COMMITTEE ON RULES
OF
PRACTICE AND PROCEDURE

Phoenix, Arizona
January 16-17, 2003

AGENDA
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
JANUARY 16-17, 2003

1. Opening Remarks of the Chair

   A. Report on the September 2002 Judicial Conference session
   B. Transmission of Judicial Conference-approved proposed rules amendments to Supreme Court

2. **ACTION** — Approving Minutes of June 2002 Committee Meeting

3. Report of the Administrative Office

   A. Legislative Report
   B. Administrative Report

4. Report of the Federal Judicial Center

5. Report of the Advisory Committee on Appellate Rules

6. Report of the Advisory Committee on Bankruptcy Rules

   A. **ACTION** — Approving publication for public comment proposed amendments to Bankruptcy Rules 3004, 3005, and 4008
   B. Minutes and other informational items

7. Report of the Advisory Committee on Civil Rules

   A. **ACTION** — Approving publication for public comment proposed amendments to Admiralty Rules "B" and "C"
   B. Minutes and other informational items

8. Report of the Advisory Committee on Criminal Rules

9. Report of the Advisory Committee on Evidence Rules

10. Report on Local Rules Project

    A. **ACTION** — Receiving and transmitting report to Standing and Advisory Committee reporters and selected committee members for preliminary review
    B. Future courses of action regarding circulation of report

11. Status Report of Subcommittee on Attorney Conduct Rules (oral report)

12. Report of Technology Subcommittee (oral report)

13. Report of September 23, 2002, Judicial Conference Committee Chairs Long-Range Planning meeting

14. Panel Discussion of Mass Claims Litigation

15. Next Meeting: June 9-10, 2003, in Philadelphia, Pennsylvania

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December 16, 2002

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December 16, 2002
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REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES

September 24, 2002

The Judicial Conference of the United States convened in Washington, D.C., on September 24, 2002, pursuant to the call of the Chief Justice of the United States issued under 28 U.S.C. § 331. The Chief Justice presided, and the following members of the Conference were present:

First Circuit:

Chief Judge Michael Boudin
Chief Judge D. Brock Hornby,
District of Maine

Second Circuit:

Chief Judge John M. Walker, Jr.
Chief Judge Frederick J. Scullin, Jr.,
Northern District of New York

Third Circuit:

Chief Judge Edward R. Becker
Chief Judge Sue L. Robinson,
District of Delaware

Fourth Circuit:

Chief Judge J. Harvie Wilkinson III
Chief Judge Charles H. Haden II,
Southern District of West Virginia

Fifth Circuit:

Chief Judge Carolyn Dineen King
Judge Martin L. C. Feldman,
Eastern District of Louisiana

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

FEDERAL RULES OF APPELLATE PROCEDURE

The Committee on Rules of Practice and Procedure submitted to the Judicial Conference proposed technical amendments to Appellate Forms 1 (Notice of Appeal to a Court of Appeals From a Judgment or Order of a District Court), 2 (Notice of Appeal to a Court of Appeals From a Decision of the United States Tax Court), 3 (Petition for Review of Order of an Agency, Board, Commission or Officer), and 5 (Notice of Appeal to a Court of Appeals From a Judgment or Order of a District Court or a Bankruptcy Appellate Panel). The Judicial Conference approved the amendments and authorized their transmittal to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

The Committee on Rules of Practice and Procedure submitted to the Judicial Conference proposed amendments to Bankruptcy Rules 1005 (Caption of Petition), 1007 (Lists, Schedules, and Statements; Time Limits), 2002 (Notices to Creditors, Equity Security Holders, United States, and United States Trustee), 2003 (Meeting of Creditors or Equity Security Holders), 2009 (Trustees for Estates When Joint Administration Ordered), 2016 (Compensation for Services Rendered and Reimbursement of Expenses), and new Rule 7007.1 (Corporate Ownership Statement), together with Committee notes explaining their purpose and intent. The Judicial Conference approved the amendments and the new rule and authorized their transmittal to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

The Committee also submitted, and the Conference approved, proposed revisions to Bankruptcy Official Forms 1 (Voluntary Petition), 5 (Involuntary Petition), and 17 (Notice of Appeal Under 28 U.S.C. § 158(a) or (b) From a Judgment, Order, or Decree of a Bankruptcy Judge) relating to multilateral clearing banks and child-support creditors, to take effect on December 1, 2002, and proposed privacy-related revisions to Bankruptcy Official Forms 1 (Voluntary Petition), 3 (Application and Order to Pay Filing Fee in Installments), 5 (Involuntary Petition), 6 (Schedules), 7 (Statement of Financial Affairs), 8 (Individual Debtor's Statement of Intention), 9 (Notice of Commencement of Case Under the Bankruptcy Code, Meeting of Creditors, and

Deadlines), 10 (Proof of Claim), 16A (Caption (Full)), 16C (Caption of Complaint in Adversary Proceeding Filed by a Debtor), 17 (Notice of Appeal Under 28 U.S.C. § 158(a) or (b) From a Judgment, Order, or Decree of a Bankruptcy Judge), and 19 (Certification and Signature of Non-Attorney Bankruptcy Petition Preparer (See 11 U.S.C. § 110)), to take effect on December 1, 2003.

FEDERAL RULES OF CIVIL PROCEDURE

The Committee on Rules of Practice and Procedure submitted to the Judicial Conference proposed amendments to Civil Rules 23 (Class Actions), 51 (Instructions to Jury: Objection), 53 (Masters), 54 (Judgments; Costs), and 71A (Condemnation of Property), and revisions to Forms 19 (Motion to Dismiss, Presenting Defenses of Failure to State a Claim, of Lack of Service of Process, of Improper Venue, and of Lack of Jurisdiction Under Rule 12(b)), 31 (Judgment on Jury Verdict), and 32 (Judgment on Decision by the Court), together with Committee notes explaining their purpose and intent. The Judicial Conference approved the changes and authorized their transmittal to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law. Included in these proposed amendments is a substantial reworking of Rule 23 class action procedures focusing on four areas of class action litigation: the timing of the certification decision and notice; judicial oversight of settlements (which was discussed at the Conference session); attorney appointment; and attorney compensation.

FEDERAL RULES OF CRIMINAL PROCEDURE

The Bail Bond Fairness Act of 2001, H.R. 2929, 107th Congress, would amend Criminal Rule 46(e) to eliminate the current power of a judge to forfeit a bail bond for failure to satisfy a condition of release, other than "if the defendant fails to appear physically before the court." Noting that current Rule 46(e) provides judges with the flexibility to impose added safeguards to ensure a defendant's compliance with conditions of release, *e.g.*, refraining from drug use, and that absent such assurance, judges might decide to retain a defendant in custody, the Committee recommended that the Conference oppose such legislation. The Conference adopted the Committee's recommendation.

FEDERAL RULES OF EVIDENCE

The Committee on Rules of Practice and Procedure submitted to the Judicial Conference a proposed amendment to Evidence Rule 608(b) (Specific instances of conduct), together with Committee notes explaining its purpose and intent. The Judicial Conference approved the amendment and authorized its transmittal to the Supreme Court for its consideration with the recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law.

COMMITTEE ACTIVITIES

The Committee on Rules of Practice and Procedure unanimously endorsed the findings and recommendations of the Advisory Committee on Civil Rules dealing with problems raised by filings of duplicative and overlapping class actions and transmitted them to the Committee on Federal-State Jurisdiction for its consideration. The Committee supports "the concept of minimal diversity for large, multi-state class actions, in which the interests of no state are paramount, with appropriate limitations or threshold requirements so that the federal courts are not unduly burdened and the states' jurisdiction over in-state class actions is left undisturbed." The Committee also approved for publication proposed amendments to Rule 9014 of the Federal Rules of Bankruptcy Procedure, Rule 41 of the Federal Rules of Criminal Procedure, Rule 804 of the Federal Rules of Evidence, and a comprehensive revision of the Rules Governing Section 2254 Cases and Section 2255 Proceedings.

COMMITTEE ON SECURITY AND FACILITIES

MAIL HANDLING POLICY

In response to concerns raised by the recent anthrax contamination of the United States mail system, the Committee on Security and Facilities contracted with an independent consultant to conduct a study of current judiciary mail handling facilities and practices and to recommend procedures and infrastructure guidelines to improve mail handling safety in federal courthouses.

LEONIDAS RALPH MECHAM
Director

CLARENCE A. LEE, JR.
Associate Director

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

WASHINGTON, D.C. 20544

December 11, 2002

MEMORANDUM TO THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT

SUBJECT: *Transmittal of Proposed Amendments to the Federal Rules of Practice and Procedure*

By direction of the Judicial Conference of the United States, pursuant to the authority conferred by 28 U.S.C. § 331, I have the honor to transmit herewith for consideration of the Court the proposed amendments to the Federal Rules of Appellate, Bankruptcy, and Civil Procedure, and the Federal Rules of Evidence, which were approved by the Judicial Conference at its September 2002 session. The Judicial Conference recommends that these changes be approved by the Court and transmitted to the Congress pursuant to law.

For your assistance in considering these proposed amendments, I am attaching a memorandum from Judge Anthony J. Scirica briefly summarizing the proposed amendments and a report on amendments that raised significant interest. I am also transmitting excerpts from the Report of the Committee on Rules of Practice and Procedure to the Judicial Conference and the reports of the various rules advisory committees.

Leonidas Ralph Mecham
Secretary

Attachments

cc: Honorable Anthony J. Scirica
Professor Daniel R. Coquillette

LEONIDAS RALPH MECHAM
Director

CLARENCE A. LEE, JR.
Associate Director

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

WASHINGTON, D.C. 20544

December 11, 2002

MEMORANDUM TO THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT

By direction of the Judicial Conference of the United States, pursuant to the authority conferred by 28 U.S.C. § 331, I have the honor to transmit herewith for consideration of the Court proposed revisions to Forms 1, 2, 3, and 5 in the Appendix to the Federal Rules of Appellate Procedure. The Judicial Conference recommends that these amendments be approved by the Court and transmitted to the Congress pursuant to law.

For your assistance in considering these proposed revisions, I am transmitting an excerpt from the Report of the Committee on Rules of Practice and Procedure to the Judicial Conference and the Report of the Advisory Committee on the Federal Rules of Appellate Procedure.

Leonidas Ralph Mecham
Secretary

Attachments

LEONIDAS RALPH MECHAM
Director

CLARENCE A. LEE, JR.
Associate Director

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

WASHINGTON, D.C. 20544

December 11, 2002

MEMORANDUM TO THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT

By direction of the Judicial Conference of the United States, pursuant to the authority conferred by 28 U.S.C. § 331, I have the honor to transmit herewith for consideration of the Court proposed amendments to Rules 1005, 1007, 2002, 2003, 2009, and 2016, and new Rule 7007.1 of the Federal Rules of Bankruptcy Procedure. The Judicial Conference recommends that these amendments be approved by the Court and transmitted to the Congress pursuant to law.

For your assistance in considering these proposed amendments, I am transmitting an excerpt from the Report of the Committee on Rules of Practice and Procedure to the Judicial Conference and the Report of the Advisory Committee on the Federal Rules of Bankruptcy Procedure.

Leonidas Ralph Mecham
Secretary

Attachments

LEONIDAS RALPH MECHAM
Director

CLARENCE A. LEE, JR.
Associate Director

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

WASHINGTON, D.C. 20544

December 11, 2002

MEMORANDUM TO THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT

By direction of the Judicial Conference of the United States, pursuant to the authority conferred by 28 U.S.C. § 331, I have the honor to transmit herewith for consideration of the Court proposed amendments to Rules 23, 51, 53, 54, and 71A and to Forms 19, 31, and 32 of the Federal Rules of Civil Procedure. The Judicial Conference recommends that these amendments be approved by the Court and transmitted to the Congress pursuant to law.

For your assistance in considering these proposed amendments, I am transmitting an excerpt from the Report of the Committee on Rules of Practice and Procedure to the Judicial Conference and the Report of the Advisory Committee on the Federal Rules of Civil Procedure.

Leonidas Ralph Mecham
Secretary

Attachments

LEONIDAS RALPH MECHAM
Director

CLARENCE A. LEE, JR.
Associate Director

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

WASHINGTON, D.C. 20544

December 11, 2002

MEMORANDUM TO THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT

By direction of the Judicial Conference of the United States, pursuant to the authority conferred by 28 U.S.C. § 331, I have the honor to transmit herewith for consideration of the Court proposed amendments to Rule 608(b) of the Federal Rules of Evidence. The Judicial Conference recommends that these amendments be approved by the Court and transmitted to the Congress pursuant to law.

For your assistance in considering these proposed amendments, I am transmitting an excerpt from the Report of the Committee on Rules of Practice and Procedure to the Judicial Conference and the Report of the Advisory Committee on the Federal Rules of Evidence.

Leonidas Ralph Mecham
Secretary

Attachments

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of June 10-11, 2002
Washington, D.C.
Draft

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ATTENDANCE

The summer meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Washington, D.C. on Monday and Tuesday, June 10-11, 2002. The following members were present:

Judge Anthony J. Scirica, Chair
David M. Bernick
Judge Michael Boudin
Judge Frank W. Bullock, Jr.
Charles J. Cooper
Dean Mary Kay Kane
Mark R. Kravitz
Patrick F. McCartan
Judge J. Garvan Murtha
Judge A. Wallace Tashima
Judge Thomas W. Thrash, Jr.
Chief Justice Charles Talley Wells

Judge Sidney A. Fitzwater and Deputy Attorney General Larry D. Thompson were unable to attend the meeting. The Department of Justice was represented at the meeting by Ted Hirt of the Civil Division.

Providing support to the committee were: Professor Daniel R. Coquillette, reporter to the committee; Peter G. McCabe, secretary to the committee; and John K. Rabiej, chief of the Rules Committee Support Office of the Administrative Office of the U.S. Courts.

Representing the advisory committees were:

Advisory Committee on Appellate Rules —
Judge Samuel A. Alito, Jr., Chair
Professor Patrick J. Schiltz, Reporter
Advisory Committee on Bankruptcy Rules —
Judge A. Thomas Small, Chair
Professor Jeffrey W. Morris, Reporter
Advisory Committee on Civil Rules —
Judge David F. Levi, Chair
Judge Lee H. Rosenthal, Member
Professor Edward H. Cooper, Reporter
Professor Richard L. Marcus, Special Consultant
Advisory Committee on Criminal Rules —
Judge David G. Trager, Member
Judge Tommy E. Miller, Member
Professor David A. Schlueter, Reporter
Advisory Committee on Evidence Rules —
Judge Milton I. Shadur, Chair
Professor Daniel J. Capra, Reporter

Also taking part in the meeting were: Joseph F. Spaniol, Jr., Professor R. Joseph Kimble, and Professor Geoffrey C. Hazard, Jr., consultants to the committee; Professor Mary P. Squiers, Director of the Local Rules Project; Joe S. Cecil and Thomas E. Willging of the Research Division of the Federal Judicial Center; Jeffrey A. Hennemuth, Nancy G. Miller, James N. Ishida, and Patricia S. Ketchum of the Office of Judges Programs of the Administrative Office; and Christopher Jennings and Ned Diver, law clerks to Judge Scirica.

INTRODUCTORY REMARKS

Judge Scirica noted with regret that the terms of Judges Boudin and Bullock were about to expire, and he thanked them for their years of distinguished service to the committee and the federal rulemaking process.

Judge Scirica reported that the Supreme Court on April 29, 2002, had approved all proposed rule amendments submitted by the Judicial Conference following its September 2001 session, except for proposed new FED. R. CRIM. P. 26(b). The rule rejected by the Court, he explained, would have authorized a court, in the interest of justice, to permit contemporaneous, two-way video presentation in open court of testimony from a witness at a different location if: (1) the requesting party establishes exceptional circumstances for the transmission; (2) appropriate safeguards for the transmission are used; and (3) the witness is unavailable within the meaning of FED. R. EVID. 804(a)(4)-(5).

Judge Scirica noted that the action by the Supreme Court constituted its first outright rejection of a rule in recent memory, and he questioned whether it might signal a difference in the way the Court reviews proposed rule amendments. He counseled the rules committees to heed the decision when drafting both rules and accompanying committee notes.

Judge Scirica reported that the restyled body of criminal rules had been approved by the Supreme Court and would take effect on December 1, 2002. He emphasized that the success of the restyling project was due to enormous efforts and skills of the chair, members, reporter, consultants of the Advisory Committee on Criminal Rules and the staff of the Rules Committee Support Office.

Judge Scirica noted that two provisions in Rule 16 of the current criminal rules had been omitted inadvertently from the package of restyled rules sent to the Supreme Court. Therefore, he said, the omitted provisions — dealing with disclosure of expert testimony on the defendant's mental condition bearing on guilt — would be eliminated by operation of law when the restyled rules take effect on December 1, 2002. He reported that he had spoken with Judge Carnes and others about the problem, and they had made a collective decision to remedy the omission through a statutory change. He said that the staff would prepare a letter to Congress asking for legislation to retain the existing Rule 16 provisions, with appropriate style revisions to conform with the usage of the restyled criminal rules. Alternatively, he added, the provisions could be re-inserted in Rule 16 through the regular rulemaking process. But even on an expedited rules schedule, there would still be a one-year gap during which a substantive provision of the current rules would be repealed.

Judge Scirica reported that he and Professor Coquillette had met with the Chief Justice to give him a status report on the work of the rules committees, including attorney conduct issues, the local rules project, and restyling of the rules. He pointed out that the Chief Justice greatly appreciated the information, is very supportive of the work of the committees, and agreed that restyling of the civil rules should proceed.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee voted without objection to approve the minutes of the last meeting, held on January 10-11, 2002.

REPORT OF THE ADMINISTRATIVE OFFICE

Mr. Rabiej reported that two bills pending in Congress could substantially affect the rulemaking process — the minimal diversity class action legislation and the omnibus bankruptcy reform legislation. He noted that the class action legislation had passed the House of Representatives, but no action was contemplated in the Senate. The bankruptcy legislation, he said, had passed both houses and its prospects for enactment seemed likely because congressional negotiators: (1) had resolved differences between the two houses over the size of the debtor's homestead exemption, and (2) appeared to be close to resolving differences over the discharge of debts from a civil judgment for damage to an abortion facility. He emphasized that if the legislation were enacted, the Advisory Committee on Bankruptcy Rules would act quickly to initiate necessary changes in the bankruptcy rules and official forms.

Mr. Rabiej announced that a subcommittee of the House Judiciary Committee had scheduled a hearing on the common practice of the courts of appeals to declare certain opinions "unpublished" and bar attorneys from citing them. He pointed out that the policy of the Judicial Conference has been to allow individual courts to regulate the subject matter through local rules of the courts of appeals. But, he said, the Solicitor General favors national uniformity and has proposed an amendment to the Federal Rules of Appellate Procedure to allow citation of non-published opinions under certain conditions. He added that the Advisory Committee on Appellate Rules had the proposed rule amendment on its agenda.

Mr. Rabiej reported that a letter had been received from the chairman of the House Judiciary Committee and three other representatives referring to the judiciary's prior-stated opposition to a proposed statutory amendment to FED. R. CRIM. P. 46(e) that would limit the grounds for forfeiture of a bail bond to only the defendant's failure to appear in court as required. The judiciary's opposition to the provision had specified

that: (1) the issue should be addressed by the rules committees under the Rules Enabling Act; and (2) it was in fact under active consideration by the committees. Mr. Rabiej said that the recent congressional letter implied that the committee had not responded further to Congress on the matter and had not taken a position on the substance of amending Rule 46(e). Mr. Rabiej reported that Judge Scirica had in fact responded in a timely fashion, informing Congress that the rules committees had explicitly rejected the legislative proposal on the merits on the grounds that Rule 46(e) should continue to give courts discretion to forfeit a bond for violation of any condition of release.

REPORT OF THE FEDERAL JUDICIAL CENTER

Mr. Cecil pointed out that the agenda book for the committee meeting contained a status report on the various educational and research projects of the Federal Judicial Center. (Agenda Item 4)

Mr. Cecil made special mention of a recent study by the Center addressing the differing circuit interpretations of FED. R. APP. P. 35(a). The rule states that a majority vote of judges in regular active service is needed for a court of appeals to hear a case en banc. He also pointed to a timely new Center monograph on redistricting legislation that addresses legal, statistical, and case management issues arising in these cases.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Alito and Professor Schiltz presented the report of the advisory committee, as set forth in Judge Alito's memorandum and attachments of May 21, 2002. (Agenda Item 5)

Amendments for Judicial Conference Approval

FORMS 1, 2, 3, AND 5

Judge Alito reported that four of the five forms in the appendix to the Federal Rules of Appellate Procedure were outdated since they referred to "the ___ day of _____, 19 __." He said that the advisory committee had voted to replace the references to "19 __" with references to "20 __." The change, he said, was technical in nature and did not need to be published for comment.

The committee without objection approved the proposed forms changes by voice vote.

Informational Items

Judge Alito noted that the advisory committee at its April 2002 meeting had discussed two matters of substantial significance and controversy. First, he said, the Department of Justice had proposed a uniform national rule to permit the citation of non-precedential opinions. He pointed out, though, that the proposed rule would not affect the precedential value of opinions, which would continue to be decided by each circuit. He said that there is considerable support on the committee, particularly among its attorneys, for a uniform national rule. The advisory committee, therefore, might present a proposal on the subject to the Standing Committee at a future meeting.

Second, he said, the advisory committee is continuing to study a possible change to FED. R. APP. P. 35(a), governing the counting of votes for an en banc hearing. The current rule and 28 U.S.C. § 46(c) refer to a vote by a "majority of the circuit judges who are in regular active service." But, he explained, the courts have interpreted the language in three different ways, commonly referred to as the "absolute majority," "case majority," and "modified case majority" approaches. He pointed out that the committee is concerned about different practices that continue to exist among the circuits despite a national statute and a national rule on the subject.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Small and Professor Morris presented the report of the advisory committee, as set forth in Judge Small's memorandum and attachments of May 10, 2002. (Agenda Item 9)

Amendments for Judicial Conference Approval

FED. R. BANKR. P. 1007 and FED. R. BANKR. P. 7007.1

Judge Small reported that the proposed amendments to Rule 1007 (lists, schedules, and statements) and new Rule 7007.1 (corporate ownership statement) require corporate parties to file a statement either (1) identifying any corporation that owns 10 percent or more of any class of its equity interests, or (2) stating that there is no such parent ownership. The amendment to Rule 1007 would require the debtor to file the statement with the petition. The amendment to Rule 7007.1 would require any other corporate party to file the statement with its first pleading in an adversary proceeding.

Judge Small noted that the advisory committee had decided not to impose the filing obligation in contested matters. Professor Morris said that the advisory committee had also decided to maintain as much consistency as possible with parallel provisions in the civil, criminal, and appellate rules.

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

FED. R. BANKR. P. 2003 and FED. R. BANKR. P. 2009 and FORM 1

Judge Small pointed out that the proposed amendments to Rule 2003 (meeting of creditors) and Rule 2009 (trustees for jointly administered estates) reflect the enactment in 2000 of new subchapter V of chapter 7 of the Bankruptcy Code, making multilateral clearing organizations eligible for bankruptcy relief. The reference in those rules to election of a trustee by creditors must be qualified because the 2000 statute specifies that the Federal Reserve Board, rather than the creditors or U.S. trustee, designates a trustee in a case under subchapter V. Official Form 1, the voluntary petition, would be amended to add a check box for designating a clearing-bank case.

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

FED. R. BANKR. P. 2016

Judge Small explained that the new Rule 2016(c) (disclosure of compensation to bankruptcy preparers) would implement section 110(h)(1) of the Bankruptcy Code, requiring bankruptcy petition preparers to disclose their fees.

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

FORMS 5 and 17

Judge Small reported that the amendments to Forms 5 (involuntary petition) and 17 (notice of appeal) reflect the provision of section 304(g) of the Bankruptcy Reform Act of 1994 specifying that no filing fee is required from a child-support creditor.

The committee without objection approved the proposed amendments to the forms by voice vote.

FED. R. BANKR. P. 1005, 1007, and 2002
FORMS 1, 3, 5, 6, 7, 8, 9, 10, 16A, 16C, and 19

Judge Small reported that these proposed amendments to the rules and forms would implement a policy statement on privacy and public access to electronic case files adopted by the Judicial Conference in September 2001. The policy specifies that documents in bankruptcy cases should be made generally available electronically to the

same extent that they are available to the public at the courthouse — except that social security numbers, dates of birth, financial account numbers, and names of minor children should be excluded from electronic access. The policy further states that the "Bankruptcy Code and Rules should be amended to allow the court to collect a debtor's full Social Security number but display only the last four digits."

Judge Small noted that proposed amendments to Rule 1005 had been published for public comment in January 2002, but there had been no requests to testify at the scheduled public hearing. Nevertheless, he said, the advisory committee had considered 32 written comments, and its Subcommittee on Privacy and Public Access had conducted a focus group meeting on April 12, 2002, with representatives of private creditors, credit data gatherers, taxing authorities, law enforcement, and the Federal Trade Commission. He reported that the advisory committee changed the proposals after the focus group meeting to satisfy the specific concerns of the participants.

Judge Small said that the advisory committee is convinced that bankruptcy creditors need the debtor's full social security number. Moreover, creditors that already have the debtor's social security number should be able to use it to search the courts' records. He explained that the proposed change to Rule 1005 (caption of the petition) would limit the caption to only the last four digits of the debtor's social security number. The proposed addition of subdivision (f) to Rule 1007 (lists, schedules, and statements) would require the debtor to "submit" only his or her full social security number to the clerk of court. The full number would not be "filed," and thus it would not become part of the official case record. The full social security number would be maintained in the clerk's office and would be included on notices to creditors, thereby facilitating the efficient identification of the debtor by creditors in a case. Judge Small pointed out that section 342 of the Code explicitly requires a debtor to provide the full social security number on all notices to creditors.

The full social security number would also be available in the clerk's office for legitimate searching purposes, including law enforcement. The proposed change to Rule 2002 (notices to creditors) would specify that notices of first meetings of creditors include the debtor's full social security number.

Judge Small pointed out that the proposed changes to the forms would limit disclosure of the debtor's social security number to the last four digits. They would also limit account numbers to the last four digits and remove the requirement that the debtor disclose the names of minor children.

But, he added, the advisory committee had rejected comments from bankruptcy petition preparers that they should be relieved from the obligation to set forth their full social security number on Form 19 (certification and signature of non-attorney

bankruptcy petition preparers). The obligation, he said, is required by section 110 of the Bankruptcy Code.

Judge Small emphasized that the forms would become effective on December 1, 2003, to coincide with the proposed changes in the rules.

The committee without objection approved the proposed amendments to the rules and forms by voice vote.

Amendments for Publication

FED. R. BANKR. P. 9014

Judge Small reported that the proposed change to Rule 9014 (contested matters) would make several provisions of FED. R. CIV. P. 26 inapplicable in contested matters. The provisions deal with mandatory disclosure, disclosure of expert witnesses, additional pre-trial disclosure, and mandatory meeting before the scheduling conference/discovery plan. He explained that most contested matters, such as motions for relief from the automatic stay, must be handled quickly. Therefore, the mandatory disclosure provisions of Rule 26 are simply ineffective. He reported that many bankruptcy judges had suggested the proposed change in the rule. He added that the provisions of Rule 26 would continue to apply in adversary proceedings, and they could still be made applicable in any contested matter by court order.

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

Informational Items

Judge Small reported that the advisory committee had decided not to proceed further with proposed changes to Rule 2014 (employment of professional persons) to modify the disclosure requirements for a professional seeking employment in a bankruptcy case.

He also reported that the advisory committee is ready to move quickly on further changes to the rules and forms if the omnibus bankruptcy reform legislation pending in Congress is enacted. He noted that the committee had completed a good deal of groundwork and had engaged the services of two consultants.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Levi, Judge Rosenthal, and Professor Cooper presented the report of the advisory committee, as set forth in Judge Levi's memorandum and attachments of May 20, 2002. (Agenda Item 7)

Amendments for Judicial Conference Approval

FED. R. CIV. P. 23

Judge Levi reported that several proposed amendments to Rule 23 (class actions) had been published in August 2001, consisting of revisions to subdivisions (c) and (e) and addition of new subdivisions (g) and (h). He noted that the advisory committee had made several improvements in the amendments and committee note as a result of the public comments, and he commended the reporters for a great job in condensing the notes and making them more readable.

Judge Levi presented a brief history of the advisory committee's decade-long review of Rule 23, beginning with the Judicial Conference's 1991 request to revisit the rule. Judge Levi pointed out that the first phase of the advisory committee's work had revolved around a proposed omnibus revision of Rule 23, drafted largely by Judge Sam Pointer and based in part on prior work by the ABA's Litigation Section.

The second phase of the committee's work had produced several amendments published for comment in 1996. Much of the focus at that time had been directed to the criteria for certifying a class under Rule 23(b)(3). The committee had published proposed amendments for certifying settlement classes and authorizing interlocutory appeals of certification decisions. And it engaged in an active and fruitful dialog on class action issues with the bench, bar, and litigants — receiving a wealth of outstanding, but often conflicting, advice from interested parties. All the documents generated during the review were later printed in four volumes of working papers. Judge Levi noted that the settlement class proposal had attracted many negative comments, particularly from the academic community, and it was eventually deferred by the committee in anticipation of the Supreme Court's decision in *Amchem Products, Inc. v. Windsor,* 521 U.S. 591 (1997).

Judge Levi said that the only amendment eventually emerging from the second phase was the new Rule 23(f), giving the courts of appeals discretion to permit an interlocutory appeal from an order granting or denying class certification. He added that Rule 23(f) appears to be working very well and has fostered greater uniformity in the law.

Judge Levi reported that the third, and most recent, phase of the committee's work had concentrated largely on mass-tort litigation. He said that the proposed amendments

to Rule 23(c) and (e) and new Rule 23(g) and (h) focus on class-action procedures, rather than substantive certification standards. The amendments largely would conform the rule to current best practices in the district courts. They are designed, he said, both to protect class members in the settlement process and to promote greater judicial supervision in class-action cases. He emphasized that they do not attempt to alter the balance between plaintiffs and defendants or between classes and class adversaries.

Judge Levi proceeded to describe the proposed amendments and the revisions made in the rule and committee note following publication. The discussion focused on the following topics:

1. Timing of the court's certification decision
2. Notice of proposed settlement
3. Standards for approving a settlement
4. Appointing class counsel
5. Attorney fees
6. Second opt-out opportunity

Judge Scirica pointed out that the proposal in Rule 23(e)(3) to give the courts discretion to afford (b)(3) class members a second opportunity to request exclusion from the class was clearly the most controversial topic. Therefore, he suggested that the committee consider and vote on all the other proposed amendments to Rule 23 before addressing proposed paragraph (e)(3).

1. Timing of the court's certification decision

Judge Levi reported that a proposal that Rule 23(c) be amended to require that the court make its determination whether to certify a class "at an early practicable time," rather than "as soon as practicable after commencement of an action." The proposed change, he said, signals a difference in approach and would bring the rule into line with prevailing practice, under which district judges take time in appropriate cases to gather information to assist them in making an informed certification decision.

The current rule, he explained, implies that the court should make the certification decision quickly and conditionally. The revised rule, on the other hand, strikes a balance between making the decision quickly and doing it correctly. It would eliminate the provision in the current rule specifying that a class certification "may be conditional," and it would provide expressly in subparagraph (c)(1)(C) that a certification order may be altered or amended before final judgment.

One of the participants emphasized that courts should be encouraged to conduct discovery into the merits of an action before making the certification decision. Judge

Rosenthal responded that the advisory committee had listened to vigorous debate as to the appropriate scope of any pre-certification discovery, and it had heard many diverse and valid viewpoints on the issue. She noted that the committee had considered the comments carefully and had revised the committee note to emphasize that courts should strike the appropriate balance in each case between looking into the merits and making the decision as to class certification.

One of the members added that the certification decision is enormously important and has great influence over the settlement process. Therefore, he said, it is essential that it be made very carefully and knowledgeably. He commended the advisory committee for striking the right balance in the rule and note between making the decision promptly, and allowing appropriate discovery in pursuit of the decision.

2. Notice of proposed settlement

Judge Levi reported that the advisory committee had modified the published proposal that would have mandated notice to class members in (b)(1) and (b)(2) class actions. He said that the committee had heard from the plaintiffs' class action bar that the cost of mandated notice would chill civil rights actions. He noted, however, that the opponents recognize that courts already have the authority to order notice in a given case.

Judge Levi reported that the advisory committee had amended the proposal in light of the comments and now would make notice in (b)(1) and (b)(2) classes discretionary, rather than mandatory. Thus, he said, revised Rule 23(c)(2)(A) provides that the court "may" direct appropriate notice to the class. Judge Levi added that the committee note assists the courts in weighing the competing considerations of providing notice to class members vis-a-vis imposing costs that may deter the pursuit of class relief.

3. Standards for approving a settlement

Judge Levi reported that proposed Rule 23(e)(1)(C) would provide an explicit standard for approving class action settlements. It specifies that a court may approve a settlement, voluntary dismissal, or compromise binding class members only after a hearing and on finding that it is "fair, reasonable, and adequate."

He added that proposed Rule 23(e)(2) would address side agreements. It requires that the parties seeking approval of a proposed settlement file a statement identifying any agreement "made in connection with" the settlement. He noted that the revised rule, as published, would have given the court discretion to decide whether to require the disclosure of side agreements. But the advisory committee had decided in light of the public comments that disclosure should be made mandatory. He added that several

comments had recommended that the actual agreements themselves be filed, but the advisory committee concluded that a statement or summary of side agreements is sufficient. He pointed out that the committee note makes clear that the court may always ask for more information or require that agreements be filed under seal.

4. Appointing class counsel

Judge Rosenthal reported that proposed new Rules 23(g) and (h) would govern appointment of class counsel and attorney fees. They specify that a court certifying a class must appoint class counsel, and class counsel must fairly and adequately represent the interest of the class. She explained that the court's scrutiny of class counsel appointment — as mandated by Rule 23(g)(1)(C) — is separate from its scrutiny of the class action itself. She pointed out that, following publication, the advisory committee had moved to the top of the list of factors for the court to consider in appointing counsel "the work that counsel has done in identifying or investigating potential claims in the action." The committee had also expanded the list of factors to include counsel's experience in handling not only class actions and other complex litigation but also "claims of the type asserted in the action." The addition, she said, makes it clear that the rule does not favor the class action lawyers at the expense of other members of the bar.

Judge Rosenthal explained that proposed Rule 23(g)(2) would authorize a court to appoint interim counsel to act on behalf of the putative class before it decides whether to certify the action as a class action. She pointed out that the proposal had been revised after publication to emphasize the importance of the work that counsel has performed for the putative class before certification.

She said that the advisory committee had amended the proposed rule to make it clear that competition in the appointment of counsel is not required. Thus, when there is only one applicant, a court may appoint that applicant as class counsel if he or she is "adequate," as measured by subparagraphs (g)(1)(B) and (C). On the other hand, if more than one adequate applicant seeks appointment as class counsel, the court must appoint the applicant "best able to represent the interests of the class."

Judge Rosenthal pointed out that references in the committee note to auctions had been deleted following publication. Judge Levi explained that public comments had complained that the published rule appeared to favor appointment of counsel through a court-approved auction. But, he said, the proposed rule and note had been revised to make it clear that a court need choose among lawyers only if there are competing applications to represent the class. Under the revised proposal, the court has discretion to hold an auction in an appropriate case, but no preference is expressed. The court may direct potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney fees and nontaxable costs. The court's

order appointing class counsel, moreover, may include provisions regarding the award of attorney fees or nontaxable costs.

5. Attorney fees

Judge Rosenthal reported that proposed new Rule 23(h) would prescribe a standard for attorney fees, requiring that they be "reasonable." It would also establish procedures to assure that the standard is met. The rule begins with a requirement that an application for an award of attorney fees be made by motion to the court. Notice of the motion must be served on all parties, and where a motion is made by class counsel, notice must be directed to class members in a reasonable manner. The court must enter findings of fact and conclusions of law on the motion, and it may refer fee matters to a master or magistrate judge.

Judge Rosenthal explained that the proposed rule is a codification of best current practices in the district courts and very little public comment had been received on the proposal. Following publication, she said, the advisory committee had shortened the note considerably and deleted extensive references to the various factors that courts consider in approving fees, such as the lodestar analysis, percentage of funds, risks borne by counsel, and the like. The note, she added, contains a reminder that under Rule 54 the court may require disclosure of fee agreements. It also provides guidance to the courts in handling objections to fee awards and deciding whether to authorize discovery relevant to the objections.

The committee without objection approved by voice vote all the proposed amendments to Rule 23, other than proposed Rule 23(e)(3).

6. Second opt-out opportunity - (Rule 23(e)(3))

Judge Levi reported that the advisory committee had published for public comment two alternative versions of Rule 23(e)(3). The first would have mandated a second opportunity for (b)(3) class members to elect exclusion from the class — unless the court finds good cause to disallow the additional opt-out. The second published alternative would have entrusted the opt-out decision entirely to the court's discretion. He said that the advisory committee had chosen to proceed with the second alternative.

He pointed out that many class-action cases are presented to a court for certification with a settlement already in hand. Class members in these cases have the opportunity to opt out of the class having knowledge of the terms of the settlement. In some instances, moreover, the proposed settlements themselves specify that they will not become effective if a certain number or percentage of class members opt out.

Judge Levi said that the proposed Rule 23(e)(3) would give a court discretion to create a new opt-out opportunity for (b)(3) class members in those cases that settle *after* the certification decision. Thus, class members who have been locked in by the certification could review the terms of the settlement and make an informed decision as to whether to elect exclusion from the class. Judge Levi noted that class action settlements often lack a truly adversary setting, and people who are bound by the class are not personally before the court. The proposed amendment would give the court discretion to provide additional protection to absent class members through a second opt-out in appropriate cases.

Judge Levi pointed out, though, that there are many cases in which a second opt-out would *not* be appropriate. A court, for example, may find that a proposed settlement is very fair or the amount awarded to each individual is so small that an additional opt-out procedure is simply not warranted. He emphasized that the public comment on the provision had been generally supportive of the concept of giving the court discretion to allow a second opt-out.

One of the members commended the advisory committee for its comprehensive treatment of the issues and its success in obtaining extensive and thoughtful input from the bar. He noted, however, that the committee note states that a cross-section of the bar both supports and opposes the principle of a second opt-out opportunity. In particular, he pointed to the bar's "common" view that the proposed amendment may make settlement agreements more difficult to reach. He said that he simply could not see the suggested benefits of the opt out in obtaining better terms for class members. But he could clearly see the negative impact that the amendment would have on settlement negotiations and on defeating good settlements. Moreover, he said, if a court lacks adequate information to determine whether a settlement is fair, adequate, and reasonable, the opt-out provision will not provide it with any meaningful additional information to make the decision. Under the circumstances, he concluded, the committee should not make a significant change in the rules when the benefits are uncertain and the harm is readily apparent.

In addition, he said, judges currently review the fairness of settlements and take into account the interests of absent class members. Typically, they ask the parties to renegotiate or adjust any settlement they find inadequate. But, he said, the proposed amendment would take pressure off judges to make tough decisions, particularly in close cases, because it would allow them to resolve doubts by allowing class members to opt out of the settlement. The amendment, he said, would also enhance the status of objectors and provide objecting counsel an incentive to solicit class members and undermine settlement negotiations. In addition, he said, the amendment is too broad and does not provide standards for the court in exercising its discretion to grant a second opt-out opportunity.

A second member agreed that the disadvantages of the opt out provision outweigh any fairness provided to class members. He emphasized that the opt out provision would inhibit settlement negotiations and delay settlements. He emphasized that companies want certainty but opt outs introduce a wild card element. Moreover, he said, professional objectors would become counsel for the class members and will prolong and increase the cost of the litigation.

Judge Levi responded that these concerns are important and thoughtful, and he pointed out that they had been voiced at the committee's Chicago symposium and in the public comments. He said, though, that the proposed amendment enjoys broad support — as well as some opposition — transcending traditional lines of "plaintiffs versus defendants." The key decision, he said, boils down to a question of values. The goals of the proposed amendments to Rule 23, he emphasized, are to enhance judicial supervision over class actions and settlements — as recommended by RAND and others — and to provide adequate information and self-determination for class members. He stated that, in reality, it is difficult for a judge to review the fairness of proposed settlements, especially when both class counsel and the defendant support the settlement. The judge, he said, should have all the tools and discretion needed to sort out all the factors.

Judge Levi added that several attorneys had commented that the opt-out provision will actually lead to earlier settlements. He said that the committee note provides guidance to the courts in deciding whether to permit a new opportunity for class members to opt out. The decision should turn, he said, on the court's level of confidence in the extent of the information available to evaluate the fairness, reasonableness, and adequacy of the settlement.

Judge Rosenthal added that the advisory committee had tried to respond to the concerns that the amendment might be abused in practice. She pointed out, for example, that the committee note makes it clear that the opportunity to request exclusion from a proposed settlement is limited to individual members of the (b)(3) class. Likewise, the note specifies that the court may set special conditions for permitting a new opportunity to opt out. She explained that a second opt-out opportunity would *not* become the default. Rather, it will be another useful tool for judges to use in exercising appropriate judicial supervision over settlements.

The participants engaged in an extended debate on these points.

Mr. Bernick moved to amend proposed Rule 23(e)(3) by tying the opt-out provision directly to the court's need for additional information. His motion would insert the following language before the words "the court may direct . . . ": "if and to the extent that the information available to the court is insufficient to make the determinations required by Rule 23(e)(1)(C)."

Several participants objected to the proposed language on the grounds that it would unnecessarily limit the discretion of the court to allow opt outs in appropriate cases. One member suggested that judges do not need the opt-out provision to obtain additional information.

Some members also raised questions as to the timing of the notice given to class members, asking whether it would occur before or after the hearing on approval of the settlement. One participant pointed out that the language of the proposed amendment contemplates that the court will approve a settlement and then allow an opt out as part of the settlement package.

Several participants added that the parties should be able to withdraw from a settlement agreement if the court authorizes a second opt out. Giving class members another opportunity to opt out of the class, they said, alters the deal negotiated by the parties. One member added that if the parties do not want a second opt out, the judge should not approve the settlement. And if the judge decides that the deal is not fair without a second opt out, the judge can so state, and the parties can decide whether they want to remake the deal. Several participants suggested that in practice lawyers will routinely include in settlement agreements an escape clause, specifying that the agreement is invalid if the court gives class members a second opt out.

One member suggested that the language of the proposed amendments may require more than one notice to class members. The members agreed that only one notice should be sent to class members. Judge Levi added that the advisory committee's approach is to provide the district court with maximum flexibility as to timing. He explained that the lawyers will normally present their views to the court as to whether the settlement is fair, reasonable, and adequate. If, he said, the court is uncertain that the settlement fully meets these standards, the rule provides the court with the possibility of allowing a second opt out.

Judge Scirica suggested that the advisory committee clarify the rule and the note to address the timing of the opt-out determination and notice to class members. During the recess, Judge Levi and Professor Cooper presented substitute text for Rule 23(e)(3) and its committee note. The new language specified that a court may afford individual class members a new opt-out opportunity either before it directs notice to the class under Rule 23(e)(1)(B) or after it conducts the Rule 23(e)(1)(C) hearing.

The committee approved by a vote of 8 to 2 the concept of including in Rule 23 a provision giving the court discretion to order a second opportunity for individual class members to request exclusion following certification.

The committee continued to discuss the specific language of proposed Rule 23(e)(3). Based on several suggestions from the members, Judge Levi recommended the following substitute language:

> In an action previously certified as a class action under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who did not request exclusion during an earlier period for requesting exclusion.

He added that the committee note would include language specifying that the court may make this decision either before sending out notice or at a later date. The note would also address the rights of people brought into the class following certification.

The committee with one objection approved the revised language of the rule by voice vote.

Dean Kane moved to delete the clause in the committee note referring to "the court's level of confidence in the extent of the information available to evaluate the fairness, reasonableness, and adequacy of the settlement." The motion was approved by a vote of 7 to 3.

FED. R. CIV. P. 51

Judge Levi stated that the current Rule 51 (jury instructions) is anachronistic and does not reflect current practices in the district courts. He noted that the text of the rule presumes that jury instructions will be heard by lawyers for the first time at the same time that they are heard by the jury. In practice, however, most judges ask the lawyers to submit proposed instructions before trial. They then give the lawyers copies of the court's instructions well in advance of closing arguments so they can be incorporated into the arguments.

Judge Levi explained that the amended rule would require the court to inform the lawyers of its proposed instructions and give them an opportunity to object on the record and out of the jury's hearing before the instructions are delivered. Failure of a party to object in a timely manner would constitute a waiver.

Judge Levi said that few comments had been received on the proposed rule during the publication period. But, he added, the advisory committee had revised the "plain error" provision of the rule following publication to conform it with the language of FED. R. CRIM. P. 52.

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

FED. R. CIV. P. 53
(and FED. R. CIV. P. 54 and 71)

Professor Cooper reported that the advisory committee had extensively revised Rule 53 (masters) to reflect current practices of the district courts in using masters. He noted that the current rule, dating from 1938, addresses the use of masters to perform trial functions. But, he said, masters today are appointed for a broad variety of pretrial and post-trial functions.

Professor Cooper pointed out that public comments on the revised rule had been supportive and helpful. He reported that the advisory committee had made two significant changes in the rule following publication: (1) it had revised the proposed standards in subdivision (g) for the court's judicial review of the master's findings and conclusions; and (2) it had deleted proposed subdivision (i), governing appointment of a magistrate judge as a master. He added that other changes had also been made following publication, and he proceeded to explain these changes.

He pointed out that the advisory committee had added language to Rule 53(a)(1)(B) to provide explicitly that a master may not perform trial functions in a jury case. The ban, he noted, had not been evident in the language of the rule itself, although the accompanying committee note clearly states that a master may not be appointed to preside at a jury trial.

Professor Cooper stated that language had been inserted into Rule 53(a)(1)(C) making it explicit that a master may be appointed to address pretrial and post-trial matters. Thus, he said, Rule 53(a)(1) will provide for appointment of a master to:

1. perform duties consented to by the parties;
2. hold trial proceedings in limited circumstances; and
3. address pretrial and post-trial matters that the court itself cannot address in an effective and timely manner.

Professor Cooper reported that the advisory committee had deleted from proposed Rule 53 the language of paragraph (a)(3), as published. It would have barred a master, during the period of the master's appointment, from appearing before the judge making the appointment. He pointed out that a flat disqualification would unduly restrict the court's ability to appoint masters. He said that the advisory committee had decided that the problem of potential conflicts of interest was sufficiently complicated that the proposed blanket prohibition should be removed from the rule. But language had been

added to the committee note warning courts to take special care to ensure that there are no actual or apparent conflicts of interest involving a master.

Judge Levi stated that several changes had been made in Rule 53(b)(2) based on comments made by the Department of Justice. In subparagraph (b)(2)(A), he said, specific mention is now made of the common role of masters in performing investigative and enforcement duties.

Judge Levi pointed out that subparagraph (b)(2)(B) specifies that the order appointing a master must state the circumstances in which the master may communicate ex parte with the court or a party. The language states that ex parte communications with the court should be limited to administrative matters unless the court permits ex parte communications on other matters.

One member expressed strong personal misgivings about special masters based on his personal experiences. In particular, he complained that masters communicate ex parte with one side in pending litigation. The practice, he said, amounts to improper contact between a party and the court through an interlocutor. Judge Levi responded that the advisory committee shared his concern, and it had addressed it forcefully in the committee note. But he pointed out that ex parte communications with the parties are essential in cases where a master is appointed to advance settlement. Nevertheless, he said, the committee note makes it clear that ex parte communications with the parties should normally be discouraged or prohibited.

Some members suggested that the rule give the court more guidance as to what kinds of ex parte communications are appropriate, noting that communications with the court are relatively common. Members added that the canons of ethics deal adequately with ex parte communications. **Judge Boudin moved to strike the language in proposed Rule 53(b)(2)(B) that would limit a master's ex parte communications with the court to administrative matters. The committee approved the amendment with one objection by voice vote.**

Judge Levi reported that subparagraphs (b)(2)(C) and (D) would require the court's order appointing a master to specify the record before the master, the method of filing the record, other procedures, and the standards for reviewing the master's report. Professor Cooper added that proposed Rule 53(b)(4) states that the order appointing a master may be amended at any time after notice to the parties and an opportunity to be heard.

Professor Cooper explained that the advisory committee had made major changes following publication in paragraphs (g)(3) and (4), governing the court's review of a master's report. He said that two alternate versions had been published for comment.

The first had provided for de novo review by the court of a master's findings of fact unless the order of appointment specifies that either (1) the findings will be reviewed for clear error, or (2) the parties stipulate with the court's consent that the master's findings will be final. The second published version, he said, had distinguished between "substantive" and "non-substantive" facts made or recommended by a master. He reported that the public had criticized the second version because of the inherent difficulty of distinguishing between substantive and other facts.

Professor Cooper emphasized that the advisory committee took to heart concerns expressed by the Standing Committee in January 2002 regarding inappropriate delegations of Article III functions by judges to masters. Therefore, he said, the advisory committee had recast proposed Rule 53(g) to specify that the district court must in all cases review de novo the facts found or recommended by a master, unless the parties stipulate with the court's consent either that: (1) the master's findings will be reviewed for clear error; or (2) in the case of an appointment other than one to conduct trial proceedings, the master's findings will be final. This, he said, is a significant change that should substantially reduce the Article III concerns expressed by the Standing Committee.

Professor Cooper added that proposed paragraph (g)(4) states that the court must decide de novo all objections to conclusions of law made or recommended by a master. He pointed out that the advisory committee had deleted a published provision that would have permitted the parties to stipulate that the master's disposition of legal questions would be final.

Professor Cooper said that proposed paragraph (g)(5) states that a master's ruling on a procedural matter may be reviewed only for an abuse of discretion. He noted that the proposal had been published in brackets, and the comments had been favorable. Some members, though, questioned whether (g)(5) was needed and whether it was sufficiently precise.

Professor Cooper reported that following publication, the advisory committee had deleted from proposed Rule 53 subdivision (i) addressing the appointment of a magistrate judge as a master. Judge Levi suggested that there is very little that a magistrate judge may do as a master that he or she cannot do in the capacity of magistrate judge — a judicial officer of the district court with broad judicial powers set out in 28 U.S.C. § 636. He pointed out that elimination of the rule's reference to magistrate judges had been endorsed by both the Magistrate Judges Committee of the Judicial Conference and the Federal Magistrate Judges Association. Thus, the rule would simply leave to case law any questions as to whether the appointment of magistrate judge as a master is appropriate in a given case.

One member responded that in his district, magistrate judges are routinely appointed as masters by operation of local court rule — both in title VII discrimination cases and in other types of cases. He said that it would be very difficult for the court to comply with proposed Rule 53(b), which requires the court in every case to give the parties notice and an opportunity to be heard before appointing a master, including a magistrate judge as a master. He said that it would be better if the rule were revised explicitly to allow the use of magistrate judges as masters without application of the appointment procedures of Rule 53(b).

Judge Boudin and Judge Levi suggested that the problem could be resolved by simply reinstating the first sentence of Rule 53(i), as published, specifying that a magistrate judge is subject to Rule 53 only when the order referring a matter to the magistrate judge expressly provides that the reference is made under the rule. Judge Scirica announced that there was a consensus on the committee for the proposed change.

During the Monday evening break, Judge Levi and Professors Cooper and Marcus drafted a number of refinements in the text of the rule and the committee note to incorporate several suggestions of the participants. They presented the revisions to the committee on Tuesday morning.

Professor Cooper also noted that the technical changes proposed in FED. R. CIV. P. 54(d) and FED. R. CIV. P. 71A(h) were required to conform the references in those rules to the proposed reorganization and renumbering of Rule 53.

The committee without objection approved the proposed amendments to the rule by voice vote.

Resolution on Legislation to Address Repetitive and Overlapping Class Actions

Judge Levi reported that the advisory committee had initially forwarded to the Standing Committee three additional proposed changes to FED. R. CIV. P. 23 to address problems posed by repetitive and overlapping class actions in the federal and state courts. The provisions would:

(1) allow a court that has denied certification of a class action to preclude later courts from adjudicating the certification issue;

(2) allow a court to prevent settlement shopping by precluding attempts to persuade another court to approve a class-action settlement that has been rejected; and

(3) provide a court with broad discretion to bar class members from pursuing overlapping class-action litigation in other courts.

Judge Levi emphasized that widespread support had been expressed for the proposals on the merits. But, he added, there is also substantial doubt as to whether they can, or should, be promulgated by rule in light of the limits imposed by the Rules Enabling Act and the Anti-Injunction Act. Moreover, political factors and serious concerns about federalism argue strongly for statutory action, rather than action through the rulemaking process. Accordingly, he explained, the advisory committee had decided not to publish the three proposals with the other proposed amendments to Rule 23. Instead, the three had been circulated separately and informally in September 2001 as part of the committee reporter's "Call for Informal Comment: Overlapping Class Actions." They had also been debated in depth at the class action conference conducted by the committee with prominent representatives of the bench, bar, and academia at the University of Chicago Law School in October 2001.

Judge Levi reported that most commentators believe that repetitive and overlapping class actions present serious problems. He said that it is simply not appropriate under our system of federalism for a state court to certify, much less repeatedly certify, class actions that are truly national in scope, *i.e.,* actions affecting litigants from many states and involving the laws of many states. The federal courts are an appropriate forum for those diversity class actions in which no one state has a paramount interest, the plaintiffs reside in many states, and the law of no one state applies. This conclusion, he added, is consistent with the 1990 recommendations of the Federal Courts Study Commission.

Judge Scirica directed the committee's attention to Judge Levi's memorandum of May 7, 2002, entitled: "Perspectives on Rule 23 Including the Problem of Overlapping Classes." He pointed out that it had been adopted unanimously by the advisory committee. He asked the Standing Committee to approve the memorandum and forward it to the Federal-State Jurisdiction Committee of the Judicial Conference. He noted that the memorandum does not ask that any particular formulation or legislative proposal be supported, but it requests the Standing Committee to —

> support the concept of minimal diversity for large, multi-state class actions, in which the interests of no one state are paramount, with appropriate limitations or threshold requirements so that the federal courts are not unduly burdened and the states' jurisdiction over in-state class actions is left undisturbed.

The committee without objection approved the memorandum by voice vote.

FORMS 19, 31, AND 32

As noted above on page 5, the committee voted to replace the outdated references to "19__" with "20__" in four appellate forms. **Following the meeting, the committee by mail vote agreed to make the same changes to Forms 19, 31, and 32 in the forms appendix to the civil rules.**

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Miller, Judge Trager, and Professor Schlueter presented the report of the advisory committee, as set forth in Judge Carnes' memorandum and attachments of May 13, 2002. (Agenda Item 6)

Amendments for Publication

FED. R. CRIM. P. 41

Judge Miller reported that Rule 41 (search and seizure) had been revised and reorganized as part of the package of restyled criminal rule amendments recently approved by the Supreme Court. He pointed out that the advisory committee had not included in the package several suggested substantive changes in Rule 41, deferring them for further study. Later, he said, the committee had to prepare additional amendments to Rule 41 on an expedited basis to incorporate provisions of the USA PATRIOT Act of 2001. Those amendments were then blended into the style package approved by the Supreme Court in April 2002.

Judge Miller reported that the advisory committee had now addressed the substantive issues deferred earlier and had decided:

1. to publish proposed amendments setting forth procedures for tracking-device warrants; and

2. to add a provision authorizing a magistrate judge to delay any notice required by Rule 41; but

3. not to proceed with amendments addressing covert, or "sneak and peek," warrants.

1. Tracking devices

Judge Miller pointed out that tracking-device searches are recognized both by statute and case law. Nevertheless, he said, the current Rule 41 provides no procedural guidance for issuing and executing tracking-device warrants. He reported that he had polled magistrate judges around the country on behalf of the advisory committee and had received their strong endorsement for a rule providing procedural guidance.

Judge Miller explained that the proposed amendments would authorize only federal judges to issue tracking-device warrants since execution of the warrants may occur beyond state lines. The amendments would also require that installation of a tracking device be completed within 10 days of the warrant's issuance. And use of the device could not exceed 45 days, unless extended by the court for good cause. Judge Miller explained that the 45-day time period had been chosen by the advisory committee purely as a judgment call. The committee, he said, wanted guidance from the public comments as to whether the period is appropriate.

2. Delay in giving notice

Judge Miller reported that proposed new paragraph (f)(3) would reflect a provision of the USA PATRIOT Act of 2001 authorizing a court to delay any notice required in conjunction with the issuance of any search warrants (18 U.S.C. § 3103a(b)). As amended, the rule would permit the government to request, and the magistrate judge to grant, a delay in giving any notice required by Rule 41 if the delay is authorized by statute. The USA PATRIOT Act provision and the proposed new subparagraph (f)(3) rendered unnecessary the proposed amendments to Rule 41, published in August 2000, that would have specified procedures for issuing "sneak and peek" warrants, i.e., warrants authorizing law enforcement agents to enter property to observe, without taking anything and without notifying the owner of the entry until much later.

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

HABEAS CORPUS RULES

Judge Trager reported that the advisory committee had completed a restyling of the Rules Governing § 2254 Cases and the Rules Governing § 2255 Proceedings, following the same pattern used to restyle the criminal rules. In addition, he said, the committee had considered a number of substantive amendments, both to reflect changes in practice and to make the rules consistent with the Antiterrorism and Effective Death Penalty Act of 1996. He pointed out that the committee had initially considered merging the § 2254 and § 2255 rules, but it decided that merger would create a number of

insurmountable problems. Instead, it made a number of parallel amendments to both sets of rules.

Judge Trager said that most of the proposed changes in the two sets of rules are stylistic — designed to standardize and improve language, reorganize material, and eliminate outdated provisions. Where substantive changes had been made, he said, they were clearly identified in the committee notes. He proceeded to explain some of the specific substantive changes.

First, he said, the current habeas corpus rules authorize the clerk of court to return to the petitioner, without filing, a petition that does not conform with the rules. The Antiterrorism and Effective Death Penalty Act of 1996, though, now imposes a one-year statute of limitations. Thus, a court's rejection of a petition or motion filed shortly before the one-year deadline, simply because it does not conform to the rules, could effectively bar a prisoner from ever having his or her claims considered. Therefore, he said, the advisory committee would add a new Rule 3(b) to each set of rules — based on FED. R. CIV. P. 5(e) — requiring the clerk of court to file non-conforming petitions and motions and enter them on the docket.

Second, Rule 9(a) of both sets of rules currently provides that the court may dismiss a petition or motion if the government has been prejudiced by the prisoner's delay in its filing. Judge Trager noted that the advisory committee would delete the provision because it is no longer necessary in light of the new one-year statute of limitations.

Third, he said, Rule 9(b) of both sets of rules would be amended to reflect the new statutory requirement that a petitioner or moving party first obtain approval from the court of appeals to file a second or successive petition or motion.

Fourth, Judge Trager reported that Rule 5 of both sets of rules would be amended to give the petitioner or moving party a right to reply to the government's answer or other pleading. The proposal, he said, reflects current practice. Most judges, for example, allow a prisoner to reply to the government's motion to dismiss on statute of limitation grounds.

Judge Trager pointed out that the proposed changes in the forms are largely stylistic in nature, but they also incorporate some changes required by the Antiterrorism and Effective Death Penalty Act. In particular, they ask the petitioner or moving party to provide additional information to help the court reach decisions on key issues at an early stage in a case, such as exhaustion of remedies, statute of limitations, and authority for second or successive petitions. He noted that the advisory committee is especially interested in receiving public comments on the list of possible grounds for relief, which

focus the petitioner's or moving party's attention on the adverse consequences of failing to allege all available grounds of relief in the petition or motion.

One participant suggested that the proposed language of Rule 1(b) of the § 2254 Rules — permitting a court to apply the rules to habeas corpus petitions other than those filed under § 2254 — should be strengthened to make it clear that the rule can be applied in 28 U.S.C. § 2241 cases. Judge Trager agreed to bring the suggestion to the advisory committee's attention. Another participant emphasized the practical importance of the forms and suggested that the forms be annotated and tied specifically to individual rules.

The committee without objection approved the proposed amendments to the rules and forms for publication by voice vote.

Legislative Action

FED. R. CRIM. P. 16

As noted above in his introductory remarks, Judge Scirica reported that two provisions in the current Rule 16 — in subparagraphs (a)(1)(G) and (b)(1)(C) — had been omitted inadvertently from the package of restyled rules sent to the Supreme Court. He explained that the two provisions had been added to the rules in 1997 to impose reciprocal obligations on the government and the defendant to disclose their expert witnesses' testimony on the defendant's mental condition bearing on the issue of guilt. The provisions, he said, are uncontroversial, have worked well, and have eliminated the need for judges to grant significant continuances in the middle of trials.

Judge Scirica reported that he had prepared a letter to the Judiciary Committees of Congress asking for legislative action to amend Rule 16(a)(1)(G) and (b)(1)(C), as transmitted to Congress by the Supreme Court in April 2002, to include the inadvertently omitted 1997 provisions, with minor style revisions.

FED. R. CRIM. P. 46

As noted above in the report of the Administrative Office, Mr. Rabiej announced that members of the House Judiciary Committee had requested the judiciary's views on pending legislation (H.R. 2929) that would amend FED. R. CRIM. P. 46(e) and specify that a court may forfeit a bond only for the defendant's failure to appear before the court as ordered, and not for violation of any other condition of the bond.

The issue was not addressed at the committee meeting, but the members considered the matter by mail following the meeting. They noted that the Advisory Committee on Criminal Rules had specifically rejected amending Rule 46(e) in 1998, and

it had just reaffirmed that position at its April 2002 meeting. It was further noted that the advisory committee had conducted a survey of magistrate judges on the proposed change. The results revealed that bonds are forfeited in most districts only if the defendant fails to appear at a scheduled court proceeding. In some districts, however, courts incorporate other conditions of release into the bond, and they forfeit bonds for violations of those conditions. The survey showed that judges in the latter districts believe strongly that the threat of forfeiture significantly increases the probability that defendants will comply with all conditions of release. Accordingly, the advisory committee concluded that the current Rule 46(e) provides judges with valuable flexibility to impose added safeguards ensuring a defendant's compliance with conditions of release.

The committee agreed to recommend to the Judicial Conference that it oppose the pending legislation that would amend FED. R. CRIM. P. 46(e) to eliminate the authority of a judge to forfeit a bond for breach of release conditions other than failure of the defendant to appear before the court.

Informational Items

FED. R. CRIM. P. 35

Professor Schlueter pointed out that Rule 35 (correcting or reducing a sentence), as restyled, permits a court to correct an error in a sentence within 7 days after "sentencing." He explained that the advisory committee in August 2001 had published a proposed amendment that would have defined "sentencing" — for purposes of Rule 35 only — as written entry of the judgment. But, he said, the majority view of the circuits is that the current rule's 7-day correction period is triggered by the trial judge's oral pronouncement of the sentence, rather than entry of the judgment. Moreover, the committee received some negative public comments on the proposal.

He said that the advisory committee had decided at its April 2002 meeting to use the term "oral announcement of the sentence," but it ran into some drafting problems. Accordingly, it decided to defer the proposed amendment to Rule 35 until it has had an opportunity to discuss the matter further at its Fall 2002 meeting.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Shadur and Professor Capra presented the report of the advisory committee, as set forth in Judge Shadur's memorandum of May 1, 2002. (Agenda Item 9)

Amendment for Judicial Conference Approval

FED. R. EVID. 608

Judge Shadur said that the purpose of the proposed amendment to Rule 608(b) (evidence of a witness's character and conduct) is to bring the text of the rule into line with the original intent of the drafters. The current rule, he explained, bars the use of extrinsic evidence to attack or support a witness's "credibility." Some courts, however, have interpreted the term "credibility" more broadly than intended, such as to prove bias, contradiction, or a prior inconsistent statement. The proposed amendment specifically limits the extrinsic evidence ban to cases in which the proponent's sole purpose is to impeach the witness's "character for truthfulness."

Judge Shadur reported that some comments received during the publication period had suggested that the term "credibility" should also be replaced with "character for truthfulness" in other rules, such as Rules 608(a), 609, and 610. He said that the advisory committee had considered the matter carefully and had agreed to make the suggested change in the last sentence of Rule 608(b), but not in the other rules. It had decided not to make the change in Rule 608(a) because the term "credibility" is already limited in that rule to evidence pertinent to a witness's character for truthfulness. The advisory committee had decided not to make the suggested change in Rules 609 and 610 because the term "credibility" in those rules had not created problems for courts and litigants. Judge Shadur also pointed out that minor changes had been made in the committee note following publication.

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

Amendment for Publication

FED. R. EVID. 804

Professor Capra reported that the Standing Committee in June 2001 had approved for publication a proposed amendment to Rule 804(b)(3) (statement against interest exception to the hearsay rule) that would have required the proponent of any declaration against penal interest — whether proffered in civil cases or criminal cases, or to inculcate or exculpate the accused — to establish corroborating circumstances clearly indicating the trustworthiness of the hearsay statement. But, he said, after reviewing the public comments, particularly the comments submitted by the Department of Justice, the advisory committee withdrew the proposal because it would create problems for the prosecution in admitting declarations against penal interest in criminal cases. The

government, he said, might be required to satisfy an evidence standard different from, or more stringent than, that required by the Confrontation Clause of the Constitution.

In addition to withdrawing the proposed amendment, Professor Capra reported that the advisory committee had decided that the existing rule needed to be reformulated because it did not comport with the Constitution in a criminal case. He explained that in *Lilly v. Virginia,* 527 U.S. 116 (1999), the Supreme Court held that a statement offered under a hearsay exception that is not "firmly rooted" satisfies the Confrontation Clause only when it bears "particularized guarantees of trustworthiness." Current Rule 804(b)(3), however, requires the prosecution to show only that a statement is disserving to the declarant's penal interest. Thus, he said, Rule 804(b)(3) is simply not consistent with the constitutional standards enunciated in *Lilly.* A hearsay statement offered by the government could satisfy the current rule and yet not satisfy the Constitution.

Accordingly, Professor Capra said, the advisory committee had decided to incorporate into Rule 804(b)(3) the specific standard imposed by the Supreme Court in *Lilly,* thus providing that a statement against penal interest offered to inculpate an accused in a criminal case is admissible only if "supported by particularized guarantees of trustworthiness." On the other hand, a statement offered either in a civil case or to exculpate an accused in a criminal case is admissible if supported by "corroborating circumstances" clearly indicating its trustworthiness. Several participants added that the "corroborating circumstances" standard is easy to apply and is supported by a substantial body of case law.

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

Informational Items

Judge Shadur reported that the advisory committee is continuing to work on a long-term project on the federal common law of privileges. He noted that Professor Kenneth Broun, a former member of the committee, has been engaged as a consultant to assist in the project. The effort, he said, had been initiated in part as a response to several bills in Congress attempting to codify particular privileges.

Judge Shadur emphasized that privileges are a very sensitive and controversial topic. Therefore, the project is proceeding slowly, and it may never result in proposed rule amendments. Nevertheless, he said that the committee's work may eventually be incorporated into a Federal Judicial Center publication, rather than an official committee document, similar to two previous publications on the divergence of committee notes and case law from the text of the rules.

Judge Shadur said that the advisory committee, as part of its ongoing long-term planning efforts, is continuing to explore whether there is a need for other amendments to the evidence rules. He added that the advisory committee adheres strongly to the view that any amendments to the Federal Rules of Evidence should be approached with great caution.

Judge Scirica noted with sadness that Judge Shadur's term as chairman of the advisory committee was about to end. He thanked him for ten years of fabulous service to the committee, first as a member and then as chair. Judge Shadur responded that his service had been a labor of love, and he thanked Judge Scirica and his predecessors for permitting the chairs of the advisory committees to participate fully in the deliberations of the Standing Committee.

LOCAL RULES PROJECT

Professor Squiers presented a progress report on the Local Rules Project. She noted that she is continuing to work on the final product, taking into account various suggestions made by the committee at the January 2002 meeting. The final report, she said, will not include model local rules. But it will highlight those topics that generate a substantial number of local rules, since proliferation may indicate a need for some national action on particular subjects.

She added that she will present individual commentary on the rules of each district that are clearly inconsistent with, or duplicative of, the national rules. A separate category will be created for local rules that are possibly, but not clearly, inconsistent with the national rules. The report will also address outmoded local rules that should be rescinded.

Judge Scirica said that he had telephoned the chief judges of the 11 district courts that have not yet renumbered their local rules in accordance with FED. R. CIV. P. 83. He reported that the chief judges had generally been very cooperative, and he volunteered the services of Professor Squiers to assist them in completing the task.

REPORT OF THE TECHNOLOGY SUBCOMMITTEE

Professor Capra reported that the Technology Subcommittee is working on two topics. First, he said, it is continuing to monitor the local court rules implementing the judiciary's national Case Management/Electronic Case Files project. He noted that the Judicial Conference had approved model local rules for civil cases. He added that the subcommittee had recently reviewed a separate set of model local rules for criminal cases,

prepared by a subcommittee of the Court Administration and Case Management Committee and adapted from the model rules for civil cases. The Technology Subcommittee and the Advisory Committee on Criminal Rules, he said, had recommended to the case management committee that forms and other documents in criminal cases that bear the defendant's signature should either be scanned into the court's electronic case file system or be retained in paper form.

Second, Professor Capra reported that the subcommittee is studying whether any other changes are needed in the federal rules to accommodate the proliferation of technology in the courts. He mentioned, as one possibility, an exception to the "learned treatise" evidence rule.

ATTORNEY CONDUCT RULES

Judge Scirica reported that the committee had decided not to move on possible federal attorney conduct rules until Congress acts on the subject. He said that the ABA had just revised Rule 4.2 of the Code of Professional Responsibility, and it is interested in further negotiations with the Department of Justice. Professor Hazard pointed out that differences still exist between the ABA and the Department on two key attorney conduct areas, both of which may arise in the context of government investigations — communications by government attorneys with represented parties and the use of deceptive tactics. He added that the events of September 11, 2001, have heightened the government's concerns over limits imposed on government attorneys.

Professor Hazard reported that an agreement had almost been reached by the parties a couple of years ago, and he expressed great hope that a formula can be produced that will satisfy the Department of Justice and be acceptable to the ABA and the Conference of Chief Justices. He added that the rules committees should not act until such a consensus is attained.

Professor Coquillette noted that the committee has been involved in the matter because there are about 600 local federal court rules regulating attorney conduct. He pointed out that the committee favors a rule of "dynamic conformity," *i.e.,* tying attorney conduct in the federal courts to the current conduct rules of each respective state. But it has also expressed interest in incorporating into any future national rule limited provisions narrowly addressing particular problems cited by the Department, as long as there is agreement among the Department, the ABA, and the Conference of Chief Justices.

LONG-RANGE PLANNING

Mr. Rabiej reported that Judge Scirica had spoken to the March 2002 long-range planning meeting of the Judicial Conference's committee chairs about the long-range planning activities of the rules committees and some pertinent strategic issues that Conference committees may need to address.

Judge Scirica and Judge Levi discussed the intersection of the activities of the Advisory Committee on Civil Rules and those of the Bankruptcy Administration Committee of the Conference on mass-tort issues. Of immediate interest, they said, is consideration of a proposal, recommended by the National Bankruptcy Review Commission, to seek statutory changes to deal with future mass-tort claims in bankruptcy cases. They strongly recommended that a joint conference be held on the matter with the two committees and with members of other affected Conference committees and representatives of the bar.

NEXT COMMITTEE MEETING

The next meeting of the committee is scheduled for Phoenix, Arizona, on Thursday and Friday, January 16-17, 2003.

Respectfully submitted,

Peter G. McCabe,
Secretary

LEONIDAS RALPH MECHAM
Director

CLARENCE A. LEE, JR.
Associate Director

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
Chief
Rules Committee Support Office

December 4, 2002

MEMORANDUM TO THE STANDING COMMITTEE

SUBJECT: *Legislative Report*

I have attached a list showing the status of rules-related bills that were introduced in the 107th Congress. With Congress having passed a stopgap spending measure to January 11, 2003, major appropriations bills, including the FY 2003 appropriations bill for the judiciary, will be taken up in the next Congress.

Since the last Committee meeting, we have focused and acted on the following bills.

21st Century Department of Justice Appropriations Authorization Act

Judge Scirica sent a letter to Chairman Leahy on June 12, 2002, recommending that the Senate Judiciary Committee amend Criminal Rule 16, as transmitted by the Supreme Court in April 2002, to include two provisions that had been inadvertently omitted. (See attached.) The omitted provisions impose reciprocal obligations on the prosecution and the defendant, requiring each side to disclose their expert witnesses testimony on the defendant's mental condition bearing on the issue of guilt.

Judge Scirica also recommended that the Senate Judiciary Committee set the effective date of Criminal Rule 16, as amended by Congress, on December 1, 2002, to coincide with the date on which the comprehensive revisions to the Criminal Rules would take effect to avoid confusion.

