Sidebar

Spring 1992

The Federal Bar Association's

Federal Litigation Section

Section Chair's Message

On February 13, 1992, at the National Press Club in Washington, D.C., the Section presented "Civil Rights and the Federal Sector: A Discussion of Pending Legislation—H.R. 3613—the Sikorski Bill." The moderator was Bob Fabia, Attorney, Office of the General Counsel, U.S. Department of Education. The speakers included Deborah Varljen, Chief Counsel, Subcommittee on Civil Service, U.S. House of Representatives; Joseph Sellers, Washington Lawyers' Committee for Civil Rights Under the Law; Andrew German, Assistant General Counsel for Labor Law, U.S. Postal Service; and Nick Inzeo, Associate Legal Counsel, U.S. Equal Employment Opportunity Commission.

The Section's Federal Rules of Procedure Committee prepared formal comments regarding the "Proposed Amendments to the Federal Rules of Procedure." The complete text of these comments is included in this issue of *Sidebar*. FBA President Al Belcuore testified at the public hearing regarding the proposed amendments on February 19, 1992, in Atlanta.

The Litigation Section and the Administration of Justice Section presented a conference entitled "Drug Money Laundering Legal Issues," in Miami, Florida on March 23, 1992. The seminar presented money laundering from the government perspective, including domestic violations, international violations, and forfeitures. The perspectives of the judiciary, of the defense bar, and of the government investigator were also presented.

As you know, the National FBA Convention will be in Cleveland, Ohio, September 9-12, 1992. There will be various seminars including a "Products Liability Seminar," co-sponsored by the Federal Litigation Section. See the back page of this newsletter for more Convention highlights. You will have a wonderful opportunity to meet many other federal practitioners and the federal judiciary. I encourage you to attend.

RADM James L. Hoffman has resigned as Chair of the Military Law Committee because

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On the Case

By Mark Lee Hogge

I strongly urge everyone to read the following article on page three which comments on the proposed changes to the Federal Rules of Civil Procedure. I found the section to be very helpful in my current practice.

On a completely different subject, I would like to discuss the necessity of maintaining document control throughout litigation. I have the dubious honor of having tried the longest case in the history of Kansas. The trial lasted six months. My particular team was complimented by the court for always being prepared. This counted for a lot. The smooth running of our presentation of the case was facilitated in large part by very good document control. As I am sure everyone understands, documents can become quite a mess as you go through discovery and trial. There is no experience worse than going to trial with your documents in a mess.

Most lawyers who practice civil litigation in federal court are primarily pre-trial lawyers, because the vast majority of cases are settled out-of-court. Thus, there is a tendency in litigators who rarely, if ever, try a case, to become sloppy with document production. I have found it is necessary to begin gathering documents at the very outset of a lawsuit—the sooner the better.

Getting right on top of document production at the very outset of litigation will enable you to gauge exactly how much documentary proof of the claims or answers were available to the parties at the time of the respective filings of the pleadings. It is very important to know such information for the purpose of obtaining attorney fee awards should your case go to trial.

It is very important to know where documents come from. I have found, and I am sure many of you are aware, that numbering the documents which your receive and produce is a very important part of the practice. I strongly suggest using a numbering system such that the first number in a series of numbers to be labelled

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he has left private practice. Mr. Thomas S. Reavely has been asked to take "command" of this Committee. He can be contacted at 100 Court Avenue, Suite 203, Des Moines, Iowa 50309.

If you would like any additional information regarding the Litigation Section or any of its activities, please contact me.

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Office of Government Ethics Announces Position on Participation in Professional Associations

In a memorandum to designated agency Ethics Officials dated December 9, 1991, Office of Government Ethics (OGE) Director, Stephen D. Potts, announced the decision to "reserve" the section on "participation in professional associations" in the next version of the OGE proposed rules on professional conduct.

This decision comes in response to hundreds of comments made on the OGE's proposed rules which were published in July 1991, according to Potts' memorandum. FBA President Alfred F. Belcuore expressed the Federal Bar Association's strong concern that the proposed rules would restrict involvement by federal employees in professional associations and do a disservice to both the government and associations. Belcuore's remarks were delivered by a September 18, 1991 letter to the OGE and during a personal appearance before the House Post Office and Civil Service Committee's Subcommittee on Human Resources on October 22, 1991.

The OGE will first concentrate on comments received concerning other sections of the rule and eventually will readdress the section on participation in professional associations, according to Potts' memorandum.

The FBA received recognition for its position in *The Washington Post, The Legal Times, Association Trends, USAE,* The Independent Association Newspaper, and the *Federal Employees News Digest.*

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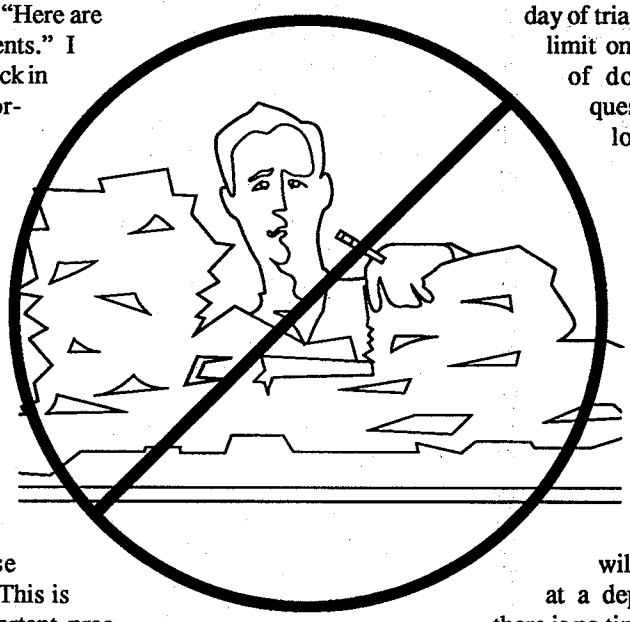
on a document indicates where the document originated. That is to say, your client may have several different offices from which you are obtaining documents. It is important to know and record which office a particular document came from. You should use multiple numbering series. A series, for instance, can begin with alphanumeric indicia which can include a code for a particular location, person, or opponent.

The first thing I do when I receive a stack of documents from any location is to number them in the order in which they were given to me. Before I even look at the stack of documents, I make sure that each page has been numbered sequentially. Second, I note the date I received that set of documents once they are numbered sequentially. This is a particularly important practice when receiving documents from your adversary.

