

## COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

Meeting of January 7-8, 1999

Marco Island, Florida

### Minutes

The winter meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Marco Island, Florida on Thursday and Friday, January 7-8, 1999. The following members were present:

Judge Anthony J. Scirica, Chair  
Judge Frank W. Bullock, Jr.  
Charles J. Cooper, Esquire  
Professor Geoffrey C. Hazard, Jr.  
Gene W. Lafitte, Esquire  
Patrick F. McCartan, Esquire  
Judge James A. Parker  
Sol Schreiber, Esquire  
Judge Morey L. Sear  
Judge A. Wallace Tashima  
Chief Justice E. Norman Veasey  
Judge William R. Wilson, Jr.

Judge Phyllis A. Kravitch and Deputy Attorney General Eric H. Holder were unable to be present. The Department of Justice was represented at the meeting by Neal K. Katyal, Advisor to the Deputy Attorney General. Roger A. Pauley also participated in the meeting on behalf of the Department.

Providing support to the committee were: Professor Daniel R. Coquillette, reporter to the committee; Peter G. McCabe, secretary to the committee; John K. Rabiej, chief of the Rules Committee Support Office of the Administrative Office of the United States Courts, Mark D. Shapiro, deputy chief of that office, and Nancy G. Miller, the Administrative Office's judicial fellow.

Representing the advisory committees were:

Advisory Committee on Appellate Rules —  
Judge Will L. Garwood, Chair  
Advisory Committee on Bankruptcy Rules —  
Judge Adrian G. Duplantier, Chair  
Professor Alan N. Resnick, Reporter  
Advisory Committee on Civil Rules —  
Judge Paul V. Niemeyer, Chair  
Professor Edward H. Cooper, Reporter

Advisory Committee on Criminal Rules —  
Judge W. Eugene Davis, Chair  
Professor David A. Schlueter, Reporter  
Advisory Committee on Evidence Rules —  
Judge Fern M. Smith, Chair  
Professor Daniel J. Capra, Reporter

Also participating in the meeting were: Joseph F. Spaniol, Jr., consultant to the committee; Professor Mary P. Squiers, project director of the local rules project; and Marie C. Leary of the Research Division of the Federal Judicial Center.

Alan C. Sundberg, former member of the committee attended the meeting and was presented with a certificate of appreciation, signed by the Chief Justice, for his distinguished service on the committee over the past six years.

#### INTRODUCTORY REMARKS

Judge Scirica reported that Judge Stotler was unable to attend the meeting because she had to participate in the dedication of the new federal courthouse in Santa Ana, California. He added that she would participate at the next committee meeting, to be held in Boston in June 1999.

Judge Scirica noted that he was participating in his first meeting as chair of the Standing Committee. He stated that it had been his great honor to have served for six years as a member of the Advisory Committee on Civil Rules under three extraordinary chairmen — Judges Pointer, Higginbotham, and Niemeyer.

Judge Scirica observed that it was very important for the rules committees to uphold the integrity of the Rules Enabling Act and be vigilant against potential violations of the Act. At the same time, he pointed out that the committees had to be careful in their work in distinguishing between matters of procedure and substance.

He emphasized the importance of establishing and maintaining good professional relations with members and staff of the Congress. He said that it would be ideal if these relationships were personal and long-lasting. But membership changes in the Congress and on the committees make it difficult as a practical matter to achieve that goal. Nevertheless, he said, it is possible to keep the Congress informed about the benefits of the Rules Enabling Act, the important institutional role of the rules committees, and ways in which the committees can be of service to the Congress.

## APPROVAL OF THE MINUTES OF THE LAST MEETING

**The committee voted without objection to approve the minutes of the last meeting, held on June 18-19, 1998.**

## REPORT OF THE ADMINISTRATIVE OFFICE

*Legislative Report*

Mr. Rabiej presented a list of 41 bills introduced in the 105<sup>th</sup> Congress that would have had an impact on the federal rules or the rulemaking process. (Agenda Item 3A) He pointed out that the Administrative Office had monitored the bills on behalf of the rules committees and the Judicial Conference, and it had prepared several letters for the chair to send to members of Congress commenting on the language of specific bills and emphasizing the need to comply with the provisions of the Rules Enabling Act. He noted that only three of the 41 bills had actually been enacted into law, and their impact on the federal rules would be comparatively minor. They included provisions: (1) establishing a new evidentiary privilege governing communications between a taxpayers and an authorized tax practitioner, (2) requiring each court to establish voluntary alternative dispute resolution procedures through local rules, and (3) subjecting government attorneys to attorney conduct rules established under state laws or rules.

Mr. Rabiej stated that comprehensive bankruptcy legislation had come close to being enacted in the 105<sup>th</sup> Congress, and it likely would be reintroduced in the 106<sup>th</sup> Congress. He pointed out that the legislation, if enacted, would create an enormous amount of work for the Advisory Committee on Bankruptcy Rules. He also predicted that legislation would also be reintroduced in the new Congress to federalize virtually all class actions.

*Administrative Actions*

Mr. Rabiej reported that the Rules Committee Support Office was now sending comments from the public on proposed amendments to the rules to committee members by electronic mail. He noted that the Administrative Office had received about 160 comments from the bench and bar on the proposed amendments to the bankruptcy rules, about 110 comments on the amendments to the civil rules, and about 65 comments on the amendments to the evidence rules. He added that all the comments, together with committee minutes, would be placed on a CD-ROM and made available to all the members of the advisory and standing committees.

## REPORT OF THE FEDERAL JUDICIAL CENTER

Ms. Leary reported that Judge Rya Zobel had announced that she would be leaving her position as director of the Federal Judicial Center to return to work as a United States district judge in Boston. She noted that a search committee had been appointed by the Chief Justice to find a successor, and it was expected that the Center's board would name a new director by April 1999.

