COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of June 15-16, 2005
Boston, Massachusetts
Minutes

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ATTENDANCE

The mid-year meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Boston, Massachusetts, on Wednesday and Thursday, June 15-16, 2005. All the members were present:

Judge David F. Levi, Chair
David J. Beck, Esquire
David M. Bernick, Esquire
Deputy Attorney General James B. Comey
Charles J. Cooper, Esquire
Judge Sidney A. Fitzwater
Judge Harris L Hartz
Dean Mary Kay Kane
John G. Kester, Esquire
Judge Mark R. Kravitz
Judge J. Garvan Murtha
Judge Thomas W. Thrash, Jr.
Justice Charles Talley Wells

Providing support to the committee were: Professor Daniel R. Coquillette, reporter to the committee; John K. Rabiej, chief of the Rules Committee Support Office of the Administrative Office; James N. Ishida and Jeffrey N. Barr, senior attorneys in the Office of Judges Programs of the Administrative Office; Brooke D. Coleman, law clerk to Judge Levi; Tim Reagan of the Research Division of the Federal Judicial Center; and Joseph F. Spaniol, Jr., and Professor Geoffrey C. Hazard, Jr., consultants to the committee.

Representing the advisory committees were:

Advisory Committee on Appellate Rules —
Judge Samuel A. Alito, Jr., Chair
Advisory Committee on Bankruptcy Rules —
Judge Thomas S. Zilly, Chair
Professor Jeffrey W. Morris, Reporter
Advisory Committee on Civil Rules —
Judge Lee H. Rosenthal, Chair
Professor Edward H. Cooper, Reporter
Advisory Committee on Criminal Rules —
Judge Susan C. Bucklew, Chair
Professor David A. Schlueter, Reporter
Professor Sara Sun Beale, Consultant
Advisory Committee on Evidence Rules —
Judge Jerry E. Smith, Chair
Professor Daniel J. Capra, Reporter

Also taking part in the meeting on behalf of the Department of Justice were John S. Davis, Associate Deputy Attorney General, and Elizabeth Shapiro, Assistant Director, Civil Division.

INTRODUCTORY REMARKS

Judge Levi reported that new bankruptcy forms and interim bankruptcy rules must be in place by October 17, 2005, the effective date of the comprehensive new Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. This, he explained, will require an enormous amount of work by the Advisory Committee on Bankruptcy Rules.

He stated that the Standing Committee would miss the important contributions of two of its distinguished lawyer members whose terms are about to expire — David Bernick and Charles Cooper. He reported that Judge John Roberts had been selected to replace Judge Samuel Alito as chair of the Advisory Committee on Appellate Rules. Judge Levi also noted that the Advisory Committee on Criminal Rules was about to lose its reporter, Professor David Schlueter, who will be replaced by Professor Sara Sun Beale. He also explained that Peter McCabe, the committee's secretary, was unable to attend the meeting because he was undergoing back surgery. He expressed the committee's best wishes for a speedy recovery.

Judge Levi reported that the Judicial Conference had approved changes in the civil and bankruptcy rules as part of the consent calendar at its March 2005 session.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee voted without objection to approve the minutes of the last meeting, held on January 13-14, 2005.

REPORT OF THE ADMINISTRATIVE OFFICE

Mr. Rabiej reported that pending legislation would undo the successful 1993 amendments to Rule 11 of the Federal Rules of Civil Procedure and require a judge to impose sanctions for violations of the rule. Mr. Rabiej explained that the legislation had been reintroduced in Congress a number of times over the years, and each time it had progressed further. Last year, he said, it had been passed by the House, but not by the Senate. This year it is likely that the House will pass it once again.

He noted that the Administrative Office had written to Congress in defense of retaining the 1993 amendments. The Federal Judicial Center, he pointed out, had conducted surveys and prepared a report on the issue. The Center's report, which was shared with Congress, found that district judges are remarkably unified in opposition to the proposed change in Rule 11. In addition, members of the committee had met with members of Congress to discuss the issue.

Mr. Rabiej reported that the Class Action Fairness Act had been enacted by Congress, and the Administrative Office is watching carefully for any impact it may have on the federal courts. There had been speculation in some quarters, he said, that the federal courts might be inundated by extra work as a result of the legislation, but the clerks of court have reported only a modest increase so far.

REPORT OF THE FEDERAL JUDICIAL CENTER

Mr. Reagan reported that the Federal Judicial Center had published empirical studies on both FED. R. CIV. P. 11 (sanctions) and proposed FED. R. APP. P. 32.1 (citation of judicial dispositions). He also distributed a status report on the various educational and research projects of the Center.

REPORT OF THE TECHNOLOGY SUBCOMMITTEE

Amendments for Publication

PRIVACY PROTECTION RULES

FED. R. APP. P. 25(a)(5)
FED. R. BANKR. P. 9037
FED. R. CIV. P. 5.2
FED. R. CRIM. P. 49.1

Judge Fitzwater reported that the E-Government Act Subcommittee had coordinated the development of new rules to protect privacy and security interests implicated by internet posting of electronic court filings. The subcommittee had produced a template rule for each advisory committee to use in adapting the rule to its own circumstances. The resulting rules, he said, were ready to be published for public comment and will undergo further style review during the comment process.

Professor Capra explained that the E-Government Act requires the federal judiciary to promulgate rules to protect the privacy of court filings made available on-line. He observed that the "practical obscurity" that had once protected private information in court case files is no more. The work of the subcommittee, he said, in large measure reflects the Judicial Conference's existing privacy policy, developed after comprehensive study by the Committee on Court Administration and Case Management.

The general principle guiding the subcommittee's work, he said, is that "public is public." In other words, whatever records are available to the public at the courthouse should also be available on the Internet, with certain exceptions. Otherwise, a cottage industry of Internet service providers would step in to disseminate courthouse information electronically.

Professor Capra explained that under the proposed rules — and existing Judicial Conference policy — parties must redact filings to eliminate certain personal identifiers, such as social security numbers and names of minor children. The redaction requirement applies whether the documents are filed in paper form or electronically and whether they

are available at the courthouse, on-line, or both. The new rules, though, make an exception for voluminous documents because it is very burdensome for parties to redact all the personal identifiers in extensive records.

Professor Capra noted that the Committee on Court Administration and Case Management had recommended that special treatment be given to social security cases because the records in those cases contain substantial amounts of private medical information that can only be redacted with considerable difficulty. Accordingly, the proposed rules specify that electronic remote access will not be provided for the records in social security cases.

He added that the Department of Justice had argued that records in immigration cases should receive similar treatment, because they too contain substantial private information. The Advisory Committee on Civil Rules agreed with the recommendation. In addition, he said, the E-Government Subcommittee had consulted with the Committee on Court Administration and Case Management, which agreed to the exemption for purposes of obtaining public comment. Therefore, proposed FED. R. CIV. P. 5.2(c) (privacy protection for filings made with the court) provides for restricted public access in both social security and immigration cases.

In addition, he explained, the new rules confirm a court's discretion on a case-by-case basis to protect private or sensitive information by limiting or prohibiting remote access by non-parties. The rules also provide that a party filing a redacted document may also file an unredacted copy of the document under seal. Finally, the new rules state that a party waives its privacy protections under the proposed rules by filing unredacted information not under seal.

Judge Alito reported that the approach adopted in the proposed appellate rule (FED. R. APP. P. 25(a)(5)) (privacy protection) is that, with limited exceptions, matters on appeal will continue to be governed by the applicable civil, criminal, or bankruptcy rules that had governed them in lower court proceedings. All other matters would be governed by the Federal Rules of Civil Procedure.

One participant asserted that there is also a need to provide an exemption for civil and criminal forfeiture cases. In a forfeiture, he noted, the government must identify the property to be forfeited. Indeed, in the case of a civil forfeiture, the property itself is listed as the defendant in an *in rem* proceeding. The government, moreover, must give public notice of the proceeding, usually by publication in a newspaper. Thus, he said, it would be anomalous for the government to have to redact the very information it is publicizing.

Professor Capra stated that a forfeiture exemption might not be necessary in bankruptcy cases. He suggested that for purposes of publishing the proposed rules, the

matter might be left as presented by the Advisory Committee on Bankruptcy Rules, *i.e.*, with no exemption for bankruptcy cases. But the advisory committee could reconsider the matter following the public comment period.

