

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

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

1. Approve the proposed amendments to Appellate Rules 4, 8, 10, and 47 and transmit them to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.....pp. 2-4
2. Approve the proposed amendments to Bankruptcy Rules 8018 and 9029 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. 5-6
3. Approve proposed amendments to Civil Rules 50, 52, 59, and 83 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. 9-10
4. Approve the proposed amendments to Criminal Rules 5, 40, 43, 46, 49, 53, and 57 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. 11-14

[The proposed amendment to Criminal Rule 46 is withdrawn.]
5. Refer the proposal in the Report on the Federal Defender Program (March 1993) to allocate certain discovery costs between the government and the defense in criminal cases to the Committee on Defender Services for further consideration.....pp. 14-15
6. Continue the existing policy on facsimile filing and take no action to permit facsimile filing on a routine basis.....pp. 18-20

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

<p style="text-align: center;">NOTICE NO RECOMMENDATION PRESENTED HEREIN REPRESENTS THE POLICY OF THE JUDICIAL CONFERENCE UNLESS APPROVED BY THE CONFERENCE ITSELF.</p>
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Agenda F-19
Rules
September 1994

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 23-24, 1994. All members of the Committee attended the meeting, except Chief Justice E. Norman Veasey, who was ill. Ms. Jamie S. Gorelick, Deputy Attorney General, attended part of the meeting, with Messrs. Roger A. Pauley and Robert E. Kopp and Ms. Mary Harkenrider representing the Deputy Attorney General in her absence.

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 Dean 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; Judge Ralph K. Winter, Jr., Chair, and Dean Margaret A. Berger, Reporter, of the Advisory Committee on Evidence Rules.

Participating in the meeting were Peter G. McCabe, the Secretary to the

NOTICE

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Committee; Professor Daniel R. Coquillette, Reporter to the Committee; John K. Rabiej, Chief of the Rules Committee Support Office; Professor Mary P. Squiers, Director of the Local Rules Project; and Bryan A. Garner and Joseph F. Spaniol, consultants to the Committee. Judith A. McKenna of the Federal Judicial Center attended the meeting. Other staff from the Administrative Office and various members of the public also attended the meeting as observers.

I. Amendments to the Federal Rules of Appellate Procedure.

A. **Recommended for Approval and Transmission**

The Advisory Committee on Appellate Rules of Procedure submitted proposed amendments to Appellate Rules 4, 8, 10, 47, and 49 together with Committee Notes explaining their purpose and intent. The proposed amendments were circulated to the bench and bar for comment in October 1993, and a public hearing was held immediately before the committee's meeting in April 1994.

The proposed amendment to Rule 4 (Appeal as of right - When taken) is one of a series of proposed amendments to the Appellate Rules and Bankruptcy Rules that conform the rules to proposed changes to the Civil Rules, which establish a uniform time within which to file certain postjudgment motions. The amendment to Rule 4 would extend the time for filing an appeal until after disposition of a postjudgment motion that is filed no later than 10 days after entry of judgment.

The proposed change to Rule 8 (Stay or injunction pending appeal) amends the cross-reference to Criminal Rule 38 to account for a later reorganization of that rule. The proposed amendments to Rule 10 (The record on appeal) conforms the rule to

recent changes in Appellate Rule 4(a)(4). When a postjudgment motion suspends a previously filed notice of appeal, the 10-day period for ordering a transcript begins to run upon entry of the order disposing of the motion.

The amendments to Rule 47 (Rules by courts of appeal) are part of a package of proposed uniform amendments to the Appellate Rules, Bankruptcy Rules, Civil Rules, and Criminal Rules. The changes would provide that: (a) local rules must be numbered consistent with any uniform numbering system prescribed by the Judicial Conference, and (b) a nonwillful violation of a local rule imposing a requirement of form may not be sanctioned in any way that would cause the party to lose rights. The amendments to the rule would also require that all general directions regarding practice before the court be set out in local rules rather than in internal operating procedures or standing orders.

All the advisory committees were asked by your committee to collaborate on drafting a uniform provision in each set of rules that would authorize the Judicial Conference to make purely technical corrections and conforming amendments to the rules directly, without submitting them to the Supreme Court and the Congress. Serious reservations and concerns were expressed by some of the advisory committees regarding the need and validity of this proposed authority. In light of those concerns, your committee decided not to approve the relevant uniform amendments, including proposed amendments to Rule 49 (Technical amendments).

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

Recommendation: That the Judicial Conference approve proposed amendments to Appellate Rules 4, 8, 10, and 47 and transmit them to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

B. Rules Approved for Publication and Comment

The Advisory Committee also submitted proposed amendments to Appellate Rules 21, 25, 26, 27, 28, and 32 and recommended that they be published for public comment.

Rule 21 (Writs of mandamus and prohibition directed to a judge or judges and other extraordinary writs) would be revised to eliminate the naming of the trial judge in the petition for a writ of mandamus. The trial judge would be allowed to appear to oppose the writ only if the court of appeals ordered the judge to do so. The "mailbox rule" under Rule 25 (Filing and service), which deems the transmission of a brief or appendix timely if mailed to the clerk by first-class mail on or before the last day for filing, would be amended to include delivery of a brief or an appendix to a "reliable commercial carrier."

Rule 26 (Computation and extension of time) would be amended to conform the rule to the proposed amendment to Rule 25 to permit service on a party by a commercial carrier. Rule 27 (Motions) would be entirely rewritten. It would set page limits on motions and responses. Conforming to Supreme Court policy, it would also

require that any legal argument necessary to support a motion be contained in the motion without a separate brief. No oral arguments would be permitted unless ordered by the court.

The proposed amendments to Rule 28 (Briefs) would delete references to length limitations that are included in proposed changes in Rule 32. Proposed amendments to Rule 32 (Form of Briefs, the appendix and other papers) would set length limitations on briefs, which are necessary to accommodate the widespread availability of computer fonts and styles.

Proposed amendments to Rules 21, 25, and 32 had been published for public comment in October 1993. In light of the comments, the committee decided to revise the amendments and publish the proposals anew for public comment.

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

II. Amendments to the Federal Rules of Bankruptcy Procedure.

A. **Recommended for Approval and Transmission**

The Advisory Committee on Bankruptcy Procedure submitted to your committee proposed amendments to Bankruptcy Rules 8018, 9029, and 9037. The proposed amendments were circulated to bench and bar for comment in October 1993. The scheduled public hearing on the amendments was canceled, because no request to appear was received by the committee.

The proposed amendments to Rule 8018 (Rules by Circuit Councils and District Courts) dealing with local rules by circuit councils and district courts conform the rule

to the proposed amendments to Rule 9029 (Local Bankruptcy Rules) dealing with local bankruptcy rules. The proposed amendments to both rules are counterparts to the proposed amendments to the other sets of rules, and would: (a) require that local court rules be numbered in accordance with any uniform numbering system prescribed by the Judicial Conference, (b) provide that a nonwillful violation of a local rule imposing a requirement of form may not be sanctioned in any way that would cause the party to lose rights, and (c) permit the imposition of a sanction for noncompliance with a local court procedure not contained in a local rule only if a party has had actual notice of the requirement.

The proposed amendment to Rule 9037 (Technical Amendments) would have authorized the Judicial Conference to make technical amendments to the rules. Your committee decided not to approve it and its counterparts in the other sets of rules for the reasons previously stated regarding the proposed changes to Appellate Rule 49.

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

RECOMMENDATION: That the Judicial Conference approve the proposed amendments to Bankruptcy Rules 8018 and 9029 and transmit them to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

B. Rules Approved for Publication and Comment

The advisory committee also submitted proposed amendments to Rules 1006, 1007, 1019, 2002, 2015, 3002, 3016, 4004, 5005, 7004, 8008, and 9006, and recommended that they be published for public comment.

The proposed amendments to Rule 1006 (Filing Fee) would include any fee prescribed by the Judicial Conference under the definition of a filing fee, and thus would permit payment in installments of a Conference-set fee, as can be done with other filing fees. Rule 1007 (Lists, Schedules and Statements; Time Limits) would be changed to provide that schedules and statements filed before conversion of a case to another chapter are treated as filed in the converted case.

Rule 1019(7) (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 abrogated to conform the rule to changes proposed in Rule 3002(c)(6) and the addition of Rule 3002(d). The proposed amendments to Rule 2002 (Notices to Creditors, Equity Security Holders, United States, and United States Trustee) would eliminate the need to mail to all parties copies of the summary of the chapter 7 trustee's final account, clarify the need to send notices to certain creditors, and eliminate certain abrogated provisions.

The proposed changes to Rule 2015 (Duty to Keep Records, Make Reports, and Give Notice of Case) would clarify when a debtor in a chapter 12 or 13 case must file an inventory of the debtor's property. Rule 3002(c)(6) (Filing Proof of Claim or Interest) would be abrogated, and a new Rule 3002(d) would be added to provide that

a creditor holding a claim that has been tardily filed may be entitled to receive a distribution in a chapter 7 case.

Rule 3016(a) (Filing of Plan and Disclosure Statement in Chapter 9 Municipality and Chapter 11 Reorganization Cases), which deals with the right to file a competing chapter 11 plan after the approval of a disclosure statement, would be abrogated, because its effect of prohibiting the filing of a competing chapter 11 plan without a court order could be inconsistent with § 1121(d) of the Bankruptcy Code. The proposed amendments to Rule 4004 (Grant or Denial of Discharge) would delay the debtor's discharge in a chapter 7 case if there is a pending motion to extend the time for filing a complaint objecting to the discharge or if the filing fee has not been paid.

Rule 5005 (Filing and Transmittal of Papers) would be amended to authorize local court rules to permit documents to be filed, signed, or verified by electronic means if the means are consistent with technical standards, if any, established by the Judicial Conference. The proposed amendments to Rule 7004 (Process; Service of Summons, Complaint) would conform the rule to the changes made to Civil Rule 4 in 1993.

Rule 8008 (Filing and Service) would be amended to conform the rule to the proposed change of Rule 5005 that authorizes filing by electronic means. Rule 9006 (Time) would be amended to conform the rule to the abrogation of Rule 2002(a)(4) and the renumbering of Rule 2002(a)(8).

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

III. Amendments to the Federal Rules of Civil Procedure.

A. **Rules Recommended for Approval and Transmission**

The Advisory Committee on Civil Rules submitted to your committee proposed amendments to Civil Rules 50, 52, 59, and 83. The proposed amendments were circulated to bench and bar in October 1993, and a public hearing was held immediately before the committee's meeting in April 1994.

The changes to Rules 50, 52, and 59 would establish a uniform period for posttrial motions authorized by those rules. The rules had been inconsistent with respect to whether the different posttrial motions had to be filed, made, or served during the prescribed period. The inconsistent time periods caused problems, particularly when several postjudgment motions were submitted at the same time. These problems affected provisions of the Appellate Rules and the Bankruptcy Rules tied to these Civil Rules.

The proposed amendments set a uniform deadline no later than 10 days after entry of judgment for filing motions under Rule 50 (Judgment as a Matter of Law in Actions Tried by a Jury; Alternative Motion for New Trial; Conditional Rulings), Rule 52 (Findings by the Court; Judgment on Partial Findings), and Rule 59 (New Trials; Amendment of Judgments).

Rule 83 (Rules By District Courts) would be amended as part of a series of changes common to the other sets of rules regarding the uniform numbering of local court rules and orders regulating matters not covered by national or local rules. The amendments would provide that a local rule imposing a requirement of form could not

be enforced in a manner that would cause a party to lose rights because of a nonwillful failure to comply. And no sanction or other disadvantage could be imposed for failure to comply with any procedural requirement not in federal law, federal rules, or local district rules unless actual notice of the requirement had been furnished in the particular case.

At the request of your committee, the advisory committee also published for public comment proposed amendments to Rule 84 dealing with technical amendments. But the advisory committee recommended that authorizing the Judicial Conference to make technical amendments to the rules directly should be more appropriately sought by legislation rather than through the rulemaking process. Your committee decided not to approve any amendment to Rule 84.

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

Recommendation: That the Judicial Conference approve proposed amendments to Civil Rules 50, 52, 59, and 83 and transmit them to the Supreme Court for its consideration with the recommendation that they be adopted by the court and transmitted to Congress in accordance with the law.

B. Rules Approved for Publication and Comment

The Advisory Committees on Bankruptcy Rules and Appellate Rules are recommending proposed amendments to be published for comment that would permit documents to be filed by electronic means so long as they are consistent with technical standards, if any, established by the Judicial Conference. The Advisory Committee on Civil Rules did not consider similar changes to Civil Rule 5(e), but the committee's

chairman agreed to publication of a parallel proposal if approved by mail vote of the advisory committee.

Your committee voted to publish the proposed amendments to Rule 5(e) to the bench and bar for comment, subject to the concurrence of the Advisory Committee on Civil Rules. The advisory committee later approved the publication.

C. Amendment Regarding *Voir Dire* Under Consideration

In light of the recent Supreme Court decision in *J.E.B. v. Alabama*, 114 S.Ct. 1419 (1994), and its predecessor decisions starting with *Batson v. Kentucky*, 476 U.S. 79 (1986), the advisory committee also advised your committee that it intends to consider at its next meeting proposing amendments to Rule 47(a). The amendments might require some active participation of lawyers in *voir dire* to account for the increased reliance on *voir dire* in jury selection as a direct result of *J.E.B.*

IV. Amendments to the Federal Rules of Criminal Procedure.

A. Recommended for Approval and Transmission

The Advisory Committee on Criminal Rules submitted proposed amendments to Criminal Rules 5, 40, 43, 46, 49, 53, 57, and 59. The proposed amendments were circulated to bench and bar for comment in October 1993, with the exceptions of the proposed technical amendments to Rules 46 and 49. A public hearing was held immediately before the committee's meeting in April 1994.

The proposed amendments to Rule 5 (Initial Appearance Before the Magistrate Judge) would exempt the government from promptly presenting a defendant charged only under 18 U.S.C. § 1073 (Unlawful Flight to Avoid Prosecution) to a magistrate

judge where the United States had no intention of prosecuting the defendant for that offense, but only assisting State authorities in apprehending the State offender. Under the amendments, the fugitive must be transferred without unnecessary delay to State officials, and the complaint alleging a violation of § 1073 must be dismissed.

Rule 40 (Commitment to Another District) would be amended to cross-reference the proposed changes in Rule 5. The proposed amendments to Rule 43 (Presence of the Defendant) would clarify the court's authority to sentence a defendant - who is absent voluntarily at the imposition of sentence, e.g., a fugitive - *in absentia* after jeopardy has attached, including after entry of a guilty or *nolo contendere* plea.

The proposed change to Rule 46(i) (Release from Custody) would correct an inadvertent cross-reference in the rule. Rule 49(e) (Service and Filing of Papers) would be repealed as unnecessary, because the statutory provisions referred to in the provision regarding filing notice of dangerous offender status have been abrogated. The proposed amendments to Rules 46 and 49 are entirely technical or conforming in nature and publishing them for public comment was unnecessary.

The proposed amendments to Rule 53 (Regulation of Conduct in the Court Room) would retain the prohibition against broadcasting of criminal cases, but would permit it if the Judicial Conference authorizes televised coverage under whatever guidelines it determines to be appropriate. The change would not require the courts to permit such coverage in criminal cases. It would provide courts with the same discretion to permit televising criminal case proceedings as they have with regard to civil case proceedings. Judicial Conference guidelines to permit broadcasting of civil

case proceedings are now under active consideration by the Committee on Court Administration and Case Management.

Your committee considered at length the proposed amendments to Rule 53. Several members voiced strong reservations or objections to the amendments. And they criticized the need and justification for the changes, disputing the favorable conclusions drawn from survey findings in various pilot projects, which monitored televised coverage in civil cases. Other members were persuaded that televised coverage would not interfere or adversely affect the conduct of criminal proceedings. Many State courts have permitted broadcasting of criminal case proceedings with no untoward problems. In addition, the vote of the Advisory Committee on Criminal Rules was nearly unanimous (only one member opposed the proposal) in approving the proposed amendments.

On a 7 to 6 vote, your committee decided to send forward the proposed amendments to Rule 53. At your committee's request, the chairman of the advisory committee agreed to revise the Committee Note and eliminate the discussion of the benefits of televised courtroom coverage. The amendment's primary purpose -- to provide the Judicial Conference with equal authority to permit and regulate televised coverage in civil and criminal trials -- would be highlighted.