Ms. Leary presented a brief update on the Center's recent publications, educational programs, and research projects. (Agenda Item 4) She noted that as a consequence of the comprehensive, ongoing studies of class actions and mass torts conducted by the Advisory Committee on Civil Rules and the Mass Torts Working Group, the Center had decided that revisions to the *Manual for Complex Litigation* were needed. To that end, the Chief Justice had appointed a board of editors to oversee the work, including Judges Stanley Marcus, John G. Koeltl, J. Frederick Motz, Lee H. Rosenthal, and Barefoot Sanders. The Chief Justice, she said, had also selected two attorneys to serve on the board of editors, and the Center was awaiting their response to his invitation. (Sheila Birnbaum and Frank A. Ray were later announced as the new members.) She added that staff of the Research Division would provide support for the work of the board of editors.

## REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Garwood presented the report of the advisory committee, as set forth in his memorandum and attachments of December 7, 1998. (Agenda Item 5)

Judge Garwood stated that the advisory committee had no action items to present to the standing committee. He noted, though, that the advisory committee had approved a number of additional amendments to the appellate rules, but had decided not to forward them to the standing committee for publication until the bar has had adequate time to become accustomed to the restyled body of appellate rules. He added that a package of amendments would probably be ready for publication by the year 2000.

### *Committee Notes*

Judge Garwood pointed out that the Standing Committee had recommended previously that the notes accompanying proposed rules amendments be referred to as "Committee Notes," rather than "Advisory Committee Notes." He reported that the Advisory Committee on Appellate Rules, although accepting the recommendation, had discussed this matter at its last meeting and had concluded that the term "Advisory Committee Notes" was both more traditional and more accurate. Judge Garwood pointed out, for example, that "Advisory Committee Notes" had long been used by the Chief Justice

when transmitting rules amendments to Congress, by legal publications, and by the legal profession generally.

Professor Cooper and Mr. Rabiej responded that the use of the term “Committee Notes” had been selected over “Advisory Committee Notes” because the Standing Committee from time to time revises or supplements the notes of an advisory committee. As a result, the published notes will contain language representing the input of both the pertinent advisory committee and the standing committee, and it is often difficult to tell exactly what has been authored by each committee.

Judge Garwood pointed out that when the Standing Committee proposes that a change be made in a note *before publication*, the chair of the advisory committee will take the matter back to the advisory committee for consideration of the change. As a rule, the advisory committee will in fact agree with — and often improve upon — the proposed change and incorporate it into the publication distributed to bench and bar. Therefore, the note effectively remains that of the advisory committee. On the other hand, when changes in a note are made by the standing committee *after publication*, the chair of the advisory committee will normally accept the changes at the standing committee meeting on behalf of the advisory committee and thereby avoid the delay of returning them for further consideration by the advisory committee.

Professor Coquillette added that the standing committee has always been deferential to the advisory committees in the preparation of committee notes, and it normally will make only minor changes in the notes and obtain the agreement of the chair and reporter of the pertinent advisory committee in doing so. But, he said, when the standing committee proposes changes that are major in nature, or disputed, it will normally send the note back to the advisory committee for further consideration and redrafting. He concluded that the question of the appropriate terminology for the notes was an important matter that would be discussed further at the reporters’ next luncheon.

#### *Proposed Effective Date for Local Rules*

Judge Garwood reported that the advisory committee at its April 1998 meeting had drafted a proposed amendment to FED. R. APP. P. 47(a)(1) that would mandate an effective date of December 1 for all local court rules, except in cases of “immediate need.” After the meeting, however, the advisory committee was informed by the Advisory Committee on Civil Rules that the concept of having a uniform, national effective date for local rules may conflict with the Rules Enabling Act, which gives each court authority to prescribe the effective date of their local rules. 28 U.S.C. § 2071(b).

Judge Garwood said that the Advisory Committee on Appellate Rules had not considered this potential legal impediment at its April meeting. Rather, it had focused only on the merits of the proposal referred to all the advisory committees to fix a uniform national effective date for all local rules. Accordingly, he suggested that it would be appropriate for the standing committee to make a threshold decision on whether the Rules Enabling Act would permit amendments to the national rules to mandate effective dates for local rules. If the committee were to decide that there would be no conflict with the Rules Enabling Act, the Advisory Committee on Appellate Rules would recommend fixing a single annual date of December 1 for all local rules of court, except in the case of emergencies.

#### REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Duplantier and Professor Resnick presented the report of the advisory committee, as set forth in Judge Duplantier's memorandum and attachments of December 3, 1998. (Agenda Item 6)

##### *Pending Amendments to the Bankruptcy Rules*

Judge Duplantier reported that a heavy volume of comments had been received from bench and bar in response to the "litigation package" of proposed amendments to the Federal Rules of Bankruptcy Procedure. He said that the great majority of the comments had expressed opposition to the package generally. The most common argument made in the comments, he said, was that the proposed amendments were simply not needed and would impose elaborate and burdensome procedures for the handling of a heavy volume of relatively routine matters in the bankruptcy courts. Most of the bankruptcy judges who commented, he said, had argued that FED. R. BANKR. P. 9013 and 9014 currently work well because they give judges flexibility — through local rules on motion practice — to distinguish among various types of "contested matters" and to fashion efficient and summary procedures to decide routine matters.

He added that many judges also had commented negatively about the requirement in revised Rule 9014 that would make FED. R. CIV. P. 43(e) inapplicable at an evidentiary hearing on an administrative motion. The proposed amendment would thus require witnesses to appear in person and testify — rather than give testimony by affidavit — when there is a genuine issue of material fact.

Judge Duplantier pointed out that the advisory committee would hold a public hearing on the proposed amendments on January 28, 1999, and it would meet again in March to consider all the comments and make appropriate decisions on the amendments.

