscure the point at which the period began to run because orders of the Supreme Court denying applications for writs are not sent to the district courts. See Johnson v. United States, 235 F.2d 459 (5th Cir. 1956). (2) If the writ were granted but later dismissed as improvidently granted, the rule did not provide any time period for reduction of sentence. (3) If the writ were granted and later the Court affirmed a judgment of the court of appeals which had affirmed the conviction, the rule did not provide any time period for reduction of sentence. The amendment makes it clear that in each of these three situations the 120-day period commences to run with the entry of the order or judgment of the Supreme Court.

The third sentence has been added to make it clear that the time limitation imposed by Rule 35 upon the reduction of a sentence does not apply to such reduction upon the revocation of probation as authorized by 18 U.S.C. § 3653.

Rule 37. Taking Appeal; and Petition for  
Writ of Certiorari

(a) Taking Appeal to a Court of Appeals

(1) How an Appeal is Taken; Notice of Appeal.  
An appeal permitted by law from a district court to a court of appeals is taken by filing with the clerk of the district court a notice of appeal in duplicate, the district court within the time provided by paragraph (2) of this subdivision. Petitions for allowance of appeal, citations and assignments of error in cases governed by these rules are abolished. The notice of appeal shall set forth the title of the case, the name and address of the appellant and of the appellant's attorney, a general statement of the offense, a concise statement of the judgment or order, giving its date and any sentence imposed, the place of confinement if the defendant is in custody and a statement that the appellant appeals

from the judgment or order. The notice of appeal shall be signed by the appellant or appellant's attorney; or by the clerk if the notice is prepared by the clerk as provided in paragraph (2) of this subdivision: specify the party or parties taking the appeal; shall designate the judgment, order or part thereof appealed from; and shall name the court to which the appeal is taken. A copy of ~~the~~ duplicate notice of appeal and a statement of the docket entries shall be forwarded immediately by the clerk of the district court to the clerk of the court of appeals. Notification of the filing of the notice of appeal shall be given by the clerk by mailing copies thereof to adverse parties; but his failure so to do does not affect the validity of the appeal. The clerk shall serve notice of the filing of a notice of appeal by mailing a copy thereof to all parties other than the appellant. When an appeal is taken by a defendant, the clerk shall also serve a copy of the notice of appeal upon him, either by personal service or by mail addressed to him. The clerk shall note on each copy to be served the date on which the notice of appeal was filed, and shall note in the docket the names of the parties on whom he serves copies, with the date of mailing or other service. Failure of the clerk to serve notice shall not affect the validity of the appeal.

(2) Time for Taking Appeal. An appeal by a defendant may be taken within 10 days after entry of the judgment or order appealed from; but if a motion for a new trial or in arrest of judgment has been made within the 10 day period an appeal from a judgment of conviction may be taken within 10 days after entry of the order denying the motion: The notice of appeal by a defendant shall be filed within 10 days after the entry of the judgment or order appealed from. A notice of appeal filed after the announcement of a decision, sentence or order but before entry of the judgment or order

shall be treated as filed after such entry and on the day thereof. If a timely motion in arrest of judgment or for a new trial on any ground other than newly discovered evidence has been made, an appeal from a judgment of conviction may be taken within 10 days after the entry of the order denying the motion. A motion for a new trial based on the ground of newly discovered evidence will similarly extend the time for appeal from a judgment of conviction if the motion is made before or within 10 days after entry of judgment. When a court after trial imposes sentence upon a defendant not represented by counsel; the defendant shall be advised of his right to appeal and if he so requests; the clerk shall prepare and file forthwith a notice of appeal on behalf of the defendant. When an appeal by the government when is authorized by statute, may be taken the notice of appeal shall be filed within 30 days after entry of the judgment or order appealed from. A judgment or order is entered within the meaning of this paragraph when it is entered in the criminal docket.

Upon a showing of excusable neglect, the district court may, before or after the time has expired, with or without motion and notice, extend the time for filing the notice of appeal otherwise allowed to any party for a period not to exceed 30 days from the expiration of the original time prescribed by this paragraph.

#### Advisory Committee's Note

Subdivision (a)(1). The first and third sentences of the present subdivision are rewritten, and the fourth sentence is eliminated, in order to assimilate the method of taking an appeal in criminal cases with the somewhat simpler method provided for civil cases. The second sentence of present (a)(1) is eliminated as being no longer necessary. The duty imposed on the clerk by the present sixth sentence is expanded in the interest of providing a defendant with actual notice that his appeal has been taken and in the interest of orderly procedure generally. •

Subdivision (a)(2). The amended subdivision is based upon the present subdivision with the following additions, omissions and changes:

(1) The first sentence is the first clause of the present first sentence, reworded to indicate the mandatory character of the provision that the notice be filed within 10 days.

(2) The second sentence incorporates the holding in Lemke v. United States, 346 U.S. 325 (1953).

(3) The third and fourth sentences are based upon the final clause of the first sentence of the present subdivision (a)(2). That clause provides that a motion for a new trial or in arrest of judgment made within the 10 day period allowed for the filing of a notice of appeal terminates the running of the time for appeal and permits an appeal to be taken within 10 days after entry of the order denying the motion. The question has arisen as to whether a motion filed within the 10 day period but beyond the time allowed for its filing by the applicable rules (Rules 33 and 34) terminates the running of the time for appeal. Cf. Lott v. United States, 280 F.2d 24 (5th Cir. 1960), holding that an invalid motion does not extend the time, with Smith v. United States, 273 F.2d 462 (10th Cir. 1959), holding that it does. On reviewing the Lott case the Supreme Court called attention to the conflict and expressed the hope that the rule would be clarified. Lott v. United States, 367 U.S. 421, 425 (1961). The proposed amendment makes it clear that only a timely motion will have the effect of terminating the time for filing the notice of appeal and that a motion based on newly discovered evidence will have the effect only if it is filed before or within 10 days after entry of judgment. The latter qualification is necessary because a motion for a new trial based on newly discovered evidence is timely under Rule 33 if filed within 2 years of the entry of judgment.

(4) The sixth sentence is added to fix the precise time at which a judgment is entered. There has been some doubt on the point. In Richards v.

United States, 192 F.2d 602 (D.C. Cir. 1951) it was held that the time for appeal ran, not from the date of the sentence, nor from the date the judgment was signed, but from the date it was filed and entered in the docket. But dicta in Hyché v. United States, 278 F.2d 915 (5th Cir. 1960) and United States v. Isabella, 251 F.2d 223 (2d Cir. 1958) state that the time for appeal starts to run from the time of the sentence in open court.

(5) The sentence comprising the final paragraph effects a major change in the present rule, under which courts have been held powerless to extend the time fixed by rule for taking an appeal. United States v. Robinson, 361 U.S. 220 (1960). The desirability of a provision permitting an extension in appropriate cases is evidenced by Berman v. United States, 378 U.S. 530 (1964), Fallen v. United States, 306 F.2d 697 (5th Cir. 1962), rev'd 378 U.S. 139 (1964), and United States v. Isabella, 251 F.2d 223 (2d Cir. 1958).

Contrary to the usual rule (see Rule 45(b); see also Rule 6(b) of the Federal Rules of Civil Procedure) the district court is authorized to extend the time after its expiration without motion and notice. The usual requirement of motion and notice has the effect of reducing the time within which an extension of the time for appeal may be sought, since, unlike other motions-for extensions, the relief itself can be granted only within a fixed time after expiration of the original time. While an adverse party ought ordinarily be afforded an opportunity to contest a request for an extension, the special circumstances which not infrequently obtain in criminal cases suggest that the district court should be empowered to grant extensions in appropriate cases without motion and notice.

(6) The second sentence of present subdivision (a)(2) has been transferred, in amended form, to Rule 32.

Rule 38. Stay of Execution, and Relief Pending  
Review

(a) Stay of Execution.

(2) Imprisonment. A sentence of imprisonment shall be stayed if an appeal is taken and the defendant ~~elects not to commence service of the sentence or~~ is admitted to bail. If the defendant is not admitted to bail, the court may recommend to the Attorney General that the defendant be retained at, or transferred to a place of confinement near the place of trial or the place where his appeal is to be heard, for a period reasonably necessary to permit the defendant to assist in the preparation of his appeal to the court of appeals.

Advisory Committee's Note

A defendant sentenced to a term of imprisonment is committed to the custody of the Attorney General who is empowered by statute to designate the place of his confinement. 18 U.S.C. § 4082. The sentencing court has no authority to designate the place of imprisonment. See, e.g., Hogue v. United States, 287 F.2d 99 (5th Cir. 1961), cert. den., 368 U.S. 932 (1961).

When the place of imprisonment has been designated, and notwithstanding the pendency of an appeal, the defendant is usually transferred from the place of his temporary detention within the district of his conviction unless he has elected "not to commence service of the sentence." This transfer can be avoided only if the defendant makes the election, a course sometimes advised by counsel who may deem it necessary to consult with the defendant from time to time before the appeal is finally perfected. However, the election deprives the defendant of a right to claim credit for the time spent in jail pending the disposition of the appeal because 18 U.S.C. § 3568 provides that the



sentence of imprisonment commences to run only from "the date on which such person is received at the penitentiary, reformatory, or jail for service of said sentence." See, e.g., Shelton v. United States, 234 F.2d 132 (5th Cir. 1956).

The amendment eliminates the procedure for election not to commence service of sentence. In lieu thereof it is provided that the court may recommend to the Attorney General that the defendant be retained at or transferred to a place of confinement near the place of trial or the place where the appeal is to be heard for the period reasonably necessary to permit the defendant to assist in the preparation of his appeal to the court of appeals. Under this procedure the defendant would no longer be required to serve dead time in a local jail in order to assist in preparation of his appeal.

Rule 40. Commitment to Another District; Removal

(b) Arrest in Distant District.

(2) Statement by Commissioner or Judge. The commissioner or judge shall inform the defendant of the charge against him, of his right to retain counsel, of his right to request the assignment of counsel if he is unable to obtain counsel, and of his right to have a hearing or to waive a hearing by signing a waiver before the commissioner or judge. The commissioner or judge shall also inform the defendant that he is not required to make a statement and that any statement made by him may be used against him, shall allow him reasonable opportunity to consult counsel and shall admit him to bail as provided in these rules.

#### Advisory Committee's Note

The amendment conforms to the change made in the corresponding procedure in Rule 5(b).

Rule 44. Right to and Assignment of Counsel

If the defendant appears in court without counsel; the court shall advise him of his right to counsel and assign counsel to represent him at every stage of the proceeding unless he elects to proceed without counsel or is able to obtain counsel.

(a) Right to Assigned Counsel. Every defendant who is unable to obtain counsel shall be entitled to have counsel assigned to represent him at every stage of the proceedings from his initial appearance before the commissioner or the court through appeal, unless he waives such appointment.

(b) Assignment Procedure. The procedures for implementing the right set out in subdivision (a) shall be those provided by law and by local rules of court established pursuant thereto.

Advisory Committee's Note

A new rule is provided as a substitute for the old to provide for the assignment of counsel to defendants unable to obtain counsel during all stages of the proceeding. The Supreme Court has recently made clear the importance of providing counsel both at the earliest possible time after arrest and on appeal. See Crooker v. California, 357 U.S. 433 (1958); Cicenia v. LaGay, 357 U.S. 504 (1958); White v. Maryland, 373 U.S. 59 (1963); Gideon v. Wainwright, 372 U.S. 335 (1963); Douglas v. California, 372 U.S. 353 (1963). See also Association of the Bar of the City of New York, Special Committee to Study the Defender System, Equal Justice for the Accused (1959); Report of the Attorney General's Committee on Poverty and the Administration of Justice (1963); Beaney, Right to Counsel Before Arraignment, 45 Minn. L. Rev. 771 (1961); Boskey, The Right to Counsel in Appellate Proceedings, 45 Minn. L. Rev. 783 (1961); Douglas, The Right to Counsel--A Foreword, 45 Minn. L. Rev. 693 (1961); Kamisar, The Right to Counsel and the Fourteenth Amendment; A Dialogue on "The Most Pervasive Right" of an Accused, 30 U. Chi. L. Rev. 1 (1962);

Kamisar, Betts v. Brady Twenty Years Later: The Right to Counsel and Due Process Values, 61 Mich. L. Rev. 219 (1962); Symposium, The Right to Counsel, 22 Legal Aid Briefcase 4-48 (1963). Provision has been made by law for a Legal Aid Agency in the District of Columbia which is charged with the duty of providing counsel and courts are admonished to assign such counsel "as early in the proceeding as practicable." D.C. Code § 2-2202. Congress has now made provision for assignment of counsel and their compensation in all of the districts. Criminal Justice Act of 1964.

