

**BRIEF SUMMARY OF THE COMMENTS
OF THE SECTION ON COURTS, LAWYERS
AND THE ADMINISTRATION OF JUSTICE
ON PROPOSED AMENDMENTS TO THE FEDERAL RULES**

The Section on Courts, Lawyers and the Administration of Justice, and its Committee on Court Rules, submit comments concerning a preliminary draft of amendments to the Federal Rules of Appellate Procedure, Civil Procedure, and Criminal Procedure that the Judicial Conference's Committee on Rules of Practice and Procedure issued for public comment.

FEDERAL RULES OF APPELLATE PROCEDURE: The Section generally supports the proposed amendments to Rule 21 that would treat petitions for writs of mandamus as adversary proceedings between the parties rather than as proceedings directed to an individual judge. In addition, the Section recommends that the Advisory Committee on Appellate Rules propose, and circulate for public comment, a rule along the lines that the Section previously recommended to the U.S. Court of Appeals for the D.C. Circuit.

FEDERAL RULES OF CIVIL PROCEDURE: The Section generally supports the proposed addition to Rule 26(c) providing that district courts have the power to modify or dissolve protective orders under broadly-defined standards. The Section recommends that (a) the proposed amendment specify one additional factor relevant to modification or dissolution of a protective order -- whether circumstances have changed since the order was entered -- and (b) it should clarify that the party or non-party seeking modification bears the burden of proof. With minor suggestions for clarification, the Section endorses amendment of Rule 43 (a) to permit witnesses in limited circumstances to provide testimony through non-oral methods of communication, such as through writing or signing, and (b) to allow trial testimony in limited circumstances by contemporaneous transmission from a different location.

FEDERAL RULES OF CRIMINAL PROCEDURE: With respect to proposed amendments of Rules 10 and 43 to permit a criminal defendant to participate in pretrial proceedings through videoconferencing, the Section suggests that the waiver requirements be strengthened to require an informed waiver in writing before the proceeding begins and that videoconferencing be introduced on an experimental basis. While supporting in principle coverage of court proceedings by radio and television broadcasters, the Section opposes the proposed amendment to Rule 53 allowing coverage of criminal cases under guidelines to be established by the Judicial Conference because (a) it does not incorporate guidelines appropriate to coverage of criminal cases, and (b) it does not provide for public comment concerning proposed guidelines before they are adopted.

SECTION ON COURTS, LAWYERS AND THE ADMINISTRATION OF JUSTICE
OF THE DISTRICT OF COLUMBIA BAR

COMMENTS OF THE SECTION ON COURTS, LAWYERS
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Ad Hoc Committee on
Cameras in the Courtroom

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The views expressed herein represent only those of the Section on Courts, Lawyers and the Administration of Justice of the District of Columbia Bar and not those of the Bar or its Board of Governors.

**COMMENTS OF THE SECTION ON COURTS, LAWYERS
AND THE ADMINISTRATION OF JUSTICE
OF THE DISTRICT OF COLUMBIA BAR ON
PROPOSED AMENDMENTS TO THE FEDERAL RULES**

The Committee on Rules of Practice and Procedure of the Judicial Conference of the United States has solicited comments on a preliminary draft of amendments to the Federal Rules of Civil Procedure, Criminal Procedure, Appellate Procedure, Bankruptcy Procedure, and Evidence. The Section on Courts, Lawyers and the Administration of Justice of the District of Columbia Bar, and its Committee on Court Rules, submit these comments concerning certain of these proposals.

The District of Columbia Bar is the integrated bar for the District of Columbia. Among the Bar's sections is the Section on Courts, Lawyers and the Administration of Justice. The Section has a standing Committee on Court Rules, whose responsibilities include serving as a clearinghouse for comments on proposed changes to court rules.

Members of the Section, together with other members of the D.C. Bar, formed an Ad Hoc Committee on Cameras in the Courtroom to assess the divergent concerns of clients, witnesses, lawyers and media in covering courtroom proceedings and to prepare comments on proposed rule changes concerning coverage.

Comments submitted by the Section represent only its views, and not those of the D.C. Bar or of its Board of Governors.

FEDERAL RULES OF APPELLATE PROCEDURE

Rule 21 - Mandamus Petitions

The Section supports the proposed amendments to Rule 21 that would treat petitions for writs of mandamus as adversary proceedings between the parties rather than as proceedings directed to an individual judge. Mandamus petitions seek appellate review of district court's decisions, and differ from appeals only in terms of procedural posture and the standard of review.