In the end, Congress included the recommended changes to Criminal Rule 16 as part of the "21st Century Department of Justice Appropriations Authorization Act" (H.R. 2215), legislation that President Bush signed on November 2, 2002. (Pub. L. No. 107-273.)

Additionally, section 11020 of the Act ("Multiparty, Multiforum Trial Jurisdiction Act of 2002") inserts a new § 1369 in title 28, United States Code, that creates minimal-diversity federal jurisdiction over any action involving a single mass accident. The Act does not address the transfer issue raised in *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998).

Homeland Security

On July 26, 2002, the House passed the "Homeland Security Act of 2002" (H.R. 5005) by a vote of 295 - 132, and the Senate passed the bill on November 19, 2002, by a vote of 90 - 9. Section 895 of the Act amends Criminal Rule 6(e) to, among other things, authorize the sharing of certain grand jury information with appropriate federal, state, local, or foreign officials. The Act, which takes effect 60 days after the date of enactment, was signed by the President on November 25, 2002. (Pub. L. No. 107-296.)

Bankruptcy Reform

In March 2001, both the House and Senate passed comprehensive bankruptcy reform bills. The bills substantially revise major portions of the Bankruptcy Code and would require extensive amendments to the Bankruptcy Rules and Official Forms. At the time of the last Committee meeting in June, both bills were being considered by a House-Senate conference committee, with little reported progress.

Subsequent to the Committee meeting, a compromise was reached on a Senate provision that would prevent abortion opponents who were fined under the Freedom of Access to Clinic Entrances, 28 U.S.C. § 248, from discharging their fines under the bankruptcy laws. The conferees came to an agreement and filed a report on July 26, 2002. (H. Rep. No. 107-617.)

In an 11th hour reversal, the House rejected a rule that would have allowed for consideration of the conference report by a vote of 172 - 243. In a compromise measure, a new bill was quickly introduced that dropped the abortion-clinic provision. The revised bill then passed the House by a vote of 244 - 116 on November 15, 2002. The Senate, however, would not consider the bill without the abortion provision, thus killing the measure for this year. It is unclear at this point whether any bankruptcy reform legislation will be introduced in the 108th Congress.

E-Government Act of 2001

During the first session, Representative Turner introduced the "E-Government Act of 2001" (H.R. 2458) on July 11, 2001. (Senator Lieberman introduced a similar measure – the "E-Government Act of 2001" (S. 803) – in the Senate on May 1, 2001.) H.R. 2458 would require the federal government to develop and maintain an integrated Internet-based system that would make it easier for the public to access government information and services. With respect to the federal judiciary, the bill requires that each court establish a web site that would include information such as the location and contact information for the courthouses, local rules, case docket information, all written court opinions (regardless of whether they are published in an official court reporter), and all documents filed with the court in electronic form. As stated in the *Report of the Administrative Actions Taken by the Rules Committees Support Office*, virtually all

of the courts of appeals, district courts, and bankruptcy courts maintain official web sites and most include the information required by the legislation.

In a last-minute move, language proposed by the Department of Justice was inserted in H.R. 2458 that would, among other things, require the Supreme Court to promulgate rules under the Rules Enabling Act to protect privacy, security, and public availability of documents filed electronically. The revised legislation also authorizes the Judicial Conference to issue interim rules and "interpretive statements" relating to the application of such rules. The House passed the bill on November 15, 2002. On the same day, the Senate passed H.R. 2458 and cleared it for the President.

In September 2001, the Judicial Conference considered and adopted a policy on privacy and public access to court records. The Conference's position was thereafter communicated to the Senate Committee on Governmental Affairs on March 15, 2002, along with a request that S. 803 be amended in several respects. The Committee subsequently adopted several of the Conference's recommendations in markup and favorably reported the bill on March 21, 2002. H.R. 2458 also includes several of the Conference's recommendations.

Terrorist Victims' Courtroom Access

President Bush signed the "2002 Supplemental Appropriations Act for Further Recovery From and Response To Terrorist Attacks on the United States" on August 2, 2002. (Pub. L. No. 107-206.) Section 203 of the Act allows victims of the September 11 terrorist acts to watch the trial proceedings of Zacarias Moussaoui via closed circuit television. The Act also preserves the district court's discretion to control the manner, circumstances, or availability of the broadcast. The Act states that the court's exercise of such discretion is entitled to substantial deference.

Class Actions

During the first session, Representative Goodlatte introduced the "Class Action Fairness Act of 2001" (H.R. 2341) on June 27, 2001. Senator Grassley introduced a similar measure – the "Class Action Fairness Act of 2001" (S. 1712) – in the Senate on November 15, 2001. These bills would give the district courts original jurisdiction over class actions involving more than 100 persons in which the amount in controversy exceeds $2 million. These bills also authorize removing a class action case to a federal court based on "minimal diversity."

On March 13, 2002, the House passed H.R. 2341 by a vote of 233 to 190. The Senate took no further action on the bill, and the measure failed. It is expected that class action legislation will be introduced in the next Congress.

Bail Bond Forfeitures

On October 8, 2002, Judge Carnes testified before the House Judiciary Committee's Subcommittee on Crime, Terrorism, and Homeland Security at a hearing on the "Bail Bond Fairness Act of 2001." (H.R. 2929.) H.R. 2929 would amend, among other things, Criminal Rule 46(e)(1) to provide that judges may declare bail bonds forfeited only when the defendant actually fails to appear before the court as ordered. The Judicial Conference opposes the legislation, concluding that current Criminal Rule 46(e) provides judges with valuable flexibility to impose additional safeguards that ensure a defendant's compliance with the conditions of release. Director Mecham, as Secretary of the Judicial Conference, sent a letter to Representatives Sensenbrenner, Smith, Conyers, and Scott on October 10, 2002, informing them of the Conference's position on H.R. 2929. (See attached.) No further action was taken and the bill failed.

Protective Orders

On September 18, 2002, Senator Kohl sent a letter to Director Mecham, as Secretary of the Judicial Conference, exhorting the Judicial Conference to "consider appropriate changes to Rule 26 of the Federal Rules of Civil Procedure." Citing recent safety and public health issues, Senator Kohl urged the Conference to consider amending Civil Rule 26 to provide bases for modifying or dissolving protective orders issued by a court.

Director Mecham responded to Senator Kohl's concerns in a letter dated October 3, 2002. (See attached.) In his letter, Director Mecham clarified that the Advisory Committee on Civil Rules opposed "only that part of proposed legislation that would have required a judge to make particularized findings of fact before approving any protective order concerning discovery materials." Director Mecham pointed out that the Advisory Committee drew a sharp distinction between protective orders concerning discovery matters and sealing orders pertaining to filed settlement agreements, and limited its comments to the former. Director Mecham also noted that there is currently no Civil Rule that addresses the sealing of filed settlement agreements.

Director Mecham concluded by saying that the Advisory Committee will be conducting a thorough review of sealing filed settlement agreements and whether there should be a national rule governing the practice.

Oversight Hearing on Unpublished Appellate Court Opinions

On June 27, 2002, the House Judiciary Committee's Subcommittee on Courts, the Internet, and Intellectual Property held an oversight hearing on the precedential value of unpublished appellate court opinions. Judge Samuel A. Alito, Jr., testified on behalf of the Judicial Conference and presented the judiciary's views on unpublished opinions. (See attached.)

James N. Ishida

Attachments

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

ANTHONY J. SCIRICA
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

SAMUEL A. ALITO, JR.
APPELLATE RULES

A. THOMAS SMALL
BANKRUPTCY RULES

DAVID F. LEVI
CIVIL RULES

EDWARD E. CARNES
CRIMINAL RULES

MILTON I. SHADUR
EVIDENCE RULES

June 12, 2002

Honorable Patrick J. Leahy
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Mr. Chairman:

On April 29, 2002, the Supreme Court transmitted to Congress a revision of all the Federal Rules of Criminal Procedure to clarify and simplify their language in accordance with the Rules Enabling Act. 28 U.S.C. §§ 2072-2077. No "substantive" changes were intended unless otherwise specifically indicated in the Committee Notes accompanying the amendments. The comprehensive revision takes effect on December 1, 2002, unless Congress acts in the interim to modify or reject them. I write to alert you to inadvertently omitted provisions in revised Rule 16(a)(1)(G) (presently numbered Rule 16(a)(1)(E)) and Rule 16(b)(1)(C) that need to be reinserted, effective December 1, 2002, to prevent unintended and undesirable substantive changes.

In 1997, two provisions of Rule 16 were amended to impose reciprocal obligations on the government and defendant requiring each to disclose their expert witnesses' testimony on the defendant's mental condition bearing on the issue of guilt. Rule 16(b)(1)(C) was amended to require a defendant at the government's request to give a written summary of the expert mental-condition testimony that the defendant intends to use at trial (after giving notice under Rule 12.2 of its intent to present the evidence). At the same time, Rule 16(a)(1)(E) (renumbered as Rule 16(a)(1)(G)) was amended to require the government to give a written summary of the expert mental-condition testimony that it intends to use at trial (after the defendant provides a written summary of its expert witness's testimony at the government's request). Failure to give advance notice of these experts and their testimony commonly results in the necessity for a significant continuance in the middle of trial. The amendments were non-controversial and since promulgation they have worked as intended.

The 1997 provisions were inadvertently deleted during the lengthy drafting process culminating in the comprehensive revision of the criminal rules. Unless corrected, the provisions will be eliminated from the Federal Rules of Criminal Procedure on December 1, 2002, and the procedures will then revert to those in effect before 1997, causing surprises at trial and leading to unnecessary continuances.

On behalf of the federal judiciary, we recommend that your committee:

(1) amend Rule 16(a)(1)(G) and (b)(1)(C), as transmitted by the Supreme Court on April 29, 2002, to include the substance of the inadvertently omitted 1997 amended provisions, and

(2) set the effective date of Rule 16(a)(1)(G) and (b)(1)(C), as amended by Congress, on December 1, 2002, to coincide with the date on which the comprehensive revision is to take effect to prevent undue confusion.

Corrected Rule 16(a)(1)(G) and (b)(1)(C) provisions that reinstate the omitted 1997 amendments are set out below. The "corrections" will restore the existing provisions with only the indicated minor stylistic changes.

Corrected Rule 16(a)(1)(G)
(Omitted matter struck through; new matter underlined.
Based on existing Rule 16(a)(1)(E).)

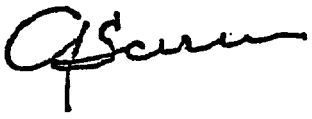
(EG) *Expert Witnesses*. At the defendant's request, the government ~~shall disclose~~ must give to the defendant a written summary of any testimony that the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence during its case-in-chief at trial. If the government requests discovery under subdivision (b)(1)(C)(ii) of this rule and the defendant complies, the government ~~shall~~ must, at the defendant's request, ~~disclose~~ give to the defendant a written summary of testimony the government intends to use under Rules 702, 703, or 705 as evidence at trial on the issue of the defendant's mental condition. The summary provided under this subdivision ~~shall~~ must describe the witnesses' opinions, the bases and the reasons for those opinions, and the witnesses' qualifications.

Corrected Rule 16(b)(1)(C)
(Omitted matter struck through; new matter underlined.
Based on existing Rule 16(b)(1)(C).)

(C) *Expert Witnesses.* Under the following circumstances, the defendant ~~shall~~ must, at the government's request, ~~disclose~~ give to the government a written summary of any testimony that the defendant intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence as evidence at trial: (i) if the defendant requests disclosure under subdivision (a)(1)~~(E)~~(G) of this rule and the government complies, or (ii) if the defendant has given notice under Rule 12.2(b) of an intent to present expert testimony on the defendant's mental condition. This summary ~~shall~~ must describe the witnesses' opinions, the bases and reasons for those opinions, and the witnesses' qualifications.

Thank you for considering our request. If you have any questions about this matter, please call me, or Michael W. Blommer (202-502-1700).

Sincerely,



Anthony J. Scirica
Judge, Third Circuit Court of Appeals

cc: Honorable Charles E. Schumer

JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

LEONIDAS RALPH MECHAM
Secretary

October 10, 2002

Honorable F. James Sensenbrenner, Jr.
Chairman, Committee on the Judiciary
United States House of Representatives
2138 Rayburn House Office Building
Washington, D.C. 20515

Honorable Lamar S. Smith
Chairman, Subcommittee on Crime,
Terrorism, and Homeland Security
Committee on the Judiciary
United States House of Representatives
207 Cannon House Office Building
Washington, D.C. 20515

Honorable John Conyers, Jr.
Ranking Democrat
Committee on the Judiciary
United States House of Representatives
B351C Rayburn House Office Building
Washington, D.C. 20515

Honorable Robert C. Scott
Ranking Democrat
Committee on the Judiciary
United States House of Representatives
B336 Rayburn House Office Building
Washington, D.C. 20515

Dear Representatives Sensenbrenner, Smith, Conyers, and Scott:

On September 24, 2002, the Judicial Conference of the United States voted to oppose legislation that would amend Federal Rule of Criminal Procedure 46 to eliminate the authority of a judge to forfeit a bail bond for breach of a condition of release other than for failing to appear physically before the court.

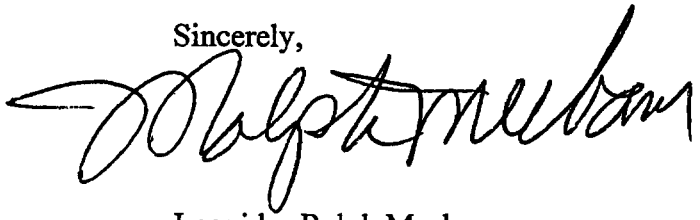
The Judicial Conference considered this matter in response to your letter of May 22, 2002, requesting the Conference's position on the Bail Bond Fairness Act of 2001 (H.R. 2929). The Conference acted on the recommendation of the Committee on Rules of Practice and Procedure and the Advisory Committee on Criminal Rules, which began its study of this issue in 1998. At that time, Judge W. Eugene Davis (advisory committee chairman) testified before a House Judiciary Subcommittee on similar bail-bond legislation and expressed concern with the bill's provisions. Soon after the hearing, the full advisory committee concurred with Judge Davis's concerns after reviewing a survey of magistrate judges and relevant case law. The advisory committee voted to oppose the proposed legislation in April 1998. Recently, the advisory committee reaffirmed its opposition to proposed bail-bond legislation at its meeting in April 2002.

In reaching its decision to oppose the proposed legislation, the advisory committee had surveyed magistrate judges and learned that Rule 46 is working well. Bail bonds in a large majority of districts are forfeited only if the defendant fails to appear at a scheduled proceeding. In some districts, however, courts incorporate conditions of release as part of the bail bond and may forfeit bonds for violations of those release conditions. In these districts, the magistrate judges strongly believe that holding a relative's or friend's assets at risk significantly increases the probability that the defendant will comply with all the release conditions. Absent this guarantee, these magistrate judges would be more reluctant to release a particular defendant. And in these cases, a magistrate judge might well decide to retain a defendant in custody rather than expose the court to the risk that the defendant will violate a significant release condition, e.g., refrain from stalking a victim or witness. In fact, some defendants themselves propose that their bail bond be subject to forfeiture if they fail to abide by the release conditions as a means of persuading a judge to release them.

The federal courts infrequently release a defendant on a bond executed by a professional bondsman because it is the least desired condition of release under the Bail Reform Act, and because other conditions of release are better suited to ensure the defendant's appearance at court proceedings and to protect the public safety. Most bail bonds in federal court are executed by the defendant or are co-signed by a family member. The Bail Bond Fairness Act of 2001 would impair the federal judiciary's ability to enforce these bail bonds. The advisory committee concluded that Rule 46(e) provides judges with the valuable flexibility to impose added safeguards ensuring a defendant's compliance with conditions of release and opposed legislation restricting it.

For your information, I am enclosing a copy of Judge Edward Carnes's statement on behalf of the Judicial Conference expressing opposition to H.R. 2929, the Bail Bond Fairness Act of 2001. If you have any questions about this matter, please contact Michael Blommer in the Office of Legislative Affairs at 502-1700.

Sincerely,



Leonidas Ralph Mecham
Secretary

Enclosure

cc: Committee on the Judiciary,
United States House of Representatives
Honorable Anthony J. Scirica
Honorable Edward E. Carnes

JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

LEONIDAS RALPH MECHAM
Secretary

October 3, 2002

Honorable Herb Kohl
United States Senate
380 Hart Senate Office Building
Washington, D.C. 20510

Dear Senator Kohl:

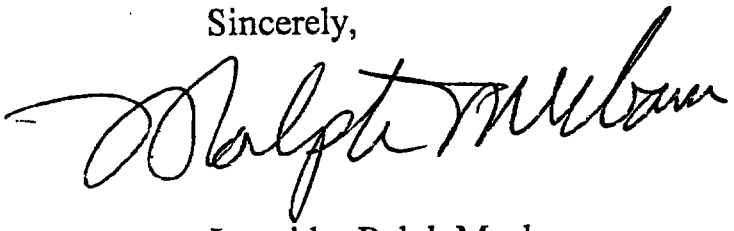
Thank you for your September 18, 2002, letter urging the Judicial Conference to "consider appropriate changes to Rule 26 of the Federal Rules of Civil Procedure." I have sent your letter to Judge David F. Levi, chair of the Advisory Committee on Civil Rules, who has informed me that he has placed the matter on the committee's agenda.

As you may recall, the Advisory Committee opposed only that part of proposed legislation that would have required a judge to make particularized findings of fact before approving any protective order concerning discovery materials. The Advisory Committee's opposition was based on a comprehensive study of protective orders and represented a concern that the proposed legislation would unnecessarily complicate discovery practices, increase cost, and prove counterproductive. Most protective orders in the course of discovery are issued to protect valid privacy interests in employment and civil rights cases or trade secrets in intellectual property litigation. The Advisory Committee drew a sharp distinction between protective orders concerning discovery materials and sealing orders related to filed settlement agreements, carefully limiting its comments to the former.

The sealing of filed settlement agreements presents different issues from protective orders concerning private, usually unfiled, discovery materials. Moreover, unlike Rule 26 protective orders, there is no Federal Rule of Civil Procedure governing the sealing of filed settlement agreements. This has been left to case law and local court rules.

Several weeks ago the Advisory Committee began considering whether the sealing of filed settlement agreements should be placed on the agenda. The Committee is now planning a thorough investigation of the matter. It will begin its work with a review of the pertinent local district court rules and state court rules as well as the case law to determine whether a national rule governing sealing settlements is feasible and appropriate.

Sincerely,



Leonidas Ralph Mecham
Secretary

cc: Honorable Anthony J. Scirica
Honorable David F. Levi

STATEMENT OF JUDGE SAMUEL A. ALITO, Jr.,
ON BEHALF OF
THE JUDICIAL CONFERENCE OF THE UNITED STATES

JUNE 27, 2002

Mr. Chairman and members of the subcommittee, I am Samuel A. Alito, Jr., judge of the United States Court of Appeals for the Third Circuit. I appear today on behalf of the Judicial Conference of the United States, which is the policy-making arm of the federal courts. I chair the Advisory Committee on the Federal Rules of Appellate Procedure. Thank you for the opportunity to share the views of the federal judiciary on "unpublished" courts of appeals opinions.

Court of appeals decisions are and always have been public. But not all opinions have been reported and included in printed volumes issued by the major legal publishers. Traditionally, major legal printers published only opinions that were submitted for that purpose by the judges authoring them. About forty years ago, the federal judiciary instituted a policy discouraging the publication of all "non-precedential" opinions in order to cope with the exponentially expanding volume of litigation. This policy was adopted for a variety of reasons, including to conserve opinion-writing time for precedent-setting decisions, to preserve the consistency and quality of precedential opinions, and to save time and money for attorneys, who would otherwise find it necessary to research a hugely increased body of case law and to pay for a great many additional volumes of case reports. Presently, most final decisions of the courts of appeals are "unpublished" — that is, they are not printed in the *Federal Reporter*.

Soon after the "unpublished-opinions" policy took effect, courts of appeals developed local procedural rules to restrict the citation of "unpublished" opinions. This was done in large part for the purpose of dispelling any suspicion that institutional litigants and others who might have ready access to collections of unpublished opinions had an advantage over other litigants without such access. Thus, lawyers were prevented from citing "unpublished" opinions in their briefs primarily as a matter of fairness. With the advent of computer assisted legal research, however, the reference to "unpublished" opinions is now something of a misnomer since the overwhelming majority of opinions are now readily available to the public, often at minimal or no cost because they are posted on court web sites and are now printed in a new series of casebooks called the *Federal Appendix* that is available in most law libraries.

Although the justification for prohibiting citation to "unpublished" opinions as a matter of fairness may no longer be viable because most opinions are available electronically, several courts of appeals continue for other reasons to prohibit or otherwise limit citation to "unpublished" opinions. They remain concerned that the problems that prompted the adoption of the Judicial Conference's "unpublished-opinions" policy may be exacerbated by a policy permitting universal citation. The debate engendered over the appropriate use and precedential value of "unpublished" opinions implicates important competing interests, and the federal judiciary continues to study this subject carefully and to confer with the bar. The effort has now focused on a draft rule amendment governing "unpublished" opinions that has been proposed by the Department of Justice and will be considered by the Advisory Committee on the Federal Rules of Appellate Procedure at its November 2002 meeting.

History of Judiciary Actions Regarding "Unpublished" Opinions

The federal courts of appeals have a longstanding practice of designating certain decisions as "unpublished opinions." Faced with an overwhelming and growing volume of reported court decisions, the Judicial Conference in 1964 began to encourage judges to report only opinions that were of general precedential value. In 1972, the Conference asked each court to develop a formal publication plan restricting the number of opinions being reported. The Federal Judicial Center surveyed the courts and recommended criteria to help them designate which opinions should be forwarded to be published. By 1974, each court of appeals had a plan in operation.

By the 1980's and 1990's, one of the justifications for limited publication no longer applied, because new technologies facilitated electronic storage and easy retrieval of immense quantities of data. In 1990, the Federal Courts Study Committee recommended that the Judicial Conference establish an ad hoc committee to study whether technological advances gave reason to reexamine the policy on "unpublished" opinions. The committee did not endorse a universal publication policy, but it noted that "non-publication policies and non-citation rules present many problems." The Conference did not act on that recommendation.

During the past decade, amendments to the rules have been periodically proposed to the Advisory Committee on the Federal Rules of Appellate Procedure to establish uniform procedures governing "unpublished" opinions. In 1998, the former chair of the advisory committee surveyed the chief circuit judges and received a virtually unanimous response that uniform rules were unnecessary. In January 2001, the Solicitor General, on behalf of the Department of Justice, proposed specific language amending the Federal Rules of Appellate

Procedure to provide for uniform procedures governing the citation of unpublished opinions. The committee is now studying the Justice Department proposal.

Limiting Publication of Opinions

"(A)ppellate opinions serve essentially two functions: to resolve particular disputes between litigants and to clarify or redefine the law in some manner." ☐ Up until the 1960's, the volume of appellate opinions was sufficiently manageable to allow careful writing for virtually all decisions. The well-documented explosion in the appellate workload since then has been thought by the judiciary to present compelling doctrinal and practical reasons to limit the "publication" — that is, the public dissemination — of opinions.

First, the judiciary has been concerned that important precedential opinions will be obscured by the thousands of opinions that are issued each year by the courts of appeals to decide cases that do not present any questions of significant precedential value. Opinions dealing with the easy application of established law to specific facts have little use as precedent for other litigants or posterity. A brief written opinion is all that is necessary to inform the litigants of the outcome and the reasons for it.

Second, the judiciary has been concerned that the universal publication of opinions would either produce a deterioration in the quality of opinions or impose intolerable burdens on judges in researching and drafting opinions. Drafting an opinion that is to be applied as a precedent in future cases is a time-consuming task. All of the relevant facts and all of the relevant aspects of the procedural history of the case must be set out. In addition, the discussion of all pertinent legal authorities and the holding must be phrased so that the opinion will not be misunderstood. The opinion must be crafted with the recognition that some future litigants may seize on any ambiguity in order to achieve an unwarranted benefit or escape the opinion's force. It would be virtually impossible for the courts of appeals to keep current with their case loads if they attempted to produce such an opinion in every case.

Responsible appellate judges must devote more time to an opinion that changes the law or clarifies it in an important way (and may thus affect many litigants in future cases) than to an opinion that simply applies well-established law to specific facts (and thus affects solely the litigants at hand). This is not to say, of course, that *the decision* in the latter type of case is unimportant or that *the decision* may be made with less care. But because the primary function of *the opinion* in such a case is to inform the parties of the basis for decision, not to serve as a guide for future litigation, the opinion need not be as detailed or formal.

Most of the courts of appeals have a local rule governing the citation of "unpublished" or "non-precedential" opinions. Many of the courts initially prohibited citation of such opinions because, as mentioned, they were largely unavailable to the public. Although technology has mooted the "fairness" justification for prohibiting citation to "unpublished" opinions, some courts believe that limiting citation is useful for other reasons. Three of the circuits generally forbid citation, except under very limited circumstances (First, Seventh, and Ninth circuits). Others either generally permit citation or allow citation for limited purposes, such as to establish res judicata or collateral estoppel (D.C., Third, Fourth, Fifth, Sixth, Eighth, Tenth, and Eleventh Circuits). Although permitting citation, some of these local rules explicitly state that "unpublished" opinions lack precedential value. Still others recognize that unpublished opinions may have persuasive value (Fifth, Eighth, Tenth, and Eleventh Circuits). All courts of appeals agree that unpublished opinions are not binding precedent. A few courts of appeals have rules permitting counsel to recommend to the court that it "publish" a particular opinion.

A variety of recent developments have led courts of appeals to reexamine and in some

instances alter their rules and practices regarding "unpublished" or non-precedential opinions. As noted, the vast majority of non-precedential opinions issued by the courts of appeals are now readily available to attorneys and the public. In the past few years, judicial decisions and scholarly articles have begun to explore the question whether the Constitution limits the authority of the federal courts to issue non-precedential opinions. ☐ The judiciary is also acutely aware that past practices regarding non-precedential opinions have led to misperceptions and that some scholars, practitioners, and others have voiced strong arguments against the continuation of some of those practices.

Present Work of the Appellate Rules Committee

The Department of Justice proposal to which I referred emerged from this backdrop. As noted, the Department of Justice has proposed an amendment to the Federal Rules of Appellate Procedure governing unpublished opinions. It is deliberately narrow and permits citation to an "unpublished" opinion only if: (1) it directly affects a related case, e.g., by supporting a claim of res judicata or collateral estoppel, or (2) "a party believes that it persuasively addresses a material issue in the appeal, and that no published opinion of the forum court adequately addresses the issue." The proposal also requires that a copy of the "unpublished" opinion be attached to any document in which it is cited. The proposal takes no position on the precedential value of an "unpublished" opinion and does not dictate whether or to what extent a court should designate opinions as "unpublished." The Department of Justice continues to endorse the proposal. As a litigant in all the circuits, it believes that a uniform national rule would be beneficial.

In response to the Justice Department proposal, the advisory committee undertook a review of the extensive number of articles and surveys on the subject and found that these express conflicting views. In accordance with its past practices, the committee surveyed the

various courts of appeals. The responses from the courts of appeals manifested no consensus on the proposal advocated by the Justice Department. Unlike earlier surveys, however, several courts expressed no objection to implementing a rule on the citation of unpublished opinions. Others continued to express strong reservations. The complexity and competing interests were summed up in one response, which concluded that "the difficulty is that the decisions as to whether and when to publish, what kind of explanation to give, and what force should be given to a limited or no citation opinion are bound up together and are substantially affected by conditions that may vary from one circuit to another." The concern is shared by others who fear that permitting citation to "unpublished" or "non-precedential" opinions will inexorably cause judges to try to draft those opinions in the same manner as precedential opinions and that this will substantially disrupt the efficient functioning of the courts.

The Advisory Committee on Appellate Rules discussed the Justice Department proposal at its last meeting in April 2002 and will again consider the Department of Justice proposal at its November 2002 meeting.

Conclusions

The subject of unpublished opinions raises many difficult issues that must be addressed on several different levels. At the same time, the practices governing "unpublished" opinions continue to evolve in the respective courts of appeals, with a majority permitting citation under certain circumstances. For example, the D.C. Circuit very recently amended its local rules to eliminate a former prohibition against citing unpublished opinions. It now permits citation "as precedent" of any decision issued by the court after January 1, 2002.

The doctrine of precedent (*stare decisis*) was established as part of the common law,

and the development of this doctrine has long been committed primarily to the stewardship of the Third Branch. As part of its "unpublished-opinions" policy, the Judicial Conference has deliberately promoted experimentation by giving the respective courts of appeals local discretion in this area. Whether the benefits of uniform procedures governing citation of opinions outweigh the flexibility of local procedures is subject to no easy answer. The federal judiciary is actively engaged in studying the experiences of the courts and all the implications regarding the appropriate use of "unpublished" opinions.

We welcome the oversight of Congress and look forward to any new information that it may gather on this important issue. Thank you again for the opportunity to express the judiciary's views.

LEGISLATION AFFECTING THE FEDERAL RULES OF PRACTICE AND PROCEDURE[1]
107th Congress

SENATE BILLS

- S. 16 - *21st Century Law Enforcement, Crime Prevention, and Victims Assistance Act*
  - Introduced by: Daschle.
  - Date Introduced: 1/22/01.
  - Status: Referred to the Committee on the Judiciary (1/22/01).
  - Related Bill: None.
  - Key Provisions:

    — Section 2134(c) amends **Criminal Rule 35(b)** to broaden the types of information eligible for sentence reduction.

    — Section 3113 amends **Criminal Rule 11** to require the Government to make reasonable efforts to notify a victim of (1) the time and date of any hearing where the defendant plans to enter a guilty or nolo contendere plea; and (2) the right to attend and be heard at that hearing. The Judicial Conference must, within 180 days after the Act's enactment, submit to Congress a report recommending the amendment of the **Criminal Rules** to provide "enhanced opportunities" for victims to be heard on whether the court should accept the defendant's guilty or no contest plea. Said report must be submitted no later than 180 days after enactment of the Act.

    — Section 3115 amends **Criminal Rule 32** to require a probation officer to give the victim an opportunity to submit a statement to the court regarding a sentence before the probation officer submits his or her presentence report to the court.

    — Section 3116 amends **Criminal Rule 32.1(a)** to require that the Government make reasonable efforts to notify the victim of the right to notice and opportunity to be heard at any hearing to revoke or modify the defendant's sentence. The Judicial Conference must submit to Congress a report recommending the amendment of the **Criminal Rules** to provide notice of any revocation hearing held pursuant to **Criminal Rule 32.1(a)(2)** to the victim and to afford an opportunity to be heard.

- S. 34 - *A bill to eliminate a requirement for a unanimous verdict in criminal trials in Federal courts*
  - Introduced by: Thurmond.
  - Date Introduced: 1/22/01.

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[1]The Congress has authorized the federal judiciary to prescribe the rules of practice, procedure, and evidence for the federal courts, subject to the ultimate legislative right of the Congress to reject, modify, or defer any of the rules. The authority and procedures for promulgating rules are set forth in the Rules Enabling Act. 28 U.S.C. §§ 2071-2077.

- Status: Referred to the Committee on the Judiciary (1/22/01).
- Related Bill: None.
- Key Provisions:

  — The bill amends **Criminal Rule 31(a)** to eliminate the requirement of a unanimous verdict in a criminal trial and would instead require a verdict by 5/6 of the jury.

- S. 420 - *Bankruptcy Reform Act of 2001*
  - Introduced by: Leahy, Kennedy, Feingold, Murray, Johnson, Schumer, Harkin.
  - Date Introduced: 4/26/01.
  - Status: Passed Senate with amendments by 83 - 15 (3/15/01). Senate appointed conferees on July 17, 2001. House appointed conferees on July 31, 2001. Conference report filed (July 26, 2002).
  - Related Bills: S.220, H.R.333.
  - Key Provisions:

    — Section 221 amends **Section 110, Title 11**, Bankruptcy Code, to require a bankruptcy petition preparer to provide to the debtor a notice, the contents of which are specified in the proposed amendment. The provision also states that the notice shall be an official form issued by the Judicial Conference.

    — Section 419 directs the Advisory Committee on Bankruptcy Rules, after considering the views of the Executive Office for the United States Trustees, to propose amendments to the **Bankruptcy Rules** and **Official Bankruptcy Forms** that assist the debtor in a chapter 11 case to disclose the value, operations, and profitability of any closely-held business.

    — Section 433 directs the Advisory Committee to propose amendments to the **Bankruptcy Rules** and **Official Bankruptcy Forms** that contain a standard form disclosure statement and reorganization plan for small business debtors.

    — Section 435 directs the Advisory Committee to propose amendments to the **Bankruptcy Rules** and **Official Bankruptcy Forms** rules and forms to be used by small business debtors to file periodic financial and other reports.

    — Section 716(e) expresses a "sense of Congress" that the Advisory Committee should propose amendments to the **Bankruptcy Rules** and **Official Bankruptcy Forms** that govern the treatment of tax claims in chapter 13 case.

- S. 486 - *Innocence Protection Act of 2001*
  - Introduced by: Leahy.
  - Date Introduced: 3/7/01.
  - Status: Referred to the Committee on Judiciary (6/27/01). Markup session held (7/11/02). Committee reported the bill favorably, as amended, by a vote of 12-7 (7/18/02). Committee placed on Senate legislative calendar (10/16/02).
  - Related Bills: S. 800, S. 2446, S. 2739, H.R. 912.
  - Key Provisions:

    — The bill authorizes a person convicted of a federal crime to apply to the

appropriate federal court for DNA testing to support a claim that the person did not commit: (1) the federal crime of which the person was convicted; or (2) any other offense that a sentencing authority may have relied upon when it sentenced the person with respect to such crime.

— The bill also prescribes procedures for the court to follow in ordering DNA testing.

- S. 783 - *Crime Victims Assistance Act of 2001*
  - Introduced by: Leahy, Kennedy, Feingold, Murray, Johnson, Schumer, Harkin.
  - Date Introduced: 4/26/01.
  - Status: Referred to the Committee on the Judiciary (4/26/01).
  - Related Bill: None.
  - Key Provisions:

    — Section 103(b) amends **Criminal Rule 11** to require the court, before entering judgment, to ask the Government if the victim has been consulted on the defendant's guilty plea.

    — Section 103(c)(2) directs the Judicial Conference to, within 180 days after the date of the enactment of the Act, submit to Congress a report recommending amending the **Criminal Rules** to provide "enhanced opportunities" for victims to be heard on whether the court should accept the defendant's guilty or no contest plea.

    — Section 105(b) amends **Criminal Rule 32** by striking the phrase "if the [sic] sentence is to be imposed for a crime of violence or sexual abuse."

    — Section 105(b) also amends **Criminal Rule 32(f)** to eliminate the definition of "crime of violence or sexual abuse."

- S. 791 - *Video Teleconferencing Improvements Act of 2001*
  - Introduced by: Thurmond.
  - Date Introduced: 4/26/01.
  - Status: Referred to the Committee on the Judiciary (4/26/01).
  - Related Bill: None.
  - Key Provisions:

    — The bill amends **Criminal Rule 5** to allow an initial appearance by video teleconference. Defendant's consent not required.

    — The bill amends **Criminal Rule 10** to allow arraignment by video teleconference. Defendant's consent is not required.

    — The bill amends **Criminal Rule 43** to conform to amended Rules 5 and 10 and permits sentencing by video conference under certain conditions.

- S. 800 - *Criminal Justice Integrity and Innocence Protection Act of 2001*
  - Introduced by: Feinstein.
  - Date Introduced: 4/30/01.
  - Status: Referred to the Committee on the Judiciary (4/30/01).

- Related Bill: S. 486, S. 2446, S. 2739, H.R. 912.
- Key Provisions:
  — Section 101 amends Part II, Title 18, U.S.C., by adding a chapter setting forth procedures for post-conviction DNA testing. Under the Act, if the DNA testing produces exculpatory evidence, the defendant may, during the sixty-day period following notification of the DNA test results, move for a new trial based on newly discovered evidence under **Criminal Rule 33.** The Act specifically allows such a motion "notwithstanding any provision of law that would bar such a motion as untimely."

- S. 803 - *E-Government Act of 2002*
  - Introduced by: Lieberman.
  - Date Introduced: 5/1/01.
  - Status: Referred to the Committee on Governmental Affairs (7/11/01); reported with an amendment in the nature of a substitute (3/21/02); Passed in Senate with amendment (S. Amdt 4172) (6/27/02). Message on Senate action sent to the House (7/8/02). Received in the House and referred to the House Committee on Government Reform (7/8/02). Referred to the House Committee on Technology and Procurement Policy (7/17/02). Subcommittee hearings held (9/18/02).
  - Related Bill: H.R. 2458
  - Key Provisions:
    — Title I creates the Office of Electronic Government with the Office of Management and Budget to promote and oversee the implementation of Internet-based information technology within the federal government.
    — Section 205(a) requires that each federal court establish a website that includes information such as the location and contact information for the courthouse, local rules and general orders of the court, case docket information, all written court opinions (published and unpublished), and all documents filed with the court in electronic form.
    — Section 205(b) requires that the information and rules posted on each federal court website shall be updated regularly and kept reasonably current. Electronic files and docket information pertaining to cases closed for more than one year are not required to be posted on the website. All written opinions issued after the effective date of the legislation shall remain available on the website.
    — Section 205(c) states that any document filed electronically shall be made available on the court website. However, documents not available to the public (*i.e.*, filed under seal) shall not be made available online. The Judicial Conference may promulgate rules under this section to "protect important privacy and security concerns."
    — Section 205(f) states that the federal courts must establish the Section 205(a) websites within two years after the effective date of the legislation. Access to documents filed in electronic form shall be established within four years of the effective date of the legislation.

— Section 205(g) allows courts to defer compliance with this section. The Judicial Conference shall submit an annual report to Congress that lists, summarizes, and evaluates all deferral notices.

- S. 848 - *Social Security Number Misuse Prevention Act of 2001*
  - Introduced by: Feinstein
  - Date Introduced: 5/9/01
  - Status: Referred to the Committee on Judiciary (5/9/01). Favorably reported by the Judiciary Committee, with an amendment (5/16/02). Referred to the Committee on Finance (5/16/02). Committee on Finance Subcommittee on Social Security and Family Policy held hearing on bill (July 11, 2002).
  - Related Bill: H.R. 4513
  - Key Provisions:

    — Section 3 amends **Title 18, Chapter 47**, to prohibit the sale, public display, or wrongful use of a person's social security number without that person's consent.

    — Section 4 amends **Title 18, Chapter 47**, to clarify that the above prohibition applies to court records that are available to the public. This prohibition, however, does not apply to public records that "incidentally" include a person's social security number. Section 4 defines "incidental" to mean "that the social security number is not routinely displayed in a consistent and predictable manner on the public record by a government entity, such as on the face of a document."

- S. 986 - *A bill to allow media coverage of court proceedings*
  - Introduced by: Grassley.
  - Date Introduced: 6/5/01.
  - Status: Referred to the Committee on Judiciary (6/5/01); reported without amendment and placed on Senate Legislative Calendar under General Orders (11/29/01).
  - Related Bill: H.R. 2519.
  - Key Provisions:

    — The bill authorizes a presiding district or circuit court judge to permit media coverage of court proceedings over which that judge presides.

    — The bill also authorizes the Judicial Conference to promulgate advisory guidelines in order to implement a media coverage policy.

- S. 1315 - *Judicial Improvement and Integrity Act of 2001*
  - Introduced by: Leahy.
  - Date Introduced: 8/2/01.
  - Status: Referred to the Committee on Judiciary (8/2/01).
  - Related Bill: None.
  - Key Provisions:

    — The bill (1) amends 18 U.S.C. § 1512 to increase the criminal penalty for those who use physical force or threaten the use of physical force against witnesses, victims, or informants; (2) amends Title 18, U.S.C., to authorize the imposition of

both a fine and a term of imprisonment; (3) amends Chapter 213 of title 18, U.S.C., to permit the reinstatement of criminal counts dismissed pursuant to a plea agreement; and (4) clarifies certain sentencing provisions.

- S. 1437 - *Professional Standards for Government Attorneys Act of 2001*
  - Introduced by: Leahy.
  - Date Introduced: 9/19/01.
  - Status: Referred to the Committee on Judiciary (9/19/01).
  - Related Bill: None.
  - Key Provisions:

    — The bill amends **28 U.S.C. § 530B** to: (1) clarify the applicable standards of professional conduct that apply to a "government attorney"; (2) provide that a "government attorney" may participate in covert activities, even though such activities may involve the use of deceit or misrepresentation; and (3) direct the Judicial Conference to prepare two reports regarding the regulation of government attorney conduct.

    — The Act also directs the Judicial Conference to come up with recommendations for amending the **federal rules** to (a) provide for a uniform national rule for "government attorneys" with respect to communicating with represented persons and parties, and (b) address any areas of actual or potential conflict between the regulation of "government attorneys" by existing standards of professional responsibility and the duties of "government attorneys" as they relate to the investigation and prosecution of federal law violations.

- S. 1615 - *Federal-Local Information Sharing Partnership Act of 2001*
  - Introduced by: Schumer
  - Date Introduced: 11/1/01.
  - Status: Referred to the Senate Committee on the Judiciary (11/1/01). Hearing held (12/11/01). Report by the Senate Judiciary Committee with an amendment in the nature of a substitute and placed on Senate Legislative Calendar (9/5/02).
  - Related Bill: H.R. 3285, H.R. 4598.
  - Key Provisions:

    — Section 2 amends **Criminal Rule 6(e)(3)(C)(i)(V)** to allow the disclosure of grand jury information pertaining to foreign intelligence or counterintelligence to state or local law enforcement officials.

- S. 1712 - *Class Action Fairness Act of 2001*
  - Introduced by: Grassley
  - Date Introduced: 11/15/01.
  - Status: Referred to the Committee on Judiciary (11/15/01). Committee on the Judiciary held hearings (7/31/02).
  - Related Bill: H.R. 2341.
  - Key Provisions:

— Section 3 amends **28 U.S.C.** by including an additional chapter on class actions. The Act includes provisions on settlement, notices of settlement information to class members, jurisdiction of federal courts, and removal of class action proceedings to federal court.
— The Act also directs the Judicial Conference to prepare and submit a report to the House and Senate Committees on the Judiciary within 12 months from the date of the enactment of the Act. In these reports, the Judicial Conference shall include the following: (1) recommendations on the "best practices" that courts can use to ensure that settlements are fair, (2) recommendations to ensure that class members are the primary beneficiaries of settlements, and (3) the actions that the Judicial Conference will take to implement its recommendations.

- S. 1751 - *Terrorism Risk Insurance Act of 2001*
  - Introduced by: Gramm.
  - Date Introduced: 11/30/01.
  - Status: Referred to the Senate Committee on Banking, Housing, and Urban Affairs (11/30/01).
  - Related Bills: H.R. 3210; S. 1748.
  - Key Provisions:

    — Under section 9, within 90 days after the occurrence of an act of terrorism the Judicial Panel on Multidistrict Litigation shall assign a single federal district court to conduct pretrial and trial proceedings in all pending and future civil actions for property damage, personal injury, or death arising out of or resulting from that act of terrorism. The district court assigned by the Judicial Panel on Multidistrict Litigation shall have original and exclusive jurisdiction over all such actions. Punitive or exemplary damages are not allowed under the Act.

- S. 1858 - *Terrorist Victims' Courtroom Access Act*
  - Introduced by: Allen.
  - Date Introduced: 12/19/01.
  - Status: Referred to the Senate Committee on the Judiciary (12/19/01). Passed Senate with an amendment by unanimous consent (12/20/01). Received in House (1/23/02) and referred to House Committee on the Judiciary (1/23/02). Referred to the House Subcommittee on Courts, the Internet, and Intellectual Property (3/18/02). Modified version of bill passed as part of the 2002 Supplemental Appropriations Act (section 203. Passed House by a vote of 397-32 on July 23, 2002; passed Senate by a vote of 92-7 on July 24, 2002; signed by President on August 2, 2002. Public Law 107-206).
  - Related Bills: H.R. 3611.
  - Key Provisions:

    — Section 2 would authorize, notwithstanding any provision of the Criminal Rules, the closed circuit broadcast of the trial of Zacarias Moussaoui to the victims of the terrorist act of September 11, 2001. The proceedings shall be broadcast to locations in Northern Virginia, Los Angeles, New York City, Boston, Newark,

San Francisco, and any other location that the trial court determines.

- S. 2446 - *Confidence in Criminal Justice Act of 2002*
  - Introduced by: Specter
  - Date Introduced: 5/2/02.
  - Status: Referred to the Senate Committee on the Judiciary (5/2/02).
  - Related Bills: S. 486, S. 800, S. 2739, H.R. 912
  - Key Provisions:

    — Section 102 would amend 28 U.S.C. § 2251 (Habeas Corpus - Stay of State Court Proceedings) to authorize a justice or judge in a habeas corpus case involving a death sentence to stay execution of sentence until the proceeding is completed. Section 102 would also amend 28 U.S.C. § 2255 to authorize a justice or judge in a proceeding involving a federal death sentence to stay execution of sentence until the proceeding is completed.

    — Section 201 would amend Part II of Title 18, United States Code, by providing provisions on DNA testing procedures.

- S. 2600 - *Terrorism Risk Insurance Act of 2002*
  - Introduced by: Dodd
  - Date Introduced: 6/7/02
  - Status: Introduced in the Senate. Read the first time. Placed on Senate Legislative Calendar (6/7/02). Measure laid before Senate by unanimous consent (6/13/02). Passed Senate with amendments by 84-14 (6/18/02). Senate later incorporated this bill in H.R. 3210 as an amendment (7/25/02).
  - Related Bills: H.R. 3210; S. 1748.
  - Key Provisions:

    — Section 10 provides for a federal cause of action for property damage, personal injury, or death arising out of or resulting from an act of terrorism. This cause of action shall be the exclusive remedy and recourse for such claims, with the exception of any actions filed against any person, government, or other entity that was a participant in, or aider and abettor of, any act of terrorism. Section 10 preempts all state actions arising out of such acts of terrorism. Punitive damages awarded in such a civil action shall not count as insurable losses under this Act.

    — Section 10 also sets forth provisions governing the applicable law.

- S. 2739 - *Death Penalty Integrity Act of 2002*
  - Introduced by: Hatch
  - Date Introduced: 7/17/02
  - Status: Referred to Senate Committee on the Judiciary (7/17/02).
  - Related Bills: S. 486, S. 800, S. 2446, H.R. 912.
  - Key Provisions:

    — Section 101 would amend Part II of Title 18, U.S.C., to set forth the procedures for a person convicted of a federal crime and is serving a term of

imprisonment to file a motion for the performance of DNA testing. The section thereafter sets forth the procedures for DNA testing.

- S. 2917 - *Comprehensive Child Protection Act of 2002*
  - Introduced by: Hatch
  - Date Introduced: 9/10/02
  - Status: Referred to Senate Committee on the Judiciary (9/10/02).
  - Related Bills: None.
  - Key Provisions:

    — Section 6 amends **Evidence Rule 414** to permit the prosecution to introduce evidence that the defendant had committed the offense of possessing sexually explicit materials involving minors. Section 6 also amends the definition of "child" in **Evidence Rules 414 and 415** to mean a person below the age of 18 (instead of the current fourteen).

- S. 3050 - *Multiparty, Multiforum Trial Jurisdiction Act of 2002*
  - Introduced by: Hatch
  - Date Introduced: 10/3/02
  - Status: Referred to Senate Committee on the Judiciary (10/3/02).
  - Related Bills: None.
  - Key Provisions:

    — Section 2 amends **section 85 of title 28, U.S.C.,** to give the district courts original jurisdiction over any civil action involving minimal diversity between adverse parties that arises from a single accident where at least 75 natural persons have died in an accident at a discrete location, provided: (1) a defendant resides in a state and a substantial part of the accident took place in another state; (2) any two defendants reside in different states; or (3) substantial parts of the accident took place in different states. Section 2 also addresses limitations of district court jurisdiction, definitions of terms, notification of the Judicial Panel on Multidistrict Litigation, venue, removal, service, and subpoenas.

HOUSE BILLS

- H.R. 199 - *Law Enforcement Officers Privacy Protection Act*
  - Introduced by: Sweeney.
  - Date Introduced: 1/3/01.
  - Status: Referred to the House Judiciary Committee (1/3/01); referred to the Subcommittee on Courts, the Internet, and Intellectual Property (2/12/01).
  - Related Bills: None.
  - Key Provisions:

    — Section 2 amends **Civil Rule 26(b)** by adding a new subdivision that would allow the discovery of law enforcement personnel records only "upon a showing by the party seeking discovery that there exists a reasonable basis, supported by

facts, for contending that the records sought are necessary and material to an issue involved in the pending action."

- H.R. 333 - *Bankruptcy Abuse Prevention and Consumer Protection Act of 2001*
  - Introduced by: Gekas.
  - Date Introduced: 1/31/01.
  - Status: House-Senate conference with S. 420 and S. 220 (7/31/01); House-Senate conference held (5/22/02). Conference report filed (7/26/02). House voted 172-243 against considering the conference report (11/15/02). House passed revised bill without abortion-clinic provision by a vote of 244-116 (11/15/02).
  - Related Bills: H.R. 71, S. 220, S. 420.
  - Key Provisions:

— Section 319 expresses "the sense of the Congress" that **Bankruptcy Rule 9011** be amended to require a debtor, before submitting any documents to the court, to make all reasonable inquiries to ensure that the information contained within the submitted papers are well grounded in law and in fact.

— Section 323 amends the **federal judicial code** to: (1) grant the presiding judge exclusive jurisdiction over the debtor's and the estate's property, as well as over claims relating to employment or disclosure of bankruptcy professionals; and (2) increase bankruptcy fees and monies deposited as offsetting collections to both the U.S. Trustee Systems Fund and a special Treasury fund.

— Section 419 directs the Advisory Committee to propose amendments to the **Bankruptcy Rules** and the **Bankruptcy Forms** to require Chapter 11 debtors to disclose any information relating to the value, operations, and profitability of any closely held corporation, partnership, or entity that the debtor holds a substantial interest in.

— Section 433 directs the Advisory Committee to propose new **Bankruptcy Forms** on standardized disclosure statements and plans of reorganization for small business debtors.

— Section 435 directs the Advisory Committee to propose amendments to the **Bankruptcy Rules** and the **Bankruptcy Forms** to assist small business debtors in complying with new uniform national reporting requirements.

— Section 601 amends **chapter 6 of title 28, U.S.C.**, to direct: (1) the clerk of each district to compile bankruptcy statistics for individual debtors with primarily consumer debt seeking relief under chapters 7, 11, and 13; (2) the Administrative Office of the U.S. Courts to make such statistics public; and (3) the AO to report the statistics annually to the Congress.

— Section 604 expresses the sense of Congress that: (1) the public record data maintained by bankruptcy clerks in electronic form should be released in electronic form to the public subject to privacy concerns and safeguards as developed by the Congress and the Judicial Conference; and (2) a bankruptcy data system should be established.

— Section 716 expresses the sense of Congress that the Advisory Committee

propose amendments to the **Bankruptcy Rules** and **Bankruptcy Forms** regarding objections to a plan confirmation by a government unit and to tax returns.
— Section 1233 amends **chapter 158 of title 28, U.S.C.**, to give the courts of appeal jurisdiction to authorize immediate interlocutory appeals from the district court and bankruptcy appellate panel.

- H.R. 733 - *Parent-Child Privilege Act of 2001*
  - Introduced by: Andrews.
  - Date Introduced: 2/27/01.
  - Status: Referred to the House Judiciary Committee (2/27/01); referred to the Subcommittee on Courts, the Internet, and Intellectual Property (3/9/01).
  - Related Bills: None.
  - Key Provisions:
    — Section 2 amends the **Evidence Rules** by adding new Rule 502 creating a parent-child privilege.

- H.R. 860 - *Multidistrict, Multiparty, Multiforum Trial Jurisdiction Act of 2001*
  - Introduced by: Sensenbrenner
  - Date Introduced: 3/6/01.
  - Status: House suspended rules and passed bill as amended (3/14/01). Received in the Senate and referred to the Committee on the Judiciary (3/15/01).
  - Related Bills: None.
  - Key Provisions:
    — Section 2 amends **section 1407 of title 28, U.S.C.,** to allow a judge with a transferred case to retain that case for trial or to transfer the case to another district.
    — Section 3 amends **section 85 of title 28, U.S.C.,** to give the district courts original jurisdiction over any civil action involving minimal diversity between adverse parties that arises from a single accident, where at least 25 natural persons have either died or incurred injury in the accident at a discrete location and, in the case of injury, the injury has resulted in damages which exceed $150,000 per person, exclusive of interest and costs.

- H.R. 912 - *Innocence Protection Act of 2001*
  - Introduced by: Delahunt
  - Date Introduced: 3/7/01.
  - Status: Referred to the House Committee on the Judiciary (3/7/2001). Referred to the Subcommittee on Crime (4/19/01); hearing held by Subcommittee on Crime (6/18/02).
  - Related Bills: S. 486, S. 800, S. 2446, S. 2739.
  - Key Provisions:
    — The Act was a companion measure with S. 486. Generally, the Act sets forth procedures for postconviction DNA testing.

- H.R. 1478 - *Personal Information Privacy Act of 2001*
  - Introduced by: Kleczka
  - Date Introduced: 4/4/01.
  - Status: Referred to the House Subcommittee on Social Security (4/24/01) and to the House Subcommittee on Financial Institutions and Consumer Credit (4/24/01).
  - Related Bills: None.
  - Key Provisions:
    — The Act prohibits the disclosure, acquisition, and distribution of an individual's Social Security number and other personal information.

- H.R. 1737 - *To amend title 18, United States Code, to provide that witnesses at Federal grand jury proceedings have the right to the assistance of counsel*
  - Introduced by: Traficant
  - Date Introduced: 5/3/01.
  - Status: Referred to the House Subcommittee on Courts, the Internet, and Intellectual Property (5/9/01).
  - Related Bills: None.
  - Key Provisions:
    — The Act amends **chapter 215 of title 18, U.S.C.**, to provide that witnesses before a federal grand jury have the right to the assistance of counsel.

- H.R. 2137 - *Criminal Law Technical Amendments Act of 2001*
  - Introduced by: Sensenbrenner
  - Date Introduced: 6/12/01.
  - Status: Passed in the House by a vote of 374-0 (7/23/01). Referred to the Senate Committee on the Judiciary (7/24/01).
  - Related Bills: None.
  - Key Provisions:
    — The Act amends various provisions of **titles 18 and 21, U.S.C.,** to make punctuation and technical changes relating to criminal law and procedure.

- H.R. 2215 - *21st Century Department of Justice Appropriations Authorization Act*
  - Introduced by: Sensenbrenner
  - Date Introduced: 6/19/01.
  - Status: Referred to the House Judiciary Committee (6/19/01). Passed House by voice vote (7/23/01). Received in the Senate and referred to the Committee on the Judiciary (7/24/01). Passed Senate with amendments (12/20/01). House and Senate appoint conferees (2/6/02). Conference report filed (107-685) (9/25/02). House agreed to conference report (9/26/02). Senate agreed to conference report (10/3/02). President signed into law (Public Law 107-273) (11/2/02).
  - Related Bills: H. Con. Res 503, House Res. 552, H.R. 809, H.R. 863, H.R. 1007, H.R. 1900, H.R. 3892, S. 166, S. 304, S. 320, S. 407, S. 487, S. 862, S. 1099, S. 1140, S. 1208, S. 1319, S. 1974, S. 2713.

• Key Provisions:

— Section 11020 amends **section 85 of title 28, U.S.C.,** to give the district courts original jurisdiction over any civil action involving minimal diversity between adverse parties that arises from a single accident, where at least 75 natural persons have either died in the accident at a discrete location if (1) a defendant resides in a state and a substantial part of the accident occurred in another state or location, (2) any two defendants reside in different states, or (3) substantial parts of the accident took place in different states.

— Section 11020 also sets forth provisions on limitations of jurisdiction of district courts, intervening parties, notifying the Judicial Panel on Multidistrict Litigation, venue, removal, and service.

— Section 11019 restores, effective December 1, 2002, two provisions in Rule 16 of the Federal Rules of Criminal Procedure that were inadvertently omitted when the proposed Criminal Rules amendments were transmitted to Congress on April 29, 2002. The omitted provisions impose reciprocal obligations on both the prosecution and the defendant to disclose their expert witnesses' testimony on the defendant's mental condition as it pertained to the issue of guilt.

● H.R. 2341 - *Class Action Fairness Act of 2001*

• Introduced by: Goodlatte

• Date Introduced: 6/27/01.

• Status: Referred to the House Committee on the Judiciary (6/27/01). Passed House Judiciary Committee by a vote of 16 to 10 (3/7/02). Passed House with three amendments (Nadler H. Amdt 435; Keller H. Amdt 437; and Hart H. Amdt 442) by a vote of 233 - 190 (3/13/02). Referred to the Senate Committee on the Judiciary (3/14/02). Senate Committee on the Judiciary held hearings (7/31/02).

• Related Bills: S. 1712; H. Res. 367.

• Key Provisions:

— Section 3 amends **Part V of title 28, U.S.C.,** to include a new chapter on Consumer Class Action Bill of Rights. The new chapter includes provisions on judicial scrutiny of coupons, prohibition on the payment of bounties, disclosure of attorneys' fees, and plain English settlement information.

— Section 4 amends **section 1332 of title 28, U.S.C.,** to give district courts original jurisdiction of any civil action in which the matter in controversy exceeds $2,000,000, exclusive of interest and costs, and is a class action in which: (1) any member of a class of plaintiffs is a citizen of a State different from any defendant; (2) any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a State; or (3) any member of a class of plaintiffs is a citizen of a State and any defendant is a foreign state or a citizen or subject of a foreign state.

— Section 5 amends **chapter 89 of title 28, U.S.C.,** to set forth when and how a class action case may be removed to federal court.

— Section 6 amends **section 1292(a) of title 28, U.S.C.,** to allow for the

interlocutory appeal of class certification orders made pursuant to Civil Rule 23. Unless otherwise ordered, all discovery and other proceedings shall be stayed during the pendency of any such appeal.

— Section 7 directs the Judicial Conference, with assistance from the Administrative Office and the Federal Judicial Center, to prepare and transmit a report to the House and Senate Committees on the Judiciary. This report, which is due 12 months after date of enactment, shall contain (1) recommendations on how courts can ensure that the proposed class settlements are fair, (2) recommendations on how the courts can ensure that the fees and expenses awarded are fair and that the class members are the primary beneficiaries of the settlement, and (3) actions that the Judicial Conference has taken and intends to take on the above-mentioned recommendations.

- H.R. 2458 - *E-Government Act of 2001*
  - Introduced by: Turner
  - Date Introduced: 7/11/01.
  - Status: Referred to House Committee on Government Reform (7/11/01). Referred to House Subcommittee on Government Efficiency, Financial Management, and Intergovernmental Relations (7/20/01). Referred to House Subcommittee on Technology and Procurement Policy (7/2/02). Subcommittee meeting held (9/18/02). Subcommittee mark-up session (10/1/02). Subcommittee voted to forward to full committee (10/1/02). Committee mark-up session held (10/9/02). Ordered to be reported (10/9/02). House passed (11/15/02). Senate passed without amendment (11/15/02). Cleared for White House (11/15/02).
  - Related Bills: S. 803.
  - Key Provisions:

    — Section 205(a) requires that each federal court establish a website that includes information such as the location and contact information for the courthouse, local rules and general orders of the court, case docket information, all written court opinions (published and unpublished), and all documents filed with the court in electronic form.

    — Section 205(b) requires that the information and rules posted on each federal court website shall be updated regularly and kept reasonably current. Electronic files and docket information pertaining to cases closed for more than one year are not required to be posted on the website. All written opinions issued after the effective date of the legislation shall remain available on the website.

    — Section 205(c) states that any document filed electronically shall be made available on the court website. However, documents not available to the public (*i.e.*, filed under seal) shall not be made available online. Under Section 205(c)(3), the Supreme Court must promulgate rules under the Rules Enabling Act "to protect privacy and security concerns relating to electronic filing of documents and the public availability under this subsection of documents filed electronically." Under Section 205(c)(3)(B)(i), the Judicial Conference may issue interim rules and

"interpretative statements" relating to the interim rules.
— Section 205(f) states that the federal courts must establish the Section 205(a) websites within two years after the effective date of the legislation. Access to documents filed in electronic form shall be established within four years of the effective date of the legislation.
— Section 205(g) allows courts to defer compliance with this section. The Judicial Conference shall submit an annual report to Congress that lists, summarizes, and evaluates all deferral notices.

- H.R. 2519 - *To allow media coverage of court proceedings*
  - Introduced by: Chabot
  - Date Introduced: 7/17/01.
  - Status: Referred to the House Subcommittee on Courts, the Internet, and Intellectual Property (8/6/01).
  - Related Bills: S. 986.
  - Key Provisions:
    — Section 2 authorizes the presiding judge of a federal appellate or district court to allow media coverage of any proceeding in which the judges presides. Section 2 also authorizes the Judicial Conference to promulgate advisory guidelines on the allowance of media coverage in court proceedings.

- H.R. 2734 - *Bail Bond Fairness Act of 2001*
  - Introduced by: Barr
  - Date Introduced: 8/2/01.
  - Status: Referred to the House Committee on the Judiciary (8/2/01); Referred to House Subcommittee on Crime (9/10/01).
  - Related Bills: H.R. 2929.
  - Key Provisions:
    — The Act amends **18 U.S.C. §§ 3146 and 3148** to provide that the forfeiture of a bail bond is limited to those situations in which the defendant actually fails to physically appear before a court as ordered. (The Act specifically provides that a judicial officer may not order a bond forfeited simply because the defendant violated a condition of release, notwithstanding the provisions in Criminal Rule 46(e).)

- H.R. 2843 - *To amend the Federal Rules of Criminal Procedure to allow motions for a new trial at any time where the error alleged is a violation of constitutional rights*
  - Introduced by: Scarborough
  - Date Introduced: 9/5/01.
  - Status: Referred to the House Committee on the Judiciary (9/5/01). Referred to the House Subcommittee on Crime (9/10/01).
  - Related Bills: None.
  - Key Provision:

— The Act amends **Criminal Rule 33** to allow a defendant to move for a new trial at any time before the final sentence when the defendant alleges a violation of a constitutional right.

- H.R. 2929 - *Bail Bond Fairness Act of 2001*
  - Introduced by: Barr
  - Date Introduced: 9/21/01.
  - Status: Referred to the House Committee on the Judiciary (9/21/01); Referred to House Subcommittee on Crime (9/28/01). Subcommittee hearings held (10/8/02).
  - Related Bills: H.R. 2734.
  - Key Provisions:

    — The Act amends **18 U.S.C. §§ 3146 and 3148** to provide that the forfeiture of a bail bond is limited to those situations in which the defendant actually fails to physically appear before a court as ordered.

    — The Act also amends **Criminal Rule 46** to provide that judges may declare bail bonds forfeited only when the defendant actually fails to physically appear before a court as ordered.

- H.R. 3162 - *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001*
  - Introduced by: Sensenbrenner.
  - Date Introduced: 10/23/01.
  - Status: Referred to the Committee on the Judiciary, and in addition to the Committees on Intelligence (Permanent Select), Financial Services, International Relations, Energy and Commerce, Education and the Workforce, Transportation and Infrastructure, and Armed Services (10/23/01). On motion to suspend the rules and pass the bill agreed to by the Yeas and Nays: 357 - 66 (10/24/01). Received in the Senate (10/24/01). Passed Senate without amendment by yea-nay vote of 98 - 1 (10/25/01). Signed by the President; became Public Law No: 107-56 (10/26/01).
  - Related Bills: S. 1510; H. Res. 264; H.R. 2975, H.R. 3108.
  - Key Provisions:

    — Section 203 amends **Criminal Rule 6** to allow for the sharing of grand jury information in matters pertaining to foreign intelligence or counterintelligence.

    — Section 219 amends **Criminal Rule 41** to authorize a magistrate judge in any district in which activities relating to terrorism has occurred to issue a nationwide search warrant.

    — Section 412 amends **8 U.S.C. § 1101 et seq.** to provide that judicial review of any decision regarding the detention of a suspected terrorist alien is available exclusively in habeas corpus proceedings in the United States Supreme Court, the United States Court of Appeals for the District of Columbia Circuit, or any district court otherwise having jurisdiction to entertain it.

- H.R. 3210 - *Terrorism Risk Protection Act*
  - Introduced by: Oxley.
  - Date Introduced: 11/1/01.
  - Status: Referred to the House Committees on Financial Services, Ways and Means, and the Budget (11/1/01). Passed the House by a yea-nay vote of 227 to 193 (11/29/01). Received in the Senate (11/30/01). Received in the Senate, read the first time, and placed on Senate Legislative Calendar (11/30/01). Read the second time and placed on Senate Legislative Calendar under General Orders (12/3/01). Senate struck all after the Enacting Clause and substituted the language of S. 2600 as amended (7/25/02). Conference requested (7/25/02) and conferees appointed (7/27/02). Conference report filed (H. Rep. 107-779) (11/13/02). House agreed to conference report by voice vote (11/14/02). Senate agreed to conference report by a vote of 86-11 (11/19/02). Signed by the President (11/26/02) (Pub. L. 107-297).
  - Related Bills: S. 1743, S. 1744, S. 1748, S. 1751, S. 2600.
  - Key Provisions:

    — Under section 15, if the Secretary of the Treasury determines that one or more acts of terrorism have occurred, all lawsuits arising out of those acts of terrorism must be filed in the federal court or courts -- which shall have original and exclusive jurisdiction -- as selected by the Judicial Panel on Multidistrict Litigation. This is the exclusive remedy for damages claimed for insured losses resulting from acts of terrorism. The Act also prohibits the award of punitive damages and limits the award of attorneys' fees. The defendants' liability is also limited to noneconomic damages.

- H.R. 3285 - *Federal-Local Information Sharing Partnership Act of 2001*
  - Introduced by: Weiner.
  - Date Introduced: 11/13/01.
  - Status: Referred to the House Committee on the Judiciary, and in addition to the Committees on Intelligence (Permanent Select), Financial Services, and Education and Workforce (11/13/01). Referred to the Subcommittee on 21st Century Competitiveness (3/6/02).
  - Related Bills: S. 1615.
  - Key Provisions:

    — Section 2 amends **Criminal Rule 6** to allow for the sharing of grand jury information in matters pertaining to foreign intelligence or counterintelligence with specific federal, state, or local officials.

    — Section 4 amends the **Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001 (P.L. No. 107-56)** to allow for the sharing of grand jury information in matters pertaining to foreign intelligence or counterintelligence with specific federal, state, or local officials.

- H.R. 3309 - *Investigation Enhancement Act of 2001*
  - Introduced by: Walden.
  - Date Introduced: 11/15/01.
  - Status: Referred to the House Committee on the Judiciary (11/15/01).
  - Related Bills: None.
  - Key Provision:

    — The Act amends **28 U.S.C. § 530B(a)** to permit a Government attorney, for the purpose of enforcing Federal law, to provide legal advice, authorization, concurrence, direction, or supervision on conducting undercover activities, notwithstanding any provision of state law.

- H.R.. 3611 - *Terrorist Victims' Courtroom Access Act*
  - Introduced by: Davis.
  - Date Introduced: 1/23/02.
  - Status: Referred to the House Committee on the Judiciary (1/23/02). Referred to the House Subcommittee on Courts, the Internet, and Intellectual Property (3/18/02).
  - Related Bills: S. 1858.
  - Key Provisions:

    — Section 2 would authorize, notwithstanding any provision of the Criminal Rules, the closed circuit broadcast of the trial of Zacarias Moussaoui to the victims of the terrorist act of September 11, 2001. The proceedings shall be broadcast to locations in Northern Virginia, Los Angeles, New York City, Boston, Newark, San Francisco, and any other location that the trial court determines.

- H.R. 3892 - *Judicial Improvements Act of 2002*
  - Introduced by: Coble.
  - Date Introduced: 3/7/02.
  - Status: Referred to the House Committee on the Judiciary (3/7/02). Referred to the Subcommittee on Courts, the Internet, and Intellectual Property (3/15/02). Subcommittee consideration and mark-up session (3/20/02). Judiciary Committee consideration and mark-up session. Ordered to be reported as amended (4/24/02). Reported by the Committee and placed on Union Calendar (5/14/02). Motion to suspend rules and pass bill as amended. Agreed by voice vote (7/22/02). Received in the Senate, read twice, and referred to the Committee on the Judiciary (7/22/02). Reported by the Committee with an amendment in the nature of a substitute; placed on legislative calendar (7/31/02).
  - Related Bills: None.
  - Key Provisions:

    — **28 U.S.C. § 46(c)** provides that a majority of judges who are in regular active service may order an en banc hearing or rehearing before the court. Section 3 amends the statute by providing that for purposes of determining a majority of judges, "there shall be excluded any judge who is recused from the case or controversy at issue." [This provision, which would have affected **Appellate Rule 35**, was deleted during House markup sessions].

- H.R. 4513 - *Social Security Number Protection Act of 2002*
  - Introduced by: Markey
  - Date Introduced: 4/18/02.
  - Status: Referred to the House Committee on Energy and Commerce, and House Committee on Ways and Means (4/18/02); Referred to House Subcommittee on Commerce, Trade and Consumer Protection (5/6/02).
  - Related Bills: S. 848.
  - Key Provisions:

    — The Act makes it unlawful for any person to sell or purchase a Social Security number in a manner that violates to-be-promulgated regulations issued by the Federal Trade Commission. Section 4(b)(3) states that these regulations shall be drafted to permit the sale or purchase of Social Security numbers for certain limited purposes, including law enforcement, public health, and other instances that are not inconsistent with congressional findings (note: Section 2 sets forth the congressional findings. Finding "(2)" recognizes that certain entities such as financial institutions, health care providers, and other entities have traditionally used Social Security numbers for identification purposes).

- H.R. 4598 - *Homeland Security Information Sharing Act*
  - Introduced by: Chambliss, Saxby
  - Date Introduced: 4/25/02.
  - Status: Referred to House Select Committee on Intelligence and House Judiciary Committee (4/25/02); Referred to House Subcommittee on Crime, Terrorism, and Homeland Security (5/6/02); Subcommittee meetings held and markup. Forwarded to full committee by voice vote (6/4/02); Committee consideration and markup. Ordered reported by voice vote (6/13/02); Passed in the House by a vote of 422-2 (6/26/02). Received in the Senate and read twice and referred to the Committee on the Judiciary (6/27/02).
  - Related Bills: H.R. 458.
  - Key Provisions:

    — Section 6 would amend **Criminal Rule 6(e)** to permit the sharing of certain grand-jury information pertaining to a criminal investigation or to prevent or respond to actual or potential attacks to appropriate state, local, and foreign government officials.

- H.R. 5005 - *Homeland Security Act of 2002*
  - Introduced by: Armey.
  - Date Introduced: 6/24/02.
  - Status: Referred to House Select Committee on Homeland Security and to the House Committees on Agriculture, Appropriations, Armed Services, Energy and Commerce, Financial Services, Government Reform, Intelligence (Permanent Select), International Relations, the Judiciary, Science, Transportation and Infrastructure, and Ways and Means Select Committee on Intelligence and House Judiciary Committee (6/24/02); passed the

House with amendments by a vote of 295-132 (7/26/02); received in the Senate and placed on legislative calendar (7/30/02). Senate passed by a vote of 90-9 (11/19/02). Signed by the President (11/25/02) (Pub. L. 107-296).

- Related Bills: H.Res. 449.
- Key Provisions:

— Section 895 amends **Criminal Rule 6(e)** by: (a) providing that any knowing violation of guidelines jointly issued by the Attorney General and Director of Central Intelligence (DCI) with respect to the unauthorized disclosure of grand jury matters may be punished as a contempt of court; (b) authorizing the disclosure of grand jury matters involving a threat of grave hostile acts of a foreign power, domestic or international sabotage or terrorism, or clandestine intelligence gathering activities by an intelligence service or network of a foreign power to appropriate federal, state, local, or foreign government officials; (c) authorizing the disclosure of grand jury matters to appropriate foreign government officials that may disclose a violation of the law of such government; and (d) requiring state, local, and foreign officials use disclosed grand jury information only in conformity with guidelines jointly issued by the Attorney General and the DCI.