*Omnibus Bankruptcy Legislation*

Professor Resnick reported that comprehensive bankruptcy legislation was likely to be introduced early in the new Congress. Among other things, it would probably add new provisions to the Bankruptcy Code to govern small business cases and international or transnational bankruptcies. In addition, the Congress may alter the appellate structure for bankruptcy cases and authorize direct appeals from a bankruptcy judge to the court of appeals. He said that the sheer magnitude of the expected legislative changes would likely require the Advisory Committee on Bankruptcy Rules to review in essence the entire body of Federal Rules of Bankruptcy Procedure and Official Forms in order to implement all the new statutory provisions.

## REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Niemeyer presented the report of the advisory committee, as set forth in his memorandum and attachments of December 10, 1998. (Agenda Item 7)

He pointed out that the committee was seeking authority to publish for comment proposed amendments that would abrogate the copyright rules and bring copyright impoundment procedures explicitly within the injunction procedures of FED. R. CIV. P. 65.

*Copyright Rules*

Professor Cooper noted that the proposed abrogation of the Copyright Rules of Practice had been proposed in 1964, but had been deferred for various reasons since that time. He explained that the advisory committee was now recommending:

1. abrogating the separate body of copyright rules;
2. adding a new subdivision (f) to FED. R. CIV. P. 65 to bring copyright impoundment procedures within that rule's injunction procedures; and
3. amending FED. R. CIV. P. 81 to reflect the abrogation of the copyright rules.

He noted that FED. R. CIV. P. 81 would also be amended both to restyle its reference to the Federal Rules of Bankruptcy Procedure and eliminate its anachronistic reference to mental health proceedings in the District of Columbia.

Professor Cooper explained that the language of the current Rule 81 was the starting point in considering the proposed amendments. RULE 81 states explicitly that the Federal Rules of Civil Procedure do not apply to copyright proceedings, except to the extent that a rule adopted by the Supreme Court makes them apply. Professor Cooper then pointed out that Rule 1 of the Copyright Rules of Procedure promulgated by the Supreme Court specifies

that copyright proceedings are to be governed by the Federal Rules of Civil Procedure. But that rule applies only to proceedings brought under the 1909 Copyright Act, which was repealed by the Congress in 1976. Thus, on the face of it, there appear to be no current rules governing copyright infringement proceedings.

Professor Cooper pointed out that the remainder of the copyright rules establish a pre-judgment procedure for seizing and holding infringing items and the means of making those items. But the procedure does not provide for notice to the defendant of the proposed impoundment, even when notice can reasonably be provided. Nor does it provide for a showing of irreparable injury as a condition of securing relief, nor for the exercise of discretion by the court. Rather, the Copyright Rules provide that an application to seize and hold items is directed to the clerk of court, who signs the writ and gives it to the marshal.

To that extent, he said, the rules are inconsistent with the 1976 copyright statute that vests a court with discretion both to order impoundment and to establish reasonable terms for the impoundment. Professor Cooper added that the pertinent case law leads to the conclusion that the procedures established by the copyright rules would likely not pass constitutional muster.

He stated that most of the courts have reacted to the lack of explicit legal authority for copyright impoundment procedures by applying the Federal Rules of Civil Procedure, especially FED. R. CIV. P. 65, which sets forth procedures for issuing restraining orders and authorizing no-notice seizures in appropriate circumstances. He added that the amendments proposed by the advisory committee would regularize the current practices of the courts and provide them with a firm legal foundation.

He also noted that another important advantage of the proposed amendments is that they would make it clear that the United States will meet its responsibilities under international conventions to provide effective remedies for preventing copyright infringements. To that end, the proposed changes would give fair and timely notice to defendants, vest adequate authority in the judiciary, and provide other elements of due process. He said that the proposed amendments would let the international community know that the United States has clear and effective procedures against copyright infringements. He added that the copyright community had expressed its acceptance of the advisory committee's proposal.

**The committee approved abrogation of the copyright rules and adoption of the proposed amendments to the civil rules for publication without objection.**



*Discovery Rules*

Judge Niemeyer reported that the standing committee had approved publication of a package of changes to the discovery rules at its last meeting. He noted that the volume of public comments received in response to the proposed amendments had been heavy. The majority of the comments, he said, were favorable to the package, but there had also been many negative comments. He added that the advisory committee had conducted one public hearing on the amendments in Baltimore, and it would conduct additional hearings in San Francisco and Chicago. Following the hearings and additional review of all the comments at its next business meeting, he said, the advisory committee could present a package of proposed amendments to the standing committee for final action in June 1999.

*Mass Torts*

Judge Niemeyer reported that the Chief Justice had authorized a Mass Torts Working Group, spearheaded by the Advisory Committee on Civil Rules, to conduct a comprehensive review of mass-tort litigation for the Judicial Conference. The group held four meetings in various parts of the country to which it invited prominent attorneys, litigants, judges, and law professors to discuss mass tort litigation. Judge Niemeyer stated that the legal and policy problems raised by mass torts were both numerous and complex. He added that the group had prepared a draft report identifying the principal problems arising in mass torts and suggesting a number of possible solutions that might be pursued by the Judicial Conference, in cooperation with the Congress and others. The final report, he said, would be presented to the Chief Justice in February 1999.

*Special Masters*

Judge Niemeyer noted that the Advisory Committee on Civil Rules had appointed a special subcommittee, chaired by Chief Judge Roger C. Vinson, to study the issues arising from the use of special masters in the courts.

*Local Rules of Court*

Judge Niemeyer reported that the advisory committee would address a number of concerns raised by the proliferation of local rules of court. He noted that the Civil Justice Reform Act had encouraged local variations in civil procedure, with a resulting erosion of national procedural uniformity among the district courts. He noted that the advisory committee was giving preliminary consideration to two alternative amendments to FED. R. CIV. P. 83.

The first suggested amendment would provide that a local rule of court could not be enforced until it is received in both the Administrative Office and the judicial council of the

circuit. The second alternative would go much further and provide that a court could not enforce a new local rule or amended rule — except in case of “immediate need” — until 60 days after the court has: (a) given notice of it to the judicial council of the circuit and the Administrative Office; and (b) made it available to the public and provided them with an opportunity to comment. Under this alternative, the Administrative Office would be required to review all new local rules or amendments and report to the district court and the circuit council if it finds that they do not conform to the requirements of Rule 83. If a new rule or amendment has been reported by the Administrative Office, enforcement of it would be prohibited until the judicial council has approved the provision.

