



Side BAR

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The Federal Bar Association

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Federal Litigation Section

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FROM THE CHAIR

By Kent S. Hofmeister

I am very pleased to advise our membership that following the successful tenure of Adrienne A. Berry, our immediate past Chair, new appointments to the various committees and Governing Board have been made. For the first time, we are honored to have two Governing Board advisory members, the **Honorable Henry A. Politz**, Chief Judge of the United States Fifth Circuit Court of Appeals, and the **Honorable Barefoot Sanders**, Chief Judge of the United States District Court for the Northern District of Texas.

As you may recall, Judge Politz was very active at the National Convention in New Orleans this past October, appearing as the Friday luncheon's featured speaker and heading the panel, which also included the Honorable Minor Wisdom and the Honorable Nathaniel R. Jones, that hosted the "Appellate Argument and Views from the Bench" seminar at the Fifth Circuit Court of Appeals. A native of Napoleon, Louisiana, Judge Politz was named Outstanding Young Lawyer in Louisiana in 1971, and he practiced with the Shreveport law firm of Booth, Lockard, Jack, Pleasant & LeSage from February 1959 until his appointment to the Court of Appeals in July 1979. While in private practice, Judge Politz was an active participant in state and local bar associations, having served as

President of both the Louisiana Trial Lawyers Association and the Shreveport Bar Association. He recently completed six years as a member of the Judicial Conference of the United States and its Committee on Codes of Conduct, the national ethics committee for federal judicial officers and employees. Judge Politz has served as the Circuit's Chief Judge since January 16, 1992.

See CHAIR on Page 12

PROFILING THE RECENT AMENDMENTS TO THE FEDERAL RULES

By Judge Patrick E. Higginbotham and
Dean Edward H. Cooper

On December 1, 1993, the amendments to the Federal Rules of Civil, Appellate and Criminal Procedure and the Federal Rules of Evidence, approved by the Supreme Court on April 22, 1993, took effect. In accordance with 28 U.S.C. § 2074(a) and the April 22, 1993 order of the Supreme Court, the amendments are to govern all proceedings commenced on or after December 1, 1993, and "insofar as just and practicable," all proceedings then pending.

The following material was co-authored by the Honorable Patrick E. Higginbotham, Judge of the United States Court of Appeals for the Fifth Circuit, and Dean Edward H. Cooper, Associate Dean of the University of Michigan Law School, who respectively are the Chair and See PROFILING on Page 2

PROFILING, Continued from Page 1

Reporter of the Advisory Committee on Civil Rules. This article, originally promulgated by the Administrative Office of the United States Courts, summarizes the most significant and controversial of the new amendments to the Federal Rules of Civil Procedure, and also contains a briefer description of some of the amendments to the Federal Rules of Appellate and Criminal Procedure and the Rules of Evidence. Reference should be made to the Committee Notes to the amendments for authoritative guidance, as they contain more detailed explanations of the reasons for each amendment. With the kind permission of Judge Higginbotham, here-with the summary:

I. FEDERAL RULES OF CIVIL PROCEDURE

Rule 1. Scope and Purpose of Rules

Rule 1 is amended to require that the rules not only be construed but also be "administered" to secure the just, speedy, and inexpensive determination of every action. The amendment is intended to recognize the affirmative duty of the court to avoid undue cost or delay. This responsibility is shared by counsel.

Rule 4. Summons

Rule 4 is rearranged and amended in several respects to facilitate service. It applies only to service of the summons. Other process is covered by new Rule 4.1. The more important changes include:

- The former 4(b) provision adopting state summons practice is deleted. Federal practice is followed in all cases.
- It is made clear that the plaintiff is responsible for service.
- Service on individuals and corporations in a judicial district of the United States can be made according to the law of the state in which service is effected as well as the state law of the district where the action is pending. The first sentence of former 4(f), restricting the authority of the process server to the state of the court where the action is pending, is deleted.
- Service on defendants in foreign countries is governed by new 4(f). Service must be made by means authorized by any applicable internationally agreed means, most notably the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents. Provision is made for service in other circumstances. The requirement in former 4(i) of specific statutory authorization for service abroad has been eliminated.
- A special long-arm provision, 4(k)(2), is added for claims arising under federal law. Personal jurisdiction is provided, to the extent consistent with the Constitution and laws of the United States, over a defendant who is not subject to the jurisdiction of the courts of general jurisdiction of any state. This provision reaches situations in

which jurisdiction can be supported by the defendant's contacts with the United States as a whole, although the contacts are not so focused on any single state as to support reliance on the jurisdiction of any state court.

- Rule 4(d) creates a waiver-of-service system to replace the "service by mail" provisions of former (c)(2)(C)(ii). Important help in understanding this new system is provided by new Forms 1A and 1B, which replace the abrogated Form 18-A. The features of waiver include:

† The request for waiver is sent by mail or other reliable means, and includes a prepaid means of compliance. When the plaintiff files a waiver, the action proceeds as if service had been made at the time of filing.

† Waiver does not waive objections to venue or personal jurisdiction.

† Waiver is encouraged by several devices. A defendant who waives service is given additional time to answer; see also Rule 12(a)(1)(B). A defendant in the United States who refuses to waive is liable for the costs of service. A defendant outside the United States who refuses to waive may be liable for the costs of service as costs taxed on conclusion of the litigation.

† Waiver is not available in actions against the United States or its agencies.

† The provisions for service on the United States or its agencies are refined to make it easier to cure failure to serve all required multiple officers, agencies, or corporations.

† The Foreign Sovereign Immunities Act is formally incorporated as the means of serving a foreign state or agency.

Rule 4.1. Service of Other Process

This rule contains the provisions of former Rule 4 governing process other than the summons. Rule 4.1(b) provides for nationwide service of an order of commitment for civil contempt.