One certain defensive tactic in document production by your adversary will be the lack of any numbering or identification of the documents being produced. Thus, your adversary will merely say, "Here are the documents." I have little luck in having attorneys on the other side agree to number their documents. Therefore, I number their documents for them and indicate the dates on which I receive those documents. This is a very important practice to develop when your discovery process can lead to many thousands of documents.



If you are involved in corporate litigation, it is a good practice at the outset of a lawsuit to notice up a 30(B)(6) deposition for the corporate opponent and interrogate the person in charge or in custody of documents concerning relevant matters. This can be done even before document production. You can learn the whereabouts of certain documents. With such information, you may be able to tailor your request to specific offices and filing cabinets. For example, my practice has been to inquire of the deponent exactly how many file cabinets there are, where documents are kept, and how many files there are. There may be many objections at a deposition to this sort of inquiry. Plow on in spite of the objections because it is important to get the questions on the record so you can immediately move to compel the answers.

[C]ontinue to ask for supplementation of document requests throughout the whole of discovery and even after discovery closes.

It is important to continue to ask for supplementation of document requests throughout the whole of discovery and even after discovery closes. This should continue up to the very day of trial. There is no limit on the number of document requests you may lodge against your adversary. This practice will go a long way toward preventing surprises. There will be occasions when documents will be produced at a deposition and there is no time to number them, nor is there any time to do anything with the documents other than to use them in the deposition. In these instances, it is very important that the court reporter at the deposition mark each document as an exhibit and you note on the record the receipt of the documents, their length, etc. Also, get some assurance from counsel on the other side of the table that the documents are being produced in re-

sponse to a request or a duty and to nail that down.

It is a good practice to go to all of your client's offices to inspect all of your client's files. You should have each and every file you believe is relevant to the lawsuit copied and delivered to your office. The numbering of the documents can be performed by a commercial photocopier, and will prevent having to label the documents later. If you perform a very thorough job in culling documents from your client, the production of documents to your opponent will be relatively simple.

One very important thing to do at this point is, when appropriate, always claim immunity and privilege for the documents you receive from your client and make sure you serve your schedule of claim of privilege on your adversary with your response to the request for production of documents. This schedule is due when you respond to a document request. For example, if you are responding to a request for production of documents and you withhold documents that should be responsive because they are privileged or immune, then you need to advise the other side that you are withholding documents pursuant to attorney-client privilege or attorney work product. If you do not claim privilege and immunity in a timely fashion, you are in danger of having your privilege or immunity pierced for an untimely objection.

I have obtained more documents in discovery under motions to compel because the other side failed to claim privilege or immunity in a timely fashion than I care to discuss. Indeed, I have received documents in discovery that I had no business ever receiving had the other side been diligent.

When discussing the topic of this article with the Section Chair, Adrienne Berry noted that one of the most important things she could think of concerning document control was the in-court maintenance of documents. For example, when an attorney is submitting evidence to the court, there should be another person at the attorney's table whose sole job is to keep track of the documents going into evidence. If possible, someone should track the document being admitted, the date of offering, whether it was admitted or refused, the bates number of the document, etc. Maintaining this kind of document control is too much for the attorneys who are listening to the testimony and trying to come up with ways to cross-examine or directly examine the witness. There is also need for a paralegal to work with the attorneys during trial concerning document control. The trial attorney will not have enough time to prepare witnesses and also make the necessary number of copies of documents, the transparencies of documents for viewing on the overhead, etc. Furthermore, the role of the paralegal in document control during trial becomes paramount when you have many days of trial and the exhibits admitted into evidence number in the hundreds. The danger of duplication of evidence admitted into the record becomes very real in these instances, and that is to be avoided, especially with a jury trial.

Documents are the single most important type of evidence an attorney can use to impeach a witness. Witnesses always have an "out" when you impeach them with their deposition by saying things like:

Indeed, I have received documents in discovery that I had no business ever receiving had the other side been diligent.

"You lawyered me." However, witnesses have a very difficult time wiggling around statements made by them in documents when there was no threat of imminent litigation.

Lastly, pre-trial litigation should be conducted as if every case is going to trial. Even though only one in ten or twenty cases actually goes to trial, you might be litigating that particular case. Also, you never know what is going to come up in discovery. You might uncover a fraud, in which case you have to amend your pleadings. Suddenly the case is definitely going to trial. In other words, what might start out as a collection action might turn into a monstrous lawsuit. Maintaining control of documents from the beginning and getting as many documents as you can concerning the complaint and answer will go a long way in helping you present the best possible case.

Federal Litigation Section Comments on Proposed Amendments to Federal Rules of Civil Procedure and Federal Rules of Evidence

The following is the text of the January 31, 1992 letter containing comments and recommendations regarding the proposed amendments to the Federal Rules of Civil Procedure and the Federal Rules Of Evidence, which was addressed to Robert C. Mueller, U.S. Court of Military Appeals, by Kent Hofmeister, Chair, Federal Rules Committee, Federal Litigation Section.

Dear Bob:

As the Immediate Past President of the Dallas Chapter of the Federal Bar Association, I appreciate the opportunity to share with you the comments and recommendations of the Federal Rules of Procedure Committee of the FBA's Federal Litigation Section (Committee) relating to the August 1991 Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure and the Federal Rules of Evidence.

As indicated by the discussion below, most of the attention has focused in particular on Rules 11 and 26. I will not address those proposed amendments to which there has been little or no substantive revision, *e.g.*, Rules 1, 84; rather, my comments will be directed more to those amendments which have evoked greater discussion and concern from the Committee and from FBA members who have written or contacted me on this topic.

Part A—Proposed Amendments to The Federal Rules of Civil Procedure

1. Rule 11. The Committee supports the spirit and language of the proposed amendments to Rule 11, and wishes to emphasize that the proposed modifications should not dilute the overall positive impact the Rule has had. As originally adopted, Rule 11 was designed to impress upon the practicing attorney, admittedly

under threat of sanction, his serious professional obligation not only to the client, but also to the court. It also is designed to provide the judiciary with an instrument to effectively ensure that the highest professional standard of conduct is met by those individuals who practice before it. Although it has been contended that motions for sanctions sometimes are frivolous themselves, and that the rulings on such motions may be, as every ruling is, subjectively based, *e.g.*, a determination whether a position urged is in good faith an "extension, modification or reversal of existing law," Rule 11 nevertheless has greatly benefited courts in establishing that a professional decorum will be maintained by all attorneys.