The Section believes that to allow district judges the option to participate in mandamus proceedings, as the proposed change in Rule 21(b) would do, is inconsistent with the basic thrust of the proposed amendment. A district judge has no more personal a stake in how a court of appeals reviews his or her decision in a mandamus proceeding than in an appeal. If an appellate court believes that the prevailing party below cannot adequately defend the challenged decision, it should appoint separate counsel as *amicus curiae*. Alternately, if the district judge has not adequately explained his or her ruling in an oral or written decision, the proper remedy would be to remand for further explanation.

Precedential Decisions with Explanations

The Section suggests that the Advisory Committee on Appellate Rules consider an additional amendment that would require courts of appeals to issue published opinions or

explanatory memoranda for every dispositive ruling and to permit every such ruling to be cited as precedent.

In 1972, the Judicial Conference adopted proposals that originated with an Advisory Council for Appellate Justice. The proposals contemplated broader use of summary decisions that would generally not be designated for publication and that would not be citable as precedent. See Reynolds & Richman, *The Non-Precedential Precedent -- Limited Publication and No-Citation Rules in the U.S. Court of Appeals*, 78 Colum. L. Rev. 1167, 1170-71 (1978) (discussing the background). A number of circuits implemented these proposals through their local rules. *E.g.*, D.C. Cir. Rule 36.

Rules encouraging summary, unpublished dispositions have resulted in a bias toward affirmance, unexplained decisions, and reduced accountability. When certain circuits began to encourage summary affirmances through local rule changes, and with no other intervening change, the percentage of affirmances rose dramatically, and the number of cases decided with published opinions or indeed any statements of reasons declined sharply. For the reporting year ending September 30, 1991, 69.4% of all federal appeals nationwide were decided by mean of unpublished dispositions.

Commentators have found that publication criteria are inconsistently and arbitrarily applied, that important decisions have not been published, and that substantial issues raised on appeal are disregarded in summary disposi-

tions. See, e.g., Haworth, *Screening and Summary Procedures in U.S. Courts of Appeals*, 1973 Wash. U.L.Q. 257; Reynolds & Richman, *The Non-Precedential Precedent -- Limited Publication and No-Citation Rules in the U.S. Court of Appeals*, 78 Colum. L. Rev. 1167, 1174-75 (1978); Martineau, *Modern Appellate Practice: Federal and State Civil Appeals* 241 (1983); Robel, *The Myth of the Disposable Opinion: Unpublished Opinions and Government Litigants in the United States Court of Appeals*, 87 Mich L. Rev. 940 (1989).^{1/} Three of the leaders of the Advisory Council that inspired the 1973 changes later withdrew their support and criticized no-opinion, non-publication and no-citation rules on multiple grounds. M. Rosenberg, P. Carrington & D. Meador, *Justice on Appeal* (1976). To the extent that the local rules permitting these practices result in a lack of careful review of appeals and in arbitrary decision-making, they undermine the statutory right of appeal, and, as the Advisory Committee recognized in its proposed Rule 47, local rules of courts of appeals should "be consistent not only with the national rules but also with Acts of Congress."

^{1/} The Section is aware of several studies concerning the experience of the District of Columbia Circuit: "Report and Recommendations of the Advisory Committee on Procedures Concerning Unpublished Dispositions by the United States Court of Appeals for the District of Columbia Circuit" (Daniel M. Gribbon, Chair, June 8, 1984); "Report of the Subcommittee on Unpublished Opinions of the Advisory Committee on Procedures of the United States Court of Appeals for the District of Columbia Circuit" (Paul L. Friedman, Chair, May 1984). See Morrison, *Decisions Without Reasons: A Crisis in the D.C. Circuit*, District Lawyer (Vol. 1, No. 1 1976).

To address these problems, the Section recommends that the Advisory Committee propose, and circulate for public comment, a rule along the lines that the Section has recommended to the U.S. Court of Appeals for the D.C. Circuit. The Section's proposed rule would (a) require that all decisions contain a sufficient explanation of their basis, (b) establish a presumption that decisions be officially published, (c) institute procedures that make generally available decisions that are not officially published, and (d) permit all decisions to be cited as precedent. A copy of the Section's proposal is attached.