- H.R. 5710 - *Homeland Security Act of 2002*
  - Introduced by: Armey.
  - Date Introduced: 11/12/02.
  - Status: Rules Committee Resolution H.Res. 600 (11/13/02). Rule provides for consideration of bill with limited debate. Bill closed to amendments. Passed House by a vote of 299-121 (11/13/02).
  - Related Bills: H.R. 5005.
  - Key Provisions:

— Section 895 amends **Criminal Rule 6(e)** by: (a) providing that any knowing violation of guidelines jointly issued by the Attorney General and Director of Central Intelligence (DCI) with respect to the unauthorized disclosure of grand jury matters may be punished as a contempt of court; (b) authorizing disclose of grand jury information to officials of foreign governments to assist in the enforcement of federal criminal law; (c) authorizing disclosure of grand jury information upon request by the government when such information is sought by a foreign court or prosecutor for use in an official criminal investigation; (d) authorizing the disclosure of grand jury matters to appropriate foreign government officials that may disclose a violation of that government's criminal laws; (e) authorizing the disclosure of grand jury matters involving a threat of actual or potential attack or other grave hostile acts of a foreign power, domestic or international sabotage or terrorism, or clandestine intelligence gathering activities by an intelligence service or network of a foreign power to appropriate federal, state, local, or foreign government officials; and (f) requiring state, local, and foreign officials use disclosed grand jury information only in conformity with guidelines jointly issued by the Attorney General and the DCI.

SENATE RESOLUTIONS

● S.J. Res. 35 - *Proposing an Amendment to the Constitution of the United States to Protect the Rights of Crime Victims*

- Introduced by: Feinstein
- Date Introduced: 4/15/02.
- Status: Referred to the Senate Committee on the Judiciary (4/15/02); hearing held by Subcommittee on the Constitution (7/17/02).
- Related Bills: H.J. Res. 91; H.J. Res. 88.
- Key Provisions:

— Section 2 provides that a victim of a violent crime shall have the constitutional right to (1) reasonable and timely notice of any public proceeding involving the defendant; (2) appear at such proceedings and to be heard on matters such as the release, plea, sentencing, reprieve, and pardon of the accused; and (3) adjudicative decisions that consider the victim's safety, interest in avoiding unnecessary delay, and interest in fair and timely claims to restitution from the accused. These rights shall not be restricted except as dictated by public safety, compelling necessity, or the administration of justice.

HOUSE RESOLUTIONS

● H.J. Res. 91 - *Proposing an Amendment to the Constitution of the United States to Protect the Rights of Crime Victims*

- Introduced by: Chabot
- Date Introduced: 5/2/02.
- Status: Referred to the House Committee on the Judiciary (5/2/02). House Judiciary Committee's Subcommittee on Constitution held hearings (5/9/02).
- Related Bills: S.J. Res. 35
- Key Provisions:

— Section 2 provides that a victim of a violent crime shall have the constitutional right to (1) reasonable and timely notice of any public proceeding involving the defendant; (2) appear at such proceedings and to be heard on matters such as the release, plea, sentencing, reprieve, and pardon of the accused; and (3) adjudicative decisions that consider the victim's safety, interest in avoiding unnecessary delay, and interest in fair and timely claims to restitution from the accused. These rights shall not be restricted except as dictated by public safety, compelling necessity, or the administration of justice.

LEONIDAS RALPH MECHAM
Director

CLARENCE A. LEE, JR.
Associate Director

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
Chief
Rules Committee Support Office

December 4, 2002

MEMORANDUM TO THE STANDING COMMITTEE

SUBJECT: *Report of the Administrative Actions Taken by the Rules Committees Support Office*

The following report briefly describes administrative actions and some major initiatives undertaken by the office to improve its support service to the rules committees.

Automation Project (Documentum)

Our new web-based electronic document-management system (Documentum 4i) is now operational. We are using Documentum 4i to review and edit all rules documents, process comments and suggestions, organize and search for documents using enhanced indexing and search capabilities, and track different versions of documents to ensure the quality and accuracy of work product. Other soon-to-come improvements include expeditious intake and processing of e-mails and attachments, document routing and workflows, and installing "redlining" software and improved search features.

The next phase, if funded, will begin in 2003 and will increase the capabilities of Documentum 4i. Potential enhancements include the following: users will be able to review and edit documents simultaneously; committee members, reporters, and staff will have remote access to the database; we will be able to publish documents on the Internet; and we will be able to archive documents directly to the National Archives and Records Administration. But funding of the enhancements remains a major issue.

Internet

We continue to update, modify, and expand the Judiciary's "Federal Rulemaking" Internet web site (http://www.uscourts.gov). We are also working to make the web site easier for a user to find, research, and track proposed rules amendments as they proceed through the rulemaking process.

With the exception of one bankruptcy court that has no Internet web site, our web site has links to every court of appeals, district court, and bankruptcy court's web site in the country. And with the exception of three courts that do not have local rules posted on their web site, our web site has access to the local rules for every court in the country.

Finally, we continue to receive comments on the proposed rule amendments through the web site. The number of comments submitted via the Internet remains modest.

Committee and Subcommittee Meetings

For the period from May 14, 2002 through November 29, 2002, the office staffed nine meetings, including one Standing Committee meeting, five advisory committee meetings, two subcommittee meetings, and a meeting of an informal group of judges working on mass torts issues. The office has also arranged and participated in numerous conference calls involving rules committees or subcommittees.

The docket sheets of all suggested amendments for Civil, Criminal, and Evidence Rules have been updated to reflect the committees' recent respective actions. We recently created a new docket for the Bankruptcy Rules as well. Every suggested amendment along with its source and status and disposition is listed. The docket sheets are updated after each committee meeting, and they are included in each agenda book. The docket sheets are also posted on our web site.

The office continues to research our historical records for information regarding any past relevant committee action on every new proposed amendment submitted to an advisory committee. Pertinent documents were forwarded to the appropriate reporter for consideration.

Record Keeping

Under the *Procedures for the Conduct of Business by the Judicial Conference Committees on Rules of Practice and Procedure*, all rules-related records must "be maintained at the Administrative Office of the United States Courts for a minimum of two years and . . . [t]hereafter the records may be transferred to a government record center . . . ."

All rules-related records from 1935 through 1996 have been entered on microfiche and indexed. The records from 1997 to the present will eventually also be stored on microfiche. Many of these records are already filed in Documentum 4i. Once the necessary scanning equipment has been purchased and installed, we should be able to scan and store virtually all the records maintained by our office on a timely basis.

The microfiche collection continues to prove useful to us and the public in researching prior committee positions.

Manual Tracking

Our manual system of tracking comments continues to work well. For the current public-comment period, the office has received, acknowledged, forwarded, and followed up on approximately 99 comments and suggestions. Each comment was numbered consecutively, which enabled committee members to determine instantly whether they had received all of them. We will continue to distribute the comments electronically using Adobe PDF, with a follow-up mailing of a complete hardcopy set of all comments received. We found that this process allows us to distribute the comments much faster and more cheaply.

State Bar Points-of-Contact

In August 1994, the president of each state bar association was requested to designate a point-of-contact for the rules committee to solicit and coordinate that state bar's comments on the proposed amendments. The Standing Committee outreach to the organized bar has resulted in 53 state bars designating a point-of-contact.

The points-of-contact list was updated in time to include the new names in *The Request for Comment* pamphlet on proposed amendments published in August 2002. Several state bars updated their designated point-of-contact. The process is being repeated every year to ensure that we have an accurate and up-to-date list.

Mailing List

The Administrative Office's new automated mailing list system – called DIRECT EXPRESS – continues to work well. The rules office maintains a large mailing list exclusively for rules-related mailings. Maintaining the list requires frequent and extensive updating, which in the past has been particularly tedious and time consuming. DIRECT EXPRESS is operated by an AO administrator and allows for immediate changes to the mailing list, which has facilitated our updating. Information on DIRECT EXPRESS can be obtained through the agency's internal AOWEB site.

Miscellaneous

In August 2002, we prepared and published the *Preliminary Draft of Proposed Amendments to the Federal Rules of Bankruptcy and Criminal Procedure, and the Federal Rules of Evidence* seeking public comment on proposed amendments to Bankruptcy Rule 9014, Criminal Rule 41, Rules 1-11 of the Rules Governing Section 2254 Cases in the United States District Courts and accompanying form, Rules 1-12 of the Rules Governing Section 2255

Proceedings for the United States District Courts and accompanying form, and Evidence Rule 804. We sent the pamphlet to legal publishers and the court family and we posted it on the federal rulemaking web site.

In November 2002, the courts were advised that the amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure approved by the Supreme Court on April 29, 2002, would take effect on December 1, 2002.

We will soon deliver to the Supreme Court proposed amendments to the Federal Rules of Appellate, Bankruptcy, and Civil Procedure, and the Federal Rules of Evidence that were approved by the Judicial Conference at its September 2002 session.

Finally, we created a new dedicated e-mail "mailbox" for the rules committees, consultants, and others to send rules-related materials to our office. This, along with other new intake procedures, should allow us to provide more timely and efficient service to the rules committees.

James N. Ishida

Attachments

BANKRUPTCY RULES SUGGESTIONS DOCKET

(By Rule Number)

ADVISORY COMMITTEE ON BANKRUPTCY RULES

The docket sets forth suggested changes to the Federal Rules of Bankruptcy Procedure considered by the Advisory Committee since 1997. The suggestions are set forth in order by: (1) bankruptcy rule number, (2) form number, and where there is no rule or form number (or several rules or forms are affected), (3) alphabetically by subject matter.

Suggestion	Docket No., Source & Date	Status
Rule 2002 Limit notices to creditors.	97-BK-G Judge Arthur J. Spector 9/19/97	11/97 - Referred to chair, reporter and committee 9/99 - Committee declined to take action **COMPLETED**
Rule 2002(a) Eliminate notices to late creditors in Chapter 13 cases.	00-BK-H Judge James A. Pusateri 7/31/00	8/00 - Referred to chair, reporter, and committee 9/00 - Committee declined to take action **COMPLETED**
Rule 2002(f) Provide for notice of order confirming Chapter 13 plan.	99-BK-E Judge Paul Mannes 4/28/99	8/99 - Referred to chair, reporter, and committee 9/99 - Committee considered 3/00 - Committee declined to take action **COMPLETED**

Rule 2002(g) Allow entity to designate address for purpose of receiving notices.	02-BK-A Bankruptcy Clerk Joseph P. Hurley, for the BK Noticing Working Group 2/4/02 00-BK-A Raymond P. Bell, Esq., Fleet Credit Card Services, L.P. 1/18/00	2/02 - Referred to chair and reporter 3/02 - Committee considered **PENDING FURTHER ACTION**
Rule 2003 Restore temporary allowance of claims provision to Rule 2003.	98-BK-B Jeffrey K. Garfinkle, Esq. 7/15/98	8/98 - Referred to chair, reporter, and committee 10/98 - Committee declined to take action **COMPLETED**
Rule 2010(b) Provide procedures for bringing action on depository bond.	99-BK-H Martha L. Davis, Esq. Executive Office for US Trustees, DOJ 7/20/99	7/99 - Referred to chair, reporter, and committee 9/99 - Committee declined to take action **COMPLETED**

Rule 2015(a) Require payment of quarterly fees in pending Chapter 11 case.	99-BK-H Martha L. Davis, Esq. Executive Office for US Trustees, DOJ 7/20/99	7/99 - Referred to chair, reporter, and committee 9/99 - Committee considered and deferred decision 3/00 - Committee approved amendment with revisions 6/00 - Standing Committee approved for publication 8/00 - Published for public comment 3/01 - Committee approved 6/01 - Standing Committee approved 9/01 - Judicial Conference approved 4/02 - Supreme Court approved 12/02 - Effective **COMPLETED**
Rule 3002(a) Consider all claims listed by debtors in Chapter 13 and asset 7 cases be deemed filed (as is current law in Chapter 11 cases).	99-BK-003 00-BK-A Raymond P. Bell, Esq. Fleet Credit Card Services, L.P. 1/18/00	2/00 - Referred to chair, reporter, and committee **PENDING FURTHER ACTION**
Rule 3002(c) Provide exception for Chapters 7 and 13 corporate cases where debtor not an individual.	01-BK-F Judge Paul Mannes 6/23/00	6/00 - Referred to chair, reporter, and committee **PENDING FURTHER ACTION**
Rule 3017.1 Eliminate rule extension number.	00-BK-013 01-BK-C Patricia Meravi 1/22/01	2/01 - Referred to chair and reporter **PENDING FURTHER ACTION**

Rule 4003 Impose burden of proof upon the debtor.	01-BK-D Judge Barry Russell 4/4/01	4/01 - Referred to chair and reporter 3/02 - Committee considered and deferred decision **PENDING FURTHER ACTION**
Rule 4004 Provide for delay in entry of discharge when motion to dismiss is filed.	99-BK-H Martha L. Davis, Esq. Executive Office for US Trustees, DOJ 7/20/99	7/99 - Referred to chair, reporter, and committee 9/99 - Committee approved amendment 6/00 - Standing Committee approved for publication 8/00 - Published for public comment 3/01 - Committee approved 6/01 - Standing Committee approved 9/01 - Judicial Conference approved 4/02 - Supreme Court approved 12/02 - Effective **COMPLETED**
Rule 4008 Provide a deadline for filing reaffirmation agreement.	01-BK-E Francis F. Szczebak, Esq., for the BK Judges Advisory Group 11/30/01	1/02 - Referred to chair and reporter 3/02 - Committee considered and deferred decision. Referred to subcommittee. **PENDING FURTHER ACTION**
Rule 6007(a) Require the trustee to give notice of specific property he intends to abandon.	99-BK-I Physa Griffith South, Esq. 10/13/99	12/99 - Referred to chair, reporter, and committee **PENDING FURTHER ACTION**
Rule 7004 Require that motion be served upon a specific individual on behalf of business entity.	98-BK-D Judge David H. Adams 10/8/98	10/98 - Referred to chair, reporter, and committee 9/99 - Committee declined to take action **COMPLETED**

Rule 7023.1 Eliminate rule extension number.	00-BK-013 01-BK-C Patricia Meravi 1/22/01	2/01 - Referred to chair and reporter **PENDING FURTHER ACTION**
Rule 7026 Eliminate mandatory disclosure of information in adversary proceedings.	00-BK-008 01-BK-A Jay L. Welford, Esq.and Judith G. Miller, Esq., for the Commercial Law League of America 1/26/01 00-BK-009 01-BK-B Judy B. Calton, Esq. 1/12/01	2/01 - Referred to chair and reporter **PENDING FURTHER ACTION**
Rule 8001(d) Dismiss an unperfected appeal.	02-BK-B Richard Craig Friedman, Esq. 2/25/02	2/01 - Referred to chair and reporter **PENDING FURTHER ACTION**
Rule 8014 Revise rule to follow FRAP 39 regarding taxation of costs.	99-BK-A Judge Paul Mannes 3/8/99	8/99 - Referred to chair, reporter, and committee 3/00 - Committee declined to take action **COMPLETED**
Rule 9011 Make grammatical correction.	97-BK-D John J. Dilenschneider, Esq. 5/30/97	6/97 - Referred to chair, reporter, and committee **PENDING FURTHER ACTION**
Rule 9014 Allow local districts the option of amending rule.	02-BK-E Thomas J. Yerbich, Esq. 2/22/02	5/02 - Referred to chair and reporter **PENDING FURTHER ACTION**

Rule 9020 Make contempt orders effective immediately.	97-BK-A Judge A. Thomas Small 2/14/97	2/97 - Referred to chair, reporter, and committee 3/98 - Committee appointed subcommittee to study rule 10/98 - Committee adopted subcommittee's recommendation to amend rule 3/98 - Committee recommended publishing rule 6/99 - Standing Committee approved for publication 8/99 - Published for public comment 3/00 - Committee approved amendments with modification 6/00 - Standing Committee approved 9/00 - Judicial Conference approved 4/01 - Supreme Court approved 12/01 - Effective **COMPLETED**
Rule 9022 Delegate responsibility to the prevailing party to give notice of entry of judgments or orders.	97-BK-E Bankruptcy Clerk Richard G. Heltzel 7/14/97	7/97 - Referred to chair, reporter, and committee 3/98 - Committee declined to take action **COMPLETED**
Rule 9027 Amend remand procedures.	97-BK-C Judge Christopher M. Klein 5/13/97	5/97 - Referred to chair, reporter, and committee 9/99 - Committee considered 3/00 - Committee declined to take action **COMPLETED**
Rule 9036 State that notice by electronic means is complete upon transmission.	02-BK-A Bankruptcy Clerk Joseph P. Hurley, for the BK Noticing Working Group 2/1/02	2/02 - Referred to reporter, chair and committee **PENDING FURTHER ACTION**

Official Form 1 Amend Exhibit C to the Voluntary Petition.	02-BK-D Gregory B. Jones, Esq. 2/7/02	2/02 - Referred to reporter, chair, and committee **PENDING FURTHER ACTION**
Official Form 9 Amend format of form; clarify role of trustee.	99-BK-F A. Thomas DeWoskin, Esq. 5/17/99	8/99 - Referred to reporter, chair, and committee 9/99 - Committee referred to Forms Subcommittee 1/00 - Forms Subcommittee recommended no action 3/00 - Committee declined to take action **COMPLETED**
Official Form 9 Direct that information regarding bankruptcy fraud and abuse be sent to the United States trustee.	97-BK-B US Trustee Marcy J.K. Tiffany 3/6/97	3/97 - Referred to reporter, chair, and committee **PENDING FURTHER ACTION**
Official Form B9C Provide less confusing notice of commencement of bankruptcy form to debtors and creditors.	00-BK-E Ali Elahinejad 2/23/00	5/00 - Referred to reporter, chair, and committee **PENDING FURTHER ACTION**

Official Form B10 Amend form and provide a block for the unsecured creditor.	00-BK-C Bankruptcy Clerk Kenneth J. Hirz 1/10/00	2/00 - Referred to reporter, chair, and committee 3/00 - Committee considered 9/00 - Committee considered 3/01 - Committee considered 12/01 - Committee approved amendments 1/02 - Standing Committee approved for publication 1/02 - Published for public comment 3/02 - Committee approved amendment 6/02 - Standing Committee approved **PENDING FURTHER ACTION**
Official Form 20B Amend requirement that creditors respond and appear in court.	99-BK-B Judge Susan Pierson Sonderby 1/8/99	8/99 - Referred to reporter, chair, and committee 9/99 - Committee referred to Forms Subcommittee 1/00 - Forms Subcommittee recommended no action 3/00 - Committee declined to take action **COMPLETED**
Director's Form B240 Make grammatical corrections.	99-BK-G Judge Paul Mannes 7/12/99	8/99 - Referred to reporter, chair, and committee 9/99 - Committee referred to Forms Subcommittee 1/00 - Forms Subcommittee recommended no action 3/00 - Committee declined to take action **COMPLETED**
[redacted]	[redacted]	[redacted]

Attorneys' Fees Amend award of attorneys' fees in Chapter 13 cases.	99-BK-C Wayne R. Bodow, Esq. 3/12/99	8/99 - Referred to reporter, chair, and committee 9/99 - Committee declined to take action **COMPLETED**
Fraud Amend the rules to protect creditors from fraudulent bankruptcy claims and the mishandling of cases by trustees.	02-BK-B Dr. & Mrs. Glen Dupree 2/4/02	2/02 - Referred to chair and reporter **PENDING FURTHER ACTION**
Manipulation of Postal Bar Codes Prevent manipulation of postal bar codes on court mailings.	00-BK-G Tom Scherer 3/2/00	7/00 - Referred to reporter, chair, and committee 9/00 - Committee declined to take action **COMPLETED**
Notice to Governmental Entities Provide adequate notice to governmental entities.	97-BK-F Karen Cordry, Esq., Bankruptcy Counsel for the National Association of Attorneys General 8/14/97	8/97 - Referred to reporter, chair, and committee 9/97 - Committee referred amendments to subcommittee 2/98 - Subcommittee recommended approval of revised amendments 3/98 - Committee adopted subcommittee's recommendations 6/98 - Standing Committee approved for publication 8/98 - Published for public comment 3/99 - Committee approved amendments 6/99 - Standing Committee approved 9/99 - Judicial Conference approved 4/00 - Supreme Court approved 12/00 - Effective **COMPLETED**

Service of Writs Allow bankruptcy judges to order service of writs of execution.	99-BK-D Scott William Dales 4/23/99	8/99 - Referred to reporter, chair, and committee 9/99 - Committee declined to take action **COMPLETED**
Small Claims Procedure Establish a "small claims" procedure.	00-BK-D Judge Paul Mannes 3/13/00 (see also 98-BK-A)	5/00 - Referred to reporter, chair, and committee **PENDING FURTHER ACTION**

AGENDA DOCKETING

ADVISORY COMMITTEE ON CIVIL RULES

Proposal	Source, Date, and Doc #	Status
[Copyright Rules of Practice] — Update	Inquiry from West Publishing	4/95 — To be reviewed with additional information at upcoming meetings 11/95 — Considered by cmte 10/96 — Considered by cmte 10/97 — Deferred until spring '98 meeting 3/98 — Deferred until fall '98 meeting 11/98 — Request for publication 1/99 — Stg. Cmte. approves publication for fall 8/99 — Published 4/00 — Cmte approves amendments 6/00 — Stg Comte approves 9/00 — Jud. Conf approves 4/01— Approved by Sup Ct 12/01–Effective **COMPLETED**
[Admiralty Rule B] — Clarifies Rule B by establishing the time for determining when the defendant is found in the district	William R. Dorsey, III, Esq., President, The Maritime Law Association (01-CV-B)	6/00 — Referred to reporter, chair, and Mark Kasanin 11/01 — Discussed and considered 10/02 — Committee approved amendment **PENDING FURTHER ACTION**
[Admiralty Rule B, C, and E] — Amend to conform to Rule C governing attachment in support of an in personam action	Agenda book for the 11/95 meeting	4/95 — Delayed for further consideration 11/95 — Draft presented to cmte 4/96 — Considered by cmte 10/96 — Considered by cmte, assigned to Subcmte. 5/97— Considered by cmte 10/97 — Request for publication and accelerated review by ST Cmte 1/98 — Stg. Com. approves publication at regularly scheduled time 8/98 — Published for comment 4/99 — Cmte approves amendments with revisions 6/99 — Stg approves 9/99 — Jud. Conf. approves and transmits to Sup. Ct 4/00 — Supreme Court approved 12/00 — Effective **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[Admiralty Rule C] — conform time deadlines with Forfeiture Act	Civil Asset Forfeiture Act of 2000	10/00 — Comte considered draft 1/01— Stg. Cmte approves publication; comments due 4/2/01 4/01 — Adv Cmte approved amendments 6/01 — Approved by ST Cmte 9/01 — Approved by Jud. Conf 4/02 — Approved by Sup Ct 12/02 Effective **PENDING FURTHER ACTION**
[Admiralty Rule-New]— Authorize immediate posting of preemptive bond to prevent vessel seizure	Mag. Judge Roberts 9/30/96 (96-CV-D) #1450	12/24/96— Referred to Admiralty and Agenda Sub cmte. 3/99 — Agenda Sub cmte. rec. Hold until more information available (2) 5/02 — Adv Cmte discussed new rule governing civil forfeiture practice **PENDING FURTHER ACTION**
[Inconsistent Statute] — 46 U.S.C. § 786 inconsistent with admiralty	Michael Cohen 1/14/97 (97-CV-A) #2182	2/97 — Referred to reporter and chair Supreme Court decision moots issue **COMPLETED**
[Non-applicable Statute]— 46 U.S.C. § 767 Death on the High Seas Act not applicable to any navigable waters in the Panama Canal Zone	Michael Marks Cohen 9/17/97 (97-CV-O)	10/97 — Referred to reporter, chair, and Agenda Sub cmte. 3/99 — Agenda Subcmte rec. Remove from agenda (5) 10/99 — Consent calendar removed from agenda **COMPLETED**
[Admiralty Rule C(4) — Amend to satisfy constitutional concerns regarding default in actions *in rem*	Gregory B. Walters, Cir. Exec., for Jud. Council of Ninth Cir. 12/4/97 (97-CV-V)	1/98 — Referred to reporter, chair, and Agenda Sub cmte. 3/99 — Agenda Sub cmte. rec. Hold until more information available (2) **PENDING FURTHER ACTION**
[Simplified Procedures] — federal small claims procedures	Judge Niemeyer 10/00	10/99 — Considered, subcmte appointed 4/00 — Considered 10/00 — Considered **PENDING FURTHER ACTION**
[CV4(c)(1)] — Accelerating 120-day service provision	Joseph W. Skupniewitz	4/94 — Deferred as premature **DEFERRED INDEFINITELY**
[CV4(d)] — To clarify the rule	John J. McCarthy 11/21/97 (97-CV-R)	12/97 — Referred to reporter, chair, and Agenda Sub cmte. 3/99 — Agenda Subcmte rec. accumulate for periodic revision (1) **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CV4(d)(2)] — Waive service of process for actions against the United States	Charles K. Babb 4/22/94	10/94 — Considered and denied 4/95 — Reconsidered but no change in disposition **COMPLETED**
[CV4(e) & (f)] — Foreign defendant may be served pursuant to the laws of the state in which the district court sits	Owen F. Silvions 6/10/94	10/94 — Rules deemed as otherwise provided for and unnecessary 4/95 — Reconsidered and denied **COMPLETED**
[CV4(i)] — Service on government in Bivens suits	DOJ 10/96 (96-CV-B; #1559)	10/96 — Referred to Reporter, Chair, and Agenda Sub cmte. 5/97 — Discussed in reporter's memo. 3/98 — Cmte approved draft 6/98 — Stg Cmte approves 8/98 — Published for comment 4/99 — Cmte approves amendments with revisions 6/99 — Standing Cmte approved 9/99 — Judicial Conference approved 4/00 — Supreme Court Approved 12/00 — Effective **COMPLETED**
[CV4(m)] — Extension of time to serve pleading after initial 120 days expires	Judge Edward Becker	4/95 — Considered by cmte **DEFERRED INDEFINITELY**
[CV4]— Inconsistent service of process provision in admiralty statute	Mark Kasanin	10/93 — Considered by cmte 4/94 — Considered by cmte 10/94 — Recommend statutory change 6/96 — Coast Guard Authorization Act of 1996 repeals the nonconforming statutory provision **COMPLETED**
[CV4] — To provide sanction against the willful evasion of service	Judge Joan Humphrey Lefkow 8/12/97 (97-CV-K)	10/97 — Referred to Reporter, Chair, and Agenda Sub cmte. 3/99 — Agenda Sub cmte. rec. Accumulate for periodic revision (1) **PENDING FURTHER ACTION**
[CV5] — Electronic filing		10/93 — Considered by cmte 9/94 — Published for comment 10/94 — Considered 4/95 — Cmte approves amendments with revisions 6/95 — Approved by ST Cmte 9/95 — Approved by Jud Conf 4/96 — Approved by Sup Ct 12/96 — Effective **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CV5] — Service by electronic means or by commercial carrier; fax noticing produces substantial cost savings while increasing efficiency and productivity	Michael Kunz, clerk E.D. Pa. and John Frank 7/29/96; 9/10/97 (97-CV-N); William S. Brownell, District Clerks Advisory Group 10/20/97 (97-CV-Q)	4/95 — Declined to act 10/96 — Reconsidered, submitted to Technology Subcommittee 5/97 — Discussed in reporter's memo. 9/97 — Information sent to reporter, chair, and Agenda Sub cmte. 11/98 — Referred to Tech. Subcommittee 3/99 — Agenda Sub cmte. rec. Refer to other cmte (3) 4/99 — Cmte requests publication 6/99 — Stg. Comte approves publication 8/99 — Published for comment 4/00 — Cmte approves amendments 6/00 — Stg Comte approves 9/00 — Jud Conf approves 4/01 — Approved by Sup Ct 12/01 — Effective **COMPLETED**
[CV5] — Resolution of dispute between court and courier as to whether courier or court was at fault for failure to file	Lawrence A. Salibra 6/5/00 (00-CV-C)	6/00 — Referred to reporter, chair, and Agenda Subc. **PENDING FURTHER ACTION**
[CV5(d)] — Whether local rules against filing of discovery documents should be abrogated or amended to conform to actual practice	Gregory B. Walters, Cir. Exec., for District Local Rules Review Cmte of Jud. Council of Ninth Cir. 12/4/97 (97-CV-V)	1/98 — Referred to reporter, chair, and Agenda Sub cmte. 3/98 — Cmte. approved draft 6/98 — Stg Cmte approves with revision 8/98 — Published for comment 4/99 — Cmte approves amendments 6/99 — Stg. Comte approves 9/99 — Jud. Conf. approves and transmits to Sup. Ct 4/00 — Supreme Court approved 12/00 — Effective **COMPLETED**
[CV5(d)]— Does non-filing of discovery material affect privilege	St Cmte 6/99	10/99 — Discussed **PENDING FURTHER ACTION**
[CV5] — Modifying mailbox rule	J. Michael Schaefer, Esq. 12/28/98 (99-CV-A)	3/99 — Referred to reporter, chair, and Agenda Sub cmte. 3/99 — Agenda Sub cmte. rec. Remove from agenda (5) 10/99 — Consent calendar removed from agenda **COMPLETED**
[CV6] — Calculate "3" days either before or after service	Roy H. Wepner, Esq. 11/27/00 (00/CV/H)	12/00 — Referred to reporter and chair 5/02 — Adv Cmte considered alternative amendments **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CV6(b)] — Enlargement of Time; deletion of reference to abrogated rule (technical amendment)	Prof. Edward Cooper 10/27/97; Rukesh A. Korde 4/22/99 (99-CV-C)	10/97 — Referred to cmte 3/98 — Cmte approved draft with recommendation to forward directly to the Jud Conf w/o publication 6/98 — Stg Cmte approved 9/98 — Jud. Conf approved and transmitted to Sup. Ct. 4/99 — Supreme Court approved 12/99 — Effective **COMPLETED**
[CV6(e)] — Time to act after service	ST Cmte 6/94	10/94 — Cmte declined to act **COMPLETED**
[CV6(e)] — Amend the rule to treat service by electronic means the same as service by mail	See Rule 5	4/99 — Cmte requests publication 6/99 — Stg. Comte approves publication 8/99 — Published for comment 4/00 — Cmte approves amendments 6/00 — Stg Comte approves 9/00 — Jud Conf approves 4/01 — Supreme Court approved 12/01 — Effective **COMPLETED**
[CV6(e)] — Clarify the method for extending time to respond after service	Appellate Rules Committee 4/02	04/02 — Referred to Committee 10/02 — Committee considered **PENDING FURTHER ACTION**
[CV7.1] — See Financial Disclosure	Request by Committee on Codes of Conduct 9/23/98	11/98 — Cmte considered 3/99 — Agenda Subcmte rec. Hold until more information available (2) 4/99 — Cmte considered; FJC study initiated 10/99 — Discussed 4/00 — Considered; request for publication 6/00 — Stg Comte approves publication 8/00 — Published 4/01 — Cmte approved amendments 6/01 — Stg Cmte approved 10/01 — Jud Conf approved 4/02 — Approved by Sup Ct 12/02 Effective **COMPLETED**
[CV8(a)(2) — Require "short and plain statement of the claim" that allege facts sufficient to establish a *prima* facie case in employment discrimination	Nancy J. Smith, Senior Assistant Attorney General, State of New Hampshire 6/17/02 (02-CV-E)	6/02 — Referred to reporter and chair **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CV8, CV12] — Amendment of the general pleading requirements	Elliott B. Spector, Esq. 7/22/94	10/93 — Delayed for further consideration 10/94 — Delayed for further consideration 4/95 — Declined to act **DEFERRED INDEFINITELY**
[CV9(b)] — General Particularized pleading	Elliott B. Spector	5/93 — Considered by cmte 10/93 — Considered by cmte 10/94 — Considered by cmte 4/95 — Declined to act **DEFERRED INDEFINITELY**
[CV9(h)] — Ambiguity regarding terms affecting admiralty and maritime claims	Mark Kasanin 4/94	10/94 — Considered by cmte 4/95 — Approved draft 7/95 — Approved for publication 9/95 — Published 4/96 — Forwarded to the ST Cmte for submission to Jud Conf 6/96 — Approved by ST Cmte 9/96 — Approved by Jud Conf 4/97 — Approved by Supreme Court 12/97 — Effective **COMPLETED**
[CV11] — Mandatory sanction for frivolous filing by a prisoner	H.R. 1492 introduced by Cong Gallegly 4/97	5/97 — Considered by cmte 3/99 — Agenda Sub cmte. rec. Remove from agenda (5) 10/99 — Removed under consent calendar **COMPLETED**
[CV11] — Sanction for improper advertising	Carl Shipley 4/97 (97-CV-G)	5/97 — Referred to reporter, chair, and Agenda Sub cmte. 3/99 — Agenda Sub cmte. rec. Remove from agenda (5) **COMPLETED**
[CV11] — Should not be used as a discovery device or to test the legal sufficiency or efficiency of allegations in pleadings	Nicholas Kadar, M.D. 3/98 (98-CV-B)	4/98 — Referred to reporter, chair, and Agenda Sub cmte. 3/99 — Agenda Sub cmte. rec. Await preliminary review by reporter (6) 8/99 — Reporter recommends removal from the agenda 10/99 — Consent calendar removed from agenda **COMPLETED**
[CV12] — Dispositive motions to be filed and ruled upon prior to commencement of the trial	Steven D. Jacobs, Esq. 8/23/94	10/94 — Delayed for further consideration 5/97 — Reporter recommends rejection 11/98 — Rejected by cmte **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CV12] — To conform to *Prison Litigation Act of 1996* that allows a defendant sued by a prisoner to waive right to reply	John J. McCarthy 11/21/97 (97-CV-R)	12/97 — Referred to reporter, chair, & Agenda Sub cmte. 3/99 — Agenda Sub cmte. rec. Ready for full committee consideration (4) 4/99 — Cmte considered and deferred action **DEFERRED INDEFINITELY**
[CV12(a)(3)] —Conforming amendment to Rule 4(i)		3/98 — Cmte approved draft 6/98 — Stg Cmte approves 8/98 — Published for comment 4/99 — Cmte approves amendments with revisions 6/99 — Stg Comte approves 9/99 — Jud. Conf. approves & transmits to Sup.Ct. 4/00 — Supreme Ct transmits to Congress 12/00 — Effective **COMPLETED**
[CV12(b)] — Expansion of conversion of motion to dismiss to summary judgment	Daniel Joseph 5/97 (97-CV-H) #2941	5/97 — Referred to reporter, chair, and Agenda Sub cmte. 3/99 — Agenda Sub cmte. rec. Remove from agenda (5) 10/99 — Consent calendar removed from agenda **COMPLETED**
[CV12(f) — Provide guidance for the clerk when the court strikes a pleading	Judge D. Brock Hornby 10/02 (02-CV-J)	10/02 — Referred to reporter and chair **PENDING FURTHER ACTION**
[CV14(a) & (c)] — Conforming amendment to admiralty changes		6/98 — Stg Cmte approves 8/98 — Published for comment 4/99 — Cmte approves amendments 6/99 — Stg Comte approves 9/99 — Jud. Conf. approves and transmits to Sup. Ct. 4/00— Supreme Court approved 12/00 — Effective **COMPLETED**
[CV15(a)] — Amendment may not add new parties or raise events occurring after responsive pleading	Judge John Martin 10/20/94 & Judge Judith Guthrie 10/27/94	4/95 — Delayed for further consideration 11/95 — Considered by cmte and deferred **DEFERRED INDEFINITELY**

Proposal	Source, Date, and Doc #	Status
[CV15(c)(3)(B)] — Clarifying extent of knowledge required in identifying a party	Charles E. Frayer, Law student 9/27/98 (98-CV-E)	9/98 — Referred to chair, reporter, and Agenda Sub cmte. 3/99 — Agenda Sub cmte. rec. accumulate for periodic revision (1) 4/99 — Cmte considered and retained for future study 5/02 — Committee considered issue along with J. Becker suggestion in 266 F.3d 186 (3rd Cir. 2001). 10/02 — Committee referred to subcommittee for further consideration **PENDING FURTHER ACTION**
[CV15(c)(3)(B) — Amendment to allow relation back	Judge Edward Becker, 266 F.3d 186 (3rd Cir. 2001)	10/01 — Referred to chair and reporter 1/02 — Committee considered 5/02 — Committee considered 10/02 — Committee referred to subcommittee for further consideration **PENDING FURTHER ACTION**
[CV19] — Clarify language regarding dismissal of actions	Prof. Bradley Scott Shannon 5/30/02 (02-CV-F)	7/02 — Referred to chair and reporter 10/02 — Referred to Style Consultant **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CV23] — Amend class action rule to accommodate demands of mass tort litigation and other problems	Jud Conf on Ad Hoc Communication for Asbestos Litigation 3/91; William Leighton ltr 7/29/94; H.R. 660 introduced by Canady on CV 23 (f)	5/93 — Considered by cmte 6/93 — Submitted for approval for publication; withdrawn 10/93, 4/94, 10/94, 2/95, 4/95, 11/95; studied at meetings. 4/96 — Forwarded to ST Cmte for submission to Jud Conf 6/96 — Approved for publication by ST Cmte 8/96 — Published for comment 10/96 — Discussed by cmte 5/97 — Approved and forwarded changes to (c)(1), and (f); rejected (b)(3)(A) and (B); and deferred other proposals until next meeting 4/97 — Stotler letter to Congressman Canady 6/97 — Changes to 23(f) were approved by ST Cmte; changes to 23(c)(1) were recommitted to advisory cmte 10/97 — Considered by cmte 3/98 — Considered by cmte deferred pending mass torts working group deliberations 3/99 — Agenda Sub cmte. rec. Refer to other Cmte (3) 4/00 — Comte Considered 10/00 — Comte Considered 4/01 — Request for publication 6/01 — ST Cmte approved for publication 8/01 — Published for public comment 10/01 — Cmte considered 1/02 — Cmte considered 5/02 — Committee approved 6/02 — ST Committee approved 9/02 — Judicial Conference approved **PENDING FURTHER ACTION**
[CV23] — Standards and guidelines for litigating and settling consumer class actions	Patricia Sturdevant, for National Association for Consumer Advocates 12/10/97 (97-CV-T)	12/97 — Referred to reporter, chair, and Agenda Sub cmte. 3/99 — Agenda Sub cmte. rec. Refer to other Cmte (3) 4/00 — Comte considered 10/00 — Comte Considered 4/01 — Request for publication 6/01 — ST Cmte approved for publication 8/01 — Published for public comment 10/01 — Cmte considered 1/02 — Cmte considered 5/02 — Committee approved 6/02 — ST Committee approved 9/02 — Judicial Conference approved **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CV23(e)] — Amend to include specific factors court should consider when approving settlement for monetary damages under 23(b)(3)	Beverly C. Moore, Jr., for Class Action Reports, Inc. 11/25/97 (97-CV-S)	12/ 97 — Referred to reporter, chair, and Agenda Sub cmte. 3/99 — Agenda Sub cmte. rec. Refer to other Cmte (3) 4/00 — Comte Considered 10/00 — Comte Considered 4/01 — Request for publication 6/01 — ST Cmte approved for publication 8/01 — Published for public comment 10/01 — Cmte considered 1/02 — Cmte considered 5/02 — Cmte approved 6/02 — ST Committee approved 9/02 — Judicial Conference approved **PENDING FURTHER ACTION**
[CV23(e)] — Require all "side-settlements," including attorney's fee components, to be disclosed and approved by the district court	Brian Wolfman, for Public Citizen Litigation Group 11/23/99 (99-CV-H)	12/99 — Referred to reporter, chair, and Agenda Sub cmte. 4/00 — Referred to Class Action subcomte 10/00 — Comte Considered 4/01 — Request for publication 6/01 — ST Cmte approved for publication 8/01 — Published for public comment 10/01 — Cmte considered 1/02 — Cmte considered 5/02 — Cmte approved 6/02 — ST Committee approved 9/02 — Judicial Conference approved **PENDING FURTHER ACTION**
[CV23(e)] — Preserve right to appeal for *unnamed* class members who do not file motions to intervene; and class members not named plaintiffs have right to appeal judicial approval of proposed dismissal or compromise without first filing motion to intervene	Bill Lockyer, Attorney General, for State of California DOJ 3/29/00 (00-CV-B) 6/21/00	4/00 — Referred to reporter, chair, Agenda Subcmte,, and Class Action Subcmte 6/00 — Referred to reporter, chair, Agenda Subcmte, and Class Action Subcmte 10/00 — Comte Considered 4/01 — Request for publication 6/01 — ST Cmte approved for publication 8/01 — Published for public comment 10/01 — Cmte considered 1/02 — Cmte considered 5/02 — Cmte approved 6/02 — ST Committee approved 6/02 — *Devlin v. Scardelletti*, 122 S.Ct. 2005 (6/10/02), resolved issue **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CV23(f)] — interlocutory appeal	part of class action project	4/98 — Sup Ct approves 12/98 — Effective **COMPLETED**
[CV23] — class action attorney fee		10/00 — Comte Considered 4/01 — Request for publication 6/01 — ST Cmte approved for publication 8/01 — Published for public comment 10/01 — Cmte considered 1/02 — Cmte considered 5/02 — Cmte approved 6/02 — ST Committee approved 9/02 — Judicial Conference approved **PENDING FURTHER ACTION**
[CV26] — Interviewing former employees of a party	John Goetz	4/94 — Declined to act **DEFERRED INDEFINITELY**
[CV26] —Initial disclosure and scope of discovery	Thomas F. Harkins, Jr., Esq. 11/30/94 and American College of Trial Lawyers; Allan Parmelee (97-CV-C) #2768; Joanne Faulkner 3/97 (97-CV-D) #2769	4/95 — Delayed for further consideration 11/95 — Considered by cmte 4/96 — Proposal submitted by American College of Trial Lawyers 10/96 — Considered by cmte; Sub cmte. appointed 1/97 — Sub cmte. held mini-conference in San Francisco 4/97 — Doc. #2768 and 2769 referred to Discovery Sub cmte. 9/97 — Discovery Reform Symposium held at Boston College Law School 10/97 — Alternatives considered by cmte 3/98 — Cmte approved draft 6/98 — Stg Cmte approves 8/98 — Published for comment 4/99 — Cmte approves amendments with revisions 6/99 — Stg Comte approves 9/99 — Jud. Conf. approves & transmits to Sup. Ct. 4/00 — Supreme Court approves 12/00 — Effective **COMPLETED**
[CV26] —Does inadvertent disclosure during discovery waive privilege	Discovery Subcmte	10/99 — Discussed **PENDING FURTHER ACTION**
[CV26] — Presumptive time limits on backward reach of discovery	Al Cortese	10/99 — Removed from agenda **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CV26] — Electronic discovery		10/99 — Referred to Subcmte 3/00 — Subcmte met 4/00 — Considered 10/00 — Comte Considered 4/01 — Cmte considered 5/02 — Cmte considered 10/02 — Subcommittee and Committee considered **PENDING FURTHER ACTION**
[CV26] — Interplay between work-product doctrine under Rule 26(b)(3) and the disclosures required of experts under Rules 26(a)(2) and 26 (b)(4)	Gregory K. Arenson, Chair, NY State Bar Assn Committee 8/7/00 (00-CV-E)	8/00 — Referred to reporter, chair, incoming chair, and Agenda Subcmte 10/02 — Discovery Subcommittee considered **PENDING FURTHER ACTION**
[CV26(a)] — To clarify and expand the scope of disclosure regarding expert witnesses	Prof. Stephen D. Easton 11/29/00 (00-CV-I)	12/00 — Sent to reporter and chair **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CV26(c)] — Factors to be considered regarding a motion to modify or dissolve a protective order	Report of the Federal Courts Study Committee, Professors Marcus and Miller, and Senator Herb Kohl 8/11/94; Judge John Feikens (96-CV-F); S. 225 reintroduced by Sen Kohl	5/93 — Considered by cmte 10/93 — Published for comment 4/94 — Considered by cmte 10/94 — Considered by cmte 1/95— Submitted to Jud Conf 3/95 — Remanded for further consideration by Jud Conf 4/95 — Considered by cmte 9/95 — Republished for public comment 4/96 — Tabled, pending consideration of discovery amendments proposed by the American College of Trial Lawyers 1/97 — S. 225 reintroduced by Sen Kohl 4/97 — Stotler letter to Sen Hatch 10/97 — Considered by Sub cmte. and left for consideration by full cmte 3/98 — Cmte determined no need has been shown to amend **COMPLETED**
[CV26] — Depositions to be held in county where witness resides; better distinction between retained and "treating" experts	Don Boswell 12/6/96 (96-CV-G)	12/96 — Referred to reporter, chair, and Agenda Sub cmte. 5/97 — Reporter recommends that it be considered part of discovery project 3/99 — Agenda Sub cmte. rec. Refer to other Cmte (3) 10/00 — Subcomte declines to take action **COMPLETED**
[CV30] — Allow use by public of audio tapes in the courtroom	Glendora 9/96/96 (96-CV-H)	12/96 — Sent to reporter and chair 11/98 — Rejected by cmte **COMPLETED**
[CV30(b)] — Give notice to deponent that deposition will be videotaped	Judge Janice M. Stewart 12/8/99 (99-CV-J)	12/99 — Referred to reporter, chair, Agenda Sub cmte., and Discovery Sub cmte. 4/00 — Referred to Disc. Subcomte **PENDING FURTHER ACTION**
[CV30(b)(1)] — That the deponent seek judicial relief from annoying or oppressive questioning during a deposition	Judge Dennis H. Inman 8/6/97 (97-CV-J)	10/97 — Referred to reporter, chair, and Agenda Sub cmte. 11/98 — Rejected by cmte **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CV30(d)(2)] — presumptive one day of seven hours for deposition		3/98 — Cmte approved draft 6/98 — Stg Cmte approves 8/98 — Published for comment 4/99 — Cmte approves amendments with revisions 6/99 — Stg Comte approves 9/99 — Jud. Conf. approves & transmits to Sup. Ct. 4/00 — Supreme Court approves 12/00 — Effective **COMPLETED**
[CV30(e)] — review of transcript by deponent	Dan Wilen 5/14/99 (99-CV-D)	8/99 — Referred to agenda Subcmte 8/99 — Agenda Sub cmte. rec. Refer to other Cmte (3) 10/00 — Subcomte declines to take action **COMPLETED**
[CV32] — Use of expert witness testimony at subsequent trials without cross examination in mass torts	Honorable Jack Weinstein 7/31/96	7/31/96 — Submitted for consideration 10/96 — Considered by cmte; FJC to conduct study 5/97 — Reporter recommends that it be considered part of discovery project 3/99 — Agenda Sub cmte. rec. Refer to other Cmte (3) **PENDING FURTHER ACTION**
[CV33 & 34] — require submission of a floppy disc version of document	Jeffrey K. Yencho (7/22/99) 99-CV-E	7/99 — Referred to Agenda Subcmte 8/99 — Agenda Sub cmte. rec. Refer to other Sub cmte. (3) **PENDING FURTHER ACTION**
[CV34(b)] — requesting party liable for paying reasonable costs of discovery		3/98 — Cmte approved draft 6/98 — Stg Cmte approves 8/98 — Published for comment 4/99 — Cmte approves amendments with revisions (moved to Rule 26) 6/99 — Stg Comte approves 9/99 — Rejected by Jud. Conf. **COMPLETED**
[CV36(a)] — To not permit false denials, in view of recent Supreme Court decisions	Joanne S. Faulkner, Esq. 3/98 (98-CV-A)	4/98 — Referred to reporter, chair, and Agenda Sub cmte. 11/98 — Rejected by cmte **COMPLETED**
[CV37(b)(3)] — Sanctions for Rule 26(f) failure	Prof. Roisman	4/94 — Declined to act **DEFERRED INDEFINITELY**

Proposal	Source, Date, and Doc #	Status
[CV37(c)(1)] — Sanctions for failure to supplement discovery		3/98 — Cmte approved draft 6/98 — Stg Cmte approves 8/98 — Published for comment 4/99 — Cmte approves amendments 6/99 — Stg Comte approves 9/99 — Jud. Conf. approves & transmits to Sup. Ct. 4/00 — Supreme Court approves 12/00 — Effective **COMPLETED**
[CV39(c) and CV16(e)] — Jury may be treated as advisory if the court states such before the beginning of the trial	Daniel O'Callaghan, Esq.	10/94 — Delayed for further study, no pressing need 4/95 — Declined to act **COMPLETED**
[CV40] — Precedence given elderly in trial setting	Michael Schaefer 1/19/00; 00-CV-A	2/00 — Referred to chair, reporter, and Agenda Sub cmte. **PENDING FURTHER ACTION**
[CV41(a)] — Makes it explicit that actions *and* claims may be dismissed	Bradley Scott Shannon 5/30/02 (02-CV-F)	7/02 — Referred to chair and reporter 10/02 — Referred to Style Consultant **PENDING FURTHER ACTION**
[CV43] — Strike requirement that testimony must be taken orally	Comments at 4/94 meeting	10/93 — Published 10/94 — Amended and forwarded to ST Cmte 1/95 — ST Cmte approves but defers transmission to Jud Conf 9/95 — Jud Conf approves amendment 4/96 — Supreme Court approved 12/96 — Effective **COMPLETED**
[CV43] — Procedures for a "summary bench trial"	Judge Morton Denlow 8/9/00 (00-CV-F)	8/00 — Referred to reporter, chair, and incoming chair 10/00 — Comte considered, declined to take action as unnecessary at this time **COMPLETED**
[CV43(f)—Interpreters] — Appointment and compensation of interpreters	Karl L. Mulvaney 5/10/94	4/95 — Delayed for further study and consideration 11/95 — Suspended by advisory cmte pending review of Americans with Disabilities Act by CACM 10/96 — Federal Courts Improvement Act of 1996 provides authority to pay interpreters **COMPLETED**
[CV44] — To delete, as it might overlap with Rules of EV dealing with admissibility of public records	Evidence Rules Committee Meeting 10/20-21/97 (97-CV-U)	1/97 — Referred to chair, reporter, and Agenda Sub cmte. 3/98 — Cmte determined no need to amend **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CV45] — Nationwide subpoena		5/93 — Declined to act **COMPLETED**
[CV45] — Notice in lieu of attendance subpoenas	J. Michael Schaefer, Esq. 12/28/98 (99-CV-A)	3/99 — Referred to chair, reporter, and Agenda Sub cmte. 8/99 — Agenda Sub cmte. rec. Remove from agenda 10/99 — Consent calendar removed from agenda **COMPLETED**
[CV45] — Clarifying status of subpoena after expiration date	K. Dino Kostopoulos, Esq. 1/27/99 (99-CV-B)	3/99 — Referred to chair, reporter, and Agenda Sub cmte. 8/99 — Agenda Sub cmte. rec. Refer to other Cmte (3) 10/00 — Subcomte declines to take action **COMPLETED**
[CV45] — Discovering party must specify a date for production far enough in advance to allow the opposing party to file objections to production	Prof. Charles Adams 10/1/98 (98-CV-G)	10/98 — Referred to chair, reporter, Agenda Sub cmte., and Discovery Sub cmte. 3/99 — Agenda Sub cmte. rec. Refer to other Cmte (3) 10/00 — Subcomte declines to take action **COMPLETED**
[CV45(d)] — Re-service of subpoena not necessary if continuance is granted and witness is provided adequate notice	William T. Terrell, Esq. 10/9/98 (98-CV-H)	12/98 — Referred to chair, reporter, and Agenda Sub cmte. 3/99 — Agenda Sub cmte. rec. Refer to other Cmte (3) 10/00 — Subcomte declines to take action **COMPLETED**
[CV47(a)] — Mandatory attorney participation in jury voir dire examination	Francis Fox, Esq.	10/94 — Considered by cmte 4/95 — Approved draft 7/95 — Proposed amendment approved for publication by ST Cmte 9/95 — Published for comment 4/96 — Considered by advisory cmte; recommended increased attention by Fed. Jud. Center at judicial training **COMPLETED**
[CV47(b)] — Eliminate peremptory challenges	Judge William Acker 5/97 (97-CV-F) #2828	6/97 — Referred to reporter, chair, and Agenda Sub cmte. 11/98 — Cmte declined to take action **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CV48] — Implementation of a twelve-person jury	Judge Patrick Higginbotham	10/94 — Considered by cmte 7/95 — Proposed amendment approved for publication by ST Cmte 9/95 — Published for comment 4/96 — Forwarded to ST Cmte for submission to Jud Conf 6/96 — ST Cmte approves 9/96 — Jud Conf rejected 10/96 — Cmte's post-mortem discussion **COMPLETED**
[CV50] — Uniform date for filing post trial motion	BK Rules Committee	5/93 —Approved for publication 6/93 — ST Cmte approves publication 4/94 — Approved by cmte 6/94 — Approved by ST Cmte 9/94 — Approved by Jud Conf 4/95 — Approved by Sup Ct 12/95 — Effective **COMPLETED**
[CV50(b)] — When a motion is timely after a mistrial has been declared	Judge Alicemarie Stotler 8/26/97 (97-CV-M)	8 /97 — Sent to reporter and chair 10/97 — Referred to Agenda Sub cmte. 3/99 — Agenda Sub cmte. rec. Accumulate for periodic revision (1) **PENDING FURTHER ACTION**
[CV51] — Jury instructions filed before trial	Judge Stotler (96-CV-E) Gregory B. Walters, Cir. Exec., for the Jud. Council of the Ninth Cir. 12/4/97 (97-CV-V)	11/8/96 — Referred to chair 5/97 — Reporter recommends consideration of comprehensive revision 1/98 — Referred to reporter, chair, and Agenda Sub cmte. 3/98 — Cmte considered 11/98 — Cmte considered 3/99 — Agenda Sub cmte. rec. Ready for full Cmte consideration 4/99 — Cmte considered 10/99 — Discussed 4/00 — Cmte considered 10/00 — Cmte considered 4/01 — Cmte considered 1/02 — Cmte held public hearing 5/02 — Cmte approved amendments 6/02 — ST Committee approved 9/02 — Judicial Conference approved **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CV52] — Uniform date for filing for filing post trial motion	BK Rules Cmte	5/93 —Approved for publication 6/93 — ST Cmte approves publication 4/94 — Approved by cmte 6/94 — Approved by ST Cmte 9/94 — Approved by Jud Conf 4/95 — Approved by Sup Ct 12/95 — Effective **COMPLETED**
[CV53] — Provisions regarding pretrial and post-trial masters	Judge Wayne Brazil	5/93 — Considered by cmte 10/93 — Considered by cmte 4/94 — Draft amendments to CV16.1 regarding "pretrial masters" 10/94 — Draft amendments considered 11/98 — Subcmte appointed to study issue 3/99 — Agenda Sub cmte. rec. Refer to other Cmte (3) 10/99 — Discussed (FJC requested to survey courts) 4/00 — Considered (FJC preliminary report) 1/02 — Cmte held public hearing 5/02 — Cmte approved amendments 6/02 — ST Committee approved 9/02 — Judicial Conference approved **PENDING FURTHER ACTION**
[CV54(d)(1)] — Proposed amendments to 28 U.S.C. § 1920 and Rule 54 re taxation of costs	Judge Jane J. Boyle 2/02 (02-CV-B)	2/02 — Referred to reporter & chair 5/02 — Cmte declined to take action **COMPLETED**
[CV54(d)(2)] —attorney fees and interplay with final judgment CV 58	ST Cmte; AP amendment to FRAP 4(a)(7), 1/00	4/00 — Request for publication 6/00 — Stg Comte approves publicatipon 8/00 — Published 4/01 — Cmte approved amendments 6/01 — ST Cmte approved 10/01 — Jud Conf approved 4/02 — Sup Ct approved 12/02 Effective **COMPLETED**
[CV56] — To clarify cross-motion for summary judgment	John J. McCarthy 11/21/97	12/97 — Referred to reporter, chair, & Agenda Sub cmte. **PENDING FURTHER ACTION**
[CV56(a)] — Clarification of timing	Scott Cagan 2/97 (97-CV-B) #2475	3/97 — Referred to reporter, chair, and Agenda Sub cmte. 5/97 — Reporter recommends rejection 3/99 — Agenda Sub cmte. rec. Accumulate for periodic revision (1) **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CV56(c)] — Time for service and grounds for summary adjudication	Judge Judith N. Keep 11/21/94	4/95 — Considered by cmte; draft presented 11/95 — Draft presented, reviewed, and set for further discussion 3/99 — Agenda Sub cmte. rec. Accumulate for periodic revision 1/02 — Committee considered and set for further discussion **PENDING FURTHER ACTION**
[CV58] — 60-day cap on finality judgment	ST Cmte; AP amendment to FRAP 4(a)(7), 1/00	4/00 — Request for publication 6/00 — Stg Comte approves 8/00 — Published 4/01 — Cmte approved revised amendments 6/01 — ST Cmte approved 10/01 — Jud Conf approved 4/02 — Sup Ct approved 12/02 Effective **COMPLETED**
[CV58] — Sets forth the procedures for entering a "final order"	Prof. Bradley Scott Shannon 5/30/02 (02-CV-F)	7/02 — Referred to reporter and chair 10/02 — Committee removed from agenda **COMPLETED**
[CV59] — Uniform date for filing for filing post trial motion		5/93 —Approved for publication 6/93 — ST Cmte approves publication 4/94 — Approved by cmte 6/94 — Approved by ST Cmte 9/94 — Approved by Jud Conf 4/95 — Approved by Sup Ct 12/95 — Effective **COMPLETED**
[CV60(b)] — Parties are entitled to challenge judgments provided that the prevailing party cites the judgment as evidence	William Leighton 7/20/94	10/94 — Delayed for further study 4/95 — Declined to act **COMPLETED**
[CV62(a)] — Automatic stays	Dep. Assoc. AG, Tim Murphy	4/94 — No action taken **COMPLETED**
[CV62.1] — Proposed new rule governing "Indicative Rulings"	Advisory Comm on Appellate Rules 4/01	1/02 — Committee considered **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CV65(f)] — rule made applicable to copyright impoundment cases	see request on copyright	11/98 — Request for publication 6/99 — Stg Cmte approves 8/99 — Published for comment 4/00 — Cmte approved 6/00 — Stg Comte approves 9/00 — Jud Conf approves 4/01 — Approved by Sup Ct 12/01 — Effective **COMPLETED**
[CV65.1] — To amend to avoid conflict between 31 U.S.C. § 9396 governing the appointment of agents for sureties and the Code of Conduct for Judicial Employees	Judge H. Russel Holland 8/22/97 (97-CV-L)	10/97 — Referred to reporter, chair, and Agenda Sub cmte. 11/98 — Cmte declined to act in light of earlier action taken at March 1998 meeting **COMPLETED**
[CV68] — Party may make a settlement offer that raises the stakes of the offeree who would continue the litigation	Agenda book for 11/92 meeting; Judge Swearingen 10/30/96 (96-CV-C); S. 79 Civil Justice Fairness Act of 1997 and § 3 of H.R. 903 Gregory K. Arenson 4/19/02 (02-CV-D)	1/21/93 — Unofficial solicitation of public comment 5/93, 10/93, 4/94 — Considered by cmte 4/94 — Federal Judicial Center agrees to study rule 10/94 — Delayed for further consideration 1995 — Federal Judicial Center completes its study **DEFERRED INDEFINITELY** 10/96 — Referred to reporter, chair, and Agenda Sub cmte. (Advised of past comprehensive study of proposal) 1/97 — S. 79 introduced § 303 would amend the rule 4/97 — Stotler letter to Hatch 5/97 — Reporter recommends continued monitoring 3/99 — Agenda Sub cmte. rec. Remove from agenda (5) 10/99 — Consent calendar removed from agenda **COMPLETED** 5/02 — Referred to reporter and chair 10/02 — Committee considered and agreed to carry forward suggestion **PENDING FURTHER ACTION**
[CV73(b)] — Consent of additional parties to magistrate judge jurisdiction	Judge Easterbrook 1/95	4/95 — Initially brought to cmte's attention 11/95 — Delayed for review, no pressing need 10/96 — Considered along with repeal of CV74, 75, and 76 5/97 — Reporter recommends continued monitoring 3/99 — Agenda Sub cmte. rec. Remove from agenda (5) 10/99 — Consent calendar removed from agenda **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CV 74,75, and 76] — Repeal to conform with statute regarding alternative appeal route from magistrate judge decisions	Federal Courts Improvement Act of 1996 (96-CV-A) #1558	10/96 — Recommend repeal rules to conform with statute and transmit to ST Cmte 1/97 — Approved by ST Cmte 3/97 — Approved by Jud Conf 4/97 — Approved by Sup Ct 12/97 — Effective **COMPLETED**
[CV 77(b)] — Permit use of audiotapes in courtroom	Glendora 9/3/96 (96-CV-H) #1975	12/96 — Referred to reporter and chair 5/97 — Reporter recommends that other Conf. Cmte should handle the issue 3/99 — Agenda Sub cmte. rec. Remove from agenda (5) 10/99 — Consent calendar removed from agenda **COMPLETED**
[CV77(d)] — Electronic noticing to produce substantial cost savings while increasing efficiency and productivity	Michael E. Kunz, Clerk of Court 9/10/97 (97-CV-N); William S. Brownell, District Clerks Advisory Group 10/20/97 (CV-Q)	9/97 — Mailed to reporter, chair, and Agenda Sub cmte. 3/99 — Agenda Sub cmte. rec. Ready for consideration by full Cmte (4) 4/99 — request publication 6/99 — Stg Comte approves publication 8/99 — Published for comment 4/00 — Cmte approves amendments 6/00 — Stg Comte approves 9/00 — Jud Conf approves 4/01 — Approved by Sup Ct 12/01 — Effective **COMPLETED**
[CV77.1] — Sealing orders		10/93 — Considered 4/94 — No action taken **DEFERRED INDEFINITELY**
[CV81] — To add injunctions to the rule	John J. McCarthy 11/21/97	12/97 — Referred to reporter, chair, and Agenda Sub cmte. **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CV 81(a)(2)] — Inconsistent time period vs. Habeas Corpus Rule 1(b)	Judge Mary Feinberg 1/28/97 (97-CV-E) #2164	2/97 — Referred to reporter, chair, and Agenda Sub cmte. 5/97 — Considered and referred to Criminal Rules Cmte for coordinated response 3/99 — Agenda Sub cmte. rec. Hold until more information available (2) 4/00 — Comte considered 6/00 — Stg Comte approves publication 8/00 — Published 4/01 — Cmte approves amendments 6/01 — Approved by ST Cmte 9/01 — Approved by Jud Conf 4/02 — Sup Ct approved 12/02 Effective **COMPLETED**
[CV81(a)(1)] — Applicability to D.C. mental health proceedings	Joseph Spaniol, 10/96	10/96 — Cmte considered 5/97 — Reporter recommends consideration as part of a technical amendment package 10/98 — Cmte. includes it in package submitted to Stg. Cmte. for publication 1/99 — Stg. Cmte. approves for publication 8/99 — Published for comment 4/00 — Cmte approved 6/00 — Stg Comte approves 9/00 — Jud Conf approves 4/01 — Sup Ct approves 12/01 — Effective **COMPLETED**
[CV81(a)(1)] — Applicability to copyright proceedings and substitution of notice of removal for petition for removal	see request on copyright	11/98 — Request for publication 1/99 — Stg. Cmte. approves for publication 8/99 — Published for comment 4/00 — Cmte approved amendments 6/00 — Approved by ST Cmte 9/00 — Approved by Jud Conf 4/01 — Approved by Sup Ct 12/01 — Effective **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CV81(a)(2)] — Time to make a return to a petition for habeas corpus	CR cmte 4/00	4/00 — Request for comment 6/00 — Stg Comte approved 8/00 — Published for comment 4/01 — Cmte approved amendments 6/01 — ST Cmte approved 10/01 — Jud Conf approved 4/02 — Sup Ct approved 12/02 Effective **COMPLETED**
[CV81(c)] — Removal of an action from state courts — technical conforming change deleting "petition"	Joseph D. Cohen 8/31/94	4/95 — Accumulate other technical changes and submit eventually to Congress 11/95 — Reiterated April 1995 decision 5/97 — Reporter recommends that it be included in next technical amendment package 3/99 — Agenda Sub cmte. rec. Accumulate for periodic revision (1) 4/99 — Cmte considered **PENDING FURTHER ACTION**
[CV82] — To delete obsolete citation	Charles D. Cole, Jr., Esq. 11/3/99 (99-CV-G)	12/99 — Referred to reporter, chair, and Agenda Subcommittee 4/00 — Comte approved for transmission without publication 6/00 — Stg Comte approves 9/00 — Jud Conf approves 4/01 — Sup Ct approves 12/01 — Effective **COMPLETED**
[CV83(a)(1)] — Uniform effective date for local rules and transmission to AO		3/98 — Cmte considered 11/98 — Draft language considered 3/99 — Agenda Sub cmte. rec. Refer to other Cmte (3) 4/00 — Comte considered **DEFERRED INDEFINITLEY**
[CV83] — Negligent failure to comply with procedural rules; local rule uniform numbering		5/93 — Recommend for publication 6/93 — Approved for publication 10/93 — Published for comment 4/94 — Revised and approved by cmte 6/94 — Approved by ST Cmte 9/94 — Approved by Jud Conf 4/95 — Approved by Sup Ct 12/95 — Effective **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CV83(b)] — Authorize Conference to permit local rules inconsistent with national rules on an experimental basis		4/92 — Recommend for publication 6/92 — Withdrawn at Stg. Comte meeting **COMPLETED**
[CV83] — Have a uniform rule making Federal Rules of Civil Procedure consistent with Federal Rules of Appellate Procedure with respect to attorney admission	Frank Amador, Esq. 9/19/02 (02-CV-H)	9/02 — Referred to reporter and chair **PENDING FURTHER ACTION**
[CV84] — Authorize Conference to amend rules		5/93 — Considered by cmte 4/94 — Recommend no change **COMPLETED**
[Recycled Paper and Double-Sided Paper]	Christopher D. Knopf 9/20/95	11/95 — Considered by cmte 6/00 — CACM assigned issue and makes recommendation for Judicial Conference policy **COMPLETED**
[Pro Se Litigants] — To create a committee to consider the promulgation of a specific set of rules governing cases filed by pro se litigants	Judge Anthony J. Battaglia, on behalf of the Federal Magistrate Judge Assn. Rules Cmte, to support proposal by Judge David Piester 7/17/97 (97-CV-I);	7/97 — Mailed to reporter and chair 10/97 — Referred to Agenda Sub cmte. 3/99 — Agenda Sub cmte. rec. schedule for further study (3) **PENDING FURTHER ACTION**
[CV Form 1] — Standard form AO 440 should be consistent with summons Form 1	Joseph W. Skupniewitz, Clerk 10/2/98 (98-CV-F)	10/98 — Referred to chair, reporter, and Agenda Sub cmte. 3/99 — Agenda Sub cmte. rec. Ready for full Cmte consideration (4) **PENDING FURTHER ACTION**
[CV Form 17] Complaint form for copyright infringement	Professor Edward Cooper 10/27/97	10/97 — Referred to cmte 3/99 — Agenda Sub cmte. rec. Ready for full Cmte consideration (4) 4/99 — Cmte deferred for further study **PENDING FURTHER ACTION**
[CV Forms 31 and 32] — Delete the phrase, "that the action be dismissed on the merits" as erroneous and confusing	Prof. Bradley Scott Shannon 5/30/02 (02-CV-F)	7/02 — Referred to chair and reporter 10/02 — Referred to Style Consultant **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[Adoption of form complaints for prisoner actions]	Iyass Suliman, prisoner 8/3/99 (99-CV-F)	8/99 — Referred to reporter, chair, and Agenda Sub cmte. 8/99 — Subc recommended removal from agenda 10/99 – Cmte approved recommendation **COMPLETED**
[Electronic Filing] — To require clerk's office to date stamp and return papers filed with the court.	John Edward Schomaker, prisoner 11/25/99 (99-CV-I)	12/99 — Referred to reporter, chair, Agenda Sub cmte., and Technology Sub cmte. **PENDING FURTHER ACTION**
[Interrogatories on Disk]	Michelle Ritz 5/13/98 (98-CV-C); see also Jeffrey Yencho suggestion re: Rules 3 and 34 (99-CV-E)	5/98 — Referred to reporter, chair, and Agenda Sub cmte. 3/99 — Agenda Sub cmte. rec. Refer to other Cmte (3) **PENDING FURTHER ACTION**
[To change standard AO forms 241 and 242 to reflect amendments in the law under the Antiterrorism and Effective Death Penalty Act of 1997]	Judge Harvey E. Schlesinger 8/10/98 (98-CV-D)	8/98 — Referred to reporter, chair, and Agenda Sub cmte. 3/99 — Agenda Sub cmte. rec. Refer to other Cmte (3) **PENDING FURTHER ACTION**
[To prevent manipulation of bar codes in mailings, as in zip plus 4 bar codes]	Tom Scherer 3/2/00 (00-CV-D)	7/00 — Referred to reporter, chair, and incoming chair **PENDING FURTHER ACTION**
[Notice to U.S. Attorney. Requires litigant to notify U.S. Attorney when the constitutionality of a federal statute is challenged and when United States is not a party to the action]	Judge Barbara B. Crabb 10/5/00 (00-CV-G)	10/00 — Referred to reporter and chair 1/02 — Committee considered 10/02 — Committee considered **PENDING FURTHER ACTION**
[Specifying page limit for motions in Civil Rules]	Jacques Pierre Ward 1/8/01 (01-CV-A)	4/00 — Referred to reporter and chair 1/02 — Committee recommended no change **COMPLETED**
[To develop new Federal procedures for decisions on minority litigant discrimination cases]	Tracey J. Ellis 1/26/02, 4/10/02 (02-CV-A)	1/02 — Referred to reporter and chair 4/02— Referred to reporter and chair 5/02 — Cmte considered and rejected **COMPLETED**
[Court filing fee: AO regulations on court filing fees should not be effective until adoption in the FRCP or Local Rules of Court]	James A. Andrews 4/1/02, 5/13/02 (02-CV-C)	4/02 — Referred to reporter and chair 6/02 — Referred to reporter and chair **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[Substitute term "action" for "case" and other similar words; substitute term "averment" for "allegation" and other similar words]	Prof. Bradley Scott Shannon 5/30/02 (02-CV-F)	7/02 — Referred to reporter and chair 10/02 — Referred to Style Consultant **PENDING FURTHER ACTION**
[Provide specifically for *de bene esse* depositions]	Judge Joseph E. Irenas 6/7/02 (02-CV-G)	7/02 — Referred to reporter and chair **PENDING FURTHER ACTION**
[Make the language understandable to all]	Conan L. Hom, law student 10/2/02 02-CV-I	10/02 — Referred to reporter and chair **PENDING FURTHER ACTION**

CRIMINAL RULES DOCKET

ADVISORY COMMITTEE ON CRIMINAL RULES

The docket sets forth suggested changes to the Federal Rules of Criminal Procedure considered by the Advisory Committee since 1991. The suggestions are set forth in order by (1) criminal rule number, or (2) where there is no rule number, or several rules may be affected — alphabetically by subject matter.