In Texas, and I am sure the same is true in other parts of the country, discovery abuses and the so-called "Rambo Litigator" have not been strangers to the legal system. In *Dondi Properties Corp. v. Commerce Sav. & Loan Ass'n*, 121 F.R.D. 284 (N.D. Tex. 1988) *en banc*, our local federal court confronted a situation that offered it the opportunity to adopt and promulgate standards of litigation conduct for attorneys appearing in civil actions in the Northern District of Texas. Various motions and cross-motions for sanctions were filed in that case, complaining of discovery abuses by the parties' counsel. In what the court described as an unusual procedure, it convened *en banc* at the request of a member of the court and the standards of litigation conduct were established. In a *per curiam* opinion, the eleven members of the court issued the following pronouncement:

> The judicial branch of the United States government is charged with responsibility for deciding cases and controversies and for administering justice. We attempt to carry out our responsibilities in the most prompt and efficient manner, recognizing that justice delayed, and justice obtained at excessive cost, is often justice denied.[5]
>
> We address today a problem that, though of relatively recent origin, is so pernicious that it threatens to delay the administration of justice and to place litigation beyond the financial reach of litigants. With alarming frequency, we find that valuable judicial and attorney time is consumed in resolving unnecessary contention and sharp practices between lawyers. Judges and magistrates of this court are required to devote substantial attention to referencing abusive litigation tactics that range from benign incivility to outright obstruction. Our system of justice can ill-afford to devote scarce resources to supervising matters that do not advance the resolution of the merits of a case; nor can justice long remain available to deserving litigants if the costs of litigation are fueled unnecessarily to the point of being prohibitive.
>
> As judges and former practitioners from varied backgrounds and levels of experience, we judicially know that litigation is conducted today in a manner far different from years past. Whether the increased size of the bar has decreased collegiality, or the legal profession has become only a business, or experienced lawyers have ceased to teach new lawyers the standards to be observed, or because of other factors not readily categorized, we observe patterns of behavior that forebode ill for our system of justice.[6] We now adopt standards designed to end such conduct.
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> A.
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> We begin by recognizing our power to adopt standards for attorney conduct in civil actions and by determining, as a matter of prudence, that we, rather than the circuit court, should adopt such standards in the first instance.
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> By means of the Rules Enabling Act of 1934, now codified as 28 U.S.C. § 2072, Congress has authorized the Supreme Court to adopt rules of civil procedure. The Court has promulgated rules that empower district courts to manage all aspects of a civil action, including pre-trial scheduling and planning (Rule 16) and discovery (Rule 26(f)). We are authorized to protect attorneys and litigants from practices that may increase their expenses and burdens (Rules 26(b)(1) and 26(c)) or may cause them annoyance, embarrassment, or oppression (Rule 26(c)), and to impose sanctions upon parties or attorneys who violate the rules and orders of the court (Rules 16(f) and 37). We likewise have the power by statute to tax costs, expenses, and attorney's fees to attorneys who unreasonably and vexatiously multiply the proceedings in any case. 28 U.S.C. § 1927. We are also granted the authority to punish, as contempt of court, the misbehavior of court officers. 18 U.S.C. § 401. In addition to the authority granted us by statute or by rule, we possess the inherent power to regulate the administration of justice. *See Batson v. Neal Spelce Associates, Inc.*, 805 F.2d 546, 550 (5th Cir. 1986) (federal courts possess inherent power to assess attorney's fees and litigation costs when losing party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons); *Thomas v. Capital Security Services, Inc.*, 836 F.2d 866, 875 (5th Cir. 1988) (*en banc*), (district court has inherent power to award attorney's fees when losing party has acted in bad faith in actions that led to the lawsuit or to the conduct of the litigation).
>
> We conclude also that, as a matter of prudence, this court should adopt standards of conduct without awaiting action of the circuit court. We find support for this approach in *Thomas*, where, in the Rule 11 context, the Fifth Circuit noted the singular perspective of the district court in deciding the fact intensive inquiry whether to impose or deny sanctions. The court noted that trial judges are "in the best position to review the factual circumstances and render an informed judgment as [they are] intimately involved with the case, the litigants, and the attorneys on a daily basis." 836 F.2d at 873. We think the circuit court's rationale for eschewing "second-hand review of the facts" in Rule 11 cases may be applied to our adopting standards of litigation conduct: "'the district court will have a better grasp of what is acceptable trial-level practice among litigating members of the bar than will appellate judges.'" *Id.* at 873 (quoting *Eastway Construction Corp. v. City of New York*, 637 F. Supp. 558, 566 (E.D.N.Y. 1986)).

[5] We do so in the spirit of Fed.R.Civ.P. 1, which provides that the federal rules "shall be construed to secure the just, speedy, and inexpensive determination of every action."

[6] Nor are we alone in our observations. In December 1984 the Texas Bar Foundation conducted a "Conference on Professionalism." The conference summary, issued in March 1985, recounts similar observations from leading judges, lawyers and legal educators concerning the subject of lawyer professionalism.

B.

We next set out the standards to which we expect litigation counsel to adhere.

The Dallas Bar Association recently adopted "Guidelines of Professional Courtesy" and a "Lawyer's Creed"[7] that are both sensible and pertinent to the problems we address here. From them we adopt the following as standards of practice[8] to be observed by attorneys appearing in civil actions in this district:

(A) In fulfilling his or her primary duty to the client, a lawyer must be ever conscious of the broader duty to the judicial system that serves both attorney and client.

(B) A lawyer owes, to the judiciary, candor, diligence, and utmost respect.

(C) A lawyer owes, to opposing counsel, a duty of courtesy and cooperation, the observance of which is necessary for the efficient administration of our system of justice and the respect of the public it serves.

(D) A lawyer unquestionably owes, to the administration of justice, the fundamental duties of personal dignity and professional integrity.

(E) Lawyers should treat each other, the opposing party, the court and members of the court staff with courtesy and civility and conduct themselves in a professional manner at all times.

(F) A client has no right to demand that counsel abuse the opposite party or indulge in offensive conduct. A lawyer shall always treat adverse witnesses and suitors with fairness and due consideration.

(G) In adversary proceedings, clients are litigants and though ill feeling may exist between clients, such ill feeling should not influence a lawyer's conduct, attitude, or demeanor towards opposing lawyers.

(H) A lawyer should not use any form of discovery, or the scheduling of discovery, as a means of harassing opposing counsel or counsel's client.