Judge Niemeyer pointed out that the advisory committee would like to see greater national procedural uniformity and fewer local rules. He added that proposed changes in the provisions dealing with local rule authority would have to be coordinated among the other advisory committees under the supervision of the standing committee.

One of the members responded that there was a legitimate need for local rules of court, especially to govern matters that necessarily have to be treated individually in each district — such as issues flowing from geographic considerations. In addition, he said, local rules help to reduce variations in practice among the judges within a district. He pointed out that the Rules Enabling Act requires the circuit councils to review and, if necessary, modify or abrogate local rules. Accordingly, he said, the most appropriate way to deal with problems that may arise from local rules of court is not to limit the authority of the courts to issue local rules, but to persuade the respective circuit councils to review the rules adequately. He added that the council in his own circuit had been very conscientious in reviewing and commenting on the local rules of the courts within the circuit.

Judge Scirica said that the proposed amendments were very helpful, and he suggested that they be referred to the local rules project for consideration in connection with a new, national study of local rules.

#### REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Davis presented the report of the advisory committee, as set forth in his memorandum and attachments of December 3, 1998. (Agenda Item 8)

##### FED. R. CRIM. P. 32.2 - *Criminal Forfeiture*

Judge Davis reported that the proposed new FED. R. CRIM. P. 32.2 — together with proposed conforming amendments to FED. R. CRIM. P. 7, 31, 32, and 38 — would govern criminal forfeiture in a comprehensive manner. He noted that an earlier version of the new rule had been presented to the standing committee at its June 1998 meeting but rejected by a

vote of 7 to 4. He said that much of the discussion at the standing committee meeting had focused on whether a defendant would be entitled to a jury trial on the issue of the nexus between the offense committed by the defendant and the property to be forfeited. In addition, concerns had been raised at the meeting regarding the right of the defendant to present evidence at the post-verdict ancillary proceeding over ownership of the property.

Judge Davis explained that the advisory committee had considered the rule anew at its October 1998 meeting, taking into account the concerns expressed by the standing committee. As a result, the advisory committee had made changes in the rule to accommodate those concerns, and it had made a number of other improvements in the rule as well. The advisory committee, he said, recommended approval of the revised version of Rule 32.2, and he directed attention to a side-by-side comparison of the June 1998 version and the revised version of the rule. He then proceeded to summarize each of the principal changes made by the advisory committee since the last meeting.

First, he pointed out that the principal change made by the advisory committee had been to paragraph (b)(4) of the rule. The revised language would specify that either the defendant or the government may request that the jury determine the issue of the requisite nexus between the property to be forfeited and the offense committed by the defendant.

He said that the advisory committee had also added language to paragraph (b)(1) to provide explicitly that both the government and the defendant have the right to present evidence to the court on the issue of the nexus between the property and the offense. To that end, the revised rule provided specifically that the court's determination may be based on evidence already in the record, including any written plea agreement, or — if the forfeiture is contested — on evidence or information presented by the parties at a hearing after the verdict or finding of guilt.

Judge Davis stated that the advisory committee had amended paragraph (b)(1) to include a specific reference to money judgments. He noted that the courts of appeals of four circuits had held that the government may seek not only the forfeiture of specific property, but also a personal money judgment against the defendant. He said that there was no reason to treat a forfeiture of specific property in the same manner as a forfeiture of a sum of money. Thus, paragraph (c)(1) had also been amended to provide that an ancillary proceeding is not required to the extent that the forfeiture consists of a money judgment.

Judge Davis noted that the advisory committee had amended Rule 32.2(a) to make it clear that the government need only give the defendant notice in the indictment or information that it will seek forfeiture of property. The earlier version had required an allegation of the defendant's interest in property subject to forfeiture.

Paragraph (b)(2) had been revised to make it clear that resolution of a third party's interest in the property to be forfeited had to be deferred until the ancillary proceeding. Paragraph (b)(3) had been amended to allow the Attorney General to designate somebody outside the Department of Justice, such as the Department of the Treasury, to seize property.

Judge Davis noted that paragraph (c)(2) had been simplified to make it clear that if no third party is involved, the court's preliminary order of forfeiture becomes the final order if the court finds the defendant had an interest in the property that is forfeitable under the applicable statute. He said that under subdivision (e) there would be no right to a jury trial on the issue of subsequently located property or substitute property

Judge Davis said that the advisory committee had spent more than two and one-half years in considering the rule and had devoted two hearings and several meetings to it. He said that the committee was very comfortable with the revised rule and believed that it would bring order to a complicated area of the law.

**Judge Wilson moved to approve the revised rule, subject to appropriate restyling, and send it to the Judicial Conference.** He added that he had opposed the rule at the June 1998 meeting, but said that inclusion of a provision for the jury to determine the issue of the nexus between the property and the offense had led him to support the current proposal.

One of the members expressed continuing concern over the jury trial issue and suggested that the revised rule was internally inconsistent in that it provided for a jury's determination in certain situations, but not in others. He said that he was troubled over the issue of money judgments, in that the government would be given not only a right to forfeit specific property connected with an offense, but also a right to restitution for an amount of money equal to the amount of the property that would otherwise be seized. He suggested that the money judgment concept constituted a improper extension beyond what is authorized by the pertinent forfeiture statutes.

Judge Davis responded that at least four of the circuits had authorized the practice. He added that the advisory committee was only attempting to provide appropriate procedures to follow in those circuits where money judgments are authorized under the substantive law of the circuit. The underlying authority, he said, is provided by circuit law, not by the rule. At Judge Tashima's request, Judge Davis agreed to insert language in the committee note to the effect that the committee did not take a position on the correctness of those rulings, but was only providing appropriate procedures for those circuits that allowed money judgments in forfeiture cases.