Like the original rule the amended rule provides a right to counsel which is broader in two respects than that for which compensation is provided in the Criminal Justice Act of 1964: (1) the right extends to petty offenses to be tried in the district courts, and (2) the right extends to defendants unable to obtain counsel for reasons other than financial. These rules do not cover procedures other than those in the courts of the United States and before United States commissioners. See Rule 1. Hence, the problems relating to the providing of counsel prior to the initial appearance before a court or commissioner are not dealt with in this rule. Cf. Escobedo v. United States, 378 U.S. 478 (1964); Enker and Elsen, Counsel for the Suspect: Massiah v. United States and Escobedo v. Illinois, 49 Minn. L. Rev. 47 (1964).

Subdivision (a). This subdivision expresses the right of the defendant unable to obtain counsel to have such counsel assigned at any stage of the proceedings from his initial appearance before the commissioner or court through the appeal, unless he waives such right. The phrase "from his initial appearance before the commissioner or court" is intended to require the assignment of counsel as promptly as possible after it appears that the defendant is unable to obtain counsel. The right to assignment of counsel is not limited to those financially unable to obtain counsel. If a defendant is able to compensate counsel but still cannot obtain counsel, he is entitled to the assignment of counsel even though not to free counsel.

Subdivision (b). This new subdivision reflects the adoption of the Criminal Justice Act of 1964. See Report of the Judicial Conference of the United States on the Criminal Justice Act of 1964, 36 F.R.D. 277 (1964).

Rule 45. Time

(a) Computation. In computing any period of time the day of the act or event after from which the designated period of time begins to run is shall not to be included. The last day of the period so computed is to shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day which is neither not a Saturday, a Sunday, nor or a legal holiday. When a period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation. A half holiday shall be considered as other days and not as a holiday: As used in these rules, "legal holiday" includes New Year's Day, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Veterans Day, Thanksgiving Day, Christmas Day, and any other day appointed as a holiday by the President or the Congress of the United States, or by the state in which the district court is held.

(b) Enlargement. When an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice, order the period enlarged if application request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion made after the expiration of the specified period permit the act to be done after the expiration of the specified period if the failure to act was the result of excusable neglect; but the court may not enlarge the period extend the time for taking any action under Rules 22, 33, 34, and 35; except as otherwise

provided in those rules; or the period for taking an appeal 35, 37(a)(2) and 39(c), except to the extent and under the conditions stated in them.

#### Advisory Committee's Note

Subdivision (a). This amendment is designed to conform the subdivision with the amendments made effective on July 1, 1963, to the comparable provision in Civil Rule 6(a). The only major change is to treat Saturdays as legal holidays for the purpose of computing time.

Subdivision (b). The amendment conforms the subdivision to the amendments made effective in 1948 to the comparable provision in Civil Rule 6(b). One of these conforming changes, substituting the words "extend the time" for the words "enlarge the period" will clarify the ambiguity which gave rise to the decision in United States v. Robinson, 361 U.S. 220 (1960). The amendment also, in connection with the amendments to Rules 29 and 37, makes it clear that the only circumstances under which extensions can be granted under Rules 29, 33, 34, 35, 37(a)(2) and 39(c) are those stated in them.

#### Rule 46. Release on Bail

(c) Amount Terms. If the defendant is admitted to bail, the amount terms thereof shall be such as in the judgment of the commissioner or court or judge or justice will insure the presence of the defendant, having regard to the nature and circumstances of the offense charged, the weight of the evidence against him, the financial ability of the defendant to give bail, and the character of the defendant, and the policy against unnecessary detention of defendants pending trial.

(d) Form, Conditions and Place of Deposit. A person required or permitted to give bail shall execute a bond for his appearance. One or more sureties may be required; cash or bonds or notes of the United States may be accepted and in proper cases no security need be required. The commissioner or court or judge or justice, having regard to the considerations set forth in subdivision (c), may require one or more sureties, may authorize the acceptance of cash or bonds or notes of the United States in an amount equal to or less than the face amount of the bond, or may authorize the release of the defendant without security upon his written agreement to appear at a specified time and place and upon such conditions as may be prescribed to insure his appearance. Bail given originally on appeal shall be deposited in the registry of the district court from which the appeal is taken.

(h) Supervision of Detention Pending Trial. The court shall exercise supervision over the detention of defendants and witnesses within the district pending trial for the purpose of eliminating all unnecessary detention. The attorney for the government shall make a biweekly report to the court listing each defendant and witness who has been held in custody pending indictment, arraignment or trial for a period in excess of ten days. As to each witness so listed the attorney for the government shall make a statement of the reasons why such witness should not be released with or without the taking of his deposition pursuant to Rule 15(a). As to each defendant so listed the attorney for the government shall make a statement of the reasons why the defendant is still held in custody.

Advisory Committee's Note

Subdivision (c). The more inclusive word "terms" is substituted for "amount" in view of the amendment to subdivision (d) authorizing releases

without security on such conditions as are necessary to insure the appearance of the defendant. The phrase added at the end of this subdivision is designed to encourage commissioners and judges to set the terms of bail so as to eliminate unnecessary detention. See Stack v. Boyle, 342 U.S. 1 (1951); Bandy v. United States, 81 S. Ct. 197 (1960); Bandy v. United States, 82 S. Ct. 11 (1961); Carbo v. United States, 82 S. Ct. 662 (1962); review den. 369 U.S. 868 (1962).

Subdivision (d). The amendments are designed to make possible (and to encourage) the release on bail of a greater percentage of indigent defendants than now are released. To the extent that other considerations make it reasonably likely that the defendant will appear it is both good practice and good economics to release him on bail even though he cannot arrange for cash or bonds in even small amounts. In fact it has been suggested that it may be a denial of constitutional rights to hold indigent prisoners in custody for no other reason than their inability to raise the money for a bond. Bandy v. United States, 81 S. Ct. 197 (1960).

The first change authorizes the acceptance as security of a deposit of cash or government securities in an amount less than the face amount of the bond. Since a defendant typically purchases a bail bond for a cash payment of a certain percentage of the face of the bond, a direct deposit with the court of that amount (returnable to the defendant upon his appearance) will often be equally adequate as a deterrent to flight. Cf. Ill. Code Crim. Proc. § 110-7 (1963).

The second change authorizes the release of the defendant without financial security on his written agreement to appear when other deterrents appear reasonably adequate. See the discussion of such deterrents in Bandy v. United States, 81 S. Ct. 197 (1960). It also permits the imposition of nonfinancial conditions, as the price of dispensing with security for the bond. Such conditions are

commonly used in England. Devlin, The Criminal Prosecution in England, 89 (1958). See the suggestion in Note, Bail: An Ancient Practice Reexamined, 70 Yale L. J. 966, 975 (1961) that such conditions "\* \* \*" might include release in custody of a third party, such as the accused's employer, minister, attorney, or a private organization; release subject to a duty to report periodically to the court or other public official; or even release subject to a duty to return to jail each night." Willful failure to appear after forfeiture of bail is a separate criminal offense and hence an added deterrent to flight. 18 U.S.C. § 3146.

For full discussion and general approval of the changes made here see Report of the Attorney General's Committee on Poverty and the Administration of Criminal Justice 58-89 (1963).

Subdivision (h). The purpose of this new subdivision is to place upon the court in each district the responsibility for supervising the detention of defendants and witnesses and for eliminating all unnecessary detention. The device of the report by the attorney for the government is used because in many districts defendants will be held in custody in places where the court sits only at infrequent intervals and hence they cannot be brought personally before the court without substantial delay. The magnitude of the problem is suggested by the facts that during the fiscal year ending June 30, 1960, there were 23,811 instances in which persons were held in custody pending trial and that the average length of detention prior to disposition (i.e., dismissal, acquittal, probation, sentence to imprisonment, or any other method of removing the case from the court docket) was 25.3 days. Federal Prisons 1960, table 22, p. 60. Since 27,645 of the 38,855 defendants whose cases were terminated during the fiscal year ending June 30, 1960, pleaded guilty (United States Attorneys Statistical Report, October 1960, p. 1 and table 2), it would appear that the greater part of the detention reported occurs prior to the initial appearance of the defendant before the court.



Rule 49. Service and Filing of Papers

(a) Service; When Required. Written motions other than those which are heard ex parte, written notices, designations of record on appeal and similar papers shall be served upon the adverse parties each of the parties.

(c) Notice of Orders. Immediately upon the entry of an order made on a written motion subsequent to arraignment the clerk shall mail to each party affected thereby a notice thereof and shall make a note in the docket of the mailing. Lack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted by Rule 37 (a)(2).

Advisory Committee's Note

Subdivision (a). The words "adverse parties" in the present rule introduce a question of interpretation. When, for example, is a co-defendant an adverse party? The amendment requires service on each of the parties thus avoiding the problem of interpretation and promoting full exchange of information among the parties. No restriction is intended, however, upon agreements among co-defendants or between the defendants and the government restricting exchange of papers in the interest of eliminating unnecessary expense. Cf. the amendment made effective July 1, 1963, to Civil Rule 5(a).

Subdivision (c). The words "affected thereby" are deleted in order to require notice to all parties. Cf. the similar change made effective July 1, 1963, to Civil Rule 77(d).

The sentence added at the end of the subdivision is designed to eliminate the possibility of extension of the time to appeal beyond the provision for a 30 day extension on a showing of "excusable neglect" provided in Rule 37(a)(2). Cf. the similar change

made in Civil Rule 77(d) effective in 1948. The question has arisen in a number of cases whether failure or delay in giving notice on the part of the clerk results in an extension of the time for appeal. The "general rule" has been said to be that in the event of such failure or delay "the time for taking an appeal runs from the date of later actual notice or receipt of the clerk's notice rather than from the date of entry of the order." Lohman v. United States, 237 F.2d 645, 646 (6th Cir. 1956). See also Rosenbloom v. United States, 355 U.S. 80 (1957) (permitting an extension). In two cases it has been held that no extension results from the failure to give notice of entry of judgments (as opposed to orders) since such notice is not required by Rule 49(d). Wilkinson v. United States, 278 F.2d 604 (10th Cir. 1960), cert. den., 363 U.S. 829; Hyche v. United States, 278 F.2d 915 (5th Cir. 1960), cert. den. 364 U.S. 881. The excusable neglect extension provision in Rule 37(a)(2) will cover most cases where failure of the clerk to give notice of judgments or orders has misled the defendant. No need appears for an indefinite extension without time limit beyond the 30 day period.

#### Rule 54. Application and Exception

##### (a) Courts and Commissioners.

(1) Courts. These rules apply to all criminal proceedings in the United States District Courts; which include the District Court for the Territory of Alaska; in the District Court of Guam and the District Court of the Virgin Islands; in the United States Courts of Appeals; and in the Supreme Court of the United States; except that all offenses shall continue to be prosecuted in the District Court of Guam and in the District Court of the Virgin Islands by information as heretofore except such as may be required by local law to be prosecuted by indictment by grand jury. The rules governing proceedings after verdict or finding of

guilt or plea of guilty apply Except as otherwise provided in the Canal Zone Code, these rules apply to all criminal proceedings in the United States District Court for the District of the Canal Zone.

(b) Proceedings.

(5) Other Proceedings. These rules are not applicable to extradition and rendition of fugitives; forfeiture of property for violation of a statute of the United States; or the collection of fines and penalties. Except as provided in Rule 20(d) they do not apply to proceedings under Title 18, U.S.C., Chapter 403 - Juvenile Delinquency - so far as they are inconsistent with that chapter. They do not apply to summary trials for offenses against the navigation laws under Revised Statutes §§ 4300-4305, 33 U.S.C. §§ 391-396, or to proceedings involving disputes between seamen under Revised Statutes §§ 4079-4081, as amended, 22 U.S.C. §§ 256-258, or to proceedings for fishery offenses under the Act of June 28, 1937, c. 392, 50 Stat. 325-327, 16 U.S.C. §§ 772-772i, or to proceedings against a witness in a foreign country under Title 28, U.S.C., § 1784.

Advisory Committee's Note

Subdivision (a). The first change reflects the granting of statehood to Alaska. The second change conforms to Section 3501 of the Canal Zone Code.

Subdivision (b). The change is made necessary by the new provision in Rule 20(d).

Rule 55. Records

The clerk of the district court and each United States commissioner shall keep such records in criminal proceedings as the Director of the Administrative Office of the United States Courts, with the

approval of the Judicial Conference of the United States, may prescribe. Among the records required to be kept by the clerk shall be a book known as the "criminal docket" in which, among other things, shall be entered each order or judgment of the court. The entry of an order or judgment shall show the date the entry is made.

#### Advisory Committee's Note

Rule 37(a)(2) provides that for the purpose of commencing the running of the time for appeal a judgment or order is entered "when it is entered in the criminal docket." The sentence added here requires that such a docket be kept and that it show the dates on which judgments or orders are entered therein. Cf. Civil Rule 79(a).

#### Rule 56. Courts and Clerks

The court of appeals and the district court shall be deemed always open for the purpose of filing any proper paper, of issuing and returning process and of making motions and orders. The clerk's office with the clerk or a deputy in attendance shall be open during business hours on all days except Saturdays, Sundays, and legal holidays, but a court may provide by local rule or order that its clerk's office shall be open for specified hours on Saturdays or particular legal holidays other than New Year's Day, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Veterans Day, Thanksgiving Day, and Christmas Day.

#### Advisory Committee's Note

The change is in conformity with the changes made in Rule 45. See the similar changes in Civil Rule 77(c) made effective July 1, 1963.

FORM 26. RULES OF CRIMINAL PROCEDURE

Form 26.

NOTICE OF APPEAL

In the United States District Court for the  
.....District of.....,

.....Division

UNITED STATES OF AMERICA)

V. )  
JOHN DOE )

No. ....

Notice is hereby given that John Doe, defendant  
above named, hereby appeals to the United States Court  
of Appeals for the \_\_\_\_\_ Circuit (from the  
final judgment) (from the order (describing it))  
entered in this proceeding on the \_\_\_\_\_ day  
of \_\_\_\_\_, 19\_\_.

Dated \_\_\_\_\_.

(S) \_\_\_\_\_

\_\_\_\_\_  
(address)  
Attorney for John Doe<sup>1</sup>

1. or "Appellant" or "Clerk" as the case may be.

Advisory Committee's Note

The form is revised to correspond with the  
amendments to Rule 37.

O R D E R

Ordered:

That Rule 19 and subdivision (c) of Rule 45 of the Rules of Criminal Procedure for the United States District Courts, promulgated by this Court on December 26, 1944, effective March 21, 1946, are hereby rescinded, effective \_\_\_\_\_.

ADVISORY COMMITTEE'S NOTE

Rule 19 is proposed to be rescinded in view of the amendments being proposed to Rule 18.

Subdivision (c) of Rule 45 is proposed to be rescinded as unnecessary in view of the 1963 amendment to 28 U.S.C. § 138 eliminating terms of court.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

SUPPLEMENTAL REPORT

TO THE JUDICIAL CONFERENCE OF THE UNITED STATES:

On July 12, 1965 when the original report of your Committee on Rules of Practice and Procedure was prepared the House of Delegates of the American Bar Association had not met and had, therefore, not had an opportunity to act upon the report and recommendations of the Association's Special Committee on Federal Rules of Procedure. The report of the Special Committee was presented to the House of Delegates at its session in Miami Beach, Florida, on August 12, 1965, and was approved. A copy of a letter from the secretary of the Association to the chairman of your committee dated August 18, 1965, setting forth the action taken by the House of Delegates upon the report of the Special Committee is annexed to this supplemental report as Exhibit 1. A copy of the report and recommendations of the Special Committee upon which the House of Delegates acted is annexed to this supplemental report as Exhibit 2.

As will be seen upon examining Exhibits 1 and 2 the recommendations of the Special Committee and the action

of the House of Delegates thereon were very favorable to the amendments to the Federal Rules of Civil and Criminal Procedure which are being currently recommended by your committee for your approval and transmission to the Supreme Court. A few suggestions for changes in specific rules and a number of editorial suggestions were made all of which your committee has considered. A number of these suggestions have been accepted by your committee and appropriate modifications have been made in the rules proposals. Others of them will be the subject of further careful study by the appropriate advisory committees. A somewhat more detailed discussion of the suggestions and recommendations of the American Bar Association Special Committee follows.

#### Unification of Civil and Admiralty Procedure

The Special Committee fully approved the unification of civil and admiralty procedure as proposed. It also favored all of the rules amendments which are being proposed to carry the unification into effect with the exception of Civil Rules 9(h) and 14(c). Your committee believes that the objections raised with respect to these two rules are meritorious and we have accordingly modified the rules as they now appear in Exhibit C annexed to our report of July 12, 1965 in a manner which we believe will meet the objections. In addition the Special Committee suggested



an amendment to Civil Rule 59(a) and certain modifications of proposed Supplemental Admiralty Rules A, E(2)(a) and E(2)(b). These proposals are being referred to the advisory committees for further study and later report.

#### Uniform Rules of Federal Appellate Procedure

Since the Supreme Court has not yet been given full statutory authority to promulgate rules of federal appellate procedure the proposed Uniform Rules of Appellate Procedure are not now being presented to the Judicial Conference for approval. Accordingly the recommendations of the American Bar Association Special Committee with respect to those rules will be referred to the advisory committee for careful consideration in connection with its further work upon the uniform rules which have been published to the bench and bar and which it is in process of perfecting.

The Federal Rules of Civil and Criminal Procedure, however, now include rules governing the appellate procedure between the time of filing the notice of appeal in the district court and the docketing of the appeal and the filing of the record in the court of appeals. These include Civil Rules 73, 74 and 75 and Criminal Rules 37 and 38. Since some amendments to these rules are necessary in any event, your committee decided also to propose amendments to those rules which would incorporate those recommendations

of the Advisory Committee on Appellate Rules which are germane to them.

Eight of the suggestions made by the Special Committee of the American Bar Association with respect to appellate procedure involve matters which have thus been incorporated in the civil and criminal rules proposals. Three of these, including all the suggestions which would involve changes in the criminal rules, have been accepted by your committee. One of them, involving a provision terminating the running of the time for appeal if the district court erroneously accepts as timely an untimely motion for a new trial, has been the subject of extended consideration by the Advisory Committees on Civil and Appellate Rules and by your committee, which decided to defer action on the proposal pending further study of it.

Of the remaining four appellate suggestions one, involving provision for consolidated appeals, has been approved in principle by the Advisory Committee on Appellate Rules and will appear in the uniform appellate rules but was believed to be inappropriate for insertion in the Federal Rules of Civil Procedure. Another suggestion, that the copy of the docket entries made part of the record on appeal by proposed Civil Rule 75(a) should not be required to be certified, will be given further consideration by the Advisory Committee on Appellate Rules. The two remaining suggestions would dispense with a supersedeas bond on appeal in proper cases and would require that the notice of appeal contain the names of the

parties to the appeal. It appears to your committee that these two suggestions are of such substance as to require study and consideration by the Advisory Committee on Appellate Rules, which they have not yet had. We are, accordingly, not recommending them at this time.

Proposed Amendments to Rules of Civil Procedure  
other than those dealing with Unification of the  
Civil and Admiralty Procedure.

We are gratified to be able to report that the Special Committee of the American Bar Association recommended approval of all of the proposals for amendments of the Federal Rules of Civil Procedure not involved in the unification proposal or the appellate area. The reservation of the committee with respect to the revocation of the special copyright rules is shared by your committee which is now recommending that Copyright Rule 2 relating to the form of the complaint in a copyright case be the only rule to be rescinded and that the remaining Copyright Rules be given further study by the Advisory Committee on Civil Rules.

The Special Committee recommends that the Judicial Conference review the question of interlocutory appeals generally, and in particular encourage the more liberal use of 28 U.S.C. § 1292(b) in connection with rulings under amended Rules 19, Joinder, and 23, Class Actions. This recommendation our committee passes on to the Conference for its consideration.

Proposed Amendments to the Rules of Criminal  
Procedure

The Special Committee approved all of the proposed amendments to the Federal Rules of Criminal Procedure with the exception of proposed Rule 12.1, Notice of Insanity, the amendments to proposed Rule 15, Depositions, the rewritten Rule 16, Discovery and Inspection, and the amendment to Rule 24 which would permit replacement of jurors who were found during the trial to be disqualified. In addition the Special Committee recommended certain amendments to Rules 6 and 49.

Your committee has met the objections of the Special Committee in part by deciding not to recommend new Rule 12.1 and the amendments to Rule 15 at this time. Instead we have referred them back to the Advisory Committee on Criminal Rules for further study. We also made certain amendments to Rule 16 which we hope will meet the objections of the Special Committee at least in part.

The Special Committee also objected to the amendment of Rule 24 which would authorize the replacement by an alternate juror of a juror who is found to be disqualified during the course of the trial. Objections to this proposal have been raised previously and very fully considered both by the Advisory Committee on Criminal Rules and your committee, both of which believe them to be largely theoretical and greatly outweighed by the advantage of avoiding a mistrial when an

impaneled juror is found to be legally disqualified. Your committee, therefore, adheres to its recommendation that Rule 24 be amended in this manner.

The Special Committee also recommends amendments to Rules 6 and 49. Its suggestions, however, involve important proposals which have not heretofore been presented to the bench and bar for their consideration and which, therefore, should and will receive further consideration by the Advisory Committee on Criminal Rules.

#### Summary

Your committee desires to express its gratitude for the careful consideration which the Special Committee and House of Delegates of the American Bar Association have given to the proposals and for their helpful suggestions so many of which we have adopted. The proposals for the amendment of the Federal Rules of Civil Procedure set out in Exhibit C and for the amendment of the Federal Rules of Criminal Procedure set out in Exhibit E annexed to our report of July 12, 1965 include the recommendations of the Special Committee which we have accepted. We accordingly recommend that they be approved by the Judicial Conference and transmitted to the Supreme Court with the recommendation that they be promulgated.

On behalf of the standing Committee  
on Rules of Practice and Procedure

*Albert B. Maris*  
Chairman

September 16, 1965

Secretary  
Gibson Gayle, Jr.  
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# AMERICAN BAR ASSOCIATION

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Telephone (312) 433-9200

August 18, 1965

The Honorable Albert B. Maris, Chairman  
Standing Committee on Rules of Practice and Procedure  
Judicial Conference of the United States  
Supreme Court Building  
Washington 25, D. C.

Dear Judge Maris:

The House of Delegates of the American Bar Association, at its session in Miami Beach, Florida, on August 12, 1965, adopted the following substantive resolutions upon recommendation of the Association's Special Committee on Federal Rules of Procedure:

That the American Bar Association favors the adoption in substance of the amendments to the Federal Rules of Civil Procedure proposed by the Judicial Conference's Standing Committee on Rules of Practice and Procedure for the purpose of effecting unification of civil and admiralty procedure and urges the Judicial Conference to give careful consideration to specific comments and suggestions submitted to its standing committee by this Association's Committee on Federal Rules of Procedure.

That the American Bar Association favors in principle the adoption of Uniform Rules of Appellate Procedure for the Federal courts and authorizes its Special Committee on Federal Rules of Procedure to transmit to the Judicial Conference's Standing Committee on Rules of Practice and Procedure its committee views and any dissenting views on the Uniform Rules of Federal Appellate procedure as presently proposed or as may be subsequently revised by the advisory committee on such rules.

That the Special Committee on Federal Rules of Procedure is authorized to transmit to the Judicial Conference's Standing Committee on Rules of Practice and Procedure its committee views and any dissenting views on the various specific amendments to the Federal Rules of Civil Procedure as now proposed or as may be subsequently modified by the Advisory Committee on such rules.

The Honorable Albert B. Maris

-2-

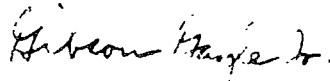
August 18, 1965

That the Special Committee on Federal Rules of Procedure is authorized to transmit to the Judicial Conference's Standing Committee on Rules of Practice and Procedure its committee views and any dissenting views on the various specific amendments to the Federal Rules of Criminal Procedure as now proposed or as may be subsequently modified by the Advisory Committee on such rules.

A copy of the Report of our Committee on Federal Rules of Procedure to the House of Delegates is enclosed for your convenient reference.

With best wishes, I am

Sincerely yours,



Gibson Gayle, Jr.  
Secretary

GGjr:ck  
Enc.

cc: General Franklin Riter  
Bert H. Early, Esq.  
General George W. Hickman, Jr.  
Judge Maris at: 5050 U. S. Court House, Philadelphia, Pa. 19107

August, 1965 - No. 53

AMERICAN BAR ASSOCIATION  
SPECIAL COMMITTEE ON  
FEDERAL RULES OF PROCEDURE

RECOMMENDATIONS

1. That the committee be continued.
2. That the American Bar Association favors the adoption in substance of the amendments to the Federal Rules of Civil Procedure proposed by the Judicial Conference's Standing Committee on Rules of Practice and Procedure for the purpose of effecting unification of civil and admiralty procedure and urges the Judicial Conference to give careful consideration to specific comments and suggestions submitted to its standing committee by this Association's Committee on Federal Rules of Procedure.
3. That the American Bar Association favors in principle the adoption of Uniform Rules of Appellate Procedure for the Federal courts and authorizes its Special Committee on Federal Rules of Procedure to transmit to the Judicial Conference's Standing Committee on Rules of Practice and Procedure its committee views and any dissenting views on the Uniform Rules of Federal Appellate procedure as presently proposed or as may be subsequently revised by the advisory committee on such rules.
4. That the Special Committee on Federal Rules of Procedure is authorized to transmit to the Judicial Conference's Standing Committee on Rules of Practice and Procedure its committee



views and any dissenting views on the various specific amendments to the Federal Rules of Civil Procedure as now proposed or as may be subsequently modified by the Advisory Committee on such rules. 5. That the Special Committee on Federal Rules of Procedure is authorized to transmit to the Judicial Conference's Standing Committee on Rules of Practice and Procedure its committee views and any dissenting views on the various specific amendments to the Federal Rules of Criminal Procedure as now proposed or as may be subsequently modified by the Advisory Committee on such rules.

## R E P O R T

### INTRODUCTION

The committee has directed its attention to the drafts of Rules of Civil Procedure, Rules of Criminal Procedure, Rules of Appellate Practice and Rules governing the unification of admiralty and civil practice being considered by the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States. More specifically, the committee has studied the following proposals of the Standing Rules Committee of the Judicial Conference:

- (1) Amendment to effect unification of civil and admiralty procedure, March 1964, and subsequent revisions;
- (2) Preliminary draft of proposed Uniform Rules of Federal Appellate Procedure, March 1964;
- (3) Amendments to the Rules of Civil Procedure for the U.S. District Courts proposed by the Advisory Committee on Civil Rules, March 1964 and subsequent revisions;

(4) Second preliminary draft of the proposed amendments to Rules of Criminal Procedure for the U. S. District Courts, March 1964.

The committee has met on numerous occasions as a whole and through various of its subcommittees. It has exchanged voluminous internal correspondence and has corresponded extensively with other groups within the association and in the legal world generally. In addition, it has, on an informal basis, in a number of instances, transmitted specific views and suggestions to the reporters for the various advisory committees to the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States.

The committee wishes particularly to thank the following groups with which it has maintained close liaison: The General Practice Section; the Criminal Law Section; the Antitrust Law Section; the Judicial Administration Section; the Maritime Law Association; the Real Property, Probate and Trust Law Section; the Insurance, Negligence and Compensation Law Section; the Admiralty and Maritime Law Standing Committee; the Patent, Trademark and Copyright Section. We have not considered the issue of modification of the copyright rules. The subject has been referred to the Section on Patent, Trademark and Copyright Law by the House of Delegates.

In connection with our proposals concerning amendment of the Federal Rules of Criminal Procedure we recognize that the current extensive program of the Special Committee on Minimum Standards for Administration of Criminal Justice will also necessarily be considering procedural matters covered in part by our report. We do not

intend to foreclose the Minimum Standards Committee from any recommendations which it may deem appropriate at the conclusion of its study but because of the immediate probability that the Federal Criminal Rules will be amended before the completion of the minimum standards project we deem it necessary to take a position as to those proposed amendments at this time.

This committee has been in direct communication with Judge Lombard, Chairman of the Special Committee on Minimum Standards for the Administration of Criminal Justice, and has reached an understanding with him in this regard. Copies of our preliminary studies have been furnished to Judge Lombard and we intend to transmit to him a copy of our final report upon its approval by this House.

Recommendation #1--Continuation of Committee

The work of the Judicial Conference of the United States with respect to rules of practice is continuing. While substantial progress has been made, it is obvious that new drafts and revisions of drafts will be proposed to the bar and submitted to the United States Supreme Court for adoption during the coming years. Unlike the situation where a specific piece of legislation is being proposed to Congress, the work of the Judicial Conference and its advisory committees presupposes a continuing cooperative endeavor with the bar. It is desirable, therefore, that this committee be granted some flexibility in transmitting its views on an informal basis while proposals also are being formulated by the advisory committees and by the Judicial Conference of the United States. If each proposal or each draft were to be separately passed upon by the House of Delegates the rules-making process of the United States Supreme Court would be stultified. It is obvious

that a more flexible approach is required in the area of law making. Accordingly, we are recommending the continuation of this committee. We are also recommending that the committee be authorized to make its views known to the Judicial Conference and its advisory committees. When such views are transmitted, it will be made clear that it is the committee itself and not the entire Bar Association that is speaking. The committee will, of course, transmit any dissenting and concurring opinions and will endeavor, insofar as possible, to reflect communications made to it by members of the bar generally as well as by the various groups cooperating with it.

Recommendation #2--Unification of Civil and Admiralty Procedure

In March 1964, the Standing Committee on Rules of Practice and Procedure of the Judicial Conference published certain proposed amendments to the Civil Rules for the purpose of effecting unification of civil and admiralty procedure (hereinafter referred to as the "March 1964 Draft"). Under date of May 1, 1965, Professor Brainerd Currie, Reporter to the Advisory Committee on Admiralty Rules, submitted modifications of the March 1964 Draft to his Committee as well as to this committee and other interested persons. Such modifications will hereinafter be referred to as the "May 1965 Draft". We understand that on June 28, 1965, the Standing Committee reviewed the March 1964 Draft as amended in May 1965 and made certain changes which do not materially affect our report.

The unification proposal as amended would combine legal, equitable, and admiralty or maritime claims in the "one form of action" of present Civil Rule 2. As a result, the Federal Rules of Civil

Procedure would be generally applicable in claims now triable as suits of admiralty, with the characteristic features of present admiralty practice preserved in a few special provisions of the merged rules and in an appended body of "Supplemental Rules for Certain Admiralty or Maritime Claims." The heart of the proposal is new Rule 9 (h) which provided that in claims which now could be tried either at law or in admiralty the complaint may contain a statement identifying the claim as an "admiralty or maritime claim." Claims identified by such a statement, and also claims as to which admiralty is the only basis of Federal jurisdiction, will be tried subject to the special admiralty provisions and to the "Supplemental Rules." The other important feature of the proposal is amended Civil Rule 18, under which admiralty or maritime claims may be joined with legal and equitable claims, provided that there is an independent basis of Federal jurisdiction for each claim. Rule 9 (h) will insure that for purposes of trial the characteristic features of present civil and admiralty practice are preserved where appropriate, despite the joinder.

Our recommendation that unification be approved is consistent with the previously expressed policy of the American Bar Association. In February 1962, the House of Delegates passed a resolution favoring "unification of the rules of practice of the Supreme Court of the United States in Civil and Admiralty matters, in so far as practicable." 87 A.B.A. Rep. 155. The report of the Standing Committee on Admiralty and Maritime Law, upon which this resolution was based, recognized the trend toward some form of merger of admiralty and civil practice and found that "actual unification into a single set of rules...modeled basically on the Civil Rules"

would in the long run be the preferable method of effectuating such a merger, provided that extensive and careful studies were undertaken to insure promulgation of "a realistic, workable set of rules, readily available to each member of the American Bar." 87 A.B.A. Rep. 226, 229. We believe that the March 1964 Draft as revised in May 1965 is consistent with the policy expressed in the 1962 resolution and amplified in the report of the Committee on Admiralty and Maritime Law.

In formulating our recommendation we have given careful consideration to the views of the Maritime Law Association. In November 1964 the Association adopted a resolution (1) stating its preference for a separate set of Admiralty Rules revised to incorporate desirable features of the Civil Rules, but (2) in the alternative urging that, if the March 1964 Draft were to be adopted, it would be modified in accordance with seven specific recommendations set out in the resolution. These recommendations were designed to deal with certain of the specific objections to unification outlined in the first part of the resolution. The resolution was based on a report of the Association's Committee on Supreme Court Admiralty Rules favoring a separate set of Admiralty Rules, but recognizing "That unification in some form is inevitable." The report went on to state that in the March 1964 Draft "there have been preserved most of the essential features of admiralty practice; and that by modification and amendment the remaining essential features of that practice can be preserved within its framework." MIA Doc. No. 479, October 1964.

The May 1965 Draft substantially incorporates the MIA's seven specific recommendations. Subsequent to the promulgation of that

Draft by the Advisory Committee on Admiralty Rules, the MLA Rules Committee reported to the MLA that changes had been made which would comply in substance with five of the seven recommendations and that the Advisory Committee had felt that the remaining two recommendations could be complied with without change. Although it continues to prefer a separate set of Admiralty Rules, the MLA Rules Committee is presumably satisfied that the unification proposal in the May 1965 revision preserves "the essential features of admiralty practice."

The detailed reasons for our recommendation have previously been circulated among the members of the House of Delegates as Appendix I to our Admiralty Rules Subcommittee's Report. They may be briefly summarized as follows:

The proposed unification merely merges civil and admiralty procedure, providing a single civil action for law, equity and admiralty, governed by a single body of procedural rules. The substantive maritime law (applicable even now whether a maritime case is tried "at law" or in admiralty) is in no way altered by the proposal, nor is there any merger of the several separate jurisdictional bases of the Federal Courts. In fact, despite the merger, distinctive admiralty remedies, such as limitation of liability, process in rem, foreign attachment, and trial to the court, are preserved for what are now suits in admiralty.

The advantages to be derived from unification are many. The Advisory Committee's proposal will put an end to the possibility of dismissal of a claim within the jurisdiction of the federal court merely because it has been brought on the wrong "side" of the court. It will permit

the permissive joinder of related claims and compulsory counter-claims whether admiralty or civil, allowing the parties to resolve all their differences in a single proceeding. It will make all the modern procedural devices of the Civil Rules and future amendments of them available in admiralty. It will eliminate traps for the unwary arising from the near similarity, yet subtle differences between many provisions of the Civil Rules and the present Admiralty Rules. It will thus terminate what seems to us an undesirable burden upon the cautious lawyer who must now familiarize himself with two distinctive sets of procedure.

We do not find the reasons offered by the opponents of unification weighty enough to offset those advantages. Constitutional and statutory objections are without merit in view of the carefully limited procedural scope of the changes proposed. The various arguments that separate Admiralty Rules are needed to preserve the procedural flexibility necessary for the proper administration of the substantive maritime law are not persuasive: Not only do the Admiralty Rules already closely approach the Civil Rules in many respects, but the proposed Supplemental Rules will preserve most of the distinctive features of admiralty practice in an easily administered, separate body of rules. The provisions for joinder of claims are said to be potentially productive of confusion in the trial of cases, but we do not anticipate any more difficulty in this regard than ensued as a result of the merger of law and equity. We also find unpersuasive the argument that unification of civil and Admiralty procedure would unduly burden or "adulterate" civil procedure used by attorneys who seldom or never encounter an admiralty case. On the contrary, it is precisely these attorneys who will



benefit from a readily accessible single set of rules.

While we recommend approval of procedural unification and the general method proposed to achieve it, we suggest certain editorial and technical revisions in the form and scope of specific rules. We have been in communication from time to time with Professor Currie and have submitted to him the comments and suggestions of this nature set forth in our Admiralty Rules Subcommittee report previously circulated among the members of the House of Delegates. We believe that these comments and suggestions are entitled to careful consideration by the Judicial Conference of the United States prior to the submission of the unification proposal to the Supreme Court.

Recommendation #3--Uniform Rules of Federal  
Appellate Procedure

Since the promulgation in March 1964 of the Preliminary Draft of Proposed Uniform Rules of Federal Appellate Procedure, there has been much discussion of the proposal among members of the bar, The American College of Trial Lawyers, the Ninth Circuit Judicial Conference, the Federal Bar Association, the Department of Justice and others have submitted lengthy critiques. As a result, we understand that the Advisory Committee intends to present a second draft that may differ substantially from the proposals which we have examined. Accordingly, we do not consider that action by the American Bar Association on the specific proposals contained in the March 1964 Draft would be appropriate or meaningful at this time.

It is our conclusion, however, that some form of Uniform Rules of Appellate Procedure for the Federal courts should be adopted with the right reserved to each Court of Appeals to adopt further rules not inconsistent with the uniform rules. The wide variations now

existing among the several circuits on matters of common concern in all federal courts are a potential source of unfairness to litigants, as well as a burden on lawyers whose practice extends beyond a single circuit. We therefore recommend that the American Bar Association favor the principle of uniform appellate rules.

We also urge that this committee be authorized to cooperate with the Advisory Committee in formulating a new draft, particularly by furnishing to it our detailed preliminary comments on the March 1964 Draft contained in a subcommittee report of this committee as previously circulated to the members of the House of Delegates.

Recommendation #4--Proposed Amendment to Rules of  
Civil Procedure for the U.S.  
District Courts other than those  
dealing with unification with  
civil admiralty procedure

We recognize the desirability of stability in the rules. In the first place, a certain amount of confusion and additional work is caused as the bench and bar become familiar with new formulations and accommodates practice to them; often litigation is required in order to determine the meaning of the revised language. In the second place, some of the states may be unwilling to follow each amendment in the Federal Rules so that the policy of uniformity between state and federal practice will be disserved. Nevertheless, the Federal Rules were drafted thirty years ago and substantial modifications are called for. While they have proven extremely effective, they have themselves created a change in our approach to litigation, making possible and desirable further advances and improvements. Moreover, it would have been unreasonable to expect that minor difficulties in drafting and divergencies in interpretation would not have to be resolved from time to time.

In our opinion the Advisory Committee has exercised good judgment and sound discretion in providing improvements in the Rules while maintaining their essential stability.

We have considered very carefully the impact of the proposed changes on State policy. As noted above, the issue of changes as they affect uniformity between state and federal practice has, in our opinion, been properly resolved by the Advisory Committee. The effect of the proposed changes in federal practice on "substantive" policies of the states have also been considered by us. The recent case of Hanna v. Plumer \_\_\_\_\_ U.S. \_\_\_\_\_, 14 L. Ed. 2d 8 (1965), has, in our opinion, failed to eliminate the difficulties. Indeed, they have, if anything, added to the burdens of draftsmen of amended federal rules. The majority opinion in the Hanna Case states fairly clearly that the rule making power is as broad as Congress' legislative power. As it noted, a Federal rule is valid unless:

"the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions." Id. at \_\_\_\_\_, 14 L. Ed. 2d at 17.

The Court used the normal legislative test for determining validity declaring:

"a federal court system (augmented by the Necessary and Proper Clause) carries with it congressional power to make rules governing the practice and pleading in those courts, which in turn includes a power to regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either." Id. at \_\_\_\_\_, 14 L. Ed. 2d at 17

Rulemakers must, therefore, weigh, in much the same way as Congress might, the desirability of uniformity and efficiency in federal litigation against the desirability of permitting the states,

wherever possible, to exercise power and enforce their own policy in areas normally regulated by the states.

A good example of the difficulties are found in Clause 1 of subdivision (b) of Rule 23 (Clause 1 of Proposed Rule 23.1) requiring that:

"the plaintiff was a shareholder or member at the time of the transaction of which he complains or that his share or membership thereafter devolved on him by operation of law." (New matter is underlined.)

In the main, the relations between shareholders and directors, so far as they relate to stockholders derivative suits, are controlled by the states. Obviously, requirement of ownership of shares at the time of the act complained of limits somewhat the possibility of shareholder suits against company officials. It does, therefore, affect the practical procedural-substantive balance in the corporate field. Whatever our judgment might have been had the issue been posed in the first instance, in view of the more than a quarter of a century history of the federal provision and the current stockholder-management balance, which has been achieved in part because of it, we believe the judgment of the Advisory Committee in retaining the provision is sound.

We have examined each of the proposed changes with this question of impact on substantive rights and State policy in mind and, in our opinion, in no instance has any substantial impact been made which is not far outweighed by a probable beneficial result on Federal Practice and judicial administration.

A considerable amount of attention was given to the question of appealability. It is our opinion that, particularly when the modifications are being initially interpreted, it is desirable to permit appeals whenever there is presented a substantial procedural issue, the proper resolution of which may have a substantial effect on the litigation.

In this connection we urge that Subdivision (b) of Section 1292 of Title 28 of the United States Code be utilized more frequently than it has been to permit appeals from decisions on procedural matters which may be decisive in a litigation or which may appreciably reduce expense. That provision permits an appeal where it is "the opinion" of the District Judge;

"that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation."

The Court of Appeals must also give permission for the appeal.

The provision has been used infrequently, only in the most "exceptional cases." See, e.g., 1960 Dir. Adm. Office U. S. Courts Ann. Rep. 72-73; H. R. Rep. No. 1667, 85th Cong., 2nd Sess., 2 (1958); Milbert v. Bison Laboratories, 260 F. 2d 431 (3d Cir. 1958). We think that this excessively restrictive useage is unfortunate.

In the case of some amendments, such as those to Rule 19 and Rule 23, there has been substituted for what appeared to be mechanical tests utilizing seemingly fixed terms such as "indispensable," "necessary," and "joint or common, or secondary," more descriptive terminology. As indicated below, we approve

the amendments as providing more accurate guides for the exercise of judicial control over procedure in practice. We should be disturbed, however, if the change in the form of the Rule caused the Courts to determine that there was no "controlling question of law," but only questions of "discretion" not subject to review under Subdivision (b) of Section 1292 of Title 28. It is noted in this connection that the proposed amendment to Rule 19 is based in part upon such provisions as those in New York and Michigan. See, Mich. Gen. Court Rules, R. 205 (effective Jan. 1, 1963); N.Y. Civ. Prac. Law & Rules, 1001 (effective Sept. 1, 1963). Our information is that the New York and Michigan Rules are working well. Part of the bar's approval of the New York Rule, however, is predicated on the fact that intermediate appeals are allowed so that review may be obtained from an appellate court before the litigation is far advanced.

It may be desirable for the Judicial Conference of the United States to review the question of intermediate appeals generally. The current crowded appellate docket is, in our opinion, no justification for unduly restricting intermediate appeals where they may be useful in securing "the just, speedy and inexpensive determination" of an action. See, Rule 1.

One final minor housekeeping point should be noted. In modifying its March, 1964 draft the revised notes of the Advisory Committee do not indicate reasons for changes. In a number of instances, the reasons for changes are clear from a comparison of the March, 1964 draft and the May, 1965 draft. In other instances the reasons become clear only in the light of the specific objections and

suggestions made by the bar and bench to the Advisory Committee. Since this legislative history is often extremely difficult to reconstruct, it would be helpful, in the future, where the problem may arise, to indicate reasons for changes.

The detailed analysis of the proposed amendments to the civil rules have previously been circulated among the members of the House of Delegates in the form of a subcommittee report. This report and the dissenting view of one member of the committee, will be transmitted to the Judicial Conference.

Recommendation #5--Proposed Amendment to Rules  
of Criminal Procedure for the  
U.S. District Courts

This committee recommends approval of all proposed amendments found in the Second Preliminary Draft, with the exception of new Rule 12.1 (Notice of Insanity); the amendments to proposed Rule 15 (Depositions); the re-written Rule 16 (Discovery and Inspection); and the amendment to Rule 24 (Trial Jurors) which would permit replacement of jurors who "are found to be" disqualified. The Committee recommends further amendment of Rule 49 (Service and Filing of Papers) and agrees with the Section of Criminal Law that Rule 6 (The Grand Jury) should be amended to require disclosure of grand jury minutes after indictment.

Discussion:

A. Rule 6 (The Grand Jury). After careful study, described below, the Section of Criminal Law and this Committee recommend that:

(1) Rule 6(e) of the Federal Rules of Criminal Procedure

be amended to provide that a reporter transcribe the minutes of all proceedings of grand jury which are accusatorial in nature; that the cost of such transcript be borne by the government of the United States and the proceedings in transcribed form be filed in a sealed envelope with the appropriate United States District Court for further necessary action;

(2) Similar action be taken either by changes in the rules of court or by necessary legislation in the several states which follow the common law practice described herein;

(3) After an indictment has been returned against a defendant, and after his arrest, that a copy of the grand jury minutes or transcript be furnished to him as a matter of right, upon his request, prior to his arraignment or as soon thereafter as is practicable; except in cases where the government reveals that national security or public interest is involved, in which event grand jury proceedings shall not be disclosed without an order of the court.

The reasons for the Section's recommendation are stated in the report of a Section Committee headed by Judge Gerald S. Levin, of the Superior Court of California at San Francisco. The reasoning of Judge Levin's committee is persuasive to this committee. A copy of his report, which is the basis for our recommendation, has previously been circulated to the members of the House of Delegates and will be transmitted to the Judicial



Conference of the United States.

B. Rule 12.1(Notice of Insanity). The proposal to require a defendant to give notice before trial that he will raise the defense of insanity is opposed by the Section of Criminal Law and by the Board of Regents of the American College of Trial Lawyers. It is the opinion of this committee that this proposal may have, in many instances, the effect of denying a defendant defenses which are constitutionally open to him on his plea of "not guilty". An essential part of the prosecution's burden in every case is to prove the mental capacity of the defendant, even though this burden may be tacitly satisfied in most cases by a presumption of sanity. If a defendant is insane, it seems unrealistic to impose any requirement upon him limiting his ability to raise his mental capacity. We feel that many problems in this area will be resolved by intelligent application of Proposed Rule 17.1 (Pretrial Procedure), which we endorse, and which will require "conferences to consider such matters as will promote a fair and expeditious trial." The question of the manner in which the government should be able to prepare for the issue of insanity is being considered by the American Bar Association Minimum Standards Project and we do not mean to foreclose whatever recommendations that project evolves.

C. Rule 15 (Depositions). The Advisory Committee would permit depositions taken at the instance of prosecution. Even though some states tolerate prosecution depositions (a questionable practice since April 5, 1965, when the Supreme Court held that the Sixth Amendment controls the States; Pointer v. Texas, No. 577, O.T. 1964, 33 Law Week 4306), the United States Supreme Court, interpreting

the Sixth Amendment right "to be confronted with the witnesses", held in Mattox v. United States, 156 U.S. 237, 242-243:

"The primary object of the constitutional provision in question was to prevent depositions or ex parte affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief."

Pretrial discovery on the part of the defense has not been expanded to a point at which the defendant's rights can be fully protected in the taking of depositions. In the traditional trial setting, a witness who is excused from the stand may be recalled later, in the trial of the parties later become aware of additional questions which should be asked of the witness. At least during the trial, the parties have total discovery of the evidence which is going to be admitted at the trial. When depositions are to be taken in advance of trial, however, the parties may not have a complete understanding of the significance of such witnesses' testimony and may be unable to examine them adequately. By their terms, the amendments to Rule 15 would permit such depositions "to prevent a failure of justice." If the testimony of such an absent witness is of such great importance that "a failure of justice" might result in

the absence of his testimony, it should be apparent that the witness is important enough so that the jury should have a chance to see and observe his demeanor.

The prosecution is not without resources under the present state of law. See United States v. Haderlein, 118 Fed. Supp. 346, in which the court arranged to transport the jury, the marshal, clerk, court reporter, and counsel for all parties to the home of a sick witness for the purpose of taking his testimony under conditions which would allow the jury to see his demeanor.

C. Rule 16 (Discovery and Inspection). The amendments to this Rule proposed in the Second Preliminary Draft are opposed by the Section of Criminal Law. The Board of Regents of the American College of Trial Lawyers has also withheld its approval. The proposed amendments of this Rule have been drastically changed since the Preliminary Draft which was approved by our Special Committee on Federal Rules of Procedure in February of 1964. This committee adheres to its endorsement of Rule 16 as it would have been amended by the preliminary draft.

The latest draft of this Rule, which would either condition defense discovery upon discovery by the government in Rule 16 (c), or alternatively, would permit discovery by the government independently of defense discovery, raises grave constitutional questions. The Fourth Amendment embraces a right to refuse to produce "mere evidentiary materials." (Gouled v. United States, 255 U.S. 298, 305-306; United States v. Lefkowitz, 285 U.S. 452, 464-465.) A search warrant under any other name is still a search warrant and it is this committee's opinion that an order permitting the

government discovery which would be tolerated in Rule 16 (c) would amount to an unconstitutional search and seizure.

The proposed amendment limits defense discovery under Rule 16 (a) only of certain reports "known by the attorney for the government to be within the possession, custody, or control of the government." This qualification, added in the Second Preliminary Draft, would place a premium on failure of administrative agencies to forward certain reports to the U. S. Attorney and upon lack of diligence by the U. S. Attorney in determining what reports exist. Acting in a similar context, Congress imposed no such qualification in the "Jencks" statute, 18 U.S.C. 3500.

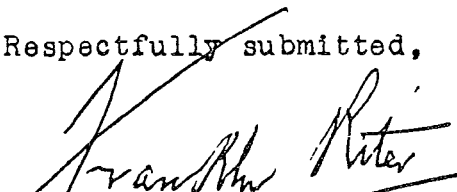
D. Rule 24 (Trial Jurors). The amendments to this Rule would permit selection of six alternate jurors, instead of the four provided by the present Rule. This committee has no objection to that proposal, but the amendment would also permit the replacement of jurors who "are found to be" Disqualified during the course of the trial. Presumably, this would include disqualification for bias, and adoption of this Rule will place a premium on intensive investigation of the empaneled jurors during the trial, when their independence is most important. In effect, the voir dire examination would continue throughout the trial. Each side will have a real motive for penetrating the jurors' privacy to ferret out any conceivable ground for disqualification. Such a practice is sure to lead to all kinds of improprieties and will inevitably place special pressures on jurors who learn from their neighbors and friends that they are under investigation.

E. Rule 49 (Service and Filing of Papers). Neither we,

Nor the College of Trial Lawyers, nor the Section on Criminal Law, oppose the amendment to Rule 49 (a) which would require all motions to be served upon "each of the parties." It is obviously fair and just that all parties have notice of all pleadings filed in the case. The Section of Criminal Law suggests, however, and we agree, that the rule should be amended to give discretion to the district judge to permit any party, upon application, to serve only a written notice on the other parties inviting their attention to a pleading filed with the court. In its present form, the amendment may place considerable burdens on appointed counsel for indigent clients at mass conspiracy trials, and the judge should at least have the power to relieve counsel of that burden.

The Criminal Law Section additionally opposed the amendment of Rule 20 and the elimination of Rule 19, which would have the effect of permitting a district judge to transfer cases from division to division within a district whether or not the defendant consents. It is our conclusion that such discretion should be vested in the trial judge since it is obvious that there can be appellate review of any claimed abuse of discretion.

Respectfully submitted,

  
Franklin Riter, Chairman

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

SUPPLEMENTAL REPORT

TO THE JUDICIAL CONFERENCE OF THE UNITED STATES:

On July 12, 1965 when the original report of your Committee on Rules of Practice and Procedure was prepared the House of Delegates of the American Bar Association had not met and had, therefore, not had an opportunity to act upon the report and recommendations of the Association's Special Committee on Federal Rules of Procedure. The report of the Special Committee was presented to the House of Delegates at its session in Miami Beach, Florida, on August 12, 1965, and was approved. A copy of a letter from the secretary of the Association to the chairman of your committee dated August 18, 1965, setting forth the action taken by the House of Delegates upon the report of the Special Committee is annexed to this supplemental report as Exhibit 1. A copy of the report and recommendations of the Special Committee upon which the House of Delegates acted is annexed to this supplemental report as Exhibit 2.

As will be seen upon examining Exhibits 1 and 2 the recommendations of the Special Committee and the action

of the House of Delegates thereon were very favorable to the amendments to the Federal Rules of Civil and Criminal Procedure which are being currently recommended by your committee for your approval and transmission to the Supreme Court. A few suggestions for changes in specific rules and a number of editorial suggestions were made all of which your committee has considered. A number of these suggestions have been accepted by your committee and appropriate modifications have been made in the rules proposals. Others of them will be the subject of further careful study by the appropriate advisory committees. A somewhat more detailed discussion of the suggestions and recommendations of the American Bar Association Special Committee follows.

#### Unification of Civil and Admiralty Procedure

The Special Committee fully approved the unification of civil and admiralty procedure as proposed. It also favored all of the rules amendments which are being proposed to carry the unification into effect with the exception of Civil Rules 9(h) and 14(c). Your committee believes that the objections raised with respect to these two rules are meritorious and we have accordingly modified the rules as they now appear in Exhibit C annexed to our report of July 12, 1965 in a manner which we believe will meet the objections. In addition the Special Committee suggested

an amendment to Civil Rule 59(a) and certain modifications of proposed Supplemental Admiralty Rules A, E(2)(a) and E(2)(b). These proposals are being referred to the advisory committees for further study and later report.

#### Uniform Rules of Federal Appellate Procedure

Since the Supreme Court has not yet been given full statutory authority to promulgate rules of federal appellate procedure the proposed Uniform Rules of Appellate Procedure are not now being presented to the Judicial Conference for approval. Accordingly the recommendations of the American Bar Association Special Committee with respect to those rules will be referred to the advisory committee for careful consideration in connection with its further work upon the uniform rules which have been published to the bench and bar and which it is in process of perfecting.

The Federal Rules of Civil and Criminal Procedure, however, now include rules governing the appellate procedure between the time of filing the notice of appeal in the district court and the docketing of the appeal and the filing of the record in the court of appeals. These include Civil Rules 73, 74 and 75 and Criminal Rules 37 and 38. Since some amendments to these rules are necessary in any event, your committee decided also to propose amendments to those rules which would incorporate those recommendations



of the Advisory Committee on Appellate Rules which are germane to them.

Eight of the suggestions made by the Special Committee of the American Bar Association with respect to appellate procedure involve matters which have thus been incorporated in the civil and criminal rules proposals. Three of these, including all the suggestions which would involve changes in the criminal rules, have been accepted by your committee. One of them, involving a provision terminating the running of the time for appeal if the district court erroneously accepts as timely an untimely motion for a new trial, has been the subject of extended consideration by the Advisory Committees on Civil and Appellate Rules and by your committee, which decided to defer action on the proposal pending further study of it.

Of the remaining four appellate suggestions one, involving provision for consolidated appeals, has been approved in principle by the Advisory Committee on Appellate Rules and will appear in the uniform appellate rules but was believed to be inappropriate for insertion in the Federal Rules of Civil Procedure. Another suggestion, that the copy of the docket entries made part of the record on appeal by proposed Civil Rule 75(a) should not be required to be certified, will be given further consideration by the Advisory Committee on Appellate Rules. The two remaining suggestions would dispense with a supersedeas bond on appeal in proper cases and would require that the notice of appeal contain the names of the

parties to the appeal. It appears to your committee that these two suggestions are of such substance as to require study and consideration by the Advisory Committee on Appellate Rules, which they have not yet had. We are, accordingly, not recommending them at this time.

Proposed Amendments to Rules of Civil Procedure  
other than those dealing with Unification of the  
Civil and Admiralty Procedure.

We are gratified to be able to report that the Special Committee of the American Bar Association recommended approval of all of the proposals for amendments of the Federal Rules of Civil Procedure not involved in the unification proposal or the appellate area. The reservation of the committee with respect to the revocation of the special copyright rules is shared by your committee which is now recommending that Copyright Rule 2 relating to the form of the complaint in a copyright case be the only rule to be rescinded and that the remaining Copyright Rules be given further study by the Advisory Committee on Civil Rules.

The Special Committee recommends that the Judicial Conference review the question of interlocutory appeals generally, and in particular encourage the more liberal use of 28 U.S.C. § 1292(b) in connection with rulings under amended Rules 19, Joinder, and 23, Class Actions. This recommendation our committee passes on to the Conference for its consideration.

Proposed Amendments to the Rules of Criminal  
Procedure

The Special Committee approved all of the proposed amendments to the Federal Rules of Criminal Procedure with the exception of proposed Rule 12.1, Notice of Insanity, the amendments to proposed Rule 15, Depositions, the rewritten Rule 16, Discovery and Inspection, and the amendment to Rule 24 which would permit replacement of jurors who were found during the trial to be disqualified. In addition the Special Committee recommended certain amendments to Rules 6 and 49.

Your committee has met the objections of the Special Committee in part by deciding not to recommend new Rule 12.1 and the amendments to Rule 15 at this time. Instead we have referred them back to the Advisory Committee on Criminal Rules for further study. We also made certain amendments to Rule 16 which we hope will meet the objections of the Special Committee at least in part.

The Special Committee also objected to the amendment of Rule 24 which would authorize the replacement by an alternate juror of a juror who is found to be disqualified during the course of the trial. Objections to this proposal have been raised previously and very fully considered both by the Advisory Committee on Criminal Rules and your committee, both of which believe them to be largely theoretical and greatly outweighed by the advantage of avoiding a mistrial when an

impaneled juror is found to be legally disqualified. Your committee, therefore, adheres to its recommendation that Rule 24 be amended in this manner.

The Special Committee also recommends amendments to Rules 6 and 49. Its suggestions, however, involve important proposals which have not heretofore been presented to the bench and bar for their consideration and which, therefore, should and will receive further consideration by the Advisory Committee on Criminal Rules.

#### Summary

Your committee desires to express its gratitude for the careful consideration which the Special Committee and House of Delegates of the American Bar Association have given to the proposals and for their helpful suggestions so many of which we have adopted. The proposals for the amendment of the Federal Rules of Civil Procedure set out in Exhibit C and for the amendment of the Federal Rules of Criminal Procedure set out in Exhibit E annexed to our report of July 12, 1965 include the recommendations of the Special Committee which we have accepted. We accordingly recommend that they be approved by the Judicial Conference and transmitted to the Supreme Court with the recommendation that they be promulgated.

On behalf of the standing Committee  
on Rules of Practice and Procedure

*Albert B. Maris*  
Chairman

September 16, 1965

Secretary  
Gibson Gayle, Jr.  
Bank of the Southwest Building  
Houston 2, Texas

Assistant Secretary  
Wm. Reece Smith, Jr.  
Box 3239  
Tampa 1, Florida

# AMERICAN BAR ASSOCIATION

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111 North Dearborn Street, Chicago, Illinois 60637

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August 18, 1965

The Honorable Albert B. Maris, Chairman  
Standing Committee on Rules of Practice and Procedure  
Judicial Conference of the United States  
Supreme Court Building  
Washington 25, D. C.

Dear Judge Maris:

The House of Delegates of the American Bar Association, at its session in Miami Beach, Florida, on August 12, 1965, adopted the following substantive resolutions upon recommendation of the Association's Special Committee on Federal Rules of Procedure:

That the American Bar Association favors the adoption in substance of the amendments to the Federal Rules of Civil Procedure proposed by the Judicial Conference's Standing Committee on Rules of Practice and Procedure for the purpose of effecting unification of civil and admiralty procedure and urges the Judicial Conference to give careful consideration to specific comments and suggestions submitted to its standing committee by this Association's Committee on Federal Rules of Procedure.

That the American Bar Association favors in principle the adoption of Uniform Rules of Appellate Procedure for the Federal courts and authorizes its Special Committee on Federal Rules of Procedure to transmit to the Judicial Conference's Standing Committee on Rules of Practice and Procedure its committee views and any dissenting views on the Uniform Rules of Federal Appellate procedure as presently proposed or as may be subsequently revised by the advisory committee on such rules.

That the Special Committee on Federal Rules of Procedure is authorized to transmit to the Judicial Conference's Standing Committee on Rules of Practice and Procedure its committee views and any dissenting views on the various specific amendments to the Federal Rules of Civil Procedure as now proposed or as may be subsequently modified by the Advisory Committee on such rules.

The Honorable Albert B. Maris

-2-

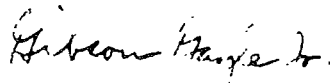
August 18, 1965

That the Special Committee on Federal Rules of Procedure is authorized to transmit to the Judicial Conference's Standing Committee on Rules of Practice and Procedure its committee views and any dissenting views on the various specific amendments to the Federal Rules of Criminal Procedure as now proposed or as may be subsequently modified by the Advisory Committee on such rules.

A copy of the Report of our Committee on Federal Rules of Procedure to the House of Delegates is enclosed for your convenient reference.

With best wishes, I am

Sincerely yours,



Gibson Gayle, Jr.  
Secretary

GGjr:ck  
Enc.

cc: General Franklin Riter  
Bert H. Early, Esq.  
General George W. Hickman, Jr.  
Judge Maris at: 5050 U. S. Court House, Philadelphia, Pa. 19107

AMERICAN BAR ASSOCIATION  
SPECIAL COMMITTEE ON  
FEDERAL RULES OF PROCEDURE

RECOMMENDATIONS

1. That the committee be continued.
2. That the American Bar Association favors the adoption in substance of the amendments to the Federal Rules of Civil Procedure proposed by the Judicial Conference's Standing Committee on Rules of Practice and Procedure for the purpose of effecting unification of civil and admiralty procedure and urges the Judicial Conference to give careful consideration to specific comments and suggestions submitted to its standing committee by this Association's Committee on Federal Rules of Procedure.
3. That the American Bar Association favors in principle the adoption of Uniform Rules of Appellate Procedure for the Federal courts and authorizes its Special Committee on Federal Rules of Procedure to transmit to the Judicial Conference's Standing Committee on Rules of Practice and Procedure its committee views and any dissenting views on the Uniform Rules of Federal Appellate procedure as presently proposed or as may be subsequently revised by the advisory committee on such rules.
4. That the Special Committee on Federal Rules of Procedure is authorized to transmit to the Judicial Conference's Standing Committee on Rules of Practice and Procedure its committee

views and any dissenting views on the various specific amendments to the Federal Rules of Civil Procedure as now proposed or as may be subsequently modified by the Advisory Committee on such rules. 5. That the Special Committee on Federal Rules of Procedure is authorized to transmit to the Judicial Conference's Standing Committee on Rules of Practice and Procedure its committee views and any dissenting views on the various specific amendments to the Federal Rules of Criminal Procedure as now proposed or as may be subsequently modified by the Advisory Committee on such rules.

## R E P O R T

### INTRODUCTION

The committee has directed its attention to the drafts of Rules of Civil Procedure, Rules of Criminal Procedure, Rules of Appellate Practice and Rules governing the unification of admiralty and civil practice being considered by the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States. More specifically, the committee has studied the following proposals of the Standing Rules Committee of the Judicial Conference:

- (1) Amendment to effect unification of civil and admiralty procedure, March 1964, and subsequent revisions;
- (2) Preliminary draft of proposed Uniform Rules of Federal Appellate Procedure, March 1964;
- (3) Amendments to the Rules of Civil Procedure for the U.S. District Courts proposed by the Advisory Committee on Civil Rules, March 1964 and subsequent revisions;



(4) Second preliminary draft of the proposed amendments to Rules of Criminal Procedure for the U. S. District Courts, March 1964.

The committee has met on numerous occasions as a whole and through various of its subcommittees. It has exchanged voluminous internal correspondence and has corresponded extensively with other groups within the association and in the legal world generally. In addition, it has, on an informal basis, in a number of instances, transmitted specific views and suggestions to the reporters for the various advisory committees to the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States.

The committee wishes particularly to thank the following groups with which it has maintained close liaison: The General Practice Section; the Criminal Law Section; the Antitrust Law Section; the Judicial Administration Section; the Maritime Law Association; the Real Property, Probate and Trust Law Section; the Insurance, Negligence and Compensation Law Section; the Admiralty and Maritime Law Standing Committee; the Patent, Trademark and Copyright Section. We have not considered the issue of modification of the copyright rules. The subject has been referred to the Section on Patent, Trademark and Copyright Law by the House of Delegates.

In connection with our proposals concerning amendment of the Federal Rules of Criminal Procedure we recognize that the current extensive program of the Special Committee on Minimum Standards for Administration of Criminal Justice will also necessarily be considering procedural matters covered in part by our report. We do not

intend to foreclose the Minimum Standards Committee from any recommendations which it may deem appropriate at the conclusion of its study but because of the immediate probability that the Federal Criminal Rules will be amended before the completion of the minimum standards project we deem it necessary to take a position as to those proposed amendments at this time.

This committee has been in direct communication with Judge Lombard, Chairman of the Special Committee on Minimum Standards for the Administration of Criminal Justice, and has reached an understanding with him in this regard. Copies of our preliminary studies have been furnished to Judge Lombard and we intend to transmit to him a copy of our final report upon its approval by this House.

Recommendation #1--Continuation of Committee

The work of the Judicial Conference of the United States with respect to rules of practice is continuing. While substantial progress has been made, it is obvious that new drafts and revisions of drafts will be proposed to the bar and submitted to the United States Supreme Court for adoption during the coming years. Unlike the situation where a specific piece of legislation is being proposed to Congress, the work of the Judicial Conference and its advisory committees presupposes a continuing cooperative endeavor with the bar. It is desirable, therefore, that this committee be granted some flexibility in transmitting its views on an informal basis while proposals also are being formulated by the advisory committees and by the Judicial Conference of the United States. If each proposal or each draft were to be separately passed upon by the House of Delegates the rules-making process of the United States Supreme Court would be stultified. It is obvious

that a more flexible approach is required in the area of law making. Accordingly, we are recommending the continuation of this committee. We are also recommending that the committee be authorized to make its views known to the Judicial Conference and its advisory committees. When such views are transmitted, it will be made clear that it is the committee itself and not the entire Bar Association that is speaking. The committee will, of course, transmit any dissenting and concurring opinions and will endeavor, insofar as possible, to reflect communications made to it by members of the bar generally as well as by the various groups cooperating with it.

Recommendation #2--Unification of Civil and Admiralty Procedure

In March 1964, the Standing Committee on Rules of Practice and Procedure of the Judicial Conference published certain proposed amendments to the Civil Rules for the purpose of effecting unification of civil and admiralty procedure (hereinafter referred to as the "March 1964 Draft"). Under date of May 1, 1965, Professor Brainerd Currie, Reporter to the Advisory Committee on Admiralty Rules, submitted modifications of the March 1964 Draft to his Committee as well as to this committee and other interested persons. Such modifications will hereinafter be referred to as the "May 1965 Draft". We understand that on June 28, 1965, the Standing Committee reviewed the March 1964 Draft as amended in May 1965 and made certain changes which do not materially affect our report.

The unification proposal as amended would combine legal, equitable, and admiralty or maritime claims in the "one form of action" of present Civil Rule 2. As a result, the Federal Rules of Civil

Procedure would be generally applicable in claims now triable as suits of admiralty, with the characteristic features of present admiralty practice preserved in a few special provisions of the merged rules and in an appended body of "Supplemental Rules for Certain Admiralty or Maritime Claims." The heart of the proposal is new Rule 9 (h) which provided that in claims which now could be tried either at law or in admiralty the complaint may contain a statement identifying the claim as an "admiralty or maritime claim." Claims identified by such a statement, and also claims as to which admiralty is the only basis of Federal jurisdiction, will be tried subject to the special admiralty provisions and to the "Supplemental Rules." The other important feature of the proposal is amended Civil Rule 18, under which admiralty or maritime claims may be joined with legal and equitable claims, provided that there is an independent basis of Federal jurisdiction for each claim. Rule 9 (h) will insure that for purposes of trial the characteristic features of present civil and admiralty practice are preserved where appropriate, despite the joinder.

Our recommendation that unification be approved is consistent with the previously expressed policy of the American Bar Association. In February 1962, the House of Delegates passed a resolution favoring "unification of the rules of practice of the Supreme Court of the United States in Civil and Admiralty matters, in so far as practicable." 87 A.B.A. Rep. 155. The report of the Standing Committee on Admiralty and Maritime Law, upon which this resolution was based, recognized the trend toward some form of merger of admiralty and civil practice and found that "actual unification into a single set of rules...modeled basically on the Civil Rules"

would in the long run be the preferable method of effectuating such a merger, provided that extensive and careful studies were undertaken to insure promulgation of "a realistic, workable set of rules, readily available to each member of the American Bar." 87 A.B.A. Rep. 226, 229. We believe that the March 1964 Draft as revised in May 1965 is consistent with the policy expressed in the 1962 resolution and amplified in the report of the Committee on Admiralty and Maritime Law.

In formulating our recommendation we have given careful consideration to the views of the Maritime Law Association. In November 1964 the Association adopted a resolution (1) stating its preference for a separate set of Admiralty Rules revised to incorporate desirable features of the Civil Rules, but (2) in the alternative urging that, if the March 1964 Draft were to be adopted, it would be modified in accordance with seven specific recommendations set out in the resolution. These recommendations were designed to deal with certain of the specific objections to unification outlined in the first part of the resolution. The resolution was based on a report of the Association's Committee on Supreme Court Admiralty Rules favoring a separate set of Admiralty Rules, but recognizing "That unification in some form is inevitable." The report went on to state that in the March 1964 Draft "there have been preserved most of the essential features of admiralty practice; and that by modification and amendment the remaining essential features of that practice can be preserved within its framework." MIA Doc. No. 479, October 1964.

The May 1965 Draft substantially incorporates the MIA's seven specific recommendations. Subsequent to the promulgation of that

Draft by the Advisory Committee on Admiralty Rules, the MLA Rules Committee reported to the MLA that changes had been made which would comply in substance with five of the seven recommendations and that the Advisory Committee had felt that the remaining two recommendations could be complied with without change. Although it continues to prefer a separate set of Admiralty Rules, the MLA Rules Committee is presumably satisfied that the unification proposal in the May 1965 revision preserves "the essential features of admiralty practice."

The detailed reasons for our recommendation have previously been circulated among the members of the House of Delegates as Appendix I to our Admiralty Rules Subcommittee's Report. They may be briefly summarized as follows:

The proposed unification merely merges civil and admiralty procedure, providing a single civil action for law, equity and admiralty, governed by a single body of procedural rules. The substantive maritime law (applicable even now whether a maritime case is tried "at law" or in admiralty) is in no way altered by the proposal, nor is there any merger of the several separate jurisdictional bases of the Federal Courts. In fact, despite the merger, distinctive admiralty remedies, such as limitation of liability, process in rem, foreign attachment, and trial to the court, are preserved for what are now suits in admiralty.

The advantages to be derived from unification are many. The Advisory Committee's proposal will put an end to the possibility of dismissal of a claim within the jurisdiction of the federal court merely because it has been brought on the wrong "side" of the court. It will permit

the permissive joinder of related claims and compulsory counter-claims whether admiralty or civil, allowing the parties to resolve all their differences in a single proceeding. It will make all the modern procedural devices of the Civil Rules and future amendments of them available in admiralty. It will eliminate traps for the unwary arising from the near similarity, yet subtle differences between many provisions of the Civil Rules and the present Admiralty Rules. It will thus terminate what seems to us an undesirable burden upon the cautious lawyer who must now familiarize himself with two distinctive sets of procedure.

We do not find the reasons offered by the opponents of unification weighty enough to offset those advantages. Constitutional and statutory objections are without merit in view of the carefully limited procedural scope of the changes proposed. The various arguments that separate Admiralty Rules are needed to preserve the procedural flexibility necessary for the proper administration of the substantive maritime law are not persuasive: Not only do the Admiralty Rules already closely approach the Civil Rules in many respects, but the proposed Supplemental Rules will preserve most of the distinctive features of admiralty practice in an easily administered, separate body of rules. The provisions for joinder of claims are said to be potentially productive of confusion in the trial of cases, but we do not anticipate any more difficulty in this regard than ensued as a result of the merger of law and equity. We also find unpersuasive the argument that unification of civil and Admiralty procedure would unduly burden or "adulterate" civil procedure used by attorneys who seldom or never encounter an admiralty case. On the contrary, it is precisely these attorneys who will

benefit from a readily accessible single set of rules.

While we recommend approval of procedural unification and the general method proposed to achieve it, we suggest certain editorial and technical revisions in the form and scope of specific rules. We have been in communication from time to time with Professor Currie and have submitted to him the comments and suggestions of this nature set forth in our Admiralty Rules Subcommittee report previously circulated among the members of the House of Delegates. We believe that these comments and suggestions are entitled to careful consideration by the Judicial Conference of the United States prior to the submission of the unification proposal to the Supreme Court.

Recommendation #3--Uniform Rules of Federal  
Appellate Procedure

Since the promulgation in March 1964 of the Preliminary Draft of Proposed Uniform Rules of Federal Appellate Procedure, there has been much discussion of the proposal among members of the bar, The American College of Trial Lawyers, the Ninth Circuit Judicial Conference, the Federal Bar Association, the Department of Justice and others have submitted lengthy critiques. As a result, we understand that the Advisory Committee intends to present a second draft that may differ substantially from the proposals which we have examined. Accordingly, we do not consider that action by the American Bar Association on the specific proposals contained in the March 1964 Draft would be appropriate or meaningful at this time.

It is our conclusion, however, that some form of Uniform Rules of Appellate Procedure for the Federal courts should be adopted with the right reserved to each Court of Appeals to adopt further rules not inconsistent with the uniform rules. The wide variations now



existing among the several circuits on matters of common concern in all federal courts are a potential source of unfairness to litigants, as well as a burden on lawyers whose practice extends beyond a single circuit. We therefore recommend that the American Bar Association favor the principle of uniform appellate rules.

We also urge that this committee be authorized to cooperate with the Advisory Committee in formulating a new draft, particularly by furnishing to it our detailed preliminary comments on the March 1964 Draft contained in a subcommittee report of this committee as previously circulated to the members of the House of Delegates.

Recommendation #4--Proposed Amendment to Rules of  
Civil Procedure for the U.S.  
District Courts other than those  
dealing with unification with  
civil admiralty procedure

We recognize the desirability of stability in the rules. In the first place, a certain amount of confusion and additional work is caused as the bench and bar become familiar with new formulations and accommodates practice to them; often litigation is required in order to determine the meaning of the revised language. In the second place, some of the states may be unwilling to follow each amendment in the Federal Rules so that the policy of uniformity between state and federal practice will be disserved. Nevertheless, the Federal Rules were drafted thirty years ago and substantial modifications are called for. While they have proven extremely effective, they have themselves created a change in our approach to litigation, making possible and desirable further advances and improvements. Moreover, it would have been unreasonable to expect that minor difficulties in drafting and divergencies in interpretation would not have to be resolved from time to time.

In our opinion the Advisory Committee has exercised good judgment and sound discretion in providing improvements in the Rules while maintaining their essential stability.

We have considered very carefully the impact of the proposed changes on State policy. As noted above, the issue of changes as they affect uniformity between state and federal practice has, in our opinion, been properly resolved by the Advisory Committee. The effect of the proposed changes in federal practice on "substantive" policies of the states have also been considered by us. The recent case of Hanna v. Plumer \_\_\_\_\_ U.S. \_\_\_\_\_, 14 L. Ed. 2d 8 (1965), has, in our opinion, failed to eliminate the difficulties. Indeed, they have, if anything, added to the burdens of draftsmen of amended federal rules. The majority opinion in the Hanna Case states fairly clearly that the rule making power is as broad as Congress' legislative power. As it noted, a Federal rule is valid unless:

"the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions." Id. at \_\_\_\_\_, 14 L. Ed. 2d at 17.

The Court used the normal legislative test for determining validity declaring:

"a federal court system (augmented by the Necessary and Proper Clause) carries with it congressional power to make rules governing the practice and pleading in those courts, which in turn includes a power to regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either." Id. at \_\_\_\_\_, 14 L. Ed. 2d at 17

Rulemakers must, therefore, weigh, in much the same way as Congress might, the desirability of uniformity and efficiency in federal litigation against the desirability of permitting the states,

wherever possible, to exercise power and enforce their own policy in areas normally regulated by the states.

A good example of the difficulties are found in Clause 1 of subdivision (b) of Rule 23 (Clause 1 of Proposed Rule 23.1) requiring that:

"the plaintiff was a shareholder or member at the time of the transaction of which he complains or that his share or membership thereafter devolved on him by operation of law." (New matter is underlined.)

In the main, the relations between shareholders and directors, so far as they relate to stockholders derivative suits, are controlled by the states. Obviously, requirement of ownership of shares at the time of the act complained of limits somewhat the possibility of shareholder suits against company officials. It does, therefore, affect the practical procedural-substantive balance in the corporate field. Whatever our judgment might have been had the issue been posed in the first instance, in view of the more than a quarter of a century history of the federal provision and the current stockholder-management balance, which has been achieved in part because of it, we believe the judgment of the Advisory Committee in retaining the provision is sound.

We have examined each of the proposed changes with this question of impact on substantive rights and State policy in mind and, in our opinion, in no instance has any substantial impact been made which is not far outweighed by a probable beneficial result on Federal Practice and judicial administration.

A considerable amount of attention was given to the question of appealability. It is our opinion that, particularly when the modifications are being initially interpreted, it is desirable to permit appeals whenever there is presented a substantial procedural issue, the proper resolution of which may have a substantial effect on the litigation.

In this connection we urge that Subdivision (b) of Section 1292 of Title 28 of the United States Code be utilized more frequently than it has been to permit appeals from decisions on procedural matters which may be decisive in a litigation or which may appreciably reduce expense. That provision permits an appeal where it is "the opinion" of the District Judge;

"that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation."

The Court of Appeals must also give permission for the appeal.

The provision has been used infrequently, only in the most "exceptional cases." See, e.g., 1960 Dir. Adm. Office U. S. Courts Ann. Rep. 72-73; H. R. Rep. No. 1667, 85th Cong., 2nd Sess., 2 (1958); Milbert v. Bison Laboratories, 260 F. 2d 431 (3d Cir. 1958). We think that this excessively restrictive useage is unfortunate.

In the case of some amendments, such as those to Rule 19 and Rule 23, there has been substituted for what appeared to be mechanical tests utilizing seemingly fixed terms such as "indispensable," "necessary," and "joint or common, or secondary," more descriptive terminology. As indicated below, we approve

the amendments as providing more accurate guides for the exercise of judicial control over procedure in practice. We should be disturbed, however, if the change in the form of the Rule caused the Courts to determine that there was no "controlling question of law," but only questions of "discretion" not subject to review under Subdivision (b) of Section 1292 of Title 28. It is noted in this connection that the proposed amendment to Rule 19 is based in part upon such provisions as those in New York and Michigan. See, Mich. Gen. Court Rules, R. 205 (effective Jan. 1, 1963); N.Y. Civ. Prac. Law & Rules, 1001 (effective Sept. 1, 1963). Our information is that the New York and Michigan Rules are working well. Part of the bar's approval of the New York Rule, however, is predicated on the fact that intermediate appeals are allowed so that review may be obtained from an appellate court before the litigation is far advanced.

It may be desirable for the Judicial Conference of the United States to review the question of intermediate appeals generally. The current crowded appellate docket is, in our opinion, no justification for unduly restricting intermediate appeals where they may be useful in securing "the just, speedy and inexpensive determination" of an action. See, Rule 1.

One final minor housekeeping point should be noted. In modifying its March, 1964 draft the revised notes of the Advisory Committee do not indicate reasons for changes. In a number of instances, the reasons for changes are clear from a comparison of the March, 1964 draft and the May, 1965 draft. In other instances the reasons become clear only in the light of the specific objections and

suggestions made by the bar and bench to the Advisory Committee. Since this legislative history is often extremely difficult to reconstruct, it would be helpful, in the future, where the problem may arise, to indicate reasons for changes.

The detailed analysis of the proposed amendments to the civil rules have previously been circulated among the members of the House of Delegates in the form of a subcommittee report. This report and the dissenting view of one member of the committee, will be transmitted to the Judicial Conference.

Recommendation #5--Proposed Amendment to Rules  
of Criminal Procedure for the  
U.S. District Courts

This committee recommends approval of all proposed amendments found in the Second Preliminary Draft, with the exception of new Rule 12.1 (Notice of Insanity); the amendments to proposed Rule 15 (Depositions); the re-written Rule 16 (Discovery and Inspection); and the amendment to Rule 24 (Trial Jurors) which would permit replacement of jurors who "are found to be" disqualified. The Committee recommends further amendment of Rule 49 (Service and Filing of Papers) and agrees with the Section of Criminal Law that Rule 6 (The Grand Jury) should be amended to require disclosure of grand jury minutes after indictment.

Discussion:

A. Rule 6 (The Grand Jury). After careful study, described below, the Section of Criminal Law and this Committee recommend that:

(1) Rule 6(e) of the Federal Rules of Criminal Procedure

be amended to provide that a reporter transcribe the minutes of all proceedings of grand jury which are accusatorial in nature; that the cost of such transcript be borne by the government of the United States and the proceedings in transcribed form be filed in a sealed envelope with the appropriate United States District Court for further necessary action;

(2) Similar action be taken either by changes in the rules of court or by necessary legislation in the several states which follow the common law practice described herein;

(3) After an indictment has been returned against a defendant, and after his arrest, that a copy of the grand jury minutes or transcript be furnished to him as a matter of right, upon his request, prior to his arraignment or as soon thereafter as is practicable; except in cases where the government reveals that national security or public interest is involved, in which event grand jury proceedings shall not be disclosed without an order of the court.

The reasons for the Section's recommendation are stated in the report of a Section Committee headed by Judge Gerald S. Levin, of the Superior Court of California at San Francisco. The reasoning of Judge Levin's committee is persuasive to this committee. A copy of his report, which is the basis for our recommendation, has previously been circulated to the members of the House of Delegates and will be transmitted to the Judicial

Conference of the United States.

B. Rule 12.1(Notice of Insanity). The proposal to require a defendant to give notice before trial that he will raise the defense of insanity is opposed by the Section of Criminal Law and by the Board of Regents of the American College of Trial Lawyers. It is the opinion of this committee that this proposal may have, in many instances, the effect of denying a defendant defenses which are constitutionally open to him on his plea of "not guilty". An essential part of the prosecution's burden in every case is to prove the mental capacity of the defendant, even though this burden may be tacitly satisfied in most cases by a presumption of sanity. If a defendant is insane, it seems unrealistic to impose any requirement upon him limiting his ability to raise his mental capacity. We feel that many problems in this area will be resolved by intelligent application of Proposed Rule 17.1 (Pretrial Procedure), which we endorse, and which will require "conferences to consider such matters as will promote a fair and expeditious trial." The question of the manner in which the government should be able to prepare for the issue of insanity is being considered by the American Bar Association Minimum Standards Project and we do not mean to foreclose whatever recommendations that project evolves.

C. Rule 15 (Depositions). The Advisory Committee would permit depositions taken at the instance of prosecution. Even though some states tolerate prosecution depositions (a questionable practice since April 5, 1965, when the Supreme Court held that the Sixth Amendment controls the States; Pointer v. Texas, No. 577, O.T. 1964, 33 Law Week 4306), the United States Supreme Court, interpreting



the Sixth Amendment right "to be confronted with the witnesses", held in Mattox v. United States, 156 U.S. 237, 242-243:

"The primary object of the constitutional provision in question was to prevent depositions or ex parte affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief."

Pretrial discovery on the part of the defense has not been expanded to a point at which the defendant's rights can be fully protected in the taking of depositions. In the traditional trial setting, a witness who is excused from the stand may be recalled later, in the trial of the parties later become aware of additional questions which should be asked of the witness. At least during the trial, the parties have total discovery of the evidence which is going to be admitted at the trial. When depositions are to be taken in advance of trial, however, the parties may not have a complete understanding of the significance of such witnesses' testimony and may be unable to examine them adequately. By their terms, the amendments to Rule 15 would permit such depositions "to prevent a failure of justice." If the testimony of such an absent witness is of such great importance that "a failure of justice" might result in

the absence of his testimony, it should be apparent that the witness is important enough so that the jury should have a chance to see and observe his demeanor.

The prosecution is not without resources under the present state of law. See United States v. Haderlein, 118 Fed. Supp. 346, in which the court arranged to transport the jury, the marshal, clerk, court reporter, and counsel for all parties to the home of a sick witness for the purpose of taking his testimony under conditions which would allow the jury to see his demeanor.

C. Rule 16 (Discovery and Inspection). The amendments to this Rule proposed in the Second Preliminary Draft are opposed by the Section of Criminal Law. The Board of Regents of the American College of Trial Lawyers has also withheld its approval. The proposed amendments of this Rule have been drastically changed since the Preliminary Draft which was approved by our Special Committee on Federal Rules of Procedure in February of 1964. This committee adheres to its endorsement of Rule 16 as it would have been amended by the preliminary draft.

The latest draft of this Rule, which would either condition defense discovery upon discovery by the government in Rule 16 (c), or alternatively, would permit discovery by the government independently of defense discovery, raises grave constitutional questions. The Fourth Amendment embraces a right to refuse to produce "mere evidentiary materials." (Gouled v. United States, 255 U.S. 298, 305-306; United States v. Lefkowitz, 285 U.S. 452, 464-465.) A search warrant under any other name is still a search warrant and it is this committee's opinion that an order permitting the

government discovery which would be tolerated in Rule 16 (c) would amount to an unconstitutional search and seizure.

The proposed amendment limits defense discovery under Rule 16 (a) only of certain reports "known by the attorney for the government to be within the possession, custody, or control of the government." This qualification, added in the Second Preliminary Draft, would place a premium on failure of administrative agencies to forward certain reports to the U. S. Attorney and upon lack of diligence by the U. S. Attorney in determining what reports exist. Acting in a similar context, Congress imposed no such qualification in the "Jencks" statute, 18 U.S.C. 3500.

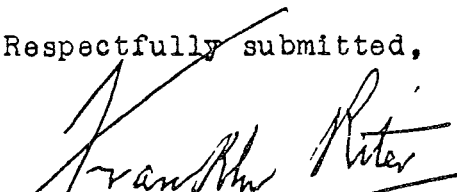
D. Rule 24 (Trial Jurors). The amendments to this Rule would permit selection of six alternate jurors, instead of the four provided by the present Rule. This committee has no objection to that proposal, but the amendment would also permit the replacement of jurors who "are found to be" Disqualified during the course of the trial. Presumably, this would include disqualification for bias, and adoption of this Rule will place a premium on intensive investigation of the empaneled jurors during the trial, when their independence is most important. In effect, the voir dire examination would continue throughout the trial. Each side will have a real motive for penetrating the jurors' privacy to ferret out any conceivable ground for disqualification. Such a practice is sure to lead to all kinds of improprieties and will inevitably place special pressures on jurors who learn from their neighbors and friends that they are under investigation.

E. Rule 49 (Service and Filing of Papers). Neither we,

Nor the College of Trial Lawyers, nor the Section on Criminal Law, oppose the amendment to Rule 49 (a) which would require all motions to be served upon "each of the parties." It is obviously fair and just that all parties have notice of all pleadings filed in the case. The Section of Criminal Law suggests, however, and we agree, that the rule should be amended to give discretion to the district judge to permit any party, upon application, to serve only a written notice on the other parties inviting their attention to a pleading filed with the court. In its present form, the amendment may place considerable burdens on appointed counsel for indigent clients at mass conspiracy trials, and the judge should at least have the power to relieve counsel of that burden.

The Criminal Law Section additionally opposed the amendment of Rule 20 and the elimination of Rule 19, which would have the effect of permitting a district judge to transfer cases from division to division within a district whether or not the defendant consents. It is our conclusion that such discretion should be vested in the trial judge since it is obvious that there can be appellate review of any claimed abuse of discretion.

Respectfully submitted,

  
Franklin Riter, Chairman