Your Committee noted the advisory committee's desire to be actively involved in the drafting of appropriate guidelines. The Committee on Court Administration and Case Management (CACM) is responsible for monitoring the pilot projects dealing with televised broadcasting of judicial proceedings. Your committee will consult with CACM

(Rev. 09-07-94)

and advise them of the advisory committee's willingness to participate in the drafting of the guidelines.

Rule 57 (Rules by District Courts) would be amended to reflect similar changes proposed to the other sets of rules dealing with uniform numbering of local court rules and restrictions on the imposition of sanctions for noncompliance with local court procedures.

The proposed amendments to Rule 59 (Effective Date; Technical Amendments), which would authorize the Judicial Conference to make technical amendments to the rules, were not approved along with proposed amendments to the other sets of rules on the same subject.

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

RECOMMENDATION: That the Judicial Conference approve the proposed amendments to Criminal Rules 5, 40, 43, 46, 49, 53, and 57 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 amendment to Criminal Rule 46 is withdrawn.]

B. Recommended Referral on Federal Defender Program

The *Report of the Judicial Conference of the United States on the Federal Defender Program* (March 1993) recommended that:

The proposal to require the prosecution to provide copies of discoverable materials to the defense and allocate the costs of duplication should be referred to the standing Committee on Rules of Practice and Procedure, for consideration in accordance with the Rules Enabling Act.

The Advisory Committee on Criminal Rules considered the proposal. It noted that the government now often provides the defense with access to photocopying machines for purposes of discovery. In any event, the advisory committee concluded that a requirement to allocate discovery costs among the parties is a subject more appropriately handled by statutory authorization. Your committee concurs with its advisory committee's conclusion.

RECOMMENDATION: That the Judicial Conference refer the proposal in the Report on the Federal Defender Program to allocate certain discovery costs between the government and the defense in criminal cases to the Committee on Defender Services for further consideration.

C. Rules Approved for Publication and Comment

The Advisory Committee recommended publication of proposed amendments to Rules 16 and 32 for public comment.

The proposed amendments to Rule 16 (Discovery and Inspection) would provide limited disclosure by the prosecution of the names and statements of witnesses at least seven days before trial. Under the proposed amendments, the government may refuse to disclose the information if it believes in good faith that pretrial disclosure of this information would threaten the safety of a person or risk the obstruction of justice. In such a case, the government simply would file a *nonreviewable, ex parte* statement with the court stating why it believes - under the facts of the particular case - that a safety threat or risk of obstruction of justice exists. The amendment also would provide reciprocal discovery by the defense.

The Department of Justice traditionally has opposed any liberalization in the rules on the disclosure of this information prior to trial. It noted that many

prosecutors already follow open file disclosure, but acknowledged that some prosecutors follow a more restrictive disclosure policy. The Department indicated that it has been working internally to reach a more liberal disclosure policy. And it strongly recommended that it should be given more time to resolve the matter by policy directive, rather than by mandatory rules.

At the request of the Department of Justice, your committee delayed publishing the proposed amendments to the rule at its January 1994 meeting to allow the Department to reach a resolution internally. Your committee was also concerned with possible Jencks Act inconsistencies with the draft amendments. The advisory committee had already delayed consideration of the proposal to publish the amendments at its April 1993 meeting to provide the newly appointed Attorney General with an opportunity to study it.

Your committee considered the Department's renewed request for additional delay in seeking an in-house resolution of the discovery issue. It also addressed the Jencks Act issue and noted that other amendments to the Criminal Rules, which mandated pretrial disclosure of information by the defendant - presumably also inconsistent with the Jencks Act - were adopted without objections and put into effect. After considerable discussion, your committee concluded that additional delay in publishing the proposed amendments was unwarranted and determined that publication of the proposed amendments would be useful in eliciting comment from the bench and bar on the Jencks Act issue and on the overall merits of the proposal. The advisory committee chair accepted the recommendation of your committee to revise the

Note to the amendments to highlight the Jencks Act issue before publishing it for public comment.

The proposed amendment to Rule 32 (Sentence and Judgment) would explicitly permit the trial court, in its discretion, to conduct forfeiture proceedings after the return of a verdict, but before sentencing.

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

V. Amendments to the Federal Rules of Evidence.

A. **No Rules Recommended for Approval and Transmission**

The Advisory Committee on Evidence Rules submitted to your committee proposed amendments to Evidence Rule 412 and 1102.

The proposed amendments to Rule 412 (Sex Offense Cases; Relevance of Victim's Past Behavior) would reinstate the provisions approved by the Judicial Conference in September 1993, but withheld by the Supreme Court and not transmitted to Congress in April 1994. The provisions were returned to the advisory committee for further consideration in light of concerns expressed by some members of the Court. The same provisions are now included in legislation pending in Congress and would extend the privacy protection under the rule to alleged victims in civil case proceedings. In light of the likelihood of Congressional passage of the provision, your committee with the concurrence of the advisory committee's chairman decided to defer taking action on the proposed amendments until its next meeting to await the outcome of the pending legislation.

The proposed amendments to Rule 1102 (Amendments), which would allow the Judicial Conference to make technical amendments to the rules, were not approved by your committee. The same proposed amendments were not approved in the other sets of rules.

B. Informational Statement Approved for Publication and Comment

Since its inception in 1992, the advisory committee has been engaged in a comprehensive review of all the Evidence Rules, and it has now completed an initial assessment of a substantial number of the rules. Although some rules initially caused interpretational problems, the committee concluded that amendments to clarify meanings that have become settled would ultimately be counterproductive. A new round of interpretations would begin with regard to the new language. Accordingly, the advisory committee has decided at this time not to amend a number of rules. The advisory committee is concerned, however, that it is not receiving sufficient input from the public and bar, and believes that comments on its work would be helpful. Accordingly, it recommended that public comment be requested on its tentative decision not to amend Evidence Rules 101, 102, 105, 106, 201, 301, 302, 401, 402, 403, 404, 409, 601, 602, 603, 604, 607, 608, 609, 610, 611, 612, 613, 614, and 615.

Your committee voted to circulate to the bench and bar for comment a list of the rules that the advisory committee decided not to amend.

VI. Facsimile Filing Standards.

At its September 1993 session, the Judicial Conference referred to the Committee on Rules of Practice and Procedure, in coordination with the Committees on Automation and Technology and Court Administration and Case Management, for a report to the September 1994 Conference,

the question of whether, and under what technical guidelines, filing by facsimile on a routine basis should be permitted.

At the request of your committee in March 1993, the Committee on Court Administration and Case Management (CACM) withdrew its proposed guidelines from the consideration of the Judicial Conference that would have permitted filing by facsimile on a routine basis. Your committee and its advisory committees devoted substantial time in reviewing the guidelines. In cooperation with CACM, the guidelines were revised consistent with procedures under the Rules Enabling Act.

In January 1994 your committee reevaluated the various problems associated with the revised standards allowing facsimile filing on a routine basis and found that: (a) the standards would impose great burdens on clerks' offices; (b) the technical equipment requirements under the standards would not be honored by those members of the bar who have obsolete equipment; and (c) the standards might create a trap for members of the bar who rely on last minute filings, but who are frustrated because others are using the same transmission lines.

Your committee agreed, nonetheless, that facsimile filing should be permitted on a non-routine and locally approved basis to reflect actual practices in the courts. The current policy of the Judicial Conference permits filing by facsimile in emergencies. To facilitate this alternative, your committee revised the guidelines and transmitted a more restricted set of revised standards on facsimile filing in exceptional cases to CACM and the Committee on Automation and Technology (CAT) for their consideration and comment. At the June 1994 meeting, we considered the responses of CACM and CAT. We believe that all three committees are now in agreement that

facsimile filing on a routine basis should not be approved and that promulgating standards to allow facsimile filing in exceptional cases would be unnecessary.

RECOMMENDATION: That the Judicial Conference continue the existing policy on facsimile filing and take no action to permit facsimile filing on a routine basis.

VII. Informational Items.

A. **Self-Study Evaluation**

As part of its long-range planning, your committee authorized a self-study soliciting comments from the public to evaluate the federal rulemaking process. Your committee is now studying the comments.

One of the issues under consideration is the appropriate composition of the rules committees. Your committee is aware of the bill (S. 2212) introduced by Senator Heflin that would require a majority of members of each of the rules committees to be members of the practicing bar. The committee advised Senator Heflin of its current reach-out efforts being undertaken, including enlarged and revised mailing lists, to elicit more bar participation in the rulemaking process.

B. **Ninth Circuit Local Rule on Capital Cases**

On March 11, 1994, five attorneys general from States within the Ninth Circuit requested the Judicial Conference to exercise its authority under 28 U.S.C. § 331 to modify or abrogate the local rules of their circuit regarding capital cases. The request was referred to the Advisory Committee on Appellate Rules on March 29 for its April 25-26 meeting.

In accordance with the 1988 amendments to the Rules Enabling Act, the Judicial Conference is obligated to review local rules promulgated by the courts of appeals. Under the amendments, the Conference "may modify or abrogate any such rule so reviewed found inconsistent (with federal law) in the course of such review." The amendments parallel amendments that authorize the respective judicial councils to modify or abrogate local rules promulgated by district courts that are found inconsistent with federal law. Until the instant matter, the rules committees have never been presented with a request to modify or abrogate a local rule of a court of appeals.

The request of the attorneys general challenged several specific provisions contained in Local Rule 22, which was adopted by the Ninth Circuit on February 14, 1994. The advisory committee provided the Ninth Circuit with an opportunity to respond. It considered at length the detailed request submitted by the attorneys general and the response from the Ninth Circuit. Before addressing the merits of the request, the advisory committee established several threshold standards as a framework for formulating recommendations to resolve the instant questions regarding the disputed Ninth Circuit rule and future challenges of local court of appeals' rules.

The advisory committee identified several provisions in the Ninth Circuit rule whose consistency with federal law, including the Federal Rules of Appellate Procedure, appeared questionable. Some of the votes on individual provisions in the rule were closely divided. The advisory committee ultimately voted to report that no provision should be abrogated or modified, but two members noted that their votes not

to abrogate were based on their judgment that the submitted materials were inadequate to reach the merits of the provisions.

Your committee considered the advisory committee's report and a subsequent letter from the attorneys general offering to present additional material to support their request. The ensuing committee discussion addressed the purposes and intent of Congress' delegation of authority to the Judicial Conference to monitor local rules, the precedent setting nature of the request, the complexity and uniqueness associated with death penalty cases, the practical problems with voting procedures in a large circuit, the response of the Ninth Circuit on the merits of the request, the availability of an option of handling the issue through litigation, and other matters.

Your committee concluded that additional information was necessary before it could make a recommendation. Accordingly, it asked the chair to prepare a letter accepting the offer of additional information from the attorneys general and inviting additional comment from the Ninth Circuit for timely consideration of the matter at its next meeting in January.

C. Report to the Chief Justice on Proposed Amendments Generating Substantial Controversy

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

D. Chart Showing Status of Proposed Amendments

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

Respectfully Submitted,



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

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

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

Agenda F-19
(Appendix A)
Rules
September 1994

ROBERT E. KEETON
CHAIRMAN

PETER G. McCABE
SECRETARY

CHAIRMEN OF ADVISORY COMMITTEES

KENNETH F. RIPPLE
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SAM C. POINTER, JR.
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WILLIAM TERRELL HODGES
CRIMINAL RULES

EDWARD LEAVY
BANKRUPTCY RULES

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

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

DATE: May 27, 1994

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

I. Action Items

- A. Proposed amendments to Federal Rules of Appellate Procedure 4(a)(4), 8, 10, 47, and 49,* approved by the Advisory Committee on Appellate Rules at its April 25 and 26 meeting. The Advisory Committee requests that the Standing Committee approve these amended rules and forward them to the Judicial Conference.

The proposed amendments were published in November 1993. A public hearing was scheduled for March 14, 1994 in Denver, Colorado, but was rescheduled for April 25. None of the testimony dealt with any of the rules that the Advisory Committee requests be sent to the Judicial Conference. The Advisory Committee has reviewed the written comments and, in some instances, altered the proposed amendments in light of the comments.

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

* * * * *

*The Standing Committee did not approve the proposed amendment to Rule 49 for submission to the Judicial Conference.

Advisory Committee on Appellate Rules
Part I. A (1), Summary - Rules for Judicial Conference

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

1. An amendment to Rule 4(a)(4) is proposed. The amendment is intended to clarify the procedure for a party who wants to obtain review of an alteration or amendment of a judgment upon disposition of a posttrial motion. The party may file a notice of appeal, or, if the party filed a notice of appeal prior to disposition of the motion, the party may amend the previously filed notice. Under changes to Rule 4(a)(4) that became effective on December 1, 1993, a previously filed notice of appeal ripens into an operative notice of appeal upon disposition of the posttrial motion but only as to the judgment or order specified in the original notice of appeal. Appeal from the disposition of the motion requires either amendment of the previously filed notice or the filing of a notice of appeal.

In addition Rule 4(a)(4) is amended to conform to amendments to Fed. R. Civ. P. 50, 52, and 59. Civil Rules 50, 52, and 59 were previously inconsistent with respect to whether postjudgment motions must be filed or merely served no later than 10 days after entry of judgment. As a consequence Rule 4(a)(4) said that such motions must be "made" or "served" within the 10-day period in order to extend the time for filing a notice of appeal. Civil Rules 50, 52, and 59, are being amended to require "filing" no later than 10 days after entry of judgment. Consequently, Rule 4(a)(4) is being amended to require "filing" of a postjudgment motion within the same period in order to extend the time for filing a notice of appeal.

2. A technical amendment to Rule 8(c) is proposed. The amendment conforms subdivision (c) to previous amendments to Fed. R. Crim. P. 38.

Subdivision 8(c) currently provides that a stay in a criminal case shall be had in accordance with the provisions of Rule 38(a). When Rule 8(c) was adopted, Criminal Rule 38(a) established procedures for obtaining a stay of execution when the sentence in question was death, imprisonment, a fine, or probation. Criminal Rule 38 was later amended and it now treats each of those topics in a separate subdivision. The proper cross-reference is to all of Criminal Rule 38, so the reference to subdivision (a) is deleted.

3. An amendment to Rule 10(b)(1) is proposed to conform that paragraph to the amendments to Rule 4(a)(4). The purpose of this amendment is to

Advisory Committee on Appellate Rules
Part I. A (1), Summary - Rules for Judicial Conference

suspend the 10-day period for ordering a transcript if a timely postjudgment motion is made and a notice of appeal is suspended under Rule 4(a)(4).

4. Amendments to Rule 47 are proposed. These amendments, and the proposed Rule 49, are the result of collaborative efforts by the chairs and reporters of the various advisory committees. The amendments to Rule 47 require that local rules be consistent not only with the national rules but also with Acts of Congress and that local rules be numbered according to a uniform numbering system. The amendments further require that all general directions regarding practice before the court be in local rules rather than internal operating procedures or standing orders. The amendments also state that a nonwillful violation of a local rule imposing a requirement of form may not be sanctioned in any way that will cause the party to lose rights. The amendments further allow a court to regulate practice in a particular case in a variety of ways so long as any such orders are consistent with federal law.

* * * * *

**GAP REPORT
CHANGES MADE AFTER PUBLICATION**

1. There were no comments on the proposed amendment of Rule 4(a)(4), and no changes have been made.
2. There were no comments on the proposed amendment of Rule 8, and no changes have been made.
3. There was one comment on the proposed amendment of Rule 10, but it resulted in no change in the proposed amendment.

The purpose of the amendment is to suspend the 10-day period for ordering a transcript if a timely postjudgment motion is made that suspends a filed notice of appeal under Rule 4(a)(4). The commentator suggested that counsel be required to notify the court reporter when there is no need to proceed with preparation of the transcript because the appeal is suspended or dismissed pending disposition of the postjudgment motion. The Advisory Committee did not add such a requirement, believing that the party bearing the cost of production of the transcript will inform the court reporter.