(I) Lawyers will be punctual in communications with others and in honoring scheduled appearances, and will recognize that neglect and tardiness are demeaning to the lawyer and to the judicial system.

(J) If a fellow member of the Bar makes a just request for cooperation, or seeks scheduling accommodation, a lawyer will not arbitrarily or unreasonably withhold consent.

(K) Effective advocacy does not require antagonistic or obnoxious behavior and members of the Bar will adhere to the higher standard of conduct which judges, lawyers, clients, and the public may rightfully expect.

Attorneys who abide faithfully by the standards we adopt should have little difficulty conducting themselves as members of a learned profession whose unswerving duty is to the public they serve and to the system of justice in which they practice.[9] Those litigators who persist in viewing themselves solely as combatants, or who perceive that they are retained to win at all costs without regard to fundamental principles of justice, will find that their conduct does not square with the practices we expect of them. Malfeasant counsel can expect instead that their conduct will prompt an appropriate response from the court, including the range of sanctions the Fifth Circuit suggests in the Rule 11 context: "a warm friendly discussion on the record, a hard-nosed reprimand in open court, compulsory legal education, monetary sanctions, or other measures appropriate to the circumstances." *Thomas*, 836 F.2d at 878.[10]

We do not, by adopting these standards, invite satellite litigation of the kind we now see in the context of Fed.R.Civ.P. 11 motions. To do so would defeat the fundamental premise which motivates our action. We do intend, however, to take the steps necessary to ensure that justice is not removed from the reach of litigants either because improper litigation tactics impose unnecessary delay or because such actions increase the cost of litigation beyond the litigant's financial grasp.[11]

Similarly, we do not imply by prescribing these standards that counsel are excused from conducting themselves in any manner otherwise required by law or by court rule. We think the standards we now adopt are a necessary corollary to existing law, and are appropriately established to signal our strong disapproval of practices that have no place in our system of justice and to emphasize that a lawyer's conduct, both with respect to the court and to other lawyers, should at all times be characterized by honesty and fair play. *Dondi*, 121 F.R.D. 286-89.

With the *Dondi* decision serving as an appropriate backdrop, the Committee wishes to emphasize that all proposed amendments that promote and ensure professional conduct not only are desirable, but indeed are mandated by the highest standards to which the legal profession must aspire.

Redirecting the focus to more specific considerations concerning Rule 11, the Committee members addressed some potential consequences the amendments may have. For example, one Committee member expressed concern regarding Rule 11(c), whereby a court, subject to the enumerated conditions stated in this provision, is empowered to sanction not only an attorney practicing within a law firm, but the law firm itself. As William W. Garretson of the FBA Iowa Chapter observed, this provision may

> [i]mpact unfairly on lawyers in the office with no knowledge or responsi-

[7] We set out in an appendix pertinent portions of the guidelines and the creed in the form adopted by the Dallas Bar Association.

[8] We also commend to counsel the AMERICAN COLLEGE OF TRIAL LAWYERS' CODE OF TRIAL CONDUCT (rev. 1987). Those portions of the Code that are applicable to our decision today are set out in the appendix.

[9] We note that these standards are consistent with both the American Bar Association and State Bar of Texas Codes of Professional Responsibility. *See, e.g.*, ethical considerations EC 7-10, EC 7-36, EC 7-37, and EC 7-38 set out in the appendix.

[10] We draw the parallel to Fed.R.Civ.P. 11 with the caveat that we are not adopting Rule 11 jurisprudence in the context presented here.

[11] We note, by way of example, the Dallas Bar Association guideline that eliminates the necessity for motions, briefs, hearings, orders, and other formalities when "opposing counsel makes a reasonable request which does not prejudice the rights of the client." This salutary standard recognizes that every contested motion, however simple, costs litigants and the court time and money. Yet our court has experienced an increasing number of instances in which attorneys refuse to agree to an extension of time in which to answer or to respond to a dispositive motion, or even to consent to the filing of an amended pleading, notwithstanding that the extension of time or the amended pleading would delay neither the disposition of a pending matter nor the trial of the case.

bility otherwise of the filings, other than their misfortune to share an office with the person who abused the rule. I can just see an irresponsible junior member of an office filing a frivolous pleading on his last day in the office, knowing that while he or she may have no estate that could be touched by the sanction imposed, the elderly counsel down the hall who has processed probate and adoption cases for the last ten years before his retirement will be left paying for it.

I trust that under this provision, despite the mandatory "shall impose" language, a court nevertheless retains its discretion whether to impose a sanction, and would adhere to the standard of not abusing that discretion in determining, on a fact intensive, case-by-case basis, whether such a result is justified. In short, Rule 11 should extend not only to the lawyer who signs a pleading that contains misinformation, but also, and only, to other lawyers who are knowingly responsible for the misinformation.

On December 31, 1991, pursuant to the Civil Justice Reform Act of 1990, the United States District Court for the Eastern District of Texas became one of the first federal courts in the region to effectuate its Civil Justice Expense and Delay Reduction Plan (Eastern District Plan). Pursuant to Article Four of the Eastern District Plan, leave of court apparently is required before a motion for sanctions may be filed. Proposed Rule 11(c)(1)(A) provides that a request for sanctions brought pursuant to the Rule must be presented as a separate motion, not simply as an additional prayer for relief contained in another motion. The arguable result in the Eastern District is that the time spent drafting and filing proposed motions for leave of court and waiting for leave to be granted prior to ruling reduces neither expense nor delay in having a matter addressed and resolved. *See, e.g., Dondi*, 121 F.R.D. at 288, n.11, which raises a similar concern.

The "safe harbor" concept of Rule 11(c)(1)(A), *i.e.*, a twenty-one-day grace period following service of a motion for sanctions prior to the motion's filing, is a praiseworthy revision that directs a litigant to correct filings when an error is discovered, and to dismiss a claim or defense without penalty of sanction by the court. The Iowa Chapter, however, suggests that a distinction should not exist regardless of whether the change is undertaken by the parties to the litigation or is directed by the court *sua sponte*, and recommends that the "safe harbor" be expanded to include both scenarios.

2. Rule 16. The proposed amendments to Rule 16 relating to pre-trial conferences should serve the avowed purpose of expediting the litigation process. August W. Steinhilber, General Counsel for the National School Boards Association and Chairman of the FBA's Northern Virginia Chapter, makes reference to what those in his geographical location affectionately call the "Rocket Docket." Gus indicates that despite some shortcomings, the Rocket Docket still is far preferable in terms of speedy justice when compared to the innumerable delays experienced in other district courts. His Chapter and this Committee support any proposed amendment to the Federal Rules of Civil Procedure that speeds up the process, reduces discovery abuses, and attempts to verify that expert witnesses in fact are experts, particularly those offering testimony of a scientific nature. More specifically, the Northern Virginia Chapter suggests that Rule 16 also provide that at the pre-trial conference, a firm trial date be set and that qualifications for expert witnesses be coordinated with Rule 702 of the Federal Rules of Evidence.

Greg White of the Central Texas Chapter notes a difficulty concerning proposed Rule 16(b)(6), which requires that scheduling orders issue no more than sixty days after the appearance of a defendant. His experience with scheduling conferences has been complicated by the filing of Rule 12 motions and suggests language be included that addresses such pending motions. I also would note that the language of Rule 16(b)(6) requiring a pre-trial order to issue "as soon as practicable but in no event more than sixty days after the appearance of a defendant," be made more precise. My thought in this regard is simply that multiple defendants will be served at different times, and some defendants, *i.e.*, "[t]he United States or an officer or agency thereof," is statutorily authorized to file a responsive pleading within sixty days after service of a complaint or other pleading. *See* Rule 12(a). Any other defendant has twenty days within which to answer, and the question is, if Defendant John Doe and Defendant United States are served on the same day, when does the court's sixty-day time period begin to run?

The Committee endorses proposed Rule 16(c)(5) to the extent that it directs the court to affirmatively address pending motions for summary judgment prior to the scheduled trial date. Six or seven years ago when I was an assistant city attorney for the City of Dallas, my co-counsel and I had timely filed a motion for summary judgment in a civil rights action filed in federal court. The morning of trial, prior to selecting a jury, we again advised the court of the pending motion, at which time argument was entertained and several hours later the motion was granted, obviating the need for the trial. As you can imagine, this resulted in a tremendous waste of resources, time, and expense for the parties and their counsel, as well as the jury panel. Hopefully the amendment as proposed will prod courts into making a more timely disposition of such motions.

The Committee also approves of the proposed amendment to Rule 16(c), which articulates what the courts assuredly already are empowered to do, *i.e.*, require that "parties, or their representatives or insurers, attend a conference to consider possibilities of settlement and participate in proceedings ordered under paragraph (9)." The language here is somewhat ambiguous in that the conference referred to could be either the pre-trial conference or a court-ordered mediation conference; however, there is no reason why a court could not order the attendance of such individuals in chambers even after a mediation session has proven unsuccessful.

3. Rule 26. By far the greatest discussion, concern, and, quite frankly, overwhelming disapproval has centered on the proposed amendments to Rule 26. As an initial observation, it appears that the main changes to the Rules of Civil Procedure are found in the new voluntary disclosure and discovery provisions of Rule 26 and that, with the notable exceptions of Rules 11 and 56, most of the significant remaining rule changes seek to effectuate implementation of and conformity with Rule 26. As discussed in greater detail below, the most far reaching and obvious of such rule changes are reflected in Rules 30, 31, and 33, which impose limitations on the permissible number and duration of depositions, the number of depositions

upon written questions, and the number of interrogatories.

Perhaps the most emphatic disapproval was submitted by Robert S. Banks, Jr., who has offices in Portland, Oregon and presently serves as President of the Oregon Chapter. A specific meeting was called by the Chapter's Executive Committee to discuss and debate each of the proposed changes to the Federal Rules, and approximately forty-five Chapter members, including United States District Judge Owen Panner of the District of Oregon, were in attendance. The Oregon Chapter unanimously opposed those proposed amendments to Rule 26(a) that would require early disclosure of information, and Bob indicated that a common sentiment expressed was that although laudable in purpose, the changes to this provision likely would lead to new motion practice concerning whether material produced by initial disclosure "bears significantly on" any claim or defense. The vast majority of the Oregon Chapter also opposed all other significant proposed amendments to the Rules generally, citing their belief that, at least in that district, "the existing federal and local rules already provide adequate mechanisms to address those instances where there are discovery abuses, and where frivolous claims and defenses are filed." The result of the meeting was the unanimous approval of the following resolution:

> After thorough discussion and debate, the Oregon Chapter of the Federal Bar Association resolves that the Chapter is opposed to the proposed changes to the Federal Rules of Civil Procedure as a whole.

Similarly, the Executive Committee of the Iowa Chapter met to discuss the proposed changes, after which it passed a motion stating that the Chapter "strongly object[s] to [any] proposed changes to Rule 26 of the Federal Rules of Civil Procedure."

Almost uniformly, different Chapters and individuals characterize the proposed amendments relating to voluntary disclosure as unworkable, unrealistic, unnecessary, and potentially counter-productive. The comments of Committee member Joyce Ann Harpole of Portland, Oregon are typical of the strong reservations enunciated by chapters around the country and this Committee:

> The [Rule 26] proposal appears to be based on the assumption that all parties have knowledge of relatively equal usefulness at the outset of the litigation which they can share with their opponents to reduce costs. This assumption is unwarranted.
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> First, because the federal rules provide for only notice pleading, a defendant often does not have sufficient information about the plaintiff's claim, before discovery from the plaintiff has begun, to determine what the basis for the claim is, who the relevant witnesses are, and what the relevant documents are.
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> Second, even if the defendant has some understanding about the claim, the standard for disclosure "likely to have information that bears significantly on any claim or defense" is different from that applicable to discovery, and is so vague as to cause the parties to provide a very broad response, lest they be accused of violating the rule. Broad responses are, however, not helpful in focusing discovery, which the rule is intended to aid. The party receiving the broad response will, of course, be inclined to request discovery from every identified witness and every document category, out of fear of overlooking the critical piece of evidence. Thus, discovery is likely to become more rather than less expansive under this proposal.
>
> Third, most practitioners find it a relatively simple task to draft at the early stages of the litigation a request for production of relevant documents, interrogatories requesting witness identification, or a Rule 30(b)(6) deposition notice. Thus, the paperwork the rule is intended to obviate does not seem to be that great a problem. If a party's request or interrogatories sweep too broadly, the parties in many jurisdictions, and under the proposed amendments to the rules, are required to confer about the matter. Such conferences frequently result in a narrowing of the request to more directly relevant information which is less burdensome to provide.
>
> Allowing the parties the flexibility to determine what information they wish to obtain and when seems preferable to establishing arbitrary disclosure requirements with new standards that are likely to provoke disputes about the sufficiency of the disclosures or multiply unduly the discovery process.
>
> Finally, the proposed disclosure requirements seem contrary to the notions underlying the work product doctrine—that one party may not take advantage of another party's thoughts and work. Requiring one party's attorney to decide what is relevant to the other party's case and disclose it seems to be a classic invasion of an attorney's work product.