Rule 5. Facsimile and Electronic Filing

Rule 5 is amended to authorize filing not only by facsimile transmission but also by other electronic means. Filing must be authorized by

local rule, and the local rule must comply with standards established by the Judicial Conference of the United States.

Rule 11. Signing of Pleadings; Representations to Court

The 1983 version of Rule 11 is substantially revised. The scope of the obligations imposed by Rule 11 is expanded in some ways, but the sanctions are scaled back. The most central of the changes noted below are those that make it clear that Rule 11 is violated by persisting in

A MESSAGE FROM ATTORNEY GENERAL JANET RENO

On January 4, 1994, United States Attorney General Janet Reno issued the following memorandum to U.S. Department of Justice attorneys and all U.S. attorneys, encouraging their involvement "at all levels" of bar activities:

Throughout my career as an attorney, I have gained tremendous personal satisfaction from serving on a variety of bar committees aimed at improving the administration of justice. I have enjoyed working in these settings with dedicated attorneys from both the public and private sectors. The active involvement of government lawyers on these committees can help contribute to the soundness of policies and positions formulated by local, state, and federal bar groups, as well as the American Bar Association.

I recognize the value of Justice Department lawyers participating in activities that improve the law, the legal system, and the legal profession. Serving on bar association study committees and serving as continuing legal education instructors at bar-sponsored programs are two examples of such activities. I encourage each of you to become involved in bar activities at all levels. Your views enhance the deliberative process of these committees, which rely on volunteer participation.

I encourage DOJ and United States Attorney supervisors to exercise the flexible use of excused absences to permit lawyers on their staffs to participate in bar work. While, in the normal course of events, attorneys will not officially be representing the department, it is difficult to separate ourselves from our status as DOJ lawyers. Please be mindful of this as you participate in bar committee work which involves policy setting.

I have designated Associate Attorney General Webster Hubbell as the department's liaison to the organized bar. You are invited to contact him with your ideas on how we can ensure greater involvement of government lawyers in bar associations and other professional organizations.

This past October, Attorney General Janet Reno was the featured guest speaker at the FBA National Convention's Presidential Inaugural Dinner in New Orleans, and she continues to demonstrate her support of bar associations such as the Federal Bar Association.

advocating a position that did not initially violate Rule 11 but has come to lack any sufficient support; that create discretion to deny any sanction for a violation; that create a “safe harbor” by allowing withdrawal or correction of positions that violate Rule 11; and that define the purpose of sanctions as deterrence, subordinating the role of compensating the expenses occasioned by the violation.

Rule 11(b).

- Rule 11(b) sets the standards for all pleadings, written motions, and other papers. But discovery matters are taken outside Rule 11 by Rule 11(d).
- Rule 11 certifications are made by signing, filing, submitting, or later advocating assertion in a paper. Although an allegation has sufficient support when first made, Rule 11 is violated by continuing to assert it after learning that it has no merit. It is not required that the paper be withdrawn or amended. Rule 11 applies to continuing advocacy after removal of positions advanced in papers initially filed in state court.
- It is made clear that Rule 11 applies to each claim, defense, allegation, and legal or factual contention.
- Rule 11(b)(1) continues to forbid presenting a position for any improper purpose.
- The test for arguing for changes of law is changed from “good faith argument” to “nonfrivo-

lous argument.” The Note explains that this eliminates any “empty-head pure-heart” justification.

- The test for factual contentions is changed from “well grounded in fact” to “have evidentiary support.” Specific provision is made for allegations “likely to have evidentiary support after a reasonable opportunity for further investigation or discovery” if they are specifically identified. Such allegations cannot be pressed if further investigation shows them unfounded.
- A separate provision is made for denials of factual contentions, permitting denial based on reasonable doubts as to the credibility of the only available evidence.

Rule 11(c).

- Rule 11(c) governs sanctions.
- Sanctions are made discretionary.
- A sanction, if imposed, is “limited to what is sufficient to deter repetition.” Nonmonetary sanctions are proper; a wide variety are suggested in the Note. Penalties payable to the court are proper; the Note states that ordinarily monetary sanctions should be paid into court. Compensation for expenses incurred by the moving party also is proper; the Note suggests that compensatory awards should be limited to unusual circumstances.
- A law firm is jointly responsible

for violations committed by partners, associates, or employees, absent exceptional circumstances.

- A party who wishes to seek sanctions under Rule 11 must serve a separate motion, but may not file or present the motion unless the challenged paper is not withdrawn or corrected within 21 days after service (the time period may be changed by court order).
- Attorney fees and expenses can be awarded for making or resisting a Rule 11 motion. This provision is intended to reduce the occasions for cross-motions asserting that a Rule 11 motion itself violates Rule 11. Sanctions also may be imposed on an unrepresented party, or on a represented party that is responsible for a violation - except that a represented party may not be sanctioned for frivolous legal arguments.
- The court may initiate Rule 11 sanctions on its own, without the advance notice required for motion by a party. Monetary sanctions can be imposed by this means only if an order to show cause is issued before voluntary settlement or dismissal.
- If sanctions are imposed, the court must describe the conduct that violated the Rule and explain the basis for the sanction imposed.

Rule 12. Time To Answer

Rule 12(a)(1)(B) is added to reflect the additional time to answer

allowed if a defendant waives service under new Rule 4(d)(3).

Rule 15. Amended Pleadings

The cross-reference in Rule 15(c)(3) is changed to reflect the designation of former Rule 4(j) as Rule 4(m).

Rule 16. Pretrial Conferences

- The time for the scheduling order is extended by using appearance of a defendant or service as the starting point, not the time of filing the complaint. This change is more important than might seem because new Rule 26(f) requires the parties to meet and discuss the case before a scheduling conference or order.
- Subdivision (c) states that “the court may take appropriate action with respect to” the listed topics, making it clear that the court can enter pretrial orders notwithstanding a party’s obligations. The list of topics in (c) is expanded by including:
 - † limitations and restrictions on expert testimony;
 - † the appropriateness and timing of summary judgment;
 - † the control and scheduling of discovery;
 - † more expansive characterization of ADR techniques;
 - † separate trials;
 - † early presentation at trial of

evidence on issues that may support early disposition under Rules 50(a) or 52(c); and

† reasonable limits on the time allowed for presenting evidence at trial.

- Subdivision (c) concludes with authority to require a party or its representative to be present or reasonably available by telephone to consider possible settlement. The Note recognizes that it may not be possible to identify a person who has authority to bind a government or institutional party, and that this provision does not limit the reasonable exercise of inherent powers.

DISCOVERY

Perhaps the single most important feature of the discovery amendments is found in the combination of Rules 26(a), (d), and (f). Rule 26(a) is entirely new. It creates obligations to disclose specified categories of information without awaiting a demand for discovery. Rule 26(f) requires the parties to meet to discuss the case and prepare a discovery plan before the Rule 16 scheduling conference or order. Rule 26(a) disclosures are to be made at or soon after this conference. Rule 26(d), with some exceptions, prohibits discovery from any source before the parties have met and conferred as required by (f). To the extent that adversaries seek in good faith to expedite the litigation, the pre-discovery meeting may have a dramatic impact on actual discovery practices.

Another important feature is that many of the new rules allow exceptions to be made by local rule, agreement of the parties, or order.

Rule 26. General Provisions Governing Discovery; Duty of Disclosure

The most dramatic change in Rule 26 is the addition of a new disclosure system. Parties are required to disclose specified information without awaiting a discovery demand. Subdivision 26(a) is divided into three paragraphs that establish three distinct types of disclosure. Rule 26(a)(1) requires preliminary disclosure of information that is likely to be sought by routine discovery requests. The timing of this disclosure is tied to the new Rule 26(f) meeting. Paragraph (a)(2) requires extensive disclosure as to expert witnesses. Paragraph (a)(3) provides for disclosure of trial witness lists and the like shortly before trial.

Rule 26(a)(1).

- Rule 26(a)(1) establishes a new practice of “disclosure” of information that must be provided without waiting for a discovery request. The time for the initial disclosure is tied to the subdivision (f) meeting of the parties - the meeting is to include discussion of disclosures, and disclosures must be made at or within 10 days after the meeting. The disclosure obligation cannot be postponed because a party has not completed its investigation, nor because of claims that another

party has failed to make sufficient disclosures or any disclosures at all. Rule 26(e)(1) imposes a duty to supplement the initial disclosures at timely intervals. All of these disclosure obligations can be suspended by stipulation, court order, or local rule. It is anticipated that many courts will adopt local rules exempting from disclosure categories of cases in which there is little reason for forcing routine exchange of information the parties would not likely seek by discovery. In addition, local variations can be made to conform to local civil justice delay and expense reduction plans.

- Subparagraph (a)(1)(A) requires disclosure of the identity of each individual “likely to have discoverable information relevant to disputed facts alleged with particularity in the pleadings.” Disclosure relates to disputed facts, not admitted facts. The reference to particular pleading responds to the concern that broad notice pleading allegations may suggest a scope of disclosure out of proportion to any real need or use. The Note states that the greater the specificity and clarity of the pleadings, the more complete should be the listing of witnesses and documents. It also observes that the parties should tailor the scope of disclosure to the actual needs of the case through the Rule 26(f) meeting.
- Subparagraph (a)(1)(B) requires disclosure of a copy or

description of documents and things in a party’s possession. The choice whether to produce copies or a description is made by the disclosing party. If a description is provided, it should be sufficient to enable other parties to make informed decisions as to initial demands for production and to frame the demands clearly.

- Subparagraph (a)(1)(C) requires disclosure of a computation of any category of damages claimed. It further requires that documents and other evidentiary material on which the computation is based be made available for inspection and copying unless privileged or protected from disclosure. The Note states that disclosure is not expected as to any portion of damages that must be calculated from information possessed by another party or person.
- Finally, subparagraph (a)(1)(D) requires disclosure of insurance agreements. This provision changes the former discovery provision of Rule 26(b)(2) into a disclosure obligation. The final two sentences of former Rule 26(b)(2) were omitted as unnecessary.
- The Note emphasizes two further points. The first is the expectation that the Rule 26(f) meeting will be used to refine the factual disputes; the parties may find it desirable to schedule an early meeting to focus the issues and to extend the time for disclosure. The second point is that Rule 26(g)(1) imposes an

obligation of reasonable inquiry into the facts in preparing disclosure; the extent of the inquiry will depend on many factors.

Rule 26(a)(2).

- This rule requires disclosure, without waiting for a discovery demand, of the identity of any person who may offer expert testimony at trial.
- Disclosure must include a detailed report by any expert witness retained or specially employed to provide testimony in the case or whose duties as a party’s employee regularly involve giving expert testimony. The report must cover the opinions to be expressed and the basis for the opinions, and provide substantial details about qualifications and experience as a witness. The Note states that the obligation to disclose the information considered by the expert should defeat any assertion that privilege or work product protection bar inquiry into materials furnished by the party for consideration by the expert.
- Times for the disclosure are set out in the rule, but the Note states that normally the court should specify timing in the scheduling order. In most cases, the party having the burden of proof on an issue should be required to make disclosure before other parties.
- Rule 26(b)(4) is amended to allow routine deposition of

expert witnesses. If (a)(2)(B) disclosure of a report is required, the deposition can be taken only after disclosure.

Rule 26(a)(3).

- Rule 26(a)(3) requires disclosure shortly before trial of information regarding evidence that may be used at trial “other than solely for impeachment purposes.” The information is similar to matters commonly covered by pretrial order. The time for disclosure may be controlled by pretrial order; absent order, disclosure must be made at least 30 days before trial.
- Trial witnesses must be identified, separately identifying those that will be called and those that may be called. The Note states that listing a witness does not create an obligation to secure attendance of the witness at trial.
- Testimony to be presented by deposition must be designated, and a transcript of the pertinent portions must be provided if the deposition was recorded by nonstenographic means.
- Documents and other exhibits must be identified, separating those the party expects to offer from those to be offered if need arises.
- Objections to the use of depositions or to the admissibility of documents or exhibits must be made within 14 days after the disclosure. Objections other than those based on Evidence Rule 402 or 403 are waived if

not made or excused.

- Sanctions for failure to make disclosures required by Rule 26(a) are provided in Rule 37(c)(1). Absent substantial justification for failure to disclose, the primary sanction is exclusion of evidence. Other sanctions may be added or substituted for exclusion.

Rule 26(b).

- Former paragraph (2) governing discovery of insurance agreements has been transferred to Rule 26(a)(1)(D) as a disclosure obligation.
- Paragraph (2) authorizes orders or local rules that change the presumptive limits set by Rules 30, 31, and 33 on the numbers of depositions and interrogatories. Local rules are especially apt in courts that adopt systems designed to assign relatively simple and relatively complex cases to different “tracks.” In addition, authority is provided to limit the length of depositions or the number of requests for admissions.
- Paragraph (2) also is amended to increase the court’s discretion to control discovery to avoid undue cost or delay.
- Paragraph (4) is amended to allow deposition of any person identified as a potential expert witness at trial; this provision is tied to a subdivision (a)(2) disclosure. The amendment also specifies interrogatories or deposition as the means of seek-

ing information from nonwitness experts specially retained in anticipation of litigation.

- Paragraph (5) is a new provision requiring a party who withholds information from discovery by claiming privilege or work-product protection to make the claim expressly and describe the nature of the information in a way that will enable other parties to assess the claim. The Note states that withholding information without complying with this requirement may be viewed as waiver of the privilege or protection. A protective order may be sought if compliance with the requirement would impose an unreasonable burden.

Rule 26(c).

- This rule is amended to require a person seeking a protective order to certify that it has conferred or attempted to confer with other affected parties in an attempt to resolve the dispute.

Rule 26(d).

- This rule bars discovery before the parties have met as required by the new provisions of Rule 26(f). Exceptions may be authorized by other rules (see 30(a)(2)(C)), local rule, or order.

Rule 26(e).

- The duty to supplement is extended to disclosures required by subdivision (a). Disclosures must be supplemented at appropriate intervals

if a party learns that in some material respect the information disclosed is incomplete or incorrect, unless the additional information has otherwise been made known during discovery or in writing. An expert witness who must provide a report under (a)(2)(B) and who has testified on deposition must supplement the deposition testimony.

- Much of the confusing language in the earlier rule has been deleted. The preface limiting the rule to discovery responses "complete when made" is deleted. Also deleted is the former distinction between responses incorrect when made and correct when made, with the related reliance on knowing concealment. The duty to supplement discovery responses is limited to interrogatories, requests for production, or requests for admission, and applies only if the party "learns" that the response "is in some material respect incomplete or incorrect."
- No particular form of supplementation is specified. The duty to supplement is satisfied if the information has been made known to the other parties during discovery or in writing.

Rule 26(f).

- The little-used discovery conference provisions added in 1980 are transformed into a rule that requires a meeting of the parties unless exempted by local rule or order. One major

function of the meeting is to arrange for - or react to - the disclosures required by (a)(1). It also is hoped that the meeting will prove helpful in arranging exchanges of information without resort to formal discovery devices.

- The meeting of the parties is to discuss the nature and basis of the claims and defenses; the possibilities for prompt settlement or resolution; and to develop a proposed discovery plan.
- All counsel and unrepresented parties are jointly responsible for arranging the meeting, for participating, and for attempting to agree on a discovery plan. To the extent that agreement is not reached, submission should be made of all issues on which agreement has been reached along with statements of the positions of the parties on other issues. Sanctions may be imposed under Rule 37(g) for failure to participate in good faith.
- New Form 35 illustrates the desired type of report.

Rule 26(g).

- Signature requirements are applied to disclosures. Rule 11 no longer applies to discovery requests or responses; Rules 26 through 37 are a self-contained system.

Rule 28. Persons Before Whom Depositions May Be Taken

- Subdivision (b) is amended to provide that depositions may be taken in a foreign country pursuant to any applicable treaty or convention. This provision is intended to make effective use of the Hague Convention on the Taking of Evidence Abroad and any future treaties. The Note observes that ordinarily a party taking a deposition must conform to an applicable treaty if it supports an effective deposition. As a matter of form, the references to letter rogatory are changed to the more modern letter of request.

Rule 29. Stipulations Regarding Discovery Procedure

- Rule 29 confirms the provisions of Rules 30(a)(2), 31(a)(2), and 33 that permit the parties to stipulate to increase the limits on numbers of depositions or interrogatories. It also expands the power to stipulate to extend the time provided in Rules 33, 34, and 36, requiring court approval only if the extension would interfere with the time set to complete discovery, to hear a motion, or for trial. The Note observes that counsel are encouraged to agree on such nondiscovery alternatives as voluntary exchange of documents or interviews; compare Rule 26(f).

Rule 30. Depositions Upon Oral Examination

- The most dramatic change is made by Rule 30(a)(2)(A), which requires leave of court or agreement of the parties before all plaintiffs, all defendants, or all third-party defendants may take more than 10 depositions under Rules 30 and 31 together. The Note states that multiple parties should attempt to agree on allocating the 10 depositions among themselves, but that the court may resolve disputes among them.
- Leave of court or party agreement also is required if the deponent already has been deposed in the case, or if a deposition is sought before the time specified in Rule 26(d), unless the person to be examined is expected to become unavailable for examination in this country.
- Subdivision (b)(2) allows the party noticing a deposition to specify nonstenographic means of recording, without the need to obtain prior court approval for one taken other than stenographically. Provisions ensuring the integrity of nonstenographic recordings remain.
- Under subdivision (b)(3), a party other than the one noticing the deposition may arrange, at their own expense, for the recording of the deposition stenographically.
- The provision allowing depositions by telephone is expanded

to allow "other remote electronic means."

- Subdivision (c) resolves the question of excluding other potential deponents from a deposition by providing that Evidence Rule 615 does not apply. Exclusion can be obtained by order under Rule 26(c)(5). The Note observes that this provision does not address the issue of attendance by others, such as members of the public or press.
- An important attempt to diminish improper obstructive tactics is made by subdivision (d)(1). Objections are to be "stated concisely and in a non-argumentative and non-suggestive manner. Lengthy and deponent-leading objections are subject to sanctions. In addition, a party may instruct a deponent not to answer only to preserve a privilege, enforce a court direction limiting evidence, or present a motion for relief under (d)(3). Subdivision (d)(2) allows the time for a deposition to be limited by order or local rule, but provides both extensions of time and sanctions if a party has impeded or delayed the examination.
- The procedure for review and signature by the deponent is simplified. Review and signature are required only if requested by the deponent or party before completion of the deposition; a period of 30 days is allowed after notice that the transcript or recording is available.

- Subdivision (f) provides that in courts that direct that depositions not be automatically filed, the reporter can send the deposition to the attorney who arranged for the transcript or recording.

Rule 31. Depositions Upon Written Questions

- The Rule 30 limits on number of depositions, deposing the same witness twice, or taking a deposition before the time set by Rule 26(d) are incorporated in Rule 31. The time for serving cross, redirect, and recross questions is shortened.

Rule 32. Use of Depositions in Court Proceedings

- A deposition cannot be used against a party who received less than 11 days notice, and who at the time of the deposition had pending a motion - promptly made - for a protective order requesting that the deposition not be held or be held at a different time or place.
- A party may offer deposition testimony in nonstenographic form, but must provide a transcript of the offered portions. If requested by any party, deposition testimony offered other than for impeachment purposes may be presented in nonstenographic form unless the court orders otherwise.

Rule 33. Interrogatories to Parties

- The number of interrogatories is limited to 25, including all dis-

crete subparts. The number may be increased by leave of court or written stipulation with the responding party. The Note states that these limits must be observed following removal of a case in which a greater number of interrogatories were outstanding in the state court.

- The Rule 26(d) time for beginning discovery is invoked.
- It is made clear that an objecting party shall answer an interrogatory to the extent that it is not objectionable. All grounds for objecting must be specifically stated; any ground not stated is waived unless the failure is excused on showing good cause.

Rule 34. Production of Documents and Things

- The Rule 26(d) time for beginning discovery is invoked.
- If objection is made to part of a request, inspection must be permitted of the remaining parts.

Rule 36. Requests for Admission

- The Rule 26(d) time for beginning discovery is invoked.

Rule 37. Failure To Make Disclosure or Cooperate in Discovery

- Rule 37 is amended at several points to include sanctions for failure to make disclosures required by Rules 26(a) and (e).

The most specific provision is new Rule 37(c)(1). A party may not offer as evidence information that, without substantial justification, was not included in an initial disclosure or by supplemental disclosure. An exception is made for harmless failures. The court may choose substitute or additional sanctions; the rule specifically permits informing the jury of the failure to make disclosure. In addition, sanctions may be imposed under subparagraphs (A), (B), and (C) of subdivision (b)(2); such sanctions are important with respect to unfavorable information that was not disclosed for the purpose of helping it out of evidence.

- Several provisions are amended to include the requirement that a person moving for relief have in good faith conferred or attempted to confer with the person against whom relief is sought.
- Sanctions may be awarded under Rule 37(a)(4) if disclosure or discovery is made only after a motion to compel was filed.

Rule 38. Jury Trial of Right

- Technical amendments.

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

- Technical amendments.

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

- Technical amendments.

Rule 53. Masters

- Technical amendments.

Rule 54. Judgments; Costs

- New subdivision (d)(2) provides a detailed procedure for advancing claims for attorney fees and related expenses that are not an element of damages to be proved at trial. It applies to statutory, common fund, and other theories of recovery.
- A motion for fees must be made no later than 14 days after judgment, but evidentiary material may be filed later.
- The motion does not of itself affect the finality of the judgment on the merits or the time for appeal. Amended Rule 58, however, does permit the court to suspend finality in order to ensure that only one appeal need to be taken.

Rule 58. Entry of Judgment

- The provision that entry of judgment must not be delayed for taxing costs is amended to make it clear that appeal time cannot be extended for this purpose.
- More important, an exception is made to allow the court to order that a timely Rule 54(d)(2) motion for attorney fees has the same effect on appeal time

under Appellate Rule 4(a)(4) as a timely Rule 59 motion. The order must be made before a notice of appeal has been filed and has become effective. This procedure will enable the court to ensure that a single appeal can be taken both as to the merits and as to fee issues.

Rules 71A. Condemnation of Property

- Minor and conforming amendments.

Rules 72-76. Magistrate Judge Proceedings

- Minor and conforming amendments.

II. FEDERAL RULES OF CRIMINAL PROCEDURE

Most of the amendments to the Federal Rules of Criminal Procedure include revisions to conform to the statutory provision that changed the title of a "magistrate" to a "magistrate judge." The amendments to Rules 12, 26.2, 32, 32.1, 46, and Rule 8 of the Rules Governing §2255 Hearings are similar and extend the provision regarding the production of witness statements to the relevant proceedings or hearings covered in these rules.

Some of the other significant revisions are discussed below.

Rule 26.3. Mistrial

The amended rule reduces the possibility of an erroneously

ordered mistrial by providing the Government and the defendant with an opportunity to comment on the propriety of ordering a mistrial in the case.

Rule 40. Commitment to Another District

The amended rule allows a warrant to be sent by facsimile transmission.

Rule 41. Search and Seizure

The amended rule expands the authority of judges in considering oral requests for search warrants. The value of using facsimile machines to transmit supporting documents is also recognized.

III. FEDERAL RULES OF APPELLATE PROCEDURE

Rules 3, 3.1, 4, 5.1, 6, 10, 12, 15, 25, 28, and 34 of the Federal Rules of Appellate Procedure are amended. Some of the more significant amendments are discussed below.

Rule 3. Appeal as of Right - How Taken

The amended rule addresses the issue raised by the Supreme Court in Torres v. Oakland Scavenger Co. and specifies the requirements in adequately naming the appellants in a notice of appeal and the consequences of failing to do so.

Rule 4. Appeal as of Right - When Taken and

Rule 6. Appeal in a Bankruptcy Case from a Final Judgment, Order, or Decree of a District Court or of a Bankruptcy Appellate Panel

The amended rules eliminate the trap for a litigant who files a notice of appeal before a posttrial motion or while a posttrial motion is pending. The amendments also conform to the Supreme Court's decision in Houston v. Lack regarding the filing of papers from an inmate confined in an institution.

Rule 12. Docketing the Appeal; Filing a Representation Statement; Filing the Record

The amendment requires that the representational statement filed with the clerk of court include a statement naming each party represented by the attorney.

Rule 15. Review or Enforcement of an Agency Order — How Obtained; Intervention

The amended rule requires that each party involved in the case be identified in the notice of appeal when seeking review of an agency order.

Rule 25. Filing and Service

The amended rule provides that each party involved in the case be identified in the notice of appeal

when seeking review of an agency order.

Rule 28. Briefs

The amended rule requires that a discussion of the standard of review for each issue be included in the appellant's brief.

Rule 34. Oral Argument

The amendment eliminates the requirement of a statement of the case in oral argument.

IV. AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE

The amendments to Rules 101, 705, and 1101 of the Federal Rules of Evidence are minor, containing technical and conforming amendments.

If you have any questions regarding these amendments or their status, you may direct your inquiries to the Rules Committee Support Office, Administrative Office of the United States Courts, in Washington, D.C.

CHAIR, Continued from page 1

Judge Sanders, a graduate of the University of Texas School of Law, served as a member of the Texas Legislature for six years (1952-58) prior to his appointment in 1961 as United States Attorney for the Northern District of Texas. From 1967 to 1969, Judge Sanders served as legislative counsel to President Lyndon B. Johnson, and in 1972, he was the Texas Democratic nominee for the United States Senate. In

1979, Judge Sanders was appointed by President Jimmy Carter to serve as United States District Judge, and in November 1989 he became Chief Judge for the District. He is a former president of the FBA's Dallas Chapter, and frequently speaks at that Chapter's annual Federal Civil Practice Seminar and other FBA-related functions.

The Section Chair for the 1993-96 term is **Kent S. Hofmeister**, a partner with the law firm of Vial, Hamilton, Koch & Knox in Dallas, Texas, and Coordinator of that firm's State and Local Government Section. Kent presently serves as Fifth Circuit Officer, and was the Dallas Chapter President in 1990-91. The former Chief of the Federal Litigation Division of the Dallas City Attorney's Office in 1982-86, he accepts primary responsibility for the tardiness of this issue of Sidebar (he is the newly reluctant Editor-in-Chief), and will strive mightily to keep future issues on track.

The Section's incoming Deputy Chair is **Robert F. Brown**, a partner with the law firm of Vial, Hamilton, Koch & Knox in Dallas, Texas. Robert is a member of that firm's State and Local Government Section, and is a frequent lecturer and author on civil rights and related governmental issues. In 1992-93 he served as the Dallas Chapter President.

N. Patrick Flanagan III is the Section's new Secretary. A former Assistant Federal Public Defender for the District of Nevada specializing in white collar criminal defense

and complex litigation, Pat has been instrumental in the recent resurrection of the FBA's Las Vegas Chapter. He is a partner with the law firm of Beckley Singleton DeLaney Jemison & List in Reno, Nevada, and serves as Chair of the Continuing Legal Education Committee of the State Bar of Nevada.

Charles W. Bobinette, a partner with the law firm of Uthoff, Graeber, Bobinette & O'Keefe in St. Louis, Missouri, is the new Chair of the Federal Rules of Procedure Committee. A former Judge of the Circuit Court, City of St. Louis (1977-81), Chuck also was a professor at St. Louis University School of Law (1977-88), where he was an instructor in trial advocacy. In 1984, he briefed and argued Prosser's Moving & Storage Co. v. Robbins, 466 U.S. 364 (1984), before the United States Supreme Court. Since 1977, Chuck has served as an adjunct professor at the Washington University School of Law in St. Louis, where he continues to teach trial advocacy and supervises the training of law students assigned to state and federal clerkships in the St. Louis area.

The Chair of the Federal Circuit and Court of Federal Claims Committee is **William K. Drew**, Senior Trial Attorney with the Department of Justice's Tax Division in Washington, D.C. Bill presently is a member of the Board of Governors of the Court of Federal Claims Bar Association, and was a contributor to the "United States Claims Court: Deskbook for Practitioners," published in 1992.

Before his tenure with the Department of Justice, Bill served with the Interstate Commerce Commission in Washington, D.C. (1977-85), specializing in antitrust analyses of corporate acquisitions.

Sidney Powell, Chair of the Appellate Law and Trial Practice Committee, is a former Assistant United States Attorney for the Western and Northern Districts of Texas and the Eastern District of Virginia. Formerly a partner at Strasburger & Price and now in private practice in Dallas, Texas, she has served as lead counsel in more than 350 appeals in the Fifth Circuit, which have resulted in more than 150 published opinions. Sidney also has been the editor of the Fifth Circuit Reporter since 1986, is the former president of the Bar Association of the Fifth Federal Circuit (1989-91) and is co-author of Appealing to the Fifth Circuit (Powell and Gabriel), which is scheduled to be published this year by Lawyers' Cooperative Publishing Company.

Continuing in his role as Chair of the Military Law Committee is **Lieutenant Colonel Rob Minor**, Chief of the General Litigation Branch for the Department of the Army. In coordination with the Department of Justice, Rob's office is responsible for representing the U.S. Army's interests in all general civil litigation in state and federal courts. Before assuming these duties, he served as the Deputy Staff Judge Advocate (1990-92), Third Infantry Division, in Wuerzburg, Germany. A graduate of the United States Military Academy, West Point, and the University of Notre

Dame Law School, Rob also has served as a Special Assistant United States Attorney for the Eastern District of Arkansas (1989-90) and for the Southern District of Georgia (1988-89).

Chuck Pardue, a partner with the law firm of Pardue and Massey in Augusta, Georgia, also renews his position as Chair of the Federal Tort Law Committee. Chuck's present practice of law is primarily a general one with an emphasis on military issues and claims brought under the Federal Tort Claims Act. He is a former member of the Judge Advocate General's Corps and has served as a military judge in Schweinfurt, Germany, and as Senior Defense Counsel, Trial Defense Service, Second Infantry Division in Camp Casey, Korea. Chuck also served as President of the Aiken-Augusta Chapter of the Federal Bar Association in 1990-91.

Serving as a member of the Governing Board is **Adrienne A. Berry**, the immediate past Section Chair and a partner with the law firm of Segal, Isenberg, Sales, Stewart & Cutler in Louisville, Kentucky. Formerly a Sixth Circuit Officer, Adrienne now serves as Deputy Secretary of the Federal Bar Association.

As the new Chair of the Federal Litigation Section, I look forward to working with you in addressing matters that impact upon each of us in the practice of law in the federal courts. My term follows that of Adrienne Berry, and I would be remiss in not thanking her for the tremendous energy, dedication and

professionalism she brought to this position. Obviously her talents have been retained by her acceptance to serve on our Governmental Board.

I also wish to recognize the tireless efforts of **Mark Hogge**, who for the past several years has served as the Editor-in-Chief of *Sidebar*, and who has done an exemplary job in making this an outstanding publication. Understandably seeking a respite, Mark nevertheless has kindly accepted to stay on as a member of our editorial board, and we welcome his continuing contributions and guidance.

Finally, I encourage all of our members to become actively involved in the Association and in this Section, and if you wish to serve on any of the committees profiled, simply contact the chair of that committee or any Section officer. To the extent that I may be of personal assistance to you or your Chapter, I certainly welcome any and all inquiries, comments or suggestions.

CIRCUIT NEWS

**GLENN L. ARCHER, JR.,
NAMED CHIEF JUDGE OF
FEDERAL CIRCUIT**

The Honorable Glenn L. Archer, Jr., has become the new Chief Judge of the Court of Appeals for the Federal Circuit, following the retirement of former Chief Judge Helen W. Nies on March 17, 1994. Chief Judge Archer is a graduate of Yale University and of The George Washington University School of Law.

After serving in the United States Air Force as an officer in the Judge Advocate General's Office, Chief Judge Archer entered private law practice with the Washington, D.C., law firm of Hamel, Park and Saunders (now Hopkins & Sutter) in 1956. Chief Judge Archer remained in private practice until 1981 when he became the Assistant Attorney General for the Tax Division at the United States

Department of Justice. Chief Judge Archer served as the Assistant Attorney General for the Tax Division until 1985, when he became a circuit judge of the Court of Appeals for the Federal Circuit, the position that he held until his recent elevation to the position of Chief Judge.

NEW EDITION OF COURT
OF FEDERAL CLAIMS DESKBOOK

The third edition of the United States Court of Federal Claims Deskbook for Practitioners is being issued this summer. The third edition updates the previous edition to reflect the Court's new name and other changes made by the Federal Courts Administration Act of 1992, Pub. L. No. 102-572, 106 Stat. 4506

**FUNDING AND THE LEVEL OF
SERVICE IN THE U.S. COURT SYSTEM**

By Nancy H. Doherty

United States courts, like other federal agencies and institutions and many private companies, are growing "leaner and meaner." Depending upon where you are located, you may already have seen a difference in services provided and fees charged. This change is due to a decrease in the amount of funding available to fund court operations. Eventually the decrease in funding for courts will be felt throughout the system, although at this time it is more noticeable in district courts and primarily in the larger courts. Because of the anticipated impact on the federal bar, I was asked to give you some background and outline some of the changes you can expect.

The funding now provided by Congress does not meet the requirements of the staffing workload of the courts. The Judicial Conference of the United States (the policy making body for the U.S. courts) has carefully considered and approved work measurement formulas for clerks' offices, probation offices and pre-trial services offices. Until recently, clerks' offices were staffed at between 95% and 100% of officially approved formulas.

With reduced funding, the percentage of positions available to the courts has decreased significantly. In Fiscal Year 1993 funding was reduced to approximately 90% of the staffing formula. However, because of disparities in staffing throughout the country, a large majority of district courts operated at far below the 90% level. Presently most district clerk's offices are staffed at

approximately 81% of their formula. Any that exceed this percentage are considered "overstrength" and must reduce their staffing through transfers, attrition and ultimately layoffs by the end of this fiscal year. Therefore, services which have been routinely provided are being reduced.

By October of 1994 (which for the federal government is the beginning of fiscal year 1995), all courts are expected to be operating at near the same percentage of formula (probably 86% or less). Unfortunately, these reductions are coming at a time when the workload is increasing. Some tightening of our belts is appropriate in these times, but decreases of this magnitude will have an impact upon everyone connected with the courts.

The bottom line is that most attorneys practicing in federal courts will see changes both in terms of level of service and increased use of fees. You may remember some changes that occurred after the passage of the Gramm-Redman-Hollings legislation. Perhaps you have noticed some recently. Because of local practices reductions in service will vary but you can likely expect to see further reductions in public hours (particularly to review records), delays in receiving copies of court documents, including orders and search requests, less personal service (i.e., increased use of phone mail systems), longer lines and more requirements for attorneys to perform specific services on their own. For example, attorneys may be required to make more mailings to other parties and attorneys. In at least one circuit attorneys are responsible for preparing civil records for appeal to the circuit courts. This practice will likely be expanded.

Increases in filing fees are being considered. Also, effective in October most federal agencies are now be subject to some of the other fees charged to non-federal agencies and attorneys. If you use the PACER (Public Access to Court Electronic Records) system, you are aware that access to this system is no longer free. Most users are now charged \$1.00 per minute. The advantages to using this system far outweigh the small fee, however. I encourage anyone who has a personal computer to take full advantage of this system. It is the best way to get docket information about cases. You should contact your local district clerk to get additional information.

All is not gloom and doom, however. The courts have steadily automated their processes for more efficiency and so that information is more readily available. PACER is a good example of these

(1992), as well as to incorporate new developments since the issuance of the second edition in June of 1992.

The Deskbook provides an overview of the Court's jurisdiction and of practice and procedure before the Court. A current edition of the deskbook is provided free of charge to attorneys when they join the Court of Federal Claims Bar Association. Nonmembers may purchase a copy of the deskbook from the Bar Association. The current price for the Deskbook is \$15 for nonmembers. Anyone interested in joining the Court of Federal Claims Bar Association or in purchasing a copy of the Deskbook should call or write to the Association's Treasurer, Philip A. Nacke (or Marilyn Cameron of Mr. Nacke's office), at Hopkins & Sutter, 888 Sixteenth Street, N.W., Suite 700, Washington, D.C. 20006, (202) 835-8224.

improvements. Other technological innovations are being reviewed and/or developed, including: 1) use of electronic filing; 2) pilot testing of electronic courtrooms, including instantaneous transcripts; 3) implementation of an electronic network throughout the federal courts; 4) pilot testing of electronic chambers; and 5) use of imaging to create a "paperless" court.

District clerks are very interested in ideas about making changes that will make the system more efficient. Our mission to provide a high level of service to the court, the bar, litigants and the public cannot be fulfilled without close cooperation with the attorneys we serve. We welcome your ideas and support.

Nancy H. Doherty has served as the United States District Clerk for the Northern District of Texas since 1983. A frequent speaker at FBA-sponsored seminars, Ms. Doherty is the former Chair (1990-92) of the National District Clerks' Advisory Committee.

UPCOMING FBA SEMINARS AND EVENTS

April 29-30, 1994

National Council Meeting
Washington, D.C.

Contact: Ms. Catharine McSwegin
(202) 638-0252

May 26-27, 1994

Advanced Bankruptcy Program
Westin Hotel
Chicago, Illinois

Contact: Ms. Edith Siler
(312) 988-6199

October 5-8, 1994

National Convention/National
Council Meeting
Atlanta, Georgia

Contact: Ms. Catharine McSwegin
(202) 638-0252

AUTHOR! AUTHOR!

The editorial board of Sidebar invites all FBA members, and particularly members of the Federal Litigation Section, to submit manuscripts to be considered for publica-

tion. If you or someone you know is interested, please let the board hear from you. The next issue will be Summer 1994, and the submission deadline for that newsletter is July 8. Subsequent submission deadlines are October 10, 1994 and January 9, 1995 for the Fall 1994 and Winter 1995 issues, respectively.

When submitting articles for consideration, please (1) submit a typed copy, double spaced on 8 1/2" by 11" paper (or preferably in either WordPerfect 5.1 or ASCII format on a 3 1/2" diskette); (2) limit the length to 25 pages; (3) include appropriate endnote citations; (4) enclose a resume and/or a brief biography as you would like it to appear; and (5) provide your name, business address and daytime telephone and fax numbers. All materials should be submitted to the Editor-in-Chief, Kent S. Hofmeister, Vial, Hamilton, Koch & Knox, 1717 Main Street, Suite 4400, Dallas, Texas 75201, telecopier: (214) 712-4402.



On February 19, 1994, the Fifth Circuit Conference was held in San Antonio, Texas. In attendance at the event, in addition to representatives from the various chapters in Texas, Louisiana and Mississippi, were (pictured from left to right): FBA President Ellen M. Lazarus; President-Elect Allan C. Harnisch; Deputy Secretary Adrienne A. Berry; Past President and Delegate to the ABA Richard J. Wieland; Dallas Chapter President Shelley Turner; and the Honorable John Lokos, San Antonio Chapter President.

PAPARAZZI! PAPARAZZI!

If you have any photographs reflecting FBA/FLS-sponsored events that you would like to see published in Sidebar, please send them to the Editor-in-Chief.

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