Suggestion	Docket Number, Source, and Date	Status
	CRIMINAL RULES	
Rule 4 Require arresting officer to notify pretrial services officer, U.S. Marshal, and U.S. Attorney of arrest	Local Rules Project	10/95 - Subcommittee appointed 4/96 - Subcommittee declined to take action **COMPLETED**
Rule 4 Clarify the ability of judges to issue warrants via facsimile transmission	01-CR-A Magistrate Judge Bernard Zimmerman 1/29/01	1/01 - Referred to chair and reporter **PENDING FURTHER ACTION**
Rule 5 Authorize video teleconferencing of initial appearances and arraignments	98-CR-A Judge Fred Biery 5/98 98-CR-B Judge Durwood Edwards 6/98	5/98 - Referred to chair and reporter 10/98 - Referred to subcommittee 10/99 - Committee approved for publication 1/00 - Committee considered as part of style package 4/00 - Committee approved for publication 6/00 - Standing Committee approved for publication 8/00 - Published for public comment 4/01 - Committee approved revision that requires defendant's consent and court approval to video teleconference 6/01 - Standing Committee approved 9/01 - Judicial Conference approved 4/02 - Supreme Court approved 12/02 - Effective **COMPLETED**
Rule 5(a) Impose time limit for hearings on unlawful-flight-to-avoid-prosecution arrests	Department of Justice 8/91; 8/92	10/92 - Subcommittee appointed 4/93 - Committee approved 6/93 - Standing Committee approved for publication 9/93 - Published for public comment 4/94 - Committee approved revised amendments 6/94 - Standing Committee approved 9/94 - Judicial Conference approved 4/95 - Supreme Court approved 12/95 - Effective **COMPLETED**

Suggestion	Docket Number, Source, and Date	Status
Rule 5.1(d) Eliminate consent requirement for magistrate judge consideration	96-CR-E Judge Cyndi Swearingen 10/28/96	1/97 - Referred to chair and reporter 4/97 - Committee recommended proposed legislation to Standing Committee 6/97 - Standing Committee recommitted 10/97 - Committee declines to take action 3/98 - Judicial Conference instructed Committee to propose amendment 4/98 - Committee approved amendment but deferred until style project completed 6/98 - Standing Committee concurred with deferral 6/99 - Committee considered 10/99 - Committee approved for publication 1/00 - Committee considered 4/00 - Committee considered; Committee requested publication 6/00 - Standing Committee approved request to publish 8/00 - Published for public comment 4/01 - Committee approved 6/01 - Standing Committee approved 9/01 - Judicial Conference approved 4/02 - Supreme Court approved 12/02 - Effective **COMPLETED**
Rule 5.1 Extend production of witness statements in Criminal Rule 26.2 to Criminal Rule 5.1	Michael R. Levine, Assistant Federal Public Defender 3/95	10/95 - Committee considered 4/96 - Committee approved for publication 6/96 - Standing Committee approved 8/96 - Published for public comment 4/97 - Committee approved 6/97 - Standing Committee approved 9/97 - Judicial Conference approved 4/98 - Supreme Court approved 12/98 - Effective **COMPLETED**
Rule 6 Statistical reporting of indictments	David L. Cook, Administrative Office of the U.S. Courts 3/93	10/93 - Committee declined to take action **COMPLETED**
Rule 6 Allow grand jury witness to be accompanied by counsel (see Rule 6(d) below)	01-CR-B Robert D. Evans, Director, American Bar Association 3/2/01	3/01 - Referred to chair and reporter **PENDING FURTHER ACTION**

Suggested Topic	Docket Number, Source, and Date	Status
Rule 6 Allow sharing of grand jury information pertaining to foreign intelligence	USA Patriot Act of 2001 Pub. L 107-56 10/26/01	11/01 - Committee approved conforming amendments 1/02 - Standing Committee approved 3/02 - Judicial Conference approved 4/02 - Supreme Court approved 12/02 - Effective **COMPLETED**
Rule 6(a) Reduce number of grand jurors	H.R. 1536	5/97 - Congressman Goodlatte introduced H.R. 1536. Bill referred to CACM with input from the Committee 10/97 - Committee voted unanimously to oppose the bill 1/98 - Standing Committee voted to recommend that the Judicial Conference oppose the bill 3/98 - Judicial Conference adopted Standing Committee's recommendation **COMPLETED**
Rule 6(d) Allow counsel to accompany witness in grand jury proceeding	Omnibus Appropriations Act (Pub. Law No. 105-277)	10/98 - Committee appointed Subcommittee to consider legislation 1/99 - Standing Committee approved Subcommittee's recommendation not to allow representation 3/99 - Judicial Conference approves report for submission to Congress **COMPLETED**
Rule 6(d) Interpreters allowed during grand jury	97-CR-B Department of Justice 1/22/97	1/97 - Sent directly to chair 4/97 - Committee approved for publication 6/97 - Standing Committee approved for publication 8/97 - Published for public comment 4/98 - Committee approved amendments 6/98 - Standing Committee approved 9/98 - Judicial Conference approved 4/99 - Supreme Court approved 12/01 - Effective **COMPLETED**
Rule 6(e) Intra-Department of Justice use of grand jury materials	Department of Justice	4/92 - Committee did not approve for publication 10/94 - Committee considered further and declined to take action **COMPLETED**
Rule 6(e)(3)(C)(iv) Disclosure of grand jury materials to state officials	Department of Justice	4/96 - Committee resolved that current practice should be reaffirmed 10/99 - Committee approved for publication **COMPLETED**

Subject	Docket Number, Source, and Date	Status
Rule 6(e)(3)(C)(iv) Disclosure of grand jury materials to state attorney disciplinary agencies	Barry A. Miller, Esq. 12/93	10/94 - Committee considered and declined to take action **COMPLETED**
Rule 6(f) Return by foreperson rather than entire grand jury	97-CR-A Department of Justice 1/22/97	1/97 - Sent directly to chair 4/97 - Committee approved for publication 6/97 - Standing Committee approved for publication 8/97 - Published for public comment 4/98 - Committee approved 6/98 - Standing Committee approved 9/98 - Judicial Conference approved 4/99 - Supreme Court approved. 12/01 - Effective **COMPLETED**
Rule 7(b) Effect of tardy indictment	00-CR-B Congressional constituent 3/21/00	5/00 - Referred to chair and reporter **PENDING FURTHER ACTION**
Rule 7(c)(2) Reflect proposed new Criminal Rule 32.2 governing criminal forfeitures		4/97 - Committee approved for publication 6/97 - Standing Committee approved for publication 8/97 - Published for public comment 4/98 - Committee approved 6/98 - Committee withdrew proposed amendment because Standing Committee rejected proposed Criminal Rule 32.2 10/98 - Committee revised proposed amendment 1/99 - Standing Committee approved 3/99 - Judicial Conference approved 4/00 - Supreme Court approved 12/00 - Effective **COMPLETED**

Subject	Docket Number, Source, and Date	Status
Rule 10 Arraignment of detainees via video teleconferencing. Defendant's presence is not required	Department of Justice 4/92	4/92 - Committee deferred for further action 10/92 - Subcommittee appointed 4/93 - Committee approved for publication 6/93 - Standing Committee approved for publication 9/93 - Published for public comment 4/94 - Committee deferred action deferred pending outcome of FJC pilot programs 10/94 - Committee considered 4/98 - Committee considered. Subcommittee appointed for further study 10/98 - Committee considered and directed reporter to redraft and submit at next meeting 4/99 - Committee considered 10/99 - Committee approved for publication 1/00 - Committee considered as part of style package 4/00 - Committee approved for publication 6/00 - Standing Committee approved for publication 8/00 - Published for public comment 4/01 - Committee approved 6/01 - Standing Committee approved 9/01 - Judicial Conference approved 4/02 - Supreme Court approved 12/02 - Effective **COMPLETED**
Rule 10 Guilty plea at an arraignment	Judge B. Waugh Crigler 10/94	10/94 - Committee considered **DEFERRED INDEFINITELY**
Rule 11 Magistrate judges authorized to accept guilty pleas and inform accused of possible deportation	James Craven, Esq. 1991	4/92 - Committee declined to take action **COMPLETED**
Rule 11 Advise defendant of impact of negotiated factual stipulation	David Adair & Toby Slawsky Administrative Office 4/92	10/92 - Motion to amend withdrawn **COMPLETED**
Rule 11 Advise non-U.S. citizen defendant of potential collateral consequences when accepting guilty plea	01-CR-C Richard J. Douglas, Esq., Senate Committee on Foreign Relations 4/3/01	4/01 - Referred to reporter & chair **PENDING FURTHER ACTION**
Rule 11 To expressly inquire prior to trial whether prosecution's proposed guilty plea agreement was communicated to defendant	02-CR-C Judge David D. Dowd, Jr. 5/20/02	6/02 - Referred to reporter & chair **PENDING FURTHER ACTION**

Suggestion	Docket Number, Source, and Date	Status
Rule 11(c) Advise defendant of any appeal waiver provision that may be contained in plea agreement	96-CR-A Judge Maryanne Trump Barry 7/19/96	10/96 - Committee considered 4/97 - Committee considered and approved for publication 6/97 - Standing Committee approved for publication 8/97 - Published for public comment 4/98 - Committee approved 6/98 - Standing Committee approved 9/98 - Judicial Conference approved 4/99 - Supreme Court approved 12/99 - Effective **COMPLETED**
Rule 11(b)(2) Examine defendant's prior discussions with a government attorney	Judge Sidney Fitzwater 11/94 & 3/99	4/95 - Committee considered but no motion to amend **COMPLETED** 3/99 - Referred to chair and reporter 4/00 - Committee considered and approved for publication 6/00 - Standing Committee approved for publication 8/00 - Published for public comment 4/01 - Committee approved 6/01 - Standing Committee approved 9/01 - Judicial Conference approved 4/02 - Supreme Court approved 12/02 - Effective **COMPLETED**
Rule 11(e) Judge, other than the judge assigned to hear case, may take part in plea discussions	Judge Jensen 4/95	10/95 - Committee considered 4/96 - Committee deferred action as moot, but directed Subcommittee to continue study on other Rule 11 issues 6/02 - Committee Note recognizes practice but expressly takes no position **COMPLETED**
Rule 11(e)(4) Binding plea agreement (Hyde decision)	Judge George P. Kazen 2/96	4/96 - Committee considered 10/96 - Committee considered 4/97 - Committee deferred action until Supreme Court rules on issue **COMPLETED**

Source and Date	Docket Number, Source, and Date	Status
Rule 11(e)(1) (A)(B) and (C) Sentencing Guidelines effect on particular plea agreements	Criminal Rules Committee 4/96	4/96 - Committee directed reporter to prepare proposed amendments 10/96 - Committee considered 4/97 - Committee approved for publication 6/97 - Standing Committee approved for publication 8/97 - Published for public comment 4/98 - Committee approved 6/98 - Standing Committee approved 9/98 - Judicial Conference approved 4/99 - Supreme Court approved 12/99 - Effective **COMPLETED**
Rule 11 Pending legislation regarding victim allocution	1997-98	10/97 - Committee indicated that it was not opposed to addressing the legislation. Committee appointed Subcommittee to monitor/respond to the legislation **COMPLETED**
Rule 11(e)(6) Court required to inquire whether the defendant is entitled to an adjustment for acceptance of responsibility	98-CR-C Judge John W. Sedwick 10/98	10/98 - Referred to chair and reporter 6/99 - Committee considered and declined to take action **COMPLETED**
Rule 12 Rule inconsistent with Constitution	Paul Sauers 8/95	10/95 - Committee considered and declined to take action **COMPLETED**
Rule 12(b) Entrapment defense raised as pretrial motion	Judge Manuel L. Real & Local Rules Project 12/92	4/93 - Committee declined to take action 10/95 - Subcommittee appointed 4/96 - Committee declined to take action **COMPLETED**
Rule 12(i) Production of statements		7/91 - Standing Committee approved for publication 8/91 - Published for public comment 4/92 - Committee considered 6/92 - Standing Committee approved 9/92 - Judicial Conference approved 4/93 - Supreme Court approved 12/93 - Effective **COMPLETED**

Suggestion	Docket Number, Source, and Date	Status
Rule 12.2(c) Authority of trial judge to order mental examination.	Roger Pauley for Department of Justice 10/97	10/97 - Committee voted to consider draft amendment at next meeting. 4/98 - Committee deferred for further study of constitutional issues 10/98 - Committee considered. Directed further study 4/98 - Committee considered 10/99 - Committee considered 1/00 - Committee considered as part of style package 4/00 - Committee considered and approved for publication 6/00 - Standing Committee approved for publication 8/00 - Published for public comment 4/01 - Committee approved 6/01 - Standing Committee approved 9/01 - Approved by Judicial Conference 4/02 - Approved by Supreme Court 12/02 - Effective **COMPLETED**
Rule 12.2(d) Sanction for defendant's failure to disclose results of mental examination	Roger Pauley 7/5/01	4/02 - Committee considered 9/02 - Committee considered **PENDING FURTHER ACTION**
Rule 12.4 Financial disclosure	Standing Committee 1/00	4/00 - Committee considered and approved for publication 6/00 - Standing Committee approved for publication 8/00 - Published for public comment 4/01 - Committee approved with post-publication changes 6/01 - Standing Committee approved 9/01 - Judicial Conference approved 4/02 - Supreme Court approved 12/02 - Effective **COMPLETED**
Rule 16 Disclosure to defense of information relevant to sentencing	John Rabiej 8/93	10/93 - Committee declined to take action **COMPLETED**
Rule 16 Prado Report and allocation of discovery costs	Judicial Conference 1994 Report of the Judicial Conference	4/94 - Committee declined to take action **COMPLETED**
Rule 16 Prosecution to inform defense of intent to introduce extrinsic act evidence	Criminal Rules Committee 1994	10/94 - Committee declined to take action **COMPLETED**

Rule/Suggestion	Docket Number, Source, and Date	Status
Rule 16(a)(1) Disclosure of experts		7/91 - Standing Committee approved for publication 8/91 - Published for public comment 4/92 - Committee considered 6/92 - Standing Committee approved 9/92 - Judicial Conference approved 4/93 - Supreme Court approved 12/93 - Effective **COMPLETED**
Rule 16(a)(1)(A) Disclosure of statements made by organizational defendants	American Bar Association	11/91 - Committee considered 4/92 - Committee considered 6/92 - Standing Committee approved for publication but deferred date of publication 12/92 - Published for public comment 4/93 - Committee approved 6/93 - Standing Committee approved 9/93 - Judicial Conference approved 4/94 - Supreme Court approved 12/94 - Effective **COMPLETED**
Rule 16(a)(1)(C) Government disclosure of materials implicating defendant	Professor Charles W. Ehrhardt & Judge O'Brien 6/92	10/92 - Committee declined to take action 4/93 - Committee reconsidered 4/94 - Committee considered but declined to take action **COMPLETED**
Rule 16(a)(1)(E) Require defense to disclose information concerning defense expert testimony	97-CR-C Jo Ann Harris, Assistant Attorney General, Criminal Division, Department of Justice 2/94	4/94 - Committee considered and approved for publication 6/94 - Standing Committee approved for publication 9/94 - Published for public comment 4/95 - Committee approved 7/95 - Standing Committee approved 9/95 - Judicial Conference declined to take action 1/96 - Standing Committee considered 4/96 - Committee approved revised amendments 6/96 - Standing Committee approved 9/96 - Judicial Conference approved 4/97 - Supreme Court approved 12/97 - Effective **COMPLETED**
Rule 16(a) Permit the same discovery of experts as is permitted under the civil rules	01-CR-D Carl E. Person, Esq. 6/01	6/01 - Referred to reporter and chair 4/02 - Committee declined to take action **COMPLETED**

Subject	Docket Number, Source and Date	Status
Rule 16(a) and (b) Disclosure of witness names and statements before trial	99-CR-D William R. Wilson, Jr., Esq. 2/92 & 5/18/99	2/92 - Committee considered 10/92 - Committee considered 4/93 - Committee deferred action until 10/93 10/93 - Committee considered 4/94 - Committee considered and approved for amendment 6/94 - Standing Committee approved for publication 9/94 - Published for public comment 4/95 - Committee considered and approved 7/95 - Standing Committee approved 9/95 - Judicial Conference declined to take action **COMPLETED** 5/99 - Referred to chair and reporter **PENDING FURTHER ACTION**
Rule 16(d) Require parties to confer on discovery matters before filing a motion	Local Rules Project & Magistrate Judge Robert Collings 3/94	10/94 - Committee deferred consideration 10/95 - Subcommittee appointed 4/96 - Subcommittee recommended no action **COMPLETED**
Rule 23(a) Address the issue of when a jury trial is authorized	00-CR-D Jeremy A. Bell 11/00	11/00 - Referred to chair and reporter **PENDING FURTHER ACTION**
Rule 23(b) Permits six-person juries in felony cases	S. 3 Introduced by Senator Orrin Hatch 1/97	1/97 - Introduced as § 502 of the Omnibus Crime Prevention Act of 1997 10/97 - Committee voted to oppose the bill 1/98 - Standing Committee expressed grave concern about any such legislation. **COMPLETED**
Rule 24(a) Attorney conducted voir dire of prospective jurors	Judge William R. Wilson, Jr. 5/94	10/94 - Committee considered 4/95 - Committee considered and approved for publication 6/95 - Standing Committee approved for publication 9/95 - Published for public comment 4/96 - Committee declined to take action. Committee directed that the matter be studied further. FJC to pursue educational programs **COMPLETED**

Suggestion	Docket Number, Source, and Date	Status
Rule 24(b) Reduce or equalize peremptory challenges in an effort to reduce court costs	97-CR-E Judge Acker S. 3	2/91 - Standing Committee, after publication and comment, declined to adopt Committee's 1990 proposal 4/93 - Committee considered and declined to take action 1/97 - Omnibus Crime Control Act of 1997 (S.3) introduced [Section 501] 6/97 - Chair Stotler sent letter to Chairman Hatch **COMPLETED** 10/97 - Committee declined to take action on proposal to randomly select petit and venire juries and abolish peremptory challenges. Committee directed reporter to prepare draft amendment equalizing peremptory challenges at 10 per side. 4/98 - Committee approved and included in style package 10/99 - Committee removed from style package **COMPLETED**
Rule 24(c) Alternate jurors to be retained in deliberations	96-CR-C Judge Bruce M. Selya 8/96	10/96 - Committee considered and approved concept. Committee directed reporter to draft proposed amendments 4/97 - Committee approved for publication 6/97 - Standing Committee approved for publication 8/97 - Published for public comment 4/98 - Committee approved 6/98 - Standing Committee approved 9/98 - Judicial Conference approved 4/99 - Supreme Court approved 12/99 - Effective **COMPLETED**
Rule 26 Questioning by jurors	Professor Stephen Saltzburg	4/93 - Committee considered and deferred until 4/94 4/94 - Committee considered and declined to take action **COMPLETED**

Suggested Rule	Docket Number, Source, and Date	Status
Rule 26 Expanding oral testimony, including video transmission	Judge Alice Marie Stotler 10/96	10/96 - Committee considered 4/97 - Subcommittee appointed 10/97 - Subcommittee recommended amending the rule 4/98 - Committee deferred for further study 10/98 - Committee approved but deferred request to publish until spring meeting or included in style package 4/99 - Committee considered 10/99 - Committee approved for publication 1/00 - Committee considered as part of style package 4/00 - Committee considered and approved for publication 6/00 - Standing Committee approved for publication 8/00 - Published for public comment 4/01 - Committee approved 6/01 - Standing Committee approved 9/01 - Judicial Conference approved 4/02 - Supreme Court declined to adopt **COMPLETED**
Rule 26 Court advise defendant of right to testify	Robert Potter	4/95 - Committee declined to take action **COMPLETED**
Rule 26.2 Production of statements for proceedings under Criminal Rules 32(e), 32.1(c), and 46(i), and Rule 8 of the 28 U.S.C. § 2255 Rules		7/91 - Standing Committee approved for publication 8/91 - Published for public comment 4/92 - Committee approved 6/92 - Standing Committee approved 9/92 - Judicial Conference approved 4/93 - Supreme Court approved 12/93 - Effective **COMPLETED**
Rule 26.2 Production of a witness's statement regarding preliminary examinations conducted under Criminal Rule 5.1	Michael R. Levine, Assistant Federal Public Defender 3/95	10/95 - Committee considered 4/96 - Committee approved for publication 6/96 - Standing Committee approved for publication 8/96 - Published for public comment 4/97 - Committee approved 6/97 - Standing Committee approved 9/97 - Judicial Conference approved 4/98 - Supreme Court approved 12/98 - Effective **COMPLETED**
Rule 26.2(f) Definition of Statement	Criminal Rules Committee 4/95	4/95 - Committee considered 10/95 - Committee considered and declined to take action **COMPLETED**

Suggestion	Docket Number, Source, and Date	Status
Rule 26.3 Proceedings for a mistrial		7/91 - Standing Committee approved for publication 8/91 - Published for public comment 4/92 - Committee considered 6/92 - Standing Committee approved 9/92 - Judicial Conference approved 4/93 - Supreme Court approved 12/93 - Effective **COMPLETED**
Rule 29 Extension of time for filing motion	02-CR-B Judge Paul L. Friedman 3/02	4/02 - Sent directly to chair and reporter 4/02 - Committee considered 9/02 - Committee deferred consideration until 4/03 meeting **PENDING FURTHER ACTION**
Rule 29(b) Defer ruling on motion for judgment of acquittal until after verdict	Department of Justice 6/91	11/91 - Committee considered 4/92 - Committee approved for publication 6/92 - Standing Committee approved for publication but deferred publication pending action by RCSO 12/92 - Published for public comment on expedited basis 4/93 - Committee considered and approved 6/93 - Standing Committee approved 9/93 - Judicial Conference approved 4/94 - Supreme Court approved 12/94 - Effective **COMPLETED**
Rule 30 Permit or require parties to submit proposed jury instructions before trial	Local Rules Project	10/95 - Subcommittee appointed 4/96 - Subcommittee declined to make recommendation **COMPLETED**

Subject Matter	Docket Number, Source, and Date	Status
Rule 30 Discretion in submitting instructions to the jury	97-CR-A Judge Alice Marie Stotler 1/15/97	1/97 - Sent directly to chair and reporter 4/97 - Committee approved for publication 6/97 - Standing Committee approved for publication 8/97 - Published for public comment 4/98 - Committee deferred consideration pending further study 10/98 - Committee considered but deferred action pending Civil Rules Committee's action on Civil Rule 51 1/00 - Committee considered as part of style package 4/00 - Committee considered and approved for publication 6/00 - Standing Committee approved for publication 8/00 - Published for public comment 4/01 - Committee approved 6/01 - Standing Committee approved 9/01 - Judicial Conference approved 4/02 - Supreme Court approved 12/02 - Effective **COMPLETED**
Rule 31 Provide for a 5/6 vote on a jury verdict	Senator Strom Thurmond S. 1426 11/95	4/96 - Committee considered and resolved that the federal rulemaking process should address issue **COMPLETED**
Rule 31(d) Individual polling of jurors	Judge Brooks Smith	10/95 - Committee considered 4/96 - Committee considered and approved for publication 6/96 - Standing Committee approved for publication 8/96 - Published for public comment 4/97 - Committee approved 6/97 - Standing Committee approved 9/97 - Judicial Conference approved 4/98 - Supreme Court approved 12/98 - Effective **COMPLETED**

Suggestion	Docket Number, Source, and Date	Status
Rule 31(e) Abrogated due to new Criminal Rule 32.2 governing criminal forfeitures		4/97 - Committee considered and approved for publication 6/97 - Standing Committee approved for publication 8/97 - Published for public comment 4/98 - Committee approved 6/98 - Committee withdrew because Standing Committee declined to adopt Criminal Rule 32.2 10/98 - Committee approved revised amendments 1/99 - Standing Committee approved 3/99 - Judicial Conference approved 4/00 - Supreme Court approved 12/00 - Effective **COMPLETED**
Rule 32 Victim allocution at sentencing	Judge Hodges Prior to 4/92 Pending legislation reactivated issue in 1997/98.	10/92 - Standing Committee approved for publication 12/92 - Published for public comment 4/93 - Committee considered 6/93 - Standing Committee approved 9/93 - Judicial Conference approved 4/94 - Supreme Court approved 12/94 - Effective **COMPLETED** 10/97 - Committee indicated that it was not opposed to addressing the legislation. Committee resolved to maintain Subcommittee to monitor/respond to the legislation. **PENDING FURTHER ACTION**
Rule 32 Findings on controverted matters in pre-sentence report		3/00 - Subcommittee considered as part of style package 4/00 - Committee considered and approved for publication 6/00 - Standing Committee approved for publication 8/00 - Published for public comment 4/01 - Committee withdrew proposal **COMPLETED**
Rule 32 Release of pre-sentence and related reports	Criminal Law Committee	10/98 - Committee considered Subcommittee's recommendations and agreed that no amendments are necessary **COMPLETED**
Rule 32(c)(3)(E) Provide for victim allocution in all felony cases	Professor Jayne Barnard	8/02 - Referred to chair and reporter 9/02 - Committee considered **PENDING FURTHER ACTION**

Suggestion	Docket Number, Source, and Date	Status
Rule 32(c)(5) Clerk required to file notice of appeal	00-CR-A Gino J. Agnello Clerk of Court, 7th Circuit 4/11/00	3/00 - Sent directly to chair 5/00 - Referred to reporter **PENDING FURTHER ACTION**
Rule 32(d)(1) Finality of sentence imposing order of restitution	Judge D. Brock Hornby 3/11/02	3/02 - Sent to chair and reporter 4/02 - Committee considered and declined to take action **COMPLETED**
Rule 32(d)(2) Forfeiture proceedings and procedures reflect proposed new Criminal Rule 32.2 governing criminal forfeitures	Roger Pauley Department of Justice 10/93	4/94 - Committee considered and approved for publication 6/94 - Standing Committee approved for publication 9/94 - Published for public comment 4/95 - Committee approved revised amendments 6/95 - Standing Committee approved 9/95 - Judicial Conference approved 4/96 - Supreme Court approved 12/96 - Effective **COMPLETED** 4/97 - Committee approved for publication 6/97 - Standing Committee approved for publication 8/97 - Published for public comment 4/98 - Committee approved 6/98 - Committee withdrew because Standing Committee declined to adopt Criminal Rule 32.2 10/98 - Committee approved revised amendments 1/99 - Standing Committee approved 3/99 - Judicial Conference approved 4/00 - Supreme Court approved 12/00 - Effective **COMPLETED**
Rule 32(e) Delete provision addressing probation and production of statements (later renumbered as Criminal Rule 32(c)(2))	Department of Justice	7/91 - Standing Committee approved for publication 4/92 - Committee approved 6/92 - Standing Committee approved 9/92 - Judicial Conference approved 4/93 - Supreme Court approved 12/93 - Effective **COMPLETED**

Suggestion	Docket Number, Source and Date	Status
Rule 32.1 Production of statements		7/91 - Standing Committee approved for publication 4/92 - Committee considered and approved 6/92 - Standing Committee approved 9/92 - Judicial Conference approved 4/93 - Supreme Court approved 12/93 - Effective **COMPLETED**
Rule 32.1 Technical correction of "magistrate" to "magistrate judge"	John Rabiej 2/6/98	2/98 - Sent directly to chair and reporter 4/98 - Committee approved but deferred until style project completed 1/00 - Committee considered as part of style package 4/00 - Committee considered and approved for publication 6/00 - Standing Committee approved for publication 8/00 - Published for public comment 4/01 - Committee approved 6/01 - Standing Committee approved 9/01 - Judicial Conference approved 4/02 - Supreme Court approved 12/02 - Effective **COMPLETED**
Rule 32.1 Pending victims rights/allocution litigation	Pending litigation 1997/98	10/97 - Committee indicated that it did not take a position on the litigation and resolved to maintain Subcommittee to monitor litigation **PENDING FURTHER ACTION**
Rule 32.1 Right of allocution before sentencing at revocation hearing	02-CR-D U.S. v. Frazier 2/25/02	3/02 - Referred to chair and reporter 4/02 - Committee considered 9/02 - Committee considered **PENDING FURTHER ACTION**
Rule 32.2 Create forfeiture procedures	96-CR-D John C. Keeney, Department of Justice 3/96	10/96 - Committee considered 4/97 - Committee considered and approved for publication 6/97 - Standing Committee approved for publication 8/97 - Published for public comment 4/98 - Committee approved 6/98 - Standing Committee did not approve 10/98 - Committee approved revised a amendments 1/99 - Standing Committee approved 3/99 - Judicial Conference approved 4/00 - Supreme Court approved 12/00 - Effective **COMPLETED**

Suggestion	Docket Number, Source, and Date	Status
Rule 33 Extension of time to file motion for new trial	02-CR-B Judge Paul L. Friedman 3/02	4/02 - Sent directly to chair and reporter 4/02 - Committee considered 9/02 - Committee deferred consideration until 4/03 meeting **PENDING FURTHER ACTION**
Rule 33 Time to file motion for new trial on ground of newly discovered evidence	John C. Keeney, Department of Justice 9/95	10/95 - Committee considered 4/96 - Committee considered and approved for publication 6/96 - Standing Committee approved for publication 8/96 - Published for public comment 4/97 - Committee approved 6/97 - Standing Committee approved 9/97 - Judicial Conference approved 4/98 - Supreme Court approved 12/98 - Effective **COMPLETED**
Rule 34 Extension of time to file motion	02-CR-B Judge Paul L. Friedman 3/02	4/02 - Sent directly to chair and reporter 4/02 - Committee considered 9/02 - Committee deferred consideration until 4/03 meeting **PENDING FURTHER ACTION**
Rule 35 Allow defendants to move for reduction of sentence	01-CR-B Robert D. Evans, American Bar Association 3/2/01	3/01 - Referred to chair and reporter **PENDING FURTHER ACTION**
Rule 35(b) Recognize combined pre-sentencing and post-sentencing assistance	Judge T. S. Ellis, III 7/95	10/95 - Committee considered 4/96 - Committee considered and approved for publication 6/96 - Standing Committee approved for publication 8/96 - Published for public comment 4/97 - Committee approved 6/97 - Standing Committee approved 9/97 - Judicial Conference approved 4/98 - Supreme Court approved 12/98 - Effective **COMPLETED**

Suggestion	Docket Number, Source, and Date	Status
Rule 35(b) To permit sentence reduction when defendant assists government before or within 1 year after sentence	99-CR-A Judge Edward Carnes 3/99 99-CR-C Department of Justice 4/99	3/99 - Referred to chair and reporter 1/00 - Committee considered as part of style package 6/00 - Standing Committee approved for publication 8/00 - Published for public comment 4/01 - Committee approved revised amendments 6/01 - Standing Committee approved 9/01 - Judicial Conference approved 4/02 - Supreme Court approved 12/02 - Effective **COMPLETED**
Rule 35(b) Recognize assistance in any offense	S.3 Senator Orrin Hatch 1/97	1/97 - Introduced as § 602 and 821 of the Omnibus Crime Prevention Act of 1997 6/97 - Judge Stotler sent letter to Chairman Hatch **COMPLETED**
Rule 35(c) Correction of sentence, timing	Judge Jensen 1994	10/94 - Committee considered 4/95 - Committee deferred consideration pending restyle of Criminal Rules 4/99 - Committee considered 4/00 - Committee considered; Committee approved style package for publication 6/00 - Standing Committee approved for publication 8/00 - Published for public comment 4/01 - Committee approved 6/01 - Standing Committee approved 9/01 - Judicial Conference approved 4/02 - Supreme Court approved 12/02 - Effective **COMPLETED**

Suggestion	Docket Number, Source and Date	Status
Rule 38(e) Conforming amendment prompted by Criminal Rule 32.2		4/97 - Committee considered and approved for publication 6/97 - Standing Committee approved for publication 8/97 - Published for public comment 4/98 - Committee approved 6/98 - Committee withdrew because Standing Committee did not approve amendments to Criminal Rule 32.2 10/98 - Committee approved revised amendments 1/99 - Standing Committee approved 3/99 - Judicial Conference approved 4/00 - Supreme Court approved 12/00 - Effective **COMPLETED**
Rule 40 Commitment to another district (warrant may be produced by facsimile)		7/91 - Standing Committee approved for publication 8/91 - Published for public comment 4/92 - Committee considered and approved 6/92 - Standing Committee approved 9/92 - Judicial Conference approved 4/93 - Supreme Court approved 12/93 - Effective **COMPLETED**
Rule 40 Treat facsimile copies as certified	Magistrate Judge Wade Hampton 2/93	10/93 - Committee declined to take action **COMPLETED**
Rule 40(a) Technical amendment conforming with change to Criminal Rule 5	Criminal Rules Committee 4/94	4/94 - Committee considered and approved. No publication necessary because changes are technical 6/94 - Standing Committee approved 9/94 - Judicial Conference approved 4/95 - Supreme Court approved 12/95 - Effective **COMPLETED**
Rule 40(a) Proximity of nearest judge for removal proceedings	Magistrate Judge Robert B. Collings 3/94	10/94 - Committee considered and deferred further discussion until 4/95 10/96 - Committee considered and declined to take action **COMPLETED**

Suggestion	Docket Number, Source, and Date	Status
Rule 40(d) Conditional release of probationer; magistrate judge to set terms of release of probationer or supervised release	Magistrate Judge Robert B. Collings 11/92	10/92 - Committee considered and approved for publication 4/93 - Committee considered and approved 6/93 - Standing Committee approved 9/93 - Judicial Conference approved 4/94 - Supreme Court approved 12/94 - Effective **COMPLETED**
Rule 41 Search and seizure warrant issued on information sent by facsimile		7/91 - Standing Committee approved for publication 8/91 - Published for public comment 4/92 - Committee considered and approved 6/92 - Standing Committee approved 9/92 - Judicial Conference approved 4/93 - Supreme Court approved 12/93 - Effective **COMPLETED**
Rule 41 Warrant issued by authority within the district	J.C. Whitaker 3/93	10/93 - Committee declined to take action **COMPLETED**
Rule 41 Allow magistrate judge to issue nationwide search warrant	USA Patriot Act of 2001 P.L. 107-56 10/26/01	11/01 - Committee approved conforming amendments 1/02 - Standing Committee approved 3/02 - Judicial Conference approved 4/02 - Supreme Court approved 12/02 - Effective **COMPLETED**
Rule 41(c)(1) To provide that the warrant designate which court the court is to be made	02-CR-A Judge D. Brock Hornby 11/28/01	2/02 - Referred to chair, reporter, chair, Rule 41 Subcommittee 4/02 - Committee considered and declined to take action **COMPLETED**
Rule 41(c)(2)(D) Recording of oral search warrant	Judge Dowd 2/98	4/98 - Committee deferred until study reveals need for change **DEFERRED INDEFINITELY**
Rule 41(d) Enlarge time period to serve search warrant and modify how search is conducted	98-CR-D Judge B. Waugh Crigler 11/98	6/00 - Standing Committee approved for publication 8/00 - Published for public comment (rejects expansion of time period) 4/01 - Committee approved 6/01 - Standing Committee approved 9/01 - Judicial Conference approved 4/02 - Supreme Court approved 12/02 - Effective **COMPLETED**

Suggestion	Docket Number, Source, and Date	Status
Rule 41(d) Permit covert entry for purposes of observation only	Department of Justice 9/2/99	10/99 - Committee considered 1/00 - Committee considered as part of style package 4/00 - Committee considered and approved for publication 6/00 - Standing Committee approved for publication 8/00 - Published for public comment 4/01 - Committee deferred further action 4/02 - Committee considered and declined to take action (Rule 41 Subcommittee had recommended that the issue be left to developing case law) **COMPLETED**
Rule 42(b) Clarify magistrate judge's contempt power	00-CR-E Magistrate Judge Tommy Miller 12/00	4/01 - Committee approved 6/01 - Standing Committee approved 9/01 - Judicial Conference approved 4/02 - Supreme Court approved 12/02 - Effective **COMPLETED**
Rule 43(b) Sentence absent defendant	Department of Justice 4/92	10/92 - Subcommittee appointed 4/93 - Committee considered and approved for publication 6/93 - Standing Committee approved for publication 9/93 - Published for public comment 4/94 - Committee approved revised amendment (deleted video teleconferencing provision) 6/94 - Standing Committee approved 9/94 - Judicial Conference approved 4/95 - Supreme Court approved 12/95 - Effective **COMPLETED**
Rule 43(b) Arraignment of detainees by video teleconferencing		10/98 - Subcommittee appointed 4/99 - Committee considered 1/00 - Committee considered as part of style package 4/00 - Committee considered and approved for publication 6/00 - Standing Committee approved for publication 8/00 - Published for public comment 4/01 - Committee approved 6/01 - Standing Committee approved 9/01 - Judicial Conference approved 4/02 - Supreme Court approved 12/02 - Effective **COMPLETED**

Subject	Docket Number, Source and Date	Status
Rule 43(c)(4) Defendant need not be present to reduce or change a sentence	John Keeney, Department of Justice 1/96	4/96 - Committee considered and approved for publication 6/96 - Standing Committee approved for publication 8/96 - Published for public comment 4/97 - Committee approved 6/97 - Standing Committee approved 9/97 - Judicial Conference approved 4/98 - Supreme Court approved 12/98 - Effective **COMPLETED**
Rule 43(a) Defendant may waive arraignment on subsequent, superseding indictments and enter plea of not guilty in writing	97-CR-I Judge Joseph G. Scoville 10/16/97	10/97 - Referred to chair and reporter 4/98 - Committee considered. Subcommittee appointed 10/98 - Committee considered 4/00 - Committee considered and approved for publication 6/00 - Standing Committee approved for publication 8/00 - Published for public comment 4/01 - Committee approved 6/01 - Standing Committee approved 9/01 - Judicial Conference approved 4/02 - Supreme Court approved 12/02 - Effective **COMPLETED**
Rule 46 Production of statements in release from custody proceedings		6/92 - Standing Committee approved 9/92 - Judicial Conference approved 4/93 - Supreme Court approved 12/93 - Effective **COMPLETED**
Rule 46(d) Release of persons after arrest for violation of probation or supervised release	Magistrate Judge Robert Collings 3/94	10/94 - Committee deferred consideration under further amendment or restyle 4/00 - Committee considered and approved for publication 6/00 - Standing Committee approved for publication 8/00 - Published for public comment 4/01 - Committee approved 6/01 - Standing Committee approved 9/01 - Judicial Conference approved 4/02 - Supreme Court approved 12/02 - Effective **COMPLETED**
Rule 46 Requirement in Appellate Rule 9(a) that court state reasons for releasing or detaining defendant in a criminal case	Judge Alice Marie Stotler 11/95	4/96 - Committee declined to take action **COMPLETED**

Suggestion	Docket Number, Source, and Date	Status
Rule 46 (e) Forfeiture of bond	H.R. 2134	4/98 - Opposed amendment **COMPLETED**
Rule 46(i) Typographical error in rule in cross-citation	Judge Jensen	7/91 - Standing Committee approved for publication 8/91 - Published for public comment 4/94 - Committee considered 9/94 - Judicial Conference took no action because Congress corrected error **COMPLETED**
Rule 47 Require parties to confer or attempt to confer before any motion is filed	Local Rules Project	10/95 - Subcommittee appointed 4/96 - Subcommittee recommended that no action be taken **COMPLETED**
Rule 49 Double-sided paper	Environmental Defense Fund 12/91	4/92 Chair informed EDF that matter was being considered by other Judicial Conference committees **COMPLETED**
Rule 49(c) Fax noticing to produce substantial cost savings while increasing efficiency and productivity	97-CR-G Michael E. Kunz, Clerk of Court 9/10/97	9/97 - Referred to chair and reporter 4/98 - Referred to Technology Subcommittee 4/99 - Committee considered and approved for publication 4/00 - Committee considered and approved for publication 6/00 - Standing Committee approved for publication 8/00 - Published for public comment 4/01 - Committee approved 6/01 - Standing Committee approved 9/01 - Judicial Conference approved 4/02 - Supreme Court approved 12/02 - Effective **COMPLETED**
Rule 49(c) Facsimile service of notice to counsel	97-CR-J William S. Brownell 10/20/97	11/97 - Referred to chair and reporter. Awaiting study from Technology Subcommittee 4/99 - Committee considered 4/00 - Committee considered and approved for publication 6/00 - Standing Committee approved for publication 8/00 - Published for public comment 4/01 - Committee approved 6/01 - Standing Committee approved 9/01 - Judicial Conference approved 4/02 - Supreme Court approved 12/02 - Effective **COMPLETED**

Suggestion	Docket Number, Source, and Date	Status
Rule 49(e) Delete provision pertaining to filing notice of dangerous offender status (conforming amendment)	Professor David Schlueter 4/94	4/94 - Committee considered and approved 6/94 - Standing Committee approved without publication 9/94 - Judicial Conference approved 4/95 - Supreme Court approved 12/95 - Effective **COMPLETED**
Rule 53 Cameras in the courtroom		7/93 - Standing Committee approved for publication 10/93 - Published for public comment 4/94 - Committee considered and approved 6/94 - Standing Committee approved 9/94 - Judicial Conference declined to adopt 10/94 - Guidelines discussed by Committee **COMPLETED**
Rule 54 Delete Canal Zone	Roger Pauley 4/97	4/97 - Committee considered and approved for publication 6/97 - Standing Committee approved for publication 8/97 - Published for public comment 4/98 - Committee approved 6/98 - Standing Committee approved 9/98 - Judicial Conference approved 4/99 - Supreme Court approved 12/99 - Effective **COMPLETED**
Rule 57 Technical and conforming amendments	Standing Committee Meeting 1/92	4/92 - Committee approved for publication 6/93 - Standing Committee approved for publication 9/93 - Published for public comment 4/94 - Committee approved 6/94 - Standing Committee approved 9/94 - Judicial Conference approved 4/95 - Supreme Court approved 12/95 - Effective **COMPLETED**
Rule 57 Uniform effective date for local rules	Standing Committee Meeting 12/97	4/98 - Committee considered and deferred action **DEFERRED INDEFINITELY**
Rule 58 Clarify whether forfeiture of collateral amounts to a conviction	Magistrate Judge David G. Lowe 1/95	4/95 - Committee declined to take action **COMPLETED**

Suggestion	Docket Number, Source and Date	Status
Rule 58 Magistrate judge petty offenses jurisdiction	00-CR-E Magistrate Judge Tommy E. Miller 12/00	12/00 - Referred to chair & reporter 4/01 - Committee considered and approved 6/01 - Standing Committee approved 9/01 - Judicial Conference approved 4/02 - Supreme Court approved 12/02 - Effective **COMPLETED**
Rule 58 (b)(2) Consent in magistrate judge trials	96- CR-B Judge Philip Pro 10/24/96	1/97 - Committee and Standing Committee approved without publication. Conforming amendments prompted by the Federal Courts Improvement Act 4/97 - Supreme Court approved 12/97 - Effective **COMPLETED**
Rule 59 Authorize Judicial Conference to correct technical errors with no need for Supreme Court & Congressional action	Report from Standing Committee's Subcommittee on Style	4/92 - Committee considered and approved for publication 6/93 - Standing Committee approved for publication 10/93 - Published for public comment 4/94 - Committee approved 6/94 - Standing Committee declined to adopt **COMPLETED**
SUBJECT MATTER		
Appeal from a magistrate judge's nondispositive, pretrial order	U.S. v. Abonce-Barerra 7/20/01	4/02 - Committee considered 9/02 - Committee approved proposed amendment **PENDING FURTHER ACTION**
Habeas Corpus Rule 8(c) Correct apparent mistakes in Rules Governing Section 2254 Cases and Section 2255 Proceedings	97-CR-F Judge Peter Dorsey 7/9/97	8/97 - Referred to chair and reporter 10/97 - Referred to Subcommittee 4/98 - Committee considered 10/98 - Committee considered 4/00 - Committee considered and approved for publication 6/00 - Standing Committee approved for publication 8/00 - Published for public comment 4/01 - Committee deferred pending further study 4/02 - Committee considered and approved for publication 6/02 - Standing Committee approved for publication 8/02 - Published for public comment **PENDING FURTHER ACTION**

Suggestion	Docket Number, Source, and Date	Status
Megatrials Address issue	American Bar Association	11/91 - Referred to chair and reporter 1/92 - Standing Committee declined to take action **COMPLETED**
Model form for motions under 28 U.S.C. § 2255	00-CR-C Robert L. Byer, Esq. & David R. Fine, Esq. 8/11/00	8/00 - Referred to chair and reporter 4/02 - Committee approved 6/02 - Standing Committee approved for publication 8/02 - Published for public comment **PENDING FURTHER ACTION**
Restyle Criminal Rules		10/95 - Committee considered 4/96 - Committee deferred action pending restyled Appellate Rules published for public comment 4/98 - Style Subcommittee announced completion of first draft by the end of the year 12/98 - Style Subcommittee completed draft 4/99 - Committee considered Rules 1-9 6/99 - Committee considered Rules 1-22 4/00 - Committee approved Rules 32-60 and requested permission to publish Rules 1-60 6/00 - Standing Committee approved for publication 8/00 - Published for public comment 4/01 - Committee approved revised amendments 6/01 - Standing Committee approved 9/01 - Judicial Conference approved 4/02 - Supreme Court approved 12/02 - Effective **COMPLETED**
Restyle Habeas Corpus Rules		10/00 - Committee considered 1/01 - Standing Committee authorizes restyle project to proceed 4/02 - Committee approved for publication 6/02 - Standing Committee approved for publication 8/02 - Published for public comment **PENDING FURTHER ACTION**
U.S. Attorneys admitted to practice in Federal courts	Department of Justice 11/92	4/93 - Committee considered and declined to take action **COMPLETED**

EVIDENCE RULES DOCKET

ADVISORY COMMITTEE ON EVIDENCE RULES

The docket sets forth suggested changes to the Federal Rules of Evidence considered by the Advisory Committee since 1992. The suggestions are set forth in order by (1) evidence rule number, or (2) where there is no rule number, or several rules may be affected — alphabetically by subject matter.

Suggestion	Docket Number, Source, and Date	Status
EVIDENCE RULES		
Rule 101 Scope		6/92 Standing Committee approved 9/92 Judicial Conference approved 4/93 Supreme Court approved 12/93 Effective 5/94 Committee decided not to amend (comprehensive review) 6/94 Standing Committee approved for publication 9/94 Published for public comment **COMPLETED**
Rule 102 Purpose and Construction		5/94 Committee decided not to amend (comprehensive review) 6/94 Standing Committee approved for publication 9/94 Published for public comment **COMPLETED**
Rule 103 Ruling on Evidence		9/93 Committee considered 5/95 Committee decided not to amend (comprehensive review) 7/95 Standing Committee approved for publication 9/95 Published for public comment **COMPLETED**

Suggestion	Docket Number, Source, and Date	Status
Rule 103(a) When an *in limine* motion must be renewed at trial (earlier proposed amendment would have added a new Rule 103(e))		9/93 Committee considered 5/94 Committee considered 10/94 Committee considered 1/95 Standing Committee approved for publication 5/95 Committee considered and revised note 9/95 Published for public comment 4/96 Committee considered 11/96 Committee considered. Subcommittee appointed to draft alternative. 4/97 Committee requested publication 6/97 Standing Committee recommitted to Committee for further study 10/97 Committee requested publication 1/98 Standing Committee approved for publication 8/98 Published for comment 10/98 Committee considered 4/99 Committee approved with revisions 6/99 Standing Committee approved 9/99 Judicial Conference approved 4/00 Supreme Court approved 12/00 Effective **COMPLETED**
Rule 104 Preliminary Questions		9/93 Committee considered 1/95 Committee considered 5/95 Committee decided not to amend (comprehensive review) 7/95 Standing Committee approved for publication 9/95 Published for public comment **COMPLETED**
Rule 105 Limited Admissibility		9/93 Committee considered 5/94 Committee decided not to amend (comprehensive review) 6/94 Standing Committee approved for publication 9/94 Published for public comment **COMPLETED**
Rule 106 Remainder of, Related Writings, or Recorded Statements		4/02 Committee referred to reporter 10/02 Committee considered **PENDING FURTHER ACTION**

Suggestion	Docket Number, Source, and Date	Status
Rule 106 Remainder of, Related Writings, or Recorded Statements		5/94 Committee decided not to amend (comprehensive review) 6/94 Standing Committee approved for publication 9/94 Published for public comment **COMPLETED**
Rule 106 Admissibility of "hearsay" statement to correct a misimpression arising from partial admission of the record		4/97 Committee referred to reporter 10/97 Committee declined to take action **COMPLETED**
Rule 201 Judicial Notice of Adjudicative Facts		9/93 Committee considered 5/94 Committee decided not to amend (comprehensive review) 6/94 Standing Committee approved for publication 9/94 Published for public comment 11/96 Committee declined to take action **COMPLETED**
Rule 201(g) Judicial Notice of Adjudicative Facts		5/94 Committee decided not to amend (comprehensive review) 6/94 Standing Committee approved for publication 9/94 Published for public comment 11/96 Committee declined to take action **DEFERRED INDEFINITELY**
Rule 301 Presumptions in General Civil Actions and Proceedings (applies to evidentiary presumptions but not substantive presumption.)		5/94 Committee decided not to amend (comprehensive review) 6/94 Standing Committee approved for publication 9/94 Published for public comment 11/96 Committee deferred until completion of project by Uniform Rules Committee **PENDING FURTHER ACTION**
Rule 302 Applicability of State Law in Civil Actions and Proceedings		5/94 Committee decided not to amend (comprehensive review) 6/94 Standing Committee approved for publication 9/94 Published for public comment **COMPLETED**

Suggestion	Docket Number, Source, and Date	Status
Rule 401 Definition of "Relevant Evidence"		9/93 Committee considered 5/94 Committee decided not to amend (comprehensive review) 6/94 Standing Committee approved for publication 9/94 Published for public comment **COMPLETED**
Rule 402 Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible		9/93 Committee considered 5/94 Committee decided not to amend (comprehensive review) 6/94 Standing Committee approved for publication 9/94 Published for public comment **COMPLETED**
Rule 403 Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time		9/93 Committee considered 5/94 Committee decided not to amend (comprehensive review) 6/94 Standing Committee approved for publication 9/94 Published for public comment **COMPLETED**
Rule 404 Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes		9/93 Committee considered 5/94 Committee decided not to amend (comprehensive review) 6/94 Standing Committee approved for publication 9/94 Published for public comment 10/94 Committee considered with Evidence Rule 415 as an alternative to Evidence Rules 413-415 4/97 Committee considered 6/97 Judge Stotler sent letter to Senator Hatch on S.3 10/97 Committee approved and recommended publication 1/98 Standing Committee approved for publication 8/98 Published for comment 10/98 Committee considered 4/99 Committee approved with revisions 6/99 Standing Committee approved 9/99 Judicial Conference approved 4/00 Supreme Court approved 12/00 Effective **COMPLETED**

Suggestion	Docket Number, Source, and Date	Status
Rule 404(a) Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes (prohibits character evidence to prove conduct in civil cases)		4/02 Committee referred to reporter 10/02 Committee considered **PENDING FURTHER ACTION**
Rule 404(b) Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes: Other crimes, wrongs, or acts (uncharged misconduct could only be admitted if the probative value of the evidence substantially outweighs the prejudicial effect)		9/93 Committee considered 5/94 Committee decided not to amend (comprehensive review) 6/94 Standing Committee approved for publication 9/94 Published for public comment 10/94 Committee considered 11/96 Committee considered but declined to take action 4/97 Committee considered 6/97 Judge Stotler sent letter to Senator Hatch on S.3 10/97 Proposed amendment in the Omnibus Crime Control Bill rejected **COMPLETED**
Rule 405 Methods of Proving Character (proof in sexual misconduct cases)		9/93 Committee considered 5/94 Committee considered 10/94 Committee considered with Evidence Rule 404 as an alternative to Evidence Rules 413-415 **COMPLETED**
Rule 406 Habit; Routine Practice		10/94 Committee decided not to amend (comprehensive review) 1/95 Standing Committee approved for publication **COMPLETED**

Suggestion	Docket Number, Source, and Date	Status
Rule 407 Subsequent Remedial Measures. (extends exclusionary principle to product liability actions, and clarify that the rule applies only to measures taken after injury or harm caused by a routine event)		4/92 Criminal Rules Committee considered and rejected 9/93 Committee considered 5/94 Committee considered 10/94 Committee considered 5/95 Committee considered 7/95 Standing Committee approved for publication 9/95 Published for public comment 4/96 Committee approved 6/96 Standing Committee approved 9/96 Judicial Conference approved 4/97 Supreme Court approved 12/97 Effective **COMPLETED**
Rule 408 Compromise and Offers to Compromise		4/02 Committee referred to reporter 10/02 Committee considered **PENDING FURTHER ACTION**
Rule 408 Compromise and Offers to Compromise		9/93 Committee considered 5/94 Committee considered 1/95 Committee considered 5/95 Committee decided not to amend (comprehensive review) 7/95 Standing Committee approved for publication 9/95 Published for public comment **COMPLETED**
Rule 409 Payment of Medical and Similar Expenses		5/94 Committee decided not to amend (comprehensive review) 6/94 Standing Committee approved for publication 9/94 Published for public comment **COMPLETED**
Rule 410 Inadmissibility of Pleas, Plea Discussions, and Related Statements		9/93 Committee considered and referred to the Criminal Rules Committee **COMPLETED**
Rule 411 Liability Insurance		5/95 Committee decided not to amend (comprehensive review) 7/95 Standing Committee approved for publication 9/95 Published for public comment **COMPLETED**

Suggestion	Docket Number, Source, and Date	Status
Rule 412 Sex Offense Cases; Relevance of Alleged Victim's Past Sexual Behavior or Alleged Sexual Predisposition		4/92 Criminal Rules Committee considered 10/92 Criminal Rules Committee considered 10/92 Civil Rules Committee considered 12/92 Published for public comment 5/93 Public hearing held. Committee considered 7/93 Standing Committee approved 9/93 Judicial Conference approved 4/94 Supreme Court approved with revision 9/94 § 40140 of the Violent Crime Control and Law Enforcement Act of 1994 (superseded Supreme Court action) 12/94 Effective **COMPLETED**
Rule 412 Sex Offense Cases; Relevance of Alleged Victim's Past Sexual Behavior or alleged Sexual Predisposition (clarifies whether the rule extends to false claims made by the victim and makes stylistic changes)		4/02 Committee referred to reporter 10/02 Committee considered and declined to take action **COMPLETED**
Rule 413 Evidence of Similar Crimes in Sexual Assault Cases		5/94 Committee considered 7/94 Standing Committee considered 9/94 Congress added by legislation 1/95 Committee considered 1/95 Reported to but disregarded by Congress 7/95 Effective **COMPLETED**
Rule 414 Evidence of Similar Crimes in Child Molestation Cases		5/94 Committee considered 7/94 Standing Committee considered 9/94 Congress added by legislation 1/95 Committee considered 1/95 Reported to but disregarded by Congress 7/95 Effective **COMPLETED**
Rule 415 Evidence of Similar Acts in Civil Cases Concerning Sexual Assault or Child Molestation		5/94 Committee considered 7/94 Standing Committee considered 9/94 Congress added by legislation 1/95 Committee considered 1/95 Reported to but disregarded by Congress 7/95 Effective **COMPLETED**

Suggestion	Docket Number, Source, and Date	Status
Rule 501 General Rule (protects confidential communications between sexual assault victims and their therapists or trained counselors)		10/94 Committee considered 1/95 Committee considered 11/96 Committee considered 1/97 Standing Committee considered 3/97 Judicial Conference considered 4/9 Reported to Congress **COMPLETED**
Rule 501 Privileges (extends the attorney-client privilege to in-house counsel)		11/96 Committee decided not to take action 10/97 Committee declined to take action 10/98 Committee appointed subcommittee to study the issue **COMPLETED**
Rule 501 Privileges (codifies the federal law of privileges)		11/96 Committee declined to take action 10/98 Committee reconsidered and appointed a subcommittee to study the issue 4/99 Committee deferred consideration pending further study 10/99 Subcommittee appointed 4/00 Committee considered subcommittee's proposals 4/01 Committee considered subcommittee's proposals 4/02 Committee considered subcommittee's proposals 10/02 Committee considered **PENDING FURTHER ACTION**
Rule 501 Parent/Child Privilege		4/98 Committee considered. Draft statement in opposition prepared **COMPLETED**
Rule 601 General Rule of Competency		9/93 Committee considered 5/94 Committee decided not to amend (comprehensive review) 6/94 Standing Committee approved for publication 9/94 Published for public comment **COMPLETED**
Rule 602 Lack of Personal Knowledge		9/93 Committee considered 5/94 Committee decided not to amend (comprehensive review) 6/94 Standing Committee approved for publication 9/94 Published for public comment **COMPLETED**

Suggestion	Docket Number, Source, and Date	Status
Rule 603 Oath or Affirmation		9/93 Committee considered 5/94 Committee decided not to amend (comprehensive review) 6/94 Standing Committee approved for publication 9/94 Published for public comment **COMPLETED**
Rule 604 Interpreters		9/93 Committee considered 5/94 Committee decided not to amend (comprehensive review) 6/94 Standing Committee approved for publication 9/94 Published for public comment **COMPLETED**
Rule 605 Competency of Judge as Witness		9/93 Committee considered 10/94 Committee decided not to amend (comprehensive review) 1/95 Standing Committee approved for publication 9/95 Published for public comment **COMPLETED**
Rule 606 Competency of Juror as Witness		9/93 Committee considered 10/94 Committee decided not to amend (comprehensive review) 1/95 Standing Committee approved for publication 9/95 Published for public comment **COMPLETED**
Rule 607 Who May Impeach		9/93 Committee considered 5/94 Committee decided not to amend (comprehensive review) 6/94 Standing Committee approved for publication 9/94 Published for public comment **COMPLETED**
Rule 608 Evidence of Character and Conduct of Witness		9/93 Committee considered 5/94 Committee decided not to amend (comprehensive review) 6/94 Standing Committee approved for publication 9/94 Published for public comment **COMPLETED**

Suggestion	Docket Number, Source, and Date	Status
Rule 608(b) Inconsistent rulings on exclusion of extrinsic evidence		10/99 Committee considered 4/00 Committee directed reporter to prepare draft amendment 4/01 Committee approved amendments 6/01 Standing Committee approved for publication 8/01 Published for public comment 4/02 Committee approved amendments with revisions 6/02 Standing Committee approved 9/02 Judicial Conference approved **PENDING FURTHER ACTION**
Rule 609 Impeachment. See 404(b)		9/93 Committee considered 5/94 Committee decided not to amend (comprehensive review) 6/94 Standing Committee approved for publication 9/94 Published for public comment 11/96 Committee considered 4/97 Committee declined to take action **COMPLETED**
Rule 609(a) Substitute the conjunction "and" with "or" to avoid confusion.	98-EV-A Mr. Victor Mroczka, law student 4/28/98	5/98 Referred to chair and reporter for consideration 10/98 Committee declined to take action **COMPLETED**
Rule 610 Religious Beliefs or Opinions		5/94 Committee decided not to amend (comprehensive review) 6/94 Standing Committee approved for publication 9/94 Published for public comment **COMPLETED**
Rule 611 Mode and Order of Interrogation and Presentation		9/93 Committee considered 5/94 Committee decided not to amend (comprehensive review) 6/94 Standing Committee approved for publication 9/94 Published for public comment **COMPLETED**
Rule 611(b) Does not limit scope of cross-examination by subject matter of the direct examination		4/94 Committee decided not to amend (comprehensive review) 6/94 Standing Committee approved for publication 9/94 Published for public comment 11/96 Committee decided not to take action **COMPLETED**

Suggestion	Docket Number, Source, and Date	Status
Rule 612 Writing Used to Refresh Memory		9/93 Committee considered 5/94 Committee decided not to amend (comprehensive review) 6/94 Standing Committee approved for publication 9/94 Published for public comment **COMPLETED**
Rule 613 Prior Statements of Witnesses		9/93 Committee considered 5/94 Committee decided not to amend (comprehensive review) 6/94 Standing Committee approved for publication 8/94 Published for public comment **COMPLETED**
Rule 614 Calling and Interrogation of Witnesses by Court		9/93 Committee considered 5/94 Committee decided not to amend (comprehensive review) 6/94 Standing Committee approved for publication 9/94 Published for public comment **COMPLETED**
Rule 615 Exclusion of Witnesses. (Statute guarantees victims the right to be present at trial under certain circumstances and places some limits on rule, which requires sequestration of witnesses. Explores relationship between rule and the Victim's Rights and Restitution Act of 1990 and the Victim Rights Clarification Act of 1997 that was passed in 1996.)		9/93 Committee considered 5/94 Committee decided not to amend (comprehensive review) 6/94 Standing Committee approved for publication 9/94 Published for public comment 11/96 Committee considered 4/97 Committee submitted for approval without publication 6/97 Standing Committee approved 9/97 Judicial Conference approved 4/98 Supreme Court approved 12/98 Effective **COMPLETE**
Rule 615 Exclusion of Witnesses		10/97 Response to legislative proposal considered; members asked for any additional comments **COMPLETED**

Suggestion	Docket Number, Source, and Date	Status
Rule 701 Opinion testimony by lay witnesses		10/97 Committee appointed subcommittee to study need for amendment 4/98 Committee approved subcommittee's proposals and recommended publication 6/98 Standing Committee approved for publication 8/98 Published for public comment 10/98 Committee considered 4/99 Committee approved with revisions 6/99 Standing Committee approved 9/99 Judicial Conference approved 4/00 Supreme Court approved 12/00 Effective **COMPLETED**
Rule 702 Testimony by Experts		2/91 Civil Rules Committee considered 5/91 Civil Rules Committee considered 6/91 Standing Committee approved for publication 8/91 Published for public comment by Civil Rules Committee 4/92 Civil and Criminal Rules Committees considered and revised 6/92 Committee considered 4/93 Committee considered 5/94 Committee considered 10/94 Committee considered 1/95 Committee considered (In light of "Contract with America" bill) 4/97 Committee considered and directed reporter to draft proposed amendment 4/97 Judge Stotler sent letters to Senator Hatch and Representative Hyde 10/97 Committee appointed subcommittee to study issue further 4/98 Committee approved amendment 6/98 Standing Committee approved for publication 8/98 Published for public comment 10/98 Committee considered 4/99 Committee approved with revisions 6/99 Standing Committee approved 9/99 Judicial Conference approved 4/00 Supreme Court approved 12/00 Effective **COMPLETED**

Suggestion	Docket Number, Source, and Date	Status
Rule 703 Bases of Opinion Testimony by Experts. (Whether rule, which permits an expert to rely on inadmissible evidence, is being used as means of improperly evading hearsay rule.)		4/92 Criminal Rules Committee considered 6/92 Standing Committee considered 5/94 Committee considered 10/94 Committee considered 11/96 Committee considered 4/97 Committee considered draft proposal 10/97 Committee appointed subcommittee to study matter further 4/98 Committee approved amendment 6/98 Standing Committee approved for publication 8/98 Published for public comment 10/98 Committee considered 4/99 Committee approved with revisions 6/99 Standing Committee approved 9/99 Judicial Conference approved 4/00 Supreme Court approved 12/00 Effective **COMPLETED**
Rule 705 Disclosure of Facts or Data Underlying Expert Opinion		5/91 Civil Rules Committee considered 6/91 Standing Committee approved for publication 8/91 Published for public comment by Civil Rules Committee 4/92 Civil and Criminal Rules Committees considered 6/92 Standing Committee approved 9/92 Judicial Conference approved 4/93 Supreme Court approved 12/93 Effective **COMPLETED**
Rule 706 Court Appointed Experts (to accommodate some of the concerns expressed by the judges involved in the breast implant litigation, and to determine whether the rule should be amended to permit funding by the government in civil cases)		2/91 Civil Rules Committee considered and deferred action 11/96 Committee considered 4/97 Committee considered and deferred action until CACM completes its study **PENDING FURTHER ACTION**
Rule 801(a-c) Definitions: Statement; Declarant; Hearsay		5/95 Committee decided not to amend (comprehensive review) 7/95 Standing Committee approved for publication 9/95 Published for public comment **COMPLETED**

Suggestion	Docket Number, Source, and Date	Status
Rule 801(d)(1) Definitions: Statements which are not hearsay. Prior statement by witness.		1/95 Committee considered and approved for publication 5/95 Committee decided not to amend (comprehensive review) 9/95 Published for public comment **COMPLETED**
Rule 801(d)(1) Hearsay exception for prior consistent statement that would otherwise be admissible to rehabilitate a witness's credibility		4/98 Committee considered and deferred action **DEFERRED INDEFINITELY**
Rule 801(d)(2) Definitions: Statements that are not hearsay. Admission by party-opponent.		4/92 Criminal Rules Committee considered and deferred action 1/95 Standing Committee considered 5/95 Committee approved 7/95 Standing Committee approved for publication 9/95 Published for public comment 4/96 Committee approved 6/96 Standing Committee approved 9/96 Judicial Conference approved 4/97 Supreme Court approved 12/97 Effective **COMPLETED**
Rule 802 Hearsay Rule		5/95 Committee decided not to amend (comprehensive review) 7/95 Standing Committee approved for publication 9/95 Published for public comment **COMPLETED**
Rule 803(1)-(5) Hearsay Exceptions; Availability of Declarant Immaterial		1/95 Committee considered 5/95 Committee decided not to amend (comprehensive review) 7/95 Standing Committee approved for publication 9/95 Published for public comment **COMPLETED**
Rule 803(4) Hearsay Exceptions; Availability of Declarant Immaterial		4/02 Committee referred to reporter 10/02 Committee considered and declined to take action **COMPLETED**

Suggestion	Docket Number, Source, and Date	Status
Rule 803(6) Hearsay Exceptions; Authentication by Certification (see Rule 902 for parallel change)		9/93 Committee considered 5/95 Committee decided not to amend (comprehensive review) 7/95 Standing Committee approved for publication 9/95 Published for public comment 11/96 Committee considered 4/97 Committee considered and appointed subcommittee to draft amendment 10/97 Committee approved 1/98 Standing Committee approved for publication 8/98 Published for public comment 10/98 Committee considered 4/99 Committee approved 6/99 Standing Committee approved 9/99 Judicial Conference approved 4/00 Supreme Court approved 12/0 Effective **COMPLETED**
Rule 803(7)-(23) Hearsay Exceptions; Availability of Declarant Immaterial		1/95 Committee considered 5/95 Committee decided not to amend (comprehensive review) 7/95 Standing Committee approved for publication 9/95 Published for public comment **COMPLETED**
Rule 803(8) Hearsay Exceptions; Availability of Declarant Immaterial: Public records and reports.		9/93 Committee considered 5/95 Committee decided not to amend (comprehensive review) 7/95 Standing Committee approved for publication 9/95 Published for public comment 4/96 Committee considered 11/96 Committee declined to take action **COMPLETED**
Rule 803(18) Should "learned treatises" be received as exhibits		4/00 Committee declined to take action **COMPLETED**

Suggestion	Docket Number, Source, and Date	Status
Rule 803(24) Hearsay Exceptions; Residual Exception		5/95 Committee considered and combined with Rule 804(b)(5) and transferred to new Rule 807 7/95 Standing Committee approved for publication 9/95 Published for public comment 4/96 Committee considered 6/96 Standing Committee approved 9/96 Judicial Conference approved 4/97 Supreme Court approved 12/97 Effective **COMPLETED**
Rule 803(24) Hearsay Exceptions; Residual Exception (clarify notice requirements and determine whether rule is being used too broadly to admit dubious evidence)		10/96 Committee considered and referred to reporter for study 10/97 Committee declined to take action **COMPLETED**
Rule 804(a) Hearsay Exceptions; Declarant Unavailable: Definition of Unavailability		4/92 Criminal Rules Committee considered 6/92 Standing Committee considered for publication 1/95 Standing Committee considered and approved for publication 5/95 Committee decided not to amend (comprehensive review) 7/95 Standing Committee approved for publication 9/95 Published for public comment **COMPLETED**
Rule 804(b)(1)-(4) Hearsay Exceptions		10/94 Committee considered 1/95 Standing Committee considered and approved for publication 5/95 Committee decided not to amend (comprehensive review) 7/95 Standing Committee considered and approved for publication 9/95 Published for public comment **COMPLETED**

Suggestion	Docket Number, Source, and Date	Status
Rule 804(b)(3) Degree of corroboration regarding declaration against penal interest		10/99 Committee considered 4/00 Committee directed reporter to prepare draft amendment 4/01 Committee approved 6/01 Standing Committee approved for publication 8/01 Published for public comment 4/02 Committee approved with substantive revisions. Committee requested re-publication for public comment 6/02 Standing Committee approved re-publication 8/02 Published for public comment **PENDING FURTHER ACTION**
Rule 804(b)(5) Hearsay Exceptions; Other Exceptions		5/95 Committee considered and combined with Rule 804(b)(5) and transferred to new Rule 807 7/95 Standing Committee approved for publication 9/95 Published for public comment 4/96 Committee considered 6/96 Standing Committee approved 9/96 Judicial Conference approved 4/97 Supreme Court approved 12/97 Effective **COMPLETED**
Rule 804(b)(6) Hearsay Exceptions; Declarant Unavailable (prevents a party from objecting on hearsay grounds to the admission of a statement made by a declarant whose unavailability was caused by the party's own wrongdoing or acquiescence)		4/92 Criminal Rules Committee approved 7/95 Standing Committee approved for publication 9/95 Published for public comment 4/96 Committee approved 6/96 Standing Committee approved 9/96 Judicial Conference approved 4/97 Supreme Court approved 12/97 Effective **COMPLETED**
Rule 805 Hearsay Within Hearsay		1/95 Committee considered 5/95 Committee decided not to amend (comprehensive review) 7/95 Standing Committee approved for publication 9/95 Published for public comment **COMPLETED**

Suggestion	Docket Number, Source, and Date	Status
Rule 806 Attacking and Supporting Credibility of Declarant (eliminate a comma)		5/95 Committee declined to take action 7/95 Standing Committee approved for publication 9/95 Published for public comment 4/96 Committee considered 6/96 Standing Committee approved 9/96 Judicial Conference approved 4/9 Supreme Court approved 12/97 Effective **COMPLETED**
Rule 806 To admit extrinsic evidence to impeach the character for veracity of a hearsay declarant		11/96 Committee declined to take action **COMPLETED**
Rule 807 Other Exceptions. Residual Exception (Rules 803(24) and 804(b)(5) were combined to form this new rule)		5/95 Committee approved 7/95 Standing Committee approved for publication 9/95 Published for public comment 4/96 Committee approved 6/96 Standing Committee approved 9/96 Judicial Conference approved 10/96 Expansion considered and rejected 4/97 Supreme Court approved 12/97 Effective **COMPLETED**
Rule 807 Notice of using the provisions		4/96 Committee considered 11/96 Committee declined to take action **COMPLETED**
Rule 901 Requirement of Authentication or Identification		5/95 Committee decided not to amend (comprehensive review) 7/95 Standing Committee approved for publication 9/95 Published for public comment **COMPLETED**
Rule 902 Self-Authentication		5/95 Committee decided not to amend (comprehensive review) 7/95 Standing Committee approved for publication 9/95 Published for public comment 10/98 Committee considered 4/99 Committee approved with revisions 6/99 Standing Committee approved **COMPLETED**

Suggestion	Docket Number, Source, and Date	Status
Rule 902 Use of seals		10/99 Committee considered 4/00 Committee declined to take action **COMPLETED**
Rule 902(6) Extending applicability to news wire reports		10/98 Committee considered 4/00 Committee considered **PENDING FURTHER ACTION**
Rules 902 (11) and (12) Self-Authentication of domestic and foreign records (see Rule 803(6) for consistent change)		4/96 Committee considered 10/97 Committee approved 1/98 Standing Committee approved for publication 8/98 Published for public comment 10/98 Committee considered 4/99 Committee approved with revisions 6/99 Standing Committee approved 9/99 Judicial Conference approved 4/00 Supreme Court approved 12/00 Effective **COMPLETED**
Rule 903 Subscribing Witness' Testimony Unnecessary		5/95 Committee decided not to amend (comprehensive review) 7/95 Standing Committee approved for publication 9/95 Published for public comment **COMPLETED**
Rule 1001 Definitions		9/93 Committee considered 5/95 Committee decided not to amend (comprehensive review) 7/95 Standing Committee approved for publication 9/95 Published for public comment **COMPLETED**
Rule 1001 Definitions (Cross references to automation changes)		10/97 Committee considered **PENDING FURTHER ACTION**
Rule 1002 Requirement of Original (technical and conforming amendments)		9/93 Committee considered 10/93 Published for public comment 4/94 Committee recommended that Judicial Conference make technical and conforming amendments 5/95 Decided not to amend 7/95 Standing Committee approved for publication 9/95 Published for public comment **COMPLETED**

Suggestion	Docket Number, Source, and Date	Status
Rule 1003 Admissibility of Duplicates		5/95 Committee decided not to amend (comprehensive review) 7/95 Standing Committee approved for publication 9/95 Published for public comment **COMPLETED**
Rule 1004 Admissibility of Other Evidence of Contents		5/95 Committee decided not to amend (comprehensive review) 7/95 Standing Committee approved for publication 9/95 Published for public comment **COMPLETED**
Rule 1005 Public Records		5/95 Committee decided not to amend (comprehensive review) 7/95 Standing Committee approved for publication 9/95 Published for public comment **COMPLETED**
Rule 1006 Summaries		5/95 Committee decided not to amend (comprehensive review) 7/95 Standing Committee approved for publication 9/95 Published for public comment **COMPLETED**
Rule 1007 Testimony or Written Admission of Party		5/95 Committee decided not to amend (comprehensive review) 7/95 Standing Committee approved for publication 9/95 Published for public comment **COMPLETED**
Rule 1008 Functions of Court and Jury		5/95 Committee decided not to amend (comprehensive review) 7/95 Standing Committee approved for publication 9/95 Published for public comment **COMPLETED**

Suggestion	Docket Number, Source, and Date	Status
Rule 1101 Applicability of Rules		6/92 Standing Committee approved 9/92 Judicial Conference approved 4/93 Supreme Court approved 12/93 Effective --- 5/95 Committee declined to take action 7/95 Standing Committee approved for publication 9/95 Published for public comment 4/98 Committee considered 10/98 Reporter submitted report. Committee declined to take action **COMPLETED**
Rule 1102 Amendments to permit Judicial Conference to make technical changes		4/92 Criminal Rules Committee approved 6/92 Standing Committee considered 9/93 Standing Committee considered 6/94 Standing Committee declined to take action 5/95 Committee decided not to amend (comprehensive review) 7/95 Standing Committee approved for publication 9/95 Published for public comment **COMPLETED**
Rule 1103 Title		5/95 Committee decided not to amend (comprehensive review) 7/95 Standing Committee approved for publication 9/95 Published for public comment **COMPLETED**
SUBJECT MATTER		
[Admissibility of Videotaped Expert Testimony]		11/96 Committee declined to take action but will continue to monitor rule 1/97 Standing Committee considered **PENDING FURTHER ACTION**
[Attorney-client privilege for in-house counsel]	97-EV-A Deborah Willard-Jones, Secretary, for American Bar Association House of Delegates 10/1/97	10/97 Referred to chair 10/97 Committee declined to take action **COMPLETED**

Suggestion	Docket Number, Source, and Date	Status
[Automation] — To investigate whether the Evidence Rules should be amended to accommodate changes in automation and technology		11/96 Committee considered 4/97 Committee considered 4/98 Committee considered 10/02 Committee considered **PENDING FURTHER ACTION**
[Circuit Splits] — To determine whether the circuit splits warrant amending the Evidence Rules		11/96 Committee considered 4/97 Committee considered **COMPLETED**
[Obsolete or Inaccurate Rules and Notes] — To identify where the Rules and/or Notes are obsolete or inaccurate.		5/93 Committee considered 9/93 Committee considered. Committee did not favor amending the note without an accompanying change in the rule 11/96 Committee considered 1/97 Standing Committee considered 4/97 Committee considered. 10/97 Committee referred to Federal Judicial Center 1/98 Committee informed Standing Committee of referral to FJC 6/98 Reporter's notes published **COMPLETED**
[Statutes Bearing on Admissibility of Evidence] — To amend the Federal Rules of Evidence to incorporate by reference all of the statutes identified, outside the Evidence Rules, that regulate the admissibility of evidence proffered in federal court		11/96 Committee considered 4/97 Committee declined to take action **COMPLETED**
[Sentencing Guidelines] — Applicability of the Federal Rules of Evidence		9/93 Committee considered 11/96 Committee declined to take action **COMPLETED**

Committee on Rules of Practice and Procedure
January 2003
Agenda Item Tab 4
Information Item

Federal Judicial Center Update

At each Committee meeting, the Federal Judicial Center provides an update on projects and activities related to committee interests.