4. There were three comments on the proposed amendment of Rule 47 and the Advisory Committee recommends several changes in Rule 47. The changes on pages 11 and 12 are indicated by the shading.
 - a. At its February meeting, the Advisory Committee on Bankruptcy Rules recommended a change in that part of the rule dealing with sanctions for violation of a local rule imposing a requirement of form. The published rule said that no sanction that would cause a party to lose rights should be imposed for a "negligent" failure to comply with such a local rule. The Bankruptcy Committee recommended that "negligent" be changed to "nonwillful." The Advisory Committee on Appellate Rules recommends an identical change found at line 23 of the amended rule.
 - b. Two of the commentators expressed concern about that in some circuits "internal operating procedures" (I.O.P.'s) are used like local rules and directly affect a party's dealings with the court.

Advisory Committee on Appellate Rules
Part I. A (3) - GAP Report

Because directions concerning practice and procedure should be in local rules and not I.O.P.'s, the Advisory Committee recommends the addition of a sentence to 47(a)(1), requiring that generally applicable directions regarding practice before a court must be in a local rule rather than an I.O.P. or standing order. The new sentence is at lines 5-8.

The civil, bankruptcy, and criminal versions of this rule do not contain a parallel sentence. During prior discussions, the other committees were apparently satisfied that the language of subdivision (b) provides a strong incentive for a court to use local rules whenever possible rather than internal operating procedures or standing orders. Subdivision (b) states that "no sanction or other disadvantage may be imposed" for noncompliance with a requirement that is not contained in the federal rules or local rules unless the violator has "actual notice of the requirement."

The issue is different in courts of appeals than in district courts because a court of appeals judge does not sit solo in a courtroom. Indeed, the panel of three is constantly reconstituted and, for that reason, practice is uniform within a circuit. Standing orders are not a problem in the courts of appeals. It is far more likely in a court of appeals that all general directives could be placed in local rules. The inappropriate use of internal operating procedures rather than local rules is a problem. A practitioner who examines the local rules, but not the internal operating procedures, may be caught unaware of a practice requirement buried in the internal operating procedures. Furthermore, the procedures for promulgation of local rules is not applicable to the development of internal operating procedures.

The Advisory Committee believes that the situation in the courts of appeals is sufficiently dissimilar to that in the district courts to justify different treatment in the rule.

- c. The Advisory Committee also recommends changing subdivision (b), if the new sentence discussed above is approved.

As published, subdivision (b) authorizes general regulation of practice by means other than rules. The published rule does not limit such regulation to entry of an order in a particular case. The

Advisory Committee on Appellate Rules
Part I. A (3) - GAP Report

published rule states that a court may not sanction failure to comply with a non-rule requirement "unless the alleged violator has been furnished in the particular case with actual notice of the requirement." That limitation applies to regulation by standing order or some other similar means.

If, as recommended by the Advisory Committee, a sentence is added to rule (a) requiring that all general directions regarding practice must be in rules, there is no need for the sanctions limitation in (b). The only type of non-rule regulation permitted would be by order in a particular case, in which instance there is actual notice. So, the Advisory Committee recommends deletion of the sanctions limitation and amendment of the first sentence, lines 24 through 26, to make it clear that it is referring to orders in individual cases.

- d. The Committee Notes have been altered to conform to the changes recommended above. The altered portion of the comments are shaded for easy identification. In addition to the conforming changes, the Advisory Committee voted to add a new sentence to the Notes. The sentence states, "It is the intent of this rule that a local rule may not bar any practice that these rules explicitly or implicitly permit." It may be found at lines 3 through 5 of the Committee Note.
5. The only comment on Rule 49 was that the delegation of authority to the Judicial Conference to make technical amendments might be better made by amending the Rules Enabling Act. The Advisory Committee has made no changes in the proposed Rule 49.

* * * * *

SUMMARY
COMMENTS RECEIVED ON PROPOSED AMENDMENTS

1. There were no comments on the proposed amendment of **Fed. R. App. P. 4(a)(4)**.
2. There were no comments on the proposed amendment of **Fed. R. App. P. 8**.
3. There was one comment on the proposed amendment of **Fed. R. App. P. 10**. The purpose of the amendment is to suspend the 10-day period for ordering a transcript if a timely postjudgment motion is made that suspends a filed notice of appeal under Rule 4(a)(4).

The commentator suggests that counsel should be required to notify the court reporter when there is no need to proceed with preparation of the transcript because the appeal is suspended or dismissed pending disposition of the postjudgment motion.

4. Three comments were submitted that discuss the proposed amendments of **Fed. R. App. P. 47**.

One commentator expressed approval of all of the amendments to Rule 47. Another commentator approved the proposed amendments but stated that they were not strong enough to preclude conflicting local rules or to prevent divergent local practices. That commentator suggested strengthening Rule 47. The third commentator was concerned about the fact that internal operating procedures operate like local rules in some circuits and that Rule 47 did not subject I.O.P's to the same constraints as local rules and standing orders. That commentator also pointed out that subdivision (a) requires consistency with Acts of Congress and the national rules, but subdivision (b) requires consistency with federal law. He asked whether the language should be consistent.

* * * * *

LIST OF COMMENTATORS
SUMMARY OF THEIR INDIVIDUAL COMMENTS

1. Rule 4(a)(4)
none

2. Rule 8
none

3. Rule 10
There was one commentator

Honorable J. Clifford Wallace
Chief Judge, United States Court of Appeals
United States Courthouse
San Diego, California 92101-8918

Chief Judge Wallace suggests that counsel be required to notify the court reporter when there is no need to proceed with preparation of the transcript if the appeal is suspended or dismissed pending disposition of the postjudgment motion.

4. Rule 47
There were three commentators

a. Philip A. Lacovara, Esquire
Mayer, Brown & Platt
2000 Pennsylvania Avenue, N.W.
Washington, D.C. 20006-1882

Mr. Lacovara has three comments:

- i. He notes that paragraph (a)(1) requires that circuit "rules" and "local rules" must conform to federal law. The third sentence of the paragraph requires the clerk of a court of appeals to send the Administrative Office a copy not only of each "local rule" but also of each "internal operating procedure." Mr. Lacovara suggests that the rule should require that internal operating procedures, as well as local rules, be consistent with federal law.
- ii. Because in some circuits "internal operating procedures" directly affect the parties' dealings with the court, paragraph (a)(2) and

Advisory Committee on Appellate Rules
Part I. A (4), Public Comments

- subdivision (b) (both of which deal with enforcement of local practice requirements) should assure that the provisions requiring notice and the limitation on sanctions for negligent non-compliance should apply to violations of internal operating procedures.
- iii. Shouldn't the same language be used in paragraph (a)(1), requiring that local rules be consistent with "Acts of Congress," and subdivision (b), requiring that local regulation of practice be consistent with "federal law"?
 - b. National Association of Criminal Defense Lawyers
1627 K Street
Washington, D.C. 20006

The National Association of Criminal Defense Lawyers expressed general approval of the proposed amendments to Rule 47.

- c. American Bar Association
Section of Litigation
750 North Lake Shore Drive
Chicago, Illinois 606011

The ABA Section of Litigation states that the amendments to Rule 47 represent a step in the right direction, but the Section believes that a stronger proclamation is needed to ensure the consistency of local rules (and internal operating procedures) with the federal rules and to control supplementation of the federal rules with divergent local requirements. Specifically, the Section recommends:

- i. Rule 47 should preclude conflicting local rules. Local rules that are more burdensome than the national rules should not be permitted unless expressly authorized by the national rule. Local rules that simplify or streamline procedure, however, should be permitted, provided that compliance with the FRAP satisfies the party's obligation to the court.
- ii. Each circuit should be permitted to amend its local rules only once a year absent exigent circumstances.
- iii. Each circuit should have a rules officer to whom questions concerning local rules are referred for an authoritative answer.

* * * * *

FEDERAL RULES OF APPELLATE PROCEDURE *

Rule 4. Appeal as of Right - When Taken

1 (a) *Appeal in a Civil Case.*

2 * * * * *

3 (4) If any party ~~makes~~ files a timely
4 motion of a type ~~specified~~ immediately below, the time
5 for appeal for all parties runs from the entry of the
6 order disposing of the last such motion outstanding.

7 This provision applies to a timely motion under the
8 Federal Rules of Civil Procedure:

9 (A) for judgment under Rule 50(b);

10 (B) to amend or make additional findings of fact
11 under Rule 52(b), whether or not granting the motion
12 would alter the judgment;

13 (C) to alter or amend the judgment under Rule
14 59;

15 (D) for attorney's fees under Rule 54 if a district
16 court under Rule 58 extends the time for appeal;

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

2 **FEDERAL RULES OF APPELLATE PROCEDURE**

17 (E) for a new trial under Rule 59; or

18 (F) for relief under Rule 60 if the motion is
19 served ~~filed within~~ no later than 10 days after the entry
20 of judgment.

21 A notice of appeal filed after announcement or
22 entry of the judgment but before disposition of any of
23 the above motions is ineffective to appeal from the
24 judgment or order, or part thereof, specified in the
25 notice of appeal, until the ~~date of the~~ entry of the order
26 disposing of the last such motion outstanding. Appellate
27 review of an order disposing of any of the above motions
28 requires the party, in compliance with Appellate Rule
29 3(c), to amend a previously filed notice of appeal. A
30 party intending to challenge an alteration or amendment
31 of the judgment shall must file ~~an~~ a notice, or amended
32 notice, of appeal within the time prescribed by this Rule
33 4 measured from the entry of the order disposing of the

- 34 last such motion outstanding. No additional fees will be
35 required for filing an amended notice.

* * * * *

Committee Note

Subdivision (a). Fed. R. Civ. P. 50, 52, and 59 were previously inconsistent with respect to whether certain postjudgment motions had to be filed or merely served no later than 10 days after entry of judgment. As a consequence Rule 4(a)(4) spoke of making or serving such motions rather than filing them. Civil Rules 50, 52, and 59, are being revised to require filing before the end of the 10-day period. As a consequence, this rule is being amended to provide that "filing" must occur within the 10 day period in order to affect the finality of the judgment and extend the period for filing a notice of appeal.

The Civil Rules require the filing of postjudgment motions "no later than 10 days after entry of judgment" -- rather than "within" 10 days -- to include postjudgment motions that are filed before actual entry of the judgment by the clerk. This rule is amended, therefore, to use the same terminology.

The rule is further amended to clarify the fact that a party who wants to obtain review of an alteration or amendment of a judgment must file a notice of appeal or amend a previously filed notice to indicate intent to appeal from the altered judgment.

Rule 8. Stay or Injunction Pending Appeal

* * * * *

1 (c) *Stays in a Criminal Cases*.-- *Stays A stay in a*
2 criminal cases shall be had in accordance with the
3 provisions of Rule 38(a) of the Federal Rules of
4 Criminal Procedure.

Committee Note

Subdivision (c). The amendment conforms subdivision (c) to previous amendments to Fed. R. Crim P. 38. This amendment strikes the reference to subdivision (a) of Fed. R. Crim. P. 38 so that Fed. R. App. P. 8(c) refers instead to all of Criminal Rule 38. When Rule 8(c) was adopted Fed. R. Crim. P. 38(a) included the procedures for obtaining a stay of execution when the sentence in question was death, imprisonment, a fine, or probation. Criminal Rule 38 was later amended and now addresses those topics in separate subdivisions. Subdivision 38(a) now addresses only stays of death sentences. The proper cross reference is to all of Criminal Rule 38.

Rule 10. The Record on Appeal

1 (a) *Composition of the Record on Appeal.*-- The
2 record on appeal consists of the The original papers and
3 exhibits filed in the district court, the transcript of
4 proceedings, if any, and a certified copy of the docket
5 entries prepared by the clerk of the district court, ~~shall~~
6 ~~constitute the record on appeal in all cases.~~

7 (b) *The Transcript of Proceedings; Duty of*
8 *Appellant to Order; Notice to Appellee if Partial Transcript*
9 *is Ordered.*

10 (1) Within 10 days after filing the notice of
11 appeal or entry of an order disposing of the last timely
12 motion outstanding of a type specified in Rule 4(a)(4),
13 whichever is later, the appellant shall must order from
14 the reporter a transcript of such parts of the proceedings
15 not already on file as the appellant deems necessary,
16 subject to local rules of the courts of appeals. The order

6 FEDERAL RULES OF APPELLATE PROCEDURE

17 shall must be in writing and within the same period a
18 copy shall must be filed with the clerk of the district
19 court. If funding is to come from the United States
20 under the Criminal Justice Act, the order shall must so
21 state. If no such parts of the proceedings are to be
22 ordered, within the same period the appellant shall must
23 file a certificate to that effect.

* * * * *

Committee Note

Subdivision (b)(1). The amendment conforms this rule to amendments made in Rule 4(a)(4) in 1993. The amendments to Rule 4(a)(4) provide that certain postjudgment motions have the effect of suspending a filed notice of appeal until the disposition of the last of such motions. The purpose of this amendment is to suspend the 10-day period for ordering a transcript if a timely postjudgment motion is made and a notice of appeal is suspended under Rule 4(a)(4). The 10-day period set forth in the first sentence of this rule begins to run when the order disposing of the last of such postjudgment motions outstanding is entered.

Rule 47. Rules by of a Courts of Appeals

- 1 (a) Local Rules.
- 2 (1) ~~Each court of appeals by action of~~
- 3 acting by a majority of ~~the circuit~~
- 4 its judges in regular active service
- 5 may, after giving appropriate public
- 6 notice and opportunity for
- 7 comment, from time to time make
- 8 and amend rules governing its
- 9 practice. A generally applicable
- 10 direction to a party or a lawyer
- 11 regarding practice before a court
- 12 must be in a local rule rather than
- 13 an internal operating procedure or
- 14 standing order. A local rule must
- 15 be not inconsistent with -- but not
- 16 duplicative of -- Acts of Congress

17 and these rules adopted under 28
18 U.S.C. § 2072 and must conform to
19 any uniform numbering system
20 prescribed by the Judicial
21 Conference of the United States.
22 The clerk of each court of appeals
23 must send the Administrative
24 Office of the United States Courts
25 a copy of each local rule and
26 internal operating procedure when
27 it is promulgated or amended. ~~In~~
28 ~~all cases not provided for by rule,~~
29 ~~the courts of appeals may regulate~~
30 ~~their practice in any manner not~~
31 ~~inconsistent with these rules.~~
32 ~~Copies of all rules made by a court~~
33 ~~of appeals shall upon their~~

34 ~~promulgation be furnished to the~~
35 ~~Administrative Office of the~~
36 ~~United States Courts.~~

37 (2) A local rule imposing a
38 requirement of form must not be
39 enforced in a manner that causes a
40 party to lose rights because of a
41 nonwillful failure to comply with
42 the requirement.

43 (b) Procedure When There Is No Controlling
44 Law. -- A court of appeals may regulate
45 practice in a particular case in any manner
46 consistent with federal law, these rules,
47 and local rules of the circuit. No sanction
48 or other disadvantage may be imposed for
49 noncompliance with any requirement not
50 in federal law, federal rules, or the local

51 circuit rules unless the alleged violator has
52 been furnished in the particular case with
53 actual notice of the requirement.

Committee Note

Subdivision (a). This rule is amended to require that a generally applicable direction regarding practice before a court of appeals must be in a local rule rather than an internal operating procedure or some other general directive. It is the intent of this rule that a local rule may not bar any practice that these rules explicitly or implicitly permit. Subdivision (b) allows a court of appeals to regulate practice in an individual case by entry of an order in the case. The amendment also reflects the requirement that local rules be consistent not only with the national rules but also with Acts of Congress. The amendment also states that local rules should not repeat national rules and Acts of Congress.

The amendment also requires that the numbering of local rules conform with any uniform numbering system that may be prescribed by the Judicial Conference. Lack of uniform numbering might create unnecessary traps for counsel and litigants. A uniform numbering system would make it easier for an increasingly national bar and for litigants to locate a local rule that applies to a particular procedural issue.

Paragraph (2) is new. Its aim is to protect against loss of rights in the enforcement of local rules relating to matters of

form. The proscription of paragraph (2) is narrowly drawn -- covering only violations that are not willful and only those involving local rules directed to matters of form. It does not limit the court's power to impose substantive penalties upon a party if it or its attorney stubbornly or repeatedly violates a local rule, even one involving merely a matter of form. Nor does it affect the court's power to enforce local rules that involve more than mere matters of form.

Subdivision (b). This rule provides flexibility to the court in regulating practice in a particular case when there is no controlling law. Specifically, it permits the court to regulate practice in any manner consistent with Acts of Congress, with rules adopted under 28 U.S.C. § 2072, and with the circuit's local rules.

The amendment to this rule disapproves imposing any sanction or other disadvantage on a person for noncompliance with such a directive, unless the alleged violator has been furnished in a particular case with actual notice of the requirement. There should be no adverse consequence to a party or attorney for violating special requirements relating to practice before a particular court unless the party or attorney has actual notice of those requirements.

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

Agenda F-19
(Appendix B)
Rules
September 1994

ALICEMARIE H. STOTLER
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

JAMES K. LOGAN
APPELLATE RULES

PAUL MANNES
BANKRUPTCY RULES

PATRICK E. HIGGINBOTHAM
CIVIL RULES

D. LOWELL JENSEN
CRIMINAL RULES

RALPH K. WINTER, JR.
EVIDENCE RULES

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

FROM: Honorable Paul Mannes, Chair
Advisory Committee on Bankruptcy Rules

SUBJECT: Report of the Advisory Committee on Bankruptcy Rules

DATE: May 16, 1994

The report of the Advisory Committee on Bankruptcy Rules includes the following items:

I. Action Items

A. Proposed amendments to Rules 8018, 9029, and 9037,* which conform to the uniform provisions dealing with local rules, standing orders, and technical amendments, are presented to the Standing Committee for its consideration. A preliminary draft of these proposed amendments was published for comment in October 1993. These proposed amendments are discussed in my separate memorandum to you dated May 12, 1994, which is enclosed immediately following this memorandum. A draft of the proposed amendments and a summary of the comments received from the bench and bar are attached to my May 12th memorandum.

B. The Advisory Committee requests permission to publish for comment by the bench and bar a preliminary draft of proposed amendments to Bankruptcy Rules 1006, 1007, 1019, 2002, 2015, 3002, 3016, 4004, 5005, 7004, 8008, and 9006. These proposed amendments are summarized in, and attached to, my enclosed letter dated May 14, 1994.

* * * * *

*The Standing Committee did not approve the proposed amendment to Rule 9037 for submission to the Judicial Conference.

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

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D. LOWELL JENSEN
CRIMINAL RULES

RALPH K. WINTER, JR.
EVIDENCE RULES

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

FROM: Honorable Paul Mannes, Chair
Advisory Committee on Bankruptcy Rules

SUBJECT: Proposed Amendments to Bankruptcy Rules 8018,
9029, and 9037

DATE: May 12, 1994

On behalf of the Advisory Committee on Bankruptcy Rules, it is my honor to transmit proposed amendments to Bankruptcy Rules 8018, 9029, and 9037 for consideration by the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States.

These proposed amendments are unusual in their origin. Whereas original recommendations for proposed amendments usually derive from the advisory committee and are presented to the Standing Committee for its approval, the original suggestions for proposed amendments governing local rules, procedure when there is no controlling law, and technical amendments originated from the Standing Committee with a view toward uniformity among the four bodies of federal procedural rules -- Appellate, Bankruptcy, Civil, and Criminal. As a result of the coordinated efforts of the reporter to the standing committee and the reporters to the advisory committees, the language of the proposed amendments on these subjects is substantially the same in all four bodies of federal rules.

The Advisory Committee on Bankruptcy Rules favors the proposed amendments to Rules 8018 and 9029 relating to local rules and procedure when there is no controlling law, and recommends that they be adopted with one change discussed below. At the Standing Committee meeting in June 1993, however, the Advisory Committee on Bankruptcy Rules expressed its opposition

to the proposed new Rule 9037 on technical amendments. The other advisory committees and the Standing Committee did not share that opposition at that time and, pursuant to the Standing Committee's request, the Advisory Committee on Bankruptcy Rules prepared for publication the preliminary draft of Rule 9037.

The preliminary draft of the proposed amendments to Bankruptcy Rules 8018, 9029, and 9037 was published for comment by the bench and bar in October 1993. Comments were received from seven respondents. A summary of these comments is enclosed. A public hearing was scheduled to be held in Washington, D.C. on March 25, 1994, but was canceled because of the lack of witnesses requesting to testify. Based on the comments received, it does not appear that the proposed amendments are the subject of substantial controversy among the bench and bar.

At its meeting on February 24-25, 1994, the Advisory Committee again reviewed the preliminary draft of these proposed amendments and voted to recommend one change in the published language. The Advisory Committee voted unanimously to change the word "negligent" to "nonwillful" in the proposed amendments to Rules 8018(a)(2) and 9029(a)(2), and in the related committee notes, dealing with local rules imposing requirements of form. In particular, the Advisory Committee recommends that the published language of Rules 8018(a)(2) and 9027(a)(2) be changed as follows:

"A local rule imposing a requirement of form must not be enforced in a manner that causes a party to lose rights because of a ~~negligent~~ nonwillful failure to comply with the requirement."

If this change is made, the following sentence in the committee note also should be changed.

"The proscription of paragraph (2) is narrowly drawn -- covering only violations ~~attributable to negligence~~ that are not willful and only those involving local rules directed to matters of form."

The Advisory Committee believes that a finding of negligence should not have to be made for a violation to be protected by this rule. Other nonwillful violations also should be protected, such as when the failure to follow a local rule relating to form is due to reasons beyond the lawyer's control, or in other situations in which the lawyer's conduct does not rise to the level of negligence.

* * * * *

**SUMMARY OF COMMENTS ON THE PROPOSED AMENDMENTS
TO BANKRUPTCY RULES 8018, 9029, AND 9037**

The Advisory Committee on Bankruptcy Rules received seven comments from the bench and bar in response to the publication of the preliminary draft of proposed amendments to Bankruptcy Rules 8018, 9029, and 9037. Listed below are the names and addresses of the commentators and a summary of each comment.

- (1) Edith Broida, Esq.
P.O. Box 5941
Washington, D.C. 20016
(March 30, 1994)

Ms. Broida disagrees with Rule 9029(b) in that it permits a judge to regulate practice before him or her. "All judges need to be instructed in judicial management and have the rules set for them." She also criticizes a particular local rule in the Southern District of Florida that permits a bankruptcy judge to hear a motion to dismiss an appeal from an order of the bankruptcy court based on the appellant's failure to comply with procedures for designating the issues. Ms. Broida also comments on several other issues that are not related to Bankruptcy Rules 8018, 9029, or 9037.

- (2) Honorable Samuel L. Bufford
United States Bankruptcy Court
Central District of California
Roybal Building
255 East Temple Street, Suite 1580
Los Angeles, CA 90012
(December 2, 1993)

Judge Bufford agrees with the comments contained in the letter of Judge Lisa Hill Fenning (see below), except that he believes that "local" local rules (standing orders) should be actively discouraged. Judge Bufford discusses the experience in the Central District of California where procedures of some 20 bankruptcy judges have been coordinated, resulting in publicized local rules rather than judge-specific standing orders.

Judge Bufford also comments that the numbering of local rules to correspond to the national Bankruptcy Rules "would introduce a needless difficulty for lawyers in finding the appropriate local rule." In the Central District, local rules have been numbered to correspond to the local district court rules. "A renumbering of the bankruptcy rules to correspond to the Federal Rules of Bankruptcy Procedure will make it more difficult for a non-specialist to find the appropriate local rule." He then recommends two ways to ameliorate this difficulty. First, the Bankruptcy Rules should be re-numbered to correspond to the Federal Rules of Civil Procedure and, second, district courts should be required to number their local rules to correspond to the Fed.R.Civ.P. Then "the entire federal practice

could be synchronized to make it easy for non-specialists to find the appropriate rule."

- (3) Robert F. Connor, Clerk
United States Bankruptcy Court
Western District of Missouri
United States Courthouse - Room 201
811 Grand Avenue
Kansas City, Missouri 64106
(Comments contained in a memorandum to
Mark Van Allsburg and Ellen A. Johanson
dated April 13, 1994)

Mr. Connor indicates that the local rules in the Western District of Missouri were recently revised to employ a numbering system consistent with the numbering system of the national Bankruptcy Rules. He thinks that conforming local rule numbers to the national rules is "achievable and could be made more palatable by allowing an extended period of time to reach that goal." However, Mr. Connor warns that "there may be more to the proposed rules than meets the eye and any proposed system adopted in the future may be more of a hinderance than a help. Most local practitioners are familiar with the rules and the practice in their respective districts. In trying to satisfy the needs of a relatively small body of practitioners with multidistrict practice the new rules have the greater potential of causing confusion among the larger body of local attorneys who would have to adjust to a new numbering system and a new style of operating practice."

He also explained the current practice in that court with respect to requirements of form. "It is the practice of this court to first advise parties of their offense by means of a deficiency notice and/or orders to correct or show cause before imposing any sanction or disadvantage on that party." This would seem to satisfy the notice requirement of proposed Rules 8018(a)(2) and 9029(a)(2).

- (4) Grace H. Dupree, Esq.
Office of the Clerk
United States Bankruptcy Court
Eastern District of Kentucky
P.O. Box 1111
Lexington, Kentucky 40588-1111
(April 19, 1994)

Ms. Dupree agrees that local rules should not duplicate national rules or legislation. She also comments that the proposed new Rule 9037 (Technical Amendments) seems to be practical and efficient. Finally, she agrees that a uniform numbering system for local rules should be adopted and suggests that the numbering system used in the Eastern District of

Kentucky, which is tied to the national Bankruptcy Rules, be used.

- (5) Honorable Lisa Hill Fenning
United States Bankruptcy court
Central District of California
Roybal Building
255 East Temple Street, Suite 1682
Los Angeles, CA 90012
(November 24, 1993)

Judge Fenning supports the goal of developing a uniform numbering system for local rules, and says that her court is awaiting guidance from the Advisory Committee as to how to renumber their rules. However, Judge Fenning urges the Advisory Committee to first consider whether the present numbering system for the national Bankruptcy Rules is "logical and consistent." She believes that the national rules have evolved in a sequence that perhaps no longer reflects a useful structure or order. Once any necessary renumbering of the national rules is completed, then local rules could be numbered to correlate with the national rules.

Judge Fenning also comments that proposed Rule 9029(b) appears to sanction the practice of "local" local rules (standing orders), which she opposes. She believes that judges should strive to reach consensus for uniform procedures to be included in local rules, rather than having numerous judge-specific orders. She supports the principle that a litigant should not be punished for noncompliance with a standing order if there is no notice of the requirement. Judge Fenning also comments that standing orders could interfere with the functioning of the clerk's office by imposing additional demands upon the clerk's staff to enforce special requirements of particular judges. She recommends that Rule 9029(b) be amended further to provide that "any regulations adopted by an individual judge must not interfere with the functioning of the clerk's office."

- (6) Honorable Henry L. Hess, Jr.
United States Bankruptcy Court
District of Oregon
1001 S.W. Fifth Avenue, #900
Portland, Oregon 97204
(January 5, 1994)

Judge Hess proposes that the Bankruptcy Rules expressly require that "local rules must conform to the numbering system of the Bankruptcy Rules." The local rules in the District of Oregon already conform to the national Bankruptcy Rules. "What better way to provide uniformity than to require local rules to use the same numbering system as the national rules?"

(7) John L.A. Lyddane, Esq.
Martin, Clearwater & Bell
220 East 42nd Street
New York, NY 10017-5842
(December 2, 1994)

Mr. Lyddane writes: "I agree that these amendments are essentially non-controversial and see no reason why they should not be implemented."

**PROPOSED AMENDMENTS TO THE
FEDERAL RULES OF BANKRUPTCY PROCEDURE***

**Rule 8018. Rules by Circuit Councils and
District Courts; Procedure When There is
No Controlling Law**

1 (a) Local Rules by Circuit
2 Councils and District Courts.

3 (1) Circuit councils which have
4 authorized bankruptcy appellate panels
5 pursuant to 28 U.S.C. § 158(b) and the
6 district courts may, ~~by action of acting~~
7 by a majority of the judges of the
8 council or district court, ~~make and~~
9 amend rules governing practice and
10 procedure for appeals from orders or
11 judgments of bankruptcy judges to the
12 respective bankruptcy appellate panel or
13 district court, ~~not inconsistent~~
14 consistent with -- but not duplicative
15 of -- Acts of Congress and the rules of

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

2 RULES OF BANKRUPTCY PROCEDURE

16 this Part VIII. Local rules must
17 conform to any uniform numbering system
18 prescribed by the Judicial Conference of
19 the United States. Rule 83
20 F.R.Civ.P. governs the procedure for
21 making and amending rules to govern
22 appeals.

23 (2) A local rule imposing a
24 requirement of form must not be enforced
25 in a manner that causes a party to lose
26 rights because of a nonwillful failure
27 to comply with the requirement. ~~In all~~
28 ~~eases not provided for by rule, the~~
29 ~~district court or the bankruptcy~~
30 ~~appellate panel may regulate its~~
31 ~~practice in any manner not inconsistent~~
32 ~~with these rules.~~

33 (b) Procedure When There is No
34 Controlling Law. A bankruptcy appellate
35 panel or district judge may regulate

RULES OF BANKRUPTCY PROCEDURE 3

36 practice in any manner consistent with
37 federal law, these rules, Official
38 Forms, and local rules of the circuit
39 council or district court. No sanction
40 or other disadvantage may be imposed for
41 noncompliance with any requirement not
42 in federal law, federal rules, Official
43 Forms, or the local rules of the circuit
44 council or district court unless the
45 alleged violator has been furnished in
46 the particular case with actual notice
47 of the requirement.

COMMITTEE NOTE

The amendments to this rule conform to the amendments to Rule 9029. See Committee Note to the amendments to Rule 9029.

**Rule 9029. Local Bankruptcy Rules;
Procedure When There is No Controlling
Law**

1. (a) Local Bankruptcy Rules.

4 RULES OF BANKRUPTCY PROCEDURE

2 (1) Each district court ~~by action~~
3 ~~of acting by~~ a majority of ~~the~~ its
4 district judges ~~thereof~~ may make and
5 amend rules governing practice and
6 procedure in all cases and proceedings
7 within the district court's bankruptcy
8 jurisdiction which are ~~not inconsistent~~
9 consistent with -- but not duplicative
10 of -- Acts of Congress and these rules
11 and which do not prohibit or limit the
12 use of the Official Forms. Rule 83
13 F.R.Civ.P. governs the procedure for
14 making local rules. A district court
15 may authorize the bankruptcy judges of
16 the district, subject to any limitation
17 or condition it may prescribe and the
18 requirements of 83 F.R.Civ.P., to make
19 and amend rules of practice and
20 procedure which are ~~not inconsistent~~
21 consistent with -- but not duplicative

22 of -- Acts of Congress and these rules
23 and which do not prohibit or limit the
24 use of the Official Forms. Local rules
25 must conform to any uniform numbering
26 system prescribed by the Judicial
27 Conference of the United States.

28 (2) A local rule imposing a
29 requirement of form must not be enforced
30 in a manner that causes a party to lose
31 rights because of a nonwillful failure
32 to comply with the requirement. In all
33 cases not provided for by rule, the
34 court may regulate its practice in any
35 manner not inconsistent with the
36 Official Forms or with these rules or
37 those of the district in which the court
38 acts.

39 (b) Procedure When There is No
40 Controlling Law. A judge may regulate
41 practice in any manner consistent with

6 RULES OF BANKRUPTCY PROCEDURE

42 federal law, these rules, Official
43 Forms, and local rules of the district.
44 No sanction or other disadvantage may be
45 imposed for noncompliance with any
46 requirement not in federal law, federal
47 rules, Official Forms, or the local
48 rules of the district unless the alleged
49 violator has been furnished in the
50 particular case with actual notice of
51 the requirement.

COMMITTEE NOTE

Subdivision (a). This rule is amended to reflect the requirement that local rules be consistent not only with applicable national rules but also with Acts of Congress. The amendment also states that local rules should not repeat applicable national rules and Acts of Congress.

The amendment also requires that the numbering of local rules conform with any uniform numbering system that may be prescribed by the Judicial Conference. Lack of uniform numbering might create unnecessary traps for counsel and litigants. A uniform

numbering system would make it easier for an increasingly national bar and for litigants to locate a local rule that applies to a particular procedural issue.

Paragraph (2) of subdivision (a) is new. Its aim is to protect against loss of rights in the enforcement of local rules relating to matters of form. For example, a party should not be deprived of a right to a jury trial because its attorney, unaware of -- or forgetting-- a local rule directing that jury demands be noted in the caption of the case, includes a jury demand only in the body of the pleading. The proscription of paragraph (2) is narrowly drawn -- covering only violations that are not willful and only those involving local rules directed to matters of form. It does not limit the court's power to impose substantive penalties upon a party if it or its attorney stubbornly or repeatedly violates a local rule, even one involving merely a matter of form. Nor does it affect the court's power to enforce local rules that involve more than mere matters of form -- for example, a local rule requiring that a party demand a jury trial within a specified time period to avoid waiver of the right to a trial by jury.

Subdivision (b). This rule provides flexibility to the court in regulating practice when there is no controlling law. Specifically, it permits the court to regulate practice in any manner consistent with federal

8 RULES OF BANKRUPTCY PROCEDURE

law, with rules adopted under 28 U.S.C. § 2075, with Official Forms, and with the district's local rules.

This rule recognizes that courts rely on multiple directives to control practice. Some courts regulate practice through the published Federal Rules and the local rules of the court. Some courts also have used internal operating procedures, standing orders, and other internal directives. Although such directives continue to be authorized, they can lead to problems. Counsel or litigants may be unaware of various directives. In addition, the sheer volume of directives may impose an unreasonable barrier. For example, it may be difficult to obtain copies of the directives. Finally, counsel or litigants may be unfairly sanctioned for failing to comply with a directive. For these reasons, the amendment to this rule disapproves imposing any sanction or other disadvantage on a person for noncompliance with such an internal directive, unless the alleged violator has been furnished in a particular case with actual notice of the requirement.

There should be no adverse consequence to a party or attorney for violating special requirements relating to practice before a particular judge unless the party or attorney has actual notice of those requirements. Furnishing litigants with a copy outlining the judge's practices -- or attaching instructions to a notice setting a case for conference or trial

RULES OF BANKRUPTCY PROCEDURE 9

-- would suffice to give actual notice, as would an order in a case specifically adopting by reference a judge's standing order and indicating how copies can be obtained.

Report to Standing Rules Committee
Advisory Committee on Civil Rules

May 25, 1994

Introduction

The draft minutes of the April 1994 meeting of the Civil Rules Advisory Committee are attached. The draft was prepared by the Committee Reporter, Edward H. Cooper, and reviewed by me. These minutes supply a detailed account of the matters summarized in this Report.

Action Items

Proposed Amendments Submitted for Approval To Transmit
to the Judicial Conference

Summary of Amendments

The Committee recommends transmission to the Judicial Conference of proposed amendments to Civil Rules 50, 52, 59, and 83. The proposals were published for comment on October 15, 1993. Each of these amendments parallels amendments being proposed by other advisory committees. The Committee does not recommend transmission to the Judicial Conference of proposed amendments to Rules 26(c), 43(a), and 84 that were published at the same time. Rule 84 is discussed in this section; Rules 26(c) and 43(a) are discussed in the next section.

The amendments to Rules 50, 52, and 59 establish a uniform period for the post-trial motions authorized by those rules. A post-trial motion under any of these rules must be filed no later than ten days after entry of the judgment. Until now, these rules have variously required that within the ten-day period the motion be served and filed, or be "made," or be served. Stylistic changes also have been made to conform to the new style conventions.

The discussion of Rules 50, 52, and 59 is set out at pages 8 to 9 of the draft minutes.

The amendments to Rule 83 deal with local rules and with orders regulating matters not covered by national or local rules. In keeping with the language of 28 U.S.C. § 2071, the requirement of conformity with national statutes and rules would be expressed by requiring that they "be consistent," in place of the present "be not inconsistent." Local rules would be required to conform to any uniform numbering system prescribed by the Judicial Conference of the United States. A local rule imposing a requirement of form could not be enforced in a manner that would cause a party to lose

rights because of a nonwillful failure to comply. And no sanction or other disadvantage could be imposed for failure to comply with any procedural requirement not in federal law, federal rules, or local district rules unless actual notice of the requirement has been furnished in the particular case. Style changes also would be made.

The discussion of Rule 83 is set out at page 9 of the draft minutes.

The amendments to Rule 84 are described here, although the Committee recommends that they not be transmitted to the Judicial Conference. Instead, the Committee recommends that the Judicial Conference be asked to support legislation that would embody the principles of these amendments. These amendments would authorize the Judicial Conference to add to, revise, or delete the forms that illustrate the operation of the rules. The Judicial Conference also would be authorized to amend the rules to correct errors in spelling, cross-references, or typography, or to make technical changes needed to conform the rules to statutory changes. Modest style changes also would be made. On reexamination, the Committee believes that these proposals would violate the procedure established by the Rules Enabling Act, 28 U.S.C. § 2072. The underlying principle, however, is sound. Legislation should be proposed authorizing the Judicial Conference to make the described changes through the Standing Committee and advisory committees structure.

The discussion of proposed Rule 84 is set out at pages 9 to 10 of the draft minutes.

Text of Amendments

GAP Report

Few changes were made in response to public comments.

The Note to Rule 59 was changed at the request of the Bankruptcy Rules Advisory Committee by adding a new sentence that refers to the difference between the Bankruptcy Rules and the Civil Rules in calculating the period actually covered by a nominal ten-day time limit.

The text of Rule 83(a)(2) was changed — again at the request of the Bankruptcy Rules Advisory Committee — by substituting "nonwillful" failure to comply for "negligent" failure. The Bankruptcy Committee was concerned that limiting the rule to negligent failures to comply with local rule requirements of form might permit sanctions for entirely innocent failures, such as those caused by circumstances beyond the lawyer's control. A parallel change was made in the Committee Note.

Summary of Comments

Rules 50, 52, and 59. There were few comments on the Rule 50, 52, and 59 proposals. One lengthy comment was premised on the erroneous belief that Rule 6(a) now permits a motion under any of these rules to be "filed" by mailing within ten days, without regard to the time of actual delivery to the court. (The requirement of delivery to the court to establish filing is illustrated by *Cavaliere v. Allstate Ins. Co.*, 11th Cir.1993, 996 F.2d 1111.) Another comment addressed the failure to clarify the question whether Rule 50(b) requires renewal of a motion for judgment as a matter of law "where the court simply fails to rule on the motion made at the close of the evidence rather than denies it." This part of Rule 50(b) was extensively amended in 1991, and the Committee decided not to revisit the issue for the present.

Rule 83. The Federal Magistrate Judges Association opposed the Rule 83 proposal. They urged that there is no compelling reason to establish national uniformity in local rule numbers, that the Rule 83(a)(2) restriction on enforcing local rules is vague, and that the Rule 83(b) requirement of actual notice would forbid enforcement of widely accepted norms that are not codified in any form of order. Another comment was that while all of the proposed changes are desirable, still greater efforts should be made to control the variable, confusing, and often unwise requirements adopted by local rules and standing orders. Perhaps the authority of the Judicial Councils of the Circuits under 28 U.S.C. §§ 332(d)(4) and 2071 should be clarified, or perhaps some other system of effective review should be established.

* * * * *

Patrick E. Higginbotham
Chair, Advisory Committee on Civil Rules
May 26, 1994

MINUTES

ADVISORY COMMITTEE ON CIVIL RULES

APRIL 28 AND 29, 1994

* * * * *

Rules 50, 52, and 59

Discussion of the proposed amendments to Rules 50, 52, and 59 focused in part on the history of the proposal. Each rule now sets 10 days as the period for these post-trial motions, but the period is allowed variously to "serve" the motion, to "file and serve" the motion, or to "make" the motion. The Bankruptcy Rules Committee suggested that the rules be changed so that each allows 10 days from entry of judgment to file the motion. This suggestion drew from the desire to further integrate bankruptcy practice with practice under the Civil Rules. A parallel change has been proposed for Appellate Rule 4. Filing was chosen as the requirement because ordinarily it is an objective phenomenon that can be easily verified at the clerk's office. Some concern was expressed with the difficulty of accomplishing timely filing by lawyers located in remote areas.

It was urged on behalf of the Bankruptcy Rules Committee that the Note to Rule 59 should be revised by adding the information that Bankruptcy Rule 9006(a) treats "intervening Saturdays, Sundays, and legal holidays" differently than Civil Rule 6(a). This request was adopted.

A motion to send Rules 50, 52, and 59 to the Standing Committee for approval, with the addition to the Rule 59 note, was adopted.

Rule 83

The Bankruptcy Rules Committee recommended that the proposed Rule 83(a)(2) reference to "negligent" failure to comply with a local rule requirement of form be changed to "nonwillful." The change reflects the prospect that read literally, the proposal would not reach an unavoidable failure to comply. The Committee accepted this recommendation without dissent.

The discussion of proposed Rule 83(b) focused on the question whether it might be possible to do something more effective to restrict or eliminate standing orders. Several Committee members thought it would be desirable to reduce drastically the use of standing orders. It was noted, however, that past efforts to reduce even the use of local rules have proved difficult; efforts to reduce the use of individual judge standing orders seem all the more likely to prove difficult.

A motion to send Rule 83 to the Standing Committee for approval was adopted.

* * * * *

Respectfully submitted,

Edward H. Cooper, Reporter

**PROPOSED AMENDMENTS TO
RULES OF CIVIL PROCEDURE***

**Rule 50. Judgment as a Matter of Law in ~~Actions Tried by~~
Jury Trials; Alternative Motion for New Trial;
Conditional Rulings**

1

* * * * *

2

(b) ~~Renewal of~~Renewing Motion for Judgment

3

After Trial; Alternative Motion for New Trial.

4

~~Whenever~~If, for any reason, the court does not grant a

5

motion for a judgment as a matter of law made at the

6

close of all the evidence ~~is denied or for any reason is~~

7

~~not granted~~, the court is ~~deemed~~considered to have

8

submitted the action to the jury subject to a ~~later~~

9

~~determination of~~the court's later deciding the legal

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questions raised by the motion. ~~Such a motion may be~~

11

~~renewed by service and~~The movant may renew its

12

request for judgment as a matter of law by filing a

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

2

Rules of Civil Procedure

13 motion not later than 10 days after entry of judgment.

14 A — and may alternatively request a new trial or join a

15 motion for a new trial under Rule 59 may be joined with

16 a renewal of the motion for judgment as a matter of law,

17 or a new trial may be requested in the alternative. If a

18 verdict was returned, In ruling on a renewed motion, the

19 court may, in disposing of the renewed motion, :

20 (1) if a verdict was returned:

21 (A) allow the judgment to stand, or

22 may reopen the judgment and either

23 (B) order a new trial, or

24 (C) direct the entry of judgment as a

25 matter of law; or

26 (2) if no verdict was returned, the court

27 may, in disposing of the renewed motion, :

28 (A) order a new trial, or

29 (B) direct the entry of judgment as a

30 matter of law ~~or may order a new trial.~~

31 (c) ~~Same: Conditional Rulings on Grant of~~
32 Granting Renewed Motion for Judgment as a Matter of
33 Law; Conditional Rulings; New Trial Motion.

34 * * * * *

35 (2) ~~The Any motion for a new trial under~~
36 Rule 59 by a party against whom judgment as a
37 matter of law has been is rendered may serve must
38 be filed a motion for a new trial pursuant to Rule
39 59 not later than 10 days after entry of the
40 judgment.

41 * * * * *

COMMITTEE NOTE

The only change, other than stylistic, intended by this revision is to prescribe a uniform explicit time for filing of post-judgment motions under this rule — no later than 10 days after entry of the judgment. Previously, there was an inconsistency in the wording of Rules 50, 52, and 59 with respect to whether certain post-judgment motions had to be filed, or merely

served, during that period. This inconsistency caused special problems when motions for a new trial were joined with other post-judgment motions. These motions affect the finality of the judgment, a matter often of importance to third persons as well as the parties and the court. The Committee believes that each of these rules should be revised to require filing before end of the 10-day period. Filing is an event that can be determined with certainty from court records. The phrase "no later than" is used — rather than "within" — to include post-judgment motions that sometimes are filed before actual entry of the judgment by the clerk. It should be noted that under Rule 6(a) Saturdays, Sundays, and legal holidays are excluded in measuring the 10-day period, and that under Rule 5 the motions when filed are to contain a certificate of service on other parties.

Rule 52. Findings by the Court; Judgment on Partial Findings

1

* * * * *

2 (b) Amendment. ~~Upon~~On a party's motion of a
3 ~~party made~~filed not later than 10 days after entry of
4 judgment, the court may amend its findings — or make
5 additional findings — and may amend the judgment
6 accordingly. The motion may ~~be made with~~accompany
7 a motion for a new trial ~~pursuant to~~under Rule 59.
8 When findings of fact are made in actions tried by the

9 ~~court without a jury, the question of the sufficiency of~~
10 ~~the evidence to support~~ supporting the findings may
11 ~~thereafter be later questioned~~ raised whether or not in
12 the district court the party raising the question ~~has made~~
13 ~~in the district court an objection to such~~ objected to the
14 ~~findings, moved~~ or has made a motion to amend them
15 ~~or a motion for judgment, or moved for partial findings.~~

16

* * * * *

COMMITTEE NOTE

The only change, other than stylistic, intended by this revision is to require that any motion to amend or add findings after a nonjury trial must be filed no later than 10 days after entry of the judgment. Previously, there was an inconsistency in the wording of Rules 50, 52, and 59 with respect to whether certain post-judgment motions had to be filed, or merely served, during that period. This inconsistency caused special problems when motions for a new trial were joined with other post-judgment motions. These motions affect the finality of the judgment, a matter often of importance to third persons as well as the parties and the court. The Committee believes that each of these rules should be revised to require filing before end of the 10-day period. Filing is an event that can be determined with certainty from court records. The phrase "no later than"

is used — rather than "within" — to include post-judgment motions that sometimes are filed before actual entry of the judgment by the clerk. It should be noted that under Rule 6(a) Saturdays, Sundays, and legal holidays are excluded in measuring the 10-day period, and that under Rule 5 the motions when filed are to contain a certificate of service on other parties.

Rule 59. New Trials; Amendment of Judgments

1

* * * * *

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(b) **Time for Motion.** Any motion for a new trial ~~shall~~must be served ~~filed~~ not later than 10 days after ~~the~~ entry of the judgment.

3

4

5

(c) **Time for Serving Affidavits.** When a motion for new trial is based upon affidavits, they ~~shall~~ must be served ~~filed~~ with the motion. The opposing party has 10 days after ~~such~~ service ~~within which to serve~~ file opposing affidavits, ~~which~~ but that period may be extended for ~~an additional period not exceeding up to~~ 20 days, either by the court for good cause ~~shown~~ or by the parties' ~~by~~ written stipulation. The court may permit

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11

12

13 reply affidavits.

14 (d) On ~~Court's Initiative of Court; Notice;~~
15 Specifying Grounds. Not later than 10 days after entry
16 of judgment the court, ~~on~~ ~~of~~ its own, ~~initiative~~ may
17 order a new trial for any reason ~~for which it might have~~
18 ~~granted a new trial on~~ that would justify granting one on
19 a party's motion of a party. After giving the parties
20 notice and an opportunity to be heard ~~on the matter~~, the
21 court may grant a timely motion for a new trial, ~~timely~~
22 served, for a reason not stated in the motion. ~~In either~~
23 ~~ease,~~ When granting a new trial on its own initiative or
24 for a reason not stated in a motion, the court ~~shall~~ must
25 specify ~~in the order~~ the grounds in its order therefor.

26 (e) **Motion to Alter or Amend a Judgment.** Any
27 motion to alter or amend ~~the~~ a judgment ~~shall~~ must be
28 served ~~filed~~ not later than 10 days after entry of the
29 judgment.

COMMITTEE NOTE

The only change, other than stylistic, intended by this revision is to add explicit time limits for filing motions for a new trial, motions to alter or amend a judgment, and affidavits opposing a new trial motion. Previously, there was an inconsistency in the wording of Rules 50, 52, and 59 with respect to whether certain post-judgment motions had to be filed, or merely served, during the prescribed period. This inconsistency caused special problems when motions for a new trial were joined with other post-judgment motions. These motions affect the finality of the judgment, a matter often of importance to third persons as well as the parties and the court. The Committee believes that each of these rules should be revised to require filing before end of the 10-day period. Filing is an event that can be determined with certainty from court records. The phrase "no later than" is used — rather than "within" — to include post-judgment motions that sometimes are filed before actual entry of the judgment by the clerk. It should be noted that under Rule 5 the motions when filed are to contain a certificate of service on other parties. It also should be noted that under Rule 6(a) Saturdays, Sundays, and legal holidays are excluded in measuring the 10-day period, but that Bankruptcy Rule 9006(a) excludes intermediate Saturdays, Sundays, and legal holidays only in computing periods less than 8 days.

Rule 83. Rules by District Courts; Judge's Directives

- 1 **(a) Local Rules.**
- 2 **(1) Each district court ~~by action of~~ acting**

3 ~~by a majority of the~~ its district judges thereof, may
4 ~~from time to time~~, after giving appropriate public
5 notice and an opportunity ~~to~~ for comment, make
6 and amend rules governing its practice. A local
7 rule must be not inconsistent with — but not
8 duplicative of — Acts of Congress and these rules
9 adopted under 28 U.S.C. §§ 2072 and 2075, and
10 must conform to any uniform numbering system
11 prescribed by the Judicial Conference of the
12 United States. A local rule ~~so adopted shall take~~
13 effect upon the date specified by the district court
14 and ~~shall remain~~ in effect unless amended by the
15 ~~district court~~ or abrogated by the judicial council
16 of the circuit ~~in which the district is located.~~
17 Copies of rules and amendments ~~so made by any~~
18 ~~district court shall~~ must, upon their promulgation,
19 be furnished to the judicial council and the

10

Rules of Civil Procedure

20

Administrative Office of the United States Courts

21

and be made available to the public.

22

(2) A local rule imposing a requirement of

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form must not be enforced in a manner that causes

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a party to lose rights because of a nonwillful

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failure to comply with the requirement.

26

(b) Procedure When There is no Controlling

27

Law. In all cases not provided for by rule, the A district

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judges and magistrates may regulate their practice in any

29

manner not inconsistent with these federal law, rules

30

adopted under 28 U.S.C. §§ 2072 and 2075, or and local

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rules these of the district in which they act. No sanction

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or other disadvantage may be imposed for

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noncompliance with any requirement not in federal law,

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federal rules, or the local district rules unless the alleged

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violator has been furnished in the particular case with

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actual notice of the requirement.

COMMITTEE NOTE

SUBDIVISION (a). This rule is amended to reflect the requirement that local rules be consistent not only with the national rules but also with Acts of Congress. The amendment also states that local rules should not repeat Acts of Congress or local rules.

The amendment also requires that the numbering of local rules conform with any uniform numbering system that may be prescribed by the Judicial Conference. Lack of uniform numbering might create unnecessary traps for counsel and litigants. A uniform numbering system would make it easier for an increasingly national bar and for litigants to locate a local rule that applies to a particular procedural issue.

Paragraph (2) is new. Its aim is to protect against loss of rights in the enforcement of local rules relating to matters of form. For example, a party should not be deprived of a right to a jury trial because its attorney, unaware of — or forgetting — a local rule directing that jury demands be noted in the caption of the case, includes a jury demand only in the body of the pleading. The proscription of paragraph (2) is narrowly drawn - covering only violations attributable to nonwillful failure to comply and only those involving local rules directed to matters of form. It does not limit the court's power to impose substantive penalties upon a party if it or its attorney contumaciously or willfully violates a local rule, even one involving merely a matter of form. Nor does it affect the court's power to enforce local rules that involve more than mere matters of form - for example, a local rule requiring parties to identify evidentiary matters relied upon to support or

oppose motions for summary judgment.

SUBDIVISION (b). This rule provides flexibility to the court in regulating practice when there is no controlling law. Specifically, it permits the court to regulate practice in any manner consistent with Acts of Congress, with rules adopted under 28 U.S.C. §§ 2072 and 2075, and with the district local rules.

This rule recognizes that courts rely on multiple directives to control practice. Some courts regulate practice through the published Federal Rules and the local rules of the court. Some courts also have used internal operating procedures, standing orders, and other internal directives. Although such directives continue to be authorized, they can lead to problems. Counsel or litigants may be unaware of various directives. In addition, the sheer volume of directives may impose an unreasonable barrier. For example, it may be difficult to obtain copies of the directives. Finally, counsel or litigants may be unfairly sanctioned for failing to comply with a directive. For these reasons, the amendment to this rule disapproves imposing any sanction or other disadvantage on a person for noncompliance with such an internal directive, unless the alleged violator has been furnished actual notice of the requirement in a particular case.

There should be no adverse consequence to a party or attorney for violating special requirements relating to practice before a particular court unless the party or attorney has actual notice of those requirements. Furnishing litigants with a copy outlining the judge's practices — or attaching instructions to a notice setting a case for conference or trial — would suffice to give actual notice, as would an order in a case specifically

adopting by reference a judge's standing order and indicating how copies can be obtained.

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

Agenda F-19
(Appendix D)
Rules
September 1994

ALICEMARIE H. STOTLER
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

JAMES K. LOGAN
APPELLATE RULES

PAUL MANNES
BANKRUPTCY RULES

PATRICK E. HIGGINBOTHAM
CIVIL RULES

D. LOWELL JENSEN
CRIMINAL RULES

RALPH K. WINTER, JR.
EVIDENCE RULES

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

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

SUBJECT Report on Proposed and Pending Rules of Criminal
Procedure

DATE: May 17, 1994

I. INTRODUCTION.

At its meeting April 18 & 19, 1994, the Advisory Committee on the Rules of Criminal Procedure acted upon proposed or pending amendments to several Rules of Criminal Procedure. This report addresses those proposals and recommendations to the Standing Committee. A GAP Report and copies of the rules and the accompanying Committee Notes are attached along with a copy of the minutes of the April meeting.

II. RULES OF CRIMINAL PROCEDURE PUBLISHED FOR PUBLIC COMMENT.

A. In General.

Pursuant to action by the Standing Committee at its Summer 1993 meeting, proposed amendments in the following rules were published for public comment: Rule 5. Initial Appearance Before the Magistrate Judge; Rule 10. Arraignment; Rule 43. Presence of the Defendant; Rule 53. Regulation of Conduct in the Court Room; Rule 57. Rules by District Courts; and finally Rule 59.*Effective Date; Technical Amendments. A hearing on these amendments was held on April 18, 1994 in Washington, D.C. in conjunction with the Committee's meeting. In addition to the three witnesses who testified at that hearing (which was televised by C-Span), the Committee also carefully considered written comments on the proposed amendments.

The attached GAP Report provides more detailed discussion of the changes

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*The Standing Committee did not approve the proposed amendment to Rule 59 for submission to the Judicial Conference.

made to the rules since their publication. The following discussion briefly notes any significant changes and the Committee's recommended action:

B. Rule 5. Initial Appearance Before the Magistrate Judge: Exception for UFAP Defendants.

The amendment to Rule 5 would exempt the government from promptly presenting a defendant charged only under 18 U.S.C. § 1073 (Unlawful Flight to Avoid Prosecution, i.e., UFAP) to a magistrate where the United States had no intention of prosecuting the defendant for that offense. Although there were very few comments on the proposed amendment to Rule 5, one commentator suggested a conforming amendment to Rule 40. The Committee agreed with that proposal and as discussed *infra*, has proposed a minor amendment to Rule 40 to reflect the change to Rule 5.

Recommendation: The Advisory Committee, which approved the amendment to Rule 5 by a vote of 9 to 2, recommends that Standing Committee approve Rule 5 and forward it to the Judicial Conference for its approval.

C. Rule 10. Arraignment

The published amendment to Rule 10 would permit use of video teleconferencing to arraign a defendant not present in the courtroom. Of the few written comments received, most were opposed to the amendment, as were two of the witnesses who presented testimony on April 18th. In addition, Judge Diamond of the Committee on Defender Services had requested deferral of the proposed amendment pending completion of a pilot program. Following discussion of the issue the Committee voted by a margin of 10 to 0, with one abstention, to defer any further action on the amendment to Rule 10.

Recommendation: None at this time.

D. Rule 40. Commitment to Another District.

In discussing the published amendment to Rule 5, *supra*, the Committee concluded that some reference should be made in Rule 40(a), which also addresses appearances before federal magistrates. The minor amendment proposed by the Committee simply cross-references the change in Rule 5; a copy of the proposed change and a Committee Note are attached.

Recommendation: The Committee recommends that the amendment to Rule 40 be approved, *without public comment*, and forwarded to the Judicial Conference.

E. Rule 43. Presence of the Defendant; In Absentia Sentencing.

The proposed amendment to Rule 43 was intended to (1) provide for teleconferencing for pretrial sessions where the accused is not in the courtroom, and (2) provide for in absentia sentencing. Based upon its discussion regarding the proposed amendment to Rule 10, *supra*, the Committee voted to delete that provision from Rule 43. The Committee also modified the proposed language in Rule 43(b) to make it clear that in absentia sentencing could take place after jeopardy had attached, including entry of a guilty plea or a nolo contendere plea. The Committee voted by a margin of 9 to 1, with one abstention, to forward the proposed amendment, as modified, to the Standing Committee.

Recommendation: The Committee recommends that Rule 43, as modified, be approved and forwarded to the Judicial Conference, without further publication and comment.

F. Rule 53. Regulation of Conduct in the Court Room

The proposed amendment to Rule 53 would permit broadcasting from, and cameras in, federal criminal trials under guidelines or standards promulgated by the Judicial Conference. The Advisory Committee considered the testimony of one witness, Mr. Steve Brill of Court TV, and several written comments, which were for the most part supportive of the amendment. During the Committee's discussion of the amendment, it was suggested that broadcasting and cameras should only be permitted if both the prosecution and defense agreed to such coverage. The Committee was generally opposed to that suggestion because it would in effect frustrate the purpose of the amendment and any possible pilot programs. It was also suggested that the amendment to Rule 53 should be written in a more neutral tone. That suggestion was also rejected because as published, the rule reflects the view the general rule of no broadcasting or cameras unless appropriate guidelines are established by the Judicial Conference. The Committee ultimately decided, by vote of 9 to 1, to forward the proposed amendment to Rule 53 as it was published for comment.

The Committee agreed that in light of other Committees' interest regarding cameras in the court room, careful coordination with those committees would be required. The Committee also believed strongly that given the special problems associated with criminal trials, that it should be actively involved in the process of formulating appropriate guidelines. To that end, a subcommittee was appointed to draft suggested guidelines and to report to the Committee at its Fall 1994 meeting.

Recommendation: The Advisory Committee recommends that the amendment to Rule 53 be approved and forwarded to the Judicial Conference, with the recommendation that the Advisory Committee on Criminal Rules should be actively involved in drafting any appropriate guidelines.

G. Rule 57. Rules by District Courts

The proposed amendment to Rule 57 mirrors similar amendments in the other procedural rules. Although the Committee was informed that the Bankruptcy Committee had recommended substitution of the word "nonwillful" for "negligent failure," the Committee unanimously approved the amendment to Rule 57 as published. Following brief discussion of the issue, the Committee did delete a brief reference in the Committee Note which referred to untimely requests for trial as being an example of a "negligent failure."

Recommendation: The Committee recommends that Rule 57 be approved and forwarded to the Judicial Conference.

H. Rule 59. Effective Date; Technical Amendments.

The proposed amendment to Rule 59, which also mirrors similar amendments in the other rules, was noncontroversial. The Committee voted unanimously to approve the amendment as published.

Recommendation: The Advisory Committee recommends that the proposed amendment to Rule 59 be approved and forwarded to the Judicial Conference.

* * * * *

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 5,
10, 40, 43, 53, 57, and 59.

DATE: May 17, 1994

At its July 1993 meeting the Standing Committee approved the circulation for public comment of proposed amendments to Rules 5, 10, 43, 53, 57 and 59.

All six rules were published in the Fall 1993 with a deadline of April 15, 1994 for any comments. At its meeting on April 18 and 19, 1994 in Washington, D.C., three witnesses presented testimony to the Committee on the proposed amendments. The Advisory Committee has considered the written submissions of members of the public as well as the three witnesses. Summaries of 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 5. Initial Appearance Before the Magistrate Judge: Exception for UFAP Defendants.**

The Committee made no changes to the proposed amendment to Rule 5. Although there were very few comments on the proposed amendment to Rule 5, one commentator suggested a conforming amendment to Rule 40. The Committee agreed with that proposal and as discussed *infra*, has proposed a minor amendment to Rule 40 to reflect the change to Rule 5.

- 2. Rule 10. Arraignment**

After considering the testimony of several witnesses and several written comments, the Committee has decided to defer any further consideration of the proposed amendment to

Rule 10 until its April 1995 meeting.

3. Rule 40. Commitment to Another District.

In discussing the published amendment to Rule 5, *supra*, the Committee concluded that some reference should be made in Rule 40(a), which also addresses appearances before federal magistrates. The minor amendment simply cross-references the change in Rule 5; a copy of the proposed change and a Committee Note are attached.

4. Rule 43. Presence of the Defendant; In Absentia Sentencing.

Based upon testimony of two witnesses and several written comments, the Committee changed the amendment by deleting the provision for video teleconferencing of pretrial sessions. The Committee also modified the proposed language in Rule 43(b) to make it clear that in absentia sentencing could take place after jeopardy had attached, including entry of a guilty plea or a nolo contendere plea.

5. Rule 53. Regulation of Conduct in the Court Room

The Committee made no changes to the proposed amendment to Rule 53 would permit broadcasting from, and cameras in, federal criminal trials under guidelines or standards promulgated by the Judicial Conference. The Advisory Committee considered the testimony of one witness, Mr. Steve Brill of Court TV, and several written comments, which were for the most part supportive of the amendment.

6. Rule 57. Rules by District Courts

No changes were made to the proposed amendment to Rule 57, which mirrors similar amendments in the other procedural rules. Following brief discussion of the issue, the Committee did delete a brief reference in the Committee Note which referred to untimely requests for trial as being an example of a "negligent failure" to follow a local rule.

7. Rule 59. Effective Date; Technical Amendments.

No changes were made to the proposed amendment to Rule 59, which also mirrors similar amendments in the other rules.

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ADVISORY COMMITTEE ON
FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENT TO RULE 5

I. SUMMARY OF COMMENTS: Rule 5

The Committee received three written comments addressing the proposed amendment to Rule 5. One commentator supported the amendment because it will save judicial and law enforcement resources. The second commentator, writing on behalf of the American Bar Association, opposed the change, inter alia, because it was in conflict with the pertinent ABA Standard. The third commentator simply suggested a conforming amendment to Rule 40.

II. LIST OF COMMENTATORS: Rule 5

1. William J. Genego & Peter Goldberger, NADCL, Washington; D.C., 4-14-94.
2. Charles B. Kuenlen, Esq., Glynco, GA, 12-17-93.
3. Myrna Raeder, Prof., Los Angeles, CA, 4-12-94.

III. COMMENTS: Rule 5

William J. Genego, Esq.
Peter Goldberger, Esq.
National Assoc. of Criminal Defense Lawyers
Washington, D.C.
April 14, 1994.

Mr. Genego and Mr. Goldberger, on behalf of the National Association of Criminal Defense Lawyers, endorses the proposed amendment to Rule 5. They believe that under appropriate circumstances the change will result in saving judicial and law enforcement resources and will facilitate the prompt return of an arrested defendant to the jurisdiction where the prosecution is pending. They suggest that the rule or committee note include some discussion that

the words "without unnecessary delay" mean a period of time of 48 hours.

Charles B. Kuenlen, Esq.
Instructor, Department of the Treasury
Glynco, Georgia
December 17, 1993.

Without commenting directing on the merits of the proposed rule change, Mr. Kuenlen observes that the amendment is in apparent conflict with Rule 40 which also requires appearance before a federal magistrate.

Myrna Raeder
Professor of Law
Southwestern University
Los Angeles, CA,
April 12, 1994.

Writing on behalf of the American Bar Association, Professor Raeder expresses opposition to the amendment. She notes that the amendment is in conflict with the "Pretrial Release" chapter of the *ABA Standards for Criminal Justice* (2d ed. 1986, Supp.) which states that unless an accused is released by lawful means or on citation, the accused is to be taken before a judicial officer promptly after an arrest. Any convenience to law enforcement officers would be greatly outweighed by the important right to appear promptly before a judicial officer.

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ADVISORY COMMITTEE ON
FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENT TO RULE 43

I. SUMMARY OF COMMENTS/TESTIMONY: Rule 43

The Committee received seven written comments and heard testimony from two witnesses on the proposed amendments to Rule 43. Support for the amendments was split. As a result of the comments, the Committee deleted the provision for video teleconferencing for pretrial sessions. It also modified language in Rule 43 for sentencing in absentia defendants.

II. LIST OF COMMENTATORS/WITNESSES: Rule 43

1. Hon. Earl Britt, ED North Carolina, 12-10-93.
2. Hon. Gustave Diamond, Chair, Judicial Conference's Committee on Defender Services, Pittsburg, PA, 4-6-94.
3. Hon. Martin Feldman, ED Louisiana, 11-16-93.
4. William J. Genego & Peter Goldberger, NADCL, Washington, D.C., 4-14-94.
5. Eduardo Gonzales, Dir., US Marshals Service, Arlington, VA., 4-15-94.
6. Kathleen M. Hawk, Dir., Federal Bureau of Prisons, Washington, D.C., 4-15-94.
7. Ms. Elizabeth Manton & Mr. Alan Dubois, Raleigh, NC, Testimony, 4-18-94
8. Myrna Raeder, Prof., Los Angeles, CA, 4-12-94.

III. COMMENTS: Rule 43

Hon. Earl Britt
District Judge

ED North Carolina
December 10, 1994

Judge Britt expressed support for the proposed amendment to Rule 43 which would permit video teleconferencing for pretrial sessions. He indicated that he had been part of the Judicial Conference's pilot project and that in his experience, the proceedings had been conducted in a fair and just manner. He expressed concern, however, that the amendment might be construed as providing the defendant with a right to be present during a competency hearing. He urged the Committee to either expressly provide that in competency hearings the defendant's consent is not required or that the amendment was not intended to cover that issue.

Hon. Gustave Diamond
Chair, Judicial Conference's Committee on Defender Services
Pittsburgh, PA
April 6, 1994

Judge Diamond urged the Committee to defer action on the proposed amendment to Rule 43 vis a vis video teleconferencing. He expressed concern about the potential impact of the amendment on costs for video teleconferencing; and noted that the process would result in a shift of funding from the Bureau of Prisons and Marshals Service to the judiciary's Defender Services appropriation. He added that he was concerned about possible issues of effective representation and noted that deferral would be appropriate pending the results of several pilot programs which could assess video teleconferencing.

Hon. Martin Feldman
District Judge
ED Louisiana
November 16, 1993

Judge Feldman questioned whether the Committee intended through the amendment to Rule 43(c)(4)(video teleconferencing for pretrial sessions) that the defendant has a right to be present at pretrial conferences.

William J. Genego, Esq.
Peter Goldberger, Esq.
National Assoc. of Criminal Defense Lawyers
Washington, D.C.
April 14, 1994.

Mr. Genego and Mr. Goldberger, on behalf of the National Association of Criminal Defense Lawyers, opposed the amendment to Rule 43(b)(2) which would provide for in absentia sentencing of a defendant. They noted that the amendment was not justified and would mean that absent defendants would automatically lose their right to appeal. They also raised questions about whether the amendment, as published, would also apply to defendants who have pleaded guilty or nolo contendere. They supported the proposed change to (c)(1) and they supported the provision for video teleconferencing for pretrial sessions, provided that the defendant was required to execute a written waiver of the right to be present in court. Finally, they opposed the amendment relating to correction of the sentence without the defendant being present because there was no provision for obtaining consent from the defendant.

Eduardo Gonzales
Director, United States Marshals Service
Arlington, VA.
April 15, 1994

Mr. Gonzales expressed strong support for the amendment vis a vis video teleconferencing for pretrial sessions, noting that the amendment would increase efficiency, save financial resources of the Marshals and the courts, and increase security for both the "court family" and the public.

Kathleen M. Hawk, Esq.
Director, Federal Bureau of Prisons
Washington, D.C.
April 15, 1994

Citing a number of important reasons, in particular

safety, for the amendments to Rule 43 concerning video teleconferencing, Ms. Hawk reiterated the Bureau of Prisons' support for the change. She noted that the need for the amendment has made clear in caselaw which holds that the Rules of Criminal Procedure do not permit video teleconferencing.

Ms. Elizabeth Manton, Esq.
Mr. Alan Dubois, Esq.
Federal Public Defenders
Raleigh, NC
April 18, 1994

Ms. Manton and Mr. Dubois presented live testimony to the Committee on April 18, 1994. Based upon their experiences in several cases, they were very opposed to the amendment to Rule 43 which would have provided for video teleconferencing for pretrial sessions. They cited a number of practical problems that the amendment would raise and reiterated the very important right of the defendant to personally appear in court.

Myrna Raeder
Professor of Law
Southwestern University
Los Angeles, CA,
April 12, 1994.

Writing on behalf of the American Bar Association, Professor Raeder expressed general support for the amendment to Rule 43 dealing with video teleconferencing of pretrial sessions. She raised a number of practical and financial considerations, however, which she believed should be studied by the Committee. She also suggested that the Judicial Conference should consider running a pilot program in two large urban districts and also consider any existing state arraignment projects.

ADVISORY COMMITTEE ON
FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENT TO RULE 53

I. SUMMARY OF COMMENTS/TESTIMONY: Rule 53

The Committee received five written comments and heard testimony from two witnesses on the proposed amendments to Rule 53. With two exceptions, the commentators and witnesses supported the amendment.

II. LIST OF COMMENTATORS/WITNESSES: Rule 53

1. Hon. Donald C. Ashmanskas, Portland OR, 12-8-93.
2. Steven Brill, Court TV, Washington, D.C. 4-18-94.
3. Prof. Edward Cooper, Ann Arbor, Mich., 1-16-94.
4. Timothy B. Dyk, Esq., Washington, D.C., 4-15-94.
5. William J. Genego & Peter Goldberger, NADCL, Washington, D.C., 4-14-94.
6. Rory K. Little, Esq., ND CA, 4-15-94
7. Myrna Raeder, Prof., Los Angeles, CA, 4-12-94.

III. COMMENTS: Rule 53

Hon. Donald C. Ashmanskas
United States Magistrate Judge
Portland OR
December 8, 1993

Judge Ashmanskas indicated that he is strongly opposed to the proposed amendment to Rule 53. He stated that his opposition is based upon 18 years of experience during which he had observed a number of horrible experiences re cameras in the court room. He noted that with the exception of coverage for naturalization, ceremonial, investiture proceedings or for educational purposes, cameras should be

completely banned from the courthouse.

Mr. Steven Brill
Chairman, American Lawyer Media, L.P.
Washington, D.C.
April 18, 1994

Mr. Brill testified before the Committee on April 18, 1994 and presented information on how broadcasting of trials can be conducted with little or no disruption to the proceedings. He also included results of a survey of state judges which generally supported broadcasting of trials.

Prof. Edward Cooper
Reporter, Civil Rules Advisory Committee
Ann Arbor, Mich.
January 16, 1994

Professor Cooper suggested that the term "standards" be substituted for the term "guidelines." The former term is used in Civil Rule 5(e) and Appellate Rule 25(a).

Timothy B. Dyk, Esq.
Washington, D.C.
April 15, 1994

Mr. Dyk indicated in both a written statement and during oral testimony that he represents various news organizations which support the amendment to Rule 53. Citing points made in the Committee Note to the amendment, he indicated that the Judicial Conference should have the flexibility to adopt new policies for media coverage of federal criminal trials. He noted that the amendment would do no more than transfer sole jurisdiction over the issues regarding cameras and audio broadcasting to the Judicial Conference.

William J. Genego, Esq.
Peter Goldberger, Esq.
National Assoc. of Criminal Defense Lawyers
Washington, D.C.

April 14, 1994.

Mr. Genego and Mr. Goldberger, on behalf of the National Association of Criminal Defense Lawyers, support the amendment and applaud attempts to give the public greater access to federal criminal proceedings. The dangers once associated with broadcasting trials are not well founded and there are substantial public benefits in doing so.

Rory K. Little, Esq.,
United States Attorney
ND, California
April 15, 1994

Mr. Little, citing years of experience in both appellate and trial courts, stated strong opposition to the proposed amendment to Rule 53. He indicated that although few may be willing to admit it, lawyers do act differently in front of cameras in a courtroom and that permitting broadcasting of trials will be distorted and lengthened with such posturing and preening. Secondly, broadcasting trials will lead to additional costs in both time and expense as the parties and the courts debate whether a particular trial should be broadcasted. He also urged the Committee not to "punt" on this issue by simply deferring to the Judicial Conference; in his view, the Committee should stop any attempts to experiment with broadcasting of trials.

Myrna Raeder
Professor of Law
Southwestern University
Los Angeles, CA,
April 12, 1994.

Writing on behalf of the American Bar Association, Professor Raeder expressed general support for the amendment to Rule 53

ADVISORY COMMITTEE ON
FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENT TO RULE 57

I. SUMMARY OF COMMENTS/TESTIMONY: Rule 57

The Committee received one written comment on the proposed amendment to Rule 57. That comment supported the changes.

II. LIST OF COMMENTATORS/WITNESSES: Rule 57

1. William J. Genego & Peter Goldberger, NADCL,
Washington, D.C., 4-14-94.

III. COMMENT: Rule 57

William J. Genego, Esq.
Peter Goldberger, Esq.
National Assoc. of Criminal Defense Lawyers
Washington, D.C.
April 14, 1994.

Mr. Genego and Mr. Goldberger, on behalf of the National Association of Criminal Defense Lawyers, support the amendment to Rule 57. They see no reason not to adopt a uniform numbering system for local rules. They also believe that the provision forbidding the loss of rights for negligent failure to follow a local rule properly respects the rights of the litigants without "denigrating the necessity for attorneys to attempt to comply..." with the local rules. Finally, the provision forbidding imposition of penalties for failure to comply with unpublished rules will permit judges to use such rules but not to unfairly punish litigants.

FEDERAL RULES OF CRIMINAL PROCEDURE *

1 Rule 5. Initial Appearance Before the
2 Magistrate Judge

3 (a) IN GENERAL. Except as otherwise
4 provided in this rule, ~~an~~ an officer
5 making an arrest under a warrant issued
6 upon a complaint or any person making an
7 arrest without a warrant ~~shall~~ must take
8 the arrested person without unnecessary
9 delay before the nearest available
10 federal magistrate judge or, ~~in the~~
11 ~~event that~~ if a federal magistrate judge
12 is not reasonably available, before a
13 state or local judicial officer
14 authorized by 18 U.S.C. § 3041. If a
15 person arrested without a warrant is
16 brought before a magistrate judge, a
17 complaint, satisfying the probable cause
18 requirements of Rule 4(a), must be

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

FEDERAL RULES OF CRIMINAL PROCEDURE

19 ~~promptly filed shall be filed forthwith~~
20 ~~which shall comply with the requirements~~
21 ~~of Rule 4(a) with respect to the showing~~
22 ~~of probable cause.~~ When a person,
23 arrested with or without a warrant or
24 given a summons, appears initially
25 before the magistrate judge, the
26 magistrate judge ~~shall~~ must proceed in
27 accordance with the applicable
28 subdivisions of this rule. An officer
29 making an arrest under a warrant issued
30 upon a complaint charging solely a
31 violation of 18 U.S.C. § 1073 need not
32 comply with this rule if the person
33 arrested is transferred without
34 unnecessary delay to the custody of
35 appropriate state or local authorities
36 in the district of arrest and an
37 attorney for the government moves
38 promptly, in the district in which the

39 warrant was issued, to dismiss the
40 complaint.

41 * * * * *

COMMITTEE NOTE

The amendment to Rule 5 is intended to address the interplay between the requirements for a prompt appearance before a magistrate judge and the processing of persons arrested for the offense of unlawfully fleeing to avoid prosecution under 18 U.S.C. § 1073, when no federal prosecution is intended. Title 18 U.S.C. § 1073 provides in part:

Whoever moves or travels in interstate or foreign commerce with intent...to avoid prosecution, or custody or confinement after conviction, under the laws of the place from which he flees...shall be fined not more than \$5,000 or imprisoned not more than five years, or both.

Violations of this section may be prosecuted...only upon formal approval in writing by the Attorney General, the Deputy Attorney General, the Associate Attorney General, or an Assistant Attorney General of the United States, which function of approving prosecutions may not be delegated.

In enacting § 1073, Congress apparently intended to provide assistance to state

criminal justice authorities in an effort to apprehend and prosecute state offenders. It also appears that by requiring permission of high ranking officials, Congress intended that prosecutions be limited in number. In fact, prosecutions under this section have been rare. The purpose of the statute is fulfilled when the person is apprehended and turned over to state or local authorities. In such cases the requirement of Rule 5 that any person arrested under a federal warrant must be brought before a federal magistrate judge becomes a largely meaningless exercise and a needless demand upon federal judicial resources.

In addressing this problem, several options are available to federal authorities when no federal prosecution is intended to ensue after the arrest. First, once federal authorities locate a fugitive, they may contact local law enforcement officials who make the arrest based upon the underlying out-of-state warrant. In that instance, Rule 5 is not implicated and the United States Attorney in the district issuing the § 1073 complaint and warrant can take action to dismiss both. In a second scenario, the fugitive is arrested by federal authorities who, in compliance with Rule 5, bring the person before a federal magistrate judge. If local law enforcement officers are present, they can take custody, once the United States Attorney informs the magistrate judge that there will be no prosecution under § 1073. Depending on the availability of state or local officers, there may be some delay in the Rule 5 proceedings; any delays following release to local officials, however, would not be a function of Rule 5. In a third situation, federal authorities arrest the

FEDERAL RULES OF CRIMINAL PROCEDURE 5

fugitive but local law enforcement authorities are not present at the Rule 5 appearance. Depending on a variety of practices, the magistrate judge may calendar a removal hearing under Rule 40, or order that the person be held in federal custody pending further action by the local authorities.

Under the amendment, officers arresting a fugitive charged only with violating § 1073 need not bring the person before a magistrate judge under Rule 5(a) if there is no intent to actually prosecute the person under that charge. Two requirements, however, must be met. First, the arrested fugitive must be transferred without unnecessary delay to the custody of state officials. Second, steps must be taken in the appropriate district to dismiss the complaint alleging a violation of § 1073. The rule continues to contemplate that persons arrested by federal officials are entitled to prompt handling of federal charges, if prosecution is intended, and prompt transfer to state custody if federal prosecution is not contemplated.

1 Rule 40. Commitment to Another District
2 (a) APPEARANCE BEFORE FEDERAL
3 MAGISTRATE JUDGE. If a person is
4 arrested in a district other than that
5 in which the offense is alleged to have
6 been committed, that person must be
7 taken without unnecessary delay before

6

FEDERAL RULES OF CRIMINAL PROCEDURE

8 the nearest available federal magistrate
9 judge, in accordance with the
10 provisions of Rule 5. Preliminary
11 proceedings concerning the defendant
12 must be conducted in accordance with
13 Rules 5 and 5.1, except that if no
14 preliminary examination is held because
15 an indictment has been returned or an
16 information filed or because the
17 defendant elects to have the preliminary
18 examination conducted in the district in
19 which the prosecution is pending, the
20 person must be held to answer upon a
21 finding that such person is the person
22 named in the indictment, information or
23 warrant. If held to answer, the
24 defendant must be held to answer in the
25 district court in which the prosecution
26 is pending -- provided that a warrant is
27 issued in that district if the arrest

28 was made without a warrant -- upon
29 production of the warrant or a certified
30 copy thereof. The warrant or certified
31 copy may be produced by facsimile
32 transmission.

33 * * * * *

COMMITTEE NOTE

The amendment to Rule 40(a) is a technical, conforming change to reflect an amendment to Rule 5, which recognizes a limited exception to the general rule that all arrestees must be taken before a federal magistrate judge.

1 Rule 43. Presence of the Defendant

2 (a) PRESENCE REQUIRED. The
3 defendant ~~shall~~ must be present at the
4 arraignment, at the time of the plea, at
5 every stage of the trial including the
6 impaneling of the jury and the return of
7 the verdict, and at the imposition of
8 sentence, except as otherwise provided
9 by this rule.

8

FEDERAL RULES OF CRIMINAL PROCEDURE

10 (b) CONTINUED PRESENCE NOT
11 REQUIRED. The further progress of the
12 trial to and including the return of the
13 verdict, and the imposition of sentence,
14 will ~~shall~~ not be prevented and the
15 defendant will ~~shall~~ be considered to
16 have waived the right to be present
17 whenever a defendant, initially present
18 at trial, or having pleaded guilty or
19 nolo contendere,

20 (1) is voluntarily absent
21 after the trial has commenced
22 (whether or not the defendant has
23 been informed by the court of the
24 obligation to remain during the
25 trial), ~~or~~

26 (2) in a noncapital case, is
27 voluntarily absent at the
28 imposition of sentence, or

29 ~~(2)~~(3) after being warned by

30 the court that disruptive conduct
31 will cause the removal of the
32 defendant from the courtroom,
33 persists in conduct which is such
34 as to justify exclusion from the
35 courtroom.

36 (c) PRESENCE NOT REQUIRED. A
37 defendant need not be present ~~in the~~
38 ~~following situations:~~

39 (1) ~~A corporation may appear~~
40 ~~by counsel for all purposes. when~~
41 represented by counsel and the
42 defendant is an organization, as
43 defined in 18 U.S.C. § 18;

44 (2) ~~In prosecutions for~~
45 ~~offenses~~ when the offense is
46 punishable by fine or by
47 imprisonment for not more than one
48 year or both, and the court, with
49 the written consent of the

10 FEDERAL RULES OF CRIMINAL PROCEDURE

50 defendant, ~~may permit~~ permits
51 arraignment, plea, trial, and
52 imposition of sentence in the
53 defendant's absence.;

54 (3) ~~At~~ when the proceeding
55 involves only a conference or
56 ~~argument~~ hearing upon a question of
57 law.;

58 (4) ~~At~~ when the proceeding
59 involves a correction ~~reduction~~ of
60 sentence under Rule 35.

COMMITTEE NOTE

The revisions to Rule 43 focus on two areas. First, the amendments make clear that a defendant who, initially present at trial or who has entered a plea of guilty or nolo contendere, but who voluntarily flees before sentencing, may nonetheless be sentenced in absentia. Second, the rule is amended to extend to organizational defendants. In addition, some stylistic changes have been made.

Subdivision (a). The changes to subdivision (a) are stylistic in nature and the Committee intends no substantive change in the operation of that provision.

FEDERAL RULES OF CRIMINAL PROCEDURE 11

Subdivision (b). The changes in subdivision (b) are intended to remedy the situation where a defendant voluntarily flees before sentence is imposed. Without the amendment, it is doubtful that a court could sentence a defendant who had been present during the entire trial but flees before sentencing. Delay in conducting the sentencing hearing under such circumstances may result in difficulty later in gathering and presenting the evidence necessary to formulate a guideline sentence.

The right to be present at court, although important, is not absolute. The caselaw, and practice in many jurisdictions, supports the proposition that the right to be present at trial may be waived through, inter alia, the act of fleeing. See generally *Crosby v. United States*, 113 S.Ct. 748, ___ U.S. ___ (1993). The amendment extends only to noncapital cases and applies only where the defendant is voluntarily absent after the trial has commenced or where the defendant has entered a plea of guilty or nolo contendere. The Committee envisions that defense counsel will continue to represent the interests of the defendant at sentencing.

The words "at trial, or having pleaded guilty or nolo contendere" have been added at the end of the first sentence to make clear that the trial of an absent defendant is possible only if the defendant was previously present at the trial or has entered a plea of guilty or nolo contendere. See *Crosby v. United States*, *supra*.

Subdivision (c). The change to subdivision (c) is technical in nature and replaces the word "corporation" with a

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5 ~~pursuant to 18 U.S.C. § 3575(a) or 21~~
6 ~~U.S.C. § 849(a) shall be made by filing~~
7 ~~the notice with the clerk of the court.~~
8 ~~The clerk shall transmit the notice to~~
9 ~~the chief judge or, if the chief judge~~
10 ~~is the presiding judge in the case, to~~
11 ~~another judge or United States~~
12 ~~magistrate judge in the district, except~~
13 ~~that in a district having a single judge~~
14 ~~and no United States magistrate judge,~~
15 ~~the clerk shall transmit the notice to~~
16 ~~the court only after the time for~~
17 ~~disclosure specified in the~~
18 ~~above-mentioned statutes and shall seal~~
19 ~~the notice as permitted by local rule.~~

COMMITTEE NOTE

Subdivision (e) has been deleted because both of the statutory provisions cited in the rule have been abrogated.

1 Rule 53. Regulation of Conduct in the
2 Court Room

14

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3 The taking of photographs in the
4 court room during the progress of
5 judicial proceedings or ~~radio~~
6 broadcasting of judicial proceedings
7 from the court room ~~shall~~ must not be
8 permitted by the court except as such
9 activities may be authorized under
10 guidelines promulgated by the Judicial
11 Conference of the United States.

COMMITTEE NOTE

The amendment to Rule 53 marks a shift in the federal courts' regulation of cameras in the court room and the broadcasting of judicial proceedings. The change does not require the courts to permit such activities in criminal cases. Instead, the rule authorizes the Judicial Conference to do so under whatever guidelines it deems appropriate.

In 1990 the Judicial Conference approved a three-year pilot program with audio coverage and photographic coverage of civil proceedings in selected trial and appellate courts. The Conference declined to apply the program to criminal proceedings -- because of the absolute ban of such activities in Rule 53. The amendment gives the Judicial Conference equal authority over criminal and civil trials.

1 Rule 57. Rules by District Courts

2 (a) IN GENERAL.

3 (1) Each district court by
4 ~~action of acting by~~ a majority of ~~the~~
5 its district judges thereof may from
6 ~~time to time~~, after giving appropriate
7 public notice and an opportunity to
8 comment, make and amend rules governing
9 its practice ~~not inconsistent with these~~
10 rules. A local rule must be consistent
11 with -- but not duplicative of -- Acts
12 of Congress and rules adopted under 28
13 U.S.C. § 2072 and must conform to any
14 uniform numbering system prescribed by
15 the Judicial Conference of the United
16 States.

17 (2) A local rule imposing a
18 requirement of form must not be enforced
19 in a manner that causes a party to lose
20 rights because of a nonwillful failure

21 to comply with the requirement.

22 (b) PROCEDURE WHEN THERE IS NO
23 CONTROLLING LAW. A judge may regulate
24 practice in any manner consistent with
25 federal law, these rules, and local
26 rules of the district. No sanction or
27 other disadvantage may be imposed for
28 noncompliance with any requirement not
29 in federal law, federal rules, or the
30 local district rules unless the alleged
31 violator has been furnished in the
32 particular case with actual notice of
33 the requirement.

34 (c) EFFECTIVE DATE AND NOTICE. A
35 local rule so adopted shall take effect
36 upon the date specified by the district
37 court and shall remain in effect unless
38 amended by the district court or
39 abrogated by the judicial council of the
40 circuit in which the district is

FEDERAL RULES OF CRIMINAL PROCEDURE 17

41 located. Copies of the rules and
42 amendments so made by any district court
43 ~~shall~~ must upon their promulgation be
44 furnished to the judicial council and
45 the Administrative Office of the United
46 States Courts and ~~shall~~ must be made
47 available to the public. ~~In all cases~~
48 ~~not provided for by rule, the district~~
49 ~~judges and magistrate judges may~~
50 ~~regulate their practice in any manner~~
51 ~~not inconsistent with these rules or~~
52 ~~those of the district in which they act.~~

COMMITTEE NOTE

Subdivision (a). This rule is amended to reflect the requirement that local rules be consistent not only with the national rules but also with Acts of Congress. The amendment also states that local rules should not repeat national rules and Acts of Congress.

The amendment also requires that the numbering of local rules conform with any numbering system that may be prescribed by the Judicial Conference. Lack of uniform numbering might create unnecessary traps for counsel and litigants. A uniform numbering

system would make it easier for an increasingly national bar to locate a local rule that applies to a particular procedural issue.

Paragraph (2) is new. Its aim is to protect against loss of rights in the enforcement of local rules relating to matters of form. The proscription of paragraph (2) is narrowly drawn -- covering only nonwillful violations and only those involving local rules directed to matters of form. It does not limit the court's power to impose substantive penalties upon a party if it or its attorney stubbornly or repeatedly violates a local rule, even one involving merely a matter of form. Nor does it affect the court's power to enforce local rules that involve more than mere matters of form -- for example, a local rule requiring that the defendant waive a jury trial within a specified time.

Subdivision (b). This rule provides flexibility to the court in regulating practice when there is no controlling law. Specifically, it permits the court to regulate practice in any manner consistent with Acts of Congress, with rules adopted under 28 U.S.C. § 2072, and with the district's local rules. This rule recognizes that courts rely on multiple directives to control practice. Some courts regulate practice through the published Federal Rules and the local rules of the court. Some courts also have used internal operating procedures, standing orders, and other internal directives. Although such directives continue to be authorized, they can lead to problems. Counsel or litigants may be unaware of the various directives. In

addition, the sheer volume of directives may impose an unreasonable barrier. For example, it may be difficult to obtain copies of the directives. Finally, counsel or litigants may be unfairly sanctioned for failing to comply with a directive. For these reasons, the amendment disapproves imposing any sanction or other disadvantage on a person for noncompliance with such an internal directive, unless the alleged violator has been furnished in a particular case with actual notice of the requirement.

There should be no adverse consequence to a party or attorney for violating special requirements relating to practice before a particular judge unless the party or attorney has actual notice of those requirements. Furnishing litigants with a copy outlining the judge's practices -- or attaching instructions to a notice setting a case for conference or trial -- would suffice to give actual notice, as would an order in a case specifically adopting by reference a judge's standing order and indicating how copies can be obtained.

PROPOSED RULES AMENDMENTS GENERATING SUBSTANTIAL CONTROVERSY

At its June 24-25, 1994 meeting, the Committee on Rules of Practice and Procedure reviewed the proposed rules amendments submitted by the Advisory Committees on the Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure. Except for Criminal Rule 53, the proposed amendments were either technical, conforming in nature, or non-controversial. No amendments were proposed to the Rules of Evidence.

Deliberations of the Advisory Committee on the Rules of Criminal Procedure

At its April 1994 meeting, the Advisory Committee on the Rules of Criminal Procedure considered the written comments and testimony concerning an amendment to Rule 53, which would permit broadcasting from, and cameras in, federal criminal trials under guidelines or standards promulgated by the Judicial Conference.

The advisory committee considered the testimony of one witness, Mr. Steven Brill of CourTV, and several written comments, most of which were supportive of the amendment. During the advisory committee's discussion of the amendment, it was suggested that broadcasting and cameras should only be permitted if both the prosecution and defense agreed to such coverage. The advisory committee was generally opposed to that suggestion because it would in effect frustrate the purpose of the amendment and any possible pilot program.

The advisory committee considered a suggestion to revise the proposed amendment by eliminating the presumption against televised broadcasting. That suggestion was also rejected because the rule as published for comment, reflects the general rule of no broadcasting or cameras unless it is in accordance with appropriate guidelines established by the Judicial Conference. The advisory committee ultimately decided, by a vote of 9 to 1, to forward the proposed amendment to Rule 53 as it was published for comment.

In approving the amendment, the advisory committee believed that the controversy surrounding cameras and broadcasting in the courtroom had subsided due to several developments. First, the Supreme Court's decision in *Chandler v. Florida*, 448 U.S. 560 (1981) made it clear that it was not a denial of due process to permit cameras at criminal trials. Second, a large majority of state courts now permit broadcasting of criminal trials without significant interruption in the proceedings or adverse impact on the participants. Third, developments in video and audio technology have enabled coverage of judicial proceedings to be accomplished with little or no disruption. Some courts have adopted rules requiring pooling of coverage, which also seems to reduce the likelihood of disruption.

The advisory committee was also persuaded, in part, by the fact that despite the increased, and now almost common, use of cameras in the State courtrooms, there has not been a long list of complaints or a parade of horrible experiences. On the contrary, the advisory committee believed that potential distractions would be reduced if the media were able to observe and record proceedings from a television monitor outside the courtroom, rather than crowding into sometimes inadequately sized courtrooms. The advisory committee also believed that the criminal justice system might be better understood and appreciated by the public if criminal proceedings were made readily available to the public at large. See *Richmond Newspapers, Inc v. Virginia*, 448 U.S. 555, 573 (1980) (role of print and electronic media as surrogates for the public; people now acquire information about court proceedings chiefly through electronic and print media).

The advisory committee agreed that in light of the interest of the Committees on Court Administration and Case Management and Automation and Technology, careful coordination with those committees regarding guidelines for cameras in the courtroom would be required. The advisory committee also believed strongly that given the special problems associated with criminal trials, it should be actively involved in the process of formulating appropriate guidelines. To that end, a subcommittee was appointed to draft suggested guidelines and to report to the advisory committee at its Fall 1994 meeting.

Deliberations of the Standing Committee

Although there was relatively little controversy over the amendments at the advisory committee stage, several members of the Standing Committee expressed strong concerns and reservations about the proposed amendment to Rule 53 at the committee's June 1994 meeting. They questioned the need for change and disputed the favorable conclusions drawn from survey findings in various pilot programs for coverage of civil trials. It was pointed out that the Federal Judicial Center survey on the subject acknowledged that it could only measure perceived, as opposed to actual, effects of electronic media coverage on jurors, witnesses, counsel, and judges. Other members of the committee believed audio and camera coverage would not disrupt proceedings, noting that such coverage is permitted in many state courts, with no untoward problems. They also noted the strong support for the amendment by the advisory committee.

Several members of the committee suggested that the issue is whether the Judicial Conference should have less authority to authorize and regulate televised coverage of criminal cases than it has in civil cases. There is no prohibition in the Federal Rules of Civil Procedure against camera coverage in civil cases. It was stressed that the proposed amendment would not commit the Judicial Conference to place cameras in the courtroom; it merely would provide the Conference with the option to establish a pilot program if it so decided. The chair of the advisory committee agreed to revise the Committee Note to Criminal Rule 53 to highlight the amendment's primary purpose of providing the Judicial Conference with equal authority to permit and regulate televised coverage in civil and criminal trials. All prior references to the potential benefits of televised coverage were struck. The Standing Committee ultimately voted to approve the proposed amendment by a margin of 7 to 6.

PROMULGATION OF RULES AMENDMENTS

	1995	JUNE	FALL	DECEMBER
Supreme Court	Supreme Court	Standing Committee	Judicial Conference	LAW
<div style="border: 1px solid black; padding: 5px; width: fit-content; margin: auto;"> Transmit to Congress AP: 4, 8, 10, (), (), (), 47 & () BK: 8018, 8029 & () CV: (), (), 50, 52, 53, 53 & () CR: 5, (), (40), 43, (46), (49), 53, 57 & () EV: () & () </div>	<div style="border: 1px solid black; padding: 5px; width: fit-content; margin: auto;"> Approve & Transmit to Standing Committee AP: (21), (25), (26), 27, 28 & (32) BK: 1006, 1007, 1019, 2002 2015, 3002, 3016, 4004 CV: (5(e)) CR: 16 & 32 EV: Tentative decision not to amend 25 rules </div>	<div style="border: 1px solid black; padding: 5px; width: fit-content; margin: auto;"> Approve & Transmit to Judicial Conference AP: (21), (25), (26), 27, 28 & (32) BK: 1006, 1007, 1019, 2002 2015, 3002, 3016, 4004 CV: (5(e)) CR: 16 & 32 EV: Tentative decision not to amend 25 rules </div>	<div style="border: 1px solid black; padding: 5px; width: fit-content; margin: auto;"> Approve & Transmit to Supreme Court AP: (21), (25), (26), 27, 28 & (32) BK: 1006, 1007, 1019, 2002 2015, 3002, 3016, 4004 CV: (5(e)) CR: 16 & 32 EV: Tentative decision not to amend 25 rules </div>	<div style="border: 1px solid black; padding: 5px; width: fit-content; margin: auto;"> Effective AP: 4, 8, 10, (), (), (), 47 & () BK: 8018, 8029 & () CV: (), (), 50, 52, 53, 53 & () CR: 5, (), (40), 43, (46), (49), 53, 57 & () EV: () & () </div>