Committee members Marsha Hymanson and Robert M. Lindquist of Los Angeles, California both cite the disclosure requirements found in the Local Rules of the Central District of California, Rule 6, which provide that parties are to voluntarily exchange documents "reasonably available" to them which "are then contemplated to be used in support of the allegations of the pleading filed by the party." According to Robert, the requirements have existed for many years and have not proven to be a hardship for either plaintiffs or defendants, and if anything, have constituted "a 'non-event' in that [the] sanction of evidence preclusion has hardly ever been enforced."

A recurring complaint also addresses the seemingly arbitrary time frame of thirty days within which a party must make disclosures following service of a pleading. The general consensus is that a plaintiff can plan in detail its case and related strategies long before the filing of a complaint. The defendant, however, enjoys no such luxury, and is at a distinct disadvantage in trying to marshal its resources, financial and otherwise, in an attempt to comply with what the proposed amendments would require. Obviously, the proposed amendments provide a means by which to address the problem, *i.e.*, seek leave of court for additional time within which to disclose the necessary information; however, the predictable result would seem to be a glut of routine motions for enlargement of time filed by defendants. If the thirty-day time frame for plaintiff's disclosure is maintained, the Committee strongly recommends that the defendant be given additional time, *e.g.*, forty-five days or more, within which to file its responses.

Garry D. Woodward, President of the Iowa Chapter, also scrutinized the perceived advantages and disadvantages of

Rule 26 from both the plaintiff's and defendant's perspectives:

> The [Executive Committee's] opinions were expressed that the rapid informal exchange of information without discovery is unfavorable to plaintiffs in general, even though large law firms largely rely on associate attorneys, clerks, and paralegals to assemble information. However, the defendant's attorneys present equally objected to the time constraints involved. Those from Iowa large firms were also opposed to this rule. The government attorneys at the meeting did not seem to be as strongly opposed, but agreed that such a rule would permit, for example, the U.S. Attorney's office to flood the opposition with documents for them to sort out. This Rule 26 change would also be a burden on the government attorneys. Although it initially seems that the courts would benefit by the goal of early preparation and informal exchange of information, the group thought it unfair to parties and believed it would take even more of the court's time with the motions likely generated by the proposed Rule 26. The concern was brought up that many times clients do not walk in until the statute of limitations is almost ready to run. It was also felt that in the long run this would create more expense for the pursuit of a lawsuit, with costs already driving poor clients away from seeking remedies.

A general concern also has been expressed by Committee members Margo L. Frasier of Austin, Texas and William Garretson that unnecessary expense may be generated through this mandatory discovery and disclosure process when so many cases are settled without trial or the expense of preparing for trial. Margo and I share a similar kind of practice in that we both represent governmental entities sued as defendants in civil rights cases. As such, the issue of qualified immunity is often addressed before formal discovery takes place. Margo raises the issue that

> [t]he protection from suit will be nullified by the requirement that extensive discovery take place without the other side having to spend a single dime to make it occur. If [Rule] 26 is changed as proposed the cost of defending civil rights actions, many of which are thrown out as frivolous, will be greatly increased.

This may be particularly true where, even if immunity is denied, an interlocutory appeal may be taken immediately upon denial of the immunity. Federal case law is quite clear that immunity serves to protect an individual defendant from both suit and damages, and the language of the proposed Rule 26, without more, would appear to vitiate the protection now enjoyed by civil rights defendants. At a workshop recently convened to address the Eastern District Plan, however, this very matter was discussed, and hopefully it should not be problematic. Article Six of the Plan provides for a "Discovery Hotline," where a judicial officer is on call during business hours and has the authority to, among other things, modify provisions of the Plan as it may relate to a particular case. At the workshop, Chief Judge Robert M. Parker of the Eastern District of Texas indicated that the issue of discovery preceding the resolution of an immunity defense was the very type of issue that the Discovery Hotline was set up to address and resolve.

Finally, a concern relating to Rule 26(a)(1)(C) is that it is unrealistic at the beginning of a case to require disclosure of a computation of the categories of damages claimed by the disclosing party. As Marsha Hymanson writes, in most complex litigation,

> [d]amages cannot be calculated without the production of a significant number of documents by the opposing side, and/or without the assistance of expensive experts. I foresee a flurry of discovery motions attempting to sanction parties who have not provided "adequate" disclosures of damages computations, thus increasing the burden to the court and the costs to the litigants.

4. Rule 30. The most significant changes proposed by the amendments to Rule 30 involve the setting of presumptive limits on both the number and the length of oral depositions, *i.e.*, no more than ten depositions taken by plaintiffs, no more than ten depositions taken by defendants, no more than ten depositions taken by third parties, and the imposition of a time limitation of no more than six hours placed upon each deposition.

The consensus of the Committee is that these proposed changes are arbitrary and without merit, and therefore should not be effectuated. Jonathan M. Hoffman of Portland, Oregon notes that

> [i]n the small case such a limitation is unnecessary. In a large case it is too stultifying. The Federal Rules as presently structured give the court discretion to issue appropriate protective orders to avoid abuse of the discovery process. I readily agree that in some cases judges fail to rein in overly zealous attorneys; I suspect the same judges would grant leave to exceed the arbitrary limits in proposed Rule 30 just as often. The solution lies not in setting an arbitrary rule, but in training and encouraging our judges to actively monitor the discovery process and tailor it fit the needs of the particular case. This is a power the judges already have.

Marsha Hymanson also finds the proposed limitations unrealistic, predicting that in the long term, exceptions to the Rule would become virtually automatic, clogging the courts with numerous motions to exceed the Rule's proposed limitations. She finds particular fault with the ten deposition limit, characterizing it as both ambiguous and unworkable in all but the most simple cases.