In making this recommendation, the Section recognizes that the problem of appellate court congestion is serious. However, the solution need not sacrifice high standards of appellate justice. In fact, a number of appellate courts have consistently provided reasoned explanations of dispositive decisions and have generally published their decisions. Adoption of the Section's proposal would not only promote the just and evenhanded disposition of every appeal, but also would be consistent with the speedy and inexpensive determination of appeals.

FEDERAL RULES OF CIVIL PROCEDURE

Rule 26(c) - Modification of Protective Orders

The Advisory Committee on Civil Rules has proposed an addition to Rule 26(c) explicitly providing that district courts have the power to modify or dissolve protective orders

and listing broadly-defined factors that courts should consider in exercising this power.

The Section agrees that it would be appropriate for the Civil Rules to provide guidance to judges faced with requests to modify protective orders, sometimes long after they have been entered and the underlying case has been resolved through adjudication or settlement. However, the Section recommends that (a) the proposed amendment should also state specifically that one factor relevant to modification or dissolution of a protective order is whether circumstances have changed since the order was entered, and (b) it should clarify that the party or non-party seeking modification bears the burden of proof.

The proposed amendment explicitly states that courts have the power to modify or even dissolve a protective order. Although it now appears reasonably well settled that courts have this power, *e.g.*, *United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424, 1427 (10th Cir. 1990); *Public Citizen v. Liggett Group*, 858 F.2d 775, 682-83 (1st Cir. 1988) (collecting cases), *cert. denied*, 488 U.S. 1030 (1989), the Section agrees that it is useful to confirm the existence of this power in the Civil Rules for the reasons stated in the proposed Advisory Committee note.

The Section agrees, and is unaware of any dispute, that the general factors listed in the proposed Rule 26(c)(3) are factors that courts should consider in exercising their discretion whether to modify a protective order. However,

the Committee suggests that one additional factor be specifically identified: whether any circumstances initially justifying the protective order have changed since entry of the order. This consideration may be implicit in consideration of reliance interests under proposed Rule 26(c)(3)(A), but it should be made explicit. Changed circumstances are relevant to modification of court orders generally, e.g., *Rufo v. Inmates of Suffolk County Jail*, 112 S. Ct. 748 (1992), and it would be appropriate to specifically include this factor here.

Furthermore, the Rule should make clear with respect to modification of protective orders, as it presently does with respect to their initial entry, that the movant has the burden of proof. It may be implicit that the movant has this burden, but it should be made explicit. This allocation of the burden of proof is consistent with the general rule that the moving party has the burden, and it is appropriate as a means to protect the reliance interest of the party providing discovery materials pursuant to a protective order entered only after a finding of good cause.

These recommendations are consistent with the premise embodied in the Federal Rules of Civil Procedure that "[a]s a general proposition, pretrial discovery must take place in public unless compelling reasons exist for denying the public access to the proceedings." *Public Citizen v. Liggett Group*, 858 F.2d at 789-90 (citations omitted). Rule 5(d) was amended in 1980 to require filing of discovery

materials because these "materials are sometimes of interest to those who may have no access to them except by a requirement of filing, such as members of a class, litigants similarly situated, or the public generally." Fed. R. Civ. P. 5(d), Advisory Committee Note, 85 F.R.D. 521, 525 (1980). "The Advisory Committee notes make clear that Rule 5(d), far from being a housekeeping rule, embodies the Committee's concern that class action litigants and the general public be afforded access to discovery materials whenever possible." *In re Agent Orange Product Liability Litigation*, 821 F.2d 139, 146 (2d Cir.), cert. denied, 484 U.S. 953 (1987). The public has a legitimate interest in access to discovery materials to learn about the workings of the discovery process, a formal proceeding controlled by judicial rules, and equally important, discovery materials provide information about the subject-matter of civil lawsuits which "frequently involve issues crucial to the public." *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1179 (6th Cir. 1983); *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 258 (7th Cir. 1975), cert. denied, 427 U.S. 912 (1976); see *Gannett Co. v. DePasquale*, 443 U.S. 368, 386 n.15 (1979). As the Advisory Committee notes in the proposed comments to Rule 26(c)(3), this public interest may be especially great in cases involving the conduct of government officials or allegedly dangerous products that may continue to cause injury.

Of course, this presumption in favor of public access to discovery materials is subject to the provision in Rule 26(c) authorizing issuance of protective orders on a showing of good cause, and like any other order, it should not be lightly set aside. Especially with the changes recommended by the Section, the proposed rule would encourage district judges to exercise appropriately their authority to modify or dissolve protective orders.

Rule 43(a) - Trial Testimony

The Section endorses amendment of Rule 43 to permit witnesses to provide testimony not only "orally" but also through alternate methods of communication, such as through writing or signing. This authorization is appropriate, provided that, as the note accompanying the amended rule makes clear, alternate means may be employed only "if the witness is unable to communicate orally." The Section suggests that this caveat be included in the text of the rule to dispel any notion that oral testimony might no longer be the preferred method of presenting testimony even for witnesses able to testify orally. An alternative would be for the text of the rule to state that the taking of testimony other than orally is permissible at the discretion of the court.

Rule 43(a) would also be amended to allow testimony in open court by contemporaneous transmission from a different location "for good cause shown and under appropriate

safeguards." The note accompanying the amended rule makes clear that "[g]ood cause shown is not established simply by showing that a witness is beyond the subpoena power of the trial court," and that "[d]epositions remain the primary means" to obtain testimony from such witnesses. With these limits on the use of testimony via remote transmission, the Section supports the proposed amendment.

The Section agrees with the additional guidance provided in the commentary about application of the good cause standard. It is more important to have crucial witnesses physically present in the courtroom than relatively unimportant witnesses. To establish good cause in the case of a critical witness, the proponent of remote transmission should have to show that the witness' unavailability to testify in person was unanticipated, and if such witnesses are permitted to testify from a remote location, a strong preference for video over audio transmission is appropriate. As the commentary states, a lesser showing, and a less expensive medium, may be appropriate for witnesses testifying "to relatively formal or unimportant matters that cannot be covered by stipulation." The Committee agrees that the court should weigh the cost of various remote transmission methods in light of the significance of the witness' testimony and the ability of the parties to bear the costs of the remote transmission.

Neither the amended rule nor the accompanying commentary addresses who is to bear the costs of the trans-

mission. Normally, the party that seeks to present the testimony by contemporaneous transmission from a different location should bear the cost. The commentary should address this issue.

Finally, the Section also agrees that non-moving parties should be given adequate opportunity to oppose use of a remote transmission and to argue instead for use of a deposition. The party against whom such testimony is offered should have the opportunity to be present at the remote location as well as in the courtroom. These measures would help achieve the goal stated in the accompanying note to "ensure adequate identification of the witness and . . . protect against influence by persons present with the witness."

FEDERAL RULES OF CRIMINAL PROCEDURE

Rules 10(b) and 43(c) - Videoconferencing

The Advisory Committee on the Federal Rules of Criminal Procedure has proposed changing Rules 10 and 43 to permit a criminal defendant to waive the right to be present in the courtroom during pretrial proceedings, including arraignments and preliminary hearings, and to participate in such proceedings instead through video teleconferencing. The Committee acknowledges that:

permitting video arraignments could be viewed as an erosion of an important element of the judicial process. First, it may be important for a defendant to see and experience first-hand the formal impact of the reading of the charge.

Second, it may be necessary for the court to personally see and speak with the defendant at arraignment, especially where there is a real question whether the defendant really understands the gravity of the proceedings. And third, there may be difficulties in providing the defendant with effective and confidential assistance of counsel if the two are in separate locations, connected only by audio and video linkage.

The Section believes that the proposed Rule ought to be modified consistent with these concerns, in light of pressures that may be brought to bear upon a defendant to "waive" the right to be personally present in court during pretrial proceedings.

"A leading principle that pervades the entire law of criminal procedure is that after indictment, nothing shall be done in the absence of the prisoner." *Lewis v. United States*, 146 U.S. 370, 372 (1892); see also *In re Bendectin*, 857 F.2d 290, 322-25 (6th Cir. 1988) (right of civil parties to be present in court), *cert. denied*, 488 U.S. 1006 (1989). Video conferencing may be, to paraphrase an old ad campaign, "the next best thing to being there," but it is still only "next best." People interact differently with human beings in the same room as compared to images on a television screen, and a defendant who is "present" on a television screen may be dehumanized in a subtle, but harmful, way. As the Supreme Court recognized in *Coy v. Iowa*, 487 U.S. 1012 (1988), "face to face" interaction is still an important component of human behavior. The defendant's

absence from the courtroom may create a psychological distance from the other participants.

The use of video teleconferencing may present concrete practical disadvantages as well. A defendant who must communicate with the court through a video teleconferencing system may be less likely to reveal signs of mental incompetency which might trigger judicial inquiry. A defendant not present in person also may be less likely to express to the judge concerns about the effectiveness of representation. Physical presence may facilitate identification of these and other problems by the judge or other participants in the process.

Physical absence from the courtroom may produce special problems during pretrial proceedings involving the taking of testimony. For example, Rule 43(c) covers preliminary hearings, and a defendant ought to be at the side of his or her lawyer during the preliminary hearing in order to assist in questioning the witnesses. Video teleconferencing offers the option of removing the lawyer from the courtroom, impairing the effectiveness of cross-examination, or requiring the lawyer and the client to communicate by telephone, significantly impairing communication during the hearing.

The proposed rules strive to protect the defendant's interests in effective participation in pretrial proceedings by requiring a voluntary waiver by the defendant of the right to be present. An incarcerated defendant might voluntarily waive the right to be personally present in

court, for example, because of the inconvenience and physical hardship involved in transportation to a pretrial proceeding, or a non-incarcerated defendant might choose to participate in a proceeding through a video monitor in order to avoid taking time away from a job, or the expense of traveling to a remote courthouse. In theory, the waiver requirement adequately protects the defendant's rights and limits the use of video teleconferencing to those instances in which the defendant willingly agrees. The Section is concerned, however, that in practice this safeguard will not afford adequate protection.

Defendants may feel pressured into waiving the right to be present in court solely to save money for the government. The Committee suggests that "[u]se of video technology might be particularly appropriate, where an arraignment will be pro forma but the time and expense of transporting the defendant to court are great." The Section recognizes that expense is a real issue in today's judicial system. But incarcerated defendants are confined involuntarily, and the expense associated with transporting them is one inherent cost of the decision to confine people before trial. A defendant asked to relieve the government of this cost may understandably perceive an implicit risk of adverse consequences if he or she instead chooses to exercise the right to be physically present in the courtroom.

Defense counsel may not effectively protect the defendant's interest in personally participating in court

proceedings. For example, defense lawyers, especially appointed counsel who are not always compensated for travel time, may opt to go to the courtroom rather than the jail from which clients participate through teleconferencing, even though the benefits of face-to-face interaction between lawyer and client may thereby be diminished or even lost.

The Section is also concerned by the Advisory Committee's suggestion that obtaining the defendant's views "during the arraignment itself" constitutes an effective waiver. While this is an effective way of recording a defendant's waiver, it is particularly likely to result in defendant's acquiescing in a *fait accompli*, rather than the truly voluntary waiver the Advisory Committee contemplates. Furthermore, a defendant may not appreciate in advance the importance of being physically present in the courtroom, for example, during preliminary hearings.

To meet these concerns, the Section suggests that, at a minimum, the waiver requirements be strengthened to require an informed waiver in writing before the proceeding is conducted. Moreover, in order to identify and correct any technological or other practical problems before a change in the federal rule, the Section also suggests introduction of video teleconferencing on an experimental basis, as well as consideration of experience with video teleconferencing in criminal cases in various state courts, including those in California, Florida, Colorado, and Michigan.

Rule 53 - Coverage of Court Proceedings

In principle, the Ad Hoc Committee on Cameras in the Courtroom ("the Committee") supports coverage of court proceedings by radio and television broadcasters. In 1984, and again in 1993, the Committee endorsed proposals for coverage on an experimental basis of proceedings in the Superior Court for the District of Columbia, in the belief that such coverage will help to educate the public concerning the activities of this local court of general jurisdiction. The Committee also believes, however, that coverage must be subject to guidelines which safeguard the rights of parties in civil and criminal proceedings, and protect the safety of parties, witnesses, jurors, and counsel. Because of the constitutional rights at stake, concerns about fairness are paramount in criminal cases.

For this reason, the Committee opposes the proposed amendment to Rule 53. Any amendment to Rule 53 should incorporate guidelines appropriate to coverage of criminal cases, and public comments concerning proposed guidelines should be obtained before guidelines are adopted and coverage is authorized. The proposed amendment does not specify guidelines for coverage of criminal cases, and therefore provides no direct assurance that coverage will be conducted in manner which minimizes the risk of prejudice to the accused. The Judicial Conference has promulgated guidelines for coverage of civil cases on an experimental basis, but

these guidelines cannot simply be transferred unmodified to criminal cases.

The proposal should be returned to the Advisory Committee on Criminal Rules for development of guidelines appropriate to criminal proceedings, and the Advisory Committee should seek public comment on proposed guidelines for the benefit of both the Advisory Committee and the Committee on Rules of Practice and Procedure.