Professor Morris responded that it is unclear whether there is a real issue in bankruptcy cases. The advisory committee, he added, would be pleased to consider the need for a forfeiture exemption in the bankruptcy rules as the public comments come in.

Judge Zilly noted that, in the bankruptcy context, the court does not see the forfeiture proceeding itself. All the judge sees is the government's motion for relief from the automatic stay, permitting it to forfeit the property. He suggested that a forfeiture exemption could be included in the amendments for publication, in order to achieve as much uniformity among the rules as possible while awaiting public comment. He added that the bankruptcy court can always seal or redact private information in particular cases, as appropriate.

One member observed that if the forfeiture exemption were included in the rules as published, it would be more likely to be noticed and to generate comments. If, however, the exemption were not included, few readers would notice the omission or comment on it.

One participant noted that, under the proposed amendments to the bankruptcy rules, certain privacy protections would attach to the names of persons known to be, and identified as minors. There may be many names listed in a bankruptcy case, some of which may be the names of minors, but no one will know as a practical matter who is a minor. Another participant stated that if the name of a parent is known, there is no doubt that someone who wants to can readily ascertain the name of the child. He reiterated that the judiciary must explain the insolubility of this problem, so that it does not face hostile and unfair criticism damaging to it as an institution.

Judge Levi reported that following discussion during a break, Judge Zilly and Professor Morris had agreed, on behalf of the bankruptcy advisory committee, that the new bankruptcy rule, as published, would be uniform with the other rules and include the same forfeiture exemption.

One member asked whether the suggested revisions to the respective sets of rules would be published side-by-side or separately. If published separately, the absence of a forfeiture exemption in the bankruptcy rules might not be noticed. Another participant added that an advantage of side-by-side publication is that it is easier for readers to review inconsistencies between the revisions to the various sets of rules. Another participant suggested that the amendments be published in both formats.

One participant suggested the need for some public expression by the committee that the drafting task is extremely difficult. For one thing, it is impossible to predict the impact of future technology, and provisions may quickly become obsolete. Moreover, the rules inevitably will not satisfy all competing interests. Some will complain about inadequate protection of privacy, others about interference with the public's right to know.

Nevertheless, he said, the judiciary must proceed with national rules because of the specific statutory mandate to do so. But the publication should state that full reconciliation of the competing principles and interests at stake cannot be accomplished, certainly not with the current ability to predict future technology. The committee, thus, should document its awareness of these limitations on its capacity to deal with the problem. Professor Capra stated that he would prepare a draft insertion to this effect, and Judge Levi agreed to its inclusion.

The committee approved the proposed new rules and amendments for publication by voice vote, with one objection.

Amendments for Final Approval

MANDATORY ELECTRONIC FILING RULES

FED. R. APP. P. 25(a)(2)
FED. R. BANKR. P. 5005(a)(2)
FED. R. CIV. P. 5(e)

Professor Cooper noted that draft FED. R. CIV. P. 5(e) (filing with the court), along with its uniform counterparts in the appellate rules and the bankruptcy rules, would allow a court by local rule to require electronic filing of documents. The rule, he said, had its impetus in the fact that many courts have already mandated that all papers be filed electronically. In addition, electronic filing has the potential of saving significant resources for the courts.

Judge Zilly noted that there had been a good deal of public comment, most of which had focused on the need for courts to provide appropriate exceptions. Professor Cooper added that the draft committee note recognizes the importance of providing exceptions from the electronic filing requirement for those who cannot file by electronic means. But, he explained, the proposed rules do not specify which exceptions must be provided. Instead, they permit a court by local rule to mandate electronic filing "if reasonable exceptions are allowed."

Professor Beale observed that there is no need for a parallel provision in the criminal rules because those rules specify that papers in criminal cases be filed in the manner prescribed by the civil rules.

Judge Alito noted that one circuit court recently had adopted a local rule mandating electronic filing. One purpose of the rule is to avoid the use of disks, because technological experts advise that it is much harder to screen for viruses on disks. In addition, electronic briefs offer a cost savings. Court employees have less need to cart heavy briefs around, and the clerk's office does not have to ship hundreds of pounds of briefs every month to the judges.

A participant added that electronic filing also helps expedite urgent appeals. He said that he knew of several appeals in which a court of appeals had specially ordered electronic filing in order to expedite the appeal.

The committee without objection approved the proposed amendments for final approval by voice vote.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Alito presented the report of the advisory committee, as set forth in his memorandum of May 6, 2005. (Agenda Item 7) He noted that Professor Schiltz, the committee's reporter, was unable to attend the meeting.

Amendments for Final Approval

FED. R. APP. P. 32.1

Judge Alito reported that concerns had been expressed by appellate judges in some circuits that the proposed new Rule 32.1 (citation of judicial dispositions) would result in additional work for judges, lead to shorter opinions, delay disposition times, create inconsistencies in circuit case law, and impose additional research burdens on attorneys. The advisory committee, he said, had asked the Administrative Office and the Federal Judicial Center to conduct studies to determine whether there is empirical support for these claims.

In response, the Administrative Office had assembled data comparing disposition times, summary dispositions, and other indicators — before and after — in the circuits that had changed their local rules to permit citation of unpublished opinions. The results showed that the permissive citation policy had resulted in few, if any, changes in these workload indicators.

Mr. Reagan reported that the Federal Judicial Center's study for the committee involved three research components: (1) a survey of federal judges; (2) a survey of attorneys; and (3) an examination of case files. The research approach had divided the circuits into "restrictive," "discouraging," and "liberal" circuits, in accordance with each circuit's current policy regarding citation of unpublished opinions.

Judge Alito noted that the Center study shows that very few judges sitting in the circuits with liberalized citation rules believe that restricting citation of unpublished opinions would reduce their workload. The great majority, rather, believe that the length of opinions would not change and there would be the same number of unpublished opinions. No significant increase in the judges' workload had occurred in the circuits that have liberalized their rules, and few judges in the survey had expressed concerns about inconsistencies in precedent.

One participant observed that he had been struck by the strength of conviction shown by the chief judges of the non-citation circuits. They had expressed fears about the workload and other consequences of permitting citation of unpublished opinions. But the empirical studies had substantially allayed his prior concerns. Judge Alito added that the Center study also appeared to have convinced some members of the advisory committee who initially had been skeptical of proceeding with a rule on unpublished opinions.

Another participant emphasized that he was unequivocally in favor of the proposed rule. He noted that the distinction between published and unpublished opinions had largely disappeared, as "unpublished" opinions are generally available from the electronic legal research services. He argued that it is absurd to have a practice that lets an attorney cite a law review note by a law student, but not an opinion of the court itself.

One member noted that some segments of the bar had expressed consternation over non-citable opinions. The law, he said, should be driven by transparency. An important court practice that is not transparent should not be condoned.

Another member acknowledged that some circuit judges fear that "the sky will fall" as a result of the new rule, but argued that there is no empirical support for that fear. The real issue, he said, is not the citation of unpublished opinions, but the precedential effect that opinions have. The revised rule, he emphasized, deliberately does not address the question of the precedential effect of opinions. That is left to each circuit to decide.

Another member emphasized that the rule change is really very simple. It does not address either the meaning or precedential value of unpublished opinions. It merely permits them to be cited to the court.

Another stated that there is a significant distinction between precedential and non-precedential opinions. Judges do not spend time worrying about the precise language of a non-precedential opinion. On some courts of appeals, each precedential opinion is disseminated to the entire court, and each judge has a fixed number of days to comment. The same process does not apply to non-precedential opinions. The main point of an "unpublished" or non-precedential opinion is that the court in a later case does not have to go en banc to disagree with it. The rule change, however, does not affect that practice, for it merely permits lawyers to cite unpublished opinions.

Another member added that he supported the rule change, but thought that its impact might be more significant than anticipated. If, for example, the change were to result in one more hour of judge work per opinion, the total for each judge would be 60 hours a year, a significant amount. Moreover, the rule might cause additional, unnecessary work for the bar.

One member noted that the committee may be perceived as forcing the change on the four circuits that have opposed it. With that in mind, he suggested, it might be better to make the change effective only prospectively. Judge Alito responded, though, that the advisory committee had discussed and rejected that idea.

One member predicted that most of the circuits that currently allow citation of unpublished opinions, but with restrictions, probably would make the rule change retroactive in any event. The idea behind a "prospective-only" change, however, would be to respect the expectations of judges who thought at the time an unpublished opinion was written that it could not be cited back to them as precedent. It might be better, he said, not to force circuits to change the ground rules after the fact.

One member suggested that there is a principled objection to the practice of barring citation of unpublished opinions. If one accepts that principled objection, then to allow a phased transition to permitting citations is simply wrong.

One participant added that a national rule to overturn local non-citation practices had been on the judiciary's agenda for years. Any concern about embarrassment or unfairness to judges incurred by making the rule change retrospective would be *de minimis*. One member stated that he would prefer to have the circuits work out for themselves how to treat prior unpublished opinions. Making the change prospective-only, he suggested, would be a minor nod to the circuits opposing any change.

The committee without objection approved the proposed new rule for final approval by voice vote.

One member suggested that he would move to make the new rule prospective only. But noting a lack of interest, no motion was made.

Judge Levi stated that the new rule itself having been approved, the Standing Committee should turn to consideration of the accompanying committee note. Two members stated that they supported the shorter version of the note. Another agreed, but suggested that the material in the longer version should be disseminated to the public in some form, but not as part of a committee note.

The committee without objection approved the shorter version of the committee note for final approval by voice vote.

FED. R. APP. P. 25 (a)(2)

As noted above on pages 7-8, the committee approved an amendment to FED. R. APP. P. 25(a)(2) (method and timeliness of filing) that would allow a court by local rule to require electronic filing of documents with the court.

Amendments for Publication

FED. R. APP. P. 25(a)(5)

As noted above on pages 4-7, the committee approved for publication a new FED. R. APP. P. 25(a)(5) (privacy protection for court filings) to protect privacy and security concerns relating to documents filed with the court electronically. The rule fulfills a requirement of the E-Government Act of 2002.

Informational Item

Judge Alito noted that complaints had been expressed by appellate litigants about the briefing requirements imposed by local appellate court rules. He reported that a recent Federal Judicial Center study for the advisory committee had documented a large number of additional briefing and procedural requirements imposed by local rules, some of which are inconsistent with the Federal Rules of Appellate Procedure. The study, he said, had been sent to all the courts of appeals. The advisory committee, moreover, plans to follow up with a letter that will cite the Center study, urge national uniformity, and point out those specific local rules that appear to be inconsistent with the Federal Rules of Appellate Procedure.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Zilly and Professor Morris presented the report of the advisory committee, as set forth in Judge Zilly's memorandum and attachments of May 2, 2005. (Agenda Item 8)

Judge Zilly reported that the advisory committee had been consumed with implementing the massive new Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. He noted that at the time the Act was passed, the Supreme Court had pending before it a proposed amendment to FED. R. BANKR. P. 4008 (discharge and reaffirmation hearing) that would set a deadline for filing reaffirmation agreements. The advisory committee, he said, had reviewed the amendment in light of the legislation and had concluded that it would conflict with the new statute. As a consequence, the Court — at the committee's request and with the concurrence of the Executive Committee — returned the rule for further consideration.

Amendments for Final Approval

FED. R. BANKR. P. 4002

Judge Zilly reported that, following publication, the advisory committee had received a number of comments on revised Rule 4002 (duties of the debtor). The amendments, initiated at the request of the Executive Office for United States Trustees would require the debtor to bring additional documentation to the first meeting of creditors. In addition, he pointed out, the new bankruptcy statute will require changes in the committee's draft.

For these reasons, he said, the advisory committee had decided that the revised rule should not be presented to the Judicial Conference. Instead, the committee will incorporate its substance into a new interim rule for adoption locally by the bankruptcy courts in advance of the effective date of the new legislation (October 17, 2005). Judge Zilly added that it would be very confusing for the Judicial Conference to submit a revised Rule 4002 to the Supreme Court at the same time that many of the same changes are being set out in a new interim rule.

The committee without objection approved withdrawal of the proposed amendment by voice vote.

FED. R. BANKR. P. 1009

Judge Zilly stated that the proposed amendment to Rule 1009 (amendments to voluntary petitions, lists, schedules, and statements) would require the debtor to submit a corrected social security number when the debtor becomes aware of an error in a previously submitted statement.

The committee without objection approved the proposed amendment for final approval by voice vote.

FED. R. BANKR. P. 5005(a)(2)

As noted above on pages 7-8, the committee approved an amendment to FED. R. BANKR. P. 5005(a)(2) (filing and transmitting papers) that would allow a court by local rule to require electronic filing of documents with the court.

FED. R. BANKR. P. 5005(c)

Judge Zilly noted that the proposed amendment to Rule 5005(c) (error in filing or transmittal) would expand the list of persons who can transmit erroneously delivered papers to the clerk of the bankruptcy court. The expanded list adds district judges and clerks of the bankruptcy appellate panels.

The committee without objection approved the proposed amendment for final approval by voice vote.

FED. R. BANKR. P. 7004

Judge Zilly explained that the proposed amendment to Rule 7004 (process and service) would require service on the debtor's attorney whenever the debtor is served with a summons and complaint.

The committee without objection approved the proposed amendment for final approval by voice vote.

Amendments for Publication

Judge Zilly explained that the amendments proposed for publication would not be affected by the new bankruptcy statute. He noted that most of them had arisen as a result of the efforts of a joint subcommittee of representatives from both the advisory committee and the Committee on the Administration of the Bankruptcy System.

FED. R. BANKR. P. 3001

Judge Zilly noted that the proposed amendments to Rule 3001(c) and (d) (proof of claim) would add page limits for the filing of a proof of claim or evidence of perfection of a security interest.

The committee without objection approved the proposed amendments for publication by voice vote.

FED. R. BANKR. P. 3007

Judge Zilly reported that the proposed amendments to Rule 3007 (objections to claims) would prohibit a party in interest from including within an objection to a claim a request for relief that requires the initiation of an adversary proceeding. It would also place restrictions on, and provide procedures for, omnibus objections to claims.

The committee without objection approved the proposed amendments for publication by voice vote.

FED. R. BANKR. P. 4001

Judge Zilly stated that the proposed amendments to Rule 4001 (relief from the automatic stay, cash collateral, and obtaining credit) would specify the content and service of motions seeking authority to use cash collateral, to obtain debtor-in-possession financing, and to approve related agreements.

The committee without objection approved the proposed amendments for publication by voice vote.

FED. R. BANKR. P. 6003

Judge Zilly explained that the proposed new Rule 6003 (interim and final relief immediately following commencement of a case) would limit the type of motions and relief that a court may grant during the first 20 days of a case.

The committee without objection approved the proposed new rule for publication by voice vote.

FED. R. BANKR. P. 6006

Judge Zilly stated that the proposed amendments to Rule 6006 (assumption, rejection, or assignment of an executory contract or unexpired lease) would place

restrictions on, and provide procedures for, omnibus assumptions, rejections, and assignments of executory contracts and unexpired leases.

The committee without objection approved the proposed amendments for publication by voice vote.

FED. R. BANKR. P. 9005.1

Judge Zilly noted that the proposed new Rule 9005.1 (constitutional challenge to a statute) would incorporate the new FED. R. CIV. P. 5.1, scheduled to take effect on December 1, 2005, and make it applicable to adversary proceedings, contested matters, and other proceedings within a bankruptcy case.

The committee without objection approved the proposed new rule for publication by voice vote.

FED. R. BANKR. P. 9037

As noted above on pages 4-7, the committee approved for publication a new FED. R. BANKR. P. 9037 (privacy protection for court filings) to protect privacy and security concerns relating to documents filed with the court electronically. The rule fulfills a requirement of the E-Government Act of 2002 and tracks the template rule used by all the advisory committees, with appropriate modifications to meet bankruptcy needs.

Informational Item

Judge Zilly stated that most of the provisions of the new bankruptcy statute will take effect on October 17, 2005. Interim bankruptcy rules, he said, must be in place by that date to assist the courts and the bar. In addition, he noted, the advisory committee has had to modify almost every existing bankruptcy form.

He explained that the advisory committee had identified five major categories of issues raised by the new statute: (1) business; (2) consumer; (3) health care; (4) cross-border proceedings; and (5) direct appeals to the courts of appeals. To reflect these five sets of issues, the committee had created five corresponding working groups, plus a sixth working group to deal with the forms. In August 2005, the committee will meet again to approve the interim bankruptcy rules and the new and revised bankruptcy forms. The rules and forms will then be sent for expedited approval by the Standing Committee and the Executive Committee of the Judicial Conference so they can be in place by October 17, 2005.

He explained that the Official Forms, once approved by the Judicial Conference, must be used in all bankruptcy cases and proceedings. But it will be up to each district to

decide whether to adopt the new interim rules. The committee will strongly encourage each district to adopt the rules without change in order to promote national uniformity. He added that public comment would be sought on both the interim rules and the forms, and the advisory committee will use them as the starting point in developing permanent national rules through the normal Rules Enabling Act process. In addition, the actual experience of the courts in using the interim rules can serve as a laboratory to aid the committee's consideration of permanent revisions to the bankruptcy rules.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Rosenthal and Professor Cooper presented the report of the advisory committee, as set out in Judge Rosenthal's memorandum and attachments of May 27, 2005. (Agenda Item 9)

Amendments for Final Approval

FED. R. CIV. P. 5(e)

As noted above on pages 7-8, the committee approved an amendment to FED. R. CIV. P. 5(e) (filing with the court) that would allow a court by local rule to require electronic filing of documents with the court.

FED. R. CIV. P. 50

Judge Rosenthal stated that the proposed amendments to Rule 50 (judgment as a matter of law) would delete the requirement that a renewed motion for judgment as a matter of law under Rule 50(b) be supported by a motion for judgment as a matter of law made at the close of the evidence. The amendment would allow a renewed Rule 50(b) motion to be supported by any Rule 50(a) motion for judgment as a matter of law made at trial.

Professor Cooper explained that decisional law had long eroded the traditional rule that requires renewal of the motion at the close of the evidence. The gradual erosion, he said, had created a growing uncertainty among practitioners, creating a need for a clear rule to let attorneys know what they have to do. The current rule can be a trap for the unwary and for those who simply forget to renew their motion at the close of the evidence. The few public comments received, he added, generally supported the change.

The committee without objection approved the proposed amendment for final approval by voice vote.

CIVIL FORFEITURE AMENDMENTS

SUPPLEMENTAL ADMIRALTY RULE G
& conforming amendments to
SUPPLEMENTAL ADMIRALTY RULES A, C, and E
FED. R. CIV. P. 9, 14, and 26(a)(1)(E)

Professor Cooper reported that there had been very little public comment on the new Supplemental Admiralty Rule G. He explained that the rule had been developed with the active cooperation of the Department of Justice and the National Association of Criminal Defense Lawyers. It represents the culmination of several years of work by the advisory committee to adapt the admiralty rules to deal better with the great growth that has occurred in civil forfeiture actions and to remove inconsistencies with federal forfeiture statutes.

Many civil forfeiture statutes, he pointed out, explicitly invoke the admiralty rules. There are, however, a number of practical differences between forfeiture actions, on the one hand, and admiralty and maritime actions on the other. Consequently, Rule G establishes distinctive procedures for forfeiture actions within the overall framework of the supplemental rules. It also establishes new provisions that take account of the Civil Asset Forfeiture Reform Act of 2000 and reflects developments in decisional and constitutional law.

Judge Levi stated that these were very beneficial changes that fill a gap in the existing rules. He also observed that Judge H. Brent McKnight, an outstanding member of the advisory committee, deserved great recognition for his important role in chairing the subcommittee that had developed the changes. He noted, with sadness, Judge McKnight's recent untimely death.

The committee without objection approved the proposed new rule and amendments for final approval by voice vote.

ELECTRONIC DISCOVERY AMENDMENTS

FED. R. CIV. P. 16, 26, 33, 34, 37, and 45, FORM 35

Judge Rosenthal explained that the proposed package of rules amendments was intended to address a number of problems that have emerged from the widespread exchange of information in electronic form as part of the discovery process. She noted that the advisory committee had been asked repeatedly since the early 1990s to consider amendments to tailor the rules more specifically to the realities of discovery in the electronic age.

The committee, she said, had been reluctant to amend the discovery rules at first. Nevertheless, it made considerable efforts to educate itself on the issues by bringing

together many people with expertise and differing perspectives at committee-sponsored symposia. As a result of the discussions and debates, the members became convinced that electronic communication was fundamentally different from paper communication by virtue of its volume and changeable quality. In addition, because electronic information may not be intelligible except through the system that created it, difficulties of accessing and deciphering such information can arise that have no counterpart in paper.

Judge Rosenthal reported that the package of proposed electronic discovery amendments had been published in August 2004, and at least 250 public comments had been submitted to the Administrative Office. In addition, the advisory committee had conducted well-attended and vigorous public hearings in San Francisco, Dallas, and Washington.

She noted that electronic discovery rules must take into account the speed and unpredictability of technological change and yet be drafted in a way that is not later made obsolete by new technology. In short, they have to be general enough to survive changes in technology, but specific enough to provide meaningful guidance to judges, lawyers, and clients.

Judge Rosenthal explained that the proposed electronic discovery amendments can be grouped into five categories:

1. *Encouraging early attention to electronic discovery issues*
2. *Protecting claims of privilege*
3. *Defining interrogatories and requests for production*
4. *Discovering electronically stored information that is not reasonably accessible*
5. *Protecting parties against sanctions when information is lost through the routine operation of an electronic system*

1. Encouraging early attention to electronic discovery issues

FED. R. CIV. P. 16(b), 26(a), and 26(f), FORM 35

Judge Rosenthal pointed out that discovery of electronically stored information requires more management and communication than discovery of paper documents. More decisions must be made at an earlier stage of litigation, both by the attorneys and the court. Professor Cooper added that as electronic discovery issues become more complex, it becomes critical for parties and the court to focus on them at the outset of the litigation.

The proposed amendments, therefore, call on the parties themselves to discuss technical issues relating to the exchange and preservation of discoverable electronic information. Revised Rule 26(f) (conference of the parties) directs the parties to discuss discovery of electronically stored information during their discovery and planning conference. Revised Rule 16(b) (scheduling and planning), in turn, alerts the court to the need, in appropriate cases, to address in its scheduling order potential problems regarding the discovery of electronically stored information.

Professor Cooper explained that some had voiced concern that flagging electronic discovery issues in the rule would serve as an invitation to parties to ask the court for preservation orders, increasing the burdens and costs that flow from overbroad preservation orders. For this reason, he said, a paragraph had been added to the committee note following publication warning that courts should not routinely enter preservation orders. It states, moreover, that courts should issue *ex parte* preservation orders only in "extraordinary circumstances."

One participant observed that the language of the draft note may be substantive in nature — though the rule amendment itself is not — because it suggests that the parties' agreement on a procedure for asserting privilege and protection claims will protect them against the risk of privilege waiver. Judge Rosenthal responded that the note does not promise any substantive outcome. It merely points out that one purpose of an agreement by the parties is to have them address specifically the potential problems associated with inadvertent production of work product or privileged information. She suggested that the note could be changed to make clear that it addresses only agreements between the parties and does not intend to preclude waiver issues as to third-parties not present in the litigation.

The committee without objection approved the proposed amendments for final approval by voice vote.

2. Protecting claims of privilege

FED. R. CIV. P. 26(b)(5)

Professor Cooper explained that enormous problems exist in screening discovery materials to detect privileged and protected items. Parties worry about waiving privilege as to all information pertaining to the subject matter, not merely as to the specific item produced, particularly as to third parties. Thus, he said, there is widespread interest in having the committee devise an effective rule governing discovery and privilege agreements. But there is also a recognition that the rules cannot address the substantive law of privilege without express Congressional approval.

One practical problem, he said, is that a party may produce a good deal of electronic information in response to a discovery request and then realize that some of the information it has turned over may be privileged. The risk of such production is greater with electronic information than with paper, because of the volume and the dynamic nature of the information, and because the way it is stored may make privilege review more difficult.

The new rule would provide a defined procedure for the producing party to raise the privilege issue and recover the pertinent material. But it does not touch the substantive questions of what is privileged nor what the scope of the waiver may be. To invoke the new procedure, the producing party must give notice of the privilege claim to the receiving party. The receiving party must stop using the described material, and must take reasonable steps to retrieve it if it has been disclosed to third parties, pending resolution of the issue. The proposed rule would allow the receiving party to submit the material to the court under seal and obtain a ruling on privilege and waiver.

One member noted that the amendment specifies that the receiving party may not use the information for "any" purpose until the court resolves the issue of privilege. The language could be read to mean that the receiving party could not even use the information for the purpose of arguing against the privilege.

A participant responded that states differ on whether a receiving party may discuss the document in question for purposes of litigating the privilege issue. Another stated that the law is very confused on these points, varying from district to district and from state to state, and it is not for the rules committees to sort out all the problems.

One member remarked that once a third party has received a privileged document and has notice that the court is considering the privilege question, it should be bound by the court's decision on the matter. He added that it may be unclear whether the court has jurisdiction to bind a non-party, but non-parties at least can be notified that a party has asserted a privilege.

One member observed that third parties beyond the control of the court can do whatever they want until they are given notice that the privilege has been claimed or determined. But once they receive notice, ethical obligations attach to restrict their conduct if they are attorneys. One participant objected that the rule seemed to be an attempt, through the guise of procedure, to impose a substantive obligation on third parties.

Judge Rosenthal acknowledged the difficulty of these thorny issues, but stated that the committee simply cannot fix all the problems. All that the amendment attempts to do, she said, is to put in place an orderly and consistent procedure for the parties, recognizing that the problem is likely to occur more frequently with electronic discovery. It is not intended to put a thumb on the substantive scales in deciding whether there has been a waiver of privilege or not.

One member voiced serious reservations about dealing with privilege problems by rule, arguing that the amendment could lead to disruption of civil litigation. For example, it does not set a time deadline for asserting a claim of privilege, and its procedure is not limited to electronic discovery or to voluminous materials. Moreover, it does not change the substantive law of waiver, so parties will still have to go through the laborious process of examining all documents before they are turned over in order to protect work product and avoid disclosing privileged information. He suggested a scenario where a party dumps 10,000 documents on the other party. Three months later, the receiving party attempts to use the documents to depose a witness. Suddenly, the producing party proclaims: "Wait a minute! I claim privilege. You cannot use this particular document. The deposition must stop until the court rules on my privilege claim." Thus, he concluded, the revised rule could lead to more intractable, expensive, and unpredictable litigation.

He acknowledged the advisory committee's assertion that the amendment is nothing more than a procedure for prompt determination of privilege claims. But, he argued, if that is all it is, existing Rule 26(b)(5) is sufficient. In practice, he said, attorneys normally negotiate privilege issues and present them to the court only when they cannot agree. Thus, privilege questions are raised with the court at the time the documents are produced, not months or years later. The new procedure, he said, will cause unanticipated problems by creating a second, parallel procedure for addressing privilege problems.

A member responded that the amendment should include a specific reference to the inadvertent production of documents and the need to raise privilege issues in a timely fashion. It could say that the asserting party must declare that the production was inadvertent and raise the issue within a reasonable time. He also said that discovery is a two-way street, pointing out that he had never seen a case in which only one side had

inadvertently produced a privileged document. The amendment, he said, was aimed at production of voluminous information, and it is sorely needed in cases with large amounts of discovery materials.

Judge Rosenthal added that all these concerns had been discussed by the advisory committee. In most jurisdictions, she said, the existence of a waiver of privilege turns on whether the claim of privilege has been timely asserted. Thus, the asserting party has every incentive to raise the issue of privilege as soon as it arises, rather than delay and increase the risk that a court will find waiver.

She agreed that the concerns addressed by the amendment are not limited to discovery of electronic information. The concerns, though, are more acute with electronic discovery because privileged information is more likely to escape detection in privilege review.

Judge Rosenthal emphasized that the committee cannot change the substantive law of privilege and privilege waiver. Once privileged information is released, the asserting party must consider its options under governing substantive law. The rules committee, she said, cannot address that problem, and the amendment merely establishes a procedure for raising the issue in the district court.

One member stated that all agree that the amendment does not affect the substantive law of waiver and will not eliminate the expenses flowing from the substantive law. But, he claimed, it will change the litigation environment, for some attorneys will use it to delay and disrupt the process and engage in gamesmanship. It will give unscrupulous attorneys the ability to claim that a particular document is privileged and cannot be used by the other side until they obtain a court ruling. The amendment, he said, will create a totally open-ended procedure.

Judge Levi stated that the Advisory Committee on Evidence Rules had on its agenda the drafting of a statute on the substantive law of privilege waiver for possible submission to Congress. One option, he said, would be to hold up the proposed discovery rule for a year and allow the evidence committee to catch up.

Judge Rosenthal stated her concern about the timing and the uncertainty of any effort that depends on Congressional action. In any event, she did not see how a potential statute on substantive privilege waiver would be inconsistent with the pending rule amendment, which is purely procedural and addresses a real and present problem.

One member stated that the amendment may cause some confusion, and the parties will still need to sift through documents before releasing them. Therefore, the key question is whether the amendment will add any value to the discovery process. Others responded that the rule will tighten up current practice to make it more routine and

mandatory. It also makes it clear that the receiving party cannot freely use a challenged document.

One participant objected that the amendment places the burden on the receiving party to show that a document is not privileged. Instead, he said, the burden should be on the releasing party to show privilege. Judge Rosenthal explained that the amendment effects no shift in the burden. The asserting party notifies the receiving party of the basis for the claim of privilege. Then the receiving party has to go to court if it wants to use the document. The party asserting the privilege stills bear the burden of proving the basis for the claim of privilege. One member responded that there may still be some burden-shifting as a practical matter because the receiving party must initiate the contest by bringing the matter to the court.

Judge Rosenthal observed that this is the way smart attorneys handle these problems now. The amendment, a modest proposal, simply codifies good practice. The public comments, she said, had convinced the committee that although the amendment does not do a great deal, it certainly does enough to make it worthwhile.

One member stated that the existing system works well because a receiving party knows that it will want the same treatment at a later time when it becomes an asserting party. Good lawyers, thus, have an interest in maintaining the integrity of the discovery process. No asserting party, he added, will attempt to claw back a document unless the document is very important and the claim of privilege is serious.

One participant suggested that the rule should not speak about the "inadvertence" of production, but instead require the asserting party to specify all the steps that it has taken to guard against inadvertent production. Judge Rosenthal responded that the law already requires that effort as part of the substantive showing that a waiver of privilege has occurred.

Judge Levi noted that the amendment had been uncontroversial during the public comment period.

The committee, by a vote of 8 to 4, approved the proposed amendment for final approval.

3. Defining interrogatories and requests for production

FED. R. CIV. P. 33 and 34

Judge Rosenthal reported that the advisory committee had received very little comment on the proposed amendment to Rule 33 (interrogatories), which makes clear that the option to produce business records — or make them available for examination, audit, or inspection — includes electronically stored information.

The proposed amendment to Rule 34 (production of documents) would add "electronically stored information" as a separate category subject to production, apart from "documents." Judge Rosenthal explained that an initial issue surrounding the amendment to Rule 34 was whether electronic information should be included as a subset of "documents," or as a new category in addition to "documents." The advisory committee had opted for the latter.

She noted that courts effectively have shoehorned all sorts of information into the elastic term "documents." But, she said, it is difficult to fit all forms of electronically stored information, many of which are dynamic in nature, within the traditional concept of a "document." In addition, the amendments make it clear that electronic information is different in kind and needs special attention, and they facilitate the rules providing distinctive treatment when appropriate.

The amendment to Rule 34(b) (procedure for production) sets out a procedure for parties to deal with the form in which electronic information is produced. The request may specify a form or forms for producing electronically stored information. The responding party may object. Even if the request does not specify a form, the responding party cannot simply produce materials in a way that presents unnecessary obstacles to review. Rather, it must produce the information requested either in the form or forms in which it is ordinarily maintained or in a form or forms that are "reasonably usable." Moreover, a party need not produce the same electronically stored information in more than one form.

The language of the amendment, she noted, uses the terminology "form or forms" because the committee did not want to suggest that all materials must be produced in the same form. Parties may agree that some information will be produced in one form, other information in another form. She noted, though, that the Style Subcommittee would prefer not to use the terminology "form or forms," because the applicable style conventions specify that the singular of a term incorporates the plural. Judge Levi suggested that Judge Rosenthal work with Judge Murtha, chair of the Style Subcommittee, to work out the precise language as part of the Style Project.

The committee without objection approved the proposed amendments for final approval by voice vote.

4. Discovering electronically stored information that is not reasonably accessible

FED. R. CIV. P. 26(b)(2)(B)

Judge Rosenthal stated that electronic information is often stored on sources that make it difficult to retrieve. If so, the information is not "reasonably accessible" because of the burdens and costs involved in retrieving it. By way of examples from current technology, information may be stored only on backup tapes that are not organized or searchable, and legacy data from obsolete systems may only be captured by recreating those systems.

She explained that sophisticated parties look first at what information is reasonably available. Often that is enough to satisfy the legitimate needs of the litigation. But if it is not sufficient, they will appraise the burdens and costs of looking further, balanced against the potential value of the information sought, and consider whether to incur those burdens and costs and, if so, how best to allocate them. The amendment seeks to provide guidance and structure to this effort.

She noted that many public comments had asserted that the draft rule is not clear enough as to what is meant by "not reasonably accessible" and what constitutes "good cause." As a result, the advisory committee, following publication, had clarified the rule by defining "not reasonably accessible" in terms of undue burden and cost. The advisory committee had also clarified the showing that a party must make to establish "good cause" for production of inaccessible information by tying it to the limitations set forth in Rule 26(b)(2)(C). Professor Cooper added that technical experts normally use the adjective "accessible" and the verb "to access," and that is one reason the committee chose the term "accessible."

Judge Rosenthal explained that the rule is intended to be a tool for discovery management. Electronic discovery requires special management and supervision by the court in ways that paper discovery usually does not. She noted that people generally expect that electronic information will be cheaper to access, but producing some electronic information can be extremely expensive.

She emphasized that the rule is not one of presumed non-discoverability, but instead makes the existing proportionality limits more effective in a novel area in which the rules can helpfully provide better guidance. In addition, the committee note clarifies that nothing in the amendment undermines or reduces existing preservation obligations under the rules or the common law. In a nutshell, the amendment in no way encourages or permits parties to bury evidence.

One member emphasized that the amendment does not relieve the producing party of any obligation it would otherwise have to preserve data. The rule, deliberately, does not affect that obligation, and it should not. Another member objected, though, that the last sentence of the fourth paragraph of the note addresses the rule's effect on a party's preservation obligation. Judge Rosenthal agreed to delete the sentence.

One member recommended that the note set forth some concrete examples of electronic information that is not reasonably accessible, even though the examples might soon become outdated. Professor Cooper responded that the committee had received testimony from computer experts that if the committee were to give concrete examples, it would not be long before they would become not only obsolete, but also misleading. As one example, he said, it used to be very expensive to search backup systems, but that is not necessarily the case today.

A member stated that the real problem is not the cost of providing discovery. The current rules, he said, already address that matter. What the amendment adds is an explicit recognition that the additional costs of searching sources that are not readily accessible may be unnecessary because the information to be retrieved will not make much difference. Thus, the amendment allows the relevance of information to be determined as a case proceeds.

The committee without objection approved the proposed amendment for final approval by voice vote.

5. Protecting parties against sanctions when information is lost through the routine operation of an electronic system

FED. R. CIV. P. 37(f)

Judge Rosenthal explained that inadvertent destruction is more likely to occur with electronic information than with paper records. Electronic systems typically automatically overwrite, discard, or filter information without conscious human intervention. Individuals may not be aware that particular records have been eliminated. This is an inherent feature of electronic systems. But it poses a great risk for companies facing regular litigation because they may be subjected to sanctions for unintentionally losing relevant information. She said that there is an acute need to provide guidance and some kind of protection for litigants when information is deleted as part of the routine, good-faith operation of their automated business systems.

She pointed out that defensive over-preservation of records for potential discovery purposes also has its costs. In addition to the costs of storage, the parties have to review substantially more information. What is needed is a rule that neither over-protects nor under-protects parties in storing their records on electronic systems. The

rule, she added, cannot enact substantive standards for preservation, but it should protect a party from sanctions if information is lost due to routine operation of its electronic system.

She reported that the advisory committee had received a great deal of public comment on this difficult issue. Some comments objected to using a negligence standard in the rule because it would only protect those parties that would not be sanctioned anyway because they were not negligent. On the other hand, if sanctions were available only for intentional or reckless failure to preserve, the rule might preclude sanctions in situations where courts might consider them appropriate.

She noted that the term "good faith" in proposed Rule 37(f) (sanctions) was a deliberate choice of the advisory committee. A party will not face sanctions if it loses information due to the "routine, good-faith operation of an electronic system." Thus, protection exists only if the operation of the system is "routine," and not where information has been specifically targeted for deletion. Moreover, with the "good faith" requirement, a party does not have a license to thwart discovery by sitting back and knowingly letting discoverable information be deleted by the routine operation of a computer system. The protection provided by the amendment is geared to situations where a party simply does not realize that discoverable information will be lost.

Judge Rosenthal added that the advisory committee had considered whether it was necessary to republish the amendment because the current language differs from what was published. But the committee had decided against republication because it had already received all the benefits that public comment is intended to provide. The public comments had thoroughly addressed the issues.

One member objected that the amendment appeared to imply that as long as a party acts in good faith, it has no duty to preserve information that will be lost routinely, even though the party knows it faces litigation or is actually in litigation. Judge Rosenthal and Professor Cooper responded that the amendment does not attempt to define the independent preservation obligations of parties. It simply limits the imposition of sanctions under specified conditions.

One participant objected that the word "routine" should be deleted from the amendment. Once litigation is initiated or a preservation order is entered, life is no longer "routine" for a party holding discoverable information. Judge Rosenthal responded that the complete phrase is "routine operation." The two words go together. What is "routine" is the operation of the electronic system, operating according to criteria not tied to particular litigation.

One member said that the advisory committee was very wise in attempting to provide a safe harbor for the routine, good-faith operation of electronic systems. He

emphasized that companies need practical guidance on this issue, as they need to know when to put a "litigation hold" on some part of their electronic systems. But, he said, the text of the committee note may be inconsistent with the rule itself in discussing the imposition of sanctions in exceptional circumstances, even when information is lost as a result of routine, good-faith operations. Others suggested deleting the note's discussion of sanctions to remedy prejudice and sanctions to punish or deter discovery conduct.

One member stated that the amendment was very beneficial, but reiterated that the language of the note is troublesome. The rule focuses on good faith, but the note says there can be sanctions, even if the party acted in good faith, if the opposing party suffers "severe prejudice." Another added that the distinctions between remedial and punitive sanctions are not as explicit as they could be, and the concept of "good faith" is asked to carry a good deal of weight.

A member said that one important merit of the amendment is that it does not attempt to address specifically the different types of situations that may occur: (1) before the litigation, (2) after the litigation is brought, and (3) after the issuance of a preservation order. Instead, it speaks generally of good faith and gives parties flexibility and leeway. In essence, he said, the rule does not provide a complete safe harbor. A party cannot remain ignorant and be confident that it is operating in good faith. And once a company faces a preservation order and does not direct a litigation hold, it presumably is not acting in good faith. Yet the amendment cannot be more explicit and do more because it might modify common-law substantive obligations to preserve information.

Another member added that the amendment makes it clear, though, that a party has no duty to vary its regular business practice, as long as it adheres to that practice in good faith.

Judge Rosenthal responded that the rule had been very difficult to draft because the jurisprudence and terminology in this area are not crisp. Court opinions often label as "sanctions" a wide range of actions not normally considered to be "sanctions." Judges, for example, may describe routine discovery management orders as "remedial sanctions." The rule seeks to preserve judges' discretion to respond effectively to a wide range of circumstances and is only intended to foreclose the imposition of "real" sanctions. She added that the proposal is more like a "protective coat" than a "safe harbor."

Professor Coquillette added that the amendment only precludes sanctions "under these rules." That permits the court to impose sanctions under other sources of authority. But several members observed that it is unclear that anyone will catch that subtlety. Therefore, they said, the note needs to be more explicit on the matter.

Judge Rosenthal responded that in light of the concerns expressed, she would support redrafting appropriate portions of the committee note.

Dean Kane moved to adopt the amendment, delete the portions of the committee note that were troubling some of the members, and add language to the note emphasizing that the rule refers only to sanctions "under these rules."

The committee without objection approved the proposed amendment for final approval by voice vote.

FED. R. CIV. P. 45

Judge Rosenthal explained that the proposed amendments to Rule 45(d)(2)(B) (subpoenas) would apply the proposed amendments dealing with electronically stored information to discovery requests aimed at non-parties. One member objected that the part of the proposed amendments to Rule 45(d)(2)(B) dealing with the inadvertent disclosure of privileged material is not an electronic discovery rule, but a privilege rule — a counterpart to proposed Rule 26(b)(5). Therefore, the same objections raised to proposed Rule 26(b)(5) would apply to Rule 45. He added that the full implications of the new procedure established by the amendments had not been fully explored.

Judge Levi pointed out that, following the discussion of Rule 26(b)(5), the committee had rejected these objections by a vote of 8 to 4. That vote, he said, apparently would apply to Rule 45 as well.

Judge Murtha moved to reconsider the vote as to both Rule 26(b)(5) and Rule 45.

The committee, by a vote of 7 to 5, agreed to reconsider the proposed amendment to FED. R. CIV. P. 26(b)(5) as part of its consideration of the proposed amendment to FED. R. CIV. P. 45.

One member stated that the proposed amendments do not explicitly recognize the substantive principles of waiver. He suggested that language be added to explain that the rule does not change the applicable substantive principles of waiver. It could also specify that a party seeking to preserve a claim of privilege is not relieved of any evidentiary burden it has under substantive law. Another member added that even if it is clear that the burdens as to waiver are unaffected, the amendments offer an opportunity for gamesmanship in the discovery process.

Judge Rosenthal reiterated that it is clear that the amendments do not displace any burdens under the substantive law of privilege and waiver. Whatever opportunity there may be for gamesmanship, *i.e.*, for a party to assert privilege claims at a time calculated to disrupt the litigation, already exists under the current rules. All the amendments do is

provide a procedure for addressing a wide variety of situations. In effect, if a receiving party receives a privileged document, it has a club. The amendments state that the receiving party cannot use that club, but instead must bring the matter to the attention of the court.

Judge Thrash moved to remand the two amendments to the advisory committee for further consideration.

The committee, by a vote of 6 to 5, rejected the motion to remand the amendments to the Advisory Committee on Civil Rules.

The committee, by a vote of 9 to 3, approved the proposed amendments for final approval.

Amendments for Publication

FED. R. CIV. P. 5.2

As noted above on pages 4-7, the committee approved for publication a new FED. R. CIV. P. 5.2 (privacy protection for court filings) to protect privacy and security concerns relating to documents filed with the court electronically. The rule fulfills a requirement of the E-Government Act of 2002 and tracks the template rule used by all the advisory committees.

Informational Items

Judge Rosenthal reported that the style project was progressing very well. She noted that a number of law professors and attorneys had agreed to review the restyled rules, provide comments, and focus on whether any unintended changes in substance have been made.

The Style Subcommittee, she said, had made great progress in restyling the civil forms. It plans to circulate them to the Standing Committee later in the summer and ask for approval to publish them. As a result, the advisory committee will be able to receive public comment simultaneously on both the restyled rules and the restyled forms.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Bucklew, Professor Schlueter, and Professor Beale presented the report of the advisory committee, as set forth in Judge Bucklew's memorandum of May 17, 2005. (Agenda Item 10).

Amendments for Final Approval

Judge Bucklew reported that the advisory committee had received only two public comments on the amendments it had published in August 2004, three of which would authorize warrants and certain other documents to be transmitted by "reliable electronic" means.

FED. R. CRIM. P. 5

Judge Bucklew noted that the proposed amendment to Rule 5 (initial appearance) would permit a magistrate judge to accept a warrant from law enforcement authorities by reliable electronic means.

The committee without objection approved the proposed amendment for final approval by voice vote.

FED. R. CRIM. P. 6

Judge Bucklew explained that the changes to Rule 6 (grand jury) did not have to be published for public comment because they are merely technical and stylistic. They conform statutory language added by the Intelligence Reform and Terrorism Prevention Act of 2004 to the language used in the rest of the criminal rules.

The committee without objection approved the proposed amendment for final approval by voice vote.

FED. R. CRIM. P. 32.1

The proposed amendment to Rule 32.1 (revoking or modifying probation or supervised release) would allow a magistrate judge to accept a judgment, warrant, and warrant application by reliable electronic means.

The committee without objection approved the proposed amendment for final approval by voice vote.

FED. R. CRIM. P. 40

The proposed amendment to Rule 40 (arrest for failing to appear in another district) would fill a perceived gap in the rules regarding persons arrested for violating the conditions of release in another district. It would specify that a magistrate judge in the district of arrest may set conditions of release.

The committee without objection approved the proposed amendment for final approval by voice vote.

FED. R. CRIM. P. 41

The proposed amendment to Rule 41 (search warrant) would authorize a magistrate judge to use reliable electronic means to issue a warrant.

Judge Bucklew stated that a separate amendment to Rule 41 would provide procedures to assist magistrate judges in issuing warrants for tracking devices. The proposal, she added, had been approved by the Standing Committee in June 2003, but not submitted to the Judicial Conference because the Department of Justice had asked for more time to consider it. She pointed out that the Department had now completed a further review of the amendment and had no further recommendations. Accordingly, she said, the amendment should now be forwarded to the Conference.

The committee without objection approved the proposed amendments for final approval by voice vote.

FED. R. CRIM. P. 58

The proposed amendment to Rule 58(b)(2) (initial appearance in a misdemeanor) sets out the advice that a magistrate judge must give at an initial appearance on a misdemeanor charge. It would eliminate a conflict with Rule 5.1(a) (preliminary hearing) regarding the defendant's entitlement to a preliminary hearing.

The committee without objection approved the proposed amendment for final approval by voice vote.

Amendments for Publication

Judge Bucklew stated that the proposed amendments to Rule 11 (pleas), Rule 32 (sentence and judgment), and Rule 35 (correcting or reducing a sentence) are needed to bring the criminal rules into conformity with the Supreme Court's recent decision in *United States v. Booker,* 125 S. Ct. 738 (2005), which makes the federal sentencing

guidelines effectively advisory. She added that the advisory committee had made only those changes deemed absolutely necessary in light of *Booker*.

FED. R. CRIM. P. 11

Judge Bucklew stated that the proposed amendment to Rule 11 (pleas) is consistent with the sentencing practice followed by most district judges after *Booker*. It would impose an obligation on a sentencing judge to calculate the applicable sentencing guideline range and to consider that range, possible departures under the guidelines, and the other sentencing factors set out in 18 U.S.C. § 3553(a).

Judge Levi stated that the amendment is consistent with his reading of the remedy section of *Booker*. He noted that if a sentencing judge does not actually calculate the guidelines sentence, the Sentencing Commission will report the case to Congress as a non-guidelines sentence. One participant added that if the sentencing judge does not calculate the guidelines sentence, the judge does not know what the guidelines would dictate and therefore cannot be said to have "considered" the guidelines.

The committee without objection approved the proposed amendment for publication by voice vote.

FED. R. CRIM. P. 32

Judge Bucklew explained that the amendments to Rule 32 (sentencing and judgment) reflect the urging of the Committee on Criminal Law that district judges use a uniform statement of reasons form to explain their sentencing decisions, so that reliable statistics can be presented to the Sentencing Commission and Congress. It also makes clear that a judge may instruct the probation office to gather and include in the presentence report any information relevant to the sentencing factors articulated in 18 U.S.C. § 3553(a). And it requires the court to give the parties notice if it is contemplating either departing from the applicable guideline range or imposing a non-guideline sentence.

The committee without objection approved the proposed amendments for publication by voice vote.

FED. R. CRIM. P. 35

Judge Bucklew noted that the proposed amendment to Rule 35 (correcting or reducing a sentence) is needed to avoid the present implication in the rule that a guidelines sentence is mandatory.

The committee without objection approved the proposed amendments for publication by voice vote.

FED. R. CRIM. P. 45

Judge Bucklew stated that the proposed amendment to Rule 45 (computing and extending time) would adjust the time-counting provision of the rule to conform more closely with the equivalent provision in the civil rules, FED. R. CIV. P. 6(e) (additional time after service). It would remove any doubt about how to calculate the additional three days given a party to respond when service is made by mail, leaving it with the clerk of court, by electronic means, or by other means consented to by the party served.
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The committee without objection approved the proposed amendment for publication by voice vote.

FED. R. CRIM. P. 49.1

As noted above on pages 4-7, the committee approved for publication a new FED. R. CRIM. P. 49.1 (privacy protection for court filings) to protect privacy and security concerns relating to documents filed with the court electronically. The amendment fulfills a requirement of the E-Government Act of 2002 and tracks the template rule used by all the advisory committees.

Informational Items

Judge Bucklew described a proposed amendment to FED. R. CRIM. P. 29 (motion for a judgment of acquittal), urged by the Department of Justice, that would require a court to defer ruling on a motion for judgment of acquittal until after the jury returns a verdict. She noted that the Department had submitted additional materials recently, and the advisory committee had considered a revised draft rule at its April 2005 meeting. The current version follows a proposal suggested by Judge Levi that would allow a defendant to consent to an appealable pre-verdict ruling conditioned upon waiving double jeopardy rights.

Judge Bucklew said that a majority of the committee at the April meeting had voted in favor of making some change in the rule. But drafting a rule had been very difficult, particularly with regard to hung juries and waiver of double jeopardy rights. She added that a subcommittee was working on polishing a rule and a committee note that would be considered at the committee's October 2005 meeting.

She pointed out that the Crime Victims' Rights Act had been signed into law in October 2004. The advisory committee, she reported, was in the process of reviewing the

full body of criminal rules to determine which might be affected by the statute and have to be amended.

Judge Bucklew reported that the American College of Trial Lawyers (ACTL) had submitted a comprehensive proposal to codify and expand the Government's disclosure obligations regarding exculpatory and impeachment evidence favorable to the defense under *Brady v. Maryland*, 373 U.S. 83 (1963), *Giglio v. United States*, 405 U.S. 150 (1972), and other Supreme Court cases. The committee had reviewed all the local district court rules on the subject, some of which attempt to codify *Brady* and define the government's disclosure obligations. She said that a majority of the committee had voted in favor of proceeding with some amendment to FED. R. CRIM. P. 16 (discovery and inspection).

Deputy Attorney General Comey stated that the Department of Justice was very strongly opposed to the proposal. He said that prosecutors already are required to disclose exculpatory evidence under *Brady*, and they err on the side of production. The Department instructs prosecutors that they have a firm obligation to disclose. Prosecutors, he emphasized, act properly, and the defendant's right to a fair trial is protected.

Most of the suggestions, he said, go well beyond constitutional requirements and would create new rights that the courts have refused to recognize. One likely result of the proposed rule would be unnecessary pretrial disclosure of the identity of government witnesses. The change could create unintended consequences that everyone, not just prosecutors, will regret. Under the ACTL proposal, he pointed out, the government would have to bear the burden in every case of showing that it has turned over all evidence that "tends" to be exculpatory. This, he said, is an impossible burden.

He observed that ACTL had catalogued a number of successful *Brady* challenges, but most of them had occurred in the state courts. There is no point in changing a federal criminal rule in order to address reported lapses by state prosecutors. He admitted that the few errors committed by federal prosecutors were not enough to justify a rule change. If there were a problem, the Department of Justice could place more specific guidance for prosecutors in the U.S. Attorneys' Manual.

In short, he concluded, the current system is not broken, and no rule amendment is justified. Moreover, the proponents of the rule have not carried the burden of establishing that a problem exists to justify such a fundamental change.

On that point, one member inquired as to whether any actual empirical data existed, beyond case decisions, as to how significant the problem of non-disclosure might be. Without a sounder empirical basis, the rationale for the proposed rule is weak. But another participant responded that the *Brady* case decisions arise in circumstances where

the exculpatory evidence, one way or another, ultimately is revealed. On the other hand, there is little information available regarding the instances in which relevant exculpatory information never comes to light. Those cases are not litigated and cannot be detected.

Another member observed that the proposed national rule is more modest than the local rules that currently exist in about a third of the federal district courts. Accordingly, if the local court rules have not caused problems, there should be no problem with a national rule.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Smith and Professor Capra presented the report of the advisory committee, as set forth in Judge Smith's memorandum and attachment of May 16, 2005. (Agenda Item 11)

Amendments for Final Approval

FED. R. EVID. 404(a)

Judge Smith stated that there has been a long-standing conflict among the circuits as to whether character evidence may be used to prove conduct in a civil case. The proposed amendment to Rule 404(a) (general inadmissibility of character evidence) would make it clear that character evidence should not be admitted for this purpose in a civil case.

The committee without objection approved the proposed amendment for final approval by voice vote.

FED. R. EVID. 408

Judge Smith stated that the proposed amendment to Rule 408 (compromise and offers to compromise) would allow conduct or statements made in compromise negotiations to be admitted in later criminal cases under certain limited circumstances. He pointed out that the Department of Justice had sought the amendment.

Professor Capra observed that the current case law is in disarray, and there is no certainty for an attorney as to what will be disclosable and useable in this area. The amendment, he said, is a compromise that should provide some certainty by making a limited exception for statements made to civil regulatory agencies to settle claims brought by them.

Associate Deputy Attorney General Davis stated that the Department of Justice supported the amendment in concept. He argued that people ought to know that what they say to the government is on the record and that they can be held responsible for lying.

He added, however, that the amendment's reference to a government regulatory agency was too vague and limiting. He suggested language along the lines of "a claim by or against a public office or agency exercising public regulatory or enforcement authority." He noted that the phrase "public office or agency" is used already in Rule 803 (hearsay). Under this language, if a government agency acts like a private party, contacts with it are treated as private conversations. The exception established by the proposed amendment would apply only when the public entity exercises public, *i.e.*, regulatory or enforcement, authority. This is a distinction that the current version of the amendment does not address.

Judge Smith stated that he supported the proposed new "public office or agency" language, but opposed the additional suggestion that the amendment be broadened to extend the exception to claims brought either "by" or "against" a government agency. He stated that claims against a government agency should not be included. Individuals should be able to sue the government for various reasons without having to worry that if they settle their claim, something they say in settlement negotiations could be used against them in a later criminal matter.

Judge Levi stated that attorneys in some private cases urge their reluctant clients to apologize just to get a case to go away. There is no way that clients will do that if their statements can be treated as an admission of guilt in a later criminal case. Therefore, the proposed amendment is limited to statements made in connection with claims brought by the government. In those claims, there is a sense that a party is on notice that what it says to the government can be used against it.

Professor Capra suggested — and the committee accepted — the following revised language: "a claim by a public office or agency in the exercise of regulatory, investigative, or enforcement authority."

The committee, by a vote of 8 to 2, approved the proposed amendment for final approval.

FED. R. EVID. 606(b)

Judge Smith stated that Rule 606(b) (inquiry into the validity of a verdict or indictment) generally prohibits parties from introducing testimony or other evidence from jurors to impeach a jury's verdict. But some courts have permitted jurors to testify as to the intent of their verdict. This, he said, should lie beyond the reach of the rule. The

amendment, therefore, would limit inquiries of jurors to proving that the verdict reported was the result of a mistake in entering it on the verdict form. The amendment, thus, would make it clear that a juror cannot testify about the intended effect of the verdict.

The committee without objection approved the proposed amendment for final approval by voice vote.

FED. R. EVID. 609

Judge Smith stated that the proposed amendment to Rule 609 (impeachment by evidence of conviction of a crime) would address the portion of the rule that admits evidence of a prior criminal conviction if the crime involved "dishonesty or false statement." The key question is how the court is to determine whether the crime involved dishonesty or false statement. It would be undesirable, he explained, for a court to get bogged down on this determination, or to hold a mini-trial to consider the terms of a past crime. Accordingly, the proposed language would admit evidence of a prior conviction "if it can readily be determined" that the crime involved dishonesty or false statement.

Deputy Attorney General Comey voiced support for the rule and the committee note. He noted that the point of the amendment is to allow a court to look beyond the formal elements of the crime itself to the actual offense committed. He said that mini-trials on this issue would be inappropriate, but some license should be provided to a court to delve beyond the mere elements of the crime.

For this reason, however, Mr. Comey objected to the language "as proved or admitted" contained in the proposed amendment. He suggested that it could cause confusion. Judges might read it to mean that they are limited to considering only the formal elements of the crime. Yet the whole point of the rule change is to allow them to go beyond that.

Professor Capra suggested that the problem could be solved by adding the word "establishing" to the amendment, so that it would read: "evidence that any witness has been convicted of a crime shall be admitted . . . if it readily can be determined that establishing the elements of the crime required proof or admission of an act of dishonesty or false statement." The committee accepted the revised language.

The committee without objection approved the proposed amendment for final approval by voice vote.

NEXT COMMITTEE MEETING

The next committee meeting was tentatively scheduled for Friday and Saturday, January 6-7, 2006, in Phoenix, Arizona.

The secretary would like to thank Jeffrey Barr very much for his invaluable assistance in preparing a draft of the minutes of the meeting.

Respectfully submitted,

Peter G. McCabe,
Secretary