> It is unclear from the wording of the Proposed Amendments whether the tendeposition limit applies to each party in multiple plaintiff and multiple defendant cases. Also, since counterclaims are often filed that raise different issues from the primary case, do the parties to the counterclaim, each of whom might be identical to the parties to the main action, each get ten additional depositions for the counterclaim discovery? Again, I believe that a more realistic level of depositions should be set out in the Rule, before the parties must utilize the resources of the court in order to resolve the discovery issues. Also unanswered by the wording of the Rule is the type of situation in which one plaintiff sues eight defendants. Does each of these eight defendants get ten depositions, or must they split them up amongst themselves?

One way of addressing Marsha's concerns is embodied in the Eastern District Plan, Part One, Article One, wherein upon the filing of a case, it is assigned by the court to one of six tracks, based upon the complexity of the case and anticipated discovery. Under the Plan, it is conceivable that fewer depositions (Track Four permits the "depositions of the parties, . . . and three other depositions per side (*i.e.*, per party or per group of parties with a common interest)") or more depositions (Track Five permits a discovery plan "tailored by the judicial officer to fit the special management needs of this case.") may be allowed. Under local rules, therefore, the number of permissible depositions suggested by the proposed amendments could be enlarged. *See* proposed amendments to Rule 83.

The Committee strongly urges that the six-hour maximum time limitation relating to the taking of depositions not be adopted. The inherent problem with this proposed rule change is the invalid underlying assumption that this limitation is realistic in most instances. It certainly is not realistic in most complex cases and penalizes the client of the thoroughly prepared attorney who in good faith reasonably attempts to gather relevant and admissible facts to zealously represent that client. As Committee member Joyce Ann Harpole of Portland, Oregon suggests, a restrictive time limitation

> [e]ncourages a deponent to be evasive and nonresponsive and encourages counsel to engage in long colloquies simply to use up the 6 hours. To require leave of court to exceed these boundaries whenever the other side will not agree simply adds an unnecessary expense. Rather, the courts should continue to presume that the number and duration of depositions being taken is appropriate to the case until a party seeks relief from the court.

Consistent with this logic, the Committee recommends that if a time limitation upon depositions is adopted, such limitation should be a realistic one, *e.g.*, two to three days, before a party needs to seek leave of court to obtain additional time.

5. Rule 31. The proposed amendments to Rule 31, which reduce the total time for developing cross-examination, redirect, and recross questions for depositions upon written questions from 50 to 28 days (14, 7, and 7 days, respectively) obviously expedite the litigation process, and bring the federal rules more in line with what the Texas rules provide, *i.e.*, 18 days (10, 5, and 3 days, respectively). *See* Tex.R.Civ.P. 208. The more restrictive Texas system has functioned smoothly, and the Committee does not foresee any significant problems with this proposed change.

6. Rule 33. Committee members Marsha Hymanson and Robert Lindquist are familiar with interrogatory limitations, which have existed in the California federal and state court systems for several years. It has been their experience that reasonable limitations have not proven to be a hardship and have generally discouraged abusive discovery practices, providing of course for the permissible waiver upon a showing of good cause. I would add that in the Northern District of Texas, Judge Robert Porter, one of our former judges, had a standard scheduling order that restricted the number of interrogatories by each party to two sets of twenty-five, including subparts. If the proposed disclosure provisions of Rule 26 are approved, a great deal of information ordinarily discovered through interrogatories will be produced very early in the litigation, and a reasonable limitation should prove workable. Judge Porter's restrictions typically did not produce an undue hardship; however, there also was no concomitant restriction on the number and length of depositions.

It is the Committee's position that any interrogatory limitation imposed upon parties be less restrictive than the present maximum of 15 interrogatories, *e.g.*, 25-50 by each party, including subparts, as previously discussed and as presently afforded by the local rules of the Central District to California. This should result in less of a burden on the courts handling the numerous anticipated motions to exceed.

It should be noted that some FBA members oppose the limitation on the number of interrogatories allowed under the proposed amendments and disagree with the Committee Notes explanation for the change. The concern expressed is that the Rule incorrectly assumes that service of a reasonable number of interrogatories is a costly device, when in fact it may prove more cost effective in certain cases and better serves the less well-heeled client than preparing for and taking depositions, regardless of duration.

7. Rules 34 and 36. As reflected by the Committee Notes, the thrust of the revisions to Rules 34 and 36 regarding documentary requests and requests for admission is to bring these Rules into conformity with the disclosure provisions of Rule 26. The Committee's comments on Rules 34 and 36, therefore, are correlative to the discussion found on Rule 26.

8. Rule 37. The proposed amendments to Rule 37 similarly complement the provisions for disclosure contained in proposed Rule 26. The Committee endorses the new language of 37(a) which encourages litigants to resolve discovery disputes by informal means without court action before filing a motion with the court, and requires certification by the movant that such an effort has been made. In addition, the revised phrase "after affording an opportunity to be heard" in proposed Rule 37(a)(4) offers the court greater flexibility and an opportunity to reduce litigation costs by not requiring an "opportunity for hearing," as previously provided.

Robert Lindquist again draws from his California practice, stating that the proposed presumption of awarding sanctions to the losing party under Rule 37 tracks the practice of the California state courts since enactment of the 1986 Civil Discovery Reform Act. He states that the Rule has encouraged more candor in discovery and also has encouraged the courts to award sanctions for run-of-the-mill discovery gamesmanship. Additionally, the Committee Notes indicate that "[l]imiting the automatic sanction to violations 'without substantial justification,' coupled with the exception for violations that are 'harmless,' is needed to avoid unduly harsh penalties in a variety of situations," and Robert cites the comparable California "reasonable justification" exception to mandatory sanctions as historically workable and an aid to the court in preventing hardship on the parties.

9. Rule 43. Rule 43 is intended to expedite non-jury trials by allowing witnesses to adopt a written affidavit containing uncontested preliminary matters and, according to the Committee Notes, to enhance the power of the court under Rule 611(a) of the Federal Rules of Evidence. Rule 611(a) addresses whether testimony shall be in the form of a free narrative or responses to specific questions, the order

of calling witnesses, the presentation of evidence, the use of demonstrative evidence, and other questions which arise during the course of a trial. In short, Rule 611(a) allows innovations in the presentation of proof and it is within the court's discretion to structure the admission of evidence.

Rule 43 fosters the goals of Rule 611(a) by allowing certain "boilerplate" testimony in non-jury trials to be submitted in written form rather than orally. This should expedite trial in most cases since judges in non-jury cases often pay little attention to these preliminary matters which, for the most part, are presented not to persuade but to lay a proper predicate for the admission of other testimony and to preserve the record on appeal.

Rule 43 will reduce both time and costs in non-jury trials "without sacrifice to the benefits of the adversarial system."

10. Rule 54. In the twenty-two point "Recommendations" position paper submitted by the Federal Civil Justice Reform Working Group, point 18, "Towards More Efficient Attorney's Fees Statutes," discusses the goal of reducing time spent litigating attorney's fees through needless satellite litigation. Proposed Rule 54, while not eliminating the need for satellite litigation, will certainly clarify the rules of procedure to be utilized in such litigation. Rule 54 imposes a procedural framework within which litigants must resolve their attorney's fees disputes through the filing of motions and, if necessary, evidentiary hearings. Rule 54 allows a tremendous amount of flexibility for local courts to determine their own rules of procedure, as well substantive rules, regarding the disposition of attorney's fees litigation. All in all, Rule 54 appears to well thought out and should inject some amount of certainty into what traditionally is a rather uncertain proceeding.

The requirement of a written motion to trigger a request for attorney's fees, within fourteen days after final judgment unless the court specifies some other time, serves the dual purpose of joining the attorney's fees issue and providing at least an opportunity to have that issue resolved prior to the time that the case on the merits is appealed, thereby fostering judicial economy by enabling the satellite attorney's fee litigation and the proceeding on the merits to be reviewed at the same time by the appellate court. Another beneficial aspect of Rule 54 is that portion which allows the court to make a determination on the liability of a party for attorney's fees prior to the submission of evidence regarding the amount of the fees. This is particularly useful in certain cases where a finding is necessary in order to trigger a recovery of attorney's fees, *i.e.*, the issue of who is a prevailing party pursuant to 42 U.S.C. § 1988.

Overall, Rule 54 appears to codify the rules and procedures already present in many districts throughout the country. Since Rule 54 authorizes courts by local rules to establish many of the procedures addressed in Rule 54, each district can make the determination whether to drastically alter its procedures regarding the resolution of attorney's fees disputes, adopt such procedures with all deliberate speed, or, in essence, retain all aspects of the current attorney's fees procedures through the adoption of local rules. I believe the Committee should support Rule 54 since it appears to be the first step necessary to reducing the time spent litigating attorney's fees.

11. Rule 56. Proposed amendments to Rule 56 have not evoked a great deal of criticism from Committee members; however, the comments which were received reflect the different practices employed by federal courts across the country relative to summary judgment practice.

For example, subsection (c)(1) requires a movant to separately identify those undisputed facts upon which a judgment or determination should be granted and subsection (c)(2) mandates that the response to the summary judgment motion identify those facts which indeed are in dispute. As noted by Committee member and Dallas Chapter President Terry Welch, these provisions already are contained in the Local Rules of Practice for the Northern District of Texas and are nothing new to Northern District practitioners; however, the Local Rules for the Eastern District of Texas, for example, contain no such provisions and Terry believes that the inclusion of these provisions will simplify summary judgment practice.

Robert Lindquist had several technical concerns regarding Rule 56 procedure. First, subsection (c)(3) sets forth fairly detailed standards of allowable evidence on a summary judgment motion. For example, affidavits must contain competent evidence. As Robert writes,

> [i]n my practice, I generally challenge incompetent evidence in summary judgment motions through a motion to strike. However, some federal courts (or more precisely, the clerks) have rejected the filing of "a motion" as untimely or otherwise unauthorized, causing the challenges to be relabeled as "Requests" to Strike or "Objections" to Evidence. In short, there is confusion about the treatment and labeling of this often key part of the summary judgment process. Thus instead of remaining silent, Rule 56 should explicitly authorize the challenging the allowability of evidence and standardize the procedure for doing so.

Robert also writes that subsection (c) mentions a motion and an opposition, but no "reply." He states that replies were filed "in 99 percent of the cases" and "invariably additional evidence is filed with the reply, often leading to a sur-reply that either asks the court to strike the additional evidence as untimely or responds to it with additional argument or evidence." Thus, Robert believes that Rule 56 should explicitly address the allowable scope of a reply and that subsection (c)(3) could be read as prohibiting additional evidence in a reply. He believes that such a provision should be stated more explicitly to prevent repeated motion practice on the issue.

Marsha Hymanson was the only Committee member who expressed concern about the new Rule 56 provisions, particularly as it relates to the jurisprudence surrounding summary judgment practice.

> I am troubled by the efforts to amend Rule 56, which has a long history of judicial interpretation of the existing rule. I am concerned that alterations to this Rule will require years of expensive and time consuming litigation in order to test the limits, the language, and the construction of the changes proposed. Moreover, I do not believe that there is a consensus among litigators that this particular Rule has been subject to abuse and requires changes in order to curb such abuse, such as the abuse to the discovery rules that is widespread. Therefore, I would recommend against the Proposed Amendments to Rule 56.

12. Rule 83. Proposed Rule 83 permits a district court, with approval of the Judicial Conference, to adopt experimental rules inconsistent with the national rules, and primarily extends to the individual district courts a desirable latitude to fashion procedures and remedies that address problematic situations unique to that particular district. This latitude was effectively utilized by the court in the *Dondi* decision where the Dallas Bar Association Guidelines of Professional Courtesy were excerpted and appended to that decision.

B—Proposed Amendments to the Federal Rules of Evidence

1. Rule 702. The Committee generally supports the proposed amendments to Rule 702 regarding testimony by experts, particularly the provision that requires expert testimony to be "reasonably reliable" and to "substantially assist" the fact-finder. August Steinhilber stresses that the quality of expert testimony must be protected, urging a return to the strictures of *Frye v. United States*, 293 F.2d 1013 (D.C. Cir. 1923) (requiring general acceptance of the scientific premises on which the testimony is based). The new language, however, is a shift in the right direction and the Committee recommends the adoption of this standard, or a standard that is designed to eliminate testimony that strays far from current scientific knowledge or mainstream professional practice. Such a revision would allow testimony based on majority and even respected minority theories, while excluding fringe theories.

I personally wish to thank the members of the Federal Rules of Procedure Committee for the time they have devoted in reviewing and discussing with their colleagues the proposed amendments and forwarding to me their insightful comments and suggestions. Hopefully our collective efforts will be of benefit to you, the Federal Bar Association, and the legal profession as a whole. If I or this Committee may be of additional service, kindly contact me at your earliest convenience.

Respectfully submitted,

Kent S. Hofmeister, Chair
Federal Rules of Procedure Committee

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