One member expressed concern about the concept of seizure in connection with a money judgment. He noted that paragraph (b)(3) of the revised draft provided that the

government may “seize the property,” and he suggested that the word “specific” be added before the word “property.” Thus, the government could not “seize” money. It could only seize the “specific property” specified in paragraph (b)(2). Judge Davis agreed to accept the language change.

Another member questioned why a jury trial would be required to determine the nexus of the property to the offense, but not when substitute property is involved. Judge Davis responded that it would be very difficult to do so, since substitute property is usually not found until after the trial is over and the original property has been converted or removed. Mr. Pauley added that the pertinent case law had been uniform in holding that there is no jury-trial right as to substitute and later-found property.

Chief Justice Veasey expressed support for the substance of the revised amendments submitted by the advisory committee. But he pointed to a letter recently received from the National Association of Criminal Defense Lawyers, which had been distributed to the members before the meeting. The letter argued that the advisory committee had made major changes in the original proposal, had approved the rule by a vote of 4 to 3, and should be required to republish it for additional public comment. He said that he was concerned about forwarding the revised new rule to the Judicial Conference without further publication. **Accordingly, Chief Justice Veasey moved to republish proposed new Rule 32.2 for additional public comment.**

Professor Schlueter responded that the 4-3 vote in the advisory committee had been on the question of whether a right to a jury determination should be preserved in light of the Supreme Court’s decision in *Libretti v. United States*. In that case, the Court held that criminal forfeiture is a part of the sentencing process. He added that considerable sentiment remained in the advisory committee that a jury determination is simply not required.

Judge Davis and three members of the committee added that it was unlikely that any additional, helpful information would be received if the proposed rule were to be published again. They recommended that the committee approve the revised rule and send it to the Conference.

**The motion to republish the rule for further comment was defeated by a vote of 9 to 2.**

**Judge Tashima moved to adopt the proposed Rule 32.2 and the companion amendments to Rules 7, 31, 32, and 38 and send them to the Judicial Conference, subject to: (a) making appropriate style revisions, and (b) adding language to the committee note stating that the committee takes no position on the merits of using money judgments in forfeiture proceedings. The committee thereupon voted to approve the proposed new rule without objection.**

Judge Davis and Professor Schlueter presented the committee with an additional sentence that would be inserted at line 277 of the committee note. After accepting suggestions from Mr. Sundberg and Judge Duplantier, they agreed to add the following language: "A number of courts have approved the use of money forfeiture judgments. The committee takes no position on the correctness of those rulings."

Professor Schlueter added that the advisory committee wished to delete the words "legal or possessory" from line 422 of the committee note. Thus, the pertinent sentence in the note would read: "Under this provision, if no one files a claim in the ancillary proceeding, the preliminary order would become the final order of forfeiture, but the court would first have to make an independent finding that at least one of the defendants had an interest in the property such that it was proper to order the forfeiture of the property in a criminal case."

#### *Presence of Defense Attorneys in Grand Jury Proceedings*

Judge Davis reported that the congressional conference report on the Judiciary's appropriations legislation required the Judicial Conference to report to Congress by April 15, 1999, on whether Rule 6(d) of the Federal Rules of Criminal Procedure should be amended to allow a witness appearing before a grand jury to have counsel present.

He noted that the time frame provided by the Congress was extremely short and simply did not permit a comprehensive study of the issues. The Advisory Committee on Criminal Rules, he said, had appointed a special subcommittee to consider the matter and make recommendations. The subcommittee reviewed earlier studies, including: (a) a comprehensive report by the Judicial Conference to the Congress in 1975 that declined to support a change to Rule 6(d); and (b) a 1980 report by the Department of Justice to the Congress opposing pending legislation that would have allowed attorney representation in the grand jury room. He noted that the subcommittee had decided that the reasons stated in the past for declining to amend Rule 6(d) remained valid today. In summary, he said, the three principal reasons for not allowing a witness to bring an attorney into the grand jury were that the practice would lead to:

1. loss of spontaneity in testimony;
2. transformation of the grand jury into an adversary proceeding; and
3. loss of secrecy, with a resultant chilling effect on witness cooperation, particularly in cases involving multiple representation.

Judge Davis said that the subcommittee had concluded by a vote of 3 to 1 not to recommend any changes Rule 6(d). The full advisory committee was then polled by a mail vote, and it concurred in the recommendation of the subcommittee by a vote of 9 to 3.

Judge Davis reported that members of the advisory committee had been concerned that allowing attorneys in the grand jury without a judge present would create problems and prolong the proceedings. He pointed out that about half the states that have retained a grand jury system do in fact permit lawyers in grand jury proceedings, but he noted that there were other ways to indict defendants in these states.

One member stated that he was in favor of amending Rule 6 to relax the restriction on the presence of attorneys. He suggested that it was not necessary to allow individual lawyers for every witness, but at least one attorney might be present to protect the basic rights of witnesses and prevent abuse and mistreatment by prosecutors. A second member expressed support for the suggestion and added that it would be fruitful to establish pilot districts to test out the concept and see whether a limited presence of attorneys for witnesses would lead to improvements in the grand jury system.

A third member concurred with the suggestion to establish pilot projects. He said that the advisory committee might wish to explore an amendment to Rule 6(d) to allow an attorney for a witness in the grand jury room upon the express approval of the court or the United States attorney. He added, however, that the time given by the Congress to respond was unreasonably short and did not allow for thoughtful consideration of alternatives. As a result, the committee would have to take a quick "up or down" vote at this time, but it could at a later date consider the advisability of further research and the establishment of pilot projects. Judge Scirica added that the judiciary had inquired informally as to whether the Congress would be amenable to giving additional time to respond, but had been informed that a request along those lines would not be well received.