The research projects described below are but a few of the projects undertaken by the Center, most in support of Judicial Conference committees.

The educational programs listed below make up a small number of the seminars and in-court programs offered in-person or electronically. The Center presents most judicial education through in-person seminars and most staff education through various types of educational technology that is used locally. Center curriculum packages, and more recently, satellite broadcasts, online conferences, and web-based educational services have helped the courts provide court employees locally controlled, structured on-site training using training modules developed for national implementation

I. Research Projects

Discovery of Electronic Documents/Evidence. At the request of the Discovery Subcommittee of the Civil Rules Advisory Committee, we have examined a variety of issues involving discovery of information and evidence that exist in digital form. Initial findings from our research were presented to the committee at its October 2002 meeting. We are also preparing a white paper on the differences between conventional and electronic discovery. The research report and the white paper will be posted on our intranet web site, along with articles, sample rules and orders, and other materials on electronic discovery that have already been posted (jnet.fjc.dcn).

Class Actions. The Center undertook all of the projects below at the request of the Advisory Committee on Civil Rules. We have completed an empirical study of the impact on class action filings of two Supreme Court decisions ("Effects of *Amchem/Ortiz* on the Filing of Federal Class Actions," available at jnet.fjc.gov). The study, which examined class action filings in eighty-two districts, found an overall increase in filings after the two decisions, contrary to the dampening effect some anticipated. To complement our examination of filing rates, we are designing a survey of attorneys who filed class actions in state and federal courts, to identify factors related to their choice of forum. We are also completing our work on illustrative plain language notices to class members concerning the pendency and settlement of class actions (to be posted on our web site by the end of the year).

Sealed Settlements. At the request of the Civil Forfeiture/Settlement Sealing Subcommittee of the Civil Rules Advisory Committee, we have begun to examine the incidence of sealed settlements and the circumstances surrounding the sealing of settlements. We will also look at variations in local rules and practices.

ADR Program of the Court of Federal Claims. At the request of the Court of Federal Claims, we are conducting an evaluation of the ADR program recently implemented by that court. Although the Center typically does not conduct studies for individual courts, the Claims Court program provides an opportunity to examine the use of senior judges as the ADR providers and the use of ADR in cases where the government is a party. Any lessons learned will be shared with other federal courts through publication of the evaluation findings.

Bankruptcy Court Time Study. The Committee on the Administration of the Bankruptcy System has requested a study to update the bankruptcy case weights. We have convened an advisory group of district and bankruptcy judges to provide guidance on this project. Following a suggestion from the advisory group, we are in the process of surveying all bankruptcy court judges and bankruptcy clerks regarding their views of the current case weights and to seek their input regarding updates to the case weights.

Bankruptcy Venue and Case Management in Mega Cases. As noted in our last report, the Bankruptcy Committee has created a subcommittee to study venue and case management aspects of mega cases that have multiple filings, and the Center is helping the subcommittee with its work. As a first step, in January 2003 we will hold a conference for a small number of judges and attorneys to help us determine the research that should be undertaken.

Offender Employment Program of the E.D. of Missouri. Because probation and pretrial officers are often stymied in their efforts to help offenders find employment, the Probation and Pretrial Services Office in the Eastern District of Missouri has set up an Offender Employment Program. We are helping that office evaluate the program. Initial statistics collected by the court show a 65% reduction in supervision revocations following implementation of the program.

Mental Health and Substance Abuse Services Needs of Native American Offenders Under Federal Supervision. The Center is conducting an assessment of the substance abuse and mental health needs of Native American offenders under federal supervision. We are completing data collection in the fourteen districts with the largest number of Native Americans under federal supervision and expect to complete the project report early next year.

Study of Remote Public Access to Criminal Case Files. At the request of the Committee on Court Administration and Case Management (CACM), the Center is conducting a study of the Judicial Conference's Criminal Case Files Pilot Program which allows selected courts to provide remote public electronic access to criminal case file documents. Working with a subcommittee of CACM as well as with AO staff to CACM, we have identified the courts in the study. Ten of the courts have been designated by the

Judicial Conference as pilot courts. We are also studying the experiences of four other courts that allowed remote electronic public access to criminal case files prior to the Judicial Conference's pilot, as well as six courts that have never allowed remote public access that will serve as comparison courts for the study. We are also studying the 8th Circuit's experiences with allowing remote public access to electronic case files in criminal appeals. We are completing interviews with the chief judges of all of the courts involved and anticipate a final report by Spring of 2003.

Update of 1993 Study of the Federal Judicial Conduct and Disability Act. Last February, Chairman Howard Coble and ranking member Howard L. Berman of the House Subcommittee on the Courts, the Internet, and Intellectual Property asked the Center to conduct limited research and analysis of the nature and content of chief judges' public orders issued pursuant to the Judicial Conduct and Disability Act of 1980 (28 U.S.C § 372(c)). Prior to commencing the study, we consulted with Judge William J. Bauer, Chairman of the Judicial Conference Committee to Review Circuit Council Conduct and Disability Orders, who endorsed our affirmative response to conduct the study. A senior attorney in the AO's Office of General Counsel assisted with the study. We submitted our report to Mr. Coble's subcommittee in May.

Federal Judicial History Office. The office continues work on long-term project approved last year by the Board of the FJC to develop on-line educational materials related to the history of the federal judiciary. The "Teaching the History of the Federal Courts" project will provide educators with historical documents and extensive descriptions of fifteen significant trials in the history of the federal courts. The history office is producing the units for several of the cases and will use FJC Foundation funds to contract with recognized scholars to produce the others. The Center is working in partnership with the American Bar Association's Public Education Division to establish summer workshops for teachers and to develop materials to support judges and court staff who wish to use the teaching units in public programs. The history office's recently published monograph *Order in the Courts: A History of the Federal Court Clerk's Office* uses legislative material and other primary sources to describe the changing nature of the clerks' duties over the course of United States history.

II. Educational Programs for Judges and Court Staff

Video Program on the Transition to Chief Judge. We are producing a video program to help incoming chief district judges prepare for their new duties. The video, *Making the Transition: From District Judge to Chief District Judge*, focuses on the management responsibilities, administrative tasks, and leadership challenges facing new chief judges. It also considers how the size of a district court may affect a chief judge's approach to these concerns. Chief District Judges Jean Hamilton (ED. Mo.), James Giles (E.D. Pa.) and Stephen McNamee (D. Az.) participate in a panel discussion moderated by Chief Judge Brock Hornby (D. Me.) We expect this video program to be completed within the next few months and plan to send it to incoming chief district judges as they assume their new duties.

Conference for Chief District Judges. We have scheduled the annual Conference for Chief District Judges for April 28-30, 2003, in Washington, DC. This conference provides information and education about leadership and management issues for chief judges.

Executive Team Building for New Chief Judges. Just before the annual meeting of district court chief judges, we will conduct an executive team building program for new chief judges and their clerk of court or other unit executive. The program will be held on April 26-27.

Conference for Chief Bankruptcy Judges. On an every-other year basis, we hold a conference for chief bankruptcy judges; the next conference will be scheduled in fiscal year 2004.

Deskbook for Chief Judges of U.S. District Courts. We are preparing a new edition of the Deskbook for Chief Judges, with a projected publication date of early 2003.

Executive Team Development Workshops. In May 2003, the Center will conduct an executive team development program for district court judges and senior court managers. Also in May, approximately thirty senior court executives from all court units will participate in an Executive Institute, where they will examine historical case studies based on Lincoln's leadership during the Civil War and draw parallels to contemporary court management challenges.

Biennial National Conference for Appellate Clerks. Planning is underway for a March 2003 national conference for clerks of court and chief deputy clerks of the courts of appeals and the clerks of the bankruptcy appellate panels.

Leadership Development Programs. As part of our multi-year leadership development programs, in June 2003 we will conduct a mid-program workshop for the 2002-2004 class of the Federal Court Leadership Program and the concluding workshop for the 2001-2003 class of the Leadership Development Program for Probation and Pretrial Services Officers.

Mediation Workshops for Judges in District and Bankruptcy Courts. In September 2002, the Center conducted two mediation workshops, one for bankruptcy judges and one for district and magistrate judges. This was the first time district judges were invited to a mediation workshop. Over 100 district judges applied, and 12 were able to attend. Program evaluations reflect that district judges found the workshop very useful and worthwhile. The Center will offer at least one mediation workshop to district and magistrate judges in FY 2003.

Federal-State Judicial Education Activities Web Site. The Federal State Jurisdiction Committee of the Judicial Conference asked for assistance with its efforts to maintain information on educational programs and activities for federal and state court judges. We developed an internet web site that will allow us to post information about recently conducted educational programs and activities that involved federal and state court judges.

Death Penalty: Managing Capital Habeas Trials. We are in the final stages of a project on managing state capital habeas cases. A manual and related materials will soon be available to judges on the Center's websites. Already available is a manual on managing federal death penalty cases, which includes information about the procedural differences between capital habeas cases and more routine criminal litigation. Also included are sample jury questionnaires, instructions, verdict forms, scheduling orders, and other materials developed by judges who have handled death penalty cases.

Mass Tort Bankruptcy Cases. The Center is preparing, with the services of Professor Elizabeth Gibson, a manual on mass tort bankruptcy cases. Professor Gibson recently submitted a draft, which has been reviewed by several judges. The target publication date is early 2003.

Redistricting Monograph. The Center has published a monograph, *Redistricting Litigation*, which covers legal, statistical, and case management issues that arise in these cases. Copies can be obtained from the Center's Information Services Office.

Programs for Law Clerks. We recently provided two programs for law clerks, both broadcast via the FJTN: an orientation program, covering ethics, legal writing, and jurisdiction of the district and bankruptcy courts, and, in cooperation with the Labor and Employment Law Section of the American Bar Association, a program on labor and employment law.

Leadership Mentoring Program for Probation and Pretrial Services Officers. A new audioconference series will link a senior Center training specialist and an experienced chief probation or pretrial services officer with up to five new chiefs to provide leadership guidance during their first six months in the position.

Probation and Pretrial Officers: Adapting to New Roles Required by Monographs 109 and 111. Anticipating Judicial Conference approval of Monographs 109 and 111 (supervision of federal offenders and defendants, respectively), we are planning a series of programs for probation and pretrial managers. These programs, which will be delivered through the FJTN and circuit-wide seminars, will include information on changes in policy and procedure, as well as guidance to help managers implement the changes in their districts.

Orientation Web Site for Court Employees. To help court staff, especially new staff, learn more about the federal courts, the Center has developed a web site, *Inside the Federal Courts*, which describes what the courts do, their organization and role, and the civil, criminal, appellate, and bankruptcy processes. Because it can also help teachers, students, the media, and the public to learn about the federal courts, we are also putting the site on the internet (www.fjc.gov).

Training Court Staff in Curriculum Development. Some years ago, in an effort to expand training for court staff, the Center began to develop packaged curricula and to train court staff to deliver training using these curricula. We are now taking the next step and will pilot a program in 2003 to teach court staff how to develop curricula themselves. This two-part Instructional Design Training program will be offered first to

probation/pretrial services officers who are deemed to be subject-matter experts in the topic assigned to them. We hope this approach will enable us to meet more training needs, expand the internal capacity of districts to produce high-quality training programs to meet their unique needs, and provide a pool of expertise as instructional design skills are dispersed throughout the court system.

Long Range Planning for Information Technology. A new packaged curriculum, *Strategic Planning for Information Technology*, shows court planners how to develop local long-range plans for information technology development. The program will be delivered at the local court level by a cadre of court employees who attended a November 2002 train-the-trainer workshop.

FJTN Programs. The January-June 2003 FJTN schedule offers sixteen original broadcasts for court personnel. Topics include an update on capital case management, motivating staff for optimal performance, and developing leadership skills.

Futures Conference. In January 2003, we will hold a Futures Conference to explore court staff training needs in the future. Center education staff, selected senior court managers, and several AO senior staff will try to project societal trends, what those trends mean for the courts, and what kind of training will be required for court staff.

Assistance to Law Offices in Filing Criminal Cases. The Center has developed a web-based tutorial to help law office staff file criminal cases electronically.

On-Site Educational Assistance in ADR and Settlement. At the suggestion of participants in a workshop conducted after the 1998 ADR Act was passed, we are developing a project to provide on-site educational assistance to courts that want help in developing or refining their ADR or settlement procedures. For courts that wish to call on the assistance of judges and/or court staff that have developed ADR expertise, the Center will cover the cost of travel and on-site consultation. The project is funded by a grant from the Hewlett Foundation to the Federal Judicial Center Foundation.

Non-Prisoner Pro Se Litigation: Identifying Education and Training Opportunities. Non-prisoner pro se litigation constitutes a significant portion of the district courts' caseloads. We have begun a project to collect and organize information about how federal courts deal with non-prisoner pro-se litigation and thus to identify education and training opportunities to further assist the courts.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

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MEMORANDUM

DATE: December 6, 2002

TO: Judge Anthony J. Scirica, Chair
Standing Committee on Rules of Practice and Procedure

FROM: Judge Samuel A. Alito, Jr., Chair
Advisory Committee on Appellate Rules

RE: Report of Advisory Committee on Appellate Rules

I. Introduction

The Advisory Committee on Appellate Rules met on November 18, 2002, in San Francisco, California. At its meeting, the Advisory Committee approved several proposed amendments and removed a number of items from its study agenda. Detailed information about the Advisory Committee's activities can be found in the minutes of the November 18 meeting and in the Advisory Committee's study agenda, both of which are attached to this report.

II. Action Items

The Advisory Committee will not be seeking Standing Committee action on any items in January.

III. Information Items

A. Amendments Approved for Later Submission to the Standing Committee

The Advisory Committee is continuing to consider and approve proposed amendments to the Appellate Rules, although, pursuant to the directive of the Standing Committee, the Advisory Committee will not forward these amendments in piecemeal fashion, but will instead present a

package of amendments at a later date. At its November meeting, the Advisory Committee approved the following amendments:

- An amendment to Rule 4(a)(6) that would clarify what type of "notice" of the entry of a judgment or order precludes a party from later moving to reopen the time to file an appeal from that judgment or order. The amendment would also clarify what type of "notice" of the entry of a judgment or order triggers the 7-day period to move to reopen the time to file an appeal from that judgment or order.

- An amendment to Rule 27(d)(1) that would provide that a motion, a response to a motion, and a reply to a response to a motion must comply with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6).

- A new Rule 28.1, which would collect in one place all rules regarding briefing in cases involving cross-appeals, and which would fill the many gaps that now exist in the Appellate Rules regarding cross-appeals. (The Advisory Committee also approved complementary amendments to Rules 28(c), 28(h), 32(a)(7)(C), and 34(d).)

B. Amendments Approved in Principle for Later Submission to the Standing Committee

At its November meeting, the Advisory Committee approved two amendments in principle. At the Advisory Committee's request, Dean Schiltz will be making revisions to the text of these amendments and the accompanying Committee Notes. I anticipate that the Advisory Committee will approve revised drafts of the following two amendments at its spring meeting:

- A new Rule 32.1 that would require courts to permit the citation of opinions, orders, or other judicial dispositions that have been designated as "not for publication," "non-precedential," or the like. Needless to say, this is a controversial matter, and I expect that, if the Standing Committee approves publication of the proposed rule, we will receive a substantial number of comments. That said, I should stress that the proposal that is under consideration is extremely limited. It takes no position on whether designating opinions as non-precedential is constitutional. It does not require any court to issue a non-precedential opinion or forbid any court from doing so. It does not dictate the circumstances under which a court may choose to designate an opinion as non-precedential or specify the procedure that a court must follow in making that decision. It says nothing about what effect a court must give to one of its non-precedential opinions or to the non-precedential opinions of another court. The one and only issue addressed by proposed Rule 32.1 is the *citation* of opinions designated as non-precedential.

- An amendment to Rule 35(a) that would provide that, in calculating whether a "majority" of circuit judges in regular active service have voted that a case be heard or reheard en banc, disqualified judges should not count in the "base." As I described in my last report to the Standing Committee, there are two national standards — 28 U.S.C. § 46(c) and Rule 35(a) — that provide that a hearing or rehearing en banc may be ordered by "a majority of the circuit judges who are in regular active service." However, because of a three-way circuit split over how disqualified judges should be treated under § 46(c) and Rule 35(a), application of these national standards varies substantially from circuit to circuit.

At this point, I anticipate that the Advisory Committee will present a package of proposed amendments to the Standing Committee — and seek the Standing Committee's permission to publish those proposed amendments for comment — at either the June 2003 or January 2004 meeting.

Advisory Committee on Appellate Rules
Table of Agenda Items — Revised December 2002

FRAP Item	Proposal	Source	Current Status
97-14	Amend FRAP 46(b)(1)(B) to replace the general "conduct unbecoming" standard with a more specific standard.	Standing Committee	Awaiting initial discussion Discussed and retained on agenda 04/98 Discussed and retained on agenda 10/99 Discussed and retained on agenda 04/00 Discussed and retained on agenda 04/01
99-06	Amend FRAP 33 to incorporate notice provisions of FRBP 7041 and 9019.	Hon. L. Edward Friend II (Bankr. N.D. W. Va.)	Awaiting initial discussion Discussed and retained on agenda 04/00; awaiting proposal from Bankruptcy Rules Committee
00-03	Amend FRAP 26(a)(4) & 45(a)(2) to use "official" names of legal holidays.	Jason A. Bezis	Awaiting initial discussion Discussed and retained on agenda 04/00 Discussed and retained on agenda 04/01 Draft approved 04/02 for submission to Standing Committee
00-07	Amend FRAP 4 to specify time for appeal of order granting or denying motion for attorney's fees under Hyde Amendment.	Hon. Stanwood R. Duval, Jr. (E.D. La.)	Awaiting initial discussion Discussed and retained on agenda 04/01; awaiting proposal from Department of Justice Discussed and retained on agenda 04/02 Discussed and retained on agenda 11/02
00-08	Amend FRAP 4(a)(6) to clarify whether a moving party "receives notice" of the entry of a judgment when that party learns of the judgment only through a verbal communication.	Hon. Stanwood R. Duval, Jr. (E.D. La.)	Awaiting initial discussion Discussed and retained on agenda 04/01 Discussed and retained on agenda 04/02 Discussed and retained on agenda 11/02
00-11	Amend FRAP 35(a) to provide that disqualified judges should not be considered in assessing whether "[a] majority of the circuit judges who are in regular active service" have voted to hear or rehear a case en banc.	Hon. Edward E. Carnes (CA11)	Awaiting initial discussion Discussed and retained on agenda 04/01; awaiting report from Federal Judicial Center Discussed and retained on agenda 04/02 Discussed and retained on agenda 11/02
00-12	Amend FRAP 28, 31 & 32 to specify the length, timing, and cover colors of briefs in cases involving cross-appeals.	Solicitor General	Awaiting initial discussion Discussed and retained on agenda 04/01; awaiting revised proposal from Department of Justice Discussed and retained on agenda 04/02 Discussed and retained on agenda 11/02

FRAP Item	Proposal	Source	Current Status
01-01	Add rule to regulate the citation of unpublished and non-precedential decisions.	Solicitor General	Awaiting initial discussion Discussed and retained on agenda 04/01 Discussed and retained on agenda 04/02 Discussed and retained on agenda 11/02
01-03	Amend FRAP 26(a)(2) to clarify interaction with "3-day rule" of FRAP 26(c).	Roy H. Wepner, Esq.	Awaiting initial discussion Discussed and retained on agenda 04/01 Referred to Civil Rules Committee 04/02
01-05	Amend Forms 1, 2, 3, and 5 to change references to "19__."	Advisory Committee	Awaiting initial discussion Draft approved 04/02 for submission to Standing Committee in 06/02 Approved by Standing Committee 06/02 Approved by Judicial Conference 09/02
02-01	Amend FRAP 27(d) to apply typeface and type-style limits of FRAP 32(a)(5)&(6) to motions.	Charles R. Fulbruge III (CA5 Clerk)	Awaiting initial discussion Discussed and retained on agenda 04/02 Draft approved 11/02 for submission to Standing Committee
02-08	Amend FRAP 10, 11 & 30 to eliminate local rule variations regarding transmitting records and filing appendices.	ABA Council of Appellate Lawyers	Awaiting initial discussion Discussed and retained on agenda 11/02; awaiting proposal from Department of Justice
02-16	Amend FRAP 28 to eliminate local rule variations regarding contents of briefs.	ABA Council of Appellate Lawyers	Awaiting initial discussion Discussed and retained on agenda 11/02; awaiting proposal from Department of Justice
02-17	Amend FRAP 32 to eliminate local rule variations regarding content of covers of briefs.	ABA Council of Appellate Lawyers	Awaiting initial discussion Discussed and retained on agenda 11/02; awaiting proposal from Department of Justice

DRAFT

Minutes of Fall 2002 Meeting of
Advisory Committee on Appellate Rules
November 18, 2002
San Francisco, California

I. Introductions

Judge Samuel A. Alito, Jr., called the meeting of the Advisory Committee on Appellate Rules to order on Monday, November 18, 2002, at 8:30 a.m. at the Park Hyatt Hotel in San Francisco, California. The following Advisory Committee members were present: Judge Diana Gribbon Motz, Judge Carl E. Stewart, Judge Stanwood R. Duval, Jr., Chief Justice Richard C. Howe, Prof. Carol Ann Mooney, Mr. W. Thomas McGough, Jr., Mr. Sanford Svetcov, and Mr. John G. Roberts, Jr. Mr. Douglas Letter, Appellate Litigation Counsel, Civil Division, U.S. Department of Justice, was present representing the Solicitor General. Also present were Judge J. Garvan Murtha, the liaison from the Standing Committee; Ms. Marcia M. Waldron, the liaison from the appellate clerks; Mr. Peter G. McCabe, Mr. John K. Rabiej, and Mr. James N. Ishida from the Administrative Office; and Ms. Marie C. Leary from the Federal Judicial Center.

II. Approval of Minutes of April 2002 Meeting

The minutes of the April 2002 meeting were approved.

III. Report on June 2002 Meeting of Standing Committee

The Reporter stated that, at its last meeting, the Standing Committee had approved this Committee's request that Forms 1, 2, 3, and 5 in the Appendix to the Appellate Rules be amended to refer to "20___" instead of to "19___." The Standing Committee also agreed that these changes were technical in nature and did not need to be published for comment.

The Reporter further stated that Judge Alito had informed the Standing Committee that this Committee was likely to act on controversial proposals to amend Rule 35(a) regarding en banc voting and to add a new rule addressing the citation of non-precedential opinions.

IV. Action Items

A. Item No. 99-09 (FRAP 22(b) — COA procedures)

Item No. 99-09 arose out of a suggestion by Judge Scirica that this Committee study the manner in which the courts of appeals process requests for certificates of appealability ("COAs") and consider whether the Appellate Rules should be amended to bring about more uniformity. After study, the Committee agreed that the variation in circuit procedures was not creating a problem for litigants and that the Committee would allow more time for circuit-by-circuit experimentation before considering whether to impose detailed rules. However, the Department of Justice asked the Committee not to remove Item No. 99-09 from its study agenda until the Department could decide whether to pursue a proposed amendment that would prevent a court from requiring the government to submit a brief until the court first decided whether to grant a COA.

Mr. Letter informed the Committee that the Department had decided not to pursue such a proposal. A member moved that Item No. 99-09 be removed from the Committee's study agenda. The motion was seconded. The motion carried (unanimously).

B. Item No. 00-03 (FRAP 26(a)(4) & 45(a)(2) — Washington's Birthday)

At its April 2002 meeting, the Committee approved amendments to Rules 26(a)(4) and 45(a)(2). Those amendments substituted the phrase "Washington's Birthday" for the phrase "Presidents' Day."

After the April 2002 meeting, the Reporter received a communication from Professor R. Joseph Kimble, a consultant to the Standing Committee's Subcommittee on Style. Prof. Kimble recommended that, instead of replacing "Presidents' Day" with "Washington's Birthday," this Committee should replace "Presidents' Day" with "Washington's Birthday (commonly known as 'Presidents' Day')."

The Reporter recommended that the Committee not revisit this matter. The Reporter pointed out that adopting Prof. Kimble's suggestion would create inconsistencies between the Appellate Rules, on the one hand, and 5 U.S.C. § 6103(a) and the newly restyled Criminal Rules, on the other hand. Both of the latter refer to "Washington's Birthday" without any parenthetical.

A couple of members agreed with the Reporter. A member moved that the amendments to Rules 26(a)(4) and 45(a)(2) remain unchanged. The motion was seconded. The motion carried (unanimously).

C. Item No. 00-08 (FRAP 4(a)(6) — clarify whether verbal communication provides "notice")

The Reporter introduced the following proposed amendment and Committee Note:

Rule 4. Appeal as of Right — When Taken

(a) Appeal in a Civil Case.

* * * * *

(6) **Reopening the Time to File an Appeal.** The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied:

(A) the court finds that the moving party did not receive notice under Federal Rule of Civil Procedure 77(d) of the entry of the judgment or order sought to be appealed within 21 days after entry;

(B) the motion is filed within 180 days after the judgment or order is entered or within 7 days after the moving party receives written notice of the entry, whichever is earlier;

~~(B) the court finds that the moving party was entitled to notice of the entry of the judgment or order sought to be appealed but did not receive the notice from the district court or any party within 21 days after entry;~~ and

(C) the court finds that no party would be prejudiced.

* * * * *

Committee Note

Rule 4(a)(6) has permitted a district court to reopen the time to appeal a judgment or order upon finding that four conditions were satisfied. First, the district court had to find that the appellant did not receive notice of the entry of the judgment or order from the district court or any party within 21 days after the judgment or order was entered. Second, the district court had to find that the appellant moved to reopen the time to appeal within 7 days after the appellant received notice of the entry of the judgment or order. Third, the district court had to find that the appellant moved to reopen the time to appeal within 180 days after the judgment or order was entered. Finally, the district court had to find that no party would be prejudiced by the reopening of the time to appeal.

Rule 4(a)(6) has been amended to specify more clearly what kind of "notice" of the entry of a judgment or order precludes a party from later moving to reopen the time to appeal. In addition, Rule 4(a)(6) has been amended to address confusion about what kind of "notice" triggers the 7-day period to bring a motion to reopen. Finally, Rule 4(a)(6) has been reorganized to set forth more logically the conditions that must be met before a district court may reopen the time to appeal.

Subdivision (a)(6)(A). Former subdivision (a)(6)(B) has been redesignated as subdivision (a)(6)(A), and one important substantive change has been made.

Prior to 1998, former subdivision (a)(6)(B) permitted a district court to reopen the time to appeal if it found "that a party entitled to notice of the entry of a judgment or order did not receive such notice from the clerk or any party within 21 days of its entry." The rule was clear that the "notice" to which it referred was the notice required under Civil Rule 77(d), which must be served by the clerk pursuant to Civil Rule 5(b) and may also be served by a party pursuant to that same rule. In other words, prior to 1998, former subdivision (a)(6)(B) was clear that, if a party did not receive formal notice of the entry of a judgment or order under Civil Rule 77(d), that party could later move to reopen the time to appeal (assuming that the other requirements of subdivision (a)(6) were met).

In 1998, former subdivision (a)(6)(B) was amended to change the description of the type of notice that would preclude a party from moving to reopen the time to appeal. As a result of the amendment, former subdivision (a)(6)(B) no longer referred to the failure of the moving party to receive "*such* notice" — that is, the notice required by Civil Rule 77(d) — but instead referred

to the failure of the moving party to receive "*the* notice." And former subdivision (a)(6)(B) no longer referred to the failure of the moving party to receive notice from "the *clerk* or any party," both of whom are explicitly mentioned in Civil Rule 77(d). Rather, former subdivision (a)(6)(B) referred to the failure of the moving party to receive notice from "the *district court* or any party."

The 1998 amendment meant, then, that the type of notice that precluded a party from moving to reopen the time to appeal was no longer limited to Civil Rule 77(d) notice. Under the 1998 amendment, *some* kind of notice, in addition to Civil Rule 77(d) notice, precluded a party. But the text of the amended rule did not make clear what kind of notice qualified. This was an invitation for litigation, confusion, and possible circuit splits.

To avoid such problems, former subdivision (a)(6)(B) — new subdivision (a)(6)(A) — has been amended to restore its pre-1998 simplicity. Under new subdivision (a)(6)(A), if the court finds that the moving party was not notified under Civil Rule 77(d) of the entry of the judgment or order that the party seeks to appeal within 21 days after that judgment or order was entered, then the court is authorized to reopen the time to appeal (if all of the other requirements of subdivision (a)(6) are met). Because Civil Rule 77(d) requires that notice of the entry of a judgment or order be formally served under Civil Rule 5(b), any notice that is not so served will not operate to preclude the reopening of the time to appeal under new subdivision (a)(6)(A).

Subdivision (a)(6)(B). Former subdivision (a)(6)(A) has been redesignated as subdivision (a)(6)(B), and one important substantive change has been made.

Former subdivision (a)(6)(A) required a party to move to reopen the time to appeal "within 7 days after the moving party receives notice of the entry [of the judgment or order sought to be appealed]." Courts had difficulty agreeing upon what type of "notice" was sufficient to trigger the 7-day period. The majority of circuits that addressed the question held that only *written* notice was sufficient, although nothing in the text of the rule suggested such a limitation. *See, e.g., Bass v. United States Dep't of Agric.*, 211 F.3d 959, 963 (5th Cir. 2000). By contrast, the Ninth Circuit held that while former subdivision (a)(6)(A) did not require written notice, "the quality of the communication [had to] rise to the functional equivalent of written notice." *Nguyen v. Southwest Leasing & Rental, Inc.*, 282 F.3d 1061, 1066 (9th Cir. 2002). It appeared that verbal communications could be deemed "the functional equivalent of written notice" if they were sufficiently "specific, reliable, and unequivocal." *Id.* Other circuits suggested in dicta that former subdivision (a)(6)(A) required only "actual notice," which, presumably, could have included verbal notice that was not "the functional equivalent of

written notice." *See, e.g., Lowry v. McDonnell Douglas Corp.*, 211 F.3d 457, 464 (8th Cir. 2000). And still other circuits read into former subdivision (a)(6)(A) restrictions that appeared only in former subdivision (a)(6)(B) (such as the requirement that notice be received "from the district court or any party," *see Benavides v. Bureau of Prisons*, 79 F.3d 1211, 1214 (D.C. Cir. 1996)) or that appeared in neither former subdivision (a)(6)(A) nor former subdivision (a)(6)(B) (such as the requirement that notice be served in the manner prescribed by Civil Rule 5, *see Ryan v. First Unum Life Ins. Co.*, 174 F.3d 302, 305 (2d Cir. 1999)).

Former subdivision (a)(6)(A) — new subdivision (a)(6)(B) — has been amended to resolve this circuit split. Under new subdivision (a)(6)(B), only *written* notice of the entry of a judgment or order triggers the 7-day period. "[R]equir[ing] written notice will simplify future proceedings. As the familiar request to 'put it in writing' suggests, writings are more readily susceptible to proof than oral communications. In particular, the receipt of written notice (or its absence) should be more easily demonstrable than attempting to discern whether (and, if so, when) a party received actual notice." *Scott-Harris v. City of Fall River*, 134 F.3d 427, 434 (1st Cir. 1997), *rev'd on other grounds sub nom. Bogan v. Scott-Harris*, 523 U.S. 44 (1998).

All that is required to trigger the 7-day period under new subdivision (a)(6)(B) is written notice of the entry of a judgment or order, not a copy of the judgment or order itself. Moreover, nothing in new subdivision (a)(6)(B) requires that the written notice be received from any particular source, and nothing requires that the written notice be served pursuant to Civil Rules 77(d) or 5(b). "Any written notice of entry received by the potential appellant or his counsel (or conceivably by some other person), regardless of how or by whom sent, is sufficient to open [new] subpart [(B)'s] seven-day window." *Wilkens v. Johnson*, 238 F.3d 328, 332 (5th Cir.) (footnotes omitted), *cert. denied*, 533 U.S. 956 (2001). Thus, a person who checks the civil docket of a district court action and learns that a judgment or order has been entered has received written notice of that entry. And a person who learns of the entry of a judgment or order by fax, by e-mail, or by viewing a website has also received written notice. However, an oral communication is not written notice for purposes of new subdivision (a)(6)(B), no matter how specific, reliable, or unequivocal.

The Reporter said that a draft amendment to Rule 4(a)(6) was discussed at length at the April 2002 meeting. Pursuant to the Committee's instructions, the Reporter made several changes to that draft amendment:

1. The contents of former subdivision (B) were moved to new subdivision (A), and the contents of former subdivision (A) were moved to new subdivision (B). The subdivisions are now set forth in a more logical order. The rule first refers to the notice that must be missing before a party is eligible to move to reopen (subdivision (A)), and then refers to the notice that triggers the 7-day period to bring such a motion (subdivision (B)).

2. New subdivision (A) was redrafted as the Committee directed. It makes clear that only notice served upon a party under Civil Rule 77(d) will act to preclude that party from later moving to reopen the time to appeal.

3. New subdivision (B) continues to require "written" notice to trigger the 7-day period to bring a motion to reopen, and the Committee Note continues to make an "eyes/ears" distinction in defining what type of notice is "written" for purposes of subdivision (B).

4. Finally, the Committee Note was rewritten to make the "tenses" clearer — that is, to make it easier to understand when the Note is referring to a past version of Rule 4(a)(6), when the Note is referring to the present version of Rule 4(a)(6), and when the Note is referring to the proposed amendment to Rule 4(a)(6).

A member commented about the "eyes/ears" distinction used in the final paragraph of the Note to define when notice is "written" for purposes of new subdivision (B). He pointed out that some types of "written" notice — such as viewing a website — are no more susceptible of proof than some types of "non-written" notice — such as a conversation with a clerk. However, the former triggers the 7-day period, while the latter does not. The Reporter agreed, but said that neither he nor the courts of appeals had been able to come up with a better dividing line. The member conceded that a better line might not be possible.

A couple of members said that they did not have a problem with using an "eyes/ears" distinction in defining "written" notice for purposes of new subdivision (B), but were concerned about the use of the word "receives" in the text of the rule. "Receives" connotes that someone affirmatively acted to provide notice to the recipient; it is awkward to state that one "receives written notice" by checking a docket or viewing a website. One member suggested that new subdivision (B) be amended to refer to a party who "receives written notice *from any source.*" Another suggested that the subdivision refer to a party who "receives written *or electronic* notice." A third suggested that the subdivision refer to a party who "receives *or observes* written notice."

A member moved that new subdivision (B) be amended to provide: "the motion is filed within 180 days after the judgment or order is entered or within 7 days after the moving party receives or observes written notice of the entry from any source, whichever is earlier." The motion was seconded. The motion carried (unanimously).

A member complained about the length of the Note, and wondered in particular whether the Note to new subdivision (B) needs to elaborate upon what constitutes "written" notice. The Reporter responded that omitting such elaboration in the Note would guarantee a circuit split over the definition of "written," meaning that the Committee would have to revisit this rule within a couple of years. The Reporter said that the examples given in the Note are not fanciful; to the contrary, every example is taken from an actual case. The member responded that, if the Note was going to elaborate on the definition of "written," it would be helpful to have that elaboration at the beginning of the Note to subdivision (B), rather than at the end. That would protect a busy practitioner from having to read the two paragraphs about the reasons for the change before getting to the third paragraph elaborating on the meaning of "written." The Reporter said that it would be easy to redraft the Note as the member requested.

A member moved that the amendment to Rule 4(a)(6) drafted by the Reporter be approved, with the change to new subdivision (B) approved by the Committee, and with the understanding that the Note to new subdivision (B) would be reordered as a member had requested. The motion was seconded. The motion carried (unanimously).

D. Item No. 00-11 (FRAP 35(a) — disqualified judges/en banc rehearing)

The Reporter introduced the following proposed amendment and Committee Note:

Rule 35. En Banc Determination

(a) **When Hearing or Rehearing En Banc May Be Ordered.** A majority of the circuit judges who are in regular active service and who are not disqualified may order that an appeal or other proceeding be heard or reheard by the court of appeals en banc, except that an appeal or other proceeding may be heard or reheard en banc only if a majority of the circuit judges who are in regular active service are not disqualified. An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless:

(1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or

(2) the proceeding involves a question of exceptional importance.

* * * * *

Committee Note

Subdivision (a). Two national standards — 28 U.S.C. § 46(c) and Rule 35(a) — provide that a hearing or rehearing en banc may be ordered by "a majority of the circuit judges who are in regular active service." Although these standards apply to all of the courts of appeals, the circuits are deeply divided over the interpretation of this language when one or more active judges are disqualified.

The Supreme Court has never addressed this issue. In *Shenker v. Baltimore & Ohio R.R. Co.*, 374 U.S. 1 (1963), the Court rejected a petitioner's claim that his rights under § 46(c) had been violated when the Third Circuit refused to rehear his case en banc. The Third Circuit had eight active judges at the time; four voted in favor of rehearing the case, two against, and two abstained. No judge was disqualified. The Supreme Court ruled against the petitioner, holding, in essence, that § 46(c) did not provide a cause of action, but instead simply gave litigants "the right to know the administrative machinery that will be followed and the right to suggest that the *en banc* procedure be set in motion in his case." *Id.* at 5. *Shenker* did stress that a court of appeals has broad discretion in establishing internal procedures to handle requests for rehearings — or, as *Shenker* put it, "'to devise its own administrative machinery to provide the *means* whereby a majority may order such a hearing.'" *Id.* (quoting *Western Pac. R.R. Corp. v. Western Pacific R.R. Co.*, 345 U.S. 247, 250 (1953) (emphasis added)). But *Shenker* did not address what is meant by "a majority" in §46(c) (or Rule 35(a), which did not yet exist) — and *Shenker* certainly did not suggest that the phrase should have different meanings in different circuits.

In interpreting that phrase, a majority of the courts of appeals follow the "absolute majority" approach. Marie Leary, Defining the "Majority" Vote Requirement in Federal Rule of Appellate Procedure 35(a) for Rehearings En Banc in the United States Courts of Appeals 8 tbl.1 (Federal Judicial Center 2002). Under this approach, disqualified judges are counted in the base in calculating whether a majority of judges have voted to hear a case en banc. Thus, in a circuit with 12 active judges, 7 must vote to hear a case en banc. If 5 of the 12 active judges are disqualified, all 7 non-disqualified judges must vote to hear the case en banc. The votes of 6 of the 7 non-disqualified judges are not enough, as 6 is not a majority of 12.

A substantial minority of the courts of appeals follow the "case majority" approach. *Id.* Under this approach, disqualified judges are not counted in the base in calculating whether a majority of judges have voted to hear a case en banc. Thus, in a case in which 5 of a circuit's 12 active judges are disqualified, only 4 judges (a majority of the 7 non-disqualified judges) must vote to hear a case en banc.

Both approaches have substantial drawbacks. The main disadvantage of the absolute majority approach is that, as a practical matter, a disqualified judge is counted as voting against hearing a case en banc. To the extent possible, the disqualification of a judge should not result in the equivalent of a vote for or against hearing a case en banc. Another disadvantage of the absolute majority approach is that it can leave the en banc court helpless to overturn a panel decision with which almost all of the circuit's active judges disagree. For example, in a case in which 5 of a circuit's 12 active judges are disqualified, the case cannot be heard en banc even if 6 of the 7 non-disqualified judges strongly disagree with the panel opinion. This permits one active judge — perhaps sitting on a panel with a visiting judge — effectively to control circuit precedent, even over the objection of all of his or her colleagues. *See Gulf Power Co. v. FCC*, 226 F.3d 1220, 1222-23 (11th Cir. 2000) (Carnes, J., dissenting from denial of rehearing en banc).

The main disadvantages of the case majority approach are that it may make it too easy to hear cases en banc (en banc proceedings are "not favored" under Rule 35(a)), and it can permit a small minority of a circuit's active judges to overturn prior panel decisions and impose an en banc ruling. For example, in a case in which 7 of a circuit's 12 active judges are disqualified, 3 judges could vote to hear the case en banc and determine the merits of the case — perhaps overturning several prior panel opinions written or joined by the other 9 of the 12 active judges. *See Zahn v. International Paper Co.*, 469 F.2d 1033, 1041 (2d Cir. 1972) (Mansfield, J., concurring in denial of rehearing en banc).

There is a third approach. The Third Circuit follows the case majority approach, except that a case cannot be heard en banc unless a majority of all active judges — disqualified and non-disqualified — are eligible to participate in the case. Under this "qualified case majority" approach, a case in which 5 of a circuit's 12 active judges are disqualified can be heard en banc upon the votes of 4 judges, but a case in which 6 of a circuit's 12 active judges are disqualified cannot be heard en banc under any circumstances.

Rule 35(a) has been amended to establish a uniform national interpretation of the phrase "majority of the circuit judges who are in regular active service." The federal rules of practice and procedure exist to "maintain consistency," which

Congress has equated with "promot[ing] the interest of justice." 28 U.S.C. § 2073(b). The courts of appeals should not follow three inconsistent approaches to deciding whether sufficient votes exist to hear a case en banc, especially when there is a governing statute and governing rule that apply to all circuits and that use identical terms, and especially when there is nothing about the local conditions of each circuit that justifies conflicting approaches.

The qualified case majority approach does not eliminate all of the problems associated with the absolute majority and case majority approaches, but it does help to minimize those problems. Under the qualified case majority approach, the disqualification of a judge does not automatically have the effect of counting as a vote against hearing a case en banc, as it does under the absolute majority approach. In addition, as compared to the absolute majority approach, the qualified case majority approach makes it more likely that the en banc court will be able to overturn a panel decision with which most of the circuit's active judges disagree. At the same time, unlike the case majority approach, the qualified case majority approach guarantees that no decision will be made on behalf of the en banc court without the participation of a majority of the circuit's active judges.

The Reporter said that, as he had been instructed by the Committee, he had drafted the amendment to Rule 35(a) to incorporate the Third Circuit's "qualified case majority" rule, rather than either the "absolute majority" rule or the "case majority" rule.

The Committee engaged in a lengthy discussion of the three options. The discussion focused on three issues:

1. At its April 2002 meeting, the Committee agreed that the qualified case majority approach represented the best approach on the merits. Several members of the Committee said that they continue to hold that view, but a couple of members said that they had changed their minds. One argued in favor of the case majority approach, pointing out that this approach would provide the most protection against a panel with only one active judge — perhaps in dissent — setting a precedent with which most of the circuit's judges disagree. The Reporter responded that, although the case majority approach provides the most protection against "outlier" *panel* precedents, it provides the least protection against "outlier" *en banc* opinions. If, for example, 9 of a circuit's 12 judges were disqualified, the case majority approach would permit 2 of the 3 non-disqualified judges to issue an en banc decision overturning years of panel decisions that had been joined at one time or another by all 10 of the other judges.

One member expressed concern that, no matter what the Committee decides, judges will try to undermine the new rule. The member said that he was concerned that, because of this opposition, an amendment to Rule 35(a) might have unanticipated consequences on such issues

as the assignment of visiting or senior judges to panels. Another member said that she was not sure that an amendment to Rule 35(a) would meet with strong opposition. The focus of judges to date has been on what 28 U.S.C. § 46(c) and Rule 35(a) provide, and not on what is the best policy as an original matter.

2. A few members argued that bringing about uniformity was more important than the particular rule that was imposed, and thus that the Committee should adopt whichever of the three approaches is most likely to be supported by the Standing Committee and the Judicial Conference. These members argued that the absolute majority approach — which is now followed by eight circuits and which reflects the most natural reading of § 46(c) — is the most likely to be approved.

The Reporter predicted that, generally speaking, the more difficult it is to hear a case en banc under a rule, the more likely the rule will garner the support of circuit judges. A member agreed and said that she would not support the case majority rule because it was doomed to fail; she would support the qualified case majority approach instead. A member responded that the qualified case majority approach was unlikely to be more popular than the case majority approach as the "qualification" affected very few cases.

Other members resisted the notion that the Committee should make its decision based upon the perceived popularity of an option. These members argued that the Committee's function is to propose the best solution, not the most popular solution. If the circuit judges successfully block the best solution, this Committee will still have done its job. Even an unsuccessful effort to amend Rule 35(a) will draw attention to the problem and perhaps help to spur Congressional action.

A member said that uniformity will not result without an amendment to Rule 35(a) or § 46(c). The judges in his circuit, for example, have dug in their heels on this issue, and will not be persuaded voluntarily to change their practices.

3. A couple of members argued that, the more that a proposed amendment to Rule 35(a) can be portrayed as a reasonable interpretation of § 46(c), the more that the amendment is likely to pass constitutional muster. These members conceded that the Rules Enabling Act provides that "[a]ll laws in conflict" with newly enacted procedural rules "shall be of no further force or effect after such rules have taken effect." 28 U.S.C. § 2072(b). Thus, the Act, on its face, authorizes an amendment to Rule 35(a) that supercedes § 46(c). However, these members argued that the "supersession" provision of the Rules Enabling Act may be unconstitutional under *INS v. Chadha*, 462 U.S. 919 (1983). Thus, these members argued, while the Rules Enabling Act process might be used to implement a procedural rule that would impose a uniform *interpretation* of an ambiguity in a statute, that process cannot be used to *supercede* a statute.

These members — and others — argued that, of the three approaches taken by the courts of appeals, the absolute majority approach can most easily be defended as an interpretation of

§ 46(c). That section requires the vote of "a majority of the circuit judges of the circuit who are in regular active service"; a judge who is disqualified in a particular case is still a judge "in regular active service." Some members argued that the case majority approach also represents a plausible interpretation of § 46(c); after all, four circuits now follow that approach, and others have followed it in the past. All members agreed, though, that the qualified case majority approach was the least likely to be viewed as a simple interpretation of § 46(c), and the most likely to be viewed as superceding the statute.

Some members did not agree that the supersession provision of the Rules Enabling Act is unconstitutional under *Chadha*. These members argued that the Committee should amend Rule 35(a) to impose the best of the three options, regardless of whether that option "interprets" or "supercedes" § 46(c).

A member moved that the amendment to Rule 35(a) drafted by the Reporter be changed by eliminating the phrase "except that an appeal or other proceeding may be heard or reheard en banc only if a majority of the circuit judges who are in regular active service are not disqualified." Thus, the first sentence of amended Rule 35(a) would provide, "A majority of the circuit judges who are in regular active service and who are not disqualified may order that an appeal or other proceeding be heard or reheard by the court of appeals en banc." The member explained that, if this amendment were approved, the Committee would be recommending adoption of the case majority approach, rather than the qualified case majority approach.

The motion was seconded. After further discussion, the motion carried (5-3, with one abstention).

After further discussion, a member moved that the amendment (as changed) be approved, with the understanding that the Reporter would redraft the Committee Note to reflect the change made by the Committee. The motion was seconded. The motion was approved (6-3).

E. Item No. 00-12 (FRAP 28, 31 & 32 — briefs in cross-appeals)

The Reporter introduced the following proposed amendments and Committee Notes:

Rule 28. Briefs

* * * * *

(c) **Reply Brief.** The appellant may file a brief in reply to the appellee's brief.

~~An appellee who has cross-appealed may file a brief in reply to the appellant's response to the issues presented by the cross-appeal.~~ Unless

the court permits, no further briefs may be filed. A reply brief must contain a table of contents, with page references, and a table of authorities — cases (alphabetically arranged), statutes, and other authorities — with references to the pages of the reply brief where they are cited.

* * * * *

~~(h) **Briefs in a Case Involving a Cross-Appeal.** If a cross-appeal is filed, the party who files a notice of appeal first is the appellant for the purposes of this rule and Rules 30, 31, and 34. If notices are filed on the same day, the plaintiff in the proceeding below is the appellant. These designations may be modified by agreement of the parties or by court order. With respect to appellee's cross-appeal and response to appellant's brief, appellee's brief must conform to the requirements of Rule 28(a)(1)–(11). But an appellee who is satisfied with appellant's statement need not include a statement of the case or of the facts.~~ [Reserved]

* * * * *

Committee Note

Subdivision (c). Subdivision (c) has been amended to delete a sentence that authorized an appellee who had cross-appealed to file a brief in reply to the appellant's response. All rules regarding briefing in cases involving cross-appeals have been consolidated into new Rule 28.1.

Subdivision (h). Subdivision (h) — regarding briefing in cases involving cross-appeals — has been deleted. All rules regarding such briefing have been consolidated into new Rule 28.1.

Rule 28.1. Briefs in a Case Involving a Cross-Appeal

(a) **Applicability.** This rule applies to a case in which a cross-appeal is filed. Rules 28(a), 28(b), 28(c), 31(a)(1), and 32(a)(2) do not apply to such a case, except as otherwise provided in this rule.

(b) **Designation of Appellant.** The party who files a notice of appeal first is the appellant for the purposes of this rule and Rules 30 and 34. If notices are filed on the same day, the plaintiff in the proceeding below is the appellant. These designations may be modified by agreement of the parties or by court order.

(c) **Briefs.** In a case involving a cross-appeal:

(1) **Appellant's Principal Brief.** The appellant must file a principal brief in the appeal. That brief must comply with Rule 28(a).

(2) **Appellee's Principal and Response Brief.** The appellee must file a principal brief in the cross-appeal and must, in the same brief, respond to the principal brief in the appeal. That brief must comply with Rule 28(a), except that the brief need not include a statement of the case or a statement of the facts unless the appellee is dissatisfied with the appellant's statement.

(3) **Appellant's Response and Reply Brief.** The appellant must file a brief that responds to the principal brief in the cross-appeal and may, in the same brief, reply to the response in the appeal. That brief must comply with Rule 28(a)(2)–(9) and (11), except that

none of the following need appear unless the appellant is dissatisfied with the appellee's statement in the cross-appeal:

(A) the jurisdictional statement;

(B) the statement of the issues;

(C) the statement of the case;

(D) the statement of the facts; and

(E) the statement of the standard of review.

(4) **Appellee's Reply Brief.** The appellee may file a brief in reply to the response in the cross-appeal. That brief must contain a table of contents, with page references, and a table of authorities — cases (alphabetically arranged), statutes, and other authorities — with references to the pages of the brief where they are cited.

(5) **No Further Briefs.** Unless the court permits, no further briefs may be filed in a case involving a cross-appeal.

(d) Cover. Except for filings by unrepresented parties, the cover of the appellant's principal brief must be blue; the appellee's principal and response brief, red; the appellant's response and reply brief, yellow; and the appellee's reply brief, gray. The front cover of a brief must contain the information required by Rule 32(a)(2).

(e) Length.

(1) **Page Limitation.** Unless it complies with Rule 28.1(e)(2) and (3), the appellant's principal brief must not exceed 30 pages; the

appellee's principal and response brief, 35 pages; the appellant's response and reply brief, 30 pages; and the appellee's reply brief, 15 pages.

(2) **Type-volume limitation.**

(A) The appellant's principal brief or the appellant's response and reply brief is acceptable if:

(i) it contains no more than 14,000 words; or

(ii) it uses a monospaced face and contains no more than 1,300 lines of text.

(B) The appellee's principal and response brief is acceptable if:

(i) it contains no more than 16,500 words; or

(ii) it uses a monospaced face and contains no more than 1,500 lines of text.

(C) The appellee's reply brief is acceptable if it contains no more than half of the type volume specified in Rule 28.1(e)(2)(A).

(3) **Certificate of compliance.** A brief submitted under Rule 28(e)(2) must comply with Rule 32(a)(7)(C)(i).

(f) Time to Serve and File a Brief. The appellant's principal brief must be served and filed within 40 days after the record is filed. The appellee's principal and response brief must be served and filed within 30 days after the appellant's principal brief is served. The appellant's response and

reply brief must be served and filed within 30 days after the appellee's principal and response brief is served. The appellee's reply brief must be served and filed within 14 days after the appellant's response and reply brief is served, but the appellee's reply brief must be filed at least 3 days before argument, unless the court, for good cause, allows a later filing.

Committee Note

The Federal Rules of Appellate Procedure have said very little about briefing in cases involving cross-appeals. This vacuum has frustrated judges, attorneys, and parties who have sought guidance in the rules. More importantly, this vacuum has been filled by conflicting local rules regarding such matters as the number and length of briefs, the colors of the covers of briefs, and the deadlines for serving and filing briefs. These local rules have created a hardship for attorneys who practice in more than one circuit.

New Rule 28.1 provides a comprehensive set of rules governing briefing in cases involving cross-appeals. The few existing provisions regarding briefing in such cases have been moved into new Rule 28.1, and several new provisions have been added to fill the gaps in the existing rules. The new provisions reflect the practices of the large majority of circuits and, to a significant extent, the new provisions have been patterned after the requirements imposed by Rules 28, 31, and 32 on briefs filed in cases that do not involve cross-appeals.

Subdivision (a). Subdivision (a) makes clear that, in a case involving a cross-appeal, briefing is governed by new Rule 28.1, and not by Rules 28(a), 28(b), 28(c), 31(a)(1), and 32(a)(2), except to the extent that Rule 28.1 specifically incorporates those rules by reference.

Subdivision (b). Subdivision (b) defines who is the "appellant" and who is the "appellee" in a case involving a cross-appeal. Subdivision (b) is taken directly from former Rule 28(h), except that subdivision (b) refers to a party being designated as an appellant "for the purposes of this rule and Rules 30 and 34," whereas former Rule 28(h) also referred to Rule 31. Because the matter addressed by Rule 31(a)(1) — the time to serve and file briefs — is now addressed directly in new Rule 28(f), the cross-reference to Rule 31 is no longer necessary.

Subdivision (c). Subdivision (c) provides for the filing of four briefs in a case involving a cross-appeal. This reflects the practice of every circuit except the Seventh. *See* 7th Cir. R. 28(d)(1)(a).

> The first brief is the "appellant's principal brief." That brief — like the appellant's principal brief in a case that does not involve a cross-appeal — must comply with Rule 28(a).
>
> The second brief is the "appellee's principal and response brief." Because this brief serves as the appellee's principal brief on the merits of the cross-appeal, as well as the appellee's response brief on the merits of the appeal, it must also comply with Rule 28(a), with the limited exceptions noted in the text of the rule.
>
> The third brief is the "appellant's response and reply brief." Like a response brief in a case that does not involve a cross-appeal — that is, a response brief that does not also serve as a principal brief on the merits of a cross-appeal — the appellant's response and reply brief must comply with Rule 28(a)(2)-(9) and (11), with the exceptions noted in the text of the rule. *See* Rule 28(b). The one difference between the appellant's response and reply brief, on the one hand, and a response brief filed in a case that does not involve a cross-appeal, on the other, is that the latter must include a corporate disclosure statement. *See* Rule 28(a)(1) and (b). An appellant filing a response and reply brief in a case involving a cross-appeal has already filed a corporate disclosure statement with its principal brief on the merits of the appeal.
>
> The fourth brief is the "appellee's reply brief." Like a reply brief in a case that does not involve a cross-appeal, it must comply with Rule 28(c).

Subdivision (d). Subdivision (d) specifies the colors of the covers on briefs filed in a case involving a cross-appeal. It is patterned after Rule 32(a)(2), which does not specifically refer to cross-appeals.

Subdivision (e). Subdivision (e) sets forth limits on the length of the briefs filed in a case involving a cross-appeal. It is patterned after Rule 32(a)(7), which does not specifically refer to cross-appeals. Subdivision (e) permits the appellee's principal and response brief to be longer than a typical principal brief on the merits because this brief serves not only as the principal brief on the merits of the cross-appeal, but also as the response brief on the merits of the appeal. Likewise, subdivision (e) permits the appellant's response and reply brief to be longer than a typical reply brief because this brief serves not only as the reply brief in the appeal, but also as the response brief in the cross-appeal.

Subdivision (f). Subdivision (f) provides deadlines for serving and filing briefs in a cross-appeal. It is patterned after Rule 31(a)(1), which does not specifically refer to cross-appeals.

Rule 32. Form of Briefs, Appendices, and Other Papers

(a) Form of a Brief.

* * * * *

(7) **Length.**

* * * * *

(C) **Certificate of Compliance.**

(i) A brief submitted under Rules 28.1(e)(2) or 32(a)(7)(B) must include a certificate by the attorney, or an unrepresented party, that the brief complies with the type-volume limitation. The person preparing the certificate may rely on the word or line count of the word-processing system used to prepare the brief. The certificate must state either:

- the number of words in the brief; or
- the number of lines of monospaced type in the brief.

(ii) Form 6 in the Appendix of Forms is a suggested form of a certificate of compliance. Use of Form 6

must be regarded as sufficient to meet the requirements of Rules 28.1(e)(3) and 32(a)(7)(C)(i).

* * * * *

Committee Note

Subdivision (a)(7)(C). Rule 32(a)(7)(C) has been amended to add cross-references to new Rule 28.1, which governs briefs filed in cases involving cross-appeals. Rule 28.1(e)(2) prescribes type-volume limitations that apply to such briefs, and Rule 28.1(e)(3) requires parties to certify compliance with those type-volume limitations under Rule 32(a)(7)(C).

Rule 34. Oral Argument

* * * * *

(d) **Cross-Appeals and Separate Appeals.** If there is a cross-appeal, Rule ~~28(h)~~ 28.1(b) determines which party is the appellant and which is the appellee for purposes of oral argument. Unless the court directs otherwise, a cross-appeal or separate appeal must be argued when the initial appeal is argued. Separate parties should avoid duplicative argument.

* * * * *

Committee Note

Subdivision (d). A cross-reference in subdivision (d) has been changed to reflect the fact that, as part of an effort to collect within one rule all provisions regarding briefing in cases involving cross-appeals, former Rule 28(h) has been abrogated and its contents moved to new Rule 28.1(b).

The Reporter said that, at its April 2002 meeting, the Committee had decided to proceed with the proposal of the Department of Justice to amend the Appellate Rules to more clearly address briefing in cross-appeals. The Committee tentatively decided to accomplish this goal by

amending existing rules rather than by creating a new rule. The Reporter agreed to review the Department's proposal and to prepare revised drafts of the amendments and Committee Notes.

The Reporter said that, after wrestling with this matter for several days, he had concluded that the Committee should address all issues regarding briefing in cross-appeals — including the number of briefs, the contents of briefs, the colors of the covers of briefs, the size of briefs, and the deadlines for serving briefs — in a new Rule 28.1. It is very difficult to amend the existing rules to address cross-appeals in a way that is consistent with the letter and spirit of the style rules. The existing rules become too long and too cumbersome. In addition, litigants are left flipping back and forth among several rules, worrying that they may have missed a provision regarding cross-appeals in a rule that they have not read.

Several members said that they agreed with the approach chosen by the Reporter and that the Reporter's draft was well done. One member said that his only suggestion was that the title of new Rule 28.1 be "Cross-Appeals" rather than "Briefs in a Case Involving a Cross-Appeal," because the new rule addresses topics in addition to briefing. By consensus, the Committee agreed to make the change.

One member said that he thought that new Rule 28.1(c)(4) should be amended so that the appellee's reply brief is limited to the issues raised in the cross-appeal; without such a limitation, the member said, the appellee could use its reply brief in the cross-appeal as a surreply in the appeal. After a brief discussion, the member moved that new Rule 28.1(c)(4) be amended by adding the following after the first sentence: "That brief must be limited to the issues presented by the cross-appeal." In addition, the member moved that the word "also" be inserted in the following sentence after "That brief must" and before "contain a table of contents." The motion was seconded. The motion carried (unanimously).

Mr. Letter said that the Department of Justice had some minor technical changes to suggest, such as fine-tuning a couple of the cross-references. The Committee agreed that Mr. Letter and the Reporter could discuss those suggestions outside of the presence of the Committee and that the Reporter could use his judgment in deciding whether any changes were necessary.

A member moved that the amendments drafted by the Reporter be approved, with the changes agreed to by the Committee. The motion was seconded. The motion carried (unanimously).

The Committee took a brief break.

F. Item No. 01-01 (citation of non-precedential decisions)

The Reporter introduced the following proposed amendments and Committee Notes:

ALTERNATIVE A

Rule 32.1. Non-Precedential Opinions

(a) Authority to Issue Non-Precedential Opinions. A court of appeals may designate an opinion as non-precedential.

(b) Citation of Non-Precedential Opinions. An opinion designated as non-precedential may be cited for its persuasive value, as well as to support a claim of claim preclusion, issue preclusion, law of the case, double jeopardy, sanctionable conduct, abuse of the writ, notice, or entitlement to attorney's fees, or a similar claim. A court must not impose upon the citation of non-precedential opinions any restriction that is not generally imposed upon the citation of other sources.

Committee Note

Rule 32.1 is a new rule addressing the issuance and citation of non-precedential opinions (commonly but misleadingly referred to as "unpublished" opinions). Subdivision (a) confirms the authority of courts to issue such opinions, and subdivision (b) authorizes the citation of such opinions for their persuasive value, as well as to support a claim of claim preclusion, issue preclusion, law of the case, double jeopardy, sanctionable conduct, abuse of the writ, notice, or entitlement to attorney's fees, or a similar claim.

Subdivision (a). Subdivision (a) confirms the authority that long has been recognized and exercised by every one of the thirteen federal courts of appeals — the authority to designate an opinion as non-precedential. The courts of appeals have cumulatively issued tens of thousands of non-precedential opinions, and about 80% of the opinions issued by the courts of appeals in recent years have been designated as non-precedential. Administrative Office of the United States Courts, Judicial Business of the United States Courts 2001, tbl. S-3 (2001). Although the courts of appeals differ somewhat in their treatment of non-precedential opinions, they generally agree that a non-precedential opinion of a circuit does not bind panels of that circuit or district courts within that circuit (or any other court).

Only once has a panel of a court of appeals expressed doubts about the constitutionality of this practice. *See Anastasoff v. United States*, 223 F.3d 898, 899-905 (8th Cir. 2000). That panel decision was later vacated as moot by the en banc court, 235 F.3d 1054 (8th Cir. 2000), and its rationale was refuted by *Hart v. Massanari*, 266 F.3d 1155, 1159-80 (9th Cir. 2001). *See also Symbol Technologies, Inc. v. Lemelson Med., Educ. & Research Found.*, 277 F.3d 1361, 1366-68 (Fed. Cir. 2002). Although there continues to be a great deal of debate about whether issuing non-precedential opinions is wise as a matter of policy, the "overwhelming consensus" of judicial and scholarly opinion is that issuing non-precedential opinions does not violate the constitution. *Hart*, 266 F.3d at 1163.

The ability to issue non-precedential opinions is a matter of survival for many of the courts of appeals, who have seen their workload increase dramatically faster than the number of judges available to handle that workload. Issuing non-precedential opinions takes less time than issuing precedential opinions, because judges can spend less time explaining their conclusions. Non-precedential opinions are written primarily to inform the parties of the reasons for the decision. The parties are already familiar with the case, and thus a detailed recitation of the facts and procedural history is unnecessary. More importantly, an opinion that simply informs parties of the reasons for a decision does not have to be written with the same degree of care and precision as an opinion that binds future panels of the court and district courts within the circuit. The Ninth Circuit made the point well:

> A judge drafting a precedential opinion must not only consider the facts of the immediate case, but must also envision the countless permutations of facts that might arise in the universe of future cases. Modern opinions generally call for the most precise drafting and re-drafting to ensure that the rule announced sweeps neither too broadly nor too narrowly, and that it does not collide with other binding precedent that bears on the issue. Writing a precedential opinion, thus, involves much more than deciding who wins and who loses in a particular case. It is a solemn judicial act that sets the course of the law for hundreds or thousands of litigants and potential litigants. When properly done, it is an exacting and extremely time-consuming task.

Hart, 266 F.3d at 1176-77 (citation and footnote omitted). Permitting courts to issue non-precedential opinions enables courts to devote sufficient attention to drafting precedential opinions.

Non-precedential opinions have been the subject of much criticism — understandably, as they are not without disadvantages — but missing from the criticism has been any suggestion of a realistic alternative. There is no reason to

believe that the size of the federal courts of appeals will increase substantially in the foreseeable future. Thus, depriving the courts of appeals of the ability to issue non-precedential opinions would seem to leave them with three options. First, they could write hurried and inevitably mistake-prone precedential opinions in all cases — opinions that would bind future circuit panels and district courts within the circuit — creating substantial damage to the administration of justice. Second, they could write detailed and careful precedential opinions in all cases, adding months or (more likely) years to the time that it takes to dispose of appeals, dramatically inflating the already unwieldy body of binding precedent, and creating countless (often inadvertent) intra- and inter-circuit conflicts in the process. Finally, they could dispose of most cases with one-word judgment orders — "affirmed" or "reversed" — that leave parties completely in the dark as to the reasons for the dispositions. None of these options is preferable to the status quo.

Rule 32.1(a) does not require any court to issue any non-precedential opinion. It also does not dictate the circumstances under which a court may choose to designate an opinion as non-precedential, the procedure that a court must follow in making that decision, or what effect a court must give to one of its non-precedential opinions. Because non-precedential opinions are a response to caseloads, and because caseloads differ substantially from circuit to circuit, these are matters that should be left to each court to decide for itself.

Subdivision (b). Subdivision (b) confirms that a non-precedential opinion may be cited to support a claim of claim preclusion, issue preclusion, law of the case, double jeopardy, sanctionable conduct, abuse of the writ, notice, or entitlement to attorney's fees. Not all of the circuits have specifically mentioned all of these claims in their local rules, but it does not appear that any circuit has ever sanctioned an attorney for citing a non-precedential opinion under these circumstances. In part, then, subdivision (b) simply codifies and clarifies existing practice.

Although all of the circuits appear to have permitted the citation of non-precedential opinions in these circumstances, the circuits have differed significantly in the restrictions that they have placed upon the citation of non-precedential opinions for their persuasive value. An opinion cited for its "persuasive value" is cited not because it is binding on the court or because it is relevant under a doctrine such as claim preclusion. Rather, it is cited because the party hopes that it will influence the court as, say, a law review article might — that is, simply through the depth of its research and the persuasiveness of its reasoning.

Some circuits have permitted such citation without restriction, some circuits have disfavored such citation but permitted it in limited circumstances,

and some circuits have not permitted such citation under any circumstances. These rules have created a hardship for practitioners, especially those who practice in more than one circuit. Subdivision (b) is intended to replace these conflicting practices with one uniform rule.

Parties may cite to the courts of appeals an infinite variety of non-precedential sources, including the opinions of federal district courts, state courts, and foreign jurisdictions, law review articles, treatises, newspaper columns, Shakespearian sonnets, and advertising jingles. No court of appeals places any restriction on the citation of these non-precedential sources (other than restrictions that apply generally to all citations, such as requirements relating to type styles). Parties are free to cite them for their persuasive value, and judges are free to decide whether or not to be persuaded.

There is no compelling reason to treat non-precedential opinions differently. It is difficult to justify a system under which the non-precedential opinions of the D.C. Circuit can be cited to the Seventh Circuit, but the non-precedential opinions of the Seventh Circuit cannot be cited to the Seventh Circuit. D.C. Cir. R. 28(c)(1)(B); 7th Cir. R. 53(b)(2)(iv) & (e). It is equally difficult to justify a system under which a litigant can cite a court of appeals to a law review article's or district court's discussion of one of its non-precedential opinions, but cannot cite the court to the opinion itself. And, most broadly, it is difficult to justify a system that permits parties to bring to a court's attention virtually every written or spoken word in existence *except* those contained in the court's own non-precedential opinions.

Some have argued that permitting citation of non-precedential opinions would lead judges to spend more time on them, defeating their purpose. However, non-precedential opinions are already commonly cited in other fora, widely read and discussed, and not infrequently reviewed by the United States Supreme Court. *See, e.g., Holmes Group, Inc. v. Vornado Air Circulation Systems, Inc.*, 122 S. Ct. 1889 (2002) (reversing unpublished decision of Federal Circuit); *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002) (reversing unpublished decision of Second Circuit). If this widespread scrutiny does not deprive courts of the benefits of non-precedential opinions, it is difficult to believe that permitting a court's non-precedential opinions to be cited to the court itself will have that effect. The majority of the courts of appeals already permit their own non-precedential opinions to be cited for their persuasive value, and "the sky has not fallen in those circuits." Stephen R. Barnett, *From* Anastasoff *to* Hart *to West's* Federal Appendix: *The Ground Shifts Under No-Citation Rules*, 4 J. APP. PRAC. & PROCESS 1, 20 (2002).

In the past, some have also argued that, without no-citation rules, large institutional litigants (such as the Department of Justice) who can afford to collect and organize non-precedential opinions would have an unfair advantage. Whatever force this argument may once have had, that force has been greatly diminished by the widespread availability of non-precedential opinions on Westlaw and Lexis, on free Internet sites, and now in the Federal Appendix. In almost all of the circuits, non-precedential opinions are as readily available as precedential opinions. Barring citation to non-precedential opinions is no longer necessary to level the playing field.

Unlike many of the local rules of the courts of appeals, subdivision (b) does not provide that citing non-precedential opinions is "disfavored" or limited to particular circumstances (such as when no precedential opinion adequately addresses an issue). Again, it is difficult to understand why non-precedential opinions should be subject to restrictions that do not apply to other non-precedential sources. Moreover, given that citing a non-precedential opinion is usually tantamount to admitting that no binding authority supports a contention, parties already have an incentive not to cite non-precedential opinions. Not surprisingly, those courts that have liberally permitted the citation of non-precedential opinions have not been overwhelmed with such citations. *See, e.g.*, Boyce F. Martin, Jr., *In Defense of Unpublished Opinions*, 60 OHIO ST. L.J. 177, 195 (1999). Finally, restricting the citation of non-precedential opinions may spawn satellite litigation over whether a party's citation of a particular opinion was appropriate. This satellite litigation would serve little purpose, other than further to burden the already overburdened courts of appeals.

Imposing a uniform rule cannot harm the administration of justice; to the contrary, it will expand the sources of insight and information that can be brought to the attention of judges and make the entire process more transparent to attorneys, parties, and the general public. At the same time, a uniform rule will relieve attorneys of several hardships. Attorneys will no longer have to pick through the conflicting no-citation rules of the circuits in which they practice, nor worry about being sanctioned or accused of unethical conduct for improperly citing a non-precedential opinion. *See Hart*, 266 F.3d at 1159 (attorney ordered to show cause why he should not be disciplined for violating no-citation rule); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 94-386R (1995) ("It is ethically improper for a lawyer to cite to a court an unpublished opinion of that court or of another court where the forum court has a specific rule prohibiting any reference in briefs to [unpublished opinions]."). In addition, attorneys will no longer be barred from bringing to the court's attention information that might help their client's cause; whether or not this violates the First Amendment (as some have argued), it is a regrettable position in which to put attorneys. Finally, game-playing should be reduced, as attorneys who in the past might have been tempted

to find a way to hint to a court that it has addressed an issue in a non-precedential opinion can now directly bring non-precedential opinions to the court's attention. As is true with any non-binding source, the court can do with that information whatever it wishes.

ALTERNATIVE B

Rule 32.1. Citation of Non-Precedential Opinions

An opinion designated as non-precedential may be cited for its persuasive value, as well as to support a claim of claim preclusion, issue preclusion, law of the case, double jeopardy, sanctionable conduct, abuse of the writ, notice, or entitlement to attorney's fees, or a similar claim. A court must not impose upon the citation of non-precedential opinions any restriction that is not generally imposed upon the citation of other sources.

Committee Note

Rule 32.1 is a new rule addressing the citation of non-precedential opinions (commonly but misleadingly referred to as "unpublished" opinions). This is an important issue. The thirteen courts of appeals have cumulatively issued tens of thousands of non-precedential opinions, and about 80% of the opinions issued by the courts of appeals in recent years have been designated as non-precedential. Administrative Office of the United States Courts, Judicial Business of the United States Courts 2001, tbl. S-3 (2001). Although the courts of appeals differ somewhat in their treatment of non-precedential opinions, they generally agree that a non-precedential opinion of a circuit does not bind panels of that circuit or district courts within that circuit (or any other court).

Rule 32.1 is extremely limited. It takes no position on whether designating opinions as non-precedential is constitutional. *See Symbol Technologies, Inc. v. Lemelson Med., Educ. & Research Found.*, 277 F.3d 1361, 1366-68 (Fed. Cir. 2002); *Williams v. Dallas Area Rapid Transit,* 256 F.3d 260 (5th Cir. 2001) (Smith, J., dissenting from denial of reh'g en banc); *Hart v. Massanari*, 266 F.3d 1155, 1159-80 (9th Cir. 2001); *Anastasoff v. United States*, 223 F.3d 898, 899-905, *vacated as moot on reh'g en banc* 235 F.3d 1054 (8th Cir. 2000). It does not require any court to issue a non-precedential opinion or forbid any court from doing so. It does not dictate the circumstances under which a court

may choose to designate an opinion as non-precedential or specify the procedure that a court must follow in making that decision. It says nothing about what effect a court must give to one of its non-precedential opinions or to the non-precedential opinions of another court. The one and only issue addressed by Rule 32.1 is the *citation* of opinions designated as non-precedential.

Rule 32.1 confirms that a non-precedential opinion may be cited to support a claim of claim preclusion, issue preclusion, law of the case, double jeopardy, sanctionable conduct, abuse of the writ, notice, or entitlement to attorney's fees. Not all of the circuits have specifically mentioned all of these claims in their local rules, but it does not appear that any circuit has ever sanctioned an attorney for citing a non-precedential opinion under these circumstances. In part, then, Rule 32.1 simply codifies and clarifies existing practice.

Although all of the circuits appear to have permitted the citation of non-precedential opinions in these circumstances, the circuits have differed significantly in the restrictions that they have placed upon the citation of non-precedential opinions for their persuasive value. An opinion cited for its "persuasive value" is cited not because it is binding on the court or because it is relevant under a doctrine such as claim preclusion. Rather, it is cited because the party hopes that it will influence the court as, say, a law review article might — that is, simply through the depth of its research and the persuasiveness of its reasoning.

Some circuits have permitted such citation without restriction, some circuits have disfavored such citation but permitted it in limited circumstances, and some circuits have not permitted such citation under any circumstances. These rules have created a hardship for practitioners, especially those who practice in more than one circuit. Rule 32.1 is intended to replace these conflicting practices with one uniform rule.

Parties may cite to the courts of appeals an infinite variety of non-precedential sources, including the opinions of federal district courts, state courts, and foreign jurisdictions, law review articles, treatises, newspaper columns, Shakespearian sonnets, and advertising jingles. No court of appeals places any restriction on the citation of these non-precedential sources (other than restrictions that apply generally to all citations, such as requirements relating to type styles). Parties are free to cite them for their persuasive value, and judges are free to decide whether or not to be persuaded.

There is no compelling reason to treat non-precedential opinions differently. It is difficult to justify a system under which the non-precedential opinions of the D.C. Circuit can be cited to the Seventh Circuit, but the non-

precedential opinions of the Seventh Circuit cannot be cited to the Seventh Circuit. D.C. Cir. R. 28(c)(1)(B); 7th Cir. R. 53(b)(2)(iv) & (e). It is equally difficult to justify a system under which a litigant can cite a court of appeals to a law review article's or district court's discussion of one of its non-precedential opinions, but cannot cite the court to the opinion itself. And, most broadly, it is difficult to justify a system that permits parties to bring to a court's attention virtually every written or spoken word in existence *except* those contained in the court's own non-precedential opinions.

Some have argued that permitting citation of non-precedential opinions would lead judges to spend more time on them, defeating their purpose. However, non-precedential opinions are already commonly cited in other fora, widely read and discussed, and not infrequently reviewed by the United States Supreme Court. *See, e.g., Holmes Group, Inc. v. Vornado Air Circulation Systems, Inc.*, 122 S. Ct. 1889 (2002) (reversing unpublished decision of Federal Circuit); *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002) (reversing unpublished decision of Second Circuit). If this widespread scrutiny does not deprive courts of the benefits of non-precedential opinions, it is difficult to believe that permitting a court's non-precedential opinions to be cited to the court itself will have that effect. The majority of the courts of appeals already permit their own non-precedential opinions to be cited for their persuasive value, and "the sky has not fallen in those circuits." Stephen R. Barnett, *From* Anastasoff *to* Hart *to West's* Federal Appendix: *The Ground Shifts Under No-Citation Rules*, 4 J. APP. PRAC. & PROCESS 1, 20 (2002).

In the past, some have also argued that, without no-citation rules, large institutional litigants (such as the Department of Justice) who can afford to collect and organize non-precedential opinions would have an unfair advantage. Whatever force this argument may once have had, that force has been greatly diminished by the widespread availability of non-precedential opinions on Westlaw and Lexis, on free Internet sites, and now in the Federal Appendix. In almost all of the circuits, non-precedential opinions are as readily available as precedential opinions. Barring citation to non-precedential opinions is no longer necessary to level the playing field.

Unlike many of the local rules of the courts of appeals, Rule 32.1 does not provide that citing non-precedential opinions is "disfavored" or limited to particular circumstances (such as when no precedential opinion adequately addresses an issue). Again, it is difficult to understand why non-precedential opinions should be subject to restrictions that do not apply to other non-precedential sources. Moreover, given that citing a non-precedential opinion is usually tantamount to admitting that no binding authority supports a contention, parties already have an incentive not to cite non-precedential opinions. Not

surprisingly, those courts that have liberally permitted the citation of non-precedential opinions have not been overwhelmed with such citations. *See, e.g.*, Boyce F. Martin, Jr., *In Defense of Unpublished Opinions*, 60 OHIO ST. L.J. 177, 195 (1999). Finally, restricting the citation of non-precedential opinions may spawn satellite litigation over whether a party's citation of a particular opinion was appropriate. This satellite litigation would serve little purpose, other than further to burden the already overburdened courts of appeals.

Imposing a uniform rule cannot harm the administration of justice; to the contrary, it will expand the sources of insight and information that can be brought to the attention of judges and make the entire process more transparent to attorneys, parties, and the general public. At the same time, a uniform rule will relieve attorneys of several hardships. Attorneys will no longer have to pick through the conflicting no-citation rules of the circuits in which they practice, nor worry about being sanctioned or accused of unethical conduct for improperly citing a non-precedential opinion. *See Hart*, 266 F.3d at 1159 (attorney ordered to show cause why he should not be disciplined for violating no-citation rule); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 94-386R (1995) ("It is ethically improper for a lawyer to cite to a court an unpublished opinion of that court or of another court where the forum court has a specific rule prohibiting any reference in briefs to [unpublished opinions]."). In addition, attorneys will no longer be barred from bringing to the court's attention information that might help their client's cause; whether or not this violates the First Amendment (as some have argued), it is a regrettable position in which to put attorneys. Finally, game-playing should be reduced, as attorneys who in the past might have been tempted to find a way to hint to a court that it has addressed an issue in a non-precedential opinion can now directly bring non-precedential opinions to the court's attention. As is true with any non-binding source, the court can do with that information whatever it wishes.

ALTERNATIVE C

Rule 32.1. Citation of Non-Precedential Opinions

(a) Related Cases. An opinion designated as non-precedential may be cited to support a claim of claim preclusion, issue preclusion, law of the case, double jeopardy, sanctionable conduct, abuse of the writ, notice, or entitlement to attorney's fees, or a similar claim.

(b) Persuasive Value. An opinion designated as non-precedential may be cited for its persuasive value regarding a material issue, but only if no precedential opinion of the forum court adequately addresses that issue. Citing non-precedential opinions for their persuasive value is disfavored.

Committee Note

Rule 32.1 is a new rule addressing the citation of non-precedential opinions (commonly but misleadingly referred to as "unpublished" opinions). This is an important issue. The thirteen courts of appeals have cumulatively issued tens of thousands of non-precedential opinions, and about 80% of the opinions issued by the courts of appeals in recent years have been designated as non-precedential. Administrative Office of the United States Courts, Judicial Business of the United States Courts 2001, tbl. S-3 (2001). Although the courts of appeals differ somewhat in their treatment of non-precedential opinions, they generally agree that a non-precedential opinion of a circuit does not bind panels of that circuit or district courts within that circuit (or any other court).

Rule 32.1 is extremely limited. It takes no position on whether designating opinions as non-precedential is constitutional. *See Symbol Technologies, Inc. v. Lemelson Med., Educ. & Research Found.*, 277 F.3d 1361, 1366-68 (Fed. Cir. 2002); *Williams v. Dallas Area Rapid Transit,* 256 F.3d 260 (5th Cir. 2001) (Smith, J., dissenting from denial of reh'g en banc); *Hart v. Massanari*, 266 F.3d 1155, 1159-80 (9th Cir. 2001); *Anastasoff v. United States*, 223 F.3d 898, 899-905, *vacated as moot on reh'g en banc* 235 F.3d 1054 (8th Cir. 2000). It does not require any court to issue a non-precedential opinion or forbid any court from doing so. It does not dictate the circumstances under which a court may choose to designate an opinion as non-precedential or specify the procedure that a court must follow in making that decision. It says nothing about what effect a court must give to one of its non-precedential opinions or to the non-precedential opinions of another court. The one and only issue addressed by Rule 32.1 is the *citation* of opinions designated as non-precedential.

Subdivision (a). Subdivision (a) confirms that a non-precedential opinion may be cited to support a claim of claim preclusion, issue preclusion, law of the case, double jeopardy, sanctionable conduct, abuse of the writ, notice, or entitlement to attorney's fees. Not all of the circuits have specifically mentioned all of these claims in their local rules, but it does not appear that any circuit has ever sanctioned an attorney for citing a non-precedential opinion under these

circumstances. For the most part, then, subdivision (a) simply codifies and clarifies existing practice.

Subdivision (b). Although all of the circuits appear to have permitted the citation of non-precedential opinions in the circumstances identified in subdivision (a), the circuits have differed significantly in the restrictions that they have placed upon the citation of non-precedential opinions for their persuasive value. An opinion cited for its "persuasive value" is cited not because it is binding on the court or because it is relevant under a doctrine such as claim preclusion. Rather, it is cited because the party hopes that it will influence the court as, say, a law review article might — that is, simply through the depth of its research and the persuasiveness of its reasoning.

Some circuits have permitted such citation without restriction, some circuits have disfavored such citation but permitted it in limited circumstances, and some circuits have not permitted such citation under any circumstances. These rules have created a hardship for practitioners, especially those who practice in more than one circuit. Subdivision (b) is intended to replace these conflicting practices with one uniform rule.

Subdivision (b) does not altogether bar the citation of non-precedential opinions for their persuasive value. Parties may cite to the courts of appeals an infinite variety of non-precedential sources, including the opinions of federal district courts, state courts, and foreign jurisdictions, law review articles, treatises, newspaper columns, Shakespearian sonnets, and advertising jingles. No court of appeals places any restriction upon the citation of these non-precedential sources (other than restrictions that apply generally to all citations, such as requirements relating to type styles). Parties are free to cite them for their persuasive value, and judges are free to decide whether or not to be persuaded. There is no compelling reason to completely bar the citation of non-precedential opinions.

Some have argued that permitting citation of non-precedential opinions would lead judges to spend more time on them, defeating their purpose. However, non-precedential opinions are already commonly cited in other fora, widely read and discussed, and not infrequently reviewed by the United States Supreme Court. *See, e.g., Holmes Group, Inc. v. Vornado Air Circulation Systems, Inc.*, 122 S. Ct. 1889 (2002) (reversing unpublished decision of Federal Circuit); *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002) (reversing unpublished decision of Second Circuit). If this widespread scrutiny does not deprive courts of the benefits of non-precedential opinions, it is difficult to believe that permitting a court's non-precedential opinions to be cited to the court itself will have that effect. The majority of the courts of appeals already permit their own non-precedential opinions to be cited in at least some circumstances for their

persuasive value, and "the sky has not fallen in those circuits." Stephen R. Barnett, *From* Anastasoff *to* Hart *to West's* Federal Appendix: *The Ground Shifts Under No-Citation Rules*, 4 J. APP. PRAC. & PROCESS 1, 20 (2002).

In the past, some have also argued that, without no-citation rules, large institutional litigants (such as the Department of Justice) who can afford to collect and organize non-precedential opinions would have an unfair advantage. Whatever force this argument may once have had, that force has been greatly diminished by the widespread availability of non-precedential opinions on Westlaw and Lexis, on free Internet sites, and now in the Federal Appendix. In almost all of the circuits, non-precedential opinions are as readily available as precedential opinions. Barring citation to non-precedential opinions is no longer necessary to level the playing field.

Although subdivision (b) does not altogether bar the citation of non-precedential opinions, it also does not give parties an unqualified right to cite such opinions for their persuasive value. Rather, subdivision (b) expressly disfavors such citation and permits it "only if no precedential opinion of the forum court adequately addresses [a material] issue." These limitations reflect the practice of a majority of the courts of appeals. Few courts permit the unqualified citation of non-precedential opinions for their persuasive value. Rather, the majority either bar such citation altogether or limit it to the circumstances described in subdivision (b).

Subdivision (b) will relieve attorneys of several hardships. Attorneys will no longer have to pick through the conflicting no-citation rules of the circuits in which they practice, with mistakes possibly subjecting them to sanctions or accusations of unethical conduct. *See Hart*, 266 F.3d at 1159 (attorney ordered to show cause why he should not be disciplined for violating no-citation rule); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 94-386R (1995) ("It is ethically improper for a lawyer to cite to a court an unpublished opinion of that court or of another court where the forum court has a specific rule prohibiting any reference in briefs to [unpublished opinions]."). In addition, attorneys will no longer be barred from bringing to the court's attention information that might help their client's cause; whether or not this violates the First Amendment (as some have argued), it is a regrettable position in which to put attorneys.

The Reporter said that, at its April 2002 meeting, the Committee had decided to move forward on the Justice Department's proposal that a new Rule 32.1 be added to the Appellate Rules to impose a uniform rule regarding the citation of non-precedential opinions. Although the Committee supported this proposal in principle, members had raised a number of concerns about

the specifics of the Department's draft rule. The Reporter agreed to take a look at this issue and prepare a revised draft.

The Reporter said that he was presenting to the Committee three alternative drafts of a proposed Rule 32.1. The first — Alternative A — was the broadest. It specifically authorizes courts to issue non-precedential opinions and permits their citation without qualification. The second — Alternative B — takes a middle position. Unlike Alternative A, it addresses only the citation of non-precedential opinions. However, unlike Alternative C, it permits the citation of such opinions without qualification. The third — Alternative C — is the narrowest. It addresses only the citation of non-precedential opinions, and it permits such citation only in limited circumstances.

The Reporter said that he had prepared these alternative drafts for a couple of reasons. First, the issue of non-precedential opinions has been a recurring one during the recent history of the Committee. It may be helpful to get all issues — and all alternatives — on the table, so that this issue might be put to rest for at least a few years. Second, the Committee may want to publish a broader proposal than it anticipates approving. This would allow for a full public airing of all of the issues, and it would give the Committee room to compromise down the road. Publishing Alternative A might also give comfort to those judges who could be persuaded to support a rule regarding citation (Alternative B or C) if they could be assured that such a rule is not a first step toward abolishing non-precedential opinions altogether.

After a brief discussion, the Committee agreed by consensus not to proceed with Alternative A. Members expressed concern about using a procedural rule to embrace one side of the debate over the constitutionality of non-precedential opinions. Members were unanimous in wanting to limit the involvement of the Committee to the issue of citation.

Most members who addressed the issue expressed a preference for Alternative B over Alternative C, largely for the reasons given in the draft Committee Note. Mr. Letter said that the Justice Department had originally asked the Committee to approve a citation rule and continues to favor such a rule. However, the Solicitor General received a phone call from Judge Alex Kozinski of the Ninth Circuit and other opponents of the rule, and he is troubled by some of the concerns that they raised. The Solicitor General believes it essential that this Committee fully consult with the Ninth Circuit regarding its concerns.

Mr. Letter said that if the Committee decides to go forward with a proposed rule, the Department would favor Alternative B over Alternative C. Although the Department originally proposed a qualified citation rule similar to Alternative C, it did so only because it thought that a qualified rule had the best chance of being approved by the Standing Committee and Judicial Conference. Mr. Letter said that, upon reflection, the Department had decided that it was preferable to "lead" with the better rule — Alternative B — and "retreat" to Alternative C if Alternative B fails to attract the necessary support.

One member argued strongly against approving any rule regarding the citation of non-precedential opinions. He said that, although he had previously favored such a rule, he had been persuaded by discussions with Judge Kozinski and others from the Ninth Circuit that no such rule should be approved. He said that non-precedential opinions are a response to circumstances (particularly caseloads) that differ from circuit to circuit, and thus each circuit should be free to adopt its own rules on the matter. He also pointed out that opinions designated as "non-precedential" or the like vary dramatically — from one-paragraph, per-curiam orders to 20-page, signed opinions containing exhaustive legal analysis. The variation in practices among circuits argued against trying to impose a single national standard.

In addition, the member said, it is logical for circuits to bar the citation of their non-precedential opinions for their persuasive value. If the rationale of a non-precedential opinion is persuasive, there is nothing that prevents a litigant from repeating that rationale in its brief. The reason that litigants want so badly to cite non-precedential opinions is not for the persuasiveness of their rationales, but because litigants want the court to be influenced by the fact that three judges agreed with a rationale. But this is a misleading use of non-precedential opinions. The practice in the Ninth Circuit and elsewhere is that a judge will join a non-precedential opinion as long as he agrees with its result, even if he does not agree with its reasoning. No-citation rules thus prevent parties from using non-precedential opinions in an unfair manner.

Several members disagreed. They pointed out that courts already know all of this and can take it into account when deciding what weight to give to non-precedential opinions. All judges have written non-precedential opinions, and all judges have joined them. Judges are not going to be misled into thinking that these opinions have more force than they do. Moreover, it is strange to regulate the force of an authority by forbidding lawyers to talk about it. Lawyers should be free to cite any non-binding source of authority they want, and judges should be free to give that authority as much or as little weight as they deem appropriate. Judges do not need to be protected from having their own non-precedential opinions drawn to their attention.

A member said that, as a judge, he frequently confronts issues that have not been addressed directly by a precedential opinion of his circuit. As far as he is concerned, the more illumination — from whatever source — the better. He is confident in his ability to decide how much weight to give a non-precedential opinion; after all, he decides every day how much weight to give to law review articles, decisions of state courts, and the other non-binding sources of authority that are cited to him.

The member who opposed a national rule said that the unique circumstances of the Ninth Circuit account for the Ninth Circuit's strong opposition to a citation rule. The Ninth Circuit must dispose of a huge number of cases. The practice in the Ninth Circuit is for judges to give their full attention to both the reasoning and result of precedential opinions. However, judges will join non-precedential opinions even if they do not agree with the reasoning, as long as they agree with the result. They do this precisely because they know that the opinions will not be binding precedent and will not be cited to the Ninth Circuit. If the Ninth Circuit was forced to

permit citation of its non-precedential opinions, the court would likely issue many fewer such opinions and many more one-word orders.

A member responded that she thinks that such a development would be a good thing. In her view, if three judges agree on a result, but not on reasoning, they should issue only a result — that is, a one-word order. She believes this practice would be better than issuing hundreds of non-precedential opinions that have been joined by judges who may or may not agree with what the opinions say. The member who opposed a citation rule disagreed, stating that the use of one-word dispositions is unfair to the parties, who should receive some explanation of a result.

The Committee also revisited the question of whether parties who cite non-precedential opinions should be required to attach copies of those opinions to their briefs, motions, or other papers. At its April 2002 meeting, the Committee decided not to include such a requirement. Non-precedential opinions are widely available today — for all practical purposes, they are as available as precedential opinions — and thus a general requirement to attach copies would result in the needless copying, serving, and filing of hundreds of thousands of pages of non-precedential opinions.

Although no member of the Committee argued in favor of a general requirement to attach copies of non-precedential opinions, a couple of members did express concerns about citations to the non-precedential opinions of the Fifth and Eleventh Circuits. Those circuits do not release their non-precedential opinions to West for publishing in the Federal Appendix, do not release their non-precedential opinions to Westlaw and LEXIS for inclusion in their electronic databases, and do not post their non-precedential opinions to their websites. The only way to get a non-precedential opinion of the Fifth or Eleventh Circuit is to call the clerk's office and request a copy.

Others discounted concerns about the Fifth and Eleventh Circuits. Because their non-precedential opinions are so difficult to get, those opinions will rarely be cited. When they are cited by a party, the other parties can pick up the phone and get a copy — either from the party that cited the opinion or from the clerk's office. To amend the Appellate Rules to address a minor problem existing (for now) in only two circuits would be overkill.

A member asked whether the Appellate Rules should be amended to *force* all circuits to make their non-precedential opinions available on-line or to Westlaw and LEXIS. The Reporter said that the former chair of the Committee, Judge Will Garwood, had appointed a subcommittee to look into this very issue a few years ago, but nothing had come of that.[1] The Reporter also

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[1]The minutes of the April 1998 meeting of the Committee state (on page 29):

"Judge Garwood said that he was prepared to entertain the following motion: Item No. 91-17 would be removed from the Committee's study agenda, without prejudice to any specific

(continued...)

said that, although his recollection is vague, he believes that the reason nothing came of the subcommittee is that someone had concluded that the issue was more properly within the jurisdiction of the Committee on Court Administration and Case Management ("CACM"). Mr. Rabiej said that his recollection was similar.

Several concerns were raised about the wording of Alternative B.

A couple of members asked whether both sentences were necessary. One member suggested that the second sentence — "[a] court must not impose upon the citation of non-precedential opinions any restriction that is not generally imposed upon the citation of other sources" — might be deleted. The Reporter responded that he feared that, without that sentence, the courts of appeals that are hostile to the citation of non-precedential opinions would impose so many conditions on such citation as to defeat the purpose of the rule.

Another member suggested that the first sentence could be deleted, and that the second sentence, standing alone, would accomplish all that the rule is intended to do. He said, though, that he would prefer that the sentence be written passively ("no restriction may be imposed") rather than actively ("a court must not impose"), as the former sounds less confrontational. A member expressed concern that the second sentence might prevent a court from requiring parties to serve a copy of a non-precedential opinion of the Fifth or Eleventh Circuit.

A couple of members raised concerns about the use of the term "non-precedential." One member said that he thought the term was misleading, as these opinions *are* precedent (although not necessarily *binding* precedent). The Reporter pointed out that the rule refers to opinions being *designated* as non-precedential; it does not take a position on whether or to what extent any particular opinion is in fact "non-precedential."

Another member expressed concern that the term might not be broad enough to reach all of the opinions that the Committee wanted to reach. For example, could a court argue that the rule does not force it to permit citation of its non-precedential opinions because those opinions are labeled "unpublished" instead of "non-precedential"? One member suggested substituting

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[1](...continued)
proposals regarding unpublished opinions that might be made in the future. At the same time, Judge Garwood would appoint a subcommittee to discuss whether and how the Third, Fifth, and Eleventh Circuits might be encouraged to provide their unpublished opinions to LEXIS and Westlaw. A member made the motion suggested by Judge Garwood. The motion was seconded. The motion carried (unanimously).

"Judge Garwood appointed a subcommittee consisting of Judge Alito, Judge Motz, and Mr. Meehan, asked Judge Motz to chair the subcommittee, and asked Judge Kravitch if she would work with the subcommittee in her capacity as liaison from the Standing Committee."

the phrase "not officially reported," but another member responded that *no* opinion of a federal court of appeals is "officially" reported. A member suggested substituting a phrase such as "non-precedential, not-for-publication, or the like."

A member said that he was also concerned about the use of the word "opinions" for similar reasons. He fears that a hostile court will argue that the rule does not apply to its non-precedential opinions, because those opinions are "orders" or "memorandum dispositions" instead of "opinions."

Finally, a member suggested that the title of new Rule 32.1 should refer to "Citation of Opinions *Designated* As Non-Precedential" rather than "Citation of Non-Precedential Opinions." Picking up on the Reporter's point, she was concerned that the latter title might imply a view about the jurisprudential impact of these opinions.

A member moved that the Committee approve Alternative B in substance, except that the Reporter be directed to draft a revised version of Alternative B incorporating the following changes:

1. New Rule 32.1 should be a single sentence, modeled after the second sentence of the current draft, but stated passively. The member suggested something like: "No restriction may be imposed upon the citation of opinions designated as non-precedential, unpublished, or the like that is not generally imposed upon the citation of other sources." Members conceded that the Reporter would have to tinker with the language of the rule to improve its clarity, make it consistent with the style rules, and make certain that it covers all of the judicial dispositions that the Committee wishes to reach.

2. The title of new Rule 32.1 should refer to judicial dispositions that are *designated* as non-precedential, unpublished, or the like.

3. Finally, a sentence should be added to the rule to require a party to serve copies of non-precedential opinions that the party has cited and that are not readily available, such as the non-precedential opinions of the Fifth and Eleventh Circuits.

The motion was seconded. The motion carried (7-1, with one abstention). The Reporter said that he would present a revised draft of Alternative B at the Committee's spring 2003 meeting.

G. Item No. 02-01 (FRAP 27(d) — apply typeface and type-style limitations to motions)

The Reporter introduced the following proposed amendment and Committee Note:

Rule 27. Motions

* * * * *

(d) Form of Papers; Page Limits; and Number of Copies.

(1) **Format.**

(A) **Reproduction.** A motion, response, or reply may be reproduced by any process that yields a clear black image on light paper. The paper must be opaque and unglazed. Only one side of the paper may be used.

(B) **Cover.** A cover is not required, but there must be a caption that includes the case number, the name of the court, the title of the case, and a brief descriptive title indicating the purpose of the motion and identifying the party or parties for whom it is filed. If a cover is used, it must be white.

(C) **Binding.** The document must be bound in any manner that is secure, does not obscure the text, and permits the document to lie reasonably flat when open.

(D) **Paper size, line spacing, and margins.** The document must be on 8½ by 11 inch paper. The text must be double-spaced, but quotations more than two lines long may be indented and single-spaced. Headings and footnotes may be single-spaced. Margins must be at least one inch on all

four sides. Page numbers may be placed in the margins, but no text may appear there.

(E) **Typeface and type styles.** The document must comply with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6).

* * * * *

Committee Note

Subdivision (d)(1)(E). A new subdivision (E) has been added to Rule 27(d)(1) to provide that a motion, a response to a motion, and a reply to a response to a motion must comply with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6). The purpose of the amendment is to promote uniformity in federal appellate practice and to prevent the abuses that might occur if no restrictions were placed on the size of typeface used in motion papers.

The Reporter said that Charles R. "Fritz" Fulbruge III, the former liaison to the Committee from the appellate clerks, brought to the Committee's attention the fact that nothing in the Appellate Rules restricts the typeface and type styles that are used in motion papers. At its April 2002 meeting, the Committee asked the Reporter to draft an amendment and Committee Note that would address this omission. The Reporter said that his draft would add a new subdivision (E) to Rule 27(d)(1). Pursuant to that new subdivision, the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) would apply to motion papers.

The Committee briefly discussed whether, under new subdivision (E), a litigant would have an incentive to use proportionally spaced typeface in motion papers. A member moved that the amendment and Committee Note drafted by the Reporter be approved. The motion was seconded. The motion carried (unanimously).

V. Discussion Items

A. Item No. 00-07 (FRAP 4 — time for Hyde Amendment appeals)

At the request of Judge Duval, this Committee placed on its study agenda the question whether an appeal from an order granting or denying an application for attorney's fees under the

Hyde Amendment (Pub. L. No. 105-119, Title VI, § 617, reprinted in 18 U.S.C. § 3006A (historical and statutory notes)) should be governed by the time limitations of Rule 4(a) (which apply in civil cases) or by the time limitations of Rule 4(b) (which apply in criminal cases). The circuits have split over this question.

During a discussion of this issue at its April 2001 meeting, Committee members described similar issues over which the circuits have disagreed. The Justice Department offered to try to identify all instances in which there are disagreements over which deadline should be applied to an appeal from a particular type of order. The Department also offered to try to draft an amendment to address the problem.

Mr. Letter gave a status report on the Department's efforts and presented a draft Rule 3.1, which would specifically identify several types of appeals that would be defined as "appeals in a criminal case," and several other types of appeals that would be defined as "appeals in a civil case." (The draft rule appears under tab V-A in the agenda book.) Mr. Letter said that the Department needed to give more thought to the specifics of the draft rule; he pointed out, for example, that an appeal from an order regarding restitution entered in a criminal case, which the draft rule defines as a "criminal" appeal, should probably be a "civil" appeal.

The Reporter said that he had several concerns about the draft rule. The Reporter pointed out that, if the draft rule was enacted in its current form, it would represent a highly unusual rule of appellate procedure. No other Appellate Rule attempts to so thoroughly catalog a list of specific orders or appeals; rather, the Appellate Rules typically embrace general principles, which the courts of appeals are left to apply to the infinite variety of orders and appeals that they confront. The Reporter said that going the "catalog" route would guarantee that this Committee would be faced with endless requests to amend the rule, as new statutes were enacted, as common law continued to evolve, as gaps or errors were found in the "catalog," and as interest groups lobbied to have a particular type of appeal reclassified from civil to criminal or vice-versa. The Reporter warned the Committee that it might regret going down this road.

The Reporter also pointed out that neither he nor the Justice Department had been able to identify more than a handful of circuit splits regarding whether an appeal from a particular type of order was an appeal in a civil or criminal case. One of those splits — involving appeals from orders granting or denying applications for a writ of error *coram nobis* — had already been fixed by the recent addition of Rule 4(a)(1)(C). The Reporter expressed skepticism that the remaining splits were creating a serious enough problem to justify the type of sweeping, unprecedented rule proposed by the Department. The Reporter urged the Committee not to use the Appellate Rules to resolve every circuit split that is brought to the Committee's attention.

The Reporter continued that, even if the Committee disagreed and wanted to address these circuit splits in the Appellate Rules, he would urge the Committee to forgo the "catalog" approach and instead try to adopt a general principle. For example, Rule 4 could be amended to

provide something like, "All appeals are appeals in a civil case, except appeals from a judgment of conviction or sentence."

The ensuing discussion focused on a few specific provisions of the rule proposed by the Department of Justice. For example, members pointed out that draft Rule 3.1(a) sets forth a laundry list of appeals and then states that those appeals are "governed by Rule 4(b)." Rule 4(b), in turn, gives defendants 10 days and the government 30 days to appeal. The Department's proposal would thus change existing law with respect to some of the orders in its laundry list by giving the government longer to appeal than defendants. Mr. Letter said that the Department did not intend such a change and would have to tinker with the wording of the rule.

For the most part, though, the Committee's discussion focused on trying to come up with a more general approach that would solve the circuit splits — and prevent future circuit splits. Among options that the Committee discussed were the following:

- Giving all parties 30 days to appeal all orders in all cases — civil and criminal. This would render irrelevant the distinction between an "appeal in a civil case" and an "appeal in a criminal case." The Committee concluded that this approach would not work as it would provide too little time for the government to decide whether to appeal — and that, in turn, would result in the government filing numerous protective appeals.

- Giving all parties 60 days to appeal all orders in all cases. The Committee rejected this approach as giving too much time to defendants in criminal cases.

- Giving all parties 30 days to appeal in cases in which the government was not a party, and 60 days to appeal in cases in which the government was a party. The Committee rejected this approach, again because it would give too much time to defendants in criminal cases.

- Giving all parties 30 days to appeal all orders in all cases — except that the government (and the government alone) would get 60 days to appeal all orders in all cases. The Committee concluded that this approach was promising, even though it would lengthen the time for defendants in criminal cases to appeal from 10 days to 30 days, and shorten the time for parties in civil cases involving the government to appeal from 60 days to 30 days.

The Committee also discussed the suggestion of the Reporter that, if a civil-criminal distinction was to be retained, the rule provide simply that a direct appeal from a criminal conviction or sentence is an appeal in a criminal case, and all other appeals are appeals in civil cases.

The Committee broke for lunch at 12:15 p.m. and reconvened at 2:00 p.m. Following further discussion, the Committee requested that the Department of Justice give further consideration to four options:

1. Retaining the status quo.

2. Amending Rule 4 to provide that all parties get 30 days to appeal all orders in all cases, except that the government gets 60 days to appeal all orders in all cases.

3. Amending Rule 4 to provide that all appeals are appeals in a civil case for purposes of Rule 4, with the exception of direct appeals from judgments of conviction entered under Fed. R. Crim. P. 32(d).

4. Adding a new Rule 3.1 that would take the "catalog" approach.

Mr. Letter said that the Department would study these four options and report back at a future Committee meeting.

B. Items Awaiting Initial Discussion

1. Item No. 02-02 (CA11 local rules)

Veronica Nunley, a pro se litigant in the Eleventh Circuit, recently wrote to Judge Alito and enclosed a copy of a lengthy petition for a writ of certiorari that she had filed with the United States Supreme Court. In her cert petition, Ms. Nunley complained about various rules of the Eleventh Circuit. She argued that these rules were inconsistent with the Appellate Rules, exceeded the Eleventh Circuit's authority under 28 U.S.C. § 2071, and violated the U.S. Constitution.

Following a brief discussion, a member moved that Item No. 02-02 be removed from the Committee's study agenda. The motion was seconded. The motion carried (unanimously).

2. Item No. 02-03 (uniform case information sheet)

3. Item No. 02-04 (uniform notice of appearance)

4. Item No. 02-05 (uniform certificate of interested persons)

5. Item No. 02-06 (uniform corporate disclosure statement)

6. Item No. 02-07 (uniform transcript request form)

Judge Alito said that he had asked the Council of Appellate Lawyers of the American Bar Association ("Council") to share with this Committee any suggestions that it might have for improving the Appellate Rules. The Council responded by making almost two dozen suggestions in a letter dated September 17, 2002. Judge Alito expressed gratitude for the considerable time and effort that the Council had devoted to his request.

The first five of the Council's suggestions were that the Appendix to the Appellate Rules be amended to provide a uniform case information sheet, uniform notice of appearance, uniform certificate of interested persons, uniform corporate disclosure statement, and uniform transcript request form. The Committee discussed the proposals at some length. Most members opposed moving forward on these suggestions. As this Committee has often demonstrated, it is concerned about differences in the local rules of the circuits when such differences impose hardships upon attorneys who practice in more than one circuit. However, the Committee must also "pick its spots" in deciding when to use the Appellate Rules to impose uniform procedures on the circuits. The Committee would create a considerable amount of resentment if it were perceived as micro-managing the internal operations of the circuits.

Members said that, while there were differences among the forms that the circuits require litigants to file, those differences were minor, and the forms were readily available on line and from clerks' offices. Members did not think that the hardships imposed on litigants justified the Committee using the Appellate Rules to impose uniform forms on all circuits.

A member moved that Item Nos. 02-03 through 02-07 be removed from the Committee's study agenda. The motion was seconded. The motion carried (unanimously).

7. Item No. 02-08 (FRAP 10, 11 & 30 — transmitting records and filing appendices)

8. Item No. 02-09 (FRAP 11(e) — require courts to accept entire record)

The Council complained that there is substantial variation in the local rules of the circuits regarding filing the appendix and transmitting the record. The Council requested that the Appellate Rules be amended to more specifically address these issues and to "pre-empt" the conflicting local rules.

The Committee discussed the Council's suggestion at length. Some members agreed that action was needed on the issue of appendices. Indeed, a couple of members stated that with respect to no issue are local rules more inconsistent or do local rules impose more of a hardship. Members discussed the conflicting practices of various circuits on matters both large (when an argument is deemed waived because of the inadequacy of an appendix) and small (how an appendix must be paginated and tabbed).

Other members expressed skepticism about whether amendments to the Appellate Rules were warranted — or, even if warranted, would solve the problem. Members pointed out that Rule 30 is already quite specific in discussing appendices; how much more specificity was possible? One member responded that the main problem is Rule 30(f), which judges have interpreted as giving them a "local option" to replace Rule 30 with a detailed set of local rules. Members also worried that amending the Appellate Rules to more specifically dictate how appendices must be assembled would be perceived as micro-managing and create resentment among circuit judges. Other members responded that the Appellate Rules already impose specific rules for briefs, and it was no less important to impose similar rules for appendices.

Following further discussion, the Committee agreed by consensus that Item No. 02-08 would remain on the study agenda. Mr. Letter agreed that the Department of Justice would give the matter further study and make a recommendation to the Committee.

The Committee also agreed by consensus to remove Item No. 02-09 from its study agenda. No member of the Committee agreed with the Council's suggestion that Rule 11(e) be amended so as to force the circuit courts to accept the entire record from district courts in every case. Members pointed out that this was a matter of internal court operations that had little or no impact on litigants. Members also pointed out that we are rapidly moving toward the day when court records will be electronic and this issue will be moot.

9. Item No. 02-10 (FRAP 27 — briefs supporting or responding to motions)

10. Item No. 02-11 (FRAP 27 — filing proposed orders with motions)

The Council complained that, although Rule 27(a)(2)(C)(i) specifically provides that a separate brief supporting or opposing a motion "must not be filed," the Second Circuit requires separate briefs to be filed in connection with all motions, and the First and Tenth Circuits require separate briefs to be filed in connection with motions for summary disposition. The Council also complains that different circuits require different numbers of copies of motions to be filed. Rule 27(d)(3) requires that an original and 3 copies be filed "unless the court requires a different number by local rule," and several circuits have enacted local rules requiring a different number. Finally, the Council complains that, although Rule 27(a)(2)(C)(iii) states that filing a proposed order "is not required," the Federal Circuit requires such filing.

The Committee agreed by consensus to remove these items from its study agenda. Some members questioned whether the ABA's understanding of the Second Circuit's practice was correct, and one member pointed out that the Federal Circuit only requires proposed orders in one category of cases. More to the point, members said that, if the Appellate Rules clearly prohibit a local rule that requires parties to file something, and a circuit ignores that prohibition and requires the "something" to be filed, it is doubtful whether amending the Appellate Rules is the

best means available for addressing the problem. Members also expressed the view that circuits should have the flexibility to decide how many copies of a document they wish to receive.

11. Item No. 02-12 (FRAP 28 — clarify statement of case, statement of facts, etc.)

The Council stated that, in drafting briefs, practitioners are often confused about the difference between the "statement of the case" required by Rule 28(a)(6) and the "statement of facts" required by Rule 28(a)(7). The Council also argued that practitioners are confused about the difference between, on the one hand, the "statement of the case" and the "statement of facts," and, on the other hand, the "summary of the argument" and "argument."

Several members expressed disagreement with the Council about the latter matter. However, a couple of members agreed that there seems to be confusion about what is supposed to appear in the "statement of the case." Many litigants file briefs that contain *no* such statement, indicating that they are not even aware that it is required. Other litigants file a statement that is several pages long. Still other litigants file the type of short summary that seems to be envisioned by Rule 28(a)(6). Confusion does exist.

Some members expressed doubts about whether the Appellate Rules should be amended to address this confusion. They pointed out that Rule 28(a)(6) already instructs practitioners that the statement of the case should "briefly indicat[e] the nature of the case, the course of proceedings, and the disposition below." They also pointed out that, because the statement of the case counts toward the page limits applicable to briefs, it really does not matter if some litigants draft short statements and others draft long statements.

The practitioner members of the Committee said that, as far as they were concerned, this was not a problem for attorneys. They said that they would favor amending Rule 28(a)(6) only if the judge members thought that there was a serious problem with statements of the case. The judge members responded that they did not. By consensus, Item No. 02-12 was removed from the Committee's study agenda.

12. Item No. 02-13 (FRAP 32 — briefs filed in cross-appeals)

The Council complained that the Appellate Rules provide little guidance about briefing in cases involving cross-appeals. Members agreed with the Council, but pointed out that the Committee has been working on the problem. Because this concern already appears on the Committee's study agenda as Item No. 00-12, the Committee agreed by consensus to remove Item No. 02-13 from its study agenda.

13. Item No. 02-14 (FRAP 25(e) & 31(b) — number of copies of briefs)

Rule 31(b) requires that 25 copies of each brief be filed with the clerk, but permits the court to require the filing of a different number. The Council recommended that this local option be removed so that the same number of briefs can be filed in every case in every circuit.

Members of the Committee disagreed with the Council. These members said that the conflicting local rules do not place much of a burden on counsel and that circuit courts should be free to decide how many copies of briefs they want. By consensus, Item No. 02-14 was removed from the Committee's study agenda.

14. Item No. 02-15 (FRAP 32(a)(5) & 32(d) — typeface variations)

Rule 32(a)(5) requires that the typeface used in briefs must be at least 14 points (for proportionally spaced typeface) or 10-1/2 characters per inch (for monospaced typeface). The Council complained that, although all circuits will accept briefs that meet the requirements of Rule 32(a)(5) (as they must, under Rule 32(d)), some circuits will also accept briefs using typeface smaller than 14 points or closer together than 10-1/2 characters per inch.

Members said that this variation in circuit procedures did not create a hardship for counsel, as counsel could always be assured that, if their briefs met the requirements of Rule 32(a)(5), they would be accepted. By consensus, the Committee removed Item No. 02-15 from its study agenda.

15. Item No. 02-16 (FRAP 28 — contents of briefs)

16. Item No. 02-17 (FRAP 32 — content of covers of briefs)

Rule 28 lists those items that must be included in a brief. The Council complained that some circuits, by local rule, have added items to the list in Rule 28. Rule 32(a)(2) specifies the contents of the covers of briefs. The Council complained that some circuits have imposed additional requirements by local rule. The Council argued that these conflicting local rules create a hardship for attorneys who practice in more than one circuit.

A couple of Committee members agreed with the Council. On behalf of the Justice Department, Mr. Letter offered to look into these conflicting local rules and prepare a recommendation for the Committee. By consensus, the Committee agreed to retain Item Nos. 02-16 and 02-17 on its study agenda and await a recommendation from the Department.

17. Item No. 02-18 (FRAP 25 — CD-ROM briefs)

The Appellate Rules now *permit* the courts of appeals to accept briefs on CD-ROM; the Council urged that the rules be amended to *require* parties to file and courts to accept such briefs.

Members of the Committee opposed this proposal. Nothing prohibits a court that wants to receive CD-ROM briefs from requiring them. It is difficult to understand what would be accomplished by forcing courts to receive briefs that they do not want.

Moreover, the Standing Committee is insistent that the provisions of the rules of practice and procedure regarding electronic filing and service be as identical as possible, and that all five advisory committees work together on any changes to those provisions. Having only recently amended the rules to permit electronic filing and service — and having given assurances to courts and attorneys that they would not be *forced* to accept electronic filing or service against their will — the Standing Committee is highly unlikely to amend the rules of practice and procedure to force courts to accept CD-ROM briefs.

By consensus, the Committee removed Item No. 02-18 from its study agenda.

18. Item No. 02-19 (FRAP 12(a) — captioning)

Rule 12(a) requires appeals to be docketed "under the title of the district-court action." The Council suggested that there is some variation in the way that circuits docket cases. Members said that they were unaware of such variation and that they were not certain what, if anything, the Council was proposing that the Committee do. By consensus, the Committee removed Item No. 02-19 from its study agenda.

19. Item No. 02-20 (FRAP 25 — require acceptance of electronically filed papers)

The Council complained that some circuits do not permit any papers to be filed electronically and that, although some circuits permit papers to be filed by fax, no circuit permits papers to be filed by e-mail or on disk. The Council urged that the Appellate Rules be amended to *require* courts to accept electronically filed papers. By consensus, the Committee removed Item No. 02-20 from its study agenda, largely for the reasons that it removed Item No. 02-18.

20. Item No. 02-21 (final judgment rule)

21. Item No. 02-22 (collateral order exception)

22. Item No. 02-23 (interlocutory appeals)

The Council proposed that the Committee use its authority to amend the Appellate Rules to define when a ruling of a district court is final for purposes of 28 U.S.C. § 1291 (*see* 28 U.S.C. § 2072(c)) and to provide for appeals of interlocutory decisions that are not already authorized by 28 U.S.C. § 1292 (*see* 28 U.S.C. § 1292(e)). Specifically, the Council encouraged the Committee to attempt to accomplish a general codification and clarification of the final judgment

rule — or at least the collateral order exception to that rule — and a general codification and expansion of the rules governing interlocutory appeals.

Members noted that similar proposals have been rejected by the Committee in the recent past. This type of general codification would be almost impossible to accomplish and would likely create many more problems than it would solve. The Committee remains open to amending the rules to define a *specific* type of ruling as final or to provide for a *specific* type of interlocutory appeal. However, the Committee will not attempt any general codification of the final judgment rule, the collateral order exception, or the rules governing interlocutory appeals.

By consensus, the Committee removed Item Nos. 02-21, 02-22, and 02-23 from its study agenda.

VI. Additional Old Business and New Business

There was no additional old business or new business.

VII. Dates and Location of Spring 2003 Meeting

The Committee will meet next spring in Washington, D.C. Before a date is chosen, the Administrative Office will survey Committee members about their availability.

VIII. Adjournment

By consensus, the Committee adjourned at 3:45 p.m.

Respectfully submitted,

_____

Patrick J. Schiltz
Reporter

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

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CRIMINAL RULES

JERRY E. SMITH
EVIDENCE RULES

TO: **Anthony J. Scirica, Chair**
Committee on Rules of Practice and Procedure

FROM: **A. Thomas Small, Chair**
Advisory Committee on Bankruptcy Rules

DATE: **December 11, 2002**

RE: **Report of the Advisory Committee on Bankruptcy Rules**

I. INTRODUCTION

The Advisory Committee on Bankruptcy Rules met on October 10-11, 2002, in Hyannis, Massachusetts.

II. ACTION ITEMS

A. *Preliminary Draft of Proposed Amendments to Bankruptcy Rules 3004, 3005, and 4008*

The Advisory Committee recommends that the Standing Committee approve the proposed amendments to Bankruptcy Rules 3004, 3005 and 4008 for circulation to the bench, bar and public for comment.

1. Synopsis of Proposed Amendments:

A. Rule 3004 is amended to conform the rule to Bankruptcy Code § 501(c). Under that section, the debtor or trustee can file a proof of a creditor's claim if the creditor has failed to file a claim in a timely fashion. The existing version of the rule allows the debtor or trustee to file a claim on behalf of the creditor prior to the expiration of the claim filing period. It also provides an opportunity for the creditor thereafter to file a claim that supersedes the claim filed by the trustee or debtor. The rule is amended to prohibit the debtor and trustee from filing proof of a creditor's claim until the creditor's opportunity to file has expired. The amendment to the rule also deletes the language that authorizes a creditor to file a claim after the debtor or

trustee has filed a claim on the creditor's behalf. Under the amended rule, the creditor's time to file a proof of claim must have expired before the debtor or trustee acts. Therefore, there is no need to provide the creditor with a second opportunity to file a proof of claim and the amendment deletes the language in the existing rule that permits the filing of a superseding claim by the creditor.

B. Rule 3005(a) is amended to delete the language in the existing rule that permits the filing of a superseding claim by the creditor. Under Bankruptcy Code § 501(b), a codebtor may file a claim on behalf of a creditor only if the creditor has not timely filed a proof of claim. Since the codebtor cannot file a proof of the claim until after the creditor's time to file has expired, there is no need to provide the creditor with an additional opportunity to file a proof of the claim. The existing version of the rule also allows a codebtor to file a proof of claim in the name of the creditor. The amendment makes clear that the proof of claim filed by a codebtor is not filed on behalf of or in the name of the creditor.

C. Rule 4008 is amended to establish a deadline for the filing of a reaffirmation agreement with the bankruptcy court. The existing version of the rule includes notice and time requirements for discharge and reaffirmation hearings, but it does not set a deadline for filing the reaffirmation agreement. In a number of cases, parties have requested the courts to reopen cases to permit the filing of reaffirmation agreements. By requiring the filing of the agreement by a date certain and deleting the notice requirements, the rule addresses this problem and enables the courts to schedule the necessary hearings in the most efficient manner rather than at a time set out in the rule.

The text of the proposed amendments to Bankruptcy Rules 3002, 3005 and 4008 are attached.

III. INFORMATION ITEMS

A. *Publication of Proposed Amendments*

At its June 2002 meeting, the Standing Committee authorized the publication of a preliminary draft of a proposed amendment to Bankruptcy Rule 9014. The deadline for submitting written comments on the proposals is February 15, 2003. A public hearing is scheduled for January 24, 2003, in Washington, D.C. To date, no request for a personal appearance has been received. We have received two comments on the proposed amendment to Bankruptcy Rule 9014, and these and any other comments that are received will be considered by the Advisory Committee at its April 2003 meeting. The Advisory Committee expects to present this amendment to the Standing Committee for approval by the Standing Committee at its June 2003 meeting.

B. *Proposed Bankruptcy Legislation*

Both the House and Senate passed versions of bankruptcy reform legislation. After lengthy negotiations over a provision in the legislation that addressed the dischargeability of claims resulting from a violation of a court order or decree that prohibits restricting access to a facility providing lawful goods or services, the conference committee reported a version of the bill in August. Neither the House nor the Senate passed the conference report. It seems likely that Congress will consider bankruptcy reform legislation again in the 108th Congress.

Attachments: Proposed Amendments to Bankruptcy Rules 3004, 3005 and 4008
Draft of the Minutes of the Advisory Committee Meeting of October 10-11, 2002

ADVISORY COMMITTEE ON BANKRUPTCY RULES

Meeting of October 10-11, 2002
Hyannis, Massachusetts

Draft Minutes

The following members attended the meeting:

Bankruptcy Judge A. Thomas Small, Chairman
District Judge Robert W. Gettleman
District Judge Norman C. Roettger, Jr.
District Judge Ernest C. Torres
District Judge Thomas S. Zilly
District Judge Laura Taylor Swain
Bankruptcy Judge James D. Walker, Jr.
Bankruptcy Judge Christopher M. Klein
Bankruptcy Judge Mark McFeeley
Professor Mary Jo Wiggins
Professor Alan N. Resnick
Eric L. Frank, Esquire
Howard L. Adelman, Esquire
K. John Shaffer, Esquire
J. Christopher Kohn, Esquire

Professor Jeffrey W. Morris, Reporter, attended the meeting. Circuit Judge Anthony J. Scirica, chair of the Committee on Rules of Practice and Procedure (Standing Committee), Professor Daniel Coquillette, reporter of the Standing Committee, and District Judge Thomas W. Thrash, Jr., liaison to the Standing Committee, attended. Bankruptcy Judge A. Jay Cristol, a former member of the Committee, attended. Bankruptcy Judge Wesley W. Steen attended the first day of the meeting as a representative of the Committee on the Administration of the Bankruptcy System (Bankruptcy Committee).

The following additional persons attended all or part of the meeting: Lawrence A. Friedman, Director, Executive Office for United States Trustees (EOUST); Martha L. Davis, Principal Deputy Director, EOUST; James J. Waldron, Clerk, United States Bankruptcy Court for the District of New Jersey; John K. Rabiej, Chief, Rules Committee Support Office, Administrative Office of the United States Courts (Administrative Office); Patricia S. Ketchum and James H. Wannamaker, Bankruptcy Judges Division, Administrative Office; Robert Niemic, Research Division, Federal Judicial Center (FJC); and Ned Diver, law clerk to Judge Scirica.

The following summary of matters discussed at the meeting should be read in conjunction with the various memoranda and other written materials referred to, all of which are on file in the

office of the Secretary of the Standing Committee. Votes and other action taken by the Committee and assignments by the Chairman appear in **bold.**

Introductory Matters

The Chairman introduced Judge Swain, a new member of the Committee, and welcomed all the members, liaisons, advisers, and guests to the meeting. The other new member of the Committee, District Judge Irene M. Keeley, was unable to attend. The Chairman presented a certificate of appreciation to Judge Cristol in recognition of his service as a member of the Committee and as chair of the Technology Subcommittee.

The Committee approved the minutes of the March 2002 meeting.

The Chairman briefed the Committee on June 2002 meeting of the Standing Committee. The Standing Committee approved the six amended rules, one new rule, and 12 amended Bankruptcy Official Forms the Committee had forwarded for adoption and sent them to the Judicial Conference. In addition, the Standing Committee approved the Committee's recommendation to publish a proposed amendment to Rule 9014 for public comment.

Judge Steen reported on the June 2002 meeting of the Bankruptcy Committee. Of the matters currently before that committee, the one most likely to have a major impact on the rules, he said, is the question of venue. The Venue Subcommittee of the Bankruptcy Committee is considering the venue of large corporate bankruptcy cases and has asked the FJC to study what factors affect the debtor's choice of venue and what factors appear to affect the progress of large chapter 11 cases. The Bankruptcy Committee additionally has recommended that bankruptcy judges be allowed to raise the question of venue and to transfer a bankruptcy case sua sponte. At its meeting in September 2002, the Judicial Conference agreed to seek the amendment of the bankruptcy venue statute, 28 U.S.C. § 1412. Judge Steen said the Bankruptcy Committee deferred the issue of whether to request a rules amendment concerning changing venue. Judge Steen stated that Bankruptcy Committee has received comments from other interested committees on the June 2002 report of its Subcommittee on Mass Torts. The report is being revised for presentation at the January 2003 meeting of Bankruptcy Committee.

Action Items

Proposed Amendment to Rule 1009. The proposed amendment was suggested as a means to reinforce the need to serve creditors with notice of the debtor's amended claim of exemptions and to reduce the number of disputes over the timeliness of exemptions claimed by way of amended schedules. Professor Morris noted that the practice in many areas is to serve an amended claim of exemptions only on the trustee, despite the requirement in Rule 1009 that the amendment be served on the trustee and "any entity affected thereby." Pursuant to Rule 4003(b),

a party in interest may file an objection to the list of exemptions within 30 days after the conclusion of the meeting of creditors or within 30 days after any amendment to the list. In the event that the debtor fails to notify all affected parties, the courts generally have held that the time for filing objections does not begin to run. Some courts have held, however, that actual notice of the amendment will trigger commencement of the objection period.

Several members questioned whether it would be more appropriate to amend Rule 4003 to require that an objection be filed within 30 days from when the amendment to the claim of exemptions is filed and served on the trustee and affected creditors. Because the proposed amendment to Rule 1009 applies only to notice of an amended claim of exemptions, one member asked whether there are other circumstances in which all creditors are affected by an amendment to the voluntary petition, list, schedule, or statement. While there may be instances in which other amendments may have an impact on all creditors, the frequency of exemption amendments and their wide ranging impact justify the separate treatment of these amendments. Professor Morris suggested that the Committee Note could be amended to state specifically that the presence of a rule regulating exemption amendments should not be read as suggesting that debtors need not serve copies of amendments to other schedules or statements on affected parties. One member stated that giving notice to all creditors of every amendment is unduly burdensome and that the rule should specify when all creditors should be noticed of any amendment, not just amended claims of exemptions. Mr. Friedman said the debtor's right to amend the petition, schedules, and statements up to the end of the case is a broader problem that presents difficulties for trustees. He said the EOUST would prefer the Committee to consider the whole problem and would present recommendations toward that objective. **The consensus was to do nothing at this time.**

Proposed amendment to Rule 4008. The Bankruptcy Judges Advisory Group had requested that the Committee consider amending Rule 4008 to establish a deadline for filing a reaffirmation agreement. Section 542(c) of the Bankruptcy Code requires that a reaffirmation agreement be in writing, be made before the entry of the debtor's discharge, be approved by the debtor's attorney, and be filed with the court. If the debtor is not represented by counsel, the court must make a finding that the agreement is in the debtor's best interest and does not impose an undue hardship on the debtor. Neither the statute nor the rules set a deadline for filing a reaffirmation agreement with the court. Thus, a reaffirmation agreement could be made before the discharge, but not filed with the court for some time. It appears that late filing of reaffirmation agreements is creating problems for some courts, which must reopen closed cases to permit the filing of these agreements. In addition, setting a deadline in Rule 4008 for filing a reaffirmation agreement would permit the courts to schedule a hearing on any agreement in a pro se case in an orderly fashion.

Professor Resnick stated that the court should have broad discretion to extend the time to file a reaffirmation agreement because a pro se debtor might not know about the filing deadline. He suggested that the Committee Note to the proposed amendment state that a request for extension of the time could be filed before or after the 10-day period. Judge Steen suggested that the deadline be set at 30 days after the discharge in order to minimize the number of requests for

extensions of time. Judge Walker said cases generally are closed shortly after discharge and, therefore, perhaps, the agreements should be filed before discharge. Judge Klein stated that the Court of Appeals for the Ninth Circuit has held, In re Staffer, 306 F.3d 967 (9th Cir. 2002), that closing a bankruptcy case is not jurisdictional and that the bankruptcy court can still entertain a dischargeability action. He added that a case doesn't have to be reopened to file a paper. After discussion, the Committee decided to delete the language of the existing rule that sets deadlines for notices of a discharge and reaffirmation hearing, and to substitute a rule that simply establishes a deadline for filing a reaffirmation agreement with the court. The filing of a reaffirmation agreement will enable the court to determine whether a discharge hearing is necessary, and the court can then schedule the hearing in the most efficient manner. The Committee concluded that getting reaffirmation agreements filed is the most important objective, and leaving discretion to the courts to notice and schedule the hearings permits the courts to set their own calendars in the most efficient manner.

At its March 2002 meeting, the Committee discussed the possibility of a survey of the bankruptcy courts regarding the extent of any problems with the late filing of reaffirmation agreements. Mr. Niemic asked whether the Committee still was interested in a such survey. Chairman Small stated that, if there is a problem, the courts will tell the Committee about it during the comment period on the proposed amendments. Professor Resnick moved to revise the proposed amendment to allow a reaffirmation agreement to be filed not later than 30 days after entry of the discharge, to specify that the court may extend the deadline for cause, to state in the Committee Note that the court has broad discretion to extend the time, and to approve the amendments and the Committee Note, as revised, for publication. The proposed amendment would no longer require the court to hold the hearing within a stated time. **The motion carried without objection.**

Proposed Amendments to Rules 2002 and 3017. Mr. Shaffer had suggested that Rules 2002 and 3017 be amended to establish a shorter notice period for the time to file objections to a disclosure statement than for the time for the hearing to consider approval of the statement. The changes were intended to prevent unnecessary delays at the hearing due to objections that are filed at the hearing. Mr. Shaffer stated that, after reading the Reporter's memorandum on the proposal, he is not sure that the amendments are needed. **The consensus was to take no action.**

Proposed Amendment to Rule 8001. Mr. Richard Friedman, an attorney in the Office of the United States Trustee in Chicago, had suggested that Rule 8001 be amended to address the problem of unperfected appeals. Mr. Friedman noted that in many instances he has faced the situation in which the appellant failed to designate the record under Rule 8006, requiring that he file a motion to dismiss in the district court, wasting time for both the appellee and the appellate court. He suggested that Rule 8001 be amended to allow the bankruptcy court to dismiss the appeal if it has not been docketed in the appellate court and the appellant has failed to take whatever action is necessary to enable the clerk to assemble and transmit the record as provided under Rule 8006.

Professor Morris stated that there is a jurisdictional difficulty with the proposed amendment because, once the notice of appeal is filed, jurisdiction over the appeal is with the appellate court. The Committee members discussed how the situation is handled in different courts. In some courts, the bankruptcy clerk notifies the clerk of the appellate court that the record has not been completed. In others, the bankruptcy clerk transmits the incomplete record or a local rule authorizes the bankruptcy court to dismiss the unperfected appeal. The Committee discussed various approaches, including a model local rule on unperfected appeals, guidance for the clerks and chief judges, a rules amendment providing for the transmission of the incomplete record if the appeal is not perfected in a timely fashion, an amendment providing for the bankruptcy clerk to transmit notice of the filing of the notice of appeal to the appellate court as is provided in Appellate Rule 3(d), and a review of Part VIII rules generally. **The Committee agreed with Chairman Small's suggestion that the matter be referred to the Subcommittee on Appeals.**

Proposed Amendment to Rule 3004. Mr. Frank and Judge Walker each had noted problems with Rule 3004. The rule provides that the trustee or debtor may file a proof of claim on behalf of a creditor if the creditor does not file a proof of claim on or before the first date set for the meeting of creditors. Although the deadline in Rule 3004 for filing such a claim is 30 days after expiration of the time for filing claims pursuant to Rules 3002(c) or 3003(c), the rule provides for a creditor to file a superseding claim "pursuant to Rule 3002 or Rule 3003(c)." Thus, the Reporter stated, the creditor has an earlier deadline for filing a superseding claim than the debtor or trustee has for filing the original claim on behalf of the creditor. The Reporter stated that, by allowing the debtor or trustee to file a proof of claim on behalf of a creditor before the creditor's deadline for filing, Rule 3004 gives the debtor and trustee more power than the statute does. 11 U.S.C. § 501(c) requires that they wait until the creditor's claim would be untimely. Furthermore, the 1983 Committee Note to Rule 3002 and and the 1987 Committee Note to Rule 3004 are inaccurate as a result of subsequent changes in the Bankruptcy Code and Rules. The Reporter stated that there is no mechanism for amending or revising a Committee Note in the absence of an amendment to the rule in question.

Several committee members discussed the extent of a creditor's right to amend a proof of claim filed by the debtor or trustee, as delineated by the Court of Appeals for the Fifth Circuit, In re Kolstad, 928 F.2d 171 (5th Cir. 1991), *cert. denied,* 502 U.S. 491 (1991), and contrasted the right to amend with filing a superseding claim or objecting to the claim filed by the debtor or the trustee. The Reporter offered an amendment to Rule 3004 which would permit the debtor or trustee to file a proof of claim for the creditor within 30 days after the expiration of the time for filing pursuant to Rule 3002(c) or 3003(c), whichever is applicable, and would delete the provision for the creditor to file a superseding claim. The proposed Committee Note stated that the rule leaves to the courts the issue of whether to permit subsequent amendment of such claims filed by the debtor or trustee. Judge Steen suggested that the amended rule state that the clerk shall give notice of the claim, rather than mailing notice. Judge Klein said that the Committee Note should state why the provision for superseding claims was deleted. **The Committee**

approved the revised amendment to Rule 3004 and Committee Note, including Judge Steen's and Judge Klein's suggestions, by a 9-1 vote.

Proposed Amendment to Rule 3005. The Reporter offered an amendment deleting the last sentence of Rule 3005 and making stylistic changes so that the rule would be consistent with section 501(b) of the Code and the proposed amendment to Rule 3002. Professor Resnick suggested adding "in a timely manner" to the first line of the amended rule, deleting the phrase "filed by the codebtor" from the last sentence of the first paragraph of the Committee Note, and ending the second paragraph of the Committee Note after the phrase "in the name of the creditor." **The Committee accepted the suggestions and approved the revised amendment to Rule 3005 without objection.**

Amendment to Rule 9031. Chief Bankruptcy Judge David S. Kennedy had written to the Committee inquiring about the possibility of amending Rule 9031 to permit a bankruptcy court to appoint a special master to assist the court in appropriate circumstances. Judge Kennedy enclosed two law review articles which assert generally that since bankruptcy courts adjudicate matters as complex as the matters heard in the district courts, the bankruptcy courts should be able to call upon the expertise of a special master to the same extent as the district courts under Civil Rule 53. The Reporter stated that the complexity of bankruptcy mega cases provides a reason for changing the rule to authorize the use of special masters but that the expanded use of examiners in chapter 11 cases, the absence of a statutory provision for compensating special masters in bankruptcy cases, and the possibility of unintended consequences resulting from a change all are reasons not to change the rule.

Professor Resnick provided some historical background for the changes made to the bankruptcy statute in 1978 which placed the power to appoint trustees and professionals in hands other than those of the judge. He said that it is important to retain that authority in a disinterested official such as the U.S. trustee or bankruptcy administrator rather than the judge. Professor Resnick also provided additional background on the Committee's prior consideration of a proposal to amend Rule 9031 to permit the appointment of special masters. The Committee expressed concerns about the adjudicatory role of a special master who may make findings of fact and conclusions of law, the constitutionality of a special master's appointment by a non-article III judge, and the standard of review of a special master's findings of fact and conclusions of law by the bankruptcy judge and on appeal.

The Committee discussed the use of court appointed experts pursuant to Evidence Rule 706 or the reference of matters to binding arbitration instead of using special masters. A member stated that parties in a case could consume hours of court time arguing about a motion to appoint a special master. Several members questioned the propriety of imposing the cost of a special master on the bankruptcy estate and whether authority would exist to do so. **The Committee determined to take no action at this time.**

Electronic Issuance of Summons. As more courts convert to the Case Management/Electronic Case Files (CM/ECF) system, there is increasing interest in the possibility of issuing a summons electronically. The chief deputy clerk of the Bankruptcy Court for the Western District of Pennsylvania wrote to the Committee requesting a rules amendment to permit electronic issuance. Mrs. Ketchum stated that the change would save time for the clerk's office and save attorneys a trip to the courthouse. She stated that attorneys complete a blank summons that has been signed and sealed by the clerk.

Mrs. Ketchum noted the difference between issuing summons electronically and serving the summons and complaint electronically. Civil Rule 5 authorizes the service of certain pleadings and cases papers by electronic means if consented to by the person served, but Civil Rule 4, which governs the service of the summons, does not have a provision for electronic service. **The consensus was to study the matter further. Chairman Small referred it to the Subcommittee on Technology and to the Civil Rules Committee.**

Listing Parties to Executory Contracts and Unexpired leases as Creditors. A debtor must list all of its executory contracts and unexpired leases on Schedule G, along with the name and address of the other parties to the contracts and leases. There is a cautionary reminder for the person completing the form that listing a person on Schedule G will not result in that person receiving notice of the bankruptcy case unless the person is also listed on the appropriate schedule of creditors. The difficulty is that many unexpired leases are not in default at the time of the bankruptcy filing and debtors are reluctant to list landlords on the matrix. In addition, if the debtor is a software licensor, it may have thousands of software users who arguably may be parties to an executory contract. Similarly, a manufacturer may have warranty obligations with thousands of customers.

Mr. Frank stated that the presumption should be to give these parties notice. If there are too many of them, the debtor can file a motion to limit notice. Professor Resnick stated that the other parties to executory contracts are creditors and that the current form gives the debtor the erroneous impression that giving them notice is discretionary. Judge Walker stated that requiring a list of creditors, including parties on Schedule G, would imply that the parties to executory contracts are creditors. Professor Resnick stated that requiring a list of creditors and parties to executory contracts would imply that the parties are not creditors. Mr. Frank suggested deleting the note on Schedule G and revising Rule 1007(a)(1) to require that the debtor file a list of creditors and parties listed on Schedule G. **Chairman Small directed the Reporter to draft proposed amendments to Rule 1007 and the Official Form and submit them at the next meeting.**

Exclusion of Certain Kinds of Adversary Proceedings from Mandatory Disclosure under Civil Rule 26. Civil Rule 26, made applicable to adversary proceedings by Rule 7026, requires a series of actions by parties including the disclosure of a variety of information and participation in a discovery conference. The Committee has proposed an amendment to Rule 9014 to exempt contested matters from the mandatory disclosure requirement because many, if not most,

contested matters conclude before the mandatory disclosure periods. The question has been raised whether some categories of adversary proceedings likewise should be exempted.

The Reporter stated that his informal survey of attorneys around the country showed that the mandatory disclosure requirements are more honored in the breach than followed. Judge Klein stated that it would be difficult to get adversary proceedings to trial as quickly as is done now if the court followed the time for mandatory disclosure set out in the rule. The judge stated that he issues an order in every adversary proceeding shortening time and exempting the parties from certain disclosure.

Professor Coquillette stated that it would be difficult to get an exemption approved by the Standing Committee without a very good empirical study of whether the mandatory disclosure is needed. Mr. Niemic said the nature of suit categories used in the Administrative Office's closing statistics on adversary proceedings are not specific enough to serve as the basis for such a Rule 26 study. As a result, he said, it probably would be necessary to use the PACER system to review the dockets of a sample of adversary proceedings. Judge Swain suggested a less formal inquiry, such as a questionnaire asking the courts whether there is a problem and, if so, what are the workarounds. **Chairman Small asked Mr. Niemic to make a preliminary inquiry about such a study and to report back at the spring meeting.** Judge Klein said he had received limited responses from the judges to his inquiries about possible exclusions. **The Chairman asked him to continue his work on a list of possible exclusions and to report back at the spring meeting.**

Information Items

Use of False Social Security Numbers. The Director of the EOUST presented a memorandum on recent cases in which the United States trustees have been involved where debtors have used false social security numbers or sought to conceal their true identities. He stated that these cases underscore he need for U.S. trustees, case trustees, and law enforcement personnel to have access to debtors' full social security numbers.

Rule 2002(g). The Administrative Office's Bankruptcy Noticing Working Group has requested that the Committee consider amending Rule 2002(g) so that a creditor receiving notices electronically could change its address centrally, rather than having to do so through each court individually. The request was discussed at the Tucson meeting and was referred by the Chairman to the Technology Subcommittee for further study. The Committee has received additional information from the Noticing Working Group. In addition, there is a provision in the pending bankruptcy legislation that would permit a creditor to specify and change its address centrally. **The Subcommittee on Technology is to report at the spring meeting if there is no legislative action.**

Transfer of Claims. Mrs. Ketchum stated that an industry has arisen that purchases claims against debtors and thereafter files a notice of the transfer of those claims in the debtors'

bankruptcy cases. Generally, if a creditor transfers a claim other than for security after filing a proof of claim, Rule 3001(e)(2) requires that the transferee file evidence of the transfer and that the clerk give the alleged transferor notice of the filing and of the time for objecting to the transfer. Mrs. Ketchum stated that some clerks follow the notice requirements despite the large number of transfers filed by claims consolidators. Other clerks accept waivers of notice signed by the transferors and filed by the transferees.

Professor Resnick stated that the notice requirement was intended to protect against bogus transfers. He stated that he does not know whether bogus transfers are a problem but that he is concerned about doing away with the notice to the transferor. Judge McFeeley stated that, if a transfer is bogus, the representation that the transferor waived notice also could be bogus. Mr. Waldron stated that processing transfers of claims and issuing the notices is a tremendous amount of work for the clerks and a considerable cost for the Judiciary. He stated that the courts are experimenting with filing transfers of claims electronically and giving electronic notice of the filing, especially to institutional creditors. **Chairman Small appointed Judge McFeeley as liaison to the Claims Subcommittee of the Bankruptcy CM/ECF Working Group. Judge McFeeley is to report on the Claims Subcommittee's work at the spring meeting.**

Confirmation of Receipt for Electronic Notices. The Administrative Office's Bankruptcy Noticing Working Group had requested previously that Rule 9036 be amended to eliminate the requirement that the sender of an electronic notice receive an electronic confirmation that the transmission has been received. Mrs. Ketchum stated that the Bankruptcy Noticing Center (BNC) is trying to expand the use of Electronic Bankruptcy Noticing (EBN) over the Internet, which would reduce the Judiciary's printing and postage costs, but that many Internet service providers do not offer the affirmative receipts required by Rule 9036. EBN also speeds the delivery of notices to the parties and facilitates the use of automated processing by recipients.

Mrs. Ketchum stated that the BNC has tested the reliability of negative receipts which are generated when the transmission fails. The negative receipts proved unreliable at times with email containing large file attachments. She stated that the BNC also has tested text email linked to an electronic copy of the of the notice, which appeared to be reliable. In addition, the BNC is considering setting up its own Internet service provider which would offer affirmative receipts. The Chair stated that it may make sense to delete the requirement for an affirmative receipt or to allow creditors to waive the receipt.

Bankruptcy Abuse Prevention and Consumer Protection Act (Bankruptcy Reform Act). The Committee discussed the possibility of the enactment of the pending Bankruptcy Reform Act, which would require amendments to the rules and forms, as well as new forms. Chairman Small stated that, if the legislation is enacted by December 1, 2002, subcommittee meetings or focus group meetings could be held in Washington in December. A public hearing on the proposed amendment to Rule 9014 has been tentatively scheduled for Washington on January 24, 2003. The Chairman stated that the Committee also could use that day to meet or to hold a focus group hearing in Washington and that another opportunity for meeting would arise in conjunction with the FJC workshop for bankruptcy judges scheduled for March 10-12, 2003, in San Francisco.

Administrative Matters

The Chair announced the appointment of Judge Walker as liaison to the Advisory Committee on Civil Rules and the appointment of Judge Klein as liaison the Advisory Committee on Evidence Rules.

The Committee's next scheduled meeting will be at Longboat Key, FL, on April 3-4, 2003. The Committee discussed several West Coast locations as possible sites of the fall 2003 meeting. The Committee agreed on September 18-19 or September 11-12, 2003, as acceptable dates, with the choice to be made based on when the better hotel rates can be obtained.

Respectfully submitted,

James H. Wannamaker, III

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

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TO: **Honorable Anthony J. Scirica, Chair, Standing Committee on Rules of Practice and Procedure**

FROM: **David F. Levi, Chair, Advisory Committee on the Federal Rules of Civil Procedure**

DATE: **December 3, 2002**

Re: **Report of the Civil Rules Advisory Committee**

Introduction

The Civil Rules Advisory Committee met on October 3 and 4 in Santa Fe, New Mexico.

Part I of this report describes the recommendation to publish for comment proposed amendments of Admiralty Rules B and C.

Part II of this report is an informational summary of matters described more fully in the attached draft Minutes for the October meeting.

I ACTION ITEMS: ADMIRALTY RULES B AND C FOR PUBLICATION

The Advisory Committee recommends publication in August 2003 of amendments to Admiralty Rules B(1) and C(6)(b)(i)(A) and the accompanying Committee Notes, which are attached to the report.

Rule B(1)(a)

The change to Admiralty B(1) was first proposed by a member of the Standing Committee during discussion of the Admiralty Rules changes that took effect on December 1, 2000, and has been endorsed by the Maritime Law Association.

Rule B(1) provides for attachment in a maritime in personam action. It applies when "a defendant is not found within the district." The "found" concept is old-fashioned; a defendant who is not physically present in the district and who has no agent there for the service of process is not "found" there, even though subject to personal jurisdiction on some other basis. Rule B(1) thus serves two purposes: it establishes a form of quasi-in-rem jurisdiction to substitute for personal jurisdiction, but it also provides a pre-judgment security device in some cases in which the court has

personal jurisdiction. The ploy attempted in the *Heidmar* case cited in the Committee Note reflects the use of Rule B(1) as a security device. The complaint was filed at 3:45 p.m. with a motion to arrest a vessel; at 4:00 the owner faxed notification that it had appointed an agent for service of process. After straightening out various confusions, the case came to be treated as presenting the question whether the application of Rule B(1) is determined at the time the complaint is filed or instead at the time the attachment issues. The court ruled that the time of filing controls. It relied in part on inference from the requirements that the complaint be accompanied by an affidavit that the defendant cannot be found, and that the court review these materials before ordering attachment — "not found" relates to the time of filing, not the time of attachment. More importantly, it relied on the theory that Rule B(1) serves the purpose of "assuring satisfaction in case the plaintiff's suit is successful," pointing out that an attachment, once issued, is not vacated when the defendant appears. The court also thought it unfair and inefficient to allow a defendant to defeat attachment by waiting to appoint an agent for service until a complaint had been filed.

Amendment is recommended to give direct notice to lawyers and courts, protecting against the need to identify the question and search for an answer in circumstances that often require prompt action. Maritime actions frequently involve defendants from other countries. Attachment is useful not only to establish quasi-in-rem jurisdiction when personal jurisdiction cannot be established, but also to meet the special needs for security that distinguish maritime practice from land-based practice. Enforcement of a personal judgment may be more difficult, more often.

C(6)(b)(i)(A)

The Committee Note tells the story. The problem with Rule C(6)(b)(i)(A) arises from the December 2000 amendments that divided Rule C(6) into separate provisions for forfeiture proceedings — subdivision (a) — and for maritime proceedings — subdivision (b). For forfeiture proceedings, C(6)(a)(1)(A) allows a statement of interest to be filed "within 20 days after the earlier of receiving actual notice of execution of process, or (2) completed publication of notice under Rule C(4)." That provision works. For maritime proceedings, the earlier rule had required that a claim be filed within 10 days after process has been executed, or within such additional time as may be allowed by the court. The admiralty bar was concerned that the 10-day period be retained, and also that it begin to run with execution of process — it was well established that the time runs from execution of process whether or not the claimant has actual notice. So the "actual notice" provision, newly added for forfeiture proceedings, was not added for maritime proceedings. At the same time, unthinking parallelism with the forfeiture proceeding retained the structure setting the date "within 10 days after the earlier of (1) the execution of process, or (2) completed publication of notice under Rule C(4) * * *." The problem is that Rule C(4) requires publication of notice only if the property that is the subject of the action is not released within 10 days after execution of process. It makes no sense to refer to completed publication of notice as if it could occur before process is executed — publication begins, at the earliest, 10 days after process is executed.

The "dead letter" character of the provision to be deleted might justify deletion as a technical amendment adopted without publication and comment. If the Rule B(1) amendment is to be published, however, there is little added cost in publishing the Rule C(6) amendment as well. The admiralty bar is small and specialized, and the benefits of the amendment will be realized in large part by publication, and indeed are likely to be substantially realized by authorization in January to publish in August. Judges and lawyers will be spared the chore of working through to the conclusion that indeed the provision for filing after publication of notice has no meaning. Although the Standing Committee may wish to consider the issue further, the circumstances suggest that the easier path is to publish.

II INFORMATION ITEMS

These information items summarize matters presented more fully in the draft Minutes.

Rules Transmitted to the Supreme Court

The Judicial Conference has recommended to the Supreme Court adoption of the amendments of Civil Rules 23, 51, and 53 that the Standing Committee recommended for adoption at the June 2002 meeting.

Bankruptcy - Mass Torts Study

Representatives of the Advisory Committee have worked with the Bankruptcy Administration Committee in considering proposals by the National Bankruptcy Review Commission to address future mass tort claims in bankruptcy. The proposals are ambitious and raise questions that are at once challenging and fundamental. A cautious approach is likely to be taken by the Bankruptcy Administration Committee.

Style Project

The project to restyle the Civil Rules is being launched. The first day of the October Advisory Committee meeting was devoted to the general questions that have been identified in the earlier projects to restyle the Appellate Rules and the Criminal Rules. The Advisory Committee received cogent advice based on the earlier projects from Judge James Parker, Professor David Schlueter, Professor R. Joseph Kimble, and John K. Rabiej.

The Advisory Committee will divide itself into two subcommittees to consider successive "packages" of rules. Professors Richard L. Marcus and Thomas D. Rowe, Jr., have agreed to serve as consultants, each working primarily with one of the subcommittees. It is anticipated that Rules 1 to 37 and 45 will be published as one package, with Rules 38 to 85 published two years later. Transmission to the Supreme Court, however, will be in one single package of all the Civil Rules. The Forms and Admiralty Rules will be approached later.

The tentative timetable for the project is ambitious but feasible. If met, the restyled rules will take effect on December 1, 2009. The first subcommittee meetings, considering Rules 1 through 7.1 and 8 through 15, are set for this month. It is hoped that ordinarily the two subcommittees can meet on successive days in the same location; at times, a meeting of the full Advisory Committee will be inserted between the first and second subcommittee meetings.

Pending Projects

Several rules changes remain on the Advisory Committee agenda for consideration in parallel with the style project. Others will inevitably arise, at times as offshoots of the style project. The following subjects are among the matters being considered:

"Rule 5.1" — Notice to Attorney General of Constitutional Challenges: Civil Rule 24(c) implements 28 U.S.C. § 2403, which requires notice to the Attorney General when a constitutional challenge is made to a federal statute. There is a parallel provision for challenges to state statutes. Appellate Rule 44 implements the statute in a rather different way. The Department of Justice believes that still further changes are appropriate, at least in the Civil Rules. The Attorney General does not always get notice. One thought is that Rule 24 does not alert litigants or courts to the notice requirement because Rule 24 is likely to be read only by parties who are thinking of intervention, not by parties unaware of the government's interest in intervening.

Rule 6(e): The Appellate Rules Committee has pointed out an ambiguity in the provision of Rule 6(e) that adds 3 days to the period otherwise prescribed for responding to a paper when service is made by deposit with the court clerk, mail, electronic means, or other means consented to by the person served. The most important goal is to achieve inescapable clarity.

Rule 15(c)(3): The Third Circuit, in *Singletary v. Pennsylvania Department of Corrections*, 2001, 266 F.3d 186, has suggested that Rule 15(c)(3) be amended to allow relation back of an amendment changing the naming of a defendant when the plaintiff knew at the time of the original pleading that the plaintiff did not know the proper defendant's name. This proposal implicates many related questions presented by Rule 15(c)(3). It may not be possible to identify a "simple" change, nor to justify a complex set of changes. These issues remain under close study.

Class Actions: The pending proposals to amend Rule 23 have not completed the work of the Rule 23 Subcommittee. The Subcommittee continues to study questions surrounding class-action settlements. The Federal Judicial Center is completing a study of settlement experience after the *Amchem* and *Ortiz* decisions, looking both to the difficulty of reaching approvable settlements and to the possibility that federal court practices may be encouraging some plaintiffs to file in state courts. It may yet prove desirable to consider adoption of specific provisions for certification of a settlement class. The Subcommittee has concluded, on the other hand, that it should suspend further consideration of rules-based approaches to the problems that arise from overlapping, duplicating, and competing class actions.

Discovery: The Discovery Subcommittee continues to monitor developing practices in the discovery of computer-based information. The Federal Judicial Center has performed a study for the Advisory Committee, and continues intensive work in this area. A number of problems have been identified, but it remains unclear whether it is desirable — or even feasible — to adopt effective rules changes. In addition to this continuing project, the Subcommittee is considering a number of more specific questions. Among them are the practice of taking "de bene esse" depositions for use as trial evidence as a means to avoid the difficulties of assembling all witnesses at the place and time of trial; forfeiture of hard-core work-product protection for materials shown to an expert trial witness; and notice to a deponent that a deposition is to be recorded by video.

"Rule 62.1": "Indicative Rulings": The Appellate Rules Committee has referred to the Civil Rules Committee a proposal by the Solicitor General to adopt express provisions to address action by a district court on a motion for relief from a judgment that is pending on appeal.

Rule 68: A new proposal to amend the offer-of-judgment provisions of Rule 68 has been made by the New York State Bar Association Committee on Federal Procedure of the Commercial and Federal Litigation Section. The proposal would allow plaintiffs to make offers; allow Rule 68 benefits to a defendant when a plaintiff loses completely; make clear provisions for entry of final judgment as to part of a multiparty or multiclaim case; and put "teeth" into the rule by recognizing discretion to add expenses other than attorney fees to the available sanctions. The Advisory Committee studied a proposal to amend Rule 68 several years ago, and surrendered the effort in 1995. The new proposal remains on the agenda.

Sealed Settlements: The Advisory Committee has undertaken to consider whether express Civil Rules provisions should be adopted to address the practice of filing settlement agreements under seal. The scope of the project has yet to be defined — it is not clear whether it is sensible to address only sealed settlements, or whether those issues cannot be severed from related issues that arise from other limits on access to court proceedings or records.

Civil Forfeiture Proceedings: The Department of Justice believes that civil forfeiture proceedings should continue to fall within the Admiralty Rules — many statutes specify that forfeiture proceedings are governed by the rules for in rem admiralty proceedings. At the same time, it believes that the forfeiture provisions should be gathered together in a new and separate Rule G. A new rule could address questions that have arisen in practice and are not now addressed in any of the rules. Much work has been done to refine a draft Rule G, and informal comments have been received from the defense bar. The work continues.

PROPOSED AMENDMENTS TO THE SUPPLEMENTAL RULES FOR CERTAIN ADMIRALTY AND MARITIME CLAIMS*

Rule B. In Personam Actions: Attachment and Garnishment

(1) When Available; Complaint, Affidavit, Judicial Authorization, and Process. In an in personam action:

(a) If a defendant is not found within the district when a verified complaint praying for attachment and the affidavit required by Rule B(1)(b) are filed, a verified complaint may contain a prayer for process to attach the defendant's tangible or intangible personal property — up to the amount sued for — in the hands of garnishees named in the process.

* * * * *

*New material is underlined; mater to be omitted is lined through.

Committee Note

Rule B(1) is amended to incorporate the decisions in *Heidmar, Inc. v. Anomina Ravennate di Armamento Sp.A.*, 132 F.3d 264, 267-268 (5th Cir. 1998), and *Navieros Inter-Americanos, S.A. v. M/V Vasilia Express*, 120 F.3d 304, 314-315 (1st Cir. 1997). The time for determining whether a defendant is "found" in the district is set at the time of filing the verified complaint that prays for attachment and the affidavit required by Rule B(1)(b). As provided by Rule B(1)(b), the affidavit must be filed with the complaint. A defendant cannot defeat the security purpose of attachment by appointing an agent for service of process after the complaint and affidavit are filed. The complaint praying for attachment need not be the initial complaint. So long as the defendant is not found in the district, the prayer for attachment may be made in an amended complaint; the affidavit that the defendant cannot be found must be filed with the amended complaint.

Rule C. In Rem Actions: Special Provisions

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(6) Responsive Pleading; Interrogatories.

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(b) Maritime Arrests and Other Proceedings. In an in rem action not governed by Rule C(6)(a):

(i) A person who asserts a right of possession or any ownership interest in the property that is the subject of the action must file a verified statement of right or interest:

(A) within 10 days after ~~the earlier of (1)~~ the execution of process, ~~or (2) completed publication of notice under Rule C(4),~~ or

(B) within the time that the court allows.

* * * * *

Committee Note

Rule C(6)(b)(i)(A) is amended to delete the reference to a time 10 days after completed publication of notice under Rule C(4). This change corrects an oversight in the amendments made in 2000. Rule C(4) requires publication of notice only if the property that is the subject of the action is not released within 10

days after execution of process. Execution of process will always be earlier than publication.

7B

DRAFT MINUTES

CIVIL RULES ADVISORY COMMITTEE

OCTOBER 3-4, 2002

The Civil Rules Advisory Committee met on October 3 and 4, 2002, at La Posada de Santa Fe in Santa Fe, New Mexico. The meeting was attended by Judge David F. Levi, Chair; Sheila Birnbaum, Esq.; Justice Nathan L. Hecht; Robert C. Heim, Esq.; Professor John C. Jeffries, Jr.; Mark O. Kasanin, Esq.; Judge Paul J. Kelly, Jr.; Judge Richard H. Kyle; Professor Myles V. Lynk; Hon. Robert D. McCallum, Jr.; Judge H. Brent McKnight; Judge Lee H. Rosenthal; Judge Thomas B. Russell; and Judge Shira Ann Scheindlin. Professor Edward H. Cooper was present as Reporter, Professor Richard L. Marcus was present as Special Reporter, and Professor Thomas D. Rowe, Jr., was present as Consultant. Judge Anthony J. Scirica, Chair, and Judge Sidney A. Fitzwater represented the Standing Committee. Judge James D. Walker, Jr., attended as liaison from the Bankruptcy Rules Committee. Judge J. Garvan Murtha, chair of the Standing Committee Style Subcommittee, attended by telephone; Professor R. Joseph Kimble, Style Consultant to the Standing Committee, also attended. Peter G. McCabe, John K. Rabiej, Jeffrey Hennemuth, and James Ishida represented the Administrative Office. Thomas E. Willging, Robert Niemic, Kenneth J. Withers, and Molly Treadway Johnson (by telephone) represented the Federal Judicial Center. Ted Hirt, Esq., Department of Justice, was present. Observers included Francis Fox (American College of Trial Lawyers); Lorna Schofield (ABA Litigation Section); Peter Freeman (ABA Litigation Section); Ira Schochet; and Alfred W. Cortese, Jr.

Judge Levi opened the meeting by observing that the Committee has accomplished much this year, but still has much to do. He noted that Robert Heim was present for the first time as a Committee member, but has been a good friend of the committee over the years, often attending meetings and also offering advice to the Class Action Subcommittee.

Judge Levi further noted that Mark Kasanin, inconceivably, is concluding service as a member after ten years; the Committee feels profound gratitude for all of his work from 1992 to 2002. The ten-year span of service happened because it was so difficult for the Committee to let go. He participated diligently and to great effect as a committee member, always concerned to find the best answers for the operation of the system and without "carrying a brief" for any particular point of view. He has been a good ambassador to bar groups, and an invaluable liaison to the Maritime Law Association in dealing with the Admiralty Rules. Member Kasanin responded that the Committee's work has been a very worthwhile effort. The Committee has had fine leadership. Members from different backgrounds of experience and perspectives have shared their views and have worked well together. There have been a few disappointments about proposals that could not be carried through to adoption, but some of the things not done may yet reemerge. Much has been accomplished in these ten years.

Good news was noted. Sol Schreiber, former member of the Standing Committee and liaison to this Committee, is soon to be married; the Committee expressed its congratulations, best wishes, and sense of joy to a long-time friend. So too, Alfred W. Cortese, Jr., a constant observer, is to marry soon. The Committee extended its congratulations and best wishes to him as well.

A certificate of appreciation for ten years of service as Reporter was presented to Professor Cooper.

Francis Fox presented a memorial minute to John P. Frank, who passed away in September, replete with quoted "Frankisms." Mr. Frank, one of the country's leading lawyers, was a member of this Committee forty years ago. He continued to pay close attention to the Committee's work, and to provide valuable help. His contributions to the work on class actions informed the Committee throughout the process that led to the amendments proposed for adoption in 2002. Fox first met Frank in 1991, when the American College of Trial Lawyers began an effort to support Rule 11 amendments, to "put Rule 11 back in its cage after the 1983 amendments." The 1983 changes were designed to encourage more sanctions. They encouraged not only sanctions, but too many sanctions proceedings. In a matter of days, Frank created a coalition of judges and lawyers, marshalling not only facts and evidence but also people. Frank framed arguments as well: "Judges like Rule 11. Lawyers do not. In a world of cats and mice, it is better to be a cat. But Rule 11 is institutionally bad for all of us." In the Rule 23 review, he advised the Committee in 1996 that the settlement class is a perversion. "In my view, this rule has turned the courts into merchants of res judicata, turned courts into 'Uncle Santa Claus for lawyers,' and has done little good for many classes." His institutional memory of the social currents at work that carried the committee to the 1966 amendments of Rules 23(b)(1) and (2) was constantly before us. And then "Judge Wyzanski had his flash of genius." He recreated for the Committee the exchanges that led to creation of the opt-out as a protection for members of what became (b)(3) classes, from Wyzanski to Moore to Frank and back. Beyond constant reminders that no one had foreseen what Rule 23(b)(3) would become, Frank provided continuing advice on the danger of unintended consequences. A proposal to permit a preliminary evaluation of the merits as part of a (b)(3) certification determination, for example, was challenged as a horrible idea. It will be difficult to get by without John Frank. We need to reinvent him.

Judge Levi noted that Professor Rowe is back with the Committee as a consultant on the style project. He served six years as a member of the Committee. He does the hard work. He was particularly engaged in the discovery work. He sees both the big picture and the details. Professor Rowe responded that it is good to be back with the Committee.

Report on Standing Committee and Judicial Conference

Judge Levi reported that Rules 51 and 53 were approved by the Judicial Conference as consent-calendar items, without discussion. The Rule 23(e)(3) "second opt-out" from a proposed settlement was on the discussion calendar because it was seen to be important and potentially controversial. But it too was approved without difficulty. The New York Times published a favorable article about the class-action proposals on the day following Judicial Conference approval.

The Standing Committee discussion of Rule 23 focused primarily on the 23(e)(3) second opt-out. The language was changed to rely on the power to disapprove a settlement that does not, by its terms, provide a second opt-out opportunity. This change leaves the matter unambiguously within

party control: the court cannot, by directing a second opt-out opportunity in the notice of settlement, force the parties to accept a settlement that they would not have agreed to if it included a second opt-out opportunity. The Committee Note was shortened and revised to emphasize that lapse of time and changed circumstances are particular reasons for permitting a second opt-out opportunity. The Standing Committee did not want to encourage use of the second opt-out as a means of avoiding doubts about the fairness of the settlement: the trial court should be forced to confront the fairness question directly, without assuaging its doubts by relying on the opportunity to request exclusion.

Rule 53 was changed by the Standing Committee by deleting a late-added part of Rule 53(b)(2)(B). The change restored the open direction that the order appointing a master must state "the circumstances — if any — in which the master may communicate ex parte with the court or a party," eliminating the qualification that ex parte communications with the court must be limited to administrative matters unless the court, in its discretion, permits ex parte communications on other matters. Concerns were expressed that the deleted portion might suggest greater room for ex parte communications than is appropriate, and that there might be some intrusion on matters of professional responsibility. Another change restored verbatim the provision of present Rule 53(f) that Rule 53 applies to a magistrate judge only if the order referring a matter to the magistrate judge expressly provides that the reference is made under Rule 53. The Advisory Committee had developed a complex provision addressing appointment of magistrate judges as special masters. The provision was opposed by the magistrate judges association and by the Judicial Conference committee on magistrate judges, and the Advisory Committee acted to delete all references to magistrate judges. In the Standing Committee, concerns were expressed that magistrate judges are routinely appointed as special masters in some districts for certain kinds of cases. Present Rule 53(f) was restored to the new rule as subdivision (i) to address this concern.

In all, the Standing Committee meeting went very well.

Judge Scirica praised as "brilliant" Judge Levi's presentation of Rule 23(e)(3) in the Judicial Conference. He also noted that the Administrative Office memorandum submitting the Civil Rules proposals to the Judicial Conference was very good, easing the path to the consent calendar. The Standing Committee submitted to the Judicial Conference the Advisory Committee report on minimum-diversity class-action legislation. The Federal-State Jurisdiction Committee also has devoted much time to studying such legislation over the last few years, and continues to take an approach somewhat different from the Advisory Committee recommendations.

Mass Torts Proposals: Bankruptcy and Minimal Diversity

Judge Levi summarized a meeting with representatives of the Judicial Conference Bankruptcy Administration Committee on the eve of the Judicial Conference meeting. The National Bankruptcy Review Commission made proposals to address future mass tort claims in bankruptcy. The Bankruptcy Administration Committee formed a committee to consider the proposals — Judge Rosenthal was the Advisory Committee member of the committee. The central difficulty arose in addressing the question whether the Amchem and Ortiz decisions that have limited the use of Rule

23 in addressing future claimants should apply differently in bankruptcy. The Civil Rules Committee has expressed doubts and reservations about the Review Commission proposals. The Bankruptcy Committee report did not assuage those doubts, in part because the scope of the recommendations was not clear. The recommendations might be read to imply that bankruptcy proceedings should be used to address not only future claims, but also the related present mass tort claims. The September meeting representatives of the Civil Rules Committee were Judge Levi, Judge Rosenthal, Sheila Birnbaum, and David Bernick (a member of the Standing Committee). The Bankruptcy Committee seemed to be persuaded that it would not be wise to recommend that Congress adopt the Review Commission proposals. Rather, they seem likely to advise that the Judicial Conference position should be that if Congress is interested, specified problems must be addressed. The sense of the meeting was that no one knows enough about how these matters are in fact handled in bankruptcy.

Judge Levi called attention to the Advisory Committee's earlier conclusion that the problems presented by overlapping, duplicating, and competing class actions in state and federal courts are better addressed by Congress than by Civil Rules changes. But it is not only the devil that lurks in the details — it also is the politics. The Committee has said only that minimum diversity is an approach worth considering. The Federal-State Jurisdiction Committee has responded positively. They have not withdrawn their opposition to pending bills, but do support further exploration of a different approach that would create a new joint federal-state panel to help coordinate parallel actions. The central concept seems to be an augmented version of the Judicial Panel on Multidistrict Litigation, adding state-court judges and recognizing authority to assign cases to state courts as well as to federal courts. This topic was not on the Judicial Conference discussion calendar, but interested groups sent memoranda to the Conference. The Public Citizen memorandum approved the approach taken by The American Law Institute in its Complex Litigation project, looking toward creation of an expanded Judicial Panel that would include state participation. This approach is seen as "more modest" than sweeping minimum-diversity provisions. Whether it is more modest may depend on perspective: it might bring fewer cases to federal courts, but it could raise troubling questions whether Congress can force unwilling states to participate in the panel process or to accept transferred cases. For the present, the important point is to remember that the Committee's only position is that these are questions for deliberation by Congress.

Sealing Orders

The District of South Carolina is considering a local rule that would prohibit entry of an order sealing a settlement agreement filed with the court. Senator Kohl has asked whether this question will be considered in the Enabling Act process. The Administrative Office has responded on behalf of the rules committees that the question will be considered. The questions surrounding this practice would benefit from empirical work. The Federal Judicial Center is beginning to consider the forms of assistance it might provide. The central questions go to the frequency of sealing orders; the reasons that lead parties to wish to file a settlement agreement with the court — and whether filing is undertaken for reasons other than implementation of an agreement that the court's jurisdiction will continue for purposes of enforcing the settlement; how often the public interest in information about

the litigation can be satisfied by access to materials in the court file, such as the pleadings, that have not been sealed; what privacy concerns the parties may have apart from the amount of the settlement. Other questions may arise as well. The questions are highly important, and equally sensitive. This project will demand a significant part of the Committee's attention.

Approval of Minutes

The Committee approved the Minutes of the May 6-7, 2002, meeting.

Style Project

Judge Levi introduced the Style Project by noting that it has come to the Advisory Committee by direction of the Standing Committee. Although the ordinary course is that projects originate in the Advisory Committee, tasks are occasionally assigned by the Standing Committee. This is one of them. The decision has been made that in the rules styling cycle, the time to do the Civil Rules has come.

The project goes back ten years. Judge Keeton, then chair of the Standing Committee, decided that the rules should be restyled. All of the sets of procedural rules include archaic and unfamiliar language. There are provisions that are simply out-of-date. There are many opportunities to clarify opaque language. But style changes can change meaning, even unintentionally. There is a risk that we will excise language that seems no longer useful, and that we will be wrong for failure to remember a use that continues still.

The Civil Rules were initially offered as the first style project. After Judge Pointer revised Bryan Garner's restyled version of the Civil Rules, the first approach was to address a few rules after completion of other agenda items at regular meetings. That approach did not work well in the press of competing business. The next approach was to schedule a special meeting devoted solely to style. This meeting at Sea Island, Georgia, has grown in legend to be described as "fabled," or less neutrally as "notorious." The Committee found many ambiguities in the rules confronted at that meeting. The uncertainty of resolving these ambiguities convinced the Committee that the style process would require more time than could be taken from other projects. There are many Civil Rules. They are "surrounded by a sea of case law." Inordinate amounts of time may be required to determine how far all identified ambiguities have been resolved or exacerbated by reported decisions.

After the decision to defer the style project for the Civil Rules, the Appellate Rules were restyled. The process went well, and the product has been well received. The Criminal Rules came next; barring last-minute action by Congress, they will take effect December 1, 2002. Those who have viewed the Criminal Rules believe the product is successful. The Chief Justice has concluded that neither the Bankruptcy Rules nor the Evidence Rules should be restyled. The Standing Committee has concluded that the time has come to return to the Civil Rules.

The process will begin with the Garner-Pointer draft, including changes adopted in the first stages of the Advisory Committee review. The Style Subcommittee consultants, Professor R. Joseph

Kimble and Joseph Spaniol, will suggest revisions of that draft. The suggested revisions will be reviewed by the Advisory Committee Reporter and by Professors Marcus and Rowe. Professors Marcus and Rowe will identify research questions, and may be able to provide answers to some of them, before the package is sent to the Style Subcommittee. The research questions identified at this stage and later typically will involve questions as to the meaning and origin of present rule provisions, particularly those that at first inspection seem ambiguous or unnecessary. The Style Subcommittee will review the package, will resolve style questions, and may identify further research questions for Professors Marcus and Rowe. The resulting package will be sent to the Reporter, who will prepare footnotes that identify issues that remain to be resolved in the Advisory Committee process.

The footnoted version will go to one of two Style Subcommittees, to be chaired by Judge Kelly and Judge Russell. It is not clear that anyone really knows what they have agreed to do in committing themselves to this undertaking. It is clear that arduous work must be done in the subcommittees. The subcommittees have been constituted with an eye to other subcommittee assignments, geography, and the balance between lawyers and judges.

All of the Civil Rules will be restyled. "We cannot spend a half day on each semicolon. As in many matters, we cannot let the best be enemy of the good."

The project will require frequent meetings if it is to be accomplished in a reasonable period. The proposed program calls for four meetings a year: one style subcommittee meets on the first day, the full Committee meets on the second day, and the other style subcommittee meets on the third day. The day of the full Committee meeting will be devoted to continuing work, and such style business as needs the attention of the full Committee.

The Civil Rules project will benefit from the experience of the other rules committees. Some of the battles have been fought; the winners and losers are identified. "Must" has replaced "shall" as a term of mandatory duty.

John Rabiej reviewed the experience of the Appellate and Criminal Rules restyling projects. The process started in the early 1990s under the leadership of Judge Keeton and Professor Charles Alan Wright. They chose Bryan Garner as style consultant. Garner is author of many authoritative works on legal writing. He restyled the Civil Rules first. Then the process turned to the Appellate Rules from 1994 to 1998; Judge Logan chaired the advisory committee, and Professor Mooney was Reporter. When the Appellate Rules were completed, the Criminal Rules came next. The Criminal Rules process began in 1999; the restyled rules are now before Congress. Judge Davis chaired the advisory committee for the first part of the process, and was succeeded by Judge Carnes. Professor Schlueter was Reporter.

The process for the earlier rules efforts began with revision and refining of the Garner draft by the Style Subcommittee. The result went to the advisory committee, then to publication. Comments were reviewed. The advisory committee then adopted a final style version that went to the Standing Committee and thence up the line to the Judicial Conference, Supreme Court, and

Congress. The advisory committee work took about three years for each project; the whole process took four or five years.

Judge James Parker, who chaired the Standing Committee Style Subcommittee while the Criminal Rules were restyled, described the process around the framework of discussion questions prepared by John Rabiej.

The last question was addressed first: did the result justify the effort? "No and yes." "No," if you focus on the project as one yielding short-term benefits. Practitioners must bear a heavy cost in relearning a complete set of restyled rules. The Advisory Committee work on the Civil Rules will stretch out over many years. "Yes," if you focus on long-term benefits, fifteen or twenty years from now. The new rules will unquestionably be more user-friendly. They will ease automated research, even by measures as simple as adding more and better titles and headings for subdivisions and paragraphs.

Pride in the quality of the product is important. Professor Wright chaired the Style Subcommittee when it was formed. His writing is wonderfully clear. The question can be illustrated in the familiar comparison of a sturdy compact automobile to a luxury sport sedan. Each does the basic job, but one does it better. The project is more worthwhile if we want the polished end product.

The care required to distinguish substantive changes from style improvements will yield a separable benefit. The need for substantive changes will appear, to be addressed separately either as the style project wends along or later when more time is available. Some, perhaps most, changes will need to be deferred. An illustration is provided by Criminal Rule 11. Rule 11 states that "the court" must not be involved in plea negotiations. Different judges interpret the rule differently — some conclude that it prohibits participation only by the sentencing judge, and permits another judge of the same district to mediate plea negotiations. This question was identified in the style project, treated as a matter going beyond mere style, and deferred.

As to procedures, the first caution is to make sure that the schedule is not too tight. The next is to avoid assigning too much work all at once to the consultants — Kimble and Spaniol should not be charged with doing a complete rule set all at once. And nit-picking edits should be avoided in the Advisory Committee and forbidden in the Standing Committee.

The question whether new procedures should be adopted remains open. The subcommittee structure looks very good. Internet communications can be used more effectively now than ten years ago. Teleconferencing should be considered — there are real benefits as compared to telephone conferences. A teleconference can be used to show a rule and proposed changes on a screen. Simply seeing each other can help. The Appellate Rules were done in large part by telephone, with handwritten edits that were hard to decipher (particularly when transmitted by facsimile). In the Criminal Rules, word processing edits encountered some breakdowns, but overall the process worked. Computerized research can help. In the Criminal Rules, for example, a question arose whether it is better to refer to an "attorney" or to "counsel" — a computer search can quickly identify

each place the term is used. The Criminal Rules use eight different ways to describe the government or attorney for the government. Is it necessary to have consistency if everyone understands the word in its context? Yes, consistency is a worthy goal. And other resources can be used. A law clerk, for example, may provide good help.

How demanding is the project in time and energy? "Very."

Face-to-face meetings generally are more efficient. Telephone conferencing can be a help — so long as you remember the time-zone problems. The face-to-face meetings also have important socializing benefits.

How many hours should be scheduled for a single day? It is difficult to say. Some participants prefer a one-day, intense, "get-it-over-with" approach. Two-day meetings are more humane, but they are more difficult to schedule and "there will be departures." (A Committee member who participated in the Sea Island meeting suggested with feeling that "one day is enough.")

Would it have helped to stretch the process out over more years? More time probably would yield a better product, but the result may be that the product is never finished. The proposed time series prepared by John Rabiej seems reasonable — it is longer than the time taken for the Appellate Rules or Criminal Rules, but the Civil Rules will be much more difficult.

Turnover in Committee membership must be addressed. "You need one driving force to get you through all this." With the Appellate Rules, Judge Logan was the driving force. With the Criminal Rules, Judge Davis initially was reluctant, but became an enthusiastic and driving force. The consultants and researchers should not change. Changes in general Committee membership are not as important.

On matters that involve style alone, not meaning at all, the Committee should give almost complete deference to the Style Subcommittee.

As to other issues identified in the agenda book: Renumbering the rules will be controversial, causing short-term grief but perhaps yielding long-term benefit. Renumbering deserves some consideration. This question was faced in one part of the Criminal Rules: Rule 60 was the final rule, but was the one that established the title of the rules. The Committee decided simply to abrogate Rule 60 as part of transferring the title to the front. Obsolete terms should be abolished — language does change over time. Our generation would say "I am eager to do that," while many of a younger generation would convey the same thought by being "anxious" to do that. The meaning of "anxious" has changed.

It would be wise to enlist a volunteer who could provide a non-lawyer perspective. When Arizona revised its jury instructions, it sought help from jurors. A majority of the jurors thought that "subsequent to" meant "before"; the phrase was eliminated. As to "negligence," a majority chose "inattentive" over "careless"; the word was not dropped, in deference to its deep roots in tradition.

A high-school English teacher or someone similar might be a good resource to read draft rules and identify confusing expressions.

Judge Parker concluded his remarks by confessing that in retrospect, "I still wonder whether it all was worth it."

Professor Schlueter observed that it was very helpful to have Judge Parker attend the Criminal Rules style meetings, most often by telephone.

John Rabiej then turned to a more detailed review of the process. The agenda materials include Rule 4 in the form adopted by Bryan Garner. Each rule is divided into boxes corresponding to subdivisions or paragraphs. The text of the present rule is presented on the left side of the page, with the restyled rule on the right. The object is to simplify, clarify, make parallel expressions consistent, remove ambiguities, and avoid substantive changes. The format provides much more "white space," and gives a uniform structure to the rules.

The Garner drafting Guidelines have been adopted for all of the sets of rules.

When the Garner draft of the Criminal Rules was submitted to the Style Subcommittee, Judge Parker refined the style work and also identified at least one hundred substantive issues. Professor Saltzburg, a veteran of the Criminal Rules process, was retained to find answers to the questions. An example of several questions and responses is included in the agenda book. So it was asked why the rules still refer to "hard labor"; an answer was found in some residual use of boot camps — there was a reason for retaining a seemingly antiquated expression. More generally, the research was helpful in addressing the meaning of provisions that had no readily identifiable meaning or reason.

The Style Subcommittee reviewed the research questions and responses, and "gave it their best shot." The drafts then went to the Criminal Rules style subcommittees, who resolved what they could and reported both resolutions and important questions to the full Criminal Rules Advisory Committee.

On the Civil Rules, Judge Pointer revised the Garner draft, making many changes and improvements. Some changes were adopted at the Sea Island meeting, and they too have been added to the draft that will go to the Style Subcommittee.

The Appellate and Criminal Rules Committees developed time tables, as will be done for the Civil Rules. They divided the rules into batches, assigned to the subcommittees. In the subcommittees, each rule was assigned to one subcommittee member who became responsible for presenting the rule at the subcommittee meeting and shepherding it through. A primary focus was to search for inadvertent substantive changes, and to discuss the deliberate substantive changes. When deliberate substantive changes seemed desirable, a choice was made whether to classify them as minor changes that could be adopted in the style package and identified in the style Committee Notes, or instead to classify them as so important as to require presentation on a separate track.

The Appellate Rules presented style changes, minor substantive changes, and major substantive changes in a single package for the Judicial Conference. The Criminal Rules presented the style changes (including minor substantive changes) in one package, and major substantive changes in a separate but parallel package. The purpose of the separate tracks was to be prepared with a styled version of the current rule for adoption if the substantive change in the parallel rule were rejected.

The timetable for the Criminal Rules package is described in the agenda materials. In a 28-month period they held ten subcommittee and six full committee meetings. Both the Appellate and Criminal Rules Committees adopted an "all deliberate speed" policy.

After making assignments to individual members, the subcommittee chair set meeting dates. Although each rule was assigned to one member for presentation, all members reviewed every rule in the package to be considered at each meeting. All comments from subcommittee members were routed through the Administrative Office. Each comment was inserted, identifying its author, on a single master draft. The consolidated master draft went to the full subcommittee meeting. Discussion focused on the comments made by the subcommittee members as reflected on the master draft.

The focus of subcommittee discussions was policy issues more than style issues. Often policy issues were identified for discussion by the full Committee. After full subcommittee meetings, the final product was sent to the full committee.

Formal records were not kept during the Criminal Rules process. Although notes were taken, the lack of more formal records was a mistake. (Professor Schlueter noted that the Criminal Rules Committee recognized the need to get on with the work.) Records will be kept during the Civil Rules project. The Reporter and consultants will work together to devise the best means of noting all significant decisions. The Reporter will attempt to attend all meetings.

Judge Levi noted that although ordinarily the Civil Rules Committee has viewed subcommittee meetings as matters for executive session, the style subcommittees are different. Representatives from concerned groups, such as the American Bar Association, will be welcome to attend.

In the Criminal Rules process, Committee Notes were developed only after a styled rule had been considered by the full Committee. In contrast the Civil Rules project will attempt to frame draft notes before Committee consideration, at least to the extent possible within the time between subcommittee meetings and Committee meetings.

Both the Appellate and Criminal Rules Committees presented their style drafts to the Standing Committee in two separate packages with the recommendations for publication. Actual publication, however, was deferred so that all rules could be published together. The public comment period for the Appellate Rules was nine months; for the Criminal Rules, the period was six months. The Criminal Rules drew only 20 or so comments on the style package; even the National Association of Criminal Defense Lawyers, an active participant in the rulemaking process, addressed only two or

three rules. In addition to the usual thousands of people and groups who receive direct mailings of published proposals, the proposals were sent directly to approximately 100 law professors. Even the professors provided few comments.

The low level of comments won by the Appellate and Criminal Rules suggests that it may be better to publish smaller sets of rules for comment on a running basis. This is the plan for the Civil Rules.

It remains to be decided whether substantive proposals should be separated from style changes in the publication stage.

The Criminal Rules packages illustrated the challenges that may be encountered. The Supreme Court rejected one of the changes proposed on the major-substantive-change track, Criminal Rule 26(b). The Committee had addressed the constitutional confrontation issue that gave the Court pause. This experience simply reflects the differences of judgment that may attend resolution of specific doubts in any rulemaking enterprise. Quite a different problem arose from the inadvertent omission of a sentence from Rule 16. The difficulty arose because the original Rule 16 version considered by the original style draft was different from a later Rule 16 that superseded the one that persisted through the style process. The Administrative Office legislation staff persuaded Congress to attach a corrective provision to the Department of Justice appropriations bill. Although the bill must be passed at some early time, it has become a Christmas tree. The Administrative Office received a copy of the bill only an hour before it passed the House, and discovered that not only had legislative staff changed all the "musts" to "shall," it also had changed a Rule dealing with "mental" condition to "medical" condition. The present hope is that these changes can be corrected by a technical amendments rule. But the point remains: correction of inadvertent gaffes will be increasingly difficult as the rules pass from the Standing Committee to the Judicial Conference, to the Supreme Court, and finally to Congress.

Judge Scirica commented that he attended the Sea Island drafting meeting while a member of the Civil Rules Committee. Judge Higginbotham concluded after that experience that it was more important to devote the Committee's time to Rule 23 and other pressing subjects. Style could not be done at the same time.

The style project was effectively launched after Judge Keeton and Professor Wright met with Chief Justice Rehnquist. The Chief Justice agreed that the style project made sense. It was decided not to do the Bankruptcy Rules or Evidence Rules at any point. The Appellate Rules became the bellwether because they are easiest to deal with. The styled rules were well received by bench and bar.

Turning to the Criminal Rules, the method of dealing with substantive changes was considered. The Supreme Court wanted to get all proposals, both of style and substance, at the same time. Judge Davis began guiding the Criminal Rules through the process as a skeptic, but became a strong believer in the project.

Last winter Judge Scirica took some restyled Criminal Rules to Chief Justice Rehnquist and suggested that it was a good idea to go ahead with the Civil Rules, recognizing that the project would be more difficult and beset with more pitfalls than the earlier style projects had encountered. One concern was framed by asking what the Civil Rules would look like in 25 years if the project is not undertaken. An opportunity was recognized in the need to examine every rule systematically. Both Professor Hazard and Professor Wright have thought it important to undertake periodic review of all rules. To paraphrase Professor Hazard, it is important to involve professors for ideas, lawyers for knowledge, and judges for responsibility. The project has to be open to input from all.

It will be possible to publish subsets of the rules in packages to afford several opportunities to comment in a more manageable framework. But the Supreme Court will want to receive a single package of the entire Civil Rules when the time comes to submit them for adoption. Substantive changes should not be part of the style package. At the same time, it is proper to effect substantive changes when necessary to resolve ambiguity in a present rule.

Although it was surprising to have so few comments on the Criminal Rules, the dearth of comment may have resulted from the high quality of the work.

Professor Schlueter described the Criminal Rules style project from the Reporter's perspective. Their first exposure to style problems began at the December 1992 Standing Committee meeting, long before the formal project. A very detailed style discussion almost persuaded the Criminal Rules Committee chair to withdraw the proposal; only an on-the-spot revision by Garner, chair, and reporter saved the proposal. "It was not a happy introduction.' But the style project made converts of the Committee.

In 1998 the Criminal Rules Committee made a commitment to get into the project and get it done. It recognized that it could not afford to get bogged down in minutiae. When the Committee came to reflect on the experience in 2002, it realized that only a few of those present in 2002 had been present in 1998.

"Time is your enemy. You can gain a lot by more time. But there is no guarantee." Getting people interested in revisiting long-ago work from the first phases of a style project "is tough — there may be rebellion." Committee and subcommittee membership will change; if new members are allowed to reopen past decisions, the process may be effectively derailed.

Criminal Rules Committee members found the style project a rewarding experience. It felt, at the end, like graduating from college.

"Keep your sense of humor. It is essential." We had tense times when Committee members wanted to change a rule they had disliked on substantive grounds for many years.

It is critical to retain the advisory committee chair in place for as long as possible. The Chief Justice should be persuaded to extend the chair's term for this purpose.

The goal is to send to the Supreme Court a style package, not a substantive change package. The Criminal Rules Committee had major substantive changes to do, and put them on a separate track. It was prepared to drop them if need be. The Department of Justice was much concerned about the style project. "They had won and lost many battles. They feared losing the victories, even as they hoped to reverse the losses." These concerns added to the reasons for putting aside many substantive matters.

The Administrative Office — and especially John Rabiej — made the project possible. It was Rabiej, not the Reporter, who kept the authentic master copy. It is difficult for a Reporter to adjust to this loss of "control," but it is essential that it happen.

The Criminal Rules Committee really appreciated the subcommittee structure, and particularly the one-person-per-rule assignments of responsibility. Although there are many people looking at each rule, it is a mistake to rely on a multiplicity of eyes to catch up inadvertent omissions. Some one or two persons must bear special responsibility for the completeness and correctness of the entire set.

The experience with Criminal Rule 16 underscores the vital importance of making sure that the "left column" is the current version of the rule, not some earlier version copied into the left column when the column is first compiled.

Often individual Committee members took on the research issues. "We did not go looking for the issues: they came to us." The Style Committee found ambiguities, which were sent to Professor Saltzburg. The Subcommittee accepted that, but found further ambiguities without intentionally looking for them. The research was spread out. "It has to be."

If something is to be taken out from the present rule, it is important to decide the reason for the deletion to enable explanation in the Committee Note.

Continuity is important. Style conventions should be identified at the outset, and adhered to. To the extent possible, a choice of preferred terms should be made; in the Criminal Rules, it became necessary at the end of the process to go back to the beginning to redefine the meaning of "court."

Deference is important at a number of levels. The Standing Committee today defers to the advisory committees more than in some earlier days. The Criminal Rules Advisory Committee deferred to the judgments of its subcommittees, but did make changes when they seemed good. To some extent, the subcommittee deferred to the single member who was responsible for a particular rule. That worked, and indeed seemed important.

The packages presented to the Standing Committee seemed a bit overwhelming. The first 30 rules were presented in one package, the remaining rules later in a second package. The advisory committee attempted to focus the presentation on the problem points.

Institutional memory is a problem. It is easy to lose the details. "You should plan." It is not clear whether the best form of record would look like minutes, or like something else. "Time and information management is the key. Keep your papers and notes."

When something is deleted from a rule, identify the deletion and explain it in the Committee Note. In deciding whether to delete something, it is wise to defer to the committee that created it: you should assume that there was a good reason, and should not assume that there is no good reason simply because you cannot discover what it was. "There are a lot of cases and tradition."

It is difficult to distinguish between "little" substantive changes and style changes. It would have been overwhelming to identify every minuscule change in a Committee Note. The test adopted for identification was whether a rule revision would lead to a change in practice. And boilerplate language was developed for the Note to each Rule: "The language of Rule _ has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic. No substantive change is intended." (The final paragraph of the Committee Note to Criminal Rule 1 varied this statement to some extent.) Revisions that seemed likely to work a change in practice were not disqualified from the style package, but were identified in the Note. Major substantive changes, on the other hand, were taken out for separate treatment. An example was video teleconferencing for arraignments.

At times a subcommittee would appoint an ad hoc group to address a specific question. One example was the question where a defendant should be taken after arrest when a judicial officer is more readily accessible in a different district.

Responding to a question, Professor Schlueter noted that as people looked at the rules, they came up with substantive ideas. This was not a deliberate focus; the project was not viewed as an occasion to reconsider all the rules. There is a cost in frustration, as with the Rule 11 example identified by Judge Parker.

And there was a special reluctance to change language that had been mandated by Congress. Changes nevertheless were made on a few occasions.

Another Committee member observed that the distinction between style and substance can blur. Clarification can change meaning and practice. Is it proper, within the scope of this project, to tell the Supreme Court that we are changing practice? Judge Scirica responded that the direction is that the Committee should resolve ambiguities — that is properly within the scope of a style project even though it may change meaning. Good judgment is called for. "You will know the major changes."

Professor Schlueter added that the Criminal Rules Committee struggled often with this problem. An attempt was made to reduce the potential confusion that could arise from presenting simultaneous "style" and revised "substantive" versions by adding a Reporter's Note to each rule in the style package that had a parallel rule in the substantive track. The Reporter's Note simply directed attention to the parallel substantive rule.

Judge Scirica observed that two of the tests that measure the appropriateness of changes in meaning as part of the style package are that it is proper to make noncontroversial changes, and that it is proper to express present practice as it has evolved from an uncertain rule basis.

Professor Kimble suggested that there is a continuum of infinite shading. At one end are matters that seem pure style: should we refer to an "attorney fee" or to an "attorney's fee"? Seemingly similar matters may not be so pure — the rules refer often to an "opposing party," but also refer to an "adverse party." Is there a difference? An intentional difference? If the Committee reaches a confident conclusion that there is no intended difference of meaning, it might adopt a consistent style convention and not identify the change in the Committee Note. Another example of the minor change questions is whether to delete the requirement that a Rule 4 summons bear the court's seal.

Judge Levi expressed concern that the very concept of "minor" substantive changes could undermine the credibility of the project. And it is important not to waste Committee time on marginal substantive changes. Many of these things could be deferred for attention after the style project is concluded.

Professor Schlueter noted that ultimately Judge Davis, Judge Scirica, and the Administrative Office agreed that consensus and concessions must be made in order to get the style package to the Supreme Court. "The key is to decide how much time to spend on the components. If extensive discussion is required in subcommittee, let go of the question."

Judge Scirica agreed. "You are going to have to decide to leave some ambiguities as you find them." Judge Levi also agreed, noting the Criminal Rule 11 question whether a judge who will not be imposing sentence can mediate plea negotiations — "there is a conflict in the case law. Let the issue continue to percolate in the courts, or put it on the separate substantive track."

Professor Schlueter noted that Professor Kimble "came in late." He was asked to go through the entire Criminal Rules package, and did. The Committee had been feeling a sense of impending relief and release, but he found a lot of inconsistencies the Committee had missed. Some of them caused real consternation. At times the "do-overs" are necessary. But "honor the committee's weariness."

Professor Kimble suggested that it is critical to follow an authoritative set of style guidelines. It would be wise to adopt them formally. And it would be useful to state them in an Introductory Note to the style package. Part of the conventions should be to adopt Bryan Garner's Dictionary of Modern Legal Usage. This makes life easier not only in drafting but in later application of the rules.

We need in every way possible to head off unintended changes of meaning. The boilerplate language denying changes of meaning should be in the Committee Note for each rule.

It is wise to defer to the Style Subcommittee. Deference should approach the level of presumption on issues of pure style. If you decide to say "can" to mean "is able," do not look back.

"After a certain point you run out of steam." Do not readdress issues already resolved, but recognize that new perspectives and insights may emerge as you progress through the rules.

The advantages of the style project will far outweigh the disadvantages. You will make mistakes. The mistakes will be corrected with time.

And remember that improving style will inevitably improve substantive meaning in many ways.

Professor Schlueter stated that once an issue has been consciously resolved, whether by vote or consensus, it is important to regard it as res judicata. Revisit the decision only for good reason.

There are many things that can distract attention. It is important to establish a specific deadline for submission to the Supreme Court. The timetable can be set by working backward from that date. The deadline and timetables give power to committee chairs to force a conclusion of discussion.

This discussion of past experience was followed by presentation of a set of "overarching issues" identified as growing out of the experience. Because much of the discussion followed the order of the agenda materials, the agenda memorandum is adopted as the minutes of the discussion with occasional interpolations to reflect such discussion as there was:

CIVIL RULES STYLE PROJECT: INTRODUCTORY QUESTIONS

Some of the generic questions that will recur throughout the Style Project can be anticipated. They range from simple needs for consistency to more important issues. The examples that follow are not ranked in order of importance, frequency of probable appearance, or interest. All deserve some attention. Specific examples — many of them drawn from a first review of Rules 1 through 7 — will be used to illustrate the choices.

Structure

The structure of the whole Civil Rules package is at times eccentric. Summary judgment is a pretrial device, but it appears as Rule 56 in the chapter dealing with judgments. It might make better sense to locate it after the discovery rules and before the trial rules. Rule 16, for that matter, occupies an odd place between the pleading rules and the party- and claim-joinder rules. For that matter, the counterclaim, cross-claim, and third-party claim rules seem to fit better between Rule 18 and Rule 19 than in their present place. Do we have any appetite for restructuring the whole?

One advantage of restructuring would be that we would be free to adopt, at least for the time being, a set of whole-number designations. No more Rule 4.1, 23.2, or (eccentrically) Rule 71A. We would no longer need to jump from Rule 73 to Rule 77.

These proposals almost inevitably will be defeated by the familiarity of Rule 56, Rule 13(a), and so on. The conservative inertia that has slowed procedural reform applies to the small as well as the large. And now we have a further argument: nothing can change, not ever, because that will foul up computer searches.

A much smaller-scale version of the structure question will arise when good style would rearrange subdivisions within a rule, or perhaps combine two or more subdivisions. If we combine subdivision (b) with subdivision (c), do we continue to describe subdivision (d) as (d), showing (c) as "abrogated," or do we re-letter (d) as new (c)?

Probably it is too late to consider the designation of subparts. Our limit has been Rule 15(c)(3)(D)(ii): (c) is subdivision, (3) is paragraph, (D) is subparagraph, and (ii) is item. Occasionally a rule might be easier to follow if we had further designations, if after the subparagraph (D) we could have one more sequence of numbers and letters. But there are several arguments against adding further designations. One is conformity to other sets of rules. Another is the need to find words to describe them: sub-subparagraph is unattractive, and the alternatives are at least as unattractive. Still another arises from the indent style we have adopted; it is helpful to set each smaller item in further from the left margin. But by the time we get to items we are already left with very short lines. Still further insetting could lead to minuscule lines.

[The question whether to redesignate rule subdivisions provoked some discussion. One purpose of the project is to advance clarity by providing a clear structure. Clear structure will involve physical layout, more white space, and more frequent use of sub-parts: a single subdivision may be broken into paragraphs, a paragraph may be broken into subparagraphs, and so on. The present rules often combine quite distinct propositions in a single subdivision or paragraph; clarity will be improved by establishing separate subdivisions or paragraphs. Additions will require renumbering. This course was often chosen in the Appellate Rules. Further discussion pointed to the Garner-Pointer draft of Civil Rule 4(b), which makes many separations of material previously run together. This example demonstrates that the rule should be to do whatever makes good style sense.

[It was asked whether the advantages of preserving familiar designations deserve some weight: should a change be made if it seems only a little better? In the Criminal Rules project, there was some major reorganizing. But they chose to work around the problems that arise when the present designation seems too well-known to change. An illustration in the Civil Rules might be Rule 13(a).

[A related question is illustrated at several places in the Civil Rules, among them Rule 80(a): since 1948, subdivision (a) has been carried forward only to show that it has been abrogated. The Criminal Rules Committee decided against preserving present designations when the only purpose is to avoid carrying forward an otherwise deleted subdivision. But there may be occasions when it is better to carry forward the designation for an abrogated part in order to preserve a related and well-known designation: Style should not be the occasion for redesignating Rule 12(b)(6). One alternative might be to show a former designation in brackets for a lengthy period — for example, if summary judgment were to be relocated as a pretrial device, it might be designated as "Rule 39.1 [Former Rule 56]." The Criminal Rules Committee did something like this in the Committee Notes. Another alternative would be to request that publishers include conversion tables with the rules.]

Sacred Phrases

It has been accepted that we must not tinker with some sacred phrases in the rules. "Transaction or occurrence" must be used to define the relationships that make a counterclaim compulsory under Rule 13(a). One challenge will be to be sure that we recognize all of the phrases that have taken on such settled elaborations that we must not attempt change in the name of style.

This approach raises the question whether we can forgive ourselves for not asking why variations are introduced on these familiar phrases. "Transaction or occurrence" persists in Rule 14, but in Rule 15(c)(2) it becomes "conduct, transaction, or occurrence." By Rule 20 it expands to "transaction, occurrence, or series of transactions or occurrences." What subtle distinctions are implied?

Definitions

Definitions presented recurring tests in the Criminal Rules style project. As later rules were styled, the committee was driven to consider again, and yet again, the definitions adopted in earlier rules. There are more definitions in the Civil Rules than many of us realize. Rule 3 defines what it means to "commence" an action. The Rule 5(e) tag line is "Filing with the Court Defined," but the rule does not really define filing — it directs how filing is to be accomplished. At the same time, it does define an electronic "paper" as "written paper." Rule 7 defines what is a "pleading." Buried in Rule 28(a) is a definition of "officer" for purposes of Rules 30, 31, and 32. The Rule 54(a) definition of "judgment" presents questions so horrendous that we abandoned any attempt even to think about them in the recent revision of Rule 58. The District of Columbia is made a "state" by Rule 81(e), "if appropriate." Rule 81(f) sets out a curiously limited definition of "officer" of the United States (including, at least on its face, a beginning that includes reference to an "agency," followed by a definition only of "officer"). Other definitions may lurk in the Rules. We may be stuck with the ones we have, except to the extent that we are prepared to make substantive amendments as part of the process. But at least we should be wary of adding new definitions. And perhaps we need to consider the need to reduce reliance on definitions.

"Legacy" Provisions

Old Practices Abolished. The Civil Rules have abolished many earlier procedural devices. The generic question is whether it is necessary to forever continue to abolish these things. Specific answers may vary.

Rule 7(c) is an example: "**(c) DEMURRERS, PLEAS, ETC., ABOLISHED.** Demurrers, pleas, and exceptions for insufficiency of a pleading shall not be used." We could spend some time debating whether devices are "abolished" by a rule that says only that they shall not be used. But why not abandon this subdivision entirely? Even if someone decides to describe an act as a demurrer rather than a Rule 12(b)(6) motion to dismiss, a 12(c) motion to strike an insufficient defense, a Rule 50(a) motion for judgment as a matter of law, or whatever, the court is likely to understand and respond appropriately.

A more familiar example is Rule 60(b), but it may be more complex. The final sentence says: "Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action." This one does abolish something. We may wonder whether there is much risk that a modern lawyer will think to reinvent these archaic procedures. Perhaps there is — the criminal law crowd continues to have questions about the persistence of coram nobis relief. However that may be, the last part of the sentence is a specific direction: relief from a judgment must be sought by motion or by independent action. We may need to keep that (and perhaps to note that an appeal — surely neither a motion as prescribed in these rules nor an independent action — is not what we mean by "relief from a judgment"?).

A less familiar example is Rule 81(b), which abolishes the writs of scire facias and mandamus.

Old Distinctions Superseded. Less direct means may be used to supersede old practices. Rule 1 is a fine example: "These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty * * *." "Suits"? "of a civil nature"? "cases" at law or in equity or in admiralty? The Style version uses "civil action" to replace suits of a civil nature, drops "cases," and raises the question whether we still need say "whether arising at law, in equity, or in admiralty." Merger of law and equity was accomplished in 1938; admiralty was brought into the fold in 1966. Is there a risk that the merger will dissolve without continued support? Whether or not we continue it, is "civil action" good enough? A very quick look at the subject-matter jurisdiction statutes that begin at 28 U.S.C. § 1330 shows that "civil action" is the most common expression. But § 1333 refers to "any civil case of admiralty or maritime jurisdiction"; § 1334(a) refers to "cases" under title 11; § 1334(b) refers to "civil proceedings arising under title 11"; § 1337 refers to "any civil action or proceeding"; § 1345, covering the United States as plaintiff, refers to "all civil actions, suits or proceedings"; § 1346(a)(2) — the Little Tucker Act — refers to "[a]ny other civil action or claim against the United States"; § 1351 refers to "all civil actions and proceedings" against consuls, etc.; § 1352 refers to "any action on a bond"; § 1354 to "actions between citizens of the same state"; § 1355 to "any action or proceeding; § 1356 to "any seizure"; § 1358 to "all proceedings to condemn real estate"; and § 1361 to "any action in the nature of mandamus" [this one is an interesting contrast with the abolition of mandamus by Rule 81(b)]. New Rule 7.1(a) refers to an "action or proceeding." Perhaps that is the phrase that should appear in Rule 1.

Familiar Terms and Concepts. Rule 4(*l*) provides for "proof of service." The Garner-Pointer draft says service must be proved to the court. Why abandon a familiar and well-understood term, substituting a phrase that may generate arguments that a different process is contemplated? There may be times when we should not abandon a well-understood term simply because it somehow seems archaic.

Familiarity goes beyond language to concept. Justice Jackson put it well: "It is true that the literal language of the Rule would admit of an interpretation that would sustain the district court's

order. * * * But all such procedural measures have a background of custom and practice which was assumed by those who wrote and should be by those who apply them." *Hickman v. Taylor*, 1947, 329 U.S. 495, 518 (concurring). As time moves on, however, the shared background of custom and practice may fade away. Reading a rule today, we may fail to understand the intended meaning, and in rewriting seemingly clear language effect a change. An illustration is the provision in Rule 19(a) that a necessary party plaintiff "may be made a defendant, or, in a proper case, an involuntary plaintiff." It is easy to pick this illustration because it is familiar — the understanding that the "proper case" is much more restricted than the words might indicate has been preserved. The more meaningful illustrations will be those that we overlook because the original understanding has been lost. The ignorant assumption of a new meaning and its expression in contemporary style may be an improvement, but it still will be a change.

[Brief discussion began by asking what harm lies in deleting antique provisions. A safeguard could be provided by establishing an appendix of materials to self-destruct in a period of perhaps twenty years if no use is found; this ploy will be considered. The Criminal Rules chose the path of deleting apparently antiquated material, stating in the Committee Note that the material is no longer needed.]

Ambiguities

The most common lament during the fabled Sea Island Style Festival was that time and again, ambiguity engulfs the meaning of a present rule. What to do?

An obvious approach is to exhaust the research possibilities that may dispel the ambiguity. If a clear present meaning is identified, the only remaining challenge is to express it clearly. How frequently this approach should be taken, all the way to the bitter and often disappointing end, is debatable. If indeed we find many ambiguities, we might slow progress more than we care to endure. The alternatives begin with identifying the ambiguity, and explaining in the Committee Note what has been done. One approach will be to carry the ambiguity forward — we do not know what it means, and we do not care to invest the energy to decide what clear meaning is better. Another approach will be to imagine a good clear answer and adopt that. No doubt each of these alternatives will be adopted in circumstances that seem appropriate.

Rule 4(d) — a relatively new rule — provides illustrations that tie to the discussion of Rule 4. The last sentence of (d)(2) refers to a plaintiff "located within the United States." (d)(3) refers to a defendant "addressed outside any judicial district of the United States." Rule 4(e) speaks of service "in any judicial district of the United States." Rule 4(f) refers to "a place not within any judicial district of the United States." Is there a difference between "within the United States" and "in any judicial district of the United States"? Are United States flag vessels, embassies, or other enclaves "within the United States" but outside any judicial district? Puerto Rico clearly is within a judicial district of the United States: is it within the United States? What subtle thoughts inspired these various phrases?

Rule 4(h)(1) is another illustration. Service on a corporation may be made by delivering process to "any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant." Is there a difference between "by law" and "by statute"? One possibility is that "by law" refers to federal law, while "statute" refers to the many state statutes on serving a corporation; see 4B Federal Practice & Procedure § 1116. Another possibility is that "law" is a broader reference to all manner of laws.

[Discussion of ambiguities and inconsistencies began with the suggestion that it is better to assume that the original drafters knew what they were doing. But it was responded that successive committees may inadvertently confuse original meanings and create inconsistencies. Another champion of the earlier drafters agreed that we should assume they knew what they were doing, but recognized that often it will be necessary to consult history to guess what it was that they knew they were doing. It must be recognized that in drafting rules, just as in legislative processes, ambiguities may result from deliberate choice. Policy disputes that cannot be resolved at the drafting stage are put off for resolution in application. When policy disputes of this character emerge in the styling process, it may again be wise to carry the ambiguity forward without change, and perhaps without comment in the Committee Note. There will be occasions, on the other hand, when it is clear that inconsistencies are no more than inconsistent style choices — it makes no difference in meaning whether we say "the court in which" or "the court where."]

Substantive Change

There will be many occasions when a rule seems to cry out for substantive change. The answer can be direct when Advisory Committee capacity allows: the rule is revised in the ordinary way, adopting current style conventions. Rule 56 is a good example. We have long deferred the project to reopen Rule 56 following the Judicial Conference rejection of revisions that were slated to take effect along with the 1991 Rule 50 amendments. Simply restyling present Rule 56 and deferring the project still further until the entire Style Project is completed seems a shame.

Other changes of meaning may well be relatively trivial, and well within the charge given to the relevant style subcommittee. In this context, there is no meaningful line between resolving ambiguity and substantive change. Rule 27(a)(2) provides a good example. Rule 27(a)(2) now provides that notice of the hearing on a petition to perpetuate testimony must be served "in the manner provided in Rule 4(d) for service of summons and complaint." Rule 4 has been revised, and Rule 4(d) now provides for waiver of service. A look at current Rule 4 presents a puzzle. It is tempting to cross-refer to all of Rule 4, but that course may entail a change of meaning as to defendants in other countries. Something must be done, and any choice may change the meaning. (A brief note is included in the October agenda materials.)

Such "small" changes present a question touched upon by Judge Higginbotham at the January 2002 Standing Committee meeting. He suggested that the style project presents the opportunity for "many small changes aimed at coherence and consistency, while bigger problems continue to be

agitated." Is it proper to undertake a relatively large number of "small" changes that go beyond what can be justified in the name of style alone?

Redundant Reassurances

Time and again, we persuade ourselves that it is wise to add words we believe to be unnecessary. The purpose may be to anticipate and forestall predictable misreadings — predictable because we do not trust people to apprehend the "plain meaning," or because we do not trust people to admit to a plain meaning they do not like. Instead, the purpose may be to provide reassurance. Rule 4(j)(2), for example, provides for "[s]ervice upon a state, municipal corporation, or other governmental organization subject to suit * * *." There is no need to add "subject to suit": Rule 4 prescribes the method of service, and does not purport to address such matters as Eleventh Amendment immunity or "sovereign" immunity. But these words protect against arguments that Rule 4 somehow limits sovereign immunity, and reassures those who fear that the arguments will be made. Should we adopt a general policy that prohibits intentional redundancy? That sets a high threshold? Or that permits whenever at least a few of us fear that language plain to us may not be plain to all?

Integration With Other Rules: Style

How far are we bound to adhere to style conventions developed in the Appellate Rules and hardened in the Criminal Rules? The Standing Committee has long favored adopting identical language for rules that address the same subject unless a substantive reason can be shown for distinguishing civil practice from some other practice. But the approach has been relatively flexible: at times justification can be found in the view that somehow the civil problem feels different. The "plain error" provision in revised Civil Rule 51, for example, was redrafted in a number of steps that culminated in adoption of the plain error language of Criminal Rule 52. But the Committee Note states that application of the rule may be affected by the differences between criminal and civil contexts. Would it be better to adopt deliberately different language when different meanings may be appropriate, even though we cannot articulate the differences?

The question whether accepted style can continue to evolve is separate, and troubling. Unshakable stability has great virtue. But continued improvement is possible, and will be inevitable unless we erect an impermeable barrier. At first the Supreme Court did not want us to adopt new style conventions as we amended rules before taking on the Style project. Now we are writing "must" into rules with abandon. And we seem to be living well enough with the blend. How far should we attempt to adopt clear rules at the beginning, and adhere to them without fail unless we are prepared to revisit all of the earlier drafting?

Integration With Other Rules: Content

Rule 5(a) now requires service of every "designation of record on appeal." Appellate Rule 10 is a self-contained provision dealing with the record on appeal; it includes a service requirement; and it does not seem to require designation. There may be archaic provisions like this that have to

be weeded out. This prospect does not seem to present any distinctive policy question: we simply must be alert to the risk.

Internal Cross-References

Current editorial suggestions raise the question whether we are in the middle of another change in cross-reference style. Within the last few years we have been trained to cross-refer by full reference to "Rule 15(c)(2)," even in Rule 15(c)(1)(3): "if the requirements of Rule 15(c)(2) are satisfied and * * *," not "if the requirements of paragraph (2) are satisfied and * * *." I had supposed that this was because we were not confident that all readers can easily remember the distinctions between subdivisions, paragraphs, subparagraphs, and items. It also simplifies the question whether we should cross-refer to Rule 15(c)(1)(A), to subdivision (c)(1)(A), to paragraph (1)(A), or to subparagraph (A). After getting over initial shock, there is a good argument for adhering to "Rule 15(c)(2)."

Committee Notes

One of the central difficulties of the style enterprise is that new words are capable of bearing new meanings. Advocates will seize on every nuance and attempt to wring advantage from it. In the first years, the effort often will be wilful: the advocate knows what the prior language was, knows what it had come to mean, and knows that no change in meaning was intended. As time passes, memory of the style project will fade. New meaning will be found without any awareness of the earlier language or meaning. In part that will be a good thing: substantive changes will be made because the new meaning is better than perpetuating the old. We cannot effectively prevent that process, and we may not wish to. But the Committee Notes are a vehicle for attempting to restrain these impulses. No doubt the Notes will vanish from sight, and with them the reminders they might provide. How far should we elaborate on the limited purposes of style changes in each Note? Is it best simply to note the more important of the ambiguities consciously resolved? Should there be a prefatory Note that somehow is expected to carry forward with the entire 200X[1] body of restyled Rules?

The style project may justify a new approach to the rule that we cannot change a Note without amending the Rule. The involuntary plaintiff provision of Rule 19 is an example. This provision has a history that suggests a very narrow application. The face of the rule, however, has no apparent limit. Any attempt to revise the rule will encounter grave difficulty. But it might be sensible to attempt to reduce the occasions for inadvertent misapplication by explaining in the Note that no change has been made in the inherited language because it is difficult to state the intended limits, but that it is important to remember the intended limits. (Part of the difficulty lies in figuring out just what the intended limits were or are; it may be impolitic to say that in a Note.)

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[1] A note of optimism here.

[It was noted that in the Criminal Rules, Committee Notes were not modified unless a rule was modified. At times a statement was added to a Note that an issue was considered without, in the end, acting on it. The Standing Committee deleted some of these statements.]

Forms

What should we do about restyling the forms? Many of the forms use antique dates for illustration — perhaps the most familiar is the June 1, 1936 date in Form 9. That date recurs throughout the forms. Fixing that is easy enough. Perhaps style changes are also desirable. But here again we may face substantive concerns. The most obvious example is the Form 17 complaint for copyright infringement, which has not been amended since 1948 — long before the transformation of copyright law by the 1976 Copyright Act. There are similar grounds for anxiety about the Form 16 complaint for patent infringement, and some others. The Forms could be left for last. Or an attempt could be made to bring them into the regular process — most of them would attach to the bundle of Rules 8 through 15.

Statutory References

The Rules occasionally refer to specific federal statutes. The "applicability" provisions of Rule 81 provide many examples. The risks of this practice are apparent — it may be difficult to be sure that the initial reference is accurate, and statutes may change. But there may be real advantages. Specific statutory provisions may be the least ambiguous means of expression, particularly in the Rule 81 statements that identify proceedings that do — or do not — come within the Rules. The Criminal Rules Committee suggested that specific references might be helpful in pointing toward the proper statute, saving research time and reducing anxiety. Perhaps we can do no better than to resolve to be careful about this practice.

Further Process Discussion

More general discussion following the "overarching issues" focused on the flow of style work through the many groups and stages involved, and on the timetable proposed for the project.

To the extent possible, it will be important to have the Reporter and consultants provide initial reviews and answer research questions before the Style Subcommittee considers a rule set. The Style Subcommittee consultants, Kimble and Spaniol, will send their edits of the Garner-Pointer draft to Reporter and consultants. The Styling Subcommittee should be presented with the reactions of Kimble and Spaniol to the style suggestions made by the Reporter and consultants, along with the research questions and answers already available. The Style Subcommittee will identify additional research questions for the consultants. All of these materials will go to the chair of the Advisory Committee and the chairs of the Advisory Committee Style Subcommittees. Every subcommittee member will review all of the rules in the package being considered by that subcommittee, and send suggestions to John Rabiej. Rabiej will produce a single integrated document that incorporates all of the suggestions. This document, including footnotes prepared by the Reporter to identify the issues, will then go to the style subcommittees for discussion at a meeting. It is anticipated that the

style subcommittees will emulate the Criminal Rules model, assigning each rule in a package to a single subcommittee member who will be responsible for guiding discussion of that rule.

The draft timetable, aiming at final submission to the Standing Committee in June 2008, looking toward an effective date on December 1, 2009, was discussed. The most ambitious part of the timetable appears at the beginning. It is important, however, to get the project in gear. Recognizing that the dates can be adjusted, the timetable was accepted as a desirable goal.

Class-Action Subcommittee Report

Judge Rosenthal began the report of the Rule 23 Subcommittee by observing that although there is ground for serious debate over the directions that might be taken by continuing work on Rule 23, the debate is not yet ripe. We await Supreme Court action on the amendments currently proposed. If the amendments are adopted, we will want time to see how they work.

Although this is not the time to propose further changes, the protests that have been voiced since the Committee took up class-action work in 1991 continue unabated. Many observers assert that serious problems remain. Some of the problems may prove amenable to Rule 23 revisions. The most fundamental task would be to start over with Rule 23, as John Frank often urged, but there is no apparent wish to do so. We should, however, remain open to suggestions on any aspect of Rule 23.

One set of pressing problems has been taken off the table. The Committee has decided not to pursue rule-based solutions to the problems of state-court class actions that duplicate and compete with actions in federal court. This topic is not likely to be reopened unless Congress fails to find a solution.

Standards for certifying settlement classes deserve continued examination, with help from the Federal Judicial Center. In 1996 a new Rule 23(b)(4) on settlement classes was published for comment. Further consideration was deferred in 1997 after certiorari was granted in what became the Amchem case. Extensive comments were provided on the published proposal. Many of the comments expressed fear that settlement classes would foster collusive deals that favor class counsel at the expense of class members — the fear that courts would enter deeper into the market for the sale of res judicata. Another concern was that lowering the bar for certification of settlement classes not only would encourage more class actions but also would wash over to lower the standards for certifying classes for trial. But suggestions continue to be made that the Committee should consider standards for certifying settlement classes. The guidance provided by Amchem and Ortiz may not suffice. There is a fear that some cases will go to state courts where settlement is easier. Others note that although many class actions continue to be settled in federal courts, that is because the courts are not really doing what Amchem requires. In addition, it is said that to the extent that Amchem and Ortiz make settlements more vulnerable, objectors win increased leverage and take unfair advantage. Still others believe that Amchem has not had any significant deterrent effect on settling cases that should be settled. There are many cases that invoke Amchem; perhaps the lower courts have found

that indeed they are free to do what should be done. Amchem requires scrutiny of adequate representation and lack of conflicting interests. It requires close consideration of any attempt to settle future claims. Future claims, however, are a discrete phenomenon encountered in a small set of cases.

All of these considerations show the need for empirical inquiry. Do Amchem and Ortiz prevent settlement of cases that can and should settle on appropriate terms? If proposed Rule 23(e) takes effect on December 1, 2003, we will have additional support for increased scrutiny of settlements. That may reduce the riskiness of settlement classes.

If we do come to consider a settlement-class rule, one approach would be to go beyond Amchem in permitting certification for settlement of a class that could not be certified for trial. Another approach would be simply to clarify the statement in Amchem that a case can be certified for settlement if the only problems that defeat certification for trial arise from manageability concerns — as observed by the dissent, the meaning of this Amchem statement is not entirely clear. The effect of choice-of-law problems, for example, might be seen as a matter of manageability; it also might be seen as something more profound. The effort might be something like the recent Evidence Rule 702 revisions to absorb the practices that emerged from the Daubert and Kumho decisions on admitting expert testimony.

The Subcommittee asked the Federal Judicial Center to assist in determining the effects of Amchem and Ortiz on settlements. The Center has done a study, directed by Thomas Willging and Robert Niemic. The review of filing and settlement rates has been completed; they are now working on the design of questionnaires to be used to elicit specific information from attorneys about the reasons for choosing between state and federal courts.

Robert Niemic led the presentation of the FJC study. The numerical-empirical phase was designed to test the predictions: What has happened to filings of federal class actions, particularly those that do not involve securities law? To removals? To settlements? To dismissals?

It would have been good to include state class-action filing statistics in the study. Data, however, are not available. The study does not reveal what has happened in state class-action filings. There may have been a dramatic increase, as some have hypothesized. There may not. We cannot tell.

The data for the study represent 82 federal districts; the data for the remaining 12 districts were insufficient. The study covered the period from January 1, 1994 to June 30, 2001. Prisoner cases and pro-se attempts were not included (a pro se litigant cannot represent a class).

The data include 1,648 lead class actions that emerged from intradistrict consolidations; 192 lead class actions that emerged from interdistrict of MDL consolidations; and 13,197 "unique" class actions that did not result from transfer or consolidations. This method of counting eliminates duplicate filings — the 1,648 intradistrict lead class actions, for example, gathered together a total of 8,335 separate class actions. The 192 interdistrict and MDL lead class actions provide a more dramatic illustration — they drew together 4,182 member class actions.

A time-series analysis was done of these filings. The analysis showed very few correlations that are statistically significant. And such statistically significant correlations as were found to not demonstrate causation: it is not possible to conclude whether either the Amchem or Ortiz decision actually caused any of the trends observed. There are many factors other than these two Supreme Court decisions that affect the rate of class-action filings. The change after Ortiz, for example, was an increase in filings — not the change anticipated in launching the study. So filings went down in the period after Amchem, but it cannot be determined what causal influence Amchem exerted, if any. Something went on that is statistically significant if we go back to six months before the Amchem decision.

The rates of class-action filings are quite similar to the filing rates for all actions in federal court.

Personal injury and property damage class actions combined — with personal injury actions dominating in all periods — rose from a filing rate of 30 at the beginning of the study to a rate greater than 80 at the end.

Removals quadrupled over the study period.

For all class actions other than securities, there was about a doubling of the filing rate over the study period. Filing rates remained reasonably steady after the Amchem decision.

Diversity filings and removals more than doubled; "the line is reasonably straight."

Settlements and dismissals were counted over the period within two and one-half years of filing. For that reason, the counting stopped with January 1, 1999. There was little change in the rate from 1994 to 1999 in considering rates over six-month intervals. The pattern is more erratic if considered over one-month intervals.

There was an abrupt decrease in securities class-action filings after the 1995 legislation, as expected. But there was an increase both before and after the 1998 legislation; it is difficult to guess why there was an increase before 1998.

In short summary, class-action filing activity decreased after Amchem and increased after Ortiz.

Discussion of the FJC report began with the observation that some lawyers believe that the Ortiz decision caused many companies involved in the third and fourth waves of asbestos litigation to go into bankruptcy. If it can be known, it would be important to know whether bankruptcies could have been avoided under a different class-action regime. What is left now is to re-do the same settlement after limited-fund class treatment is denied, providing an opportunity to opt out. Another member agreed that "those who are knowledgeable think Ortiz caused the recent round of asbestos bankruptcies." It would be difficult, however, to gather sound empirical information on this subject. Lawyer interviews might provide some answers, but the results would not be rigorous.

It also was observed that the more general questions about the effects of the Amchem and Ortiz decisions cannot be answered without knowing what is happening in state courts. We hear anecdotes that plaintiffs are going to state court, but nothing more than anecdotes.

A draft of the survey instrument that will be used to gather information from plaintiffs who filed in federal courts was discussed. A different instrument will be used for cases that were removed from state court. The purpose is to go behind the filing data compiled for the first phase of the FJC study to explore how the Amchem and Ortiz decisions figured as factors in attorney decisions on court selection. So in cases removed from state court, the FJC will talk to the lawyer who chose to file in a state court and to the lawyer who decided to remove to a federal court. The survey instruments will be sent to lawyers in all the cases in the data base that were removed from state court.

The survey instruments posit a wide range of factors that may influence the choice of court. Have the right factors been chosen? One response was that many lawyers believe plaintiffs choose state courts because they dislike the Daubert limits on expert testimony — perhaps that should be made a specific item in the survey.

Noting that the survey proposes to ask about lawyers' perceptions of favoritism in state or federal court, it was asked whether lawyers would respond openly to such questions. The first suggestion was that the "no applicable" column in this set of questions was confusing. It was further observed that it is important to avoid an appearance of shopping for answers that will reflect unfavorably on state judges. Attention to the phrasing of the question is important. The first sentence in this item, referring to favoritism "(including bias)" might be eliminated.

The ABA representatives might be asked to review the survey questions with an eye to considering how lawyers are likely to understand them, and also to consider whether other questions might be added.

The Federal Judicial Center also has continued to work on its model class-action notices. Todd Hillsee, who testified on earlier drafts, has volunteered to participate on a pro bono basis, and has offered real improvements in putting the FJC content into an attention-getting format.

Judge Rosenthal concluded the class-action discussion by observing that the FJC information will help the Subcommittee in deciding whether to recommend to the full Committee whether work toward further Rule 23 amendments should be resumed. There may be no justification, in light of developing case law, for going forward. Or reasons may appear for going forward. If there is to be further work, however, it does not seem likely that the time has come to pursue further the concept of opt-in classes, whether for small claims or for large claims.

Discovery Subcommittee

Professor Lynk reported on the Discovery Subcommittee meeting during the first day of this Committee meeting. Four agenda items were discussed.

Judge Irenas has suggested adoption of rules changes to support more general use of a "de bene esse" deposition practice that he has found useful. With consent of the parties and court authorization, videotaped depositions can be taken shortly before trial to be used in place of live witness testimony. Examination and cross-examination of the witness would proceed as at trial, not in the quite different modes common in depositions taken for discovery purposes. All objections to admissibility would be made at the deposition. Objections are reviewed by the court before trial, to enable editing of the deposition to delete inadmissible portions. This process may make more work for the judge, but it can make it much easier to schedule a trial. The subcommittee discussed the question on the assumption that such trial depositions could be taken only with the consent of all parties, but did not explore that issue. It also wondered whether the question is as much one to be considered by the Evidence Rules Committee as the Civil Rules Committee — there is a rather eccentric allocation of trial issues between the two sets of rules. And concern was expressed about encouraging non-live testimony. The only decision for the present has been to ask the Evidence Rules Committee to comment on the question. (In response to a question, it was observed that the concern with the Evidence Rules was not with any specific Rule of Evidence, but with the more general question of the mode of presenting evidence at trial. The reason for considering rules amendments is that there is no express authority for this practice, and there are a number of points at which present rules seem inconsistent with it — it seems to work only because all parties consent. But it can be done now; one judge observed "we do it all the time." It also was observed that the Subcommittee did not go into the problems that will arise when a party, having participated in a videotape trial deposition, is disappointed with the results and wants to substitute live trial testimony. The conclusion was that the question will be put to the Evidence Rules Committee. No one is suggesting a rule that would authorize this practice over dissent of any party.)

The question of disclosing "core work-product" under the expert-trial-witness provisions of Rule 26(a)(2)(B) has been posed by the New York State Bar Association. Most Subcommittee members have believed that any information disclosed to an expert trial witness as a basis for shaping opinions to be expressed at trial is subject to disclosure and exploration at deposition. The disclosure Rule and Committee Note seem to contemplate this result, but are not entirely clear. Lower courts have disagreed, although perhaps a majority of the reported decisions think disclosure is required. This topic could be considered without reopening the entire area of work-product protection. Some Subcommittee members believe that disclosure is not wise. The proper rule is not immediately apparent. The Subcommittee will continue to explore the question, and will reach out to bar groups for further information on general practice and suggestions about desirable practice.

Another question is whether the a nonparty deponent should be notified that a deposition is to be videotaped. There have been a few cases in which a "high profile" witness has won a protective order barring videotaping for fear that the tape may be used for inappropriate invasions of privacy. The general nonfiling rule may reduce the privacy concern to some extent, although use of the deposition in the proceedings will lead to filing. Apart from special interests in privacy, there is an interest of fairness to the deponent, who may need to prepare emotionally for a performance "on

camera." The Subcommittee agreed unanimously that a rule amendment is appropriate. A proposed amendment will be brought to the full Committee, most likely at the January meeting.

Finally, an old proposal for use of written testimony at trial was revisited because of the connection to the de bene esse deposition proposal. A draft Rule 43(a) was prepared that would authorize part of a trial on written materials with the consent of all parties and the court's approval. Some district judges are doing this in nonjury cases. The Subcommittee discussion began with uncertainty whether this trial issue is a proper matter for consideration by the Discovery Subcommittee. It is not clear in any event whether this practice should be encouraged by adopting an express rule. The Subcommittee, however, will continue to study the issue. But there will be no suggestion that this practice could be employed over objection by a party who prefers trial with live witnesses.

All agreed that the Discovery Subcommittee should proceed as planned.

Computer-Based Discovery

The agenda materials include a letter from Professor Marcus to "interested others" asking for advice on the prospect of making rules specifically aimed at discovery of computer-based information. The mailing list is extensive; Kenneth Withers provided much help in compiling it. But the list can be supplemented. Because there will be duplications, it is desirable to suggest additional recipients to the Discovery Subcommittee.

The Discovery Subcommittee plans to make recommendations at a spring meeting in 2003 with respect to new proposals. It may prove desirable to have a Subcommittee meeting to help shape proposals.

Molly Johnson and Kenneth Withers reported on the FJC Qualitative Study of Issues Raised by The Discovery of Computer-Based Information in Civil Litigation. They noted that Meghan A. Dunn is a third author of the study, and that Thomas Willging provided invaluable help.

The Discovery Subcommittee was consulted in looking for in-depth illustrations of how these issues play out in particular cases. The Study was divided into three parts — a survey of magistrate judges, a survey of computer consultants, and ten case studies.

Magistrate judges were selected for surveying because the Subcommittee thought they are likely to have more experience with computer-based discovery issues than district judges have. In addition, there is an e-mail list that makes it easy to reach all magistrate judges. They were asked about their experiences, including types of cases and the types of issues that had come up. They also were asked to suggest cases that might be good for in-depth study.

The survey of consultants was designed to supplement the survey of magistrate judges. The rate of return was disappointing: 75 experts were addressed, but only 10 usable responses emerged. Among the problems were timing — the survey was sent out just before September 11, 2001;

responses received in free form that could not be translated to the survey format; and confidentiality agreements with clients.

The researchers also reached out the Defense Research Institute, the American Trial Lawyers Association, and others for nominations of cases to be considered for in-depth study.

The case study sought cases recently closed or settled in federal courts in which at least the judge and one attorney were willing to participate in the study. The first step was study of the case file. Then the participants were interviewed. The interview protocol was designed to facilitate cross-case comparison.

The results of the case study cannot be taken as completely representative of federal-court experience. The participants were mainly magistrate judges; it is possible that district judges encounter different case types and problems. The focus was on cases with problems that came to a judge; there are many cases that do not present such problems. The study involved interviews with only ten judges and seventeen attorneys; the number is too small to ensure full representation.

The magistrate-judge survey showed that three out of five who responded had encountered computer-based discovery problems. (The three-out-of-five number is taken from a sample limited to magistrate judges who do discovery work.) The case types that most frequently generated problems were individual-plaintiff employment cases, general commercial cases, and patent or copyright cases. The employment and general commercial cases are relatively frequent in overall case filings. The problems in patent and copyright cases are disproportionate to overall case filings, but it may be that these cases generate a disproportionate share of general discovery disputes as well as computer-based discovery disputes.

Sixty-nine percent of the magistrate judges identified as an "issue" that the case involved a computer consultant or expert; they did not say whether this was a cause of problems, a relief from problems, or a neutral factor. Privilege waiver, on-site inspection, requests for sharing retrieval costs, and concerns about spoliation were other problems that "led the pack." But again there is no basis in the study for comparing the frequency of these problems to cases involving discovery of other sorts of material.

In the case studies, the judges and attorneys were asked whether it would be useful to amend the discovery rules to account for computer-based information. Seven of the ten judges did not favor rule changes. Twelve of the seventeen attorneys did favor rules changes. A majority of the participants thought that the present rules had no effect on their cases.

Specific rules changes suggested by more than one participant included a rule that the court can designate the form of production — this seems particularly important in directing production in all-electronic form if the records are kept that way. The rules might provide for early data-preservation orders, entered before the scope of discovery is determined: this is done under the

current rules, but a specific rule would help. It was suggested that Rule 26(a) disclosures, Rule 26(f) discovery plans, and Rule 16 pretrial orders should be directed to consider computer-based discovery directly. And it might be possible to clarify the extent of the obligation to review computer records for discovery responses.

The case studies show that many judges are willing to use their powers to manage discovery. One judge developed a questionnaire for all of a party's employees exploring the extent to which they used e-mail for business purposes. The same judge scheduled a one-day "computer summit meeting" to help set the directions of discovery. The parties may be ordered to provide frequent reports on the progress of discovery. Another judge provided for discovery of e-mail "headers" alone, not the body of the messages, for purposes akin to a privilege log: the headers reveal the sender, recipient, time, and subject of the message. This information can be used to channel further discovery.

Many of the case-study participants thought that judges and attorneys need more education.

The FJC education system has provided every federal judge an opportunity to attend a conference on computer-based discovery. Many FJC publications devote increasing attention to these issues. Speakers and materials have been provided for circuit and district conferences. And, working with the Federal Bar Association, a kit has been prepared for local seminars. The kit includes a DVD demonstration in which Committee Member Judge McKnight presides over five problem presentations. Federal Bar Association chapters will have these kits, and every district court chief judge. The kit can support a program with a local panel. The FJC web site will soon provide resources.

The FJC has compiled information from more than 180 CLE conferences on computer-based discovery. Arrangements will soon be made to provide access to this data base for every Civil Rules Committee member.

The National Center for State Courts is pursuing a research project parallel to the FJC efforts, based on focus groups of judges. The FJC is cooperating in this study.

A working group of the Sedona Conference will formulate the views of defense attorneys. The ABA Section of Science and Technology Law is preparing a treatise. And groups of records managers and information technology professionals are creating programs. Many special-interest bar groups also have programs.

No specific rules proposals have yet emerged from these multifarious projects.

"Rule 5.1" — Intervention Notice to Government

Civil Rule 24(c) implements the provisions of 28 U.S.C. § 2403 that direct that a court give notice to the United States Attorney General when the constitutionality of a federal statute affecting the public interest is drawn in question, and likewise give notice to a state attorney general when a state statute is challenged. Appellate Rule 44 implements the statute in somewhat different terms. A "mailbox" suggestion that the Civil Rules might be made parallel to the Appellate Rule has been

supported by the Department of Justice on the ground that there still are a worrisome number of cases in which notice is not provided.

One source of difficulty with Rule 24(c) may arise from its location in the general intervention rule: it is more likely to be noticed by parties who are thinking of intervention possibilities than by parties who are focusing only on challenging a statute. The drafts that have been prepared to illustrate possible changes accordingly have been designated provisionally as a new Rule 5.1.

The Department of Justice has suggested several revisions of the first draft. Responses to those suggestions were not reviewed in time to support further development by the Department. The topic is not yet ripe for consideration by the Committee.

One specific issue was noted. Section 2403 directs the court to certify to the Attorney General the fact that a challenge to a federal statute has been made. Appellate Rule 44 supplements this by directing a party who makes the challenge to notify the circuit clerk, and then directs the clerk to certify the fact of the challenge to the Attorney General. It has been suggested that although the statute imposes the notice obligation on the court, the Rule should impose a parallel obligation on the party. If the party must notify the court, as in Appellate Rule 44, it is simple enough to require that the notice also be sent to the Attorney General. Although the result would be duplicating notices to the Attorney General unless we are prepared to discard the statutory requirement that the court certify the fact of the challenge, the double notice may be valuable.

The Rule 5.1 draft includes several departures from Appellate Rule 44. Because of the general policy that parallel provisions in separate sets of Rules should be parallel, the need to work with the Appellate Rules Committee will be explored.

As with many other ongoing projects to amend the rules, this project will be on a separate track from the style track.

Rule 6(e): "3 days shall be added to the prescribed period"

The Appellate Rules Committee has pointed out the ambiguity of the provision in Civil Rule 6(e) that directs that when service has been made under Rule 5(b)(2)(B), (C), or (D), "3 days shall be added to the prescribed period" for responding. The ambiguity arises from the interplay between this provision and the Rule 6(a) provision that intervening Saturdays, Sundays, and legal holidays are excluded in computing a time period that is less than 11 days. This ambiguity has not been ironed out in the reported cases, which take different approaches.

An additional three days are provided to recognize that there may be some delay when service is made by mail, by deposit with the court clerk, or by electronic means or other means agreed to by the parties. This purpose is served most clearly by providing that the prescribed period begins three days after service is made, or else by providing that it ends three days later than it otherwise would end. Either approach avoids the absurdities that may arise from alternative constructions.

In some circumstances it makes a difference whether three days are added at the beginning or the end of the period, at least when the prescribed term for responding is less than 11 days after service.

It was agreed that the most important consideration is to achieve a clear statement that eliminates any ambiguity.

The central argument for starting the prescribed period three days after service is made — e.g., by mailing — is that the purpose is to reflect the fact that as many as three days may be needed for delivery. And clear, simple drafting is possible.

Some of the lawyers suggested that they had assumed that the three days are added at the end of the period. In some circumstances this will give a greater extension of time than would result from starting the period three days late. It was urged that if this version can be drafted clearly, it is better to achieve clarity on terms that conform with the mode of current practice. Absent any clear reason for making one choice or the other, it is better to adopt the approach that will cause least disruption during the period when many lawyers will continue to adhere to old habits without considering a new rule provision.

It was asked why the problem should not be solved by undoing all of the complicated calculation rules and expanding the periods that now seem too brief unless we exclude weekends and holidays and add time when in-hand or at-home service is not made. This question is frequently asked in discussion of these problems, and has always been resisted. The reasons for resistance are not entirely clear. One problem may be the difficulty of rethinking all of the relevant time periods and setting new, longer, but still arbitrary periods. Another may be that the present system works to set shorter periods in many situations than would result if general periods were set with an eye to accommodating all situations. However that may be, no support was voiced for taking up this chore.

The American Bar Association representatives volunteered to conduct an informal survey of Litigation Section leaders to determine whether there is any common understanding in practice.

Alternative Rule 6(e) drafts will be presented at a 2003 winter or spring Advisory Committee meeting, one starting the period three days late and the other ending the period three days late.

Rule 15(c)(3)

In *Singletary v. Pennsylvania Department of Corrections*, 3d Cir.2001, 266 F.3d 186, the court invited this Committee to consider an amendment of Rule 15(c)(3) identified in an earlier Committee agenda item. The problem arises from the provision that allows relation back of an amendment changing the party or the naming of a party against whom a claim is asserted when, among other things, the new party had notice that but for some "mistake" concerning the identity of the proper party, the action would have been brought against the new party. Several courts of appeals have agreed that when a plaintiff is aware that the plaintiff cannot identify an intended defendant, there is no "mistake." The problem has arisen in a variety of settings. A common

illustration is provided by a plaintiff who believes that police officers have used excessive force against the plaintiff but who cannot identify the police officers to sue. A direct approach to this problem would be to add a few words to Rule 15(c)(3): "but for some mistake or lack of information concerning the identity of the proper party * * *."

The apparently easy amendment may not be so easy. The cases that evoke sympathy are those in which a plaintiff has made diligent efforts to identify the proper defendant within the limitations period, but has failed. There is less reason for concern when a plaintiff simply waits to file on the last day of the limitations period and then sets about identifying a proper defendant. If this omission is to be addressed, the amendment is not quite so simple.

If Rule 15(c)(3) is to be amended, it also must be asked whether some of its other apparent problems should be addressed. Truly perplexing puzzles are posed by the 1991 amendment that set the time for getting notice to the new defendant as "the period provided by Rule 4(m) for service of the summons and complaint." Unraveling these puzzles will be difficult, in part perhaps because they do not appear to have caused any general problems in actual practice.

Yet other questions might be addressed. Rule 15(c)(3) has never been used to address the problems that arise from changing plaintiffs after a limitations period has expired; these problems are not much less difficult than the problems that attend changing defendants. Counterclaims might be addressed. Still other clarifications seem desirable.

A more fundamental set of questions also besets Rule 15(c)(3). Rule 15(c)(1) allows relation back of an amendment whenever relation back is permitted by the law that provides the statute of limitations applicable to the action. The sole purpose of Rule 15(c)(3) is to permit relation back when the statute cannot be interpreted to permit it. This result may seem at odds with the Enabling Act provision that a rule must not abridge, enlarge, or modify any substantive right.

Brief discussion noted that "Doe" pleading in California is disruptive, posing real problems for the courts. It may be used for cases in which the plaintiff knows the identity of an intended defendant but does not know whether there is a cause of action.

But it also was noted that the "lack of information" provision would address a real problem. There are many cases in which a diligent plaintiff is not able, without the help of discovery, to identify a proper defendant. These questions are of interest not only plaintiffs but also to judges, municipal entities, and many others.

These problems are difficult. It may prove desirable to appoint a subcommittee to consider them in greater depth before the Committee considers them further.

Rule 68

A proposal to amend Rule 68 was included in the consent calendar items. The proposal was to make the rule more effective by allowing plaintiffs to make offers; providing sanctions when a plaintiff rejects an offer and then wins nothing; making it clear that the clerk can enter judgment as

to part of a multiparty or multiclaim case; and increasing sanctions by allowing an award of expenses (although not attorney fees) in addition to costs.

It was noted that "Rule 68 has been with us for a long time." The earlier consideration bogged down in elaboration of a complicated proposal to establish a limited provision for attorney-fee sanctions. In its present form, Rule 68 "is an embarrassment." We should either get rid of it, or we should reform it. California practice has an offer-of-judgment provision that is used regularly because it "has teeth" in the form of a discretionary award of expenses, not attorney fees. Expenses for expert witnesses can be a "huge weapon" in encouraging settlement. Plaintiffs as well as defendants can make offers. The device is useful after judgment as well as before trial — expense sanctions are traded away for dismissal of an appeal.

It was observed that any proposal that includes attorney-fee sanctions will produce strong reactions.

It was asked whether an improved Rule 68 should address the issue-preclusion effects of a judgment based on an offer of settlement. One possibility would be to permit an offer that includes an agreement on issue preclusion as a means of making settlement more nearly equivalent to victory at trial.

It was decided to carry the Rule 68 questions forward for consideration at a later meeting.

Admiralty Rules

Rule B: Admiralty Rule B(1)(a) provides for attachment in an in personam admiralty action. Attachment serves two purposes. It can establish quasi-in-rem jurisdiction in an action that cannot be supported by personal jurisdiction. It also provides security. The security function can be served even in an action supported by personal jurisdiction because B(1)(a) attachment does not depend on the ability to command personal jurisdiction. Instead, the availability of attachment turns on whether the defendant is "found" in the district. A defendant is "found" only if subject to service in person or through an agent. This circumstance makes it important to fix the moment for determining whether a defendant can be "found" in the district. A defendant not found in the district when an demand for attachment is made may seek to appoint an agent for service so as to avoid attachment. Two courts of appeals have ruled that the determination should be made at the moment when a verified complaint praying for attachment is filed. It was suggested at a Standing Committee meeting that Rule B should be amended to reflect these rulings. The Maritime Law Association has joined in supporting the recommendation.

Discussion noted that the Rule B concept of finding a defendant in the district does not depend on temporary absence — a defendant generally to be found in the district is not subject to attachment simply because absent for a day.

It also was noted that there may be special reasons for affording a special pre-judgment security remedy in admiralty cases: "enforcement of a personal judgment may be more difficult, more often."

The proposed amendment was recommended to the Standing Committee for publication, aiming toward adoption in the ordinary course.

Rule C: Admiralty Rule C(6)(b)(i)(A) has recently been amended as part of the process that separated forfeiture proceedings from true maritime proceedings in many parts of the Supplemental Rules. Unfortunately, unthinking parallelism with the provisions adopted for forfeiture led to inclusion of a provision that has no meaning. As adopted, a person who asserts a right of possession or an ownership interest in property that is the subject of an admiralty in rem action must file a verified statement "within 10 days after the earlier of (1) the execution of process, or (2) completed publication of notice under Rule C(4)." The difficulty is that Rule C(4) requires publication of notice only if attached property is not released within 10 days after execution of process. Because notice does not even begin until 10 days after execution of process, there cannot be any situation in which Rule C(4) notice is completed earlier than the execution of process.

This drafting oversight is easily corrected: "within 10 days after ~~the earlier of (1)~~ the execution of process, ~~or (2) completed publication of notice under Rule C(4),~~ or * * *."

It was asked whether this change should be pursued without publication, as a technical amendment. Immediate correction would be helpful to protect practitioners against the waste of time entailed in a fruitless effort to find meaning for the material proposed to be stricken. Publication, on the other hand, will do the same job: the admiralty bar is small, and pays attention to these matters. Publication of the proposal will call attention to the issue and resolve it effectively in practice. Publication, indeed, can be accomplished earlier than an amendment could be made with no publication — the seemingly longer process may in fact provide earlier effective relief. Since the Rule B proposal is appropriate for publication, this proposal may better be published as well.

Proposed Rule G: The Department of Justice has proposed that all the explicit Supplemental Rules provisions for civil forfeiture proceedings be stripped out of Rules A through E and gathered together in a new Rule G. The Maritime Law Association position is that this approach is appropriate so long as nothing is done to alter procedures for maritime cases; there is some uncertainty whether it would be better to make Rule G entirely self-contained, or whether instead to permit it to incorporate by reference any provisions in Rules A through E that may be useful to supplement its explicit provisions.

Drafting in this sensitive area is not a simple matter. After several revisions of the initial draft, a polished version was circulated for comment to the National Association of Criminal Defense Lawyers and an American Bar Association section. The National Association of Criminal Defense Lawyers was active in commenting on the forfeiture provisions in the Criminal Rules, pursuing its comments to the level of the Judicial Conference, and responded to the Rule G draft with lengthy,

detailed, and thoughtful comments. The Admiralty Rules Subcommittee will be reconstituted as a forfeiture rule subcommittee for the purpose of considering the best ways to consider these comments, and whether to reach out to other groups for further comments. It is difficult to predict whether this process can lead to a draft ready for publication by the time of the spring 2003 meeting.

Respectfully submitted,

Edward H. Cooper
Reporter

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

ANTHONY J. SCIRICA
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

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JERRY E. SMITH
EVIDENCE RULES

TO: **Hon. Anthony J. Scirica, Chair**
Standing Committee on Rules of Practice and Procedure

FROM: **Edward E. Carnes, Chair**
Advisory Committee on Federal Rules of Criminal Procedure

SUBJECT: **Report of the Advisory Committee on Criminal Rules**

DATE: **December 11, 2002**

I. Introduction

The Advisory Committee on the Rules of Criminal Procedure met on September 26-27, 2002, in Cape Elizabeth, Maine and took action on a number of proposed amendments to the Rules of Criminal Procedure. The Minutes of that meeting are included at Appendix A.

This Report addresses several informational items. The Committee has no items requiring action by the Standing Committee.

II. Information Item—Approval of Style and Substantive Changes to Rules of Criminal Procedure

On December 1, 2002, the restyled Rules of Criminal Procedure went into affect, without any amendments by Congress. Congress did enact legislation amending Rule 16, to replace the language inadvertently deleted in the restyling project.

III. Information Item—Comment Period on Proposed Amendments to Rule 41. Search Warrants.

At its June 2002 meeting in Washington, the Standing Committee approved for comment several proposed amendments to Rule 41. Those amendments would cover tracking device warrants and authority to delay the giving of notice. The comment period on these proposed amendments ends on February 15, 2003. To date, very few comments have been received on them. The Committee anticipates presenting these amendments to the Standing Committee at its June 2003 meeting.

IV. Information Item—Comment Period on Proposed Substantive and Restyling Amendments to Rules Governing § 2254 Proceedings and Rules Governing § 2255 Proceedings and Accompanying Forms.

In addition to approving for publication proposed amendments to Rule 41, the Standing Committee at its June 2002 meeting also approved for publication the restyled Rules Governing § 2254 Proceedings and Rules Governing § 2255 Proceedings and the forms accompanying those rules. In addition to changes related to the restyling effort, the Advisory Committee had proposed several substantive changes to those rules. The comment period for these proposed amendments ends on February 15, 2003, and the Committee anticipates presenting these amendments to the Standing Committee at its June 2003 meeting.

V. Information Items —Consideration of Proposed Amendments to Rules

A. Rule 35. Correcting or Reducing a Sentence.

Prior to the restyling efforts for the Rules of Criminal Procedure, Rule 35(c) permitted the court to correct an error in the sentence within 7 days of the "imposition of sentence." In August 2000, as part of the restyling project, Rule 35(c) was moved to Rule 35(a) and the term "sentencing" was substituted for "imposition of sentence." That revision, which was not intended to make any change in practice, took effect on December 1, 2002. While the rule was out for public comment, as part of the comprehensive style package, the Committee gave further consideration to that amendment, at the urging of the Appellate Rules Committee which was concerned because the triggering event for appeal purposes was the entry of the judgment.

In June 2001, the Standing Committee approved publication of a proposed amendment to Rule 35. In that amendment, proposed new Rule 35(a) includes a definition of "sentencing"—only for purposes of Rule 35. Under that rule, sentencing means "entry of the judgment." The Comment period for that proposed amendment ended on February 15, 2002. The Committee received only seven written comments.

The Circuits are split on the question of what the term "sentencing" means in relation to the 7-day rule in Rule 35. The majority view (six circuits) is that the 7-day period is triggered by the oral pronouncement of the sentence. The minority view (one circuit), and the one adopted in the proposed amendment, is that the period commences with the entry of the judgment. The Committee opted for the latter position in order to make the rule more consistent with Appellate Rule 4 and any other rules that might specify when the right to appeal is triggered.

At its April 2002 meeting the Committee considered the public comments and the caselaw on the topic and determined that for purposes of Rule 35, the term sentencing should mean "oral announcement of the sentence," which is the position of the majority of the circuits. Rather than including a special definition for sentencing in the Rule itself, the Committee decided to substitute the term "oral announcement of the sentence" whenever the term "sentencing" was used. After the meeting, it became apparent that approach presented drafting problems.

At its September 2002 meeting, the Committee reconsidered its position and voted to continue the "definitional" approach in Rule 35, but to define sentencing for the purposes of that rule as the "oral announcement of the sentence." This amendment will be presented to the Standing Committee at its June 2003 meeting, with a recommendation that it be forwarded to the Judicial Conference.

B. Rule 12.2. Notice of Insanity Defense; Mental Examination

The Committee is considering an amendment to Rule 12.2 concerning sanctions in those cases where the defense fails to disclose the results of a mental examination conducted by the defense expert.

C. Rules 29, 33, and 34; Proposed Amendments re Rulings by Court

Rules 29, 33, and 34 require that motions under them be filed within 7 days of the times specified in those rules. In the alternative the moving party may obtain an extension of time for filing the motions, but the court must grant the extension and fix a new due date within the original 7-day period specified in each rule. The Committee is considering circumstances such as the case where the defendant files a request for an extension of time within the 7 days but due to the judge's illness or absence, the court does not, within the 7-day limit, extend the deadline. At least one Circuit had ruled that the 7-day limit is jurisdictional.

D. Rule 32.1. Revoking or Modifying Probation or Supervised Release

Currently, there is no provision in Rule 32.1 for the defendant's right to allocution. The Committee has decided to recommend an amendment to Rule 32.1 to

provide for the right of allocution. An amendment is being drafted and will be on the agenda for the Committee's Spring 2003 meeting.

E. Proposed Rule Regarding Appeal of Rulings by Magistrate Judges

The Committee has decided to proceed with drafting an amendment, or possibly a new rule, that would parallel Rule of Civil Procedure 72(a), which addresses what counsel must do to preserve an issue for appeal from a magistrate judge's rulings on nondispositive and dispositive matters. The Committee is also considering the issue of whether to address explicitly in that rule the question of magistrate judges taking guilty pleas in felony cases. At its September 2002 meeting, the Committee agreed tentatively on some key language, which has been presented to the Committee on the Administration of the Magistrate Judges System for its consideration and comment.

Attachment:

A. Minutes of April 2002 Meeting

APPENDIX A
[Minutes of September 2002 Meeting]

MINUTES (DRAFT)
of
THE ADVISORY COMMITTEE
on
FEDERAL RULES OF CRIMINAL PROCEDURE

September 26-27, 2002
Cape Elizabeth, Maine

The Advisory Committee on the Federal Rules of Criminal Procedure met at Cape Elizabeth, Maine on September 26 and 27, 2002. These minutes reflect the discussion and actions taken at that meeting.

I. CALL TO ORDER & ANNOUNCEMENTS

Judge Carnes, Chair of the Committee, called the meeting to order at 8:30 a.m. on Thursday, September 26, 2002. The following persons were present for all or a part of the Committee's meeting:

Hon. Edward E. Carnes, Chair
Hon. John M. Roll
Hon. Susan C. Bucklew
Hon. David G. Trager
Hon. Harvey Bartle III
Hon. Tommy E. Miller
Prof. Nancy J. King
Mr. Robert B. Fiske, Esq.
Mr. Donald J. Goldberg, Esq.
Mr. Lucien B. Campbell
Mr. Eric Jaso, designate of the Asst. Attorney General for the Criminal Division, Department of Justice
Prof. David A. Schlueter, Reporter

Also present at the meeting were: Hon. A. Wallace Tashima, member of the Standing Committee and liaison to the Criminal Rules Committee; Professor Daniel Coquillette, Reporter to the Standing Committee; Mr. Peter McCabe and Mr. James Ishida of the Administrative Office of the United States Courts, Mr. John Rabiej Chief of the Rules Committee Support Office of the Administrative Office of the United States Courts; Ms. Laurel Hooper, of the Federal Judicial Center; and Mr. Jonathan Wroblewski from the Department of Justice.

Judge Carnes welcomed Mr. Eric Jaso to the Committee, as the designated representative of the Assistant Attorney General for the Criminal Division of the Department of Justice.

II. APPROVAL OF MINUTES

Judge Roll moved that the minutes of the Committee's meeting in Washington, D.C. in April 2002 be approved. The motion was seconded by Judge Miller and following minor corrections to the Minutes, carried by a unanimous vote.

III. RULES PENDING BEFORE THE CONGRESS

Professor Schlueter informed the Committee that the package of Style amendments to Rules 1-60, the proposed substantive amendments to Rules 5, 10, 12.2, 12.4, 30, and 35; and the more recently proposed amendments to Rules 6 and 41, were pending before Congress. He noted that if Congress makes no changes to the Rules, they would be effective December 1, 2002. He stated that language missing from Rule 16, concerning reciprocal discovery of certain expert testimony, would hopefully be re-inserted into Rule 16 through pending legislation. He explained that the language had been added to Rule 16 in 1997, shortly before the style consultants worked up their first draft of the restyled rules; because the new language had not been in their working draft, the language was inadvertently deleted from later drafts and the final product.

IV. RULES PUBLISHED FOR PUBLIC COMMENT: RULE 41 AND THE HABEAS RULES.

Professor Schlueter informed the Committee that in June the Standing Committee had approved the Committee's recommendation that Rule 41 (tracking-device warrants) and the restyled habeas rules be published for public comment. He added that the proposed amendments had been published in August and that the deadline for public comments was February 15, 2003, and that a public hearing is currently scheduled for January 31, 2003 in Atlanta, Georgia.

V. PENDING PROPOSED AMENDMENTS TO RULES

A. Rule 12.2. Sanctions for Failure to Discovery Provisions

The Reporter noted that Mr. Pauley had written to the Committee in July 2001 suggesting that the revised Rule 12.2, currently pending before the Supreme Court, was missing a sanction provision for those cases where the defense fails to disclose the results of a mental examination conducted by the defense expert. The issue had been discussed briefly at the April 2002 meeting and Judge Carnes had asked him to draft language for the Committee's consideration.

The Committee discussed the proposed language and noted that the suggested language might be overbroad, which in turn raised the question whether the current sanction provisions are also overbroad. Following additional discussion, Judge Carnes appointed a subcommittee consisting of Mr. Campbell and Mr. Jaso to work with the Reporter in drafting alternative language that could be considered by the Committee at its Spring 2003 meeting. There was also some discussion about whether the Committee Note for that amendment should address the issue of granting a continuance in order to provide for review of reports compiled under the Rule.

B. Rules 29, 33, and 34; Proposed Amendments re Rulings by Court

Judge Carnes noted that published agenda for the meeting included continued discussion of proposed amendments to Rules 29, 33, and 34. In the absence of Judge Friedman, however, he indicated that those proposals would carried over until the Spring 2003 meeting.

C. Rule 32. Victim Allocution

Judge Miller raised the question about whether Rule 32 should be amended to provide for victim allocution in felony cases not involving violence or sexual abuse. He pointed out that a recent law review article by Professor Joyce W. Barnard in 77 Notre Dame L. Rev. 1 (2001) made a good case for expanding the right of victims to be heard during sentencing. Judge Bucklew responded that victims in economic crimes generally wish to be heard and that she normally permits them to address the court. Judges Trager and Bartle agreed with that view. Mr. Goldberg noted, however, that he is aware of judges who do not permit victims of non-violent crimes to address the court.

The Reporter provided some historical background on the current provision in Rule 32, noting that Congress had added it in 1994. Mr. Campbell believed that the author of the article had not made a case for those situations where the judge denies a victim the right to allocution and that the article seems to broaden the purposes of Rule 32 itself; for example, to permit victims to regain their sense of dignity. Mr. Fiske stated that the issue should be left to individual judges. Professor King agreed with Mr. Campbell's assessment of the proposal and was reluctant to draft a "must" requirement into the rule, for fear of generating litigation in those cases where the judge, for a variety of reasons, decides to limit allocution.

Following additional comments, Mr. Fiske moved to amend Rule 32 to expand victim allocution to non-violent and non-sexual abuse felonies. Judge Miller seconded the motion, which carried by a vote of 8 to 2. The Reporter was asked to draft the proposed language for consideration at the Committee's meeting in Spring 2003.

Mr. Jaso noted that the Sentencing Commission was in the process of reviewing the issue of how to best handle those cases involving a large number of victims.

D. Rule 32.1; Right of Allocution

Judge Carnes stated that in March 2002, he had provided the Committee with a copy of *United States v. Frazier*, 283 F.3d 1242 (11th Cir. 2002), where the court observed that there is no explicit provision in Rule 32.1 for the defendant's right to allocution; he pointed out that the court had recommended that the Advisory Committee might wish to address that issue. At the April 2002 meeting, the Committee had voted 12-0 to amend Rule 32.1. In response to that vote, the Reporter had drafted proposed language, that would add a new Paragraph (E) in Subdivision (b)(2).

The Reporter observed that although the Committee had addressed only the question of allocution rights at revocation hearings, a similar provision might be appropriate at proceedings to modify a sentence. The Committee agreed with that view and suggested that there were several possible alternatives: first, to blend Rule 32.1(b) and (c) together; second, to simply add language in existing (c)(1) that would parallel new language in Rule 32.1(b)(2)(E); or third, cross-reference the rights listed in (b)(2). Judge Carnes asked the Reporter to work up an additional draft and present it to the Committee at its Spring 2003 meeting.

E. Rule 35; Definition of Sentencing.

The Reporter provided a brief history of the pending amendment to Rule 35. Although the restyled Rule 35 had been approved by the Supreme Court and forwarded to Congress, the Advisory Committee believed it important to move forward with another amendment to Rule 35 that would more clearly spell out the starting point for the 7-day period for correcting a clear error in the sentence. Thus, the proposed new Rule 35(a), published for comment in 2001, includes a definition of "sentencing"—only for purposes of Rule 35. In response to that published amendment, the Committee had received seven written comments, which were mixed. The Department of Justice, the Federal Bar Association, the Committee on the U.S. Courts of the State Bar of Michigan, and the NACDL opposed the amendment. On the other hand, the State Bar of California Committee on Federal Courts, the Federal Magistrate Judges Assn., and Judge David Lawson endorsed the amendment.

He pointed out that, as reflected in the comment submitted by the Department of Justice, the Circuits are split on the question of what the term "sentencing" means in relation to the 7-day rule in Rule 35. The majority view (six circuits) is that the 7-day period is triggered by the oral pronouncement of the sentence. The minority view (one circuit), and the one adopted in the proposed amendment, is that the period commences with the entry of the judgment. He noted that the Committee had opted for the latter position in order to make the rule more consistent with Appellate Rule 4 and any other rules that might specify when the right to appeal is triggered.

The Reporter continued by noting that at the April 2002 meeting a motion to adopt the minority position and substitute the term "entry of judgment" throughout the rule had failed by a vote of 4 to 6. But a motion to revise the amended rule by dropping the definitional provision in proposed Rule 35(a) and use the term "oral announcement" throughout the rule, passed by a vote of 6 to 4. At that meeting the Reporter responded that he would make the necessary changes in the Rule and the Committee Note and circulate the draft for the Committee's consideration. However, after attempting to implement the Committee's vote, it became apparent that simply substituting the term "oral announcement of the sentence" throughout the rule would be very awkward.

The Committee again briefly discussed the problems of drafting the amendment and reaffirmed its desire to adopt the view held by six circuits that any changes to the sentence must be made within 7 days of the oral announcement of the sentence. Judge Roll moved that the proposed amendment be altered to include a definitional provision that would indicate that for purposes of Rule 35, the term "sentencing" means "oral announcement of the sentence." That motion carried by a vote of 7 to 2, with one abstention.

F. Proposed Rule Addressing Review of Magistrate Judges' Decisions

1. Requirement for Moving Party to Object to Magistrate Judge's Rulings in Order to Preserve Issue for Review

Judge Miller provided a brief history of the proposed new rule that would address the issue of review of magistrate judge decisions: Judge Tashima had originally proposed that the Committee consider adding a new rule to the Rules of Criminal Procedure that would parallel Rule of Civil Procedure 72(a). The Civil Rule addresses what counsel must do to preserve an issue for appeal from a magistrate judge's rulings on nondispositive, pretrial matters. The issue had been raised in *United States v. Abonce-Barerra*, 257 F.3d 959, 969 (9th Cir. 2001) (court noted absence of such a rule and concluded that in criminal cases, unlike civil cases, a defendant is not required to appeal a magistrate judge's decision to the district judge in order to preserve the matter for appeal). At its April 2002 meeting, the Committee had voted 11 to 1 to consider the issue further. In response to that vote, Judges Miller and Roll had been asked to draft appropriate language for the Committee's consideration.

In a memo on the subject, Judges Miller and Roll, had recommended that the proposed language be placed in a new Rule 12(i).

Judge Miller explained that the draft distinguished between rulings on dispositive and non-dispositive matters. Judge Carnes raised the question about the status of the proposed revisions to Civil Rule 72; Judge Trager thought it best not to wait on any potential revisions to that rule. Following a brief discussion on the question of whether a magistrate judge's rulings on Batson would be considered non-dispositive or dispositive, Judge Roll commented that he believed that there seemed to be no statutory impediment

to drafting a rule and that the Committee should proceed with proposing language for public comment.

Mr. Campbell observed that the cure of drafting a rule could be drastic and costly. He expressed concern about whether a rule could adequately address all of the issues and that the practice varies greatly from district to district and from judge to judge. He added that depending on how the rule was drafted, a District Court might have to rule on an issue twice. Judge Miller responded that less than 5% of motions are challenged on appeal in civil cases. The Committee also briefly discussed potential problems with placement of the rule.

Judge Roll moved that the Committee approve a rule that would specify that in order to preserve a magistrate judge's ruling on a nondispositive matter, an objection to that ruling would be required, and that the rule specify the procedure for filing an objection. Mr. Goldberg seconded the motion, which passed by a vote of 9 to 1.

Following additional brief discussion, Judge Miller moved that the Committee approve a similar rule for addressing dispositive matters. Mr. Fiske seconded the motion, which carried by a vote of 10 to 0.

The Committee discussed possible style changes to the language proposed by Judges Miller and Roll and also decided to include language from Rule 30(d), addressing reviewability of objections not raised.

2. Authority of Magistrate Judges to Take Felony Guilty Pleas

Judge Miller stated that the proposed draft of the new magistrate's rule included explicit recognition of the ability of magistrate judges to take guilty pleas in felony cases —a matter of some controversy. He noted that in 46 Districts, taking guilty pleas in felony cases is significant part of a magistrate judge's duties. Judge Roll added that the Circuits are not uniform in their approach to the ability of magistrate judges to take guilty pleas. The majority view, he said, is that if the magistrate judge takes a change of plea, the magistrate is required to prepare a report and recommendation only if the defendant objects. In that case, the district judge conducts a de novo review; that is similar he said, to a magistrate judge's disposition of a matter following an adversarial-type hearing on a dispositive motion or matter. In contrast, the Ninth Circuit requires de novo review in every case. Judges Miller and Roll noted that over the years the various Committees of the Judicial Conference had taken different positions on the issue. In a response to a question from Judge Carnes, Judge Roll indicated that the percentage of cases where there is an objection is very small.

Judge Tashima observed that because there is no specific statutory authorization for magistrate judges taking felony guilty pleas, there may be a real issue of whether a rule could authorize that practice. He stated, however, that an argument could be made that under the catchall provision in § 636, a magistrate judge would probably be

authorized to take such pleas. Several members commented that if the Committee were to draft a rule, it would be important that the Committee Note address the possible interplay between conditional pleas and filing objections to the magistrate judge's actions in taking the plea. Several members noted that the rule could affect literally thousands of cases, considering the volume of felony guilty pleas being heard by magistrate judges.

Judge Bartle commented that the Ninth Circuit may be taking a position on substantive law regarding the ability of a magistrate judge to take a felony guilty plea; he added that he was not sure what the Third Circuit's position would be on the issue. He was concerned in general with the issue of whether the Committee might be exceeding its authority. Professor Coquillette pointed out that on the merits, the idea of including reference in the rule to the ability of a magistrate to take a felony guilty plea was worthwhile. Nonetheless, it seemed clear to him that the Supreme Court would review the constitutionality issue before forwarding any amendment to Congress. Thus, he noted, the Committee should be prepared for a constitutional attack.

Judge Bucklew stated that in her practice the magistrate obtains the defendant's waiver, takes the plea, and prepares a report and recommendation which is forwarded to the district judge. If no objection is made, the judge accepts the plea. In three of four years of using that practice, there had not been any objections.

Mr. Campbell observed that he had not detected any pressure in either direction, either to waive or not waive the right to plead guilty before a district judge. Mr. Jaso indicated that the position of the Department of Justice would be that the defendant's consent would avoid the constitutional question. Judge Miller responded that he had provided a draft to the Magistrate Judges division and that they had suggested including a specific provision on waiver. He added that the only objection had come from magistrate judges in the Tenth Circuit, which recommended leaving out any language regarding guilty pleas.

Mr. Goldberg commented that although there seemed to be a clear trend to permitting magistrate judges to take felony guilty pleas, from the defense standpoint he could not imagine not wanting to see the judge who would do the sentencing. He also questioned whether a defendant could ever truly consent to letting a magistrate judge take the plea. In that regard, several members of the Committee commented on whether including a period for filing any objections would protect a defendant who had a change of heart about letting the magistrate judge take the plea.

Judge Carnes noted that there were some potential issues regarding the jurisdiction of the Committee to draft the rule. He added that if the Committee were inclined to address the topic of guilty pleas in the proposed "magistrate's rule," the matter would be forwarded to the Committee on the Administration of the Magistrate Judges System for its comments and suggestions.

Following additional discussion, Judge Trager moved that the Committee include a specific reference to the ability of magistrate judges to take felony guilty pleas. Mr. Jaso seconded the motion, which carried by a vote of 9 to 1.

VI. OTHER RULES AND PROJECTS PENDING BEFORE ADVISORY COMMITTEES, STANDING COMMITTEE AND JUDICIAL CONFERENCE

A. Congressional Consideration of an Amendment to Rule 46.

Mr. Rabiej briefly reported that Congress was considering an amendment to Rule 46, urged by bail bondsmen that would potentially limit the ability of judges to send conditions for release, other than for failure to appear in court. That issue, he explained by had been raised before and the Committee had presented its view through former chair, Judge Davis, who had asked Congress to defer to the Rules Enabling Act process. The Committee, in turn, had rejected any such limitation in the rule itself. Mr. Rabiej added that the bail bondsmen were concerned that if left intact, Rule 46 might serve as the basis for similar treatment in state practice.

Judge Carnes indicated that he would testify on the matter and back the Committee's version of the Rule. Following additional discussion, there was a consensus that the Committee would not present any alternative language or position to Congress.

B. Civil Rules Style Project; Experiences with Criminal Rules

Judge Carnes informed the Committee that the Civil Rules Committee was proceeding with its restyling of all of the civil rules and that they had asked for comments and suggestions from the Criminal Rules Committee, based on its experiences in restyling the criminal rules. During the ensuing discussion, the members made the following summarized suggestions and comments:

- Be mindful of continuity issues, which are critical. Someone should insure that the approach in rules restyled early in the process are carried forward to later rules.
- Make decisions and stick with those decisions, rather than constantly changing positions.
- Develop a Committee "style book" that reflects Committee decisions made early in the process;
- The Department of Justice representative provided helpful continuity;
- Decide whether the proposed change is substantive or stylistic in nature;
- Prepare written history or record of changes made to rules throughout the process, in order to better track language that was either deleted or included;
- It was helpful to use subcommittees to do the initial reviews of the drafts;

- It was helpful to use the computer during the Committee meetings to make the changes to the various drafts; that process permitted all of the participants to follow the suggested changes;
- It was important to permit the subject matter experts to take the lead in discussing amendments to the rules;
- It was frustrating to deal with last-minute changes to the rules; the Committee should consider adopting "drop-dead" deadlines for phases of projects;
- Encourage the Chief Justice to extend terms of members involved in the project in an attempt to provide continuity during the project; and
- Overall, restyling the Criminal Rules was a very worthwhile project and a very satisfying work product.

Judge Carnes stated that he and the Reporter would pass those comments along to the Civil Rules Committee.

VII. DESIGNATION OF TIME AND PLACE OF NEXT MEETING

The Committee tentatively agreed to hold its next meeting in April 2003, at a location to be determined, depending on availability of accommodations.

Respectfully submitted

David A. Schlueter
Professor of Law
Reporter, Criminal Rules
Committee

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

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CHAIR

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TO: **Honorable Anthony J. Scirica, Chair**
Standing Committee on Rules of Practice and Procedure

FROM: **Jerry E. Smith, Chair**
Advisory Committee on Evidence Rules

DATE: **December 5, 2002**

RE: **Report of the Advisory Committee on Evidence Rules**

I. Introduction

The Advisory Committee on Evidence Rules (the "Committee") met on October 18, 2002, in Seattle, Washington. It worked on and reviewed a number of possible long-term projects, but it is not proposing any action items for the Standing Committee at its January 2003 meeting. The proposed amendment to Evidence Rule 804(b)(3) is still in the public comment period, so no action is required on that proposal at this time. At its Spring 2003 meeting, the Committee will consider the comments received on the proposed amendment to Rule 804(b)(3) and will determine how and whether to proceed with the proposal.

Part III of this Report provides a summary of the Committee's long-term projects. A complete discussion can be found in the draft minutes of the October meeting, attached to this Report.

II. Action Items

No Action Items

III. Information Items

A. Long-Term Project on Possible Changes to Evidence Rules

The Committee has directed the Reporter to review scholarship, caselaw, and other sources of evidence law to determine whether there are any evidence rules that might be in need of amendment. At its April 2002 meeting, the Committee reviewed a number of potential changes and directed the Reporter to prepare a report on a number of different rules, so the Committee could take an in-depth look at whether those rules require amendment. The Committee's decision to investigate those rules is not intended to indicate that the Committee has agreed to propose any amendments. Rather, the Committee determined that with respect to those rules, a more extensive investigation and consideration is warranted.

At its October 2002 meeting, the Committee began to consider the Reporter's memoranda on some of the rules that have been found worthy of in-depth consideration. The Committee agreed that the problematic rules should be considered over the course of four Committee meetings and that if any Rules are found in need of amendment, the amendment proposals would be delayed in order to package them as a single set of amendments to the Evidence Rules. This would mean that the package of amendments, if any, would go to the Standing Committee at its June 2004 meeting, with a recommendation that the proposals (again, if any) be released for public comment.

The Committee considered reports on a number of possibly problematic evidence rules at its Fall 2002 meeting. The goal of the Committee was not to vote definitively on whether to propose an amendment to any of those Rules, but rather to determine whether to proceed further with the rules as part of a possible package of amendments. Thus, a "no" vote from the Committee meant rejection of any proposed amendment. A "yes" vote meant only that the Committee was interested in further inquiry into a possible amendment and might consider possible language for an amendment at a later date.

The Committee voted to reject the following proposals:

1. *Rule 106:* Commentators have suggested that Rule 106, the rule of completeness, should be expanded to cover oral as well as written statements. But the Committee determined that such a change would be unnecessarily disruptive to the order of proof at a trial.

2. *Rule 412*: The rule has certain stylistic and technical anomalies, and it has been suggested that the rule be amended to correct those anomalies. But the Committee determined that those tech-

nical matters have not created any practical problems in the application of the rule, so the costs of an amendment are not justified. The Committee also rejected a proposed amendment that would have clarified whether false claims of rape were covered by the Rule 412 exclusionary rule. The question of the admissibility of false claims has not arisen with sufficient frequency to justify the costs of an amendment.

3. *Rule 803(4)*: The Committee considered and rejected a proposal that would have excluded from this hearsay exception (covering statements to medical personnel) those statements made solely for purposes of litigation. The Committee determined, among other things, that it would be too difficult to distinguish between statements made solely for purposes of litigation and statements made for purposes of both treatment and litigation. The Committee also concluded that, to the extent the amendment would be intended to exclude statements made by victims of child abuse to medical personnel for purposes of litigation, this is an enormously complicated question that is better left to caselaw development.

4. *Rule 804(a)(5)*. The rule establishes a "deposition preference" for hearsay exceptions premised on unavailability. Occasionally, this preference has led to anomalous results—hearsay statements otherwise admissible as declarations against interest under Rule 804(b)(3) have been excluded when the declarant has given a deposition on the subject, and the asserted ground of unavailability is absence. The Committee determined that although the rule has created problems and anomalous results from time to time, those cases are relatively infrequent. The problems were not found to be so serious or prevalent as to justify the costs of an amendment.

5. *Rule 804(b)(1)*. The rule provides that in a civil case, prior testimony may be admitted against a party who had a similar motive to develop the testimony at the time it was given, or whose "predecessor in interest" had such a motive. The courts have divided over whether the term "predecessor in interest" is broad enough to cover parties in a prior litigation with no legal relationship to the party against whom the testimony is now offered, but whose development of that testimony was as effective as the current party could have done. The Committee determined that it was not necessary to propose an amendment to the rule, because any dispute among the courts over the scope of the rule is one of form rather than substance. Courts that have refused to interpret "predecessor in interest" expansively nonetheless admit prior testimony under the residual exception where the party who initially cross-examined the declarant was as effective as the current party could have been.

6. *Rule 807*. It has been suggested that the residual exception to the hearsay rule should be modified to clarify both the breadth of the exception and the notice requirement of the Rule. The Committee determined that the breadth of the residual exception presented a policy question that most courts had already worked through—therefore an amendment on this ground was unjustified. As to notice, the Committee noted that courts have applied the notice requirement flexibly even

though the language of Rule 807 does not seem to permit excuses for late notice or the failure to notify. The Committee determined that it might be useful to change the language of the text to codify the result already reached by the courts, but the benefits of such codification would be outweighed by the costs of an amendment. Those costs including the risk of upsetting settled expectations and the risk that the amendment will be misinterpreted as broader than intended.

7. *Rule 902(1).* This rule contains a possible stylistic anomaly, because it provides for self-authentication of domestic public records of the Canal Zone. Because there is no longer a Canal Zone, it has been suggested that the rule be amended to delete the reference. The Committee decided not to proceed with an amendment to the rule, however, because such an amendment would be the kind of stylistic, non-substantive change that the Committee has decided, as a matter of policy, is insufficient to justify, on its own, the substantial costs of amending an evidence rule.

The Committee also rejected, at least tentatively, a proposal to provide for self-authentication of public documents without the necessity of affixing a seal. The former Justice Department representative on the Committee had suggested that the Rule should be amended, because many state officials who certify documents no longer use a seal; but to this date, the Department has made no showing that the sealing requirement has created a problem in practice. The Committee invited the DOJ representative to look into the matter to determine whether DOJ lawyers were in fact having a substantial problem in complying with the sealing requirement. Any further consideration of an amendment to Rule 902(2) was tabled pending a report from the DOJ representative.

Finally, the Committee rejected a proposal to amend Rule 902(6) to permit self-authentication of internet materials that serve the same function as printed newspapers or periodicals. The Committee reasoned that a party can authenticate internet materials by making the necessary showing of authenticity under Rule 901. The benefits of permitting self-authentication in this single area were found to be outweighed by the cost of amendment. Moreover, Committee members expressed concern that there might be legitimate questions concerning the authenticity of material taken from the internet, as distinguished from printed newspapers that are obviously likely to be authentic.

8. *Rule 1006.* The Committee observed that there has been some confusion in distinguishing between summaries admissible under Rule 1006 and summaries of evidence already admitted at trial. Summaries of evidence admitted at trial are demonstrative or pedagogical devices that are not governed by Rule 1006. It has been argued that Rule 1006 should be amended to clarify that it does not apply to summaries of evidence admitted at trial. But the Committee decided not to proceed with an amendment to Rule 1006, because it concluded that any confusion among litigants as to the scope of the Rule has been handled adequately by the courts and has not created a problem that affected any result in the reported cases. Thus, any problem is one of form rather than substance and does not justify the substantial costs of an amendment to an evidence rule.

The Evidence Rules Committee voted to give further consideration to the following proposals:

1. *Rule 106*: The Committee agreed to further consider a proposal to provide that evidence necessary to complete a misleading written statement could be admissible even if it is hearsay. The Committee instructed the Reporter to determine whether the apparent conflict in the circuits about the use of Rule 106 has actually led to a difference in result in the cases.

2. *Rule 404(a)*: The Committee resolved to inquire further into whether an amendment is necessary to clarify that evidence of character is never admissible to prove a person's conduct in a civil case. The text of Rule 404(a) seems to prohibit the circumstantial use of character evidence in a civil case, and yet two circuits have held that such evidence is admissible when a defendant is charged by the plaintiff with what amounts to criminal activity.

3. *Rule 408:* The Committee agreed to investigate whether an amendment to Rule 408, which limits the admissibility of evidence of settlement and compromise, is necessary. Currently there is substantial dispute over three important questions: a) whether evidence of a civil compromise is admissible in subsequent criminal litigation; b) whether statements made during settlement negotiations can be admitted to impeach a party for prior inconsistent statement; and c) whether an offer to settle can be admitted in favor of the party who made the offer. The Reporter's memorandum on Rule 408 indicated that there is direct conflict in the caselaw on all three of these questions; that the conflicts on each of these issues raise important policy questions about the need to encourage settlement and the intent of Rule 408; and that each of the problems derives from the fact that the current Rule 408 is (as is widely acknowledged) poorly drafted.

4. *Rule 410:* The Committee agreed to consider whether Rule 410—the rule that, among other things, limits the admissibility of statements and offers made during guilty plea negotiations—could be amended to cover the statements and offers of prosecutors as well as defendants and defense counsel. Currently the rule does not protect statements and offers of prosecutors from admissibility at trial. Some courts have relied on Rule 408 to provide such protection, but that rule plainly is applicable only to offers and settlements made in civil litigation. The Committee resolved, at least tentatively, that the policy of encouraging plea bargaining would be furthered by providing protection for the statements of all of the parties to a plea negotiation.

5. *Rule 806*: The Rule provides that if a hearsay statement is admitted under a hearsay exception or exemption, the opponent may impeach the hearsay declarant to the same extent as if the declarant were testifying in court. The courts are in dispute, however, about whether a hearsay declarant's character for truthfulness may be impeached with prior bad acts under Rule 806. The

Committee directed the Reporter to prepare a report on whether the conflict in the cases is significant enough to require an amendment to the rule.

6. *Rule 901:* Some commentators have argued that the use of digital photography poses special concerns for establishing and challenging authenticity and have suggested that Rule 901 should be amended to provide special rules for authenticating digital photography—such as requiring evidence of a digital "fingerprint." Committee members were skeptical that such a rule would be necessary, because the current Rule 901 probably is flexible enough to allow the judge to exercise discretion to assure that digital photographs are authentic and have not been altered. The Reporter noted, however, that it might be worthwhile for the Committee to allow the Reporter to conduct further research on the problem and to provide a background memorandum to the Committee, especially given the Standing Committee's interest in assuring that the rules are updated, where necessary, to accommodate technological changes. The Committee directed the reporter to prepare a background memorandum on the use of digital photographs as evidence, to be considered at a future meeting.

In addition, and as set forth in the Report to the Standing Committee in June 2002, the Committee has directed the Reporter to prepare memoranda on the following rules, to determine whether any changes to these rules are necessary:

Rule 606(b) (to consider whether statements by jurors should be admissible where the inquiry is to determine whether the jury made a clerical error in rendering the verdict).

Rule 607 (to consider whether the rule should be amended to prohibit a party from calling a witness solely to impeach that witness with otherwise inadmissible information).

Rule 609 (to consider whether to adopt the Uniform Rules definition of a conviction involving dishonesty or false statement).

Rule 613(b) (to consider whether to require a party to confront a witness with a prior inconsistent statement before it can be admitted for impeachment).

Rule 704(b) (to consider whether the rule should be amended to exclude only opinions of mental health experts).

Rule 706 (to consider certain stylistic suggestions and to determine whether to incorporate civil trial practice standards developed by the ABA).

Rule 801(d)(1)(B) (to consider whether the rule should be amended to provide that a prior consistent statement is admissible for its truth whenever it is admissible to rehabilitate the witness).

Rule 803(3) (to consider whether the rule should be amended to cover statements of the declarant's state of mind where offered to prove the conduct of someone other than the declarant).

Rule 803(4) (to consider whether statements made to medical personnel for purposes of litigation should continue to be admissible under the exception).

Rule 803(5) (to consider whether the hearsay exception should cover records prepared by someone other than the party with personal knowledge of the event).

Rule 803(6) (to consider whether the business records exception should be amended to require that statements recorded by a person without knowledge of the event must be shown to be reliable, either because of business duty or some other guaranty of trustworthiness.)

Rule 803(8) (to consider whether the language excluding law enforcement reports in criminal cases should be replaced by general language requiring that public reports are to be excluded if they are untrustworthy under the circumstances).

Rule 803(18) (to consider whether the "learned treatise" exception should be amended to provide for admissibility of "treatises" in electronic form).

I wish to emphasize that in regard to any rules or other items as to which the Committee has indicated possible interest, this should by no means be read as an indication that the Committee ultimately will propose, or has a substantial likelihood of proposing, an amendment. The Committee merely wishes to be thorough in its consideration of any potential problems in the existing rules, but the Committee continues to be wary of recommending changes that are not considered absolutely necessary to the proper administration of justice.

B. Privileges

The Committee's Subcommittee on Privileges has been working on a long-term project to prepare provisions that would state, in rule form, the federal common law of privileges. At its October 2002 meeting, the Committee once again considered what the proper goal and scope of the privilege project should be. The Committee resolved that it would not propose any privilege rules as amendments to the Federal Rules of Evidence. Privilege rules must be enacted by Congress

directly; and submitting a new set of privileges for congressional consideration could create far more problems than it would solve.

It should be noted, however, that, from time to time, Congress has proposed rules of privilege. Therefore the Committee believes that it needs to be prepared to comment on such proposals and that the work of the Privileges Subcommittee will be helpful in responding to such Congressional ventures. The Committee also believes that it would perform a valuable service to the bench and bar by giving guidance on what the federal common law of privilege currently provides. This could be accomplished by a publication outside the rulemaking process, such as has been done previously with respect to outdated Advisory Committee Notes and caselaw divergence from the Federal Rules of Evidence.

The Committee therefore has resolved to continue with the privileges project and has determined that the goal of the project will be to provide, in the form of a draft rule and commentary, a "survey" of the existing federal common law of privilege. Any end-product will be intended as a descriptive, non-evaluative presentation of the existing federal law. It will not be a "best principles" attempt to write how the rules of privilege "ought" to look. Rather, any survey would be intended to help courts and lawyers determine what the federal law of privilege actually is.

The Committee has directed the Subcommittee on Privileges to prepare a draft of one of the privileges as an example for the Committee to review. The Subcommittee has chosen the psychotherapist-patient privilege as an exemplar and will prepare a survey on that rule and the necessary commentary for the Committee's review at the Spring 2003 meeting.

IV. Minutes of the October 2002 Meeting

The Reporter's draft of the minutes of the Committee's October 2002 meeting is attached to this report. These minutes have not yet been approved by the Committee.

Attachment:

Draft minutes

Advisory Committee on Evidence Rules

Draft Minutes of the Meeting of October 18, 2002

Seattle, Washington

The Advisory Committee on the Federal Rules of Evidence (the "Committee") met on October 18, 2002, at the Madison Renaissance Hotel in Seattle, Washington.

The following members of the Committee were present:

Hon. Jerry E. Smith, Chair
Hon. Robert L. Hinkle
Hon. Jeffrey L. Amestoy
Patricia Lee Refo, Esq.
Thomas W. Hillier, Esq.
Christopher A. Wray, Esq.

Also present were:

Hon. David C. Norton, former member of the Evidence Rules Committee
Hon. Christopher M. Klein, Liaison from the Bankruptcy Rules Committee
Hon. Richard H. Kyle, Liaison from the Civil Rules Committee
Peter G. McCabe, Esq., Secretary, Standing Committee on Rules of Practice and Procedure
John K. Rabiej, Esq., Chief, Rules Committee Support Office
James Ishida, Esq., Rules Committee Support Office
Jennifer Marsh, Esq., Federal Judicial Center
Professor Daniel J. Capra, Reporter to the Evidence Rules Committee
Professor Kenneth S. Broun, Consultant to the Evidence Rules Committee

Opening Business

The meeting began at 7:30 a.m. Judge Smith, the newly appointed Chair of the Committee, welcomed the members. He asked for approval of the draft minutes of the April 2002 Committee meeting. The minutes were approved unanimously.

Judge Smith expressed his regret that Judge Shadur, the former Chair of the Committee, could not make it to the meeting. He noted that the Committee looked forward to having Judge Shadur attend the Spring 2003 meeting of the Committee.

The Reporter gave a short report on the June 2002 Standing Committee meeting, at which that committee approved the proposed amendment to Evidence Rule 608(b) and referred it to the Judicial Conference. Subsequently, the Judicial Conference approved the proposed amendment and referred it to the Supreme Court. Barring any unforeseen developments, the amendment will become effective December 1, 2003.

The proposed amendment to Rule 804(b)(3) had been substantially revised by the Committee at its April 2002 meeting, and as revised was submitted to the Standing Committee with the recommendation that it be released for a new round of public comment. The Standing Committee unanimously approved the proposal. The Reporter noted that, so far, there have been no public comments submitted on the proposed amendment; a public hearing on the proposal is scheduled for January 27, 2003.

Judge Smith asked Committee members whether, upon review of the proposed amendment to Rule 804(b)(3), any member had found substantial problems with the proposed change in the text or with the Committee Note. No Committee member had any problem with the proposal.

Long-Range Planning — Consideration of Possible Amendments to Certain Evidence Rules

At its April 2001 meeting, the Committee directed the Reporter to review scholarship, caselaw, and other bodies of evidence law to determine whether there are any evidence rules that might be in need of amendment. At the April 2002 meeting, the Committee reviewed a number of potential changes and directed the Reporter to prepare a report on a number of different rules, so that the Committee could take an in-depth look at whether these rules require amendment. The Committee's decision to investigate these rules further was not intended to indicate that the Committee had actually agreed to propose any amendments. Rather, the Committee determined that with respect to these rules, a more extensive investigation and consideration is warranted.

At the October 2002 meeting, the Committee began to consider the Reporter's memoranda on some of the rules that have been found worthy of in-depth consideration. The Committee agreed that the problematic rules should be considered over the course of four Committee meetings, and that if any rules are found in need of amendment, the amendment proposals would be delayed in order to package them as a single set of amendments to the Evidence Rules. This would mean that the package of amendments, if any, would go to the Standing Committee at its June 2004 meeting, with a recommendation that the proposals (again, if any) be released for public comment.

With that timeline in mind, the Committee considered reports on five possibly problematic Evidence Rules at its Fall 2002 meeting. The goal of the Committee was not to vote definitively on whether to propose an amendment to any of those rules, but, rather, to determine whether to proceed

further with the rules as part of a possible package of amendments. Thus, a "no" vote from the Committee would mean that no action would be taken to propose an amendment. A "yes" vote would mean only that the Committee was interested in further inquiry into a possible amendment and would consider possible language for an amendment at a later date.

1. Rule 106

The Reporter's memorandum on Rule 106, the rule of completeness, indicated that courts and commentators are in dispute over two important questions about the scope of the rule. One question is whether the rule operates as an independent rule of admissibility—admitting completing evidence even if it would otherwise be excluded as hearsay or under some other rule of exclusion. This is called a "trumping" function. The other major question is whether the rule should permit completing evidence of oral statements and actions as well as the written statements currently covered by the rule. The Reporter prepared model drafts that would cover these points.

Discussion indicated that most Committee members were skeptical about including a trumping function in Rule 106. The Justice Department representative argued that if a trumping function were included in the rule, this would give parties an incentive to argue that evidence is necessary for completeness purposes, even though it is not really necessary to clarify a misleading impression. The Justice Department representative also pointed out that a number of exclusionary rules, such as Rules 403 and 412, should never be trumped by Rule 106.

Another Committee member questioned whether it was necessary, as a practical matter, to amend Rule 106 to include a trumping function. He noted that if admission of evidence indeed were necessary to correct a misleading impression, a trial judge would find a way to admit it even without Rule 106—for example, the trial court could hold that the proponent of misleading evidence opened the door, or waived the right to complain about completing evidence. Thus, the trial judge will reach a fair result without a change to Rule 106. Other members noted that the concept of "opening the door" is a principle that runs through many evidentiary doctrines, including admission of hearsay and evidence that is otherwise prejudicial. It might be considered misleading to codify an "open the door" principle with respect to completing evidence only, while failing to treat the use of that concept in other situations.

One member in favor of a proposed change to Rule 106 argued that in criminal cases, the government often proffers selected parts of a statement, and it is only fair to allow defendants to admit other portions that are necessary to place the initially admitted parts in context. If the rule were to include a trumping function, it is more likely that defendants will receive a fair ruling on completing evidence.

Members of the Committee also expressed skepticism about amending Rule 106 to cover oral as well as written statements. This could lead to attempts of an opponent to disrupt the proponent's

order of proof by contending that the proponent's witness testified to a misleading portion of an oral statement; disputes will often arise about what the oral statement actually was. There often will have to be a sidebar hearing to determine who said what.

Committee members also noted that many courts have used Rule 611(a) to admit completing evidence of an oral statement—from this they concluded that there was no reason to amend Rule 106 to cover the presentation of completing oral statements. The change would be one of form only, not of substance.

The Committee took a tentative vote on whether to continue work on a possible amendment to Rule 106. Two members of the Committee voted against continuing work on Rule 106. All members of the Committee voted against any amendment to Rule 106 that would cover oral statements. A majority of the Committee, however, agreed to consider further an amendment to Rule 106 that would provide some form of trumping function in the rule.

2. Rule 404(a)

The Reporter's memorandum on Rule 404(a) indicated that there is a split among the circuits as to whether character evidence can be used circumstantially in a civil case. A typical situation in which the question is presented is where an official is sued for assault in a 42 U.S.C. § 1983 case. Can the defendant introduce evidence of his own peaceful character to show that he acted peacefully on the time in question? Can the defendant introduce evidence of the plaintiff's aggressive character to show that the plaintiff was the aggressