SUMMARY OF THE

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

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

1. Approve proposed amendments to Bankruptcy Rules 1010, 1019, 2002, 2007.1, 3014, 3017, 3018, 3021, 8001, 8002, 9011, and 9035, and proposed new Rules 1020, 3017.1, 8020, and 9015 and transmit them to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law .....pp. 4-9

2. Approve proposed amendments to Civil Rules 9 and 48 and transmit them to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law ..... pp. 10-13

3. Approve proposed amendments to Criminal Rule 16 and transmit them to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law pp.16-17

4. Approve proposed amendments to Evidence Rules 407, 801, 803(24), 804(b)(5), 806, and proposed new Rules 804(b)(6) and 807 and transmit them to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law pp.19-21

The remainder of the report is submitted for the record, and includes the following items for the information of the Conference:

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

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

Your Committee on Rules of Practice and Procedure met on June 19-20, 1996. All the members attended the meeting, with Ian H. Gershengorn attending on behalf of Deputy Attorney General Jamie S. Gorelick, who was unable to be present.

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

Participating in the meeting were Peter G. McCabe, the Committee's Secretary; Professor Daniel R. Coquillette, the Committee's reporter; John K. Rabiej, Chief, and

Mark D. Shapiro, attorney, of the Administrative Office's Rules Committee Support Office; Patricia S. Channon of the Bankruptcy Judges Division; William B. Eldridge of the Federal Judicial Center; Professor Mary P. Squiers, Director of the Local Rules Project; and Bryan A. Garner and Joseph F. Spaniol, consultants to the Committee.

AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE

Rules Recommended for Tentative Approval Subject to Later Reconsideration

The Advisory Committee on Appellate Rules submitted for approval amendments to Appellate **Rules 26.1, 29, 35**, and **41**, together with Committee Notes explaining their purpose and intent. The proposed amendments had been circulated to the bench and bar for comment in September 1995. A public hearing was scheduled, but later canceled. The advisory committee requested that transmission of the amendments to the Judicial Conference be deferred, however, until the completion of the style revision project.

The style revision of the Appellate Rules is part of a comprehensive effort to clarify and simplify the language of the procedural rules. The style changes are designed to be nonsubstantive. The comprehensive style revision was published for public comment in April 1996, and the comment period expires on December 31, 1996. Instead of approving and transmitting the substantive amendments to **Rules 26.1, 29, 35,** and **41** separately, the advisory committee recommended that their transmittal be deferred until next year, when they could be considered along with the stylized revision of the Appellate Rules.

Your committee approved the proposed amendments provisionally, subject to reconsideration in light of any comments that may be received on the same rules during consideration of the stylized revision of the rules. A full explanation of the proposed amendments will be submitted next year when they are transmitted to the Judicial Conference for approval.

Rules Approved for Publication and Comment

The Advisory Committee on Appellate Rules submitted proposed amendments that would combine Appellate **Rules 5 and 5.1** into a **new Appellate Rule 5** with the recommendation that it be published for public comment.

Rule 5 (*Appeal by Permission Under 28 U.S.C. § 1292(b)*) and **Rule 5.1** (*Appeal by Permission Under 28 U.S.C. § 636(c)(5)*) would be amended to combine both rules into a **new Rule 5** that would govern all discretionary appeals from district court orders, judgments, and decrees. Although Rule 5 deals with interlocutory appeals and Rule 5.1 deals with judgments originally entered on direction of a magistrate judge, both rules involve discretionary appeals, and much of Rule 5.1 is repetitive of Rule 5. Most of the changes are intended to broaden the language so that the new Rule 5 would apply to all discretionary appeals.

In addition to economizing the rules, the proposed rules' consolidation would govern any future discretionary appeals authorized under 28 U.S.C. § 1292(e). The statutory provision was amended in 1992 authorizing the Supreme Court to prescribe rules that "provide for an appeal of an interlocutory decision to the courts of appeals that

is not otherwise provided for" in § 1292. The Court has not yet exercised its authority under § 1292(e), but a proposed amendment to Civil Rule 23 is being published for comment that would permit a discretionary interlocutory appeal from a district court order granting or denying class action certification. Instead of prescribing separate rules for each newly authorized interlocutory appeal, the proposed single rule would govern present and future discretionary appeals.

Appellate **Form 4** (*Affidavit to Accompany Motion for Permission to Appeal in Forma Pauperis*) would be substantially revised to request more detailed information, which is needed to evaluate a party's eligibility to proceed in forma pauperis.

The committee voted to circulate the proposed amendment of Appellate Rules 5 and 5.1 and the revised Appellate Form 4 to the bench and bar for comment.

AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Bankruptcy Rules submitted proposed amendments to Federal Rules of Bankruptcy Procedure **1010, 1019, 2002, 2007.1, 3014, 3017, 3018, 3021, 8001, 8002, 9011,** and **9035** and proposed **new Rules 1020, 3017.1, 8020,** and **9015**, together with Committee Notes explaining their purpose and intent. Many of the changes conform to, or implement, the Bankruptcy Reform Act of 1994. The Act contains provisions on procedures governing, among other matters, small businesses, appointment of trustees, and jury trials. The proposed amendments — with the exception of Rule 1010 — and new rules had been circulated to the bench and bar for comment in

September 1995. A public hearing was scheduled, but later canceled because no request to appear was received by the committee.

The proposed amendments to **Rule 1010** (*Service of Involuntary Petition and Summons; Petition Commencing Ancillary Case*) would conform certain references to subdivisions in Civil Rule 4 and Bankruptcy Rule 7004 that were changed in 1993, and 1996, respectively. The amendments are technical and not intended to make any substantive change.

After approving amendments to Rule 1010, your committee agreed with the request of the advisory committee not to publish them for comment because they were purely conforming and technical involving changes in certain cross-references and their publication for comment was not appropriate or necessary. Under section 4(d) of the *Procedures for the Conduct of Business by the Judicial Conference Committees on Rules of Practice and Procedure*, "(t)he Standing Committee may eliminate the public notice and comment requirement if, in the case of a technical or conforming amendment, it determines that notice and comment are not appropriate or necessary."

Rule 1019 (*Conversion of Chapter 11 Reorganization Case, Chapter 12 Family Farmer's Debt Adjustment Case, or Chapter 13 Individual's Debt Adjustment Case to Chapter 7 Liquidation Case*) would be amended to clarify the effect of a conversion of a case to a different chapter of the Bankruptcy Code and make stylistic improvements.

New Rule 1020 (*Election to be Considered a Small Business in a Chapter 11 Reorganization Case*) provides procedures and time limits for a small business to elect to

be considered a small business in a chapter 11 case. The new rule implements certain provisions added to the Bankruptcy Code by the Bankruptcy Reform Act of 1994 that authorize a qualified debtor in a chapter 11 reorganization case to elect to be considered a small business.

Rule 2002 (*Notices to Creditors, Equity Security Holders, United States, and United States Trustee*) is amended to provide notice of a meeting called for the purpose of electing a chapter 11 trustee. In addition, the caption of every notice required to be given by the debtor to a creditor must include information mandated under § 342(c) of the Bankruptcy Code as amended by the Bankruptcy Reform Act of 1994.

Rule 2007.1 (*Appointment of Trustee or Examiner in a Chapter 11 Reorganization Case*) is amended to provide procedures for the election of a chapter 11 trustee implementing § 1104(b) of the Bankruptcy Code as amended by the Bankruptcy Reform Act of 1994.

The proposed amendments to **Rule 3014** (*Election Under § 1111(b) by Secured Creditor in Chapter 9 Municipality or Chapter 11 Reorganization Case*) would set a deadline for secured creditors to elect the application of § 1111(b)(2) of the Bankruptcy Code in a small business case when a conditionally-approved disclosure statement is approved finally without a hearing.

Rule 3017 (*Court Consideration of Disclosure Statement in Chapter 9 Municipality and Chapter 11 Reorganization Cases*) is amended to give the court flexibility in fixing the record date for determining the holders of securities who are

entitled to receive a disclosure statement, ballot, and other materials in connection with the solicitation of votes on a plan.

New Rule 3017.1 (*Court Consideration of Disclosure Statement in a Small Business Case*) would implement § 1125(f), added by the Bankruptcy Reform Act of 1994, by providing procedures for the conditional and final approval of a disclosure statement in a small business chapter 11 case.

Rule 3018 (*Acceptance or Rejection of Plan in a Chapter 9 Municipality or a Chapter 11 Reorganization Case*) would be amended to provide a court with flexibility in fixing the record date for determining the holders of securities who may vote on a plan.

Rule 3021 (*Distribution Under Plan*) would be amended to provide flexibility in fixing the record date for determining the holders of securities who are entitled to receive distributions under a confirmed plan; to treat the holders of debt securities the same as other creditors by requiring that their claims be allowed to receive distribution; and to clarify that all interest holders whose interests have not been disallowed may receive a distribution under a confirmed plan.

Rule 8001 (*Manner of Taking Appeal; Voluntary Dismissal*) would be amended to conform to the 1994 Bankruptcy Reform Act's provisions that amended 28 U.S.C. § 158 to permit an appeal as of right from an order extending or reducing the exclusivity period for filing a chapter 11 plan under § 1121 of the Code. Subdivision (e) would be specifically amended to provide a procedure for electing to have an appeal heard by the

district court rather than by a bankruptcy appellate panel, under 28 U.S.C. § 158(c)(1), as amended by the Act.

The proposed amendments to **Rule 8002** (*Time for Filing Notice of Appeal*) would allow a court, based on excusable neglect, to enter an order — more than 20 days after the expiration of the time to file a notice of appeal — permitting a party to file a notice of appeal if the motion for an extension was timely and the notice of appeal is filed not later than ten days after the entry of the order extending the time; and to prohibit any extension of time to file a notice of appeal if the appeal is from certain types of orders.

New Rule 8020 (*Damages and Costs for Frivolous Appeal*) would be added to clarify the authority of a district court or a bankruptcy appellate panel hearing an appeal to award damages and costs for a frivolous appeal.

Rule 9011 (*Signing of Papers; Representations to the Court; Sanctions; Verification and Copies of Papers*) would be amended to conform to the 1993 amendments to Civil Rule 11, except that the Rule 11 "safe harbor" provision — which prohibits the filing of a motion for sanctions unless the challenged paper is not withdrawn or corrected within a prescribed time after service of the motion — does not apply if the challenged paper is a bankruptcy petition.

New Rule 9015 (*Jury Trials*) would provide procedures relating to jury trials in bankruptcy cases and proceedings, including procedures for consenting to have a jury trial conducted by a bankruptcy judge under 28 U.S.C. § 157(e), as added by the Bankruptcy Reform Act of 1994.

Rule 9035 (*Applicability of Rules in Judicial Districts in Alabama and North Carolina*) would be amended to clarify that the Bankruptcy Rules do not apply to the extent that they are inconsistent with any federal statutory provision relating to bankruptcy administrators in the districts of North Carolina and Alabama.

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

> **Recommendation:** That the Judicial Conference approve proposed amendments to Bankruptcy Rules 1010, 1019, 2002, 2007.1, 3014, 3017, 3018, 3021, 8001, 8002, 9011, and 9035, and proposed new Rules 1020, 3017.1, 8020, and 9015 and transmit them to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Official Bankruptcy Forms Approved for Publication and Comment

The Advisory Committee on Bankruptcy Rules submitted proposed revisions of **Official Bankruptcy Forms 1, 3, 6, 8, 9, 10, 14, 17,** and **18,** and **new Forms 20A** and **20B** and recommended that they be published for public comment.

Most of the proposed changes to the Official Forms are technical or intended to clarify or simplify existing forms. Some of the more frequently used forms were redesigned by a graphics expert, and instructions in forms often used by petitioners in bankruptcy or creditors were rewritten using plain English.

Your committee voted to circulate the proposed amendments to Official Forms 1, 3, 6, 8, 9, 10, 14, 17, and 18, and new Forms 20A and 20B to the bench and bar for comment.

AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Civil Rules submitted to your committee proposed amendments to Civil **Rules 9** and **48** together with Committee Notes explaining their purpose and intent. The proposed amendments were circulated to the bench and bar for comment in September 1995. Public hearings were held in Oakland, California; New Orleans, Louisiana; and Atlanta, Georgia.

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

The proposed amendments to **Rule 48** (*Number of Jurors — Participation in Verdict*) would require the initial empaneling of a jury of twelve persons in all civil cases, in the absence of stipulation by counsel to a lesser number. The jury may be reduced to fewer members if some are excused under Rule 47(c). A jury may be reduced to fewer than six members, however, only if the parties stipulate to a lower number before the verdict is returned. The proposed amendments would not alter the requirement of unanimity, nor require alternate jurors.

The advisory committee found the following considerations persuasive:

- It reviewed the considerable body of literature on jury size, particularly empirical studies, which overwhelmingly favored a return to twelve-person juries. (A survey

of the relevant articles is contained in an October 12, 1994 memorandum from the advisory committee's chairman. It is set out in Appendix B.)

- A twelve-person jury would significantly increase the statistical probability of having a more diverse cross-section of the community and would include more persons from different occupational and economic backgrounds than a smaller jury. In particular, a twelve-person jury would likely include more racial, religious, and ethnic minority representation. For example, the statistical probability of including in a twelve-person jury at least one member of a minority that constitutes 10% of the population is one and one-half times greater than in a six-person jury. An empirical study substantiating the statistical probabilities has shown that minorities constituting 10% of the population were represented on twelve-person juries 82% of the time and on six-person juries only 32% of the time.

- A twelve-person jury has a greater capacity for recalling all facts and arguments presented at trial.

- A larger jury would be less likely to be dominated by a single aggressive juror and less likely to reach an aberrant decision.

- Recent studies have challenged the data relied on by the courts when they originally decided to reduce jury size in the early 1970's.

- Few magistrate judges lack access to twelve-person jury courtrooms within reasonable proximity to their chambers.

- Although the added costs are not insignificant — roughly $10 million per year — the increase would be less than 13% of the funds allocated to pay for jurors' expenses and only one-third of one percent of the judiciary's overall $3 billion budget. The advisory committee was sensitive to and appreciated the concerns of the Economy Subcommittee "that the fiscal implications of (this) policy (change) be carefully considered as part of (the) deliberations before these amendments are placed before the Judicial Conference." (The Economy Subcommittee expressed no policy position on the proposed amendments.)

Objections to the proposal were voiced during the public comment period. First, opponents argue that the present flexibility in the rule, which allows, but does not require, a judge to seat a jury of less than twelve persons, has been working well, and the

proposed change is unnecessary. Second, they also assert that incurring added costs to pay the expenses of additional veniremembers and some structural renovation to jury boxes in magistrate judge courtrooms would be unwise, especially in these times of financial restraints. An argument was also made that more hung juries would result.

The advisory committee concluded that the possibility of an increase in the number of "hung juries" caused by the proposed amendments was not supported by data. The committee found telling the statistical comparison of hung juries in civil and criminal jury trials. Recent data showed that in 1995, only 122 of 4,248 jury trials in criminal cases (2.9 percent) and 26 of 4,236 jury trials in civil cases (six tenths of one percent) resulted in hung juries. The difference in the overall number of hung juries between the two can be discounted further when considering the more demanding "beyond a reasonable doubt" level of certainty mandated in criminal twelve-person jury trials. The advisory committee also recognized that some districts would experience difficulties in securing a larger juror pool. But it concluded that the benefits outweighed the difficulties.

The advisory committee unanimously voted to recommend that the proposed amendments to **Rule 48** be submitted for approval. The advisory committee found particularly helpful the article written by Chief Judge Richard S. Arnold, which reviews the long history and extols the virtues of a twelve-person jury. *Trial by Jury: The Constitutional Right to a Jury of Twelve in Civil Trials*, 22 Hofstra L. Rev. 1 (1993) — contained in Appendix C. Professors Wright and Miller also found the article to be "a persuasive argument that smaller juries are inferior to twelve person juries." 9A Charles

A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2491, n. 35 (1995). In the end, the advisory committee believed that juries lie at the core of the Article III function and that it is important to regain the strength of twelve-person juries, restoring the longstanding tradition of the court system that had been followed for over 600 years.

The Standing Committee noted the substantial public comment on the proposed amendments, much of it adverse from the bench, while positive from practitioners, including national bar associations. A committee member expressed concern over the opposition expressed by a number of judges who commented on the proposed amendments. In addition, the Committee on Court Administration and Case Management opposes the proposed amendments for reasons set out in Judge Ann C. Williams' December 21, 1994 and March 20, 1996 letters contained in Appendix D. The Department of Justice stated its strong view, however, favoring the proposed amendments because the gains — better representation and better verdicts — were worth the additional costs. After carefully considering the various points of views, your committee voted 9 to 2 with one abstention to recommend approval of the proposed amendments.

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

> **RECOMMENDATION:** That the Judicial Conference approve the proposed amendments to Civil Rules 9 and 48 and transmit them to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

The proposed amendments to **Rule 26(c)** (*General Provisions Governing Discovery; Duty of Disclosure*) dealing with protective orders were originally published for comment in October 1993, but were later revised and republished in September 1995 after being returned to the rules committees by the Judicial Conference. The advisory committee decided not to proceed with the amendments at this time, but to defer further consideration to coincide with future study of the American College of Trial Lawyers' request to narrow the general scope of discovery.

The proposed amendments to **Rule 47** (*Selection of Jurors*) would have given the parties a right to supplement the court's examination and orally question prospective jurors under reasonable limits on time, manner, and subject matter determined by the trial court in its discretion. The proposed amendments were circulated to the bench and bar for comment in September 1995. The advisory committee decided not to go forward with the proposal. Instead, the advisory committee urged the Federal Judicial Center to include presentations of experienced practitioners and judges on voir dire at future judicial programs and orientations.

Amendment of Rule 23 Approved for Publication and Comment

At the request of the Ad Hoc Committee on Asbestos Litigation, the Judicial Conference in March 1991 directed your committee to ask the Advisory Committee on Civil Rules to study whether **Rule 23** should be amended to accommodate the demands of mass tort litigation.

The advisory committee began its work with a review of a draft rule proposed in 1986 by the American Bar Association, which would have collapsed the three subdivisions of Rule 23(b); created an opt-in class provision; authorized a court to permit or deny opting out of any class action; specifically governed notice requirements for (b)(1) and (b)(2) classes; and made many other changes, many of them independently significant. In 1993, the advisory committee recommended publication of a modified version of the ABA proposal, but then withdrew it for further consideration.

The advisory committee requested that the Federal Judicial Center study all class actions terminated in a two-year period in four metropolitan districts. Meanwhile, the advisory committee continued to study the rule. It invited experienced class action practitioners to meet with the advisory committee, held a conference at the University of Pennsylvania Law School, attended a symposium at Southern Methodist University Law School, and participated in a symposium at the New York University Law School. In addition, many lawyers and representatives of bar groups attended and spoke at the Fall 1995 and Spring 1996 advisory committee meetings.

The advisory committee faced a host of competing proposals that would substantially amend **Rule 23.** At several meetings, it painstakingly drafted and debated various options. In the end, the advisory committee requested publication of proposed amendments that were significant, but much less sweeping and comprehensive than many other proposals promoted by serious class action participants. Among other things, the advisory committee's preliminary draft would provide more discretion to the district court

in certifying class actions, explicitly permit certification of settlement classes, and establish a discretionary interlocutory appeal of the certification decision.

Class actions involve difficult and divisive issues. The advisory committee's proposal has drawn immediate criticism from some persons and professional groups that have closely followed the rulemaking process. Although there was some disagreement on some of the substantive provisions, your committee agreed that the public airing of the proposal would provide all interested persons an opportunity to express their views as contemplated under the Rules Enabling Act. Further views and comments from academics, experienced practitioners, and judges on the proposal would be especially helpful in the committees' future deliberations.

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

AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Criminal Rules submitted to your committee proposed amendments to Criminal **Rule 16** together with Committee Notes explaining their purpose and intent.

Rule 16 (*Discovery and Inspection*) would be amended to require pretrial reciprocal disclosure by the parties of expert testimony offered on the issue of the defendant's mental condition. The reciprocal disclosure provisions, parallel to similar provisions adopted in 1993, would be triggered when the government requests disclosure

concerning expert witness' information regarding the defendant's mental condition after the defendant has given notice under Rule 12.2(b).

The proposed amendments to **Rule 16** were circulated to the bench and bar for comment in September 1994, together with controversial changes that would have required the government to disclose the names of witnesses to be called at trial seven days before the trial. Although there was no controversy or discussion of the specific amendments providing reciprocal rights for the disclosure of expert witness' information, the specific proposal was subsumed by the action of the Judicial Conference at its September 1995 session rejecting the amendments to Rule 16 — which was aimed at the provision requiring government pretrial disclosure of the names of witnesses. JCUS-SEP 95, p. 96.

The advisory committee concluded that separate republication of the same proposal on disclosure of expert witness' information on the defendant's mental condition was unnecessary. It submitted the proposed amendments for approval.

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

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

The Advisory Committee on Criminal Rules decided not to proceed with proposed amendments to **Rule 24** (*Trial Jurors*) that would have provided parties with a right to

participate in the oral questioning of prospective jurors by supplementing the court's examination under reasonable limits on time, manner, and subject matter determined by the court in its discretion. The proposed amendments were circulated to the bench and bar for comment in September 1995. The advisory committee joined with the Advisory Committee on Civil Rules in urging the Federal Judicial Center to use its training and educational programs to provide more information on effective voir dire from experienced lawyers and judges.

Rules Approved for Publication and Comment

The Advisory Committee on Criminal Rules submitted to your committee proposed amendments to Criminal Rules **5.1, 26.2, 31, 33, 35,** and **43** and recommended that they be published for public comment.

The proposed amendments to **Rule 5.1** (*Preliminary Examination*) would require the production of witness' statements after the witness had testified at a preliminary hearing. **Rule 26.2** (*Production of Witness Statements*) would be amended to include a cross-reference to the proposed amendment of Rule 5.1. The amendments are similar to changes made in 1993 requiring production of witness statements in other proceedings governed by Rules 32, 32.1, 46, and Rule 8 of the Rules Governing Proceedings Under § 2255.

The proposed amendments to **Rule 31** (*Verdict*) would require that jurors be polled individually whenever any polling occurs after the verdict, either at a party's request or on the court's motion.

Rule 33 (*New Trial*) would be amended to clarify the time within which to file a motion for a new trial on the ground of newly discovered evidence. Under the proposed amendment, the two-year time limit would commence on the date of the verdict or finding of guilty instead of on the date of the final judgment — which has been interpreted to mean either the appellate court's judgment or the issuance of its mandate.

Rule 35 (*Correction or Reduction of Sentence*) would be amended to allow a court to aggregate a defendant's assistance rendered before and after sentencing in determining whether a defendant's subsequent assistance is "substantial" as required under Rule 35(b).

The proposed amendments to **Rule 43** (*Presence of the Defendant*) would add proceedings involving the reduction of sentence under Rule 35(b) and (c) and resentencing hearings under 18 U.S.C. § 3582(c) to those at which the defendant's presence is not required. A defendant's presence is not now required in similar proceedings involving the correction of sentence.

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

AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE

Rules Recommended for Approval and Transmission

The Advisory Committee on Evidence Rules submitted to your committee proposed amendments to Federal Rules of Evidence **407, 801(d)(2), 803(24), 804(b)(5), 806,** and **807,** and **new Rule 804(b)(6)** together with Committee Notes explaining their

purpose and intent. The proposed amendments were circulated to the bench and bar for comment in September 1995. A public hearing was held in New York, New York in January 1996.

Rule 407 (*Subsequent Remedial Measures*) would be amended to extend the exclusionary principle expressly to product liability actions and to clarify that the rule applies only to remedial measures made after the occurrence that produced the damages giving rise to the action.

Rule 801 (*Definitions*) would be amended to address the issues raised by the Supreme Court in Bourjaily v. United States, 483 U.S. 171 (1987). It would codify the holding in Bourjaily by stating expressly that a court must consider the contents of a coconspirator's statement in determining "the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered." The amendment also provides that the content of the declarant's statement does not alone suffice to establish a conspiracy in which the declarant and the defendant participated. The amendments also treat analogously preliminary questions relating to the declarant's authority and the agency or employment relationship.

The contents of **Rule 803(24)** (*Other Hearsay Exceptions; Availability of Declarant Immaterial*) and Rule **804(b)(5)** (*Other Hearsay Exceptions; Declarant Unavailable*) would be combined and transferred to a **new Rule 807** (*Residual Exception*) under the proposed amendments. The changes would facilitate future additions to Rules 803 and 804. No change in meaning was intended.

New Rule 804(b)(6) (*Hearsay Exceptions; Declarant Unavailable*) would provide that a party forfeits the right to object on hearsay grounds to the admission of a declarant's prior statement when the party's deliberate wrongdoing or acquiescence therein was intended to procure the unavailability of the declarant as a witness. The rule would apply in civil as well as criminal cases and would apply to any party, including the government. The amendment would apply only to actions taken after the event to prevent a witness from testifying at trial.

The proposed amendment of **Rule 806** (*Attacking and Supporting Credibility of Declarant)* corrects a misplaced comma in a citation.

Proposed new **Rule 807** (*Residual Exception*) consists of old Rules 803(24) and 804(b)(5).

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

> **Recommendation:** That the Judicial Conference approve the proposed amendments to Evidence Rules 407, 801, 803(24), 804(b)(5), 806, and proposed new Rules 804(b)(6) and 807 and transmit them to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

The proposed amendments to **Rule 103** (*Rulings on Evidence*) would have clarified the different practices among the courts regarding the finality of rulings on pretrial motions concerning the admissibility of evidence. Unless the court ruling had been stated on the record or the context clearly demonstrated that the ruling was final, the

proposed amendments would have explicitly established a default rule requiring counsel to renew at trial any pretrial objection or proffer that was earlier denied by the court to preserve the objection for appeal purposes.

The proposed amendments to **Rule 103** were circulated to the bench and bar for comment in September 1995. Neither the rule published for comment nor an alternative default rule commanded a majority in the comments or in the advisory committee. The advisory committee decided not to go forward with the proposed amendments.

RULES GOVERNING ATTORNEY CONDUCT

Your committee sponsored a second special study conference on federal rules governing attorney conduct to follow up on a conference held in January 1996. Inclement weather experienced on the East Coast in January prevented several key participants from attending the initial conference. The conferees completed their work, unanimously agreeing that problems caused by the present "balkanization" of applicable local rules in the districts need to be addressed and corrected. Several recommendations were submitted for the committee's consideration, including obtaining more data on the 17 courts that adopted a previously approved Conference model local rule and the attorney disciplinary procedures employed by the districts. The committee agreed to request the Federal Judicial Center to study these two matters. It deferred any formal action until the conclusion of ongoing negotiations between the Department of Justice and the Conference of Chief Justices on contacting represented parties.

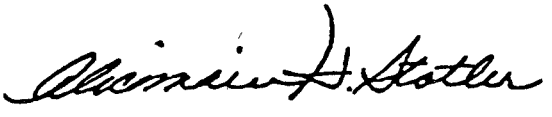
REPORT TO THE CHIEF JUSTICE
ON PROPOSED SELECT NEW RULES OR
RULES AMENDMENTS GENERATING CONTROVERSY

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

STATUS OF PROPOSED AMENDMENTS

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

Respectfully submitted,



Alicemarie H. Stotler

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APPENDICES

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

FROM: Paul Mannes, Chair
Advisory Committee on Bankruptcy Rules

DATE: May 13, 1996

RE: Report of the Advisory Committee on Bankruptcy Rules

Introduction

The Advisory Committee on Bankruptcy Rules met on March 21-22, 1996, in Memphis, Tennessee. The Committee considered public comments regarding the proposed amendments to the Bankruptcy Rules that were published in September, 1995. After making several changes, the Committee approved the proposed amendments for presentation to the Standing Committee for final approval. Following the meeting, the Committee added to the package of proposed amendments a technical amendment to Rule 1010 that was not published for comment.

At its March meeting, the Committee also approved a package of proposed amendments to the Official Bankruptcy Forms, and two new Official Bankruptcy Forms, for presentation to the Standing Committee with a request to publish them for comment.

I. Action Items

A. Proposed Amendments to Bankruptcy Rules 1010, 1019, 2002, 2007.1, 3014, 3017, 3018, 3021, 8001, 8002, 9011, and 9035, and Proposed New Rules 1020, 3017.1, 8020, and 9015 Submitted for Approval by the Standing Committee and Transmittal to the Judicial Conference.

A preliminary draft of these proposed amendments (except for the proposed amendments to Rule 1010) were published for comment by the bench and bar in September 1995. Only five letters were received during the comment period. Comments were submitted by the following judges, lawyers, and organizations:

(1) Hon. Geraldine Mund, United States Bankruptcy Judge, Central

District of California

(2) Hon. James E. Yacos, United States Bankruptcy Judge, District of New Hampshire

(3) James Gadsden, Esq., New York City, New York

(4) Anthony Michael Sabino, Esq., Chair of the Bankruptcy Section of the Federal Bar Association (submitting the Bankruptcy Section's comments)

(5) Joseph Patchan, Esq., Director of the Executive Office for United States Trustees

These comments are discussed below following the text of the relevant proposed amendments.

The public hearing on the preliminary draft of the proposed amendments, scheduled to be held in Washington, D.C., on February 9, 1996, was canceled for lack of witnesses.

The proposed amendments to Rule 1010, which were not published for comment, are technical and are necessary to conform to changes in subdivision designations in Civil Rule 4 and in Bankruptcy Rule 7004. The Advisory Committee requests that the amendments to Rule 1010 be approved and transmitted to the Judicial Conference without the need for publication. (Rule 4(d) of the Procedures for the Conduct of Business by the Judicial Conference Committees on Rules of Practice and Procedure provides that "[the Standing Committee may eliminate the public notice and comment requirement if, in the case of a technical or conforming amendment, it determines that notice and comment are not appropriate or necessary.").

1. Synopsis of Proposed Amendments

(a) Rule 1010, which contains references to certain subdivisions of Civil Rule 4 and Bankruptcy Rule 7004, is amended solely to conform to the 1993 changes in subdivision designations in Civil Rule 4 and the 1996 changes in subdivision designations in Bankruptcy Rule 7004.

(b) Rule 1019(3) and (5) are amended to delete such phrases as "superseded case" and "original petition" because they give the erroneous impression that conversion of a case to a different chapter of the Bankruptcy Code results in a new case or a new petition for relief, and to make stylistic improvements.

(c) Rule 1020 is added to provide procedures and time limits for a small business to elect to be considered a small business in a chapter 11 case under § 1121(e) and 1125(f) of the Code as amended by the Bankruptcy Reform Act of 1994.

(d) Rule 2002(a) is amended to provide for notice of a meeting called for the purpose of electing a chapter 11 trustee under § 1104(b) of the Code as amended by the Bankruptcy Reform Act of 1994.

(e) Rule 2002(n) is amended, consistent with the 1994 amendment to § 342(c) of the Code, to provide for the inclusion of certain information in the caption of every notice required to be given by a debtor to a creditor.

(f) Rule 2007.1 is amended to provide procedures for the election of a chapter 11 trustee under § 1104(b) of the Code as amended by the Bankruptcy Reform Act of 1994.

(g) Rule 3014 is amended to provide a time limit for secured creditors to make an election under § 1111(b)(2) of the Code in a small business chapter 11 case.

(h) Rule 3017 is amended to give the court flexibility in fixing the record date for the purpose of determining the holders of securities who are entitled to receive a disclosure statement, ballot, and other materials in connection with the solicitation of votes on a plan.

(i) Rule 3017.1 is added to provided procedures, consistent with the Bankruptcy Reform Act of 1994, for the conditional and final approval of a disclosure statement in a small business chapter 11 case.

(j) Rule 3018 is amended to give the court flexibility in fixing the record date for the purpose of determining the holders of securities who may vote on a plan.

(k) Rule 3021 is amended (a) to provide flexibility in fixing the record date for the purpose of determining the holders of securities who are entitled to receive distributions under a confirmed plan, (b) to treat the holders of debt securities the same as other creditors by requiring that their claims be allowed in order to receive a distribution, and (c) to clarify that all interest holders (not only those that are "equity security holders") may receive a distribution under a confirmed plan.

(l) Rule 8001(a) is amended to conform to the Bankruptcy Reform Act of 1994 which amended 28 U.S.C. § 158 to permit an appeal as of right from an

order extending or reducing the exclusivity period for filing a chapter 11 plan under § 1121.

(m) Rule 8001(e) is amended to provide a procedure for electing under 28 U.S.C. 158(c)(1), as amended by the Bankruptcy Reform Act of 1994, to have an appeal heard by the district court rather than by a bankruptcy appellate panel.

(n) Rule 8002(c) is amended (1) to provide that a request for an extension of time to appeal must be "filed" (rather than "made") within the applicable time period; (2) to give the court discretion -- more than 20 days after the expiration of the time to file a notice of appeal -- to order that a party may file a notice of appeal if the motion for an extension was timely and the notice of appeal is filed not later than ten days after entry of the order extending the time; and (3) to prohibit any extension of time to file a notice of appeal if the appeal is from certain types of orders.

(o) Rule 8020 is added to clarify that a district court hearing an appeal, or a bankruptcy appellate panel, may award damages and costs for a frivolous appeal.

(p) Rule 9011 is amended to conform to the 1993 amendments to Civil Rule 11, except that the safe harbor provision -- prohibiting the filing of a motion for sanctions unless the challenged paper is not withdrawn or corrected within a prescribed time after service of the motion -- does not apply if the challenged paper is a bankruptcy petition.

(q) Rule 9015 is added to provide procedures relating to jury trials in bankruptcy cases and proceedings, including procedures for consenting to have a jury trial conducted by a bankruptcy judge under 28 U.S.C. § 157(e) that was added by the Bankruptcy Reform Act of 1994.

(r) Rule 9035 is amended to clarify that the Bankruptcy Rules do not apply to the extent that they are inconsistent with any federal statutory provision relating to bankruptcy administrators in the judicial districts in North Carolina and Alabama.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE*

Rule 1010. Service of Involuntary Petition and Summons; Petition Commencing Ancillary Case

On the filing of an involuntary petition or a petition commencing a case ancillary to a foreign proceeding the clerk shall forthwith issue a summons for service. When an involuntary petition is filed, service shall be made on the debtor. When a petition commencing an ancillary case is filed, service shall be made on the parties against whom relief is sought pursuant to § 304(b) of the Code and on any other parties as the court may direct. The summons shall be served with a copy of the petition in the manner provided for service of a summons and complaint by Rule 7004(a) or (b). If service cannot be so made, the court may order that the summons and petition be served by mailing copies to the party's last known address, and by at least one publication in

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

a manner and form directed by the court. The summons and petition may be served on the party anywhere. Rule ~~7004(f)~~ 7004(e) and Rule ~~4(g) and (h)~~ 4(l) F.R.Civ.P. apply when service is made or attempted under this rule.

COMMITTEE NOTE

The amendments to this rule are technical, are promulgated solely to conform to changes in subdivision designations in Rule 4, F.R.Civ.P., and in Rule 7004, and are not intended to effectuate any material change in substance.

In 1996, the letter designation of subdivision (f) of Rule 7004 (Summons; Time Limit for Service) was changed to subdivision (e). In 1993, the provisions of Rule 4, F.R.Civ.P., relating to proof of service contained in Rule 4(g) (Return) and Rule 4(h) (Amendments), were placed in the new subdivision (l) of Rule 4 (Proof of Service). The technical amendments to Rule 1010 are designed solely to conform to these new subdivision designations.

The 1996 amendments to Rule 7004 and the 1993 amendments to Rule 4, F.R.Civ.P., have not affected the availability of service by first class mail in accordance with Rule 7004(b) for the service of a summons and petition in an involuntary case commenced under § 303 or an ancillary case commenced under § 304 of the Code.

GAP Report on Rule 1010. These amendments, which are technical and conforming, were not published for comment.

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

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

* * * * *

(3) CLAIMS FILED BEFORE CONVERSION ~~IN SUPERSEDED CASES~~. All claims actually filed by a creditor ~~in the superseded case~~ before conversion of the case are ~~shall be~~ deemed filed in the chapter 7 case.

* * * * *

(5) FILING FINAL REPORT AND SCHEDULE OF POSTPETITION DEBTS.

(A) *Conversion of Chapter 11 or Chapter 12 Case*. Unless the court directs otherwise, if a chapter 11 or chapter 12 case is converted to chapter 7, the

debtor in possession or, if the debtor is not a debtor in possession, the trustee serving at the time of conversion, shall:

(i) not later than 15 days after conversion of the case, file a schedule of unpaid debts incurred after the filing of the petition and before conversion of the case, including the name and address of each holder of a claim; and

(ii) not later than 30 days after conversion of the case, file and transmit to the United States trustee a final report and account;

(B) *Conversion of Chapter 13 Case.* Unless the court directs otherwise, if a chapter 13 case is converted to chapter 7,

(i) the debtor, not later than 15 days after conversion of the case, shall file a schedule of unpaid debts incurred after the filing of the petition and before conversion of the case, including the name and address of each holder of a claim; and

(ii) the trustee, not later than 30 days after conversion of the case, shall file and transmit to the United States trustee a final report and account;

(C) *Conversion After Confirmation of a Plan.* Unless the court orders otherwise, if a chapter 11, chapter 12, or chapter 13 case is converted to chapter 7 after confirmation of a plan, the debtor shall file:

(i) a schedule of property not listed in the final report and account acquired after the

filing of the petition but before conversion, except if the case is converted from chapter 13 to chapter 7 and § 348(f)(2) does not apply;

(ii) a schedule of unpaid debts not listed in the final report and account incurred after confirmation but before the conversion; and

(iii) a schedule of executory contracts and unexpired leases entered into or assumed after the filing of the petition but before conversion.

(D) *Transmission to United States Trustee.* The clerk shall forthwith transmit to the United States trustee a copy of every schedule filed pursuant to Rule 1019(5).

~~Unless the court directs otherwise, each debtor in possession~~

~~or trustee in the superseded case shall: (A) within 15 days following the entry of the order of conversion of a chapter 11 case, file a schedule of unpaid debts incurred after commencement of the superseded case including the name and address of each creditor; and (B) within 30 days following the entry of the order of conversion of a chapter 11, chapter 12, or chapter 13 case, file and transmit to the United States trustee a final report and account. Within 15 days following the entry of the order of conversion, unless the court directs otherwise, a chapter 13 debtor shall file a schedule of unpaid debts incurred after the commencement of a chapter 13 case, and a chapter 12 debtor in possession or, if the chapter 12 debtor is not in possession, the trustee shall file a schedule of unpaid debts incurred after the commencement of a chapter 12 case. If the conversion order is entered after confirmation of a plan, the debtor shall file~~

~~(A) a schedule of property not listed in the final report and account acquired after the filing of the original petition but before entry of the conversion order; (B) a schedule of unpaid debts not listed in the final report and account incurred after confirmation but before entry of the conversion order; and (C) a schedule of executory contracts and unexpired leases entered into or assumed after the filing of the original petition but before entry of the conversion order. The clerk shall forthwith transmit to the United States trustee a copy of every schedule filed pursuant to this paragraph.~~

* * * * *

COMMITTEE NOTE

The amendments to subdivisions (3) and (5) are technical corrections and stylistic changes. The phrase "superseded case" is deleted because it creates the erroneous impression that conversion of a case results in a new case that is distinct from the original case. Similarly, the phrase "original petition" is deleted because it erroneously implies that there is a second petition with respect to a converted case. See § 348 of the Code.

Public Comments on Rule 1019. None.

GAP Report on Rule 1019. No changes to the published draft.

Rule 1020. Election to be Considered a Small Business in a Chapter 11 Reorganization Case

In a chapter 11 reorganization case, a debtor that is a small business may elect to be considered a small business by filing a written statement of election not later than 60 days after the date of the order for relief.

COMMITTEE NOTE

This rule is designed to implement §§ 1121(e) and 1125(f) that were added to the Code by the Bankruptcy Reform Act of 1994.

Public Comments on Rule 1020:

(1) Mr. Patchan, Director of the Executive Office for U.S. Trustees, made a "minor suggestion" that the deadline for filing an election to be treated as a small business in a chapter 11 case be the first date set for the meeting of creditors under § 341 of the Code (rather than 60 days after the order for relief).

(2) Mr. Sabino of the Federal Bar Association suggested that (a) the rule state that only a debtor that is qualified under the Code as a small business may elect to be treated as a small business, and (b) the rule

provide that the court may extend the 60-day period to file an election only "if the debtor seeks such an extension within those original 60 days and the court signs an order granting such extension."

GAP Report on Rule 1020. The phrase "or by a later date as the court, for cause, may fix" at the end of the published draft was deleted. The general provisions on reducing or extending time periods under Rule 9006 will be applicable.

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

(a) TWENTY-DAY NOTICES TO PARTIES IN INTEREST. Except as provided in subdivisions (h), (i), and (l) of this rule, the clerk, or some other person as the court may direct, shall give the debtor, the trustee, all creditors and indenture trustees at least ~~not less than~~ 20 days' ~~days~~ notice by mail of:

(1) the meeting of creditors ~~pursuant to~~ under § 341 or § 1104(b) of the Code;

* * * * *

(n) CAPTION. The caption of every notice given under this rule shall comply with Rule 1005. The caption of every notice required to be given by the debtor to a creditor shall include the information required to be in the notice by § 342(c) of the Code.

* * * * *

COMMITTEE NOTE

Paragraph (a)(1) is amended to include notice of a meeting of creditors convened under § 1104(b) of the Code for the purpose of electing a trustee in a chapter 11 case. The court for cause shown may order the 20-day period reduced pursuant to Rule 9006(c)(1).

Subdivision (n) is amended to conform to the 1994 amendment to § 342 of the Code. As provided in § 342(c), the failure of a notice given by the debtor to a creditor to contain the information required by § 342(c) does not invalidate the legal effect of the notice.

Public Comments on Rule 2002. None.

GAP Report on Rule 2002. No changes to the published draft.

Rule 2007.1. Appointment of Trustee or Examiner in a Chapter 11 Reorganization Case

(a) ORDER TO APPOINT TRUSTEE OR EXAMINER. In a chapter 11 reorganization case, a motion for an order to appoint a trustee or an examiner ~~pursuant to~~ under § 1104(a) or § ~~1104(b)~~ 1104(c) of the Code shall be made in accordance with Rule 9014.

(b) ELECTION OF TRUSTEE.

(1) *Request for an Election.* A request to convene a meeting of creditors for the purpose of electing a trustee in a chapter 11 reorganization case shall be filed and transmitted to the United States trustee in accordance with Rule 5005 within the time prescribed by § 1104(b) of the Code. Pending court approval of the person elected, any person appointed by the United States trustee under § 1104(d) and

approved in accordance with subdivision (c) of this rule shall serve as trustee.

(2) *Manner of Election and Notice.* An election of a trustee under § 1104(b) of the Code shall be conducted in the manner provided in Rules 2003(b)(3) and 2006. Notice of the meeting of creditors convened under § 1104(b) shall be given as provided in Rule 2002. The United States trustee shall preside at the meeting. A proxy for the purpose of voting in the election may be solicited only by a committee of creditors appointed under § 1102 of the Code or by any other party entitled to solicit a proxy pursuant to Rule 2006.

(3) *Report of Election and Resolution of Disputes.*

(A) *Report of Undisputed Election.* If the election is not disputed, the United States trustee shall promptly file a report of the election, including the name and address of the person elected and a statement that the election is undisputed. The United States trustee shall file with the report an application for approval of the appointment in accordance with subdivision (c) of this rule. The report constitutes appointment of the elected person to serve as trustee, subject to court approval, as of the date of entry of the order approving the appointment.

(B) *Disputed Election.* If the election is disputed, the United States trustee shall promptly file a report stating that the election

is disputed, informing the court of the nature of the dispute, and listing the name and address of any candidate elected under any alternative presented by the dispute. The report shall be accompanied by a verified statement by each candidate elected under each alternative presented by the dispute, setting forth the person's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, and any person employed in the office of the United States trustee. Not later than the date on which the report of the disputed election is filed, the United States trustee shall mail a copy of the report and each verified statement to any party

in interest that has made a request to convene a meeting under § 1104(b) or to receive a copy of the report, and to any committee appointed under § 1102 of the Code. Unless a motion for the resolution of the dispute is filed not later than 10 days after the United States trustee files the report, any person appointed by the United States trustee under § 1104(d) and approved in accordance with subdivision (c) of this rule shall serve as trustee. If a motion for the resolution of the dispute is timely filed, and the court determines the result of the election and approves the person elected, the report will constitute appointment of the elected person as of the date of entry of the order approving the appointment.

~~(b)~~ (c) APPROVAL OF APPOINTMENT. An order approving the appointment of a trustee elected under § 1104(b) or appointed under § 1104(d), or the appointment of an examiner ~~pursuant to § 1104(c)~~ under § 1104(d) of the Code, shall be made ~~only~~ on application of the United States trustee~~;~~. The application shall state ~~stating~~ the name of the person appointed~~, the names of the parties in interest with whom the United States trustee consulted regarding the appointment~~; and, to the best of the applicant's knowledge, all the person's connections with the debtor, creditors, any other parties in interest, their respective attorneys and accountants, the United States trustee, and persons employed in the office of the United States trustee. Unless the person has been elected under § 1104(b), the application shall state the names of the parties in interest with whom the United States trustee consulted regarding the appointment. The application shall be

accompanied by a verified statement of the person appointed setting forth the person's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, and any person employed in the office of the United States trustee.

COMMITTEE NOTE

This rule is amended to implement the 1994 amendments to § 1104 of the Code regarding the election of a trustee in a chapter 11 case.

Eligibility for voting in an election for a chapter 11 trustee is determined in accordance with Rule 2003(b)(3). Creditors whose claims are deemed filed under § 1111(a) are treated for voting purposes as creditors who have filed proofs of claim.

Proxies for the purpose of voting in the election may be solicited only by a creditors' committee appointed under § 1102 or by any other party entitled to solicit proxies pursuant to Rule 2006. Therefore, a trustee or examiner who has served in the case, or a committee of equity security holders appointed under § 1102, may not solicit proxies.

The procedures for reporting disputes to the court derive from similar provisions in Rule 2003(d) applicable to chapter 7 cases. An election may be disputed by a party in interest or by the United States trustee. For example, if the United States trustee believes that the

person elected is ineligible to serve as trustee because the person is not "disinterested," the United States trustee should file a report disputing the election.

The word "only" is deleted from subdivision (b), redesignated as subdivision (c), to avoid any negative inference with respect to the availability of procedures for obtaining review of the United States trustee's acts or failure to act pursuant to Rule 2020.

Public Comments on Rule 2017.1:

(1) Mr. Patchan, Director of the Executive Office for U.S. Trustees, recommended that the proposed amendments be changed to provide that the U.S. trustee's report of the election of a chapter 11 trustee constitute the appointment of the trustee, rather than requiring the U.S. Trustee to appoint the person elected. That is, rather than the U.S. Trustee *making* the appointment, the U.S. Trustee's report to the court *is* the appointment. He also suggested that the committee note clarify that (a) scheduled creditors whose claims are deemed filed under § 1111(a) of the Code are treated, for voting purposes, as creditors who have filed proofs of claim, and (2) any examiner or trustee who has served in the case, or an equity security holders' committee, may not solicit proxies for the purpose of the election of a trustee.

(2) Mr. Sabino of the Federal Bar Association suggested that the rule require the U.S. trustee to file a motion asking the court to resolve a disputed election, rather than waiting for a party in interest to file such a motion.

GAP Report on Rule 2017.1. The published draft of proposed new subdivision (b)(3) of Rule 2017.1, and the Committee Note, was

substantially revised to implement Mr. Patchan's recommendations (described above), to clarify how a disputed election will be reported, and to make stylistic improvements.

Rule 3014. Election ~~Pursuant to~~ Under § 1111(b) by Secured Creditor in Chapter 9 Municipality or ~~and~~ Chapter 11 Reorganization Case ~~Cases~~

An election of application of § 1111(b)(2) of the Code by a class of secured creditors in a chapter 9 or 11 case may be made at any time prior to the conclusion of the hearing on the disclosure statement or within such later time as the court may fix. If the disclosure statement is conditionally approved pursuant to Rule 3017.1, and a final hearing on the disclosure statement is not held, the election of application of § 1111(b)(2) may be made not later than the date fixed pursuant to Rule 3017.1(a)(2) or another date the court may fix. The election shall be in writing and signed unless made at the hearing on the disclosure statement. The election, if made by the majorities required by § 1111(b)(1)(A)(i), shall

be binding on all members of the class with respect to the plan.

COMMITTEE NOTE

This amendment provides a deadline for electing application of § 1111(b)(2) in a small business case in which a conditionally approved disclosure statement is finally approved without a hearing.

Public Comment on Rule 3014. Mr. Sabino of the Federal Bar Association suggested that the rule be amended to provide that any extension of time to file a § 1111(b)(2) election may not be extended unless the extension is ordered before the conclusion of the disclosure statement hearing. This comment was unrelated to the proposed amendments to the rule.

GAP Report on Rule 3014. No changes to the published draft.

Rule 3017. Court Consideration of Disclosure Statement in Chapter 9 Municipality and Chapter 11 Reorganization Cases

(a) HEARING ON DISCLOSURE STATEMENT AND OBJECTIONS ~~THERETO~~. Except as provided in Rule 3017.1, after a disclosure statement is filed in accordance with Rule 3016(b) ~~Following the filing of a disclosure statement as~~

~~provided in Rule 3016(c)~~, the court shall hold a hearing on ~~not less than~~ at least 25 ~~days~~ days' notice to the debtor, creditors, equity security holders and other parties in interest as provided in Rule 2002 to consider ~~such~~ the disclosure statement and any objections or modifications thereto. The plan and the disclosure statement shall be mailed with the notice of the hearing only to the debtor, any trustee or committee appointed under the Code, the Securities and Exchange Commission, and any party in interest who requests in writing a copy of the statement or plan. Objections to the disclosure statement shall be filed and served on the debtor, the trustee, any committee appointed under the Code, and any ~~such~~ other entity ~~as may be~~ designated by the court, at any time before the disclosure statement is approved ~~prior to approval of the disclosure statement~~ or by ~~such~~ an earlier date as the court may fix. In a chapter 11 reorganization case,

every notice, plan, disclosure statement, and objection required to be served or mailed pursuant to this subdivision shall be transmitted to the United States trustee within the time provided in this subdivision.

(b) DETERMINATION ON DISCLOSURE STATEMENT. Following the hearing the court shall determine whether the disclosure statement should be approved.

(c) DATES FIXED FOR VOTING ON PLAN AND CONFIRMATION. On or before approval of the disclosure statement, the court shall fix a time within which the holders of claims and interests may accept or reject the plan and may fix a date for the hearing on confirmation.

(d) TRANSMISSION AND NOTICE TO UNITED STATES TRUSTEE, CREDITORS, AND EQUITY SECURITY HOLDERS. Upon ~~On~~ approval of a disclosure

statement, ~~unless~~ — except to the extent that the court orders otherwise with respect to one or more unimpaired classes of creditors or equity security holders; — the debtor in possession, trustee, proponent of the plan, or clerk as ~~ordered by~~ the court orders shall mail to all creditors and equity security holders, and in a chapter 11 reorganization case shall transmit to the United States trustee,

(1) the plan; or a ~~court-approved~~ court-approved summary of the plan;

(2) the disclosure statement approved by the court;

(3) notice of the time within which acceptances and rejections of ~~such~~ the plan may be filed; and

(4) any ~~such~~ other information as the court may direct, including any court opinion ~~of the court~~

approving the disclosure statement or a ~~court~~ ~~approved~~ court-approved summary of the opinion.

In addition, notice of the time fixed for filing objections and the hearing on confirmation shall be mailed to all creditors and equity security holders in accordance with ~~pursuant to~~ Rule 2002(b), and a form of ballot conforming to the appropriate Official Form shall be mailed to creditors and equity security holders entitled to vote on the plan. ~~In the event~~ If the ~~opinion of the~~ court opinion is not transmitted or only a summary of the plan is transmitted, the ~~opinion of the~~ court opinion or the plan shall be provided on request of a party in interest at the plan proponent's expense ~~of the proponent of the plan~~. If the court orders that the disclosure statement and the plan or a summary of the plan shall not be mailed to any unimpaired class, notice that the class is

designated in the plan as unimpaired and notice of the name and address of the person from whom the plan or summary of the plan and disclosure statement may be obtained upon request and at the plan proponent's expense ~~of the proponent of the plan~~, shall be mailed to members of the unimpaired class together with the notice of the time fixed for filing objections to and the hearing on confirmation. For the purposes of this subdivision, creditors and equity security holders shall include holders of stock, bonds, debentures, notes, and other securities of record on ~~at~~ the date the order approving the disclosure statement is ~~was~~ entered or another date fixed by the court, for cause, after notice and a hearing.

(e) TRANSMISSION TO BENEFICIAL HOLDERS OF SECURITIES. At the hearing held pursuant to subdivision (a) of this rule, the court shall consider the procedures for transmitting the documents and information

required by subdivision (d) of this rule to beneficial holders of stock, bonds, debentures, notes, and other securities, ~~and~~ determine the adequacy of the ~~such~~ procedures, and enter any ~~such~~ orders ~~as~~ the court deems appropriate.

COMMITTEE NOTE

Subdivision (a) is amended to provide that it does not apply to the extent provided in new Rule 3017.1, which applies in small business cases.

Subdivision (d) is amended to provide flexibility in fixing the record date for the purpose of determining the holders of securities who are entitled to receive documents pursuant to this subdivision. For example, if there may be a delay between the oral announcement of the judge's order approving the disclosure statement and entry of the order on the court docket, the court may fix the date on which the judge orally approves the disclosure statement as the record date so that the parties may expedite preparation of the lists necessary to facilitate the distribution of the plan, disclosure statement, ballots, and other related documents.

The court may set a record date pursuant to subdivision (d) only after notice and a hearing as provided in § 102(1) of the Code. Notice of a request for an order fixing the record date may be included in the notice of the hearing to consider approval of the disclosure statement mailed pursuant to Rule 2002(b).

If the court fixes a record date pursuant to subdivision (d) with

respect to the holders of securities, and the holders are impaired by the plan, the judge also should order that the same record date applies for the purpose of determining eligibility for voting pursuant to Rule 3018(a).

Other amendments to this rule are stylistic.

Public Comments on Rule 3017. James Gadsden, Esq., inquired as to the need for the amendments to Rule 3017(d) that will give the court discretion, for cause and after notice and a hearing, to fix a record date -- for the purpose of receiving vote solicitation materials — that differs from the date on which the order approving the disclosure statement is entered. He believes that the rule works fine as is and that the effect of the amendment could operate as an injunction against transfers of securities without the protections of Rule 7065.

GAP Report on Rule 3017. No changes to the published draft.

Rule 3017.1 Court Consideration of Disclosure Statement in a Small Business Case

(a) CONDITIONAL APPROVAL OF DISCLOSURE STATEMENT. If the debtor is a small business and has made a timely election to be considered a small business in a chapter 11 case, the court may, on application of the plan proponent, conditionally approve a disclosure statement filed

in accordance with Rule 3016(b). On or before conditional approval of the disclosure statement, the court shall:

(1) fix a time within which the holders of claims and interests may accept or reject the plan;

(2) fix a time for filing objections to the disclosure statement;

(3) fix a date for the hearing on final approval of the disclosure statement to be held if a timely objection is filed; and

(4) fix a date for the hearing on confirmation.

(b) APPLICATION OF RULE 3017. Rule 3017(a), (b), (c), and (e) do not apply to a conditionally approved disclosure statement. Rule 3017(d) applies to a conditionally approved disclosure statement, except that conditional approval is considered approval of the disclosure statement for the purpose of applying Rule 3017(d).

(c) FINAL APPROVAL.

(1) *Notice.* Notice of the time fixed for filing objections and the hearing to consider final approval of the disclosure statement shall be given in accordance with Rule 2002 and may be combined with notice of the hearing on confirmation of the plan.

(2) *Objections.* Objections to the disclosure statement shall be filed, transmitted to the United States trustee, and served on the debtor, the trustee, any committee appointed under the Code and any other entity designated by the court at any time before final approval of the disclosure statement or by an earlier date as the court may fix.

(3) *Hearing.* If a timely objection to the disclosure statement is filed, the court shall hold a

hearing to consider final approval before or combined with the hearing on confirmation of the plan.

COMMITTEE NOTE

This rule is added to implement § 1125(f) that was added to the Code by the Bankruptcy Reform Act of 1994.

The procedures for electing to be considered a small business are set forth in Rule 1020. If the debtor is a small business and has elected to be considered a small business, § 1125(f) permits the court to conditionally approve a disclosure statement subject to final approval after notice and a hearing. If a disclosure statement is conditionally approved, and no timely objection to the disclosure statement is filed, it is not necessary for the court to hold a hearing on final approval.

Public Comment on Rule 3017.1. Bankruptcy Judge Geraldine Mund recommended that the proposed new rule be expanded to apply to any debtor (rather than being limited to debtors that are small businesses) for whom the court orders conditional approval of a disclosure statement and a combined hearing on final approval of the disclosure statement and plan confirmation.

GAP Report on Rule 3017.1. No change to the published draft.

Rule 3018. Acceptance or Rejection of Plan in a Chapter 9 Municipality or a Chapter 11 Reorganization Case

(a) ENTITIES ENTITLED TO ACCEPT OR REJECT PLAN; TIME FOR ACCEPTANCE OR REJECTION. A plan may be accepted or rejected in accordance with § 1126 of the Code within the time fixed by the court pursuant to Rule 3017. Subject to subdivision (b) of this rule, an equity security holder or creditor whose claim is based on a security of record shall not be entitled to accept or reject a plan unless the equity security holder or creditor is the holder of record of the security on the date the order approving the disclosure statement is entered or on another date fixed by the court, for cause, after notice and a hearing. For cause shown, the court after notice and hearing may permit a creditor or equity security holder to change or withdraw an acceptance or rejection. Notwithstanding objection to a claim or interest,

the court after notice and hearing may temporarily allow the claim or interest in an amount which the court deems proper for the purpose of accepting or rejecting a plan.

* * * * *

COMMITTEE NOTE

Subdivision (a) is amended to provide flexibility in fixing the record date for the purpose of determining the holders of securities who are entitled to vote on the plan. For example, if there may be a delay between the oral announcement of the judge's decision approving the disclosure statement and entry of the order on the court docket, the court may fix the date on which the judge orally approves the disclosure statement as the record date for voting purposes so that the parties may expedite preparation of the lists necessary to facilitate the distribution of the plan, disclosure statement, ballots, and other related documents in connection with the solicitation of votes.

The court may set a record date pursuant to subdivision (a) only after notice and a hearing as provided in § 102(1) of the Code. Notice of a request for an order fixing the record date may be included in the notice of the hearing to consider approval of the disclosure statement mailed pursuant to Rule 2002(b).

If the court fixes the record date for voting purposes, the judge also should order that the same record date shall apply for the purpose of distributing the documents required to be distributed pursuant to Rule 3017(d).

Public Comments on Rule 3018. James Gadsden, Esq., inquired as to the need for the amendments to Rule 3018(a) that will give the court discretion, for cause and after notice and a hearing, to fix a record date — for the purpose of voting eligibility — that differs from the date on which the order approving the disclosure statement is entered. He believes that the rule works fine as is and that the effect of the amendment could operate as an injunction against transfers of securities without the protections of Rule 7065.

GAP Report on Rule 3017. No changes to the published draft.

Rule 3021. Distribution Under Plan

After confirmation of a plan, distribution shall be made to creditors whose claims have been allowed, to interest holders ~~of stock, bonds, debentures, notes, and other securities of record at the time of commencement of distribution whose claims or equity security~~ whose interests have not been disallowed, and to indenture trustees who have filed claims pursuant to Rule 3003(c)(5) ~~and which~~ that have been allowed. For the purpose of this rule, creditors include holders of bonds, debentures, notes, and other debt securities, and interest holders include the holders of stock and other

equity securities, of record at the time of commencement of distribution unless a different time is fixed by the plan or the order confirming the plan.

COMMITTEE NOTE

This rule is amended to provide flexibility in fixing the record date for the purpose of making distributions to holders of securities of record. In a large case, it may be impractical for the debtor to determine the holders of record with respect to publicly held securities and also to make distributions to those holders at the same time. Under this amendment, the plan or the order confirming the plan may fix a record date for distributions that is earlier than the date on which distributions commence.

This rule also is amended to treat holders of bonds, debentures, notes, and other debt securities the same as any other creditors by providing that they shall receive a distribution only if their claims have been allowed. Finally, the amendments clarify that distributions are to be made to all interest holders — not only those that are within the definition of "equity security holders" under § 101 of the Code — whose interests have not been disallowed.

Public Comments on Rule 3021. James Gadsden, Esq., inquired as to the need to change the present rule (providing that the record date for distribution purposes is the date on which distributions commence) to provide that the record date for distribution purposes is the date on which distributions commence unless the plan or confirmation order fixes a different date. He believes that the rule works fine as is and that the effect of the amendment could operate

as an injunction against transfers of securities without the protections of Rule 7065.

GAP Report on Rule 3021. No changes to the published draft.

Rule 8001. Manner of Taking Appeal; Voluntary Dismissal

(a) APPEAL AS OF RIGHT; HOW TAKEN. An appeal from a ~~final~~ judgment, order, or decree of a bankruptcy judge to a district court or bankruptcy appellate panel as permitted by 28 U.S.C. § 158(a)(1) or (a)(2) shall be taken by filing a notice of appeal with the clerk within the time allowed by Rule 8002. An appellant's failure ~~Failure of an appellant~~ to take any step other than ~~the~~ timely filing ~~of~~ a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the district court or bankruptcy appellate panel deems appropriate, which may include dismissal of the appeal. The notice of appeal shall (1) conform substantially to the appropriate Official Form, (2)

~~shall~~ contain the names of all parties to the judgment, order, or decree appealed from and the names, addresses, and telephone numbers of their respective attorneys, and (3) be accompanied by the prescribed fee. Each appellant shall file a sufficient number of copies of the notice of appeal to enable the clerk to comply promptly with Rule 8004.

(b) APPEAL BY LEAVE; HOW TAKEN. An appeal from an interlocutory judgment, order, or decree of a bankruptcy judge as permitted by 28 U.S.C. § 158(a)(3) shall be taken by filing a notice of appeal, as prescribed in subdivision (a) of this rule, accompanied by a motion for leave to appeal prepared in accordance with Rule 8003 and with proof of service in accordance with Rule 8008.

* * * * *

(e) ELECTION TO HAVE APPEAL HEARD BY DISTRICT COURT INSTEAD OF BANKRUPTCY

APPELLATE PANEL. ~~CONSENT TO APPEAL TO BANKRUPTCY APPELLATE PANEL. Unless otherwise provided by a rule promulgated pursuant to Rule 8018, consent to have an appeal heard by a bankruptcy appellate panel may be given in a separate statement of consent executed by a party or contained in the notice of appeal or cross appeal. The statement of consent shall be filed before the transmittal of the record pursuant to Rule 8007(b), or within 30 days of the filing of the notice of appeal, whichever is later.~~ An election to have an appeal heard by the district court under 28 U.S.C. § 158(c)(1) may be made only by a statement of election contained in a separate writing filed within the time prescribed by 28 U.S.C. § 158(c)(1).

COMMITTEE NOTE

This rule is amended to conform to the Bankruptcy Reform Act of 1994 which amended 28 U.S.C. § 158. As amended, a party may — without obtaining leave of the court — appeal from an interlocutory order or decree of the bankruptcy court issued under

§ 1121(d) of the Code increasing or reducing the time periods referred to in § 1121.

Subdivision (e) is amended to provide the procedure for electing under 28 U.S.C. § 158(c)(1) to have an appeal heard by the district court instead of the bankruptcy appellate panel service. This subdivision is applicable only if a bankruptcy appellate panel service is authorized under 28 U.S.C. § 158(b) to hear the appeal.

Public Comments on Rule 8001. Mr. Sabino of the Federal Bar Association commented that the amendments to Rule 8001(e) (election to have appeal heard by district court) are "premature" because the goal of having a bankruptcy appellate panel (BAP) in every circuit is "far from being achieved."

GAP Report on Rule 8001. The heading of subdivision (e) is amended to clarify that it applies to the election to have an appeal heard by the district court instead of the BAP. The final paragraph of the Committee Note is revised to clarify that subdivision (e) is applicable only if a BAP is authorized to hear the appeal.

Rule 8002. Time for Filing Notice of Appeal

* * * * *

(c) EXTENSION OF TIME FOR APPEAL.

(1) The bankruptcy judge may extend the time for filing the notice of appeal by any party ~~for a period~~

~~not to exceed 20 days from the expiration of the time otherwise prescribed by this rule~~ , unless the judgment, order, or decree appealed from:

(A) grants relief from an automatic stay under § 362, § 922, § 1201, or § 1301;

(B) authorizes the sale or lease of property or the use of cash collateral under § 363;

(C) authorizes the obtaining of credit under § 364;

(D) authorizes the assumption or assignment of an executory contract or unexpired lease under § 365;

(E) approves a disclosure statement under § 1125; or

(F) confirms a plan under § 943, § 1129, § 1225, or § 1325 of the Code.

(2) A request to extend the time for filing a notice of appeal must be made by written motion filed before the time for filing a notice of appeal has expired, except that such a motion filed not later ~~request made no more~~ than 20 days after the expiration of the time for filing a notice of appeal may be granted upon a showing of excusable neglect ~~if the judgment or order appealed from does not authorize the sale of any property or the obtaining of credit or the incurring of debt under § 364 of the Code, or is not a judgment or order approving a disclosure statement, confirming a plan, dismissing a case, or converting the case to a case under another chapter of the Code~~. An extension of time for filing a notice of

appeal may not exceed 20 days from the expiration of the time for filing a notice of appeal otherwise prescribed by this rule or 10 days from the date of entry of the order granting the motion, whichever is later.

COMMITTEE NOTE

Subdivision (c) is amended to provide that a request for an extension of time to file a notice of appeal must be filed within the applicable time period. This amendment will avoid uncertainty as to whether the mailing of a motion or an oral request in court is sufficient to request an extension of time, and will enable the court and the parties in interest to determine solely from the court records whether a timely request for an extension has been made.

The amendments also give the court discretion to permit a party to file a notice of appeal more than 20 days after expiration of the time to appeal otherwise prescribed, but only if the motion was timely filed and the notice of appeal is filed within a period not exceeding 10 days after entry of the order extending the time. This amendment is designed to protect parties that file timely motions to extend the time to appeal from the harshness of the present rule as demonstrated in In re Mouradick, 13 F.3d 326 (9th Cir. 1994), where the court held that a notice of appeal filed within the 3-day period expressly prescribed by an order granting a timely motion for an extension of time did not confer jurisdiction on the appellate court

because the notice of appeal was not filed within the 20-day period specified in subdivision (c).

The subdivision is amended further to prohibit any extension of time to file a notice of appeal — even if the motion for an extension is filed before the expiration of the original time to appeal — if the order appealed from grants relief from the automatic stay, approves a disclosure statement, confirms a plan, or authorizes the sale or lease of property, use of cash collateral, obtaining of credit, or assumption or assignment of an executory contract or unexpired lease under § 365. These types of orders are often relied upon immediately after they are entered and should not be reviewable on appeal after the expiration of the original appeal period under Rule 8002(a) and (b).

Public Comment on Rule 8002. None.

GAP Report on Rule 8002. No changes to the published draft.

Rule 8020. Damages and Costs for Frivolous Appeal

If a district court or bankruptcy appellate panel determines that an appeal from an order, judgment, or decree of a bankruptcy judge is frivolous, it may, after a separately filed motion or notice from the district court or bankruptcy

appellate panel and reasonable opportunity to respond, award just damages and single or double costs to the appellee.

COMMITTEE NOTE

This rule is added to clarify that a district court hearing an appeal, or a bankruptcy appellate panel, has the authority to award damages and costs to an appellee if it finds that the appeal is frivolous. By conforming to the language of Rule 38 F.R.App.P., this rule recognizes that the authority to award damages and costs in connection with frivolous appeals is the same for district courts sitting as appellate courts, bankruptcy appellate panels, and courts of appeals.

Public Comment on Rule 8020. None.

GAP Report on Rule 8020. No changes to the published draft.

Rule 9011. Signing ~~and~~ of Papers; Representations to the Court; Sanctions; Verification and Copies of Papers

(a) SIGNATURE. Every petition, pleading, written motion, and other paper ~~served or filed in a case under the Code on behalf of a party represented by an attorney~~, except a list, schedule, or statement, or amendments thereto, shall be signed by at least one attorney of record in the attorney's

individual name. A party who is not represented by an attorney shall sign all papers. ~~, whose office address and telephone number shall be stated. A party who is not represented by an attorney shall sign all papers and state the party's address and telephone number.~~ Each paper shall state the signer's address and telephone number, if any. ~~The signature of an attorney or a party constitutes a certificate that the attorney or party has read the document; that to the best of the attorney's or party's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation or administration of the case. If a document is not signed, it~~ An unsigned paper shall be stricken

unless ~~it is signed promptly after the~~ omission of the signature is corrected promptly after being called to the attention of the ~~person whose signature is required~~ attorney or party. ~~If a document is signed in violation of this rule, the court on motion or on its own initiative, shall impose on the person who signed it, the represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the document, including a reasonable attorney's fee.~~

(b) REPRESENTATIONS TO THE COURT. By presenting to the court (whether by signing, filing, submitting, or later advocating) a petition, pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and

belief, formed after an inquiry reasonable under the circumstances, —

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

(c) SANCTIONS. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

(1) *How Initiated.*

(A) *By Motion.* A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as

provided in Rule 7004. The motion for sanctions may not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected, except that this limitation shall not apply if the conduct alleged is the filing of a petition in violation of subdivision (b). If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations

committed by its partners, associates, and employees.

(B) *On Court's Initiative.* On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto.

(2) *Nature of Sanction; Limitations.* A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a

penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.

(A) Monetary sanctions may not be awarded against a represented party for a violation of subdivision (b)(2).

(B) Monetary sanctions may not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned.

(3) *Order.* When imposing sanctions, the court shall describe the conduct determined to

constitute a violation of this rule and explain the basis for the sanction imposed.

(d) INAPPLICABILITY TO DISCOVERY. Subdivisions (a) through (c) of this rule do not apply to disclosures and discovery requests, responses, objections, and motions that are subject to the provisions of Rules 7026 through 7037.

~~(b)~~(e) VERIFICATION. Except as otherwise specifically provided by these rules, papers filed in a case under the Code need not be verified. Whenever verification is required by these rules, an unsworn declaration as provided in 28 U.S.C. § 1746 satisfies the requirement of verification.

~~(c)~~(f) COPIES OF SIGNED OR VERIFIED PAPERS. When these rules require copies of a signed or verified paper, it shall suffice if the original is signed or verified and the copies are conformed to the original.

FEDERAL RULES OF BANKRUPTCY PROCEDURE 53

COMMITTEE NOTE

This rule is amended to conform to the 1993 changes to F.R.Civ.P. 11. For an explanation of these amendments, see the advisory committee note to the 1993 amendments to F.R.Civ.P. 11.

The "safe harbor" provision contained in subdivision (c)(1)(A), which prohibits the filing of a motion for sanctions unless the challenged paper is not withdrawn or corrected within a prescribed time after service of the motion, does not apply if the challenged paper is a petition. The filing of a petition has immediate serious consequences, including the imposition of the automatic stay under § 362 of the Code, which may not be avoided by the subsequent withdrawal of the petition. In addition, a petition for relief under chapter 7 or chapter 11 may not be withdrawn unless the court orders dismissal of the case for cause after notice and a hearing.

Public Comments to Rule 9011:

(1) Bankruptcy Judge Geraldine Mund observed that subdivision (c)(1)(B) does not give a 21-day safe harbor when the court discovers the wrongful conduct and brings it to light by an order to show cause, asked whether this is intentional, and suggested that the committee "may wish to discuss and clarify" this. Judge Mund also suggested that subdivision (c)(2)(B) should permit the court to order monetary sanctions even if the matter is settled or dismissed.

(2) Bankruptcy Judge Yacos suggested that Rule 9011(a) expressly provide that unsigned papers will not be accepted for filing by the clerk and that the provision regarding the striking of unsigned papers should apply only with respect to papers that clerks "inadvertently and through a mistake" accept for filing.

GAP Report on Rule 9011. The proposed amendments to subdivision (a) were revised to clarify that a party not represented by an attorney must sign lists, schedules, and statements, as well as other papers that are filed.

Rule 9015. Jury Trials

(a) APPLICABILITY OF CERTAIN FEDERAL RULES OF CIVIL PROCEDURE. Rules 38, 39, and 47-51 F.R.Civ.P., and Rule 81(c) F.R.Civ.P. insofar as it applies to jury trials, apply in cases and proceedings, except that a demand made pursuant to Rule 38(b) F.R.Civ.P. shall be filed in accordance with Rule 5005.

(b) CONSENT TO HAVE TRIAL CONDUCTED BY BANKRUPTCY JUDGE. If the right to a jury trial applies, a timely demand has been filed pursuant to Rule 38(b) F.R.Civ.P., and the bankruptcy judge has been specially designated to conduct the jury trial, the parties may consent to have a jury trial conducted by a bankruptcy judge under 28 U.S.C. § 157(e) by jointly or separately filing a statement of

consent within any applicable time limits specified by local rule.

COMMITTEE NOTE

This rule provides procedures relating to jury trials. This rule is not intended to expand or create any right to trial by jury where such right does not otherwise exist.

Public Comment on Rule 9015. Mr. Sabino of the Federal Bar Association commented that the language of the proposed amendment (speaking of bankruptcy judges being "specially designated") does not comport with the statute. He also suggested that the statement of consent track specific language (he suggested that reference to Civil Rule 38 "might be helpful in this regard as a reference point").

GAP Report on Rule 9015. No changes to the published draft.

Rule 9035. Applicability of Rules in Judicial Districts in Alabama and North Carolina

In any case under the Code that is filed in or transferred to a district in the State of Alabama or the State of North Carolina and in which a United States trustee is not authorized to act, these rules apply to the extent that they are

not inconsistent with any federal statute ~~the provisions of title 11 and title 28 of the United States Code~~ effective in the case.

COMMITTEE NOTE

Certain statutes that are not codified in title 11 or title 28 of the United States Code, such as § 105 of the Bankruptcy Reform Act of 1994, Pub. L. 103-394, 108 Stat. 4106, relate to bankruptcy administrators in the judicial districts of North Carolina and Alabama. This amendment makes it clear that the Bankruptcy Rules do not apply to the extent that they are inconsistent with these federal statutes.

Public Comment on Rule 9035. None.

GAP Report on Rule 9035. No changes to the published draft.

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

M E M O R A N D U M

To: Members Advisory Committee on Civil Rules

From: Patrick E. Higginbotham

Re: Six-Person Versus Twelve-Person Juries

Date: October 12, 1994

Herewith a brief survey of the literature on jury decisionmaking, particularly empirical studies. As well, the policy arguments on both sides. While most of these arguments are drawn from existing literature, the arguments about juror education, juror political participation, and application of Batson have not yet been made in the context of jury size. I hope that this summary is useful.

Part I discusses reasons for returning to twelve-person juries. These reasons fall into two categories: Section A analyzes the intrinsic workings of the jury, and Section B examines the broader values served by twelve-person juries. Part II considers policy arguments supporting smaller juries.

I. ARGUMENTS FOR TWELVE-PERSON JURIES

A. Jury Deliberations and Outcomes

1. Influence of Minority Viewpoints

Small jury size reduces the number of viewpoints on a jury and decreases the chance that there will be minority viewpoints. It reduces the likelihood that the minority will influence enough jurors in the majority to switch their votes, which suggests that groups and minorities do not participate in as much deliberation on small juries. Alice M. Padawer-Singer et al., Legal and Social-Psychological Research in the Effects of Pre-Trial Publicity on Juries, Numerical Makeup of Juries, Non-Unanimous Verdict Requirements, 3 Law & Psychol. Rev. 71, 78 (1977). Small size makes it difficult for a member of the minority to hold out, because that member is much less likely to have an ally to support him. Michael J. Saks, Ignorance of Science Is No Excuse, Trial, Nov.-Dec. 1974, at 18, 19; see also Robert MacCoun, Inside the

Black Box: What Empirical Research Tells Us About Decisionmaking by Civil Juries 150 (1994) (reprinted from Robert E. Litan ed., Verdict: Assessing the Civil Jury System (1993)).

2. Quality of Deliberation

Small juries are more influenced by personalities, particularly by dominant individuals in the group. Victor J. Baum, The Six-Man Jury--The Cross Section Aborted, Judges' J., Jan. 1973, at 12, 13; Norbert L. Kerr & Juin Y. Huang, Jury Verdicts: How Much Difference Does One Juror Make?, 12 Personality & Soc. Psychol. Bull. 325, 332 (1986); John R. Snortum et al., The Impact of an Aggressive Juror in Six- and Twelve-Member Juries, 3 Crim. Just. & Behav. 255 (1976). Juror bias is more influential in a small group. Carol M. Werner et al., The Impact of Case Characteristics and Prior Jury Experience on Jury Verdicts, 15 J. Applied Soc. Psychol. 409 (1985). Small groups recall less evidence. MacCoun, supra, at 161, 167. They deliberate more quickly and less thoroughly. Id. They are less likely to correct errors. Id.

3. Outcomes

The verdicts of small juries are more inconsistent than those of twelve-person juries. Shari Seidman Diamond, Order in the Court: Consistency in Criminal-Court Decisions, in 2 C. James Scheirer & Barbara L. Hammonds, The Master Lecture Series: Psychology and the Law 123, 133 (1982). Small juries are more likely to render aberrant verdicts. Valerie P. Hans & Neil Vidmar, Judging the Jury 167 (1986); Baum, supra, at 12; Michael J. Saks, If There Be a Crisis, How Shall We Know It?, 46 Md. L. Rev. 63, 76 & n.51 (1986).

Small juries' verdicts are generally more severe. Robert Buckhout et al., Jury Verdicts: Comparison of 6- vs. 12-Person Juries and Unanimous vs. Majority Decision Rule in a Murder Trial, 10 Bull. Psychonomic Soc'y 175 (1977). In criminal cases, small juries are more likely to convict. E.g., Angelo Valenti & Leslie Downing, Six Versus Twelve Member Juries: An Experimental Test of the Supreme Court Assumption of Functional Equivalence, 1 Personality & Soc. Psychol. Bull, 273 (1974). Contra Martin F. Kaplan & Charles E. Miller, Group Decision Making and Normative Versus Informational Influence: Effects of Type of Issue and Assigned Decision Rule, 53 J. Personality & Soc. Psychol. 306 (1987). Small juries hang less frequently, Valenti & Downing, supra, which suggests that they suppress reasonable disagreement and confirms the difficulty that holdouts face in small juries.

B. Broader Values Served by Twelve-Person Juries

1. Diversity

Small juries are less likely to comprise a fair, diverse cross-section of the community. They are less likely to contain members of minorities, whether they be racial, ethnic, or religious minorities. See Saks, Ignorance of Science, supra, at 19; see also Hans Zeisel, The Waning of the American Jury, 58 A.B.A. J. 367, 368 (1972). It is more difficult to apply Batson to small juries; because it takes fewer peremptory challenges to exclude minorities, it is more difficult to discern a pattern of discriminatory challenges. Small juries usually contain a smaller percentage of women. Lucy M. Keele, An Analysis of Six vs. 12-Person Juries, Tenn. B.J., Jan.-Feb. 1991, at 32, 34. Small juries contain a narrower range of ages and occupations. Id.

2. Education and Participation of Citizens

As Alexis de Tocqueville noted, one of the key functions of juries is to educate the citizenry about the administration of justice:

> The jury, and more especially the civil jury, serves to communicate the spirit of the judges to the minds of all the citizens; and this spirit, with the habits which attend it, is the soundest preparation for free institutions. It imbues all classes with a respect for the thing judged and with the notion of right. . . . It teaches men to practice equity; every man learns to judge his neighbor as he would himself be judged . . . .
> . . . It may be regarded as a gratuitous public school, ever open, in which every juror learns his rights, enters into daily communication with the most learned and enlightened members of the upper classes, and becomes practically acquainted with the laws . . . .
> . . . I look upon [the jury] as one of the most efficacious means for the education of the people which society can employ.

1 Alexis de Tocqueville, Democracy in America 295-96 (Vintage ed. 1945) (emphasis added). Six-person juries by definition educate only half as many citizens as twelve-person juries do.

They also empower fewer citizens, reducing popular participation in the justice system. Tocqueville recognized that popular rule is bound up with popular education: "[T]he jury, which is the most energetic means of making the people rule, is also the most efficacious means of teaching it how to rule well." Id. at 297. Popular participation is desirable in a democracy; it diffuses power and enables citizens to practice self-government. The Supreme Court has recognized the participatory benefits of jury

service. E.g., Powers v. Ohio, 111 S. Ct. 1364, 1368-69 (1991); see also Akhil R. Amar, The Bill of Rights as a Constitution, 100 Yale L.J. 1131, 1187-89 (1991). But small juries limit the number who can share this experience, this responsibility, this right of the people to participate.

3. Perceived Fairness and Legitimacy

Finally, the populace recognizes twelve-person juries as the paradigm. The number twelve is enshrined in our history and in our culture; the classic Henry Fonda movie Twelve Angry Men exemplifies and reinforces this view. Smaller juries are seen as illegitimate; to the man in the street, "jury" is synonymous with twelve jurors. Perhaps for this reason, people perceive small juries as being less fair. Robert MacCoun & Tom R. Tyler, The Basis of Citizens' Perceptions of the Criminal Jury: Procedural Fairness, Accuracy, and Efficiency, 12 Law & Human Behav. 333 (1988).

II. ARGUMENTS FOR SMALLER JURIES

Proponents of juries smaller than twelve members rely on only two arguments. The first one is time savings. If a trial requires fewer jurors, voir dire will supposedly be faster. Accelerating voir dire conserves the time of the judge, the jurors, and other court personnel. (While a few proponents claim that faster deliberations are a benefit, reducing deliberation is a liability because it brings with it a lack of thoroughness and suppression of legitimate disagreement.) The counter argument is that in practice, the amount of time saved has been negligible. One study found that the average voir dire for a six-person jury took 52.0 minutes, while the average voir dire for a twelve-person jury took 52.1 minutes. Keele, supra, at 33. Time savings were linked not to the size of the jury, but rather to the size of the venire panel. Id. Furthermore, in the days before six-person juries, trial judges spent less than one percent of their time impaneling juries, so any time savings for judges are minor. Id. (citing 1971 study by the Federal Judicial Center). The argument continues that the only people who save much time as a result of smaller juries are the handful of venire members who would have to serve as jurors if the jury were larger.

The second claimed benefit of small juries is cost. Advocates of smaller juries predicted cost savings in the neighborhood of three to four million dollars per year, based on fewer salaries for jurors and cost savings flowing from time savings for court personnel. The counter argument is that juror fees are paltry. And because the actual time savings have been minuscule, the government probably has not realized the projected cost savings. Peter W. Sperlich, . . . And Then There Were Six: The Decline of the American Jury, Judicature, Dec.-Jan. 1980, at 262, 276. Even

if the cost savings have materialized, they are minuscule, amounting to less than one-thousandth of one percent of the federal budget. Richard S. Arnold, Trial by Jury: The Constitutional Right to a Jury of Twelve in Civil Trials, 22 Hofstra L. Rev. 1, 27 (1993); Zeisel, supra, at 370. The argument concludes that the cost difference is an insufficient justification when compared to the inferior brand of justice meted out by small juries.

Our trial courts are the heart of the federal judiciary. A United States District Court Judge brings to his tasks a greater array of skills and talents than any other federal judicial officer. Conducting jury trials is one of the more important of these tasks. Happily, the conduct of trials is our most successful endeavor. We do this well and have for two centuries. The traditions and practices that together comprise this institution are, to my lights, a national treasure. With eyes on the British model, the judicial conference cut the civil juries in half--only fifteen or so years ago. We have crept back toward twelve with the abolition of alternates. Whether we return to the traditional model is our question.

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HOFSTRA L.R.(Pasteup)

Volume 22, No. 1 Fall 1993

TRIAL BY JURY: THE CONSTITUTIONAL RIGHT TO A JURY OF TWELVE IN CIVIL TRIALS

Richard S. Arnold[*]

I. INTRODUCTION

Good afternoon. It's going to be hard to live to up my introduction, and if I don't I hope you won't be too hard on me. I like to hear all those high-sounding things about appointments to the bench and so forth. I suppose some judges, at least, are political appointees. That's not true with me. I was appointed on merit. My merit was that I worked for a senator! The Dean was also kind enough to refer to the fact that I am now Chief Judge of the Eighth Circuit. Let me tell you how you get to be Chief Judge: you live that long! That's all there is to it. I had the good fortune to survive my predecessor, who took senior status. Now I am Chief Judge, and that doesn't amount to nearly as much as it sounds like. The job of Chief Judge is to do what the other judges want.

I must begin by thanking the Hofstra Law School community for inviting me to make this talk. Your school has a very strong and excellent reputation, which is confirmed to me by the presence of some of my friends on the faculty who are very strong scholars. I am

* Chief Judge, United States Court of Appeals for the Eighth Circuit. This Article is adapted from the 1993-1994 Howard Kaplan Memorial Lecture, delivered by Judge Arnold on October 6, 1993, at the Hofstra University School of Law. The author acknowledges with gratitude the substantial assistance of his law clerk, Elizabeth Bowles, in the preparation of this Article.

referring particularly to my old friend and law school classmate, Leon Friedman, who is the world's foremost scholar on the subject of federal habeas corpus. Another law school friend of mine, John Gregory, is here, and I spent many happy hours with John in the Harkness Commons at Cambridge talking about life and the law. Two classmates who are not from law school, but from clerkship, are on the faculty here, Bernie Jacob and Malachy Mahon, the founding Dean. So I feel that I am among friends.

It is very gratifying to be associated with the name of Howard Kaplan. It's a distinguished name in legal circles, and not the only such name in the Kaplan family. But the real reason I know this is a great law school is that you've invited me to speak! No other law school has given me a similar invitation, so I now pronounce you number one in the country.

I am a little doubtful as to why I was invited. I guess the invitation, from my own point of view, should not be examined too closely. It may be because I'm from out of town. An expert, as you know, is somebody from a long way off who knows a little bit about the subject. More likely, it has something to do with my being from Arkansas, a small state, now better known than it used to be. Political comments are off-limits to judges, so I won't make any, but I have noticed that being from Arkansas gets me a lot more attention—and of the right kind—than it used to. If the events of the last year have proved anything, they've shown that at least two people from our state know how to read and write! Some people have come to suspect that there may be more where those two came from.

In any event, it's wonderful to address a group of law students—I count faculty members and practicing lawyers in that number, by the way, and also judges. Speaking of faculty members, notice how the faculty are arranged in the jury boxes—that's the way they treat judges. They routinely reverse us in the classroom, which is good for us, I guess. I am proud to be a law student. One of the great things about the law is that you learn something new every day. You can even see new things in a single case every time you look at it again. So it's really a privilege for me to be in a law school community, and I think I get a great deal more out of it than you will from hearing me.

Well, the talk is billed as "Trial by Jury." I should begin by admitting that I am for juries. Some lawyers are not; some judges are not. But I believe that juries are a good thing in civil cases and in criminal cases, in complex matters as well as simple ones. When I

served as a district judge for about eighteen months, I was fond of telling jurors in my courtroom that I would prefer to have a case decided by twelve ordinary people than by one ordinary person. In other words, I do not believe much in expertise, and if there is such a thing, I doubt if it is any match for common sense.

So what is the big deal? What is so interesting about the subject? Trial by jury is in the Constitution, and therefore we have always had it and always will. So why should we be talking about it? Because trial by jury is an institution under attack from those who are opposed to it outright and from those who think it ought to be watered down. In England, which we rightly regard, in some ways, as the source of our liberties, the institution has all but completely disappeared in civil cases. And in this country, especially in the last twenty years or so, various measures have been taken to limit or water down the right to trial by jury. In some federal district courts, you can't get your case before a jury unless you first go through a mandatory arbitration procedure. And in every federal district court in this country, if you do get a jury, it is likely to be a truncated group of six or eight instead of the traditional "twelve good people and true."[1] My brother—who is a judge on our court and a former law teacher, and therefore a person we listen to—says that a group of six is not a jury, it is a committee.

What I want to talk about briefly is how we got into this business of reducing the size of juries, how it got started, and make a few comments on its implications and whether or not it is a good idea. What I am going to do is describe a couple of United States Supreme Court opinions which have upheld, against constitutional attack, juries of less than twelve. Then I want to talk about some of the historical and procedural arguments on both sides of the issue. In the end, I will try to draw some observations on broader questions. I am sure a lot of you are already acquainted with some of this, and I thought I was too until I started some intensive examination of the subject. Sometimes it is just good to be reminded of things.

II. THE *WILLIAMS* AND *COLGROVE* CASES

For over six hundred years, Western civilization took it for granted that a jury must be composed of twelve persons. This as-

1. *See, e.g.*, TWELVE GOOD MEN AND TRUE: THE CRIMINAL TRIAL JURY IN ENGLAND, 1200-1800 (J.S. Cockburn & Thomas A. Green eds., 1988).

sumption was belied in 1970, when the United States Supreme Court held in *Williams v. Florida*[2] that a Florida rule of criminal procedure that allowed six-person juries was constitutional. The Court held that the Florida rule did not violate the Sixth Amendment to the United States Constitution as applied against the states through the Due Process Clause of the Fourteenth Amendment.[3] Although *Williams* was in fact limited to a discussion of whether due process required a jury of twelve in criminal cases in the state courts, it soon came to be cited for the proposition that a twelve-person jury was not constitutionally required in any case—state or federal, civil or criminal. Commentators drew this conclusion from sweeping statements made by Justice White, writing for the majority: "We conclude . . . the fact that the jury at common law was composed of precisely 12 is a historical accident, unnecessary to effect the purposes of the jury system and wholly without significance 'except to mystics.'"[4] The Court belittled the significance of the number twelve from both a historical and a utilitarian standpoint.

Three years later, in 1973, the Supreme Court went one step further when it held in *Colgrove v. Battin*[5] that the Seventh Amendment to the United States Constitution did not mandate twelve-person juries in civil cases—six would do. The Court relied predominantly on the conclusion in *Williams* that the number twelve was "a historical accident" and on empirical studies that ostensibly demonstrated that there was little difference between a six and a twelve-person jury.[6] The assumption was that you got the same kind of decisions, with the same or greater speed, and with less money spent. The *Colgrove* Court thereby completed the process begun in *Williams*, a process which resulted in a fundamental redefinition of a cornerstone of our legal system—the twelve-person civil jury.[7]

So there you have two cases. *Colgrove*, by the way, was a 5-4

2. 399 U.S. 78 (1970).

3. *Id.* at 80-86.

4. *Id.* at 102 (quoting Duncan v. Louisiana, 391 U.S. 145, 182 (1968) (Harlan, J., dissenting)). I digress, but I do want to say that I think it is unfortunate for opinions of any court to make snide references about groups—here, mystics. I don't know if the mystics rose up in protest over this, but a mystic is simply somebody who prays a lot and who not only talks to God but listens. That's all there is to it; there is nothing mysterious about it. The way the Court uses the term here, it sounds like they think a mystic is someone who believes numbers are magic, and that is not the case.

5. 413 U.S. 149 (1973).

6. *Id.* at 160 n.17.

7. *See also* discussion *infra* part VII.

decision. Justice Brennan wrote the opinion of the Court. There was a dissent by Justice Douglas and Justice Powell which found simply that the practice violated the Federal Rules of Civil Procedure, because it was instituted simply by local rule in the district court, and the district court by local rule ought not to be able to do something that important.[8] Then Justice Marshall, joined by Justice Stewart, dissented on constitutional grounds.[9] I guess that if I had but one thing I would leave you with, it would be to take some time to read the dissenting opinion of Justice Marshall in *Colgrove v. Battin*, because it is a great exposition of constitutional law and theory.

When the Founders drafted the Bill of Rights to include the Seventh Amendment, a jury of twelve was what they contemplated: the common law of England had fixed the number at twelve over four hundred years before the drafting of the Bill of Rights. Furthermore, it was a scholarly axiom at the time the Bill of Rights was drafted that a jury was comprised of twelve. This clearly was the understanding of the Founding Generation and continued to be the understanding in this country until *Williams*.[10]

III. A HISTORY OF THE JURY IN ENGLAND

Little is known for certain about the origin of the jury and how it first came to England. In 1878, the historian William Forsyth stated, that "[f]ew subjects have exercised the ingenuity and baffled the research of the historian more than the origin of the jury."[11] Because by the Middle Ages the jury in England was unquestionably viewed as the protector of human liberty, English scholars, out of a sense of Anglo-Saxon pride, traced the origin of the jury to Alfred the Great (871-899).[12] Other scholars have cited the laws of Aethelred I (865-871) and Aethelred the Unready (978-1016), as well as the judgment of twelve witnesses during the reigns of Edgar the Peaceful (959-975) and Edward the Confessor (1042-1066), as proof that the jury was

8. *Colgrove*, 413 U.S. at 165 (Douglas, J., dissenting).

9. *Id.* at 166-88.

10. *See, e.g.*, United States v. Wood, 299 U.S. 123 (1936) (jury is twelve, no more, no less, and must be unanimous); Capital Traction Co. v. Hof, 174 U.S. 1 (1899) (trial by jury is trial by a jury of twelve men under the superintendence of a judge); American Publishing Co. v. Fisher, 166 U.S. 464 (1897) (verdict must be returned by twelve; nine is insufficient).

11. WILLIAM FORSYTH, HISTORY OF TRIAL BY JURY 2 (Lenox Hill Pub. & Dist. Co. 1971) (2d ed. 1878).

12. *See, e.g., id.* Blackstone called Alfred the Great a "superior genius." 3 WILLIAM BLACKSTONE, COMMENTARIES 350 (William S. Hein & Co., Inc. 1992) (1768).

English in origin.[13] William Blackstone himself wrote that jury trial was "co-eval" with the first civil government in England.[14]

After the middle nineteenth century, however, scholars acknowledged that the English jury may not have been English in origin. Some scholars traced the original jury back to ancient Greece and to the Athenian statesman Solon.[15] Others argued that the system of *Judices* found under the twelve tables of Rome was sufficiently similar to the English jury that the jury may have been brought over to England at the time of the Roman Conquest.[16] Nonetheless, these scholars have conceded that any direct influence Greek and Roman legal systems might have had on the development of the English jury was, at best, slight.[17]

Because there are large gaps in the trail from ancient Rome to the England of the Middle Ages, perhaps a better suggestion comes from a passage in the laws of King Aethelred the Unready, circa 997, which provided that twelve thanes—or knights—and a representative of the king would swear upon a relic that they would "accuse no innocent man, nor conceal any guilty one."[18] Since Aethelred the Unready's laws came from Wantage, a portion of tenth century England that had been occupied by the Danes, some scholars have looked to the parallel development of Scandinavian juries to find the roots of the English jury. Once again because of historical gaps, these scholars have met with little success.[19]

The best guess now seems to be that William the Conqueror brought the jury across the Channel to England with the Frankish *inquisitio* in 1066, and that the English jury finally took root at that time, eventually developing into its modern form towards the end of

13. *See, e.g.*, LLOYD E. MOORE, THE JURY: TOOL OF KINGS, PALLADIUM OF LIBERTY 27-29 (1973).

14. 3 BLACKSTONE, *supra* note 12, at 349.

15. *See, e.g.*, MORRIS J. BLOOMSTEIN, VERDICT: THE JURY SYSTEM 2-3 (1968); RENÉ A. WORMSER, THE LAW 52, 54, 56-58 (1949).

16. *See, e.g.*, MAXIMUS A. LESSER, THE HISTORICAL DEVELOPMENT OF THE JURY SYSTEM 29-46 (Rochester, The Lawyers' Cooperative Publishing Co. 1894). "[A]n institution resembling the modern jury in various respects must have existed in England—brought thither by the Romans, and originating among the Greeks—at the earliest civilized period . . . ." *Id.* at 171.

17. *See, e.g., id.* at 17-18.

18. THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 108 (5th ed. 1956).

19. *See, e.g., id.* at 108-09. The gaps in historical evidence of the origin of the jury led William Forsyth to quote Bourguignon: "Its origin is lost in the night of time." FORSYTH, *supra* note 11, at 2.

the fourteenth century.[20] Regardless of where the jury began, by the 1080s it was firmly established in England, although its function little resembled that which we consider to be the jury's today. While Sir Edward Coke cited an instance of its use in 1074,[21] the first recorded use of a jury in an English court occurred between 1083 and 1086.[22]

In the Frankish Empire, as the Court correctly pointed out in *Williams*, the number of jurors varied.[23] Similarly, among the French Normans, the number varied, and twelve "has not even the place of the prevailing *grundzahl* [baseline number]."[24] Nonetheless, in England, the number twelve was the *grundzahl* and most likely had been since the time of Henry II (1154-1189).[25]

During the early years of the jury, when its function was to serve as a means of gathering evidence by calling those who were familiar with the facts in issue, the usual number of family members or neighbors called was twelve.[26] Additionally, when a plaintiff or defendant had to "make his law," he was required to provide jurors who acted as oath-helpers, that is, men who were willing to swear upon penalty of damnation that the interested party was telling the truth.[27] The customary number of men required was twelve, although a noble or person of great influence might be required to produce more.[28] As the jury increasingly became used to evaluate and weigh

20. *E.g.*, EDWARD JENKS, A SHORT HISTORY OF ENGLISH LAW 47-48 (1949); 1 SIR FREDERICK POLLOCK & FREDERIC W. MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 140-42 (Cambridge University Press 2d ed. 1968) (1895); JAMES B. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 48 (Boston, Little Brown & Co. 1898).

21. RICHARD THOMSON, AN HISTORICAL ESSAY ON THE MAGNA CHARTA OF KING JOHN 228 (Gryphon Editions, Ltd. 1982) (1829).

22. The trial was a civil one and involved a disputed land title of the abbot of Ely. *See* MOORE, *supra* note 13, at 35-36; 1 POLLOCK & MAITLAND, *supra* note 20, at 143-44; JOHN REEVES, HISTORY OF THE ENGLISH LAW 84-85 (Augustus M. Kelley 1969) (2d ed. 1787). At one time in history, the most important principles of law evolved out of land disputes. At one time, constitutional law in England was a branch of the law of real property. PLUCKNETT, *supra* note 18, at 37. Therefore, it is not surprising to find that the first jury case is a dispute over a land title.

23. Williams v. Florida, 399 U.S. 78, 87 n.19 (1970).

24. THAYER, *supra* note 20, at 85.

25. *Id.*

26. 2 POLLOCK AND MAITLAND, *supra* note 20, at 600-01; *see also* FORSYTH, *supra* note 11, at 63.

27. Robert H. White, *Origin and Development of Trial by Jury*, 29 TENN. L. REV. 8, 11-13 (1961).

28. *Id.* at 11.

evidence presented by the parties, twelve men, or more specifically twelve peers,[29] were used to judge the evidence, although the number continued to vary if not enough men were acquainted with the parties or the facts, or if the parties consented.[30]

By the late thirteenth century, twelve had come to be the recognized number for juries, although numerous cases are reported where the parties agreed to fewer.[31] Additionally, a unanimous verdict was not yet the rule.[32] In 1367, during the rule of Edward III (1327-1377), the requirement of a unanimous verdict of twelve was firmly established. There is a great report in the Yearbooks of an argument before the Court of King's Bench. The case was an action of trespass in which one of the twelve jurors would not agree to the verdict. The court accepted the verdict from the eleven and imprisoned the twelfth upon learning that he would not alter his opinion. When counsel moved for judgment, he argued that the English courts had formerly approved a verdict of eleven in trespass, and that he could produce a record to prove this fact. Chief Justice Thorpe of the King's Bench responded as follows: "It is fundamental (*la ley fuit fondue*) that every inquest shall be by twelve . . . and no fewer. . . . Though you bring us a dozen records, it shall not help you at all; those who gave judgment on such a verdict were greatly blamed."[33] In other words, "Don't bother me with precedent, I am telling you what the law is." And with that, the rule of a unanimous verdict of twelve was established.

The unanimity requirement in civil cases continued, nonetheless, to be sporadically applied, primarily because it was easier to obtain a verdict from fewer men.[34] However, any variation in number ended during the reign of Edward IV (1461-1483) when the unanimous verdict of twelve unquestionably and invariably became the law of England, absent consent of the parties.[35] In 1410, the jury took on what would be its modern form when the jurors were limited to

29. A noble had to be judged by nobles. Charles L. Wells, *The Origin of the Petty Jury*, 27 L.Q. REV. 347, 360 (1911).

30. THAYER, *supra* note 20, at 86.

31. *Id.* at 89-90.

32. *Id.* at 86-88.

33. *Id.* at 88 (citing Y.B. 41 Edw. 3, fol. 31, pl. 36 (1367)).

34. J.E.R. Stephens, *The Growth of Trial by Jury in England*, 10 HARV. L. REV. 150, 159 (1897) (observing that because "procuring a verdict of twelve" was difficult, "for a time the verdict of the majority [was] received").

35. THAYER, *supra* note 20, at 88-90; Stephens, *supra* note 34, at 159.

consideration of evidence presented in open court.[36]

Once the jury began to consider evidence presented in court rather than render verdicts based on their own knowledge, the problem of jury control was squarely presented. In the sixteenth century, political trials were common, and the English courts began to take it upon themselves to punish jurors for returning verdicts that were clearly against the evidence. Since courts could set aside verdicts and punish jurors at will, they regularly did so when they did not approve of the jury's verdict. This result severely undermined the jury protection the English had come to value, and it allowed the courts to operate as inquisitors.[37] One example of this appeared in a 1594 treatise on the jurisdiction of the courts. A popular Protestant folk hero who had played an active role in Wyatt's rebellion was acquitted by the jury for purely political reasons and in complete derogation of the evidence. The court severely fined many of the jurors, incarcerated some of them, and set aside the verdict.[38]

The practice of stringent jury control by the courts ended in 1670 in the famous *Bushel's Case*.[39] *Bushel's Case* was a habeas corpus action by a juror seeking his release from prison. The jury upon which Bushel sat had acquitted William Penn of unlawful assembly, despite full and manifest evidence. As a result, Bushel was committed to prison. Chief Justice Vaughan took the opportunity to clarify the position and duties of the jury. He stated that the jury was not required to do the court's bidding, because, if the jurors returned a wrong verdict, they, and not the judge who directed the verdict, would be punished by the attaint,[40] a procedure whereby a second jury would convict and punish the first for rendering a false verdict. In his view, because the jury was operating under the shadow of the sanction of attaint, it must be completely free from the directions of the bench and from other punishments meted out by the court.[41] Chief Justice Vaughan knew that for all intents and purposes the attaint was an obsolete form; therefore, his opinion was in effect a declaration of the independence of the jury, an independence that would continue to ensure its position in English jurisprudence as

36. FORSYTH, *supra* note 11, at 131.
37. PLUCKNETT, *supra* note 18, at 131-33.
38. *See id.* at 133-34 (citing RICHARD CROMPTON, AUTHORITIE ET JURISDICTION DES COURTS fol. 32*b* (1594)).
39. 124 Eng. Rep. 1006 (C.P. 1670).
40. PLUCKNETT, *supra* note 18, at 134.
41. *Id.*

protector of the individual.

IV. THE REASONING BEHIND THE USE OF TWELVE JURORS

So the number of jurors became absolutely fixed some five hundred years ago, which is a pretty good length of time as human institutions go. But why twelve? What difference does it make? I suppose that if the question were "Why not eleven?" or "Why not thirteen?", it would not excite me. But the question is "Why not six?" This is a substantial difference, so we need to look at some of the historical background to determine why there were twelve.

The reason the jury's number came to be fixed at twelve is difficult to pinpoint with certainty. Various theories have been proposed. One reason suggested is based on the structure of the English courts during the Middle Ages. The largest and most important administrative, political, and judicial subdivision in England was the county.[42] Each county had its own courts where trials were conducted for crimes and disputes occurring anywhere within the county.[43] The counties were subdivided into units called hundreds, each of which also contained its own courts.[44] Each hundred had its own presentment jury, the forerunner to the modern grand jury, drawn from its residents.[45]

From this organization, scholars have extrapolated that since the presentment jury of the hundred was comprised of twelve, this formed the basis of the later creation of petit juries of twelve.[46] The presentment jury originally functioned much as a grand jury, "presenting" what were, in essence, indictments.[47] Gradually, the presentment jury began to function increasingly as a fact-finding body that rendered verdicts.[48] Because verdicts were to be rendered, in both civil and criminal cases, county-wide, the various presenting juries from the hundreds were combined to accomplish this and grew as large as eighty-four jurors.[49] They became, according to Wells, "embarrass-

42. *Id.* at 90-94; 1 POLLOCK & MAITLAND, *supra* note 20, at 532-56.
43. PLUCKNETT, *supra* note 18, at 90-91; 1 POLLOCK & MAITLAND, *supra* note 20, at 535-37.
44. PLUCKNETT, *supra* note 18, at 87-89; 1 POLLOCK & MAITLAND, *supra* note 20, at 556-60.
45. Wells, *supra* note 29, at 348.
46. *See, e.g., id.*
47. *Id.* at 354.
48. *Id.* at 356.
49. *Id.*

ingly large and unwieldy, and the sense of the personal responsibility of each juror was in danger of being lost."[50] To solve this problem, the next step was to create petit juries by taking a number of men from each of the presentment juries until twelve men were assembled. Since the petit jury was to represent the whole county in deciding cases, it stood to reason that its structure would parallel the structure of the presentment jury.[51] What is not clear is why the presentment jury itself numbered twelve.

Another theory as to why the number was fixed at twelve stems from the fact that twelve was the common number throughout Europe, particularly Scandinavia, and that it made its way with the Danes into England. Proffatt stated, "The singular unanimity in the selection of the number twelve to compose certain judicial bodies, is a remarkable fact in the history of many nations."[52] Serjeant Stephen, who wrote in the middle of the nineteenth century, believed both the jury and the use of twelve stemmed from the Scandinavians: "The most probable theory," he said, "seems to be that we owe the germ of this (as of so many of our institutions) to the Normans, and that it was derived by them from Scandinavian tribunals, where the judicial number of twelve was always held in great veneration."[53] Once again, however, why twelve was held in such veneration is not considered.

Perhaps the most reasonable explanation comes from Lord Coke's *Institutes of the Lawes of England* and Duncombe's 1665 work, *Trials per Pais*. Duncombe states:

> And first as to [the jury's] number twelve: and this number is no less esteemed by our law than by Holy Writ. If the twelve apostles on their twelve thrones must try us in our eternal state, good reason hath the law to appoint the number of twelve to try our temporal. The tribes of Israel were twelve, the patriarchs were twelve, and Solomon's officers were twelve.[54]

50. *Id.*

51. *Id.* at 357.

52. JOHN PROFFATT, TRIAL BY JURY 11 n.2 (San Francisco, Sumner Whitney & Co. 1877).

53. FORSYTH, *supra* note 11, at 4 (quoting 3 JAMES STEPHEN, NEW COMMENTARIES ON THE LAWS OF ENGLAND 349 (London, Butterworths 1845)); *see also* 1 FRANCIS X. BUSCH, LAW AND TACTICS IN JURY TRIALS § 24 (1949); THORL. G. REPP, TRIAL BY JURY § 33 (Edinburgh, Thomas Clark 1832).

54. THAYER, *supra* note 20, at 90 (quoting GILES DUNCOMBE, TRIALS PER PAIS. OR, THE LAW OF ENGLAND CONCERNING JURIES BY NISI PRIUS. & C. 92 (8th ed. 1766)).

Similarly, in his *Institutes of the Lawes of England*, Lord Coke, Chief Justice, stated that the "number of 12 is much respected in holy writ, as 12 apostles, 12 stones, 12 tribes, etc."[55] Even the oath taken by jurors of that time supports this theory: "Hear this, ye Justices! that I will speak the truth of that which ye shall ask of me on the part of the king, and I will do faithfully to the best of my endeavor. So help me God, and these holy Apostles."[56] As far back as A.D. 725, the ancient king of Wales, Morgan of Gla-Morgan, whom some credit with the adoption of trial by jury, called it Apostolic Law. He stated, "For . . . as Christ and his twelve apostles were finally to judge the world, so human tribunals should be composed of the king and twelve wise men."[57] It does seem true, and I think we can take it as a given, that the number twelve was picked for the English courts because of the religious background. In fact, in *Williams*, the United States Supreme Court uses this argument as a way of disparaging the use of the number twelve, calling this reasoning "mystical or superstitious insights into the significance of '12.'"[58] I do not think Christians and Jews would be thrilled by being called superstitious. To be sure, it is clear that Christianity likely played a role in the decision to fix the number of jurors at twelve, rather than eleven or thirteen. I suppose, nonetheless, that everyone would concede that the mere fact that the number has a religious significance does not argue one way or the other for its use in a civil institution. I would put it to you that it does not really matter where the number came from. If the number twelve was settled on five hundred years ago and was used without interruption until twenty years ago, it carries with it a certain presumption of regularity, a certain entitlement to respect, no matter what the origin may have been. The origin of the number itself in no way diminishes that there are other equally valid reasons, discussed below, for retaining that number, nor does it diminish the fact that the Founders believed a "jury" to be twelve when they drafted the Seventh Amendment.

55. 1 SIR EDWARD COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWES OF ENGLAND 155 (Garland Publishing, Inc. 1979) (1628).

56. WILLIAM FORSYTH, HISTORY OF TRIAL BY JURY 197 (London, John W. Parker & Son 1852).

57. PROFFATT, *supra* note 52, at 11 n.2 (citing FORSYTH, *supra* note 11, at 45 n.2).

58. Williams v. Florida, 399 U.S. 78, 88 (1970).

V. THE UNDERSTANDING OF THE JURY AT THE TIME OF THE ENACTMENT OF THE SEVENTH AMENDMENT

This brings us to that dreaded phrase, "the intention of the Framers." We hear a lot of debate about original intent these days. If you call it history, that's fine, but if you call it original intent, it becomes controversial. So you can call it whatever you like, but I am going to give you a few facts about what juries were like in the colonies before the Constitution was written.

It is always best to begin at the beginning, and the beginning of the civil jury was in England. There, the constitutional right to a jury trial was guaranteed by the Magna Charta, signed at Runnymede by King John on June 15, 1215. The Magna Charta provided that no freeman would be disseized, dispossessed, or imprisoned except by judgment of his peers or by "the laws of the land."[59] It further stated, "To none will we sell, to none will we deny, to none will we delay right or justice."[60] During the next hundred years, the English kings reaffirmed the Magna Charta thirty-eight times.[61] By the 1600s, when the thirteen colonies were founded, jury trial had become one of the great palladiums of English liberty.

The colonists brought the jury to the colonies across the Atlantic from England. The 1606 Charter to the Virginia Company incorporated the right to a jury trial, and by 1624 all trials in Virginia, both civil and criminal, were by jury.[62] In 1628, the Massachusetts Bay Colony introduced jury trials, and the right to a jury trial was codified in the Massachusetts Body of Liberties by 1641.[63] The Colony of West New Jersey implemented trial by jury in 1677, as did New Hampshire in 1680 and Pennsylvania in 1682, under William Penn.[64] Massachusetts (1641), Rhode Island (1647), New Jersey (1683), South Carolina (1712), and Delaware (1727) adopted the Magna Charta's specific language.[65]

59. THOMSON, *supra* note 21, at 85.

60. *Id.* at 83.

61. 1 WINSTON CHURCHILL, A HISTORY OF THE ENGLISH SPEAKING PEOPLES 254 (1956); THOMSON, *supra* note 21, at 369-93.

62. Harold M. Hyman & Catherine M. Tarrant, *Aspects of American Trial Jury History*, *in* THE JURY SYSTEM IN AMERICA 21, 24-25 (Rita J. Simon ed., 1975).

63. MASSACHUSETTS BODY OF LIBERTIES ¶ 29 (n.p. 1641), *reprinted in* SOURCES OF OUR LIBERTIES 151 (Richard L. Perry & John C. Cooper eds., 1959).

64. Stephan Landsman, *The Civil Jury in America: Scenes from an Unappreciated History*, 44 HASTINGS L.J. 579, 592 (1993).

65. 1 J. KENDALL FEW, IN DEFENSE OF TRIAL BY JURY 36 (1993).

One of the interesting things that occurred during this time period is that the king of England tried to water down the right to trial by jury. He issued mandates to colonial governors, who then attempted to circumvent the right to trial by jury by expanding admiralty jurisdiction.[66] The colonies resisted stoutly, and congresses were held to protest this oppression. From these congresses ultimately developed the Declaration of Independence, which listed the denial of "the benefits of trial by jury" as one of the grievances which led to the Revolution.[67] Additionally, American lawyers listed the extension of admiralty jurisdiction as one of eight violations of "immemorial rights or liberties secured by the law of the land."[68] The civil jury right was so important to the colonists that the guarantee of a jury trial was one of only three rights universal to all of the pre-United States bills of rights.[69] This was so because judges were appointed and removed by royal governors, who insisted on verdicts they favored in order for the judge to remain on the bench. Therefore, despite the fact that juries were often chosen by sheriffs, who were also tools of the governors, jury trial was the only chance for a fair trial for either an accused or a civil litigant.[70] By 1791 it was clear that the colonists believed a jury of fewer than twelve to be a concept both alien and ominous.

Although the civil jury played an important role throughout the growth of the colonies, a right to a civil jury trial was not included in the original draft of the Constitution. The absence of a Bill of Rights in the Constitution, specifically the right to a civil jury trial, led to some of the more stringent opposition to the Constitution's acceptance. Yet the issue of whether it was necessary to include the right of trial by jury in the Constitution was raised only twice during the entire Philadelphia Convention. The first mention of including such a right occurred five days before the Convention was to adjourn. Mr. Williamson, a delegate from North Carolina, noticed that no provision for civil juries had been made and suggested that there was

66. *See* Landsman, *supra* note 64, at 595; Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 654 & n.47 (1973). There were, and are, no juries in admiralty courts. *See* 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 469 (Jonathan Elliot ed., Philadelphia, J.B. Lippincott Co. 1836) [hereinafter DEBATES]; *infra* text accompanying note 101.

67. Landsman, *supra* note 64, at 596.

68. ROSCOE POUND, THE DEVELOPMENT OF CONSTITUTIONAL GUARANTEES OF LIBERTY 71 (1957).

69. *Id.* at 84-85.

70. *Id.* at 85.

a necessity for such a provision.[71] Upon this remark, some members of the Convention suggested that a "Committee to prepare a Bill of Rights" be created.[72] After some debate, this motion was defeated for fear that the new Federal Bill of Rights would be supreme to the bills of rights of the individual states.[73] Two days before adjournment, the right to a civil jury trial was again raised by a delegate from South Carolina, who suggested that the phrase "And a trial by jury shall be preserved as usual in civil cases," be added to the end of Article III.[74] This motion was defeated, however, on the basis that what was considered "usual" differed from state to state.[75]

Why the Framers chose not to include the right to a civil jury trial in the original Constitution may be understandable. After months of debate and tinkering with the broad shape and powers of the federal government, the delegates were doubtless under a great deal of pressure to complete the task they had been sent to perform.[76] Some delegates argued that attempting to put a right to a jury trial in the Constitution presented drafting difficulties that were hard to overcome at such a late stage.[77] Modern scholars, however, have found these claims to be disingenuous and argue that, in actuality, many Federalists believed that the fledgling country could ill afford to protect liberty in such a costly way.[78] Due to the fact that the civil jury trial often functioned to protect debtors to the detriment of creditors, and since jury decisions were often ad hoc, they seemed to be too unreliable to protect America's financial system.[79] With the Revolution, the need for juries to counterbalance judges hand-picked by England had been eliminated, and many delegates believed that the elected representatives of the people would adequately protect the rights of the individual, so that civil jury protection was unnecessary.[80]

71. James Madison, *Wednesday Sepr. 12. 1787—In Convention, in* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 587-88 (Max Farrand ed., 1966) [hereinafter RECORDS].

72. *Id.* at 588.

73. Journal, *Wednesday September 12. 1787, in* 2 RECORDS, *supra* note 71, at 583; Madison, *supra* note 71, at 588.

74. James Madison, *Saturday Sepr. 15. 1787—In Convention, in* 2 RECORDS, *supra* note 71, at 628.

75. *Id.*

76. Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 661 (1973).

77. Landsman, *supra* note 64, at 598.

78. *See, e.g., id.*

79. *Id.*

80. *Id.*

Despite the confidence many of the drafters had that the new government would not infringe on the rights of the individual, the failure to include a right to a civil jury trial was nearly a fatal blow to the new Constitution.[81] The failure to provide for jury trials created a wave of protest.[82] Some key delegates had refused to sign the Constitution, and plans were laid to attack the document even before the Convention adjourned.[83] Some Anti-Federalists argued that the new Constitution had eliminated the right to a civil jury entirely—a result unacceptable to the citizens of the new republic.[84] These attacks forced the Federalists to defend the new Constitution and to explain that the Constitution did not eliminate the right to jury trial. Alexander Hamilton, in *The Federalist No. 83*, extolled the virtues of the jury, referring to it as "the very palladium of free government,"[85] and averred that the omission of the right to a civil jury was not intended to abolish the right entirely.[86] He continued, however, to argue that the civil jury was not inseparable from the concept of liberty and that the jury's only function was to serve as a protection against an active judiciary.[87]

The Anti-Federalists' response to Hamilton was decisively negative. They argued that the failure to include the right to a civil jury trial warranted rejection of the Constitution in its entirety. They pointed out that a jury served three functions: first, it protected against unwise laws enacted by the legislature; second, it protected debtors; and third, it protected against an overreaching judiciary.[88] They frequently cited Blackstone's famous statement:

> The impartial administration of justice, which secures both our persons and our properties, is the great end of civil society. But if that be entirely entrusted to the magistracy, a select body of men, and those generally selected by the prince or such as enjoy the highest offices in the state, their decisions, in spight of their own natural integrity, will have frequently an involuntary bias towards those of their own rank and dignity: it is not to be expected from human

81. Wolfram, *supra* note 66, at 661.
82. Landsman, *supra* note 64, at 598.
83. Wolfram, *supra* note 66, at 662.
84. *Id.* at 668.
85. THE FEDERALIST NO. 83, at 257-58 (Alexander Hamilton) (Roy P. Fairfield ed., 2d ed. 1966).
86. Landsman, *supra* note 64, at 598-99.
87. *Id.* at 599.
88. *Id.*

> nature, that *the few* should be always attentive to the interests and good of *the many.*[89]

The Anti-Federalists were unwilling to accept an unrestrained federal judiciary and insisted upon the injection of "the many" into the proceedings of "the few." They were ever mindful that a federal judiciary that was too free from constraint could go the way of England's Lord Mansfield, of whom a Virginia court said in 1786, his "habit of control[l]ing juries does not accord with the free institutions of this country."[90]

Ultimately, the Anti-Federalists were unsuccessful in preventing the Constitution's adoption; however, the Constitution's drafters were reduced to pleading drafting difficulties to explain the omission of the civil jury right and promised repeatedly that a Bill of Rights would be among the first acts of the First Congress.[91] At least seven of the states ratifying the Constitution called immediately for an amendment to include the right to a jury trial.[92] Since the Anti-Federalist arguments were the driving force behind the adoption of the Seventh Amendment, commentators have argued that their statements should be accorded weight in determining the motivation behind its adoption.[93]

The debates surrounding the Constitution's adoption demonstrated the strong belief of the American populace that the role of the civil jury was vital to the protection of individual liberty,[94] and the Seventh Amendment proved far easier to draft than the Federalists had supposed. The broad text of the Seventh Amendment, and its references to the common law, ultimately were in accord with early Anti-Federalist arguments as they appeared in the *Pennsylvania Packet* in 1787. In including the right to a civil jury trial in the Constitution, "a reference might easily have been made to the common law of England, which obtains through every state."[95] Not only was the victory of the civil jury found in the Seventh Amendment, it was also to be

89. 3 BLACKSTONE, *supra* note 12, at 379, *cited in* Landsman, *supra* note 64, at 599-600.

90. Landsman, *supra* note 64, at 600 & n.119.

91. Wolfram, *supra* note 66, at 666.

92. Landsman, *supra* note 64, at 600.

93. *See, e.g.*, Wolfram, *supra* note 66, at 672-73.

94. *Id.* at 668-69.

95. Edith G. Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289, 297 (1966) (citing a piece in the *Pennsylvania Packet* for October 23, 1787 authored by "A Democratic Federalist").

found in the Judiciary Act of 1789,[96] which held equity in check while emphasizing remedies at law and the jury trial.[97]

The final text of the Seventh Amendment read: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."[98] Unlike the Sixth Amendment, which made no reference to the common law, the Seventh Amendment referred to the common law twice—once to define the types of cases triable before a jury, and once to specify the circumstances under which the jury's verdict could be reviewed.

To understand what the Framers considered to be included within the ambit of the civil jury, it is necessary to look to the structure of jury law in the colonies in 1791. Critics of the theory that the Framers intended juries to be comprised of twelve individuals have argued that, since vast disparities existed from colony to colony with respect to jury practice, the legal posture in the colonies cannot be consulted when determining what the Framers intended by "jury trial."[99] In fact, disparities did exist among the colonies with respect to the sorts of cases tried before civil juries, the dollar amount necessary to trigger the jury right, whether the jury was competent to determine law as well as facts, and the extent of judicial control over the jury process.[100] None of the disparities discussed at the time spoke to the issue of whether a jury is comprised of twelve members.

Several remarks made during the ratification debates casually alluded to the civil jury as being comprised of twelve. Governor Edmund Randolph of Virginia commented that admiralty cases at common law were not decided by a jury since "[t]hese depend on the law of nations, and no twelve men . . . could be equal to the decision of such a matter."[101] With respect to criminal trials he remarked, "There is no suspicion that less than twelve jurors will be thought sufficient."[102] Chief Justice Thomas McKean of the Pennsylvania Supreme Court referred to the jury as being twelve in his de-

96. Judiciary Act, ch. 20, 1 Stat. 73 (1789).
97. Landsman, *supra* note 64, at 600.
98. U.S. CONST. amend. VII.
99. *See, e.g.*, Henderson, *supra* note 95, at 299.
100. *Id.* at 299-320.
101. 3 DEBATES, *supra* note 66, at 469.
102. *Id.* at 467.

fense of the Constitution's provision for appellate review.[103]

Additionally, while jury practice in the colonies did vary with respect to the jury's domain, cases concurrent with or immediately following the debates about the adoption of the Seventh Amendment conclude that a jury of twelve must be provided in every case in which a jury was required by a state's constitution. In the 1780 case of *Holmes v. Walton*,[104] the New Jersey legislature had passed a law providing for seizure of goods traded from New Jersey, which was controlled by the Continental Army, and New York City, which was controlled by the British.[105] Although trade between New Jersey and New York was objectionable from a military standpoint, it was quite profitable for the people of New Jersey, and therefore, the law forbidding it and providing for seizure of the profits was not popular with the public.[106] Nonetheless, the New Jersey legislature deemed the seizures important and was therefore anxious to make this unpopular statute work. To this end, it had provided for juries of six, thinking a jury of six to be more easily controlled by the courts.[107] It was a very simple idea—if you have fewer people, it is easier to get them to agree, and then it is more likely that the state is going to win. That seems self-evident to me, but as you will see if you read *Williams*[108] and *Colgrove*,[109] it was not self-evident to the Supreme Court. In any event, the defendant in *Holmes v. Walton* argued on certiorari to the New Jersey Supreme Court that the trial was in violation of his right to trial by jury as guaranteed by the New Jersey Constitution.[110] The New Jersey Constitution provided "that the inestimable right of trial by jury shall remain confirmed, as a part of the law of this colony, without repeal, forever."[111] On the basis of this language, the New Jersey Supreme Court ruled Holmes's trial unconstitutional and ordered his goods restored to him.[112]

In 1808, the Pennsylvania Supreme Court interpreted its state's constitution by reference to the laws of William Penn in 1682, which

103. 2 *id.* at 539-40.
104. (N.J. 1780) (unreported case).
105. POUND, *supra* note 68, at 97.
106. *Id.*
107. *Id.*
108. 399 U.S. 78 (1970); *see* discussions *supra* part II and *infra* part VII.
109. 413 U.S. 149 (1973); *see* discussions *supra* part II and *infra* part VII.
110. POUND, *supra* note 68, at 97.
111. N.J. CONST. of 1776, art. XXII, *cited in* POUND, *supra* note 68, at 190.
112. POUND, *supra* note 68, at 97-98.

declared that a jury trial should be by twelve men.[113] Clearly the court believed that the Commonwealth's constitution had incorporated this provision. The debates surrounding the adoption of the Pennsylvania Constitution of 1873 similarly shed light on the intent of the Framers in 1791. The delegates to the Pennsylvania Convention debated whether to alter the substance of the constitutional right to a jury trial as found in the Pennsylvania Constitution of 1776. As the delegates debated the changes in jury law an amendment would make, one delegate said, "It is scarcely necessary to remark that a trial by jury means a jury of twelve men . . . . No less number can satisfy the requirement in the Bill of Rights. It is necessary to have a jury of twelve men. That is a jury; the only legal jury."[114] All of the delegates agreed that the Pennsylvania Constitution of 1776 required a jury of twelve.[115] Even those delegates in support of the changes to the Pennsylvania Constitution recognized that "when we speak about juries, we usually remember that twelve men constitute a jury, and we have been constantly carrying on cases in our courts before that number of men."[116]

In 1795, the Virginia Supreme Court stated in *Bennet v. Commonwealth*[117] that it would look to the common law of England to determine which cases must be tried to a jury of twelve. Since the act under which the suit was brought in *Bennet* did not exist at common law, a jury of twelve was not required; however, twelve would have been required in any case triable to a jury at common law.[118] The North Carolina Supreme Court held in 1800 in *Whitehurst v. Davis*,[119] which was tried before a panel of thirteen, that it was a constitutional error to try a case to more than twelve jurors.[120] The South Carolina Supreme Court stated in 1844 that the structure of the jury was as it had been at the adoption of the original South Carolina Constitution—twelve jurors[121]—and cited as support for this proposi-

113. Emerick v. Harris, 1 Binn. 416 (Pa. 1808).

114. Jerome L. Edelstein, Comment, *The Jury Size Question in Pennsylvania: Six of One and a Dozen of the Other*, 53 TEMP. L.Q. 89, 112 (1980) (citing 2 DEBATES OF THE CONVENTION TO AMEND THE CONSTITUTION OF PENNSYLVANIA 296 (Harrisburg, B. Singerly 1873)).

115. *Id.* at 111-12 & n.99.

116. *Id.* at 112 n.99.

117. 2 Va. (2 Wash.) 154 (1795).

118. *Id.* at 154-55.

119. 3 N.C. (2 Hayw.) 110 (1800).

120. *Id.* at 110.

121. State *ex rel.* Kohne v. Simons, 29 S.C.L. (2 Speers) 761, 767 (1844).

tion the 1794 case *Zylstra v. Corporation of Charleston*.[122] In 1805, the Delaware Court of Common Pleas reiterated that all of its civil jury verdicts must be unanimous,[123] and in 1815 the Delaware Supreme Court referred to the unanimity requirement as being a unanimous verdict of twelve.[124] Massachusetts also required a unanimous verdict.[125]

Although each of these cases reflect the early states' interpretation of their individual constitutions, they also reflect the commonly held view among the people of the early Union that a civil jury was comprised of no more and no less than twelve members. There were, to be sure, efforts in some of the colonies to have juries of less than twelve for cases that were considered somehow second class. A very interesting example is a South Carolina statute that provided that juries in cases involving slaves should have no less than three members, but no more than five.[126] That is a very clear implication, it seems to me, that the six-person jury was thought of as a kind of second-rate institution, and I just wonder how much of that history was brought to the attention of the Supreme Court when they made their decision in *Colgrove*.

Well, what about treatises? One of the great ways to detemine what the legal atmosphere of a certain time period was is to look at its law books. I have the great good fortune of having in my possession a list of law books that were in my grandfather's law office in 1895 in a little town called Washington, Arkansas. They were predominantly treatises: Blackstone, Kent, Story, Cooley. There was very little change in the law then. You could buy a treatise and be pretty sure that ten years later it would still be the law. Of course, that is far different from how we live now, but in the days of the Framers you had Lord Coke, you had Matthew Hale, and you had Bracton, and they all concurred that juries meant twelve.[127]

In his book, *The Development of Constitutional Guarantees of*

122. 1 S.C.L. (1 Bay) 382, 384 (1794).

123. Gillaspy v. Garrat, 2 Del. Cas. 225 (1805).

124. Pierce v. Patterson, 1 Del. Cas. 541 (1815) (noting *Gillaspy*, 2 Del. Cas. at 225).

125. Commonwealth v. Tuey, 62 Mass. (8 Cush.) 1, 4 (1851); *cf.* Apthorp v. Backus, 1 Kirby 407, 416-17 (Conn. 1788) (requiring a unanimous verdict in Connecticut).

126. Terry W. Lipscomb & Theresa Jacobs, *The Magistrates and Freeholders Court*, S.C. HIST. MAG., Jan. 1976, at 62, 62.

127. *See infra* notes 133-34 and accompanying text (views of Coke and Hale); for Bracton's view, see 2 HENRY OF BRACTON, BRACTON ON THE LAWS AND CUSTOMS OF ENGLAND 328-29 (Samuel E. Thorne trans., 1968).

Liberty,[128] Roscoe Pound wrote that eighteenth century colonial lawyers were "steeped" in the teachings of Lord Coke, the "most authoritative law books available to them."[129] It was these teachings that caused the colonial lawyers to rebel against England's claim to absolute and authoritative rule.[130] When these lawyers opposed the manipulation of the jury by colonial courts, they were upholding the traditional teachings of their law books.[131] In this light, the requirements for jury trial stated by Lord Coke in his *Institutes of the Lawes of England*[132] become weighty evidence as to the number of jurors the colonists, and, by extension, the Framers, believed necessary. Lord Coke clearly understood the jury to be comprised of twelve individuals.[133] Sir Matthew Hale stated that a jury was "twelve, and no less, of such as are indifferent."[134] In 1736, Matthew Bacon stated that the petit jury consisted "of twelve, and can be neither more nor less."[135] Duncombe also referred to a jury as being twelve in his treatise, *Trials per Pais*.[136]

All of this evidence demonstrates that it was the settled understanding at the time the Seventh Amendment was drafted that a jury was comprised of twelve, no more and no less.[137] Nonetheless, the *Williams* Court made much of the fact that the Framers had declined to put a "vicinage" requirement into the Seventh Amendment, although, as the Court noted, that feature was as much a part of the common law as was the number twelve.[138] The Court drew from this fact that the Framers did not intend to elevate every aspect of the common law jury right to a constitutional level, and, therefore, twelve jurors were not required by the reference to the jury in the Constitution.[139] I suggest that the Court may have misapprehended the significance of this omission. Unlike the requirement of a twelve-person

128. POUND, *supra* note 68.
129. *Id.* at 57.
130. *Id.*
131. *See id.*
132. 1 COKE, *supra* note 55.
133. *Id.* at 155; *see supra* text accompanying note 55.
134. 2 SIR MATTHEW HALE, THE HISTORY OF THE COMMON LAW 141 (photo. reprint 1993) (London, G.G. & J. Robinson 5th ed. 1794).
135. 3 MATTHEW BACON, A NEW ABRIDGMENT OF THE LAW 727 (London, A. Strahan, 6th ed. 1807).
136. *See supra* note 54 and accompanying text.
137. Larry T. Bates, *Trial by Jury After* Williams v. Florida, 10 HAMLINE L. REV. 53, 63-64 (1987).
138. Williams v. Florida, 399 U.S. 78, 96 (1970).
139. *Id.* at 96.

jury, which was retained by each of the colonies,[140] many of the colonies had declined to adopt a vicinage requirement, and those that had such a requirement each treated the vicinage as encompassing a different area.[141] Like the other discrepancies in the right to a civil jury referred to by opponents of the twelve-member jury, the failure to include the vicinage requirement in the Seventh Amendment does nothing to negate the fact that the Framers understood the civil jury to be comprised of twelve men.

In fact, prior to *Williams*, the Supreme Court had adopted this understanding. In *Capital Traction Co. v. Hof*,[142] decided in 1899, the Supreme Court stated, "'Trial by jury,' in the primary and usual sense of the term at the common law and in the American constitutions . . . is a trial by a jury of twelve men, in the presence and under the superintendence of a judge."[143] In *American Publishing Co. v. Fisher*,[144] decided in 1897, the Court likewise determined that the right to jury given by the Seventh Amendment included the right to a unanimous verdict—a verdict by nine with the rest disagreeing was insufficient.[145] In 1913, the Court held in *Slocum v. New York Life Insurance Co.*,[146] that the right to jury trial "preserved is the right to have the issues of fact presented by the pleadings tried by a jury of twelve, under the direction and superintendence of the court."[147] The Court reaffirmed its conclusion that the fact that the common-law jury was comprised of twelve meant that the Seventh Amendment required twelve several times, although often in dicta.[148]

In *Williams v. Florida*,[149] the United States Supreme Court discussed its precedents on the civil jury. Although *Williams* was a criminal case construing the applicability of the Sixth Amendment to the states, much of its discussion focused on the intent of the Framers and the contents of the word "jury."[150] Therefore, the Court felt constrained to address its own determinations of what a jury entailed.

140. *See* Bates, *supra* note 137, at 65-68.
141. *See* Drew L. Kershen, *Vicinage*, 29 OKLA. L. REV. 801, 814-16 (1976).
142. 174 U.S. 1 (1899).
143. *Id.* at 13.
144. 166 U.S. 464 (1897).
145. *Id.* at 468.
146. 228 U.S. 364 (1913).
147. *Id.* at 397.
148. *See, e.g.*, Crowell v. Benson, 285 U.S. 22 (1932); Herron v. Southern Pac. Co., 283 U.S. 91 (1931); Webster v. Reid, 52 U.S. (11 How.) 437 (1850).
149. 399 U.S. 78 (1970).
150. *Id.* at 92-101.

It dismissed *Capital Traction* and *Fisher* in a footnote by stating that "cases interpreting the jury trial provisions of the Seventh Amendment generally leap from the fact that the jury possessed a certain feature at common law to the conclusion that that feature must have been preserved by the Amendment's simple reference to trial by 'jury.'"[151] Despite this language, the *Williams* Court expressly left open "whether . . . additional references to the 'common law' that occur in the Seventh Amendment might support" an interpretation different from that accorded the Sixth Amendment in *Williams*.[152]

Although the *Williams* Court specifically recognized that its reasoning might "be thought to bear equally on the interpretation of the Seventh Amendment[]"[153] and sought to dispel that conclusion, promptly following the *Williams* decision, many federal district courts moved quickly to amend their local rules to allow six-person juries in civil cases.[154] *Williams* additionally served as the genesis of an idea in the Judicial Conference to require six-person juries in all federal civil cases.[155]

VI. THE JUDICIAL CONFERENCE

So, where did the movement come from to change juries from twelve to six? I can tell you that in the federal courts it did not come by law, because Congress refused to pass, and has never passed, a law providing for juries of less than twelve. It did not come by amendment to the Federal Rules of Civil Procedure. It was not until 1991 that the Federal Rules were amended to refer even to the possibility of a jury of fewer than twelve.[156] The change came from local rulemaking in federal district courts backed up by resolutions of the Judicial Conference of the United States (the "Conference").[157]

Following the *Williams* decision, in early 1971 the Committee on

151. *Id.* at 92 n.30.

152. *Id.*

153. *Id.*

154. *See infra* notes 164, 167, 174, 187 and accompanying text.

155. *Three Judge Court and Six-Person Civil Jury: Hearings on S. 271 and H.R. 8285 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the Comm. on the Judiciary*, 93d Cong., 2d Sess. 30 (1974) [hereinafter *Hearings*] (statement of Hon. Edward Devitt, Chief Judge, District of Minnesota).

156. *See infra* notes 188-91 and accompanying text.

157. The Judicial Conference is a body of twenty-seven judges: the chief judge of each judicial circuit, the chief judge of the Court of Claims, the chief judge of the Court of Customs and Patent Appeals, a district judge selected from each circuit, and the Chief Justice of the United States, who presides over the Conference. It is the body that governs the lower federal courts for administrative purposes. 28 U.S.C. § 331 (1988).

the Operation of the Jury System recommended that the Judicial Conference adopt the position that federal civil juries should be composed of six members unless the parties themselves stipulated to fewer than six.[158] The Conference adopted this resolution in March of 1971.[159] In its second meeting of that year, however, the Conference determined that the best way to effectuate its resolution would be to seek passage of a statute and specifically considered a bill[160] then pending in the House.[161] While the Conference approved the bill to the extent that it affirmed the Conference's position on civil juries, it refused to extend its reasoning to criminal juries.[162] The Conference specifically referred to juror utilization and cost efficiency as reasons to require the change and estimated that three million dollars could be saved by the Judiciary by adopting six-person juries.[163] Despite these optimistic figures, the Conference acknowledged that the savings in 1971 in the twenty-nine districts that had moved to six-person juries were "less than could be realized" because the courts continued to call the same size panels as they had when they were using twelve-person juries.[164]

The House bill did not pass, and the following year the Conference reiterated its support for six-person juries. The Conference approved[165] of another pending House bill[166] that provided for six-person juries and a reduction of peremptory challenges in civil cases. This bill also failed to pass, but by the end of 1972, fifty-six of the ninety-four federal districts had, nonetheless, adopted six-person juries.[167] In April of 1973, the Conference again pledged its support for pending six-person jury legislation.[168] In June of that year, the United States Supreme Court held in *Colgrove v. Battin*,[169] a 5-4

158. REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 5-6 (Mar. 15-16, 1971).
159. REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 41 (Oct. 28-29, 1971).
160. H.R. 7800, 92d Cong., 1st Sess. (1971).
161. REPORT, *supra* note 159, at 41.
162. *Id.*
163. 1971 DIR. ADMIN. OFF. U.S. CTS. ANN. REP. 198.
164. *Id.*
165. REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 5-6 (Apr. 6-7, 1972).
166. H.R. 13496, 92d Cong., 2d Sess. (1972).
167. 1972 DIR. ADMIN. OFF. U.S. CTS. ANN. REP. 169, 176-181.
168. REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 13 (Apr. 5-6, 1973).
169. 413 U.S. 149 (1973).

decision, that the Seventh Amendment to the United States Constitution did not require the civil jury to be composed of twelve.[170]

Armed with the *Colgrove* decision, the Conference reviewed two new bills[171] pending before the 93d Congress and endorsed a bill[172] that preserved unanimity and limited the number of peremptory challenges in civil cases.[173] By 1973, seven additional districts had reduced their civil juries to six.[174] At the hearing before a Subcommittee of the Committee on the Judiciary, District Judges Devitt and Stanley testified that a reduction in the size of the civil jury would save the Judiciary both time and money[175]—up to four million dollars could be saved by the move.[176] They argued that a reduction in jury size would mean that less money would be needed to maintain the court system; additionally, the time spent by judges, lawyers, clerks, and jurors would be more efficiently utilized if the jury were smaller.[177] Proponents also argued that the judge's expertise could take the place of the jury's, and, following *Colgrove*, that the difference between using juries of six rather than twelve was insignificant.[178]

Now, the United States Supreme Court is not the only organ of constitutional law. Just because the Supreme Court says that an action is proper under the Constitution—such as reducing the size of the jury—does not mean that Congress has to do it, of course. It does not even mean that Congress has to agree with the constitutional proposition, and none of the *Colgrove* arguments were particularly persuasive to members of the congressional subcommittee. The subcommittee members were unwilling to take a step of such constitutional magnitude on the basis of what was, ultimately, the determination of only five members of the Supreme Court.[179] This reluctance

170. *Id.* at 160.

171. H.R. 8285, 93d Cong., 1st Sess. (1973) & S. 288, 93d Cong., 1st Sess. (1973).

172. S. 2057, 93d Cong., 1st Sess. (1973).

173. REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 54-55 (Sept. 13-14, 1973).

174. *See Hearings*, *supra* note 155, at 17 (statement of Hon. Edward Devitt, Chief Judge, District of Minnesota).

175. *Id.* at 17-18 (statement of Hon. Edward Devitt, Chief Judge, District of Minnesota); *id.* at 18-23 (statement of Hon. Arthur J. Stanley, Chairman of the Judicial Conference Committee on the Operation of the Jury System).

176. *Id.* at 160 (statement of Prof. Hans Zeisel, University of Chicago Law School).

177. Lucy M. Keele, *An Analysis of Six vs. 12-Person Juries*, TENN. B.J., Jan.-Feb. 1991, at 32, 33.

178. *Id.* at 33-34.

179. *See, e.g.*, *Hearings*, *supra* note 155, at 30 (remarks of Rep. Robert F. Drinan).

was increased in light of evidence demonstrating that time savings had been negligible in the districts already using six-person juries. In fact, according to a 1972 study, the average time for voir dire of a six-person jury was 52.0 minutes; the average time of voir dire for twelve-person juries was a mere tenth of a minute longer, 52.1 minutes.[180] Additionally, overall time savings were related not to the number of jurors on the petit jury, but rather to the size of the panel from which the jurors were drawn.[181] The conclusion that the time saved was negligible was confirmed by a separate study conducted in 1971, which showed that just under one percent of a judge's total working time was spent impaneling juries.[182] Even cutting impaneling time in half would save a judge only four-tenths of one percent of his or her total working time.[183] Finally, the four million dollars that could be saved by reduction of the jury, while not an insignificant sum, was only two percent of the 1973 judicial budget and less than one-thousandth of one percent of the total federal budget.[184]

The judges' argument that a number of federal district courts had adopted this new rule was unavailing. Members of Congress felt that the Judiciary had simply assumed the power to alter the jury to six members, regardless of congressional action.[185] Finally, no justifications beyond time and money saved were offered in support of the six-person jury, and proponents could not explain why they had arbitrarily chosen six, as opposed to four or eight, as the proper number.[186]

Due to congressional misgivings, neither this bill nor two subsequent bills passed either house of Congress, despite the best efforts of the Conference to support the legislation and to resubmit bills for consideration. In 1978, after many failed attempts to get Congress to adopt legislation permitting six-person juries, the Judicial Conference agreed to stop seeking legislation on the subject, a result not completely at odds with its goals, since eighty-five of the ninety-five federal district courts had rules permitting the use of fewer than

180. Keele, *supra* note 177, at 33.

181. *Id.*

182. *Id.* (citing a 1971 Federal Judicial Center Study).

183. *Id.*

184. *Hearings*, *supra* note 155, at 160 (statement of Prof. Hans Zeisel, University of Chicago Law School).

185. *Id.* at 36-37 (remarks of Rep. Robert F. Drinan).

186. *See, e.g., id.* at 30 (statement of Hon. Edward Devitt, Chief Judge, District of Minnesota, acknowledging uniformity as the primary purpose of the bill).

twelve jurors.[187] Ultimately, since many districts had adopted six as the standard size for civil juries, in 1991 the Conference amended Federal Rule of Civil Procedure 48 to allow the district courts to seat juries of no less than six and no more than twelve.[188] Believing that the minimum size of the civil jury had been constitutionally set at six by the Supreme Court,[189] the Conference ensured that Rule 48 would allow juries of less than six only when the parties so stipulated.[190] Rule 48 also preserved the unanimity requirement, absent consent of the parties.[191] Although far from the mandatory six-person civil jury rule advocated by the Conference in the early 1970s, Rule 48 nonetheless represented the culmination of what the Conference had been attempting to accomplish for twenty years in the federal courts—the six-person civil jury.

VII. THE SUPREME COURT'S RELIANCE ON EMPIRICAL EVIDENCE

After the *Colgrove* holding, the Conference appeared to be on constitutional terra firma in its pursuit of six-person federal juries. Indeed, the Supreme Court has not reevaluated the position it took in *Colgrove*. The *Colgrove* Court interpreted the Seventh Amendment's references to "common law" to mean that the right of trial by jury had been preserved, although not the "various incidents of trial by jury."[192] Citing its holding in *Williams*, the Court continued: "[C]onstitutional history reveals no intention on the part of the Framers 'to equate the constitutional and common-law characteristics of the jury.'"[193] The Court then stated that the inquiry turned on "whether a jury of 12 is of the substance of the common-law right of trial by jury," which in turn came down to the question of whether jury performance, in assuring a fair and equitable resolution of factual issues, is a function of jury size.[194] In other words, the Supreme Court said that the number of jurors did not make a difference.

187. REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 78 (Sept. 21-22, 1978).

188. FED. R. CIV. P. 48.

189. Ballew v. Georgia, 435 U.S. 223, 245 (1978) (disallowing five-person criminal juries).

190. FED. R. CIV. P. 48 advisory committee's note accompanying 1991 amendment.

191. FED. R. CIV. P. 48.

192. Colgrove v. Battin, 413 U.S. 149, 155-56 (1973).

193. *Id.* at 156 (quoting Williams v. Florida, 399 U.S. 78, 99 (1970)).

194. *Id.* at 157.

Distinguishing *Capital Traction Co. v. Hof*[195] and other prior Supreme Court cases by stating that their references to civil juries of twelve[196] were dicta, the Court proceeded to analyze whether the jury of six satisfied the Seventh Amendment.[197] To make this determination, the Court referred to statistical studies, much as it did in *Williams*, and concluded that there was no difference in the function of six versus twelve-person juries.[198] Since there was no difference, the requirement of twelve could not be a substantive one. In rejecting the conclusion that the Seventh Amendment jury right included the right to twelve jurors, the Court misplaced its reliance on empirical evidence.

The *Colgrove* Court cited the six "experiments" relied on in *Williams*[199] that the Court said demonstrated there were "no discernible differences" between six and twelve-person juries.[200] One such experiment was an unsupported assertion that there would be no differences between the two.[201] Three of the studies were reports of courtroom officials' casual observations of six-person juries, and a fifth was a statement that a jurisdiction was considering switching to six-person juries.[202] The final experiment was an article on the cost savings expected from the change to six-person juries.[203]

The Court then concluded that the minority's ability to defend its position in the face of a 5-1 split is equivalent to its ability to do so in a 10-2 split because both result in an 83% to 17% ratio.[204] However, the studies cited by the Court to support this proposition found precisely the opposite. In fact, it is the absolute, not the relative, size of the opposition that determines the minority's ability to defend itself.[205] The presence of even the single ally in the 10-2 split makes an enormous difference in the ability of the minority to resist pressure to conform.[206]

195. 174 U.S. 1 (1899).
196. *See supra* notes 142-48 and accompanying text.
197. *Colgrove*, 413 U.S. at 158.
198. *Id.* at 158-60.
199. Williams v. Florida, 399 U.S. 78, 101 n.48 (1970).
200. *Colgrove*, 413 U.S. at 158 & n.14.
201. Michael J. Saks, *Ignorance of Science is No Excuse*, TRIAL, Nov.-Dec. 1974, at 18, 18.
202. *Id.*
203. *Id.*
204. Williams v. Florida, 399 U.S. 78, 101 n.49 (1970).
205. Saks, *supra* note 201, at 19.
206. *Id.*

The *Williams* Court also asserted that there would be a negligible difference in the amount of minority representation and participation when jury sizes were reduced.[207] But sample size will always affect the extent to which minority groups are represented. A 1974 statistical study showed that in a community with a 10% minority population, it could be expected that one or more minority members would be present on 72% of twelve-person juries; however, this statistic changes dramatically when the number of jurors is reduced to six.[208] On a six-person jury, one or more minority members would be expected to be present on only 47% of the panels. Not only is this projected disparity significant, an empirical study of actual minority representation on six and twelve-person juries demonstrated that, rather than the predicted 72% to 47% contrast, minorities were represented on twelve-person juries 82% of the time and on six-person juries only 32% of the time.[209] Not only are minorities underrepresented on the six-person jury, women are as well. Women constitute 52% of the population of the United States, but they constitute only 30% of all six-member jury panels; they comprise 57% of the twelve-member panels.[210] These differences are not negligible. If one of the objectives is for the jury to be representative of the community—and that clearly is one of the things that juries are supposed to do—then part of being representative is having minority members, if there are some in the community.

Subsequent studies have further demonstrated that the differences between six and twelve-member juries are significant. Judge Victor Baum argued in 1973 that six-person juries were more likely to give what he termed "haywire" verdicts, verdicts that are less predictable and more indefensible than those rendered by twelve-person juries.[211] Additionally, he found that six-person juries were far more likely to fall under the influence of a single juror.[212]

Judge Baum's first-hand observations have been borne out by subsequent studies. First, when the size of a jury is reduced from twelve to six, the variability in awards increases by 41%, leading to

207. *Williams*, 399 U.S. at 102.

208. Saks, *supra* note 201, at 19; *see also* Hans Zeisel, *The Waning of the American Jury*, 58 A.B.A. J. 367, 368 (1972).

209. Saks, *supra* note 201, at 19.

210. Keele, *supra* note 177, at 34.

211. Judge Victor J. Baum, *The Six-Man Jury—The Cross Section Aborted*, JUDGES' J., Jan. 1973, at 12, 12.

212. *Id.* at 13.

more unpredictable verdicts.[213] Second, a 1976 study demonstrated that a six-person jury is far more likely to fall under the influence of an aggressive juror than is a twelve-person jury.[214] A 1988 study showed that personality characteristics of individual jurors are far more likely to control a six-person jury than a twelve-person jury, leading to determinations based on personality rather than the evidence.[215]

Third, numerous recent studies have demonstrated that the quality of the jury's discussion and deliberation is better in larger groups than in smaller ones.[216] As mentioned previously, minority viewpoints are far more likely to be present on a larger jury.[217] Jury members in the minority are far more likely to maintain their viewpoint if they are certain that at least one other member of the jury agrees with them. This is far more likely in the twelve-member jury than in a six-member jury.[218] Since, according to the *Williams* and *Colgrove* Courts, one of the requirements of the jury is effective deliberation, and since the jury is predicated on the notion that a cross-section is crucial to a fair outcome, the fact that more viewpoints are available in twelve-person juries than six-person juries is all the more significant.[219] An early majority in the twelve-person jury is reversed far more often than in six-member juries, suggesting that in twelve-person juries there is greater group and minority participation.[220]

Individual juror bias is reduced by an increase in jury size,[221] and verdicts are less severe in twelve-person juries.[222] In the crimi-

213. Michael J. Saks, *If There Be a Crisis, How Shall We Know It?*, 46 MD. L. REV. 63, 76 n.51 (1986), *cited with approval in* David L. Faigman, *To Have and Have Not: Assessing the Value of Social Science to the Law as Science and Policy*, 38 EMORY L.J. 1005, 1022-23 (1989).

214. John R. Snortum et al., *The Impact of an Aggressive Juror in Six and Twelve-Member Juries*, 3 CRIM. JUST. & BEHAV. 255 (1976).

215. Norbert L. Kerr & Juin Y. Huang, *Jury Verdicts: How Much Difference Does One Juror Make?*, 12 PERSONALITY & SOC. PSYCHOL. BULL. 325 (1986).

216. *See, e.g.*, Keele, *supra* note 177, at 36, 40; R. Scott Tindale et al., *Asymmetrical Social Influence in Freely Interacting Groups: A Test of Three Models*, 58 J. PERSONALITY & SOC. PSYCHOL. 438 (1990).

217. *See supra* notes 208-09 and accompanying text.

218. *See supra* notes 205-06 and accompanying text.

219. Keele, *supra* note 177, at 34-35.

220. Alice M. Padawer-Singer et al., *Legal and Social-Psychological Research in the Effects of Pre-Trial Publicity on Juries, Numerical Makeup of Juries, Non-Unanimous Verdict Requirements*, 3 L. & PSYCHOL. REV. 71, 78 (1977).

221. Carol M. Werner et al., *The Impact of Case Characteristics and Prior Jury Experience on Jury Verdicts*, 15 J. APPLIED SOC. PSYCHOL. 409 (1985).

222. Robert Buckhout et al., *Jury Verdicts: Comparison of 6- vs. 12-Person Juries and*

nal context, six-person juries have been shown to be far more likely to convict than twelve-person juries, and twelve-person juries' deliberations are more likely to result in a hung jury.[223]

In my opinion, the empirical evidence now available demonstrates unequivocally that there are significant differences between six and twelve-member juries. These differences affect the nature of civil verdicts, the ability to obtain an adequate cross-section of the population, the ability of minority jurors to hold fast in their opinions, and the quality of the decision-making process.

VIII. CONCLUSION

Well, what am I saying? Am I saying that the Supreme Court is wrong and ought to be overruled? Of course not. One of the most irrelevant things in the world, maybe the most irrelevant thing, is a lower-court judge who does not agree with the United States Supreme Court. It is only slightly less insulting for me to say that they are wrong than for me to say that they are right! You remember that famous quote from Justice Holmes that it irritated him somewhat for law reviews to write articles saying he was wrong in an opinion he had written, but it really drove him up a wall when they said he was right.[224] So my purpose is not to say whether the Supreme Court was right or wrong. The Supreme Court is the Supreme Court and that is the end of that. They decided what the Constitution means, and I am bound by that decision.

But let me remind you that courts are not the only source of rights in this country. The Court does not say you *must* have a six-person jury; the Court says you *may* have a six-person jury. Congress by statute, or the Judicial Conference and the Congress by rule, or the local district courts by rule, or the Judicial Conference by resolution, all have the authority to raise the size of juries to twelve if they so desire. In fact, individual district judges have that authority. When I was on the district court, I refused to try cases with juries of less than twelve, and the lawyers did not protest. But then I have found that lawyers do not usually protest what the judge does.

Unanimous vs. Majority Decision Rule in a Murder Trial, 10 BULL. PSYCHONOMIC SOC'Y 175 (1977).

223. Angelo Valenti & Leslie Downing, *Six Versus Twelve Member Juries: An Experimental Test of the Supreme Court Assumption of Functional Equivalence*, 1 PERSONALITY & SOC. PSYCHOL. BULL. 273 (1974).

224. *See* Charles E. Hughes, *Foreword*, 50 YALE L.J. 737, 737 (1941).

So what is the point here? I have heard it said that a good speech should make one point, and I want you to know I have not made that point yet. The point is not that every incident of the jury as it existed in 1791 should be preserved. If that were the point, we would have twelve jurors, but they would all be men, they would all be white, and they would all own real estate. And no one argues that those qualifications, if that is what they are, are enshrined in the Constitution, or even that they are a good thing. Why not? Because conditions have changed. In the case of gender and color, you have explicit constitutional change. You have the three Civil War Amendments and the Nineteenth Amendment, and maybe the Equal Rights Amendment someday, that say that this is a different world from 1791.

So I'm not arguing that juries should look exactly the way they looked in 1791. But my question is this: what has changed with respect to the number? There is no social condition that exists now that did not in 1791 that has a thing to do with how many people are to be on a jury. There is no social condition that existed then that no longer exists now that has to do with how many people are to be on a jury. Often, we use the phrase "evolving Constitution," and we all know that it does evolve. It evolves because facts change, because conditions change. But sometimes we should ask ourselves if it always evolves in the right direction. Change is going to occur, but all change is not change for the better. I suggest to you that a change to "water down" juries from twelve members to six is not for the better.

Justice Marshall's dissenting opinion in *Colgrove* makes exactly these points. He says, first of all, that what matters is the intention of the Framers.[225] Of course, the jury-trial provision is a little more specific than some of the others in the Constitution and it is possible to engage in some meaningful and fairly detailed historical research about what a jury trial meant in 1791, whereas a phrase like "due process" or "equal protection" is much more general. One of the things that Justice Marshall says deserves to be quoted. He writes, "[W]hen constitutional rights are grounded in nothing more solid than the intuitive, unexplained sense of five Justices that a certain line is 'right' or 'just,' those rights are certain to erode and eventually disappear altogether."[226] The difference is "the difference between inter-

225. Colgrove v. Battin, 413 U.S. 149, 167, 176-77 (1973) (Marshall, J., dissenting).
226. *Id.* at 181.

preting a constitution and making it up as one goes along."[227]

So the debate in *Williams* and *Colgrove* is about the intention of the Framers. There is no one saying, "We don't care what the Framers intended." The Justices on both sides argued from the historical record as to what that intention was. And the assumption is that if you know what the intention was, then you follow it. That is an assumption that I think every judge on those Courts would have agreed with. So when someone argues that the interpretation of the Constitution should change, you have to ask yourself, "Is this a change for the better?" Is it really something that is happening because of modern conditions, or is it something that is happening, as in the case of the reduction of the number of jurors, because you are going to save a little money and arguably become a little more efficient? I would remind you that efficiency, although it is a value, is not the only value that we expect out of our government. In fact, the Framers deliberately constructed a system that would not be completely efficient. They did not trust government, and the jury is one of the institutions designed to put a check on it.

Alexis de Tocqueville observed:

> The institution of the jury, if confined to criminal causes, is always in danger, but when once it is introduced into civil proceedings, it defies the aggressions of time and man. . . . The jury, and more especially the civil jury, serves to communicate the spirit of the judges to the minds of all the citizens; and this spirit, with the habits which attend it, is the soundest preparation for free institutions. It imbues all classes with a respect for the thing judged and with the notion of right. If these two elements be removed, the love of independence becomes a mere destructive passion. It teaches men to practice equity; every man learns to judge his neighbor as he would himself be judged. And this is especially true of the jury in civil causes; for while the number of persons who have reason to apprehend a criminal prosecution is small, everyone is liable to have a lawsuit. . . . It invests each citizen with a kind of magistracy; it makes them all feel the duties which they are bound to discharge towards society and the part which they take in its government. By obliging men to turn their attention to other affairs than their own, it rubs off that private selfishness which is the rust of society.[228]

227. *Id.* at 182.

228. 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 284-85 (Alfred A. Knopf 1945) (1835).

Well, by now you may have guessed that I feel fairly strongly about this subject. And I guess that I come to it with some degree of emotion. And here is the thing I wanted to tell you—the point: emotion is not a bad thing. In law or anywhere else, we do not often think of it that way, perhaps. We say that the life of the law is reason, but there is more to it than cold rationalism. As Pascal said, "The heart has its reasons, which reason does not know."[229] In legal matters, if you have strong feelings, if you become emotional about them, there is nothing wrong with that so long as your feelings and your emotions can be tested by reason.

When I hear the words "the Bill of Rights" and when I hear the names of James Madison or the other great Founders of our constitutional order, I get a whole set of emotional responses. I take alarm at the effort to do away with one jot or tittle of the cherished freedoms they gave us. We hear a lot these days about unenumerated rights, and we know that there are such rights, but let us also preserve those rights that are enumerated, like the right to trial by jury. And when you defend those rights do not be afraid to let your heart have a say as well as your head. Thank you.

229. BLAISE PASCAL, PENSEES 95 (William F. Trotter trans., Random House, Inc. 1941) (1669).

COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT
of the
JUDICIAL CONFERENCE OF THE UNITED STATES

United States District Court
Everett McKinley Dirksen Building
219 South Dearborn Street
Chicago, Illinois 60604

March 20, 1996

Honorable Patrick E. Higginbotham
United States Court of Appeals
13E1 Earle Cabell Federal Building
and United States Courthouse
1100 Commerce Street
Dallas, TX 75242-1003

Dear Judge Higginbotham:

In December 1994, I wrote you expressing the Court Administration and Case Management Committee's views on proposals to amend Rules 47(a) and 48 of the Federal Rules of Civil Procedure. The Committee is opposed to requiring judges to allow attorneys to supplement the voir dire examination by asking questions of the jurors directly. It is also opposed to mandating a twelve-member jury in all civil cases. I have attached our earlier letter which more fully explains the Committee's position.

Sincerely,

Ann C. Williams

Ann C. Williams

Attachment

COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT

JUDICIAL CONFERENCE of the UNITED STATES

Honorable Ann C. Williams
Chair

December 21, 1994

Honorable Patrick E. Higginbotham
Chair, Advisory Committee on Civil Rules
13E1 Earle Cabell Federal Building and
United States Courthouse
1100 Commerce Street
Dallas, Texas 75242

Dear Judge Higginbotham:

In response to your request for our Committee's views on two proposed civil rule changes affecting the selection of prospective jurors in civil cases, the Court Administration and Case Management Committee discussed both proposals at its December meeting. I am writing to report that the Committee unanimously declined to endorse either proposed rule change.

The first proposal would amend Rule 47(a) of the Federal Rules of Civil Procedure to require judges to allow counsel to supplement the voir dire examination by asking questions of the jurors directly. The present rules permit this practice, and the Federal Judicial Center report indicated that more and more judges, according to its 1994 survey, are following this practice. Although many of the judges on our Committee permit this practice, none would want to compel judges to require it. The Committee's view is that the current rule is working well and need not be changed.

Members also noted that the lawyers are cooperative during voir dire, in that they do not use it as a forum to argue their cases. Concern was expressed that if the permissive rule were made an entitlement, the lawyers' behavior might change. Moreover, Committee members thought that a mandatory rule might provide an opportunity for attorneys to raise additional appellate review issues.

In discussing the impact of Batson v. Kentucky, 476 U.S. 79 (1986), and the several cases expanding the Supreme Court's decision, the Committee concluded that judges have become more flexible in the manner they conduct voir dire examination by allowing greater attorney participation. Rather than changing the rule to require attorneys to conduct or supplement voir dire examination, the Committee recommends that judges be educated on the merits of attorney participation by urging them to encourage attorney questioning within definite time limits and under specified instructions as to the types of questions that are permitted to be asked of jurors.

The second proposal would amend Rule 48 to require twelve-member juries for all civil jury trials. While the Committee members acknowledge the benefits of seating a twelve-member jury, they did not think it necessary to change the current rule to achieve those benefits. The Committee concluded that the present rule provides the flexibility for judges to seat from 6 to 12 persons on the jury, depending upon the complexity of the case. The Committee expressed concern that by mandating twelve-member juries, we are asking our citizens to spend a great deal more time in the judicial process, in cases where that might not be necessary. The Committee suggests that education of judges regarding what size jury is best in particular types of cases is a better alternative than mandating a twelve-member jury in all cases.

In addition to obvious extra costs entailed by increasing the size of the jury, the proposed rule change would also result in capital expenses; many of our jury boxes in magistrate judges' and bankruptcy judges' courtrooms would need to be redesigned to accommodate the larger sized juries.

We appreciate the opportunity to provide our thoughts and opinions on these issues. Please let us know if we can provide further assistance.

Sincerely,

Ann C. Williams
Chair

cc: Abel J. Mattos
John K. Rabiej
Susan Hayes
Mark Shapiro

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

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

DATE: **May 17, 1996**

Re: **Report of the Advisory Committee on Civil Rules**

I. Introduction

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

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II. ACTION ITEMS

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

1. Synopsis of proposed amendments

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

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

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

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

(a) Rule 9(h)

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

(b) Rule 48

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

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

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

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

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE[1]

Rule 9. Pleading Special Matters

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

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

Committee Note

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

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

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

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

limiting the interlocutory appeal right to orders that determine the rights and liabilities of the parties to an admiralty claim.

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

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

GAP REPORT ON RULE 9(h)

No changes have been made in the published proposal.

Summary of Comments: Rule 9(h)

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

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

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

Testimony on Rule 9(h)

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

Rule 48. Number of Jurors — Participation in Verdict

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

Committee Note

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

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

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

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

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

Stylistic changes have been made.

GAP Report on Rule 48

No changes have been made in Rule 48 as published.

Prepublication Comments

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

Honorable. William T. Moore, Jr.: As practicing lawyer and newly appointed judge, has had no difficulties with Rule 48, and recommends that it not be changed.
Honorable. John F. Nangle: In practice, 7- and 8-member juries are used due to the elimination of alternates. In 21 years on the bench has never had a hung jury. Are majority verdicts being considered? Why ask for trouble? Do not adopt the proposal.
Honorable. Morey L. Sear: The Rule 47 proposal is very bad. "[T]he proposal to go back to 12 person juries is equally bad."
Honorable. J. Clifford Wallace: The Judicial Council of the Ninth Circuit unanimously opposes the Rule 48 proposal. Experiences with smaller juries generally have been positive, and there are no compelling reasons to empanel larger juries for all cases.
Honorable. Ann C. Williams: The Court Administration and Case Management Committee unanimously declined to endorse the proposal. The present rule provides flexibility, allowing 12-person juries when the complexity of the case warrants. Mandating 12-

person juries for all cases would require citizens to spend more time in the judicial process in cases where that may not be necessary. Education of judges regarding jury size in particular cases is a better alternative. And some court facilities are not equipped for 12-person juries.

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

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

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

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

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

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

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

Comments After Publication

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

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

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

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

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

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

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

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

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

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

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

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

95-CV-113: Honorable. Judith N. Keep, for the unanimous judges of the Southern District of California: Realistically, this will mean 11- and 12-person juries in short cases, and 6- or 7-person juries in long cases because of attrition in long cases. And there is no hope of a cross-section in long cases in any event, since financial and family hardships eliminate many groups of people. And "tradition" is not a compelling concern when various states have widely different practices.

95-CV-114: Honorable. John W. Bissell: The "core" of the 12-person jury will not be restored, because fewer will be left at verdict time in protracted cases; 16 or 18 would be needed to have 12 to decide. Costs would go up. And New Jersey has 6-person juries; defendants would be encouraged to remove, expecting less risk of a substantial

plaintiff's verdict from a 12-person jury ("did the defense insurance industry promote and/or endorse the proposed amendment"?).

95-CV-115 Honorable. Richard L. Williams: Present juries generally have 8 members. A 50% increase would increase the burden on citizens called to serve. Sufficient representativeness is achieved by 8. Larger juries will protract deliberations, and increase the number of mistrials for failure to agree.

95-CV-118: Richard C. Watters, Esq.: "Rule 48 would be a positive step in civil jury trials."

95-CV-119: Richard A. Sayles, Esq.: "[J]uries of less than twelve, especially of six, produce extreme results, one way or the other, more often than juries of twelve."

95-CV-121: Honorable. Michael A. Telesca: Increasing jury size will lead to greater costs, particularly with jury-box sizes now often set at eight. If the judge carefully selects the jury, 6 will not be susceptible to domination, can accurately recall the evidence, and can decide fairly.

95-CV-122: Allen L. Smith, Jr., Esq.: I participated in a Supreme Court case that questioned 6-person juries in 1972. I heartily approve a return to 12. 12 are needed to provide "a desirable experiential diversity needed in so much civil litigation."

95-CV-126: Daniel V. Flatten, Esq.: Favors the proposal.

95-CV-127: Daniel A. Ruley, Jr., Esq.: "My experience with six person juries is that they lend themselves to control by one or two dominant persons, something that seldom happened with twelve persons." (See also 95-CV-165.)

95-CV-128: Mike Milligan, Esq.: Favors the increase. It will make it more difficult to exercise peremptory challenges in a discriminatory manner.

95-CV-129: Honorable. Charles P. Sifton: As chief judge of E.D.N.Y., currently constructing two new courthouses with 8-person jury boxes in magistrate judges' courtrooms, objects to a proposal

that will require redesign and increased expense.

95-CV-132: Honorable. Robert P. Propst: (See also 95-CV-108): The Committee should consider less-than-unanimous verdicts. This may be particularly desirable if a first trial has mistried for failure to reach unanimous agreement.

95-CV-134: Professor Michael H. Hoffheimer: It is good to return to 12-member juries, but bad to allow them to be reduced to as few as 6 at deliberation time. This will encourage court and attorneys to tolerate significant attrition.

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

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

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

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

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

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

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

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

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

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

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

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

95-CV-159: Honorable. B. Avant Edenfield: Vigorously opposed. 12-person juries are used at times now, but it is more orderly to use 8. There is no information showing 12-person juries are better. (Judge Edenfield renewed his comments in 95-CV-272.)

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

95-CV-162: J. Richard Caldwell, Jr., Esq.: 12-person juries represent a meaningful cross-section. There is less risk that one juror with a private agenda will dominate. There is no reason to expect that significantly more time will be required.
95-CV-163: Honorable. Prentice H. Marshall: Wholeheartedly approves.
95-CV-164: Honorable. Donald D. Alsop: The amendment at least should provide for quotient [sic for majority] verdicts if the jury is unable to agree unanimously after a stated number of hours. Minnesota state courts allow a 5/6 verdict after 6 hours of deliberation; the practice is successful.
95-CV-165: Daniel A. Ruley, Jr., Esq.: 6-person juries frequently are controlled by one or two dominant persons, leading to higher and lower verdicts and, at times, verdicts contrary to the evidence. These risks are reduced by 12-person juries. (See also 95-CV-127.)
95-CV-166: Honorable. Lucius D. Bunton: A survey of all 10 active judges in W.D. Tex. shows 9 opposed to changing rule 48. None now use 12 jurors; most use 7 or 8. Minorities "are more than adequately represented." An experiment with 3-person shadow juries showed that in 80% of the cases the 3-person juries reached the same result as the 6-person juries. An increase in numbers is expensive.
95-CV-169: Honorable. Gene E. Brooks: 12-person juries will bring additional costs. Minority participation in the *system* will be unchanged; only the numbers in particular trials will be affected. Differences between 6 and 12 in sociological and psychological dynamics should be statistically insignificant: "For the Committee to base its preference upon psychological intangibles is wrong."
95-CV-172: Honorable. Jerry Buchmeyer: The change "is also unnecessary. I use 12-member juries in all my criminal and civil trials."
95-CV-173: Honorable. Sam R. Cummings: Registers opposition.

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

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

95-CV-181: Honorable. Thomas P. Griesa, for the unanimous judges of S.D.N.Y.: There is no significant benefit in returning to 12-person juries. The change would increase cost and lengthen the time needed to select a jury. 6-, 8-, and 9-member juries are as likely to be representative of the community, and are no more likely to be dominated by a single member. (The same statement was forwarded by Judge John F. Keenan and assigned number 95-CV-181.)

95-CV-183: Honorable. Fred Biery: Experience with 6- and 12-member juries in state and federal courts has shown no observable difference. Jury funds are stretched already.

95-CV-184: Paul W. Mollica, Esq., for the Federal Courts Committee of the Chicago Council of Lawyers: Endorses 12-person juries for the reasons advanced by the Committee Note, adding that larger juries may reduce the incidence of Batson violations.

95-CV-185: Honorable. Clarence A. Brimmer: I try cases to 7-person juries "to save funds." 12-person juries would be "a waste of money."

95-CV-186: Honorable. Sam Sparks: 6-person jury verdicts parallel 12-person jury verdicts. The expense of jury trials is staggering; why double it?

95-CV-187: Honorable. Edward C. Prado for the 5th Circuit District Judges Assn.: A poll of 94 district judges in the 5th Circuit produced 73 responses as of the date of writing. 63 oppose the proposal, while 10 favor it.

95-CV-189: Honorable. Barefoot Sanders: Normally uses 8- or 9-person juries. Only speculation supports the proposal to revert to 12.

95-CV-190: Robert R. Sheldon, for the Connecticut Trial Lawyers Assn.: Because attorney voir dire takes time, expanding the jury may hamper efforts to provide attorney voir dire. 12-member juries may lead to compromise verdicts because of the difficulty of securing unanimity; the proposal "contains a strong bias against the party carrying the burden of proof — which means that the proposal would work against plaintiffs in civil cases."

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

95-CV-198: Honorable. John D. Rainey: 12-person juries will result in longer trials, and add delay for illness, car trouble, or the like. There will be more mistrials and more expense.

95-CV-200: Honorable. David Hittner: There is no need for a 12-person jury when a unanimous verdict is required. It will add expense.

95-CV-203: Honorable John F. Nangle: By eliminating alternates, we have gone to 7- or 8-person juries. "The idea of securing more diversity with 12 is ridiculous! Why not 14 or 16? * * * [A]re you still going to require a unanimous verdict"?

95-CV-206: Dean M. Harris, Esq., for Atlantic Richfield Co.: A 12-person jury is more likely to be representative, and more likely to render an impartial verdict.

95-CV-214: Kathleen L. Blaner, Esq., for Litigation Section, D.C. Bar: The proposal "should foster improved diversity among jury members, resulting in a jury that is more representative of the community."

95-CV-215: Honorable. Terry C. Kern: 12 jurors will increase costs, and lead to a dramatic increase in mistrials. Requiring a unanimous 12-person verdict "would be a heavy burden for plaintiffs and would skew the process dramatically in the defendant's favor."

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

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

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

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

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

total number of minorities serving will increase, but not the proportion.

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

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

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

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

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

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

95-CV-256: Harriet L. Turney, Esq., for State Bar of Arizona: Opposes the proposal. To be sure, 12 members would increase

diversity in the makeup of the jury and the views expressed, and make it more difficult for one person to dominate. But the requirement of unanimity makes it easier for one person to deadlock the jury. And the added cost is not insignificant.

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

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

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

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

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

95-CV-273: Pamela Anagnos Liapakis, Esq., for Association of Trial Lawyers of America: "[W]here there is a requirement of unanimity, twelve-member juries tend to be a cumbersome mechanism which are more likely to be sidetracked by a single intransigent or biased juror * * *. Nor are six-member juries necessarily destined to be less representative of the community if there is adequate opportunity for voir dire." But there is no reason to have a uniform national practice.

The Committee should "draft a new rule which would make the jury size the same whether a litigant is in state or federal court in any given jurisdiction" — conformity to state jury practice. [It is not clear whether this proposal would include state majority-verdict rules as well.]

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

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

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

95-CV-283: Terisa E. Chaw, Executive Director, National Employment Lawyers Assn.: The Association is constituted by lawyers "who primarily or exclusively represent individual employees in employment-related matters." The 12-person jury amendment is desirable, "providing [sic] that a less than unanimous jury could return a verdict." Unanimity will prolong deliberations and increase mistrials; mistrials are a problem for individual litigants who lack the

resources for retrials. "A jury system which is less than unanimous will not engender an overwhelming number of verdicts in favor of plaintiffs." Before adopting the amendment, the Advisory Committee should study "whether the unanimity requirement substantially affects the results of trials compared to states which have 6-person juries."

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

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

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

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

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

Supreme Court when it approved 6-person criminal and civil juries has been shown wrong.

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

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

Testimony on Rule 48

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

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

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

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

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

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

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

Louise A. La Mothe, Esq., December 15: Tr 153 to 168: While I was a member of the California State Judicial Council we had a study

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

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

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

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

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

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

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

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

John A. Chandler, Esq., January 26: Tr 93 to 100: The rationale in the Advisory Committee Note supports the proposal, "to provide more diversity and to avoid the odd verdict. * * * You get more aberrant decisions with six-person juries * * *. I think predictability helps lawyers and helps clients assess cases." There are anecdotes suggesting that plaintiffs' lawyers tend to choose the 6-person jury state court in Fulton county, rather than the 12-person jury superior court, because "they believe that they are more likely to get a result that's outside of the box with a six-person jury."

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

Honorable Hayden W. Head, February 9: All but 2 of the judges of S.D. Tex. oppose the return to 12-person juries. Their views are largely based on cost, and the belief that they have seen adequate and fair verdicts returned by smaller juries. A poll of the 5th Circuit

District Judges Association got 73 responses from 94 members. 63 oppose the proposal, while 10 support it. Again, the feeling is that the proposal increases costs without real benefit.

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

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

Honorable. John M. Roper, February 9: Tr. 64 to 80: Appearing for the Economy Subcommittee, Budget Committee of the Judicial Conference. This testimony is directed only to cost implications, not to the wisdom of the proposal as a matter of procedure. (The chair of the Budget Committee has vigorously supported a return to 12-person juries as a matter of policy.) The cost of returning to 12-person juries could go as high as $12,000,000. The more jurors you select, the greater the pool, the greater the number of challenges for cause, the greater the number of people who simply do not show up, the greater the need to send marshals out to round up people, and so on. There are also courtroom costs, both with respect to retrofitting existing magistrate judge courtrooms with larger jury boxes and with respect to new court construction plans that contemplated shared use of courtrooms in ways that permit construction of some courtrooms for smaller juries, and others for 12-person juries. Although parties can

be told that they can have a magistrate-judge trial only if they consent to a smaller jury, this may reduce the frequency of consents to magistrate-judge trials. Some defense firms believe there is a greater prospect of a hung jury with 12, and are willing to pay for it, whether or not the perception is accurate.

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

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

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

SUBJECT Report on Proposed and Pending Rules of Criminal
Procedure

DATE: May 7, 1996

I. INTRODUCTION.

At its meeting April 29, 1996, the Advisory Committee on the Rules of Criminal Procedure acted upon proposed or pending amendments to Rules of Criminal Procedure 5.1, 16, 26.2, 31, 33, 35, and 43. The Committee decided not to take any further action on a proposed amendment to Rule 24(a), which would have provided for attorney-conducted voir dire.

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II. ACTION ITEMS

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B. Rule 16. Discovery and Inspection; Disclosure of Expert's Testimony.

At its July 1995 meeting, the Standing Committee approved for transmittal to the Judicial Conference two key amendments to Rule 16. The first amendment would have required the government to provide the names of its witnesses to be called at trial seven days before the trial. The second, would have required the parties to disclose summaries of expert testimony offered on the issue of the defendant's mental condition. The amendment requiring pretrial disclosure of names and government witnesses was the subject of pro and con discussion and was ultimately rejected by the Judicial Conference. Although there was no controversy and no discussion concerning the expert testimony amendment, it was rejected at the same time by the Judicial Conference.

At its January 1996 meeting, in light of this history, the Standing Committee asked whether the Advisory Committee wished to reconsider the amendment governing expert testimony and during its April 1996 meeting, the Advisory Committee did reconsider this proposal and voted to resubmit it to the Standing Committee.

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Recommendation: The Advisory Committee recommends that the amendments to Rule 16 regarding expert testimony be resubmitted to the Judicial Conference without further public comment.

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PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 16. Discovery and Inspection[1]

(a) GOVERNMENTAL DISCLOSURE OF EVIDENCE.

(1) Information Subject to Disclosure.

* * * * *

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

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

evidence at trial on the issue of the defendant's mental condition. ~~This~~ The summary provided under this subdivision shall ~~must~~ describe the witnesses' opinions, the bases and the reasons for those opinions ~~therefor~~, and the witnesses' qualifications.

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

by government witnesses or prospective government witnesses except as provided in 18 U.S.C. § 3500.

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(b) THE DEFENDANT'S DISCLOSURE OF EVIDENCE.

(1) *Information Subject to Disclosure.*

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(C) EXPERT WITNESSES. Under the following circumstances, the defendant shall, at the government's request, disclose to the government a written summary of testimony that the defendant intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence as evidence at trial: (i) if ~~If~~ the defendant requests disclosure under subdivision (a)(1)(E) of this rule and the government complies, or (ii) if the defendant has given notice under Rule 12.2(b) of an intent to

present expert testimony on the defendant's mental condition. ~~the defendant, at the government's request, must disclose to the government a written summary of testimony the defendant intends to use under Rules 702, 703 and 705 of the Federal Rules of Evidence as evidence at trial.~~ This summary ~~must~~ shall describe the witnesses' opinions ~~of the witnesses~~, the bases and reasons for those opinions ~~therefor~~, and the witnesses' qualifications.

* * * * *

COMMITTEE NOTE

Subdivision (a)(1)(E). Under Rule 16(a)(1)(E), as amended in 1993, the defense is entitled to disclosure of certain information about expert witnesses which the government intends to call during the trial. And if the government provides that information, it is entitled to reciprocal discovery under (b)(1)(C). This amendment is a parallel reciprocal disclosure provision which is triggered by a government request for information concerning defense expert witnesses as to the

defendant's mental condition, which is provided for in an amendment to (b)(1)(C), *infra*.

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

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

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

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

DATE: May 23, 1995

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

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

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

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

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

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

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ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO RULE 16

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II. LIST OF COMMENTATORS: Rule 16

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

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

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

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

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

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IV. COMMENTS: Rule 16

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

Judge Mullen believes the proposed new Rule 16 is long overdue.

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

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

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

Judge Marshall urges the Committee to adopt the language of Rule 26(a)(2) of the Rules of Civil Procedure in the proposed amendment to Criminal Rule 16 relating to anticipated expert testimony.

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

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

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

The Akron Bar Assoc. supports the proposed amendments to Rule 16.... It also supports the provisions for discovery concerning experts.

* * * * *

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

From: Ralph K. Winter, Jr., Chair
Advisory Committee on Federal Rules of Evidence

Date: May 15, 1996

Re: Report of the Advisory Committee on Evidence Rules

Introduction

The Advisory Committee on Evidence Rules met on April 22, 1996, in Washington, D.C. The Committee considered public comments regarding the proposed amendments to the Evidence Rules that were published in September 1995. After deferring action on a proposed amendment to Rule 103(e) and making several changes to other proposed amendments, the Committee approved the amendments discussed below for presentation to the Standing Committee for final approval.

Rule 103(e). Although a majority of the Committee agreed that a uniform default rule ought to be codified as to whether a pretrial objection to, or a proffer of, evidence must be renewed at trial, neither the rule that was published for comment nor the alternative formulation commanded a majority. Comments received in connection with the proposed amendment were unanimously in favor of a rule, but split on the proper formulation. Nine comments supported the published rule while eleven supported the reverse formulation.

I. Action Items

A. **Proposed Amendments to Evidence Rules 407, 801(d)(2), 803(24), 804(b)(5), 804(b)(6), 806, and 807 Submitted for Approval by the Standing Committee and Transmittal to the Judicial Conference.**

These proposed amendments were published for comment by the bench and bar in September 1995. Letters were received from thirty-nine commentators. (Two of the comments are identical but were submitted by different members of the Federal Magistrate Judges Association.) The following letters contain only general statements regarding published rules submitted for Standing Committee approval:

(1) Leon Karelitz, Esq. of Raton, N.M., in a letter dated November 7, 1995, "supported the Advisory Committee's proposed amendments" and also "commend[ed] that Committee's reasoning and decision not to amend the rules listed on pp. 160-161."

(2) Senior Judge Prentice H. Marshall of the Northern District of Illinois, approves of the proposed amendments and the Advisory Committee's tentative decision not to propose amendments to the listed rules.

(3) J. Houston Gordon, Esq., Covington, Tenn., supports the changes in Rules 407 and 801(d)(2).

(4) Magistrate Judge Virginia M. Morgan, on behalf of the Federal Magistrate Judges Association, in a letter dated January 23, 1996, supports the proposed changes.

(5) Carolyn B. Witherspoon, Esq., on behalf of the Arkansas Bar Association, in a letter dated January 31, 1996, wrote that the Committee had no objection to the proposed changes to Rules 801, 803, 804, new Rule 807, and Rule 804(b)(6) and 806, and pointed out that the proposed change to Rule 407 would change the law in the Eighth Circuit.

(6) James A. Strain, Esq., on behalf of The Seventh Circuit Bar Association, characterized the proposed amendments as "appropriate."

(7) Harriet L. Turney, Esq., on behalf of the State Bar of Arizona, in a letter dated February 27, 1996, writes that the State Bar "supports the proposed amendments to Rules 801, 803, 804, 806, and 807."

(8) Kent S. Hofmeister, Esq., on behalf of the Federal Bar Association, in a letter dated February 29, 1996, endorses the proposed amendments.

(9) Donald R. Dunner, Esq., on behalf of the American Bar Association Section of Intellectual Property Law, in a letter dated March 1, 1990, writes that "this committee has no substantive comment" on the amendments proposed for Rules 407, 801(d)(2) or 804(b)(6). With regard to amendments to the latter two rules, the letter further states that the committee "finds the amendments to be reasonable."

(10) Nanci L. Clarence, Esq., on behalf of the Executive Committee of the Litigation Section of the State Bar of California, in a letter dated February 28, 1996, writes that the Section takes "no position" on the proposed amendments.

Judge Ralph K. Winter, Chair, presided over a public hearing in New York on January 18, 1996, which was also attended by the Hon. Jerry E. Smith and

Gregory P. Joseph, members of the Evidence Committee and Professor Margaret A. Berger, the Reporter. At the hearing, the Committee heard from Professor Richard D. Friedman of the Michigan Law School and Thais L. Richardson, a student at the American University Law School.

Bryan Garner, consultant on style, suggested certain stylistic improvements that were incorporated into the rules that were published for comment. The Advisory Committee voted, however, at its April, 1996 meeting to defer all restylization efforts. Consequently, any changes that had been made in the rules solely for stylistic reasons have been eliminated.

1. Synopsis of Proposed Amendments

(a) Rule 407 is amended to extend the exclusionary principle of the rule to product liability actions, and to clarify that the rule applies only to measures taken after an injury or harm caused by an event.

(b) Rule 801(d)(2) is amended to provide that a court shall consider the contents of the statement seeking admission when determining whether the proponent has established the preliminary facts that make a statement admissible as an authorized or vicarious admission or a coconspirator's statement. With regard to a coconspirator's statement this amendment codifies the holding in Bourjaily v. United States, 483 U.S. 171 (1987). The amendment also resolves an issue on which the Supreme Court had reserved decision by providing that the contents of the statement do not alone suffice to establish the preliminary facts.

(c) Rule 804(b)(6) is added to provide that a party forfeits the right to object on hearsay grounds to the admission of a statement made by a declarant whose unavailability as a witness was procured by the party's wrongdoing or acquiescence therein. This rule codifies a principle that has been recognized by every circuit that has addressed the issue, although the tests for finding waiver and the applicable standard of proof have not been uniform. The proposed rule adheres to the usual Rule 104(a) preponderance of the evidence standard for preliminary questions. The rule would apply in civil as well as criminal cases and would apply to wrongdoing by the government.

(d) The contents of Rules 803(24) and 804(b)(5) have been combined and transferred to a new Rule 807. Consequently, there will now be only one residual hearsay exception instead of two. This change was made to facilitate future additions to Rules 803 and 804. No change in meaning is intended.

(e) Rule 806 is amended to eliminate a comma that mistakenly appears in the current rule.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE*

Rule 407. Subsequent Remedial Measures

When, after an injury or harm allegedly caused by an event, measures are taken ~~which~~ that, if taken previously, would have made the ~~event~~ injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, ~~or~~ culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction ~~in connection with the event~~.

* * * * *

COMMITTEE NOTE

The amendment to Rule 407 makes two changes in the rule. First, the words "an injury or harm allegedly caused by" were added to clarify that the rule applies only to changes made after the occurrence that produced the damages giving rise to the action. Evidence of measures taken by the defendant prior to the "event" causing "injury or harm" do not fall within the exclusionary scope of

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

Rule 407 even if they occurred after the manufacture or design of the product. See Chase v. General Motors Corp., 856 F.2d 17, 21-22 (4th Cir. 1988).

Second, Rule 407 has been amended to provide that evidence of subsequent remedial measures may not be used to prove "a defect in a product or its design, or that a warning or instruction should have accompanied a product." This amendment adopts the view of a majority of the circuits that have interpreted Rule 407 to apply to products liability actions. See Raymond v. Raymond Corp., 938 F.2d 1518, 1522 (1st Cir. 1991); In re Joint Eastern District and Southern District Asbestos Litigation v. Armstrong World Industries, Inc., 995 F.2d 343 (2d Cir. 1993); Cann v. Ford Motor Co., 658 F.2d 54, 60 (2d Cir. 1981), cert. denied, 456 U.S. 960 (1982); Kelly v. Crown Equipment Co., 970 F.2d 1273, 1275 (3d Cir. 1992); Werner v. Upjohn,Inc., 628 F.2d 848 (4th Cir. 1980), cert. denied, 449 U.S. 1080 (1981); Grenada Steel Industries, Inc. v. Alabama Oxygen Co., Inc., 695 F.2d 883 (5th Cir. 1983); Bauman v. Volkswagenwerk Aktiengesellschaft, 621 F.2d 230, 232 (6th Cir. 1980); Flaminio v. Honda Motor Company, Ltd., 733 F.2d 463, 469 (7th Cir. 1984); Gauthier v. AMF, Inc., 788 F.2d 634, 636-37 (9th Cir. 1986).

Although this amendment adopts a uniform federal rule, it should be noted that evidence of subsequent remedial measures may be admissible pursuant to the second sentence of Rule 407. Evidence of subsequent measures that is not barred by Rule 407 may still be subject to exclusion on Rule 403 grounds when the dangers of prejudice or confusion substantially outweigh the probative value of the evidence.

Public Comments on Rule 407.

(1) Judge Martin L.C. Feldman of the Eastern District of Louisiana, in his letter of November 6, 1995, expressed concern that the impeachment exception to Rule 407 might be applied too broadly.

(2) Frank E. Tolbert of Miller, Tolbert, Muehlhausen, Muehlhausen & Groff, P.C., Logansport, Ind., in a letter dated November 1, 1995, agreed that Rule 407 should be extended to product liability actions as to changes made after the occurrence that produced the injury.

(3) Richard C. Watters, Esq., of Miles, Sears & Eanni, Fresno, CA, in a letter dated November 9, 1995, supported the proposed amendment.

(4) Joseph D. Jamil, Esq., of Jamil & Kolius, Houston, Tex., in a letter dated November 6, 1995, wrote that "the rule should, if anything, be amended to ***permit*** proof of subsequent remedial measures in products liability cases."

(5) Professor Michael H. Hoffheimer, University of Mississippi Law Center, in a letter dated December 1, 1995, objected to a stylistic change that substituted a "that" for a "which."

(6) Brent W. Coon, Esq., of Provost, Umphrey, Beaumont, Tex., in a letter dated November 27, 1995, recommended amending the rule "to specifically exclude claims grounded in products liability as opposed to expressly including such claims. The public would be much better served."

(7) John A.K. Grunert, Esq., of Campbell & Associates, Boston, MA., in a letter dated January 4, 1996, urges reconsideration of some of the proposed changes. He suggests that "the rule should apply only to remedial measures taken after the alleged tortfeasor knew or should have known of the 'injury or harm.'" As drafted, he fears the rule will produce "the same uncertainty and factual difficulty that the so-called 'discovery rule' and 'successive harms' rule have created with respect to statute of limitations defenses." He proposes eliminating the words relating to "injury or harm" entirely as not needed due to judicial decisions, or if there is a need for clarification substituting instead: "When, after the first occurrence of injury or harm for which damages or other forms of relief are sought in the litigation," etc. He also suggests adding "a breach of warranty" in order to fully accomplish the Committee's purpose and deleting "a defect in a product's design" as "a redundant source of possible confusion." Finally, he see no need to change the second sentence of the rule.

(8) Judge Edward R. Becker of the Third Circuit, in a letter dated January 17, 1996, "commend[s] the Committee for this proposal."

(9) Robert F. Wise, Jr., Esq., on behalf of the Federal Procedure Committee of the New York State Bar Association, in a letter dated February 28, 1996, writes that "the proposed amendments appear to codify the existing case law, and we support their adoption."

(10) Hugh F. Young, Jr., on behalf of the Product Liability Advisory Council (PLAC), in a letter dated February 29, 1996, comments extensively on the proposed amendments. He writes that PLAC "is a non-profit association whose corporate members include

more than 110 major product manufacturers along with more than 300 attorneys in private practice who represent those manufacturers at trial and on appeal in cases involving products liability." PLAC supports the change extending Rule 407 to all product liability actions, but urges the Committee to revise the rule "to make clear that, in product liability cases, it applies not only to changes made in a product line after an accident occurs but also to any product line changes made after the sale of the product involved in the case." PLAC argues that the change is needed in order to encourage manufacturers to make changes that will avoid additional accidents.

(11) Thais L. Richardson, a student at American University Law School, submitted a Comment that will be published in volume 45 of The American University Law Review. The Comment approves of extending the rule to products liability actions but objects that limiting the rule to measures taken after the event giving rise to the lawsuit is "inconsistent with both public policy and substantive products liability law." Ms. Richardson testified to the same effect at the public hearing on January 18, 1996.

(12) William B. Poff, Esq., on behalf of the National Association of Railroad Trial Counsel, in a letter dated March 1, 1996, approves the changes.

(13) Professor David P. Leonard of Loyola Law School, Los Angeles, CA, in a letter dated March 1, 1996, finds that the Committee's clarification of the meaning of "after an event" is "ill-advised." "[T]he goal of promoting safety would be thwarted by admitting evidence of subsequent remedial measure taken before the accident in question had occurred." Accordingly he recommends applying "the exclusionary principle to all cases in which admission might materially affect the decision whether to repair, regardless of

whether the measure was taken before or after the accident in question. While a rule requiring the judge to make such a factual finding would not be perfect, it would reach results more in accordance with the rule's purpose in a greater number of cases than would the current proposal."

(14) Pamela Anagnos Liapakis, on behalf of the Association of Trial Lawyers of America (ATLA), in a letter dated March 1, 1996, opposed the revision principally on the grounds that disagreements among circuits ought to be resolved by the Supreme Court, and that excluding evidence of subsequent measures is a bad rule for products liability cases as no empirical evidence exists that anybody has ever made a safety-related change because of the rule. She states that subsequent repair evidence is often the only evidence available to a plaintiff to prove feasibility since other evidence resides in defendants' file cabinets. She also states that the amended rule is outcome-determinative because it would make plaintiffs susceptible to summary judgment motions long before a litigation would reach the stage where feasibility might be controverted so that the exception in the second sentence of Rule 407 would apply.

GAP Report on Rule 407. The words "injury or harm" were substituted for the word "event" in line 4. The stylization changes in the second sentence of the rule were eliminated. The words "causing 'injury or harm'" were added to the Committee Note.

Rule 801. Definitions

* * * * *

(d) Statements which are not hearsay. A statement is not hearsay if —

* * * * *

(2) Admission by party-opponent. The statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the

existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy. The contents of the statement shall be considered but are not alone sufficient to establish the declarant's authority under subdivision (C), the agency or employment relationship and scope thereof under subdivision (D), or the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subdivision (E).

COMMITTEE NOTE

Rule 801(d)(2) has been amended in order to respond to three issues raised by Bourjaily v. United States, 483 U.S. 171 (1987). First, the amendment codifies the holding in Bourjaily by stating expressly that a court shall consider the contents of a coconspirator's statement in determining "the existence of the conspiracy and the

participation therein of the declarant and the party against whom the statement is offered." According to Bourjaily, Rule 104(a) requires these preliminary questions to be established by a preponderance of the evidence.

Second, the amendment resolves an issue on which the Court had reserved decision. It provides that the contents of the declarant's statement do not alone suffice to establish a conspiracy in which the declarant and the defendant participated. The court must consider in addition the circumstances surrounding the statement, such as the identity of the speaker, the context in which the statement was made, or evidence corroborating the contents of the statement in making its determination as to each preliminary question. This amendment is in accordance with existing practice. Every court of appeals that has resolved this issue requires some evidence in addition to the contents of the statement. See, e.g., United States v. Beckham, 968 F.2d 47, 51 (D.C.Cir. 1992); United States v. Sepulveda, 15 F.3d 1161, 1181-82 (1st Cir. 1993), cert. denied, 114 S.Ct. 2714 (1994); United States v. Daly, 842 F.2d 1380, 1386 (2d Cir.), cert. denied, 488 U.S. 821 (1988); United States v. Clark, 18 F.3d 1337, 1341-42 (6th Cir.), cert. denied, 115 S.Ct. 152 (1994); United States v. Zambrana, 841 F.2d 1320, 1344-45 (7th Cir. 1988); United States v. Silverman, 861 F.2d 571, 577 (9th Cir. 1988); United States v. Gordon, 844 F.2d 1397, 1402 (9th Cir. 1988); United States v. Hernandez, 829 F.2d 988, 993 (10th Cir. 1987), cert. denied, 485 U.S. 1013 (1988); United States v. Byrom, 910 F.2d 725, 736 (11th Cir. 1990).

Third, the amendment extends the reasoning of Bourjaily to statements offered under subdivisions (C) and (D) of Rule 801(d)(2). In Bourjaily, the Court rejected treating foundational facts pursuant to the law of agency in favor of an evidentiary approach governed by Rule 104(a). The Advisory Committee believes it appropriate to treat

analogously preliminary questions relating to the declarant's authority under subdivision (C), and the agency or employment relationship and scope thereof under subdivision (D).

Public Comments on Rule 801.

(1) Judge Edward R. Becker of the Third Circuit, in a letter dated January 17, 1996, finds the proposed rule an improvement over the current state of the law, but urges the Committee to restore the old evidence aliunde principle that predated the Bourjaily opinion. Judge Becker notes that Bourjaily was an exercise in the jurisprudence of "plain meaning" rather than a "jurisprudential declaration" about the law of evidence by the Supreme Court; that he knows of no evidence that the drafters of the rules intended to abolish the independent evidence requirement; and that coconspirators' statements are suspect in terms of trustworthiness so that bootstrapping is "particularly dangerous." Abandonment of the independent evidence requirement eliminates one of the few safeguards of reliability.

(2) Daniel E. Monnat, on behalf of the Kansas Association of Criminal Defense Lawyers, in a letter dated January 22, 1996, opposes allowing the contents of a hearsay statement to be used in determining the admissibility of a hearsay statement, but "absolutely support[s] that part of the amendment which clarifies that the contents of the hearsay statement are not alone sufficient to establish the existence of a conspiracy."

(3) Paul W. Mollica, on behalf of the Chicago Council of Lawyers, in a letter dated February 7, 1996, urges additional study before the rule is extended to civil cases. He argues that the per se rule established by the proposal requiring corroboration before a

statement is admitted into evidence "could unreasonably deprive a party of important evidence, especially where the party opposing admission of the statement proffers no evidence to rebut it."

(4) Robert F. Wise, Jr., on behalf of the Commercial and Federal Litigation Section of the New York State Bar Association, in a letter dated February 28, 1996, characterizes the proposed amendment as "a net gain for those resisting admission of co-conspirator statements," although he notes that some, particularly criminal defense lawyers will question whether "some independent evidence" is sufficient protection. He also observes that the "quality of the independent evidence required has not been defined." Treating authorized and vicarious admissions consistently with coconspirators' statements makes sense as all rest on an agency theory. On balance he terms the proposed amendment an improvement that helps to clarify the law.

(5) Professor James J. Duane of Regent University Law School, in a letter dated February 29, 1996, submitted lengthy comments that he hopes to have published. He objects to the proposed amendment as codifying pure dictum, predicts that the amendment will have no impact on any cases, and "if adopted, will instantly become the most frivolous and trivial of all the Federal Rules of Evidence." He suggests that something should have been done about the quantity or quality of the additional independent evidence, the source of the independent evidence, and the need for each of the three required findings to be supported by independent evidence. He also proposed substituting "conspirator" for "coconspirator," and rewriting the rule to substitute "conspirator of the party" for "conspirator of a party" because the provision's plain-meaning is that a statement may be offered against any defendant in a multi-party criminal case (even one who was not a member of the

conspiracy), if it was made by someone who was in a conspiracy with at least one of the other defendants.

(6) William J. Genego and Peter Goldberger as Co-Chairs of the National Association of Criminal Defense Lawyers' Committee on Rules of Procedure (NACDL), in a letter dated February 29, 1996, write that NACDL would prefer to reject Bourjaily and does not support the extension of that holding to other agents' statements, particularly in criminal cases. But if these suggestions are rejected, NACDL states that "we certainly support the creation of a specific rule of insufficiency for bootstrapped offers of co-conspirator statements." NACDL points out that concerns about the reliability of coconspirator statements have been exacerbated by the Sentencing Guidelines' harsh penalties and incentives for cooperation. NACDL also states that the extension of the bootstrapping rule to other forms of admissions makes matters worse in "white collar crime" cases arising in a business setting.

(7) Professor Myrna S. Raeder of Southwestern Law School, in a letter dated March 1, 1996, objects to the proposed amendment as "fall[ing] short of any meaningful assurance of reliability. . . . Some type of additional reliability check is warranted, whether by independent evidence or . . . by additional foundational requirements." She enclosed a 1990 report prepared by the American Bar Association Criminal Justice Section's Committee on Rules of Criminal Procedure and Evidence.

(8) Professor Richard D. Friedman of the University of Michigan Law School testified at the public hearing held on January 18, 1996. He does not think the amendment should be adopted because it is not needed and will increase confusion. "When we talk about some evidence, I think it is very, very hard to put your fingers on what that means and I don't even think -- I don't really think it is possible." In his view there almost always is other evidence, and in cases in which there really was no conspiracy one should trust the district trial courts to make the appropriate judgment.

GAP Report on Rule 801. The word "shall" was substituted for the word "may" in line 26. The second sentence of the committee note was changed accordingly.

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial

* * * * *

(24) [Transferred to Rule 807] ~~Other exceptions. -- A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted~~

~~under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.~~

COMMITTEE NOTE

The contents of Rule 803(24) and Rule 804(b)(5) have been combined and transferred to a new Rule 807. This was done to facilitate additions to Rules 803 and 804. No change in meaning is intended.

Public Comments on Rule 803.

(1) Professor Bruce Comely French of Ohio Northern University Law School, in a letter dated January 16, 1996, noted his opposition to the residual provisions on principle. He also opposed combining the exceptions, if they are to be retained, into the proposed Rule 807. He believes that a designation system such as (24a) or (5a) would aid historical research.

(2) All other comments approved combining the two residual exceptions into a new Rule 807.

(3) Comments addressed to the substance of the residual exception are discussed in connection with Rule 807.

GAP Report on Rule 803. The words "Transferred to Rule 807" were substituted for "Abrogated."

Rule 804. Hearsay Exceptions; Declarant Unavailable

* * * * *

(b) Hearsay exceptions.

* * * * *

(5) [Transferred to Rule 807] ~~Other exceptions. -- A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure~~

~~through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.~~

(6) Forfeiture by wrongdoing. A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.

COMMITTEE NOTE

Subdivision (b)(5). The contents of Rule 803(24) and Rule 804(b)(5) have been combined and transferred to a new Rule 807. This was done to facilitate additions to Rules 803 and 804. No change in meaning is intended.

Subdivision (b)(6). Rule 804(b)(6) has been added to provide that a party forfeits the right to object on hearsay grounds to the admission of a declarant's prior statement when the party's deliberate wrongdoing or acquiescence therein procured the unavailability of the declarant as a witness. This recognizes the need for a prophylactic rule to deal with abhorrent behavior "which strikes at the heart of the system of justice itself." United States v. Mastrangelo, 693 F.2d 269, 273 (2d Cir. 1982), cert. denied, 467 U.S. 1204 (1984). The wrongdoing need not consist of a criminal act. The rule applies to all parties, including the government. It applies to actions taken after the event to prevent a witness from testifying.

Every circuit that has resolved the question has recognized the principle of forfeiture by misconduct, although the tests for determining whether there is a forfeiture have varied. See, e.g., United States v. Aguiar, 975 F.2d 45, 47 (2d Cir. 1992); United States v. Potamitis, 739 F.2d 784, 789 (2d Cir.), cert. denied, 469 U.S. 918 (1984); Steele v. Taylor, 684 F.2d 1193, 1199 (6th Cir. 1982), cert. denied, 460 U.S. 1053 (1983); United States v. Balano, 618 F.2d 624, 629 (10th Cir. 1979), cert. denied, 449 U.S. 840 (1980); United States v. Carlson, 547 F.2d 1346, 1358-59 (8th Cir.), cert. denied, 431 U.S. 914 (1977). The foregoing cases apply a preponderance of the evidence standard. Contra United States v. Thevis, 665 F.2d 616, 631 (5th Cir.) (clear and convincing standard), cert. denied, 459 U.S. 825 (1982). The usual Rule 104(a) preponderance of the evidence

standard has been adopted in light of the behavior the new Rule 804(b)(6) seeks to discourage.

Public Comments on Rule 804(b)(5). See Public Comments on Rule 803.

Public Comments on Rule 804(b)(6).

(1) Robert F. Wise, Jr., Esq. on behalf of the Commercial and Federal Litigation Section of the New York State Bar Association, in a letter dated February 28, 1996, states that the proposed amendment raises "two potential concerns." First, a higher clear and convincing standard would be more appropriate than the preponderance of the evidence standard because a penalty or punishment is at stake and because the consequences of admission may be severe. He also believes that a higher standard may cut down on time consuming satellite litigation. Second, he finds that the words "'wrongdoing' and 'acquiesced' are somewhat nebulous and are likely to engender dispute." He asks whether the rule would apply to a corporation in civil litigation that refused to produce its employees in a foreign jurisdiction? Finally, he finds no pressing need for a rule since the courts have been able to deal with these situations, and fears that more litigation and a more mechanical approach may ensue if the amendment is adopted.

(2) William B. Poff, Esq. on behalf of the National Association of Railroad Trial Counsel, in a letter dated March 1, 1996, comments that the word "acquiesce" is too vague and suggests substituting "who has engaged, directly or indirectly, in wrongdoing."

(3) Professor Myrna S. Raeder of Southwestern University School of Law, on behalf of ten professors of evidence and

individuals interested in evidentiary policy, in a letter dated March 1, 1996, made a number of suggestions. "Forfeiture" should be substituted for "waiver" because the concept of knowing waiver in this context is a fiction. The rule should be rewritten so that it would apply only when the defendant is aware that the victim is likely to be a witness in a proceeding. If the defendant is accused of murdering an individual, and there is no connection to witness tampering, a traditional hearsay exception should be required so as to ensure trustworthy evidence and to discourage persons from manufacturing inculpatory statements from victims in murder cases. Therefore the words "obstruct justice" should be added at line 34 after the words "intended to" and the phrase "in a pending proceeding should be added after the word "witness" at line 36. The phrase "acquiesced in wrongdoing" is too broad a standard; mere knowledge by the party should not suffice. She suggests substituting "engaged in or directed wrongdoing" at lines 33-34, and amending the committee note to indicate that the exception will not apply "unless a plausible possibility existed that had the accused opposed the conduct it would not have occurred." She also endorses substituting the more stringent "clear and convincing" standard and adding an advance notice provision because the proposed rule resembles the residual rules and Rule 404(b) in dealing with evidence whose presentation is not necessarily self-evident.

(4) William J. Genego and Peter Goldberger, Co-Chairs of the National Association of Criminal Defense Lawyers' Committee on Procedure, in a letter dated February 29, 1996, write that "NACDL strongly opposes the addition of proposed subparagraph (b)(6)." "A rule necessarily allowing the admissibility of untrustworthy, immaterial, inferior quality, and unjust evidence as a sanction for supposed misconduct is strong medicine, which should be more carefully formulated." It objects specifically that the terminology

("wrongdoing) is too vague; the preponderance standard of proof too low; that a notice requirement is needed; and that "forfeiture" should be substituted for "waiver." NADCL further objects to "a party who" instead of "a party that" which would more clearly be potentially applicable to the government. NADCL suggests that a more appropriate remedy is to admit evidence of the wrongdoing as tending to show "consciousness of guilt" by the defendant or "consciousness of doubt" by the government, accompanied by an "adverse inference" charge to the jury.

(5) Professor Richard D. Friedman of the University of Michigan Law School, at the public hearing on January 18, 1996, and in his submitted statement voiced a number of concerns. He prefers "forfeiture" to "waiver" and a "clear and convincing" standard. He approves of the rationale behind "acquiescence" but wishes the committee note to state that "knowledge of the conduct, and even satisfaction concerning it, does not suffice unless there was at least a plausible possibility that if the accused had opposed the conduct the person engaged in it would not have done so." He suggested that absence ought not to equal unavailability unless "the prosecution has been unable by reasonable means to secure the attendance or testimony of the declarant." Professor Friedman would apply the rule even when the conduct that rendered a potential witness unable to testify is the same conduct with which the defendant is charged, as in a child abuse case if the defendant's conduct prevented the victim from testifying fully. He would also extend the rule to admit statements by declarants who were intimidated by the defendant before the particular crime with which defendant is now charged.

GAP Report on Rule 804(b)(5). The words "Transferred to Rule 807" were substituted for "Abrogated."

GAP Report on Rule 804(b)(6). The title of the rule was changed to "Forfeiture by wrongdoing." The word "who" in line 33 was changed to "that" to indicate that the rule is potentially applicable against the government. Two sentences were added to the first paragraph of the committee note to clarify that the wrongdoing need not be criminal in nature, and to indicate the rule's potential applicability to the government. The word "forfeiture" was substituted for "waiver" in the note.

Rule 806. Attacking and Supporting Credibility of Declarant

When a hearsay statement, or a statement defined in Rule 801(d)(2)~~;~~ (C), (D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted

calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

COMMITTEE NOTE

The amendment is technical. No substantive change is intended.

Public Comments on Rule 806. No specific comments were received.

GAP Report. Restylization changes in the rule were eliminated.

Rule 807. ~~Other Exceptions~~ Residual Exception**

A statement not specifically covered by ~~any of the foregoing exceptions~~ Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the

** Although Rule 807 is new, it consists of contents of former Rules 803(24) and 804(5). For comparison purposes, the matter underlined and lined through is based on the two former rules.

statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

COMMITTEE NOTE

The contents of Rule 803(24) and Rule 804(b)(5) have been combined and transferred to a new Rule 807. This was done to facilitate additions to Rules 803 and 804. No change in meaning is intended.

Public Comments on Rule 807.

(1) Judge Edward R. Becker of the Third Circuit, in a letter dated January 17, 1996, applauded the combining of the residual exceptions but thought the Committee should also redraft the notice requirement "to unify the circuits and promote more flexibility."

(2) Professor Myrna S. Raeder, on behalf of ten evidence professors and individuals interested in evidentiary policy, in a letter dated March 1, 1996, argues that the residuals are being overused by prosecutors. She urges a tightening of the rule in criminal cases. She notes two additional reasons for revisiting the rule: 1. there is confusion about different standards of trustworthiness for evidentiary and confrontation clause purposes, and whether the evidentiary standard should be the same in civil and criminal cases; 2. the proposed forfeiture exception in Rule 804(b)(6) provides prosecutors with new flexibility when unavailability was caused by the defendant's wrongdoing; consequently the Committee should consider tightening Rule 807 in typical criminal cases.

(3) William J. Genego and Peter Goldberger, Co-Chairs of the National Association of Criminal Defense Lawyers' Committee on Procedure, in a letter dated February 29, 1996, propose a full study of "the excessive invocation of these residual exceptions by the courts." They suggest that the wording should be narrowed to make it less easy to invoke the rule as a vehicle for admitting "near miss" hearsay evidence that does not satisfy traditional hearsay exceptions.

(4) Professor Richard D. Friedman of the University of Michigan Law School, in a statement submitted in connection with his appearance at the January 18, 1996 public hearing, objected that

"to speak of the statement having 'circumstantial guarantees of trustworthiness' that are 'equivalent' to those of the aggregate of exceptions of Rules 803 and 804 is a meaningless standard."

GAP Report on Rule 807. Restylization changes were eliminated.

PROPOSED SELECT NEW RULES OR RULES AMENDMENTS GENERATING SUBSTANTIAL CONTROVERSY

The following summary outlines considerations underlying the recommendations of the advisory committees and the Standing Committee as to certain new rules or controversial rules amendments. A fuller explanation of the committees' considerations was submitted to the Judicial Conference and is forwarded together with this report.

Federal Rules of Civil Procedure

I. Rule 48 (*Court must initially empanel jury of 12*)

A. Brief Description of Changes

The proposed amendments would require the initial empaneling of a jury of twelve persons in all civil cases, in the absence of stipulation by counsel to a lower number. The jury may be reduced to fewer members if some are excused under Rule 47(c). The proposed amendments would not alter the requirement of unanimity, nor require alternate jurors. Under the present rule, the court has the discretion to seat a jury of not less than six and not more than twelve.

B. Arguments in Favor

1. More diverse juries: A twelve-person jury would significantly increase the statistical probability of having a more diverse cross-section of the community and would include more persons from different occupational and economic backgrounds than a smaller jury. In particular, a twelve-person jury would likely include more racial, religious, and ethnic minority representation.

2. Greater recall of facts and arguments.

3. Domination by a single aggressive juror less likely; jury less likely to reach an aberrant decision.

4. Data relied on by the courts in the early 1970's when jury size was originally reduced has been challenged by more recent studies.

C. Objections

1. Change is unnecessary: The present flexibility in the rule, which allows, but does not require, a judge to seat a jury of less than twelve persons, has been working well.

2. Cost: Incurring added costs to pay the expenses of additional venire members and some structural renovation to jury boxes in magistrate judge courtrooms would be unwise, especially in these times of financial restraints.

3. The possibility of an increase in the number of "hung juries."

D. Advisory Committee Consideration

The advisory committee unanimously voted to recommend that the proposed amendments to Rule 48 be submitted for approval. The advisory committee reviewed the considerable body of literature on jury size, particularly empirical studies, which overwhelmingly favored a return to twelve-person juries. (A survey of the relevant articles is contained in an October 12, 1994 memorandum from the advisory committee's chairman. It is set out as *Appendix B* to the Conference materials on rules.)

The advisory committee found that the expected cost increase, although not insignificant — roughly $10 million per year — would be less than 13% of the funds allocated to pay for jurors' expenses and only one-third of one percent of the judiciary's overall $3 billion budget.

Further, the advisory committee concluded that the possibility of a rise in the number of "hung juries" caused by the proposed amendments was not supported by data. The advisory committee recognized that some districts would experience difficulties in securing a larger juror pool. But it concluded that the benefits outweighed the difficulties.

In the end, the advisory committee believed that juries lie at the core of the Article III function and that it is important to regain the strength of twelve-person juries, restoring the longstanding tradition of the court system that had been followed for over 600 years.

E. Standing Committee Consideration

The Standing Committee noted the substantial public comment on the proposed amendments, much of it adverse from the bench, while positive from practitioners, including national bar associations. A committee member expressed concern over the opposition expressed by the Committee on Court Administration and Case Management and a number of judges who commented. The Department of Justice stated its strong view, however, favoring the proposed amendments because the gains — better representation and better verdicts — were worth the additional costs. After carefully discussing and considering the various points of views, the Standing Committee voted 9 to 2 with one abstention to recommend approval of the proposed amendments.

Federal Rules of Evidence

I. Rule 801 (*Statement of coconspirator, person authorized, or agent or servant must be considered*)

A. Brief Description of Changes

The amendments would require a court to consider the contents of a coconspirator's statement in determining "the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered." The amendments also provide that the content of the declarant's statement does not alone suffice to establish a conspiracy in which the declarant and the defendant participated. The amendments treat analogously preliminary questions relating to the declarant's authority and the agency or employment relationship.

B. Advisory Committee Consideration

The proposed amendments would codify the holding by the Supreme Court in Bourjaily v. United States, 483 U.S. 171 (1987), and resolve an issue left open in Bourjaily by providing that the content of the statement is not alone sufficient to establish conspiracy. The advisory committee found that this was in accord with existing practice — the eight courts of appeals that have faced this issue have required some evidence in addition to the contents of the statement. Public comment on the proposed changes was generally favorable, although a number of commentators debated the wisdom of omitting the requirement that *evidence aliunde* must be received to establish the alleged conspiracy.

C. Standing Committee Consideration

The Standing Committee approved the proposed amendments to Rule 801 without objection.

II. Rule 804(b)(6) (*Admissibility not precluded when declarant's unavailability caused by party's wrongdoing*)

A. Brief Description of Changes

The amendments would add a new provision providing that a party forfeits the right to object on hearsay grounds to the admission of a declarant's prior statement when the party's deliberate wrongdoing or acquiescence therein was intended to procure the unavailability of the declarant as a witness. The rule would apply in civil as well as criminal cases and to all parties, including the government. The amendment would apply only to actions taken after the event to prevent a witness from testifying.

B. Advisory Committee Consideration

Every circuit that has resolved the question has recognized the principle of forfeiture by misconduct, although one of those circuits applies the "clear and convincing" standard and the four other circuits apply the "preponderance of the evidence" standard for determining whether there is a forfeiture. The amendment

adopts the preponderance of the evidence standard. There was some discussion regarding the precise meaning of a party's "wrongdoing" and "acquiescence." The advisory committee believed that further refinement of what was intended by the terms would be counterproductive and would lead to risks of being under (or over) inclusive. They concluded that future judicial interpretation of the terms' meanings in individual cases would be more appropriate.

C. Standing Committee Consideration

The Standing Committee approved the proposed amendments to Rule 804 with one member objecting.

July 1, 1996

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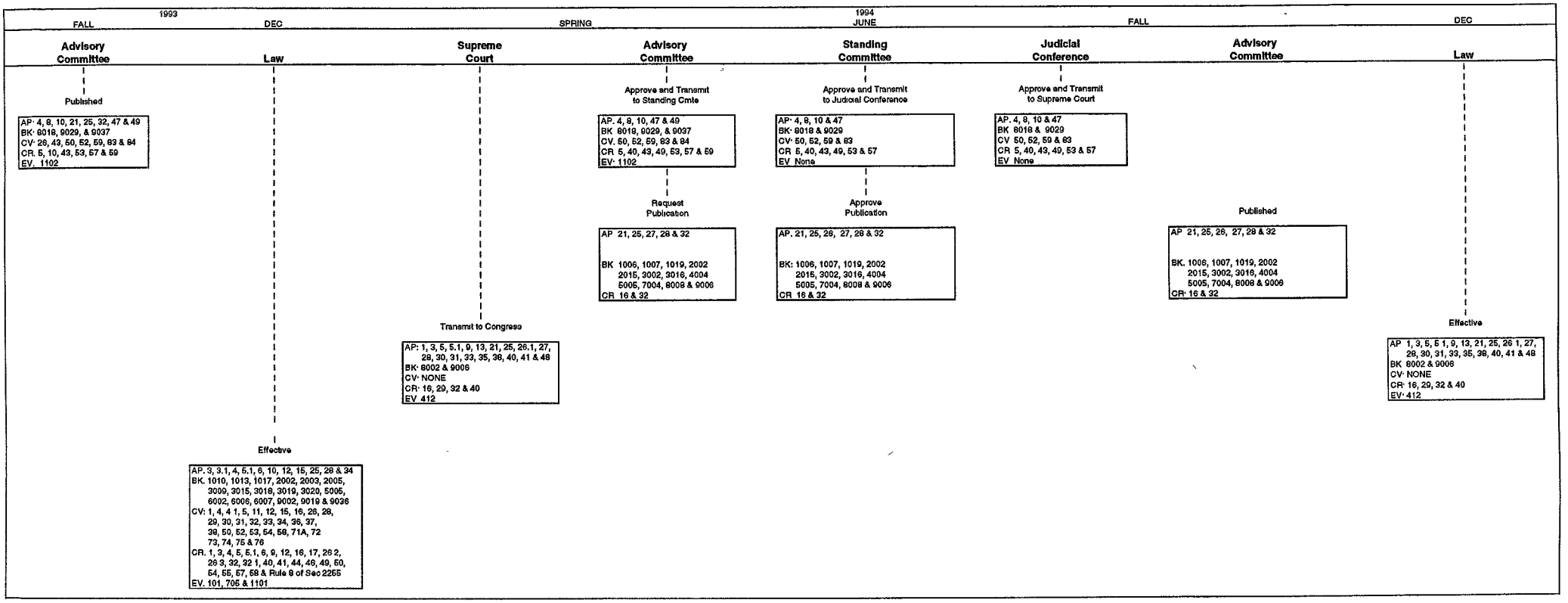

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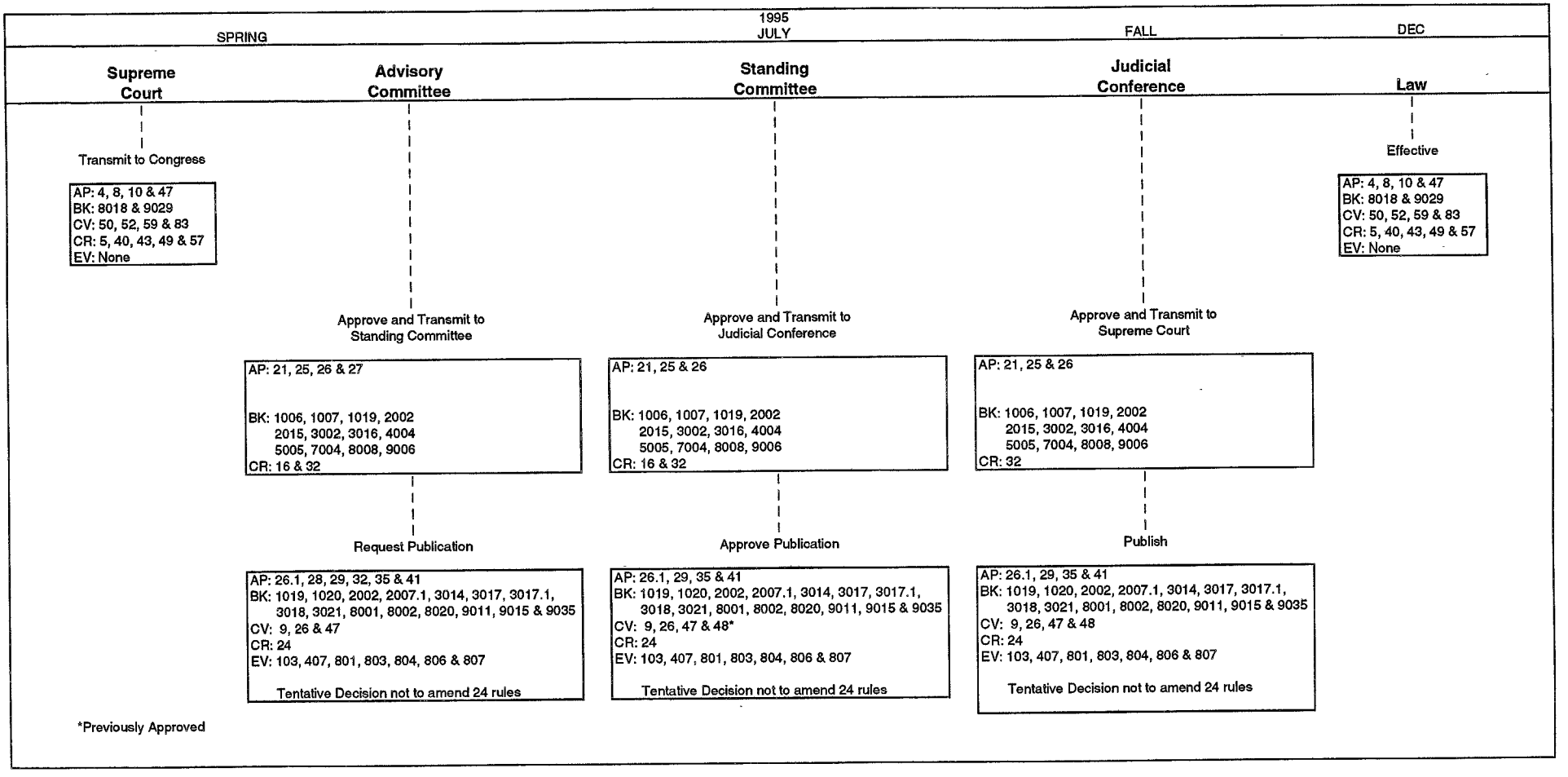

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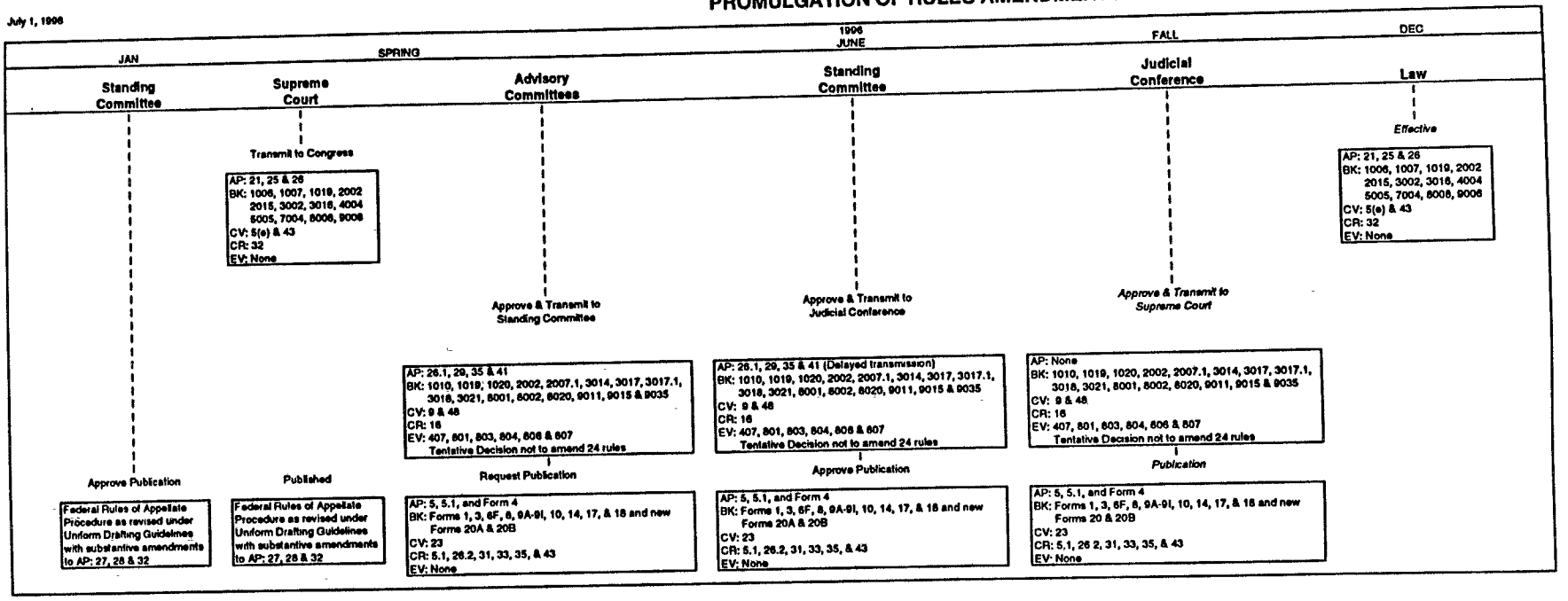

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