Mr. Pauley expressed the strong support of the Department of Justice for the advisory committee's report and recommendation. He pointed out that the proposal to amend Rule 6(d) was not new and had been rejected in the past. He added that the Department was very much opposed to a change in the rule and feared that it would adversely impact its ability to investigate organized crime. He concluded a prerequisite for consideration of any change in the rule should be the demonstration of an "overwhelming" case of need for the change.

Mr. Pauley also emphasized that the Department of Justice had taken effective steps against potential prosecutorial abuses and had set forth effective safeguards in the United States attorneys' manual. Among other things, the manual requires prosecutors to give *Miranda* warnings to witnesses who may be the target of grand jury proceedings. He added that the Department enforced the manual strictly.

**Chief Justice Veasey moved to approve the report of the advisory committee.**

**Judge Wilson moved, by way of amendment, to have the committee inform the Judicial Conference that it did not support changes in Rule 6(d) at this time, but that it would enthusiastically support the establishment of pilot studies to test the impact of the presence of lawyers for witnesses in the grand jury.**

Another member said that empirical data would be needed to test the concerns expressed on both sides of the issue and how they would play out in practice. He suggested that, rather than establishing a pilot program, it would be advisable at the outset to research the practice and experience in the states that permit lawyers into the grand jury room.

Three other members said that the advisory committee might well study the issues further and make appropriate recommendations for change in the future, but they emphasized that the Judicial Conference had been required by legislation to provide a quick response to the Congress. Therefore, the committee had to take a “yes or no” vote on whether to amend Rule 6(d) at this time.

Judge Scirica proceeded to call the question, noting that the committee could discuss at a later point whether any pilot projects or additional research were needed. He noted that the Advisory Committee on Criminal Rules would be responsible for taking the lead on giving any additional consideration to the matter.

**The committee voted to reject Judge Wilson’s amendment by a voice vote.**

**It then approved Chief Justice Veasey’s motion to approve the report of the advisory committee by a vote of 7 to 2. Judges Wilson and Tashima noted for the record their opposition to the motion.**

One of the members said that there was no need to discuss the matter of pilot projects further since the chair and reporter of the Advisory Committee on Criminal Rules had just participated in the discussion and could take the issues and suggestions back to the advisory committee for any additional consideration. Judge Davis concurred and noted that the Rules Committee Support Office had already begun to gather information on state practices regarding attorneys for witnesses in grand jury proceedings.

#### *Restyling of the Criminal Rules*

Professor Schlueter reported that the advisory committee had been working with the style subcommittee to restyle the Federal Rules of Criminal Procedure. He said that the committee would spend a substantial amount of time on the restyling project at its next several meetings, and it would address other matters only if they were found to be essential. He added that Professor Stephen Saltzburg had been engaged by the Administrative Office to work with the advisory committee and the style subcommittee on the restyling project.



## REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Smith presented the report of the advisory committee, as set forth in her memorandum and attachments of December 1, 1998. (Agenda Item 9)

Judge Smith reported that the advisory committee had no action items to present to the standing committee. She noted that a substantial number of public comments had been received in response to the package of rule amendments published in August 1998 and that:

1. eight commentators had appeared before the committee at its October 1998 hearing in Washington;
2. the December 1998 hearing in Dallas had been canceled; and
3. at least 15 people had filed requests to date to testify at the San Francisco hearing in January 1999.

Judge Smith said that most of the comments received had been directed to the proposed amendments to FED. R. EVID. 701-703, dealing with expert testimony.

## FED. R. EVID. 701-703

Judge Smith noted that the proposed amendment to FED. R. EVID. 701 was designed to prohibit the use of expert testimony in the guise of lay testimony. The Department of Justice, she said, had submitted a negative comment on the proposal, but the other public comments in response to the rule had been positive. She added that the advisory committee was listening to the Department's concerns and was open to refining the language of the amendment further, particularly with regard to drawing a workable distinction between lay testimony and expert testimony.

Judge Smith explained that the proposed amendment to FED. R. EVID. 702 would provide specific requirements that must be met for the admission of all categories of expert testimony. She said that the public comments received in response to the proposed amendments to Rule 702 were about evenly divided, with defense lawyers strongly in favor of the amendments and plaintiffs' lawyers strongly opposed to them.

She noted that the Supreme Court had recently granted certiorari in *Kumho Tire v. Carmichael*, where the issue was whether the gatekeeping standards set down by the Supreme Court in the *Daubert* case apply to the testimony of a tire failure expert who had testified largely on the basis of his personal experience. She said that the Department of Justice had cautioned against making amendments in the rule before the Court renders its decision in the *Kumho* case. But, she said, the advisory committee wanted to continue receiving public comments on the merits of the proposed amendment to Rule 702. The

advisory committee, though, would await the outcome of the *Kumho* case before forwarding any amendment to the Standing Committee.

Judge Smith pointed out that the amendment to FED. R. EVID. 703 would limit the ability of an attorney to introduce hearsay evidence in the guise of information relied upon by an expert. She said that the advisory committee wanted to admit the opinion of the expert into evidence but have a presumption against admitting the underlying information relied upon by the expert unless it is independently admissible. She reported that the public comments on Rule 703 had been uniformly positive.

#### FED. R. EVID. 103

Judge Smith noted that the proposed amendment to FED. R. EVID. 103 would provide that there is no need for an attorney to renew an objection to an advance ruling of the court on an evidentiary matter as long as the court makes a "definitive ruling" on the matter. She said that some public comments had questioned whether the term "definitive ruling" was sufficiently explicit.

#### FED. R. EVID. 404

Judge Smith pointed out that the proposed amendment to FED. R. EVID. 404 would provide that if an accused attacked the character of a victim, evidence of a "pertinent" character trait of the accused may also be introduced. She explained, however, that use of the term "pertinent" in the proposed amendment might allow the introduction of more matters than the advisory committee believes advisable. Accordingly, she said, it was inclined to refine the language of the proposed amendment to allow the introduction only of evidence bearing on the "same" character trait of the witness. She added that the issue arises most frequently in matters of self-defense. Thus, for example, if the defendant were to attack the aggressiveness of a witness, the witness could in turn raise the question of the aggressiveness of the defendant.

#### FED. R. EVID. 803 AND 902

Judge Smith said that the proposed amendments to FED. R. EVID. 803(g) and 902 would allow certain business records to be admitted into evidence as a hearsay exception without calling the custodian for in-court testimony. She said that the proposed rule would provide consistency in the treatment of domestic business records and foreign business records. Currently, she noted, proof of foreign business records in criminal cases may be made by certification, but business records in civil cases and domestic business records in criminal cases must be proven by the testimony of a qualified witness.

## DISCLOSURE OF FINANCIAL INTERESTS

Professor Coquillette stated that recent news accounts had focused attention on the need to provide federal judges with assistance in meeting their statutory responsibility of recusing themselves in cases of financial conflict. He said that the Judicial Conference's Committee on Codes of Conduct had suggested that it would be beneficial to "revis[e] the Federal Rules of Civil Procedure or local district court rules to require corporate parties to disclose their parents and subsidiaries (along the lines of FED. R. APP. P. 26.1) and possibly also to require periodic updating of such affiliations." The Codes of Conduct Committee had reported to the Conference in September 1998 that it would coordinate with the standing committee on the possible addition of corporate disclosure requirements in the federal rules.

Professor Coquillette reported that the reporters had discussed this matter collectively at their luncheon and had agreed to coordinate with each other in drafting common language for the advisory committees that might be used as the basis for proposed amendments to the various sets of federal rules on corporate disclosure. He pointed out, though, that bankruptcy cases presented special problems and that some adjustments in the common language might be needed in proposed amendments to the Federal Rules of Bankruptcy Procedure.

Mr. Rabiej pointed out that FED. R. APP. P. 26.1 was quite narrow in scope and did not apply to subsidiaries. He suggested that the advisory committees might seek some guidance from the Standing Committee as to whether a proposed common disclosure rule should include subsidiaries or in other respects be broader than the current FED. R. APP. 26.1.

Judge Garwood said that the Advisory Committee on Appellate Rules had considered Rule 26.1 recently and had concluded that it would simply not be possible to devise a workable disclosure statement rule that would cover all the various types of conflicting situations and financial interests that require recusal on the part of a judge. He said that the rule should focus on those categories of conflicts that require automatic recusal under the statute, rather than the conflicts that entail judicial discretion.

## PROPOSED RULES GOVERNING ATTORNEY CONDUCT

Professor Coquillette referred to his memorandum of December 6, 1998, and reported that each of the five advisory committees had appointed two members to serve on the Special Committee on Rules Governing Attorney Conduct. He said that Judge Stotler had named Chief Justice Veasey and Professor Hazard to serve on the committee as representatives of the standing committee and that the Department of Justice would also be asked to name participants.

He said that the special committee would hold a meeting in Washington on May 4, 1999. At that time, the members would review the pertinent empirical studies and consider the major recommendations submitted to date by various organizations and individuals. All options would be discussed at the May meeting, but no decisions would be made at that time.

The special committee would then meet again in the fall of 1999. At that time, it would be expected to approve concrete proposals to bring before the respective advisory committees for a vote at their fall meetings. The standing committee at its January 2000 meeting could then consider the final attorney conduct recommendations of the special committee and the advisory committees.

Professor Coquillette said that the options at this point appeared to be either:

1. to adopt a single federal rule adopting the attorney conduct statutes and rules of the state in which a federal district court sits; or
2. to adopt a single federal rule adopting the attorney conduct statutes and rules of the state in which a federal district court sits, except for a small number of “core” issues to be governed by uniform, national federal rules. These would be limited to matters of particular concern to federal courts and federal agencies, such as the Department of Justice.

He pointed out that there was considerable disagreement over these options within the legal community.

#### SHORTENING THE RULEMAKING PROCESS

Judge Scirica reported that the Executive Committee of the Judicial Conference had asked the committee to consider ways in which the length of the rulemaking process might be shortened without adverse effect. He said that there were, essentially, two basic options that might accomplish that objective — either eliminating the participation in the rules process of one of the bodies presently required to approve rule amendments or shortening the time periods now prescribed by statute or Judicial Conference procedures. He said that neither alternative was attractive and added that most of the members of the standing committee had already expressed opposition to shortening the time allotted for public comment on proposed amendments.

Some members added that it was apparent that the Supreme Court wanted to continue playing a significant role in the rulemaking process. They said that it would be very difficult, in light of the Court’s schedule, to reduce the amount of time that the justices currently are given to review proposed rules amendments. Nevertheless, they said, it might

be useful to take a fresh look at all the time limits currently imposed by statute or Judicial Conference procedures.

Judge Scirica reported that it had been suggested that the committee consider adopting an emergency procedure for adopting amendments on an expedited basis when there is a clear need to do so. Several members pointed out that the rules committees had, in fact, acted on an expedited basis on several occasions in response to pending action by the Congress. Most recently, they noted, the committees had acted outside the normal, deliberative Rules Enabling Act process in responding to the Congressional mandate for their views on the advisability of amending FED. R. CRIM. P. 6(d) to permit witnesses to bring their lawyers into the grand jury room.

But several members also cautioned against establishing a regularized procedure for handling potential amendments on an expedited basis. They said that the Rules Enabling Act process, as protracted as it may seem, ensures the integrity of the rulemaking process. It assures careful research and drafting, thorough committee deliberations, and meaningful input by the public. They added that only a few selective matters require expedited treatment, and these exceptions can be dealt with expeditiously on a case-by-case basis. They said that the very establishment of a regularized "fast track" procedure would only encourage its use and undermine the effectiveness of the rulemaking process.

Judge Scirica said that the committee might respond to the Executive Committee by stating that the present deliberative process serves the public very well, but that the rules committees are prepared to respond to individual situations on an expedited basis whenever necessary. The members agreed with his observation and suggested that he explore it with the chairman of the Executive Committee.

#### REPORT OF THE STYLE SUBCOMMITTEE

Judge Parker reported that the restyling of the body of the Federal Rules of Criminal Procedure was the major task pending before the style subcommittee. He noted that soon after the Supreme Court had promulgated the revised Federal Rules of Appellate Procedure, Bryan Garner, the Standing Committee's style consultant, prepared a first draft of a restyled set of criminal rules. That draft, he said, was then revised by each member of the style subcommittee and by Professor Stephen Saltzburg, who had been engaged specially by the Administrative Office to assist in the restyling task. Mr. Garner then prepared a second draft of the criminal rules, and the style subcommittee met in Dallas to begin work on reviewing the product.

Judge Parker reported that the style subcommittee had completed its review of FED. R. CRIM. P. 1-11, 54, and 60, and it planned to complete action on another dozen rules

by mid-February 1999. Judge Davis added that the Advisory Committee on Criminal Rules was working closely with the style subcommittee on the project. He stated that one of the great challenges was to avoid making inadvertent, substantive changes in the rules as they are restyled.

#### REPORT OF THE TECHNOLOGY SUBCOMMITTEE

Mr. Lafitte reported that the technology subcommittee was monitoring developments in technology with a view towards their potential impact on the federal rules. He noted that the subcommittee was concentrating its efforts on considering rules amendments that might be needed to accommodate the judiciary's Electronic Case Files (ECF) initiative. He said that, among other things, ECF will permit: (a) electronic filing and service of court papers, (b) maintenance of the court's case files in electronic format, (c) electronic linkage of docket entries to the underlying documents, and (d) widespread electronic access to the court's files and records. The project, he added, was being tested in 10 pilot courts and was expected to be made available by the Administrative Office to all federal courts within one to two years.

Mr. Lafitte reported that the subcommittee had met the afternoon before the standing committee meeting to review the status of ECF and identify any federal rules that might need to be changed to accommodate electronic processing of case papers. He said that the subcommittee had been aided substantially in that effort by a comprehensive policy paper prepared by Nancy Miller, the Administrative Office's judicial fellow.

Mr. Lafitte said that the 1996 amendments to the rules had authorized a court by local rule to "permit papers to be filed, signed, or verified by electronic means that are consistent with technical standards, if any, that the Judicial Conference . . . establishes." [FED. R. CIV. P. 5(e); FED. R. BANKR. P. 5005; FED. R. APP. P. 25(a)(2). *See also* FED. R. CRIM. P. 49(d).] The rules, however, do not authorize service by electronic means. Accordingly, he said, the ECF pilot courts have relied on the consent of the parties in experimenting with electronic service in the prototype systems.

Mr. Lafitte reported that the subcommittee had concluded that it was necessary to legitimize the experiments taking place in the pilot courts and amend the federal rules to provide an appropriate legal foundation for electronic service. To that end, he said, the subcommittee would like the advisory committees to consider a common amendment to the rules that would authorize courts by local rule to permit papers to be *served* by electronic means — just as they may currently authorize papers to be *filed, signed, or verified* by electronic means. He said that the subcommittee had asked Professor Cooper to prepare a draft rule, using as a model the proposed amendment to FED. R. BANKR. P. 9013(c) published in August 1998.

He added, however, that the proposed amendment to authorize electronic service through local rules should be identified as an interim solution, necessary because of rapid advances in technology and local experimentation. The ultimate objective, he said, should be to fashion a uniform set of national rules that will govern electronic files and filing in the federal courts.

Mr. Lafitte also reported that the subcommittee would meet again in February 1999 — together with judges, clerks, and lawyers from the ECF pilot districts and Administrative Office staff — to consider procedural issues raised by the change from manual to electronic processing of case papers and files.

Judge Scirica recommended that Nancy Miller's paper be sent to all members of the standing committee.

#### LOCAL RULES PROJECT

Professor Coquillette reported that the first local rules project had been mandated by the Congress in response to widespread concern over the proliferation of federal court local rules. He explained that Professor Mary Squiers, the director of the project, had reviewed the local rules of every district court and reported back to those courts on inconsistencies and other problems with their rules. The process, he said, had been voluntary, and it led a number of courts to improve and reduce their local rules.

Professor Squiers then described the original project in detail and pointed out that the review of all the local rules had also been beneficial in that it revealed many subjects covered by local rules that were later determined to be appropriate subjects to be included in the national rules. The project, she said, had also considered the possibility of drafting a set of model local rules, but it decided instead simply to compile several samples of effective local rules for the courts to consider. Professor Squiers added that the 1995 amendments to the federal rules required courts to renumber their local rules to conform with the numbering systems of the national rules.

Professor Coquillette said that a new study of local rules was needed. He pointed out that the Civil Justice Reform Act had greatly complicated the picture by encouraging local procedural experimentation and de facto "balkanization" of federal procedure. In addition, he said, several courts had not yet complied with the requirement to renumber their local rules.

One of the members added that recently-enacted legislation requires each district court to establish an alternative dispute resolution program under authority of local rules. He suggested that a new local rules project consider the advisability of having certain uniformity among the courts in this area.

Professor Coquillette said that it was important for the committee to decide in advance as a matter of policy what it would do with the results of a new national study of local rules. He said, for example, that the committee might consider the following options:

1. developing model local rules;
2. proposing new national rules to supersede certain categories of local rules; or
3. encouraging more vigorous enforcement of FED. R. CIV. P. 83.

One of the members suggested that the committee draft model local rules and use them as a vehicle for judging the local rules of the courts.

#### NEXT COMMITTEE MEETING

The committee will hold its next meeting in Boston on Monday and Tuesday, June 14-15, 1999. Judge Scirica pointed out that the agenda for the meeting would be very heavy and may require the scheduling of a working dinner for Sunday night, June 13.

Respectfully submitted,

Peter G. McCabe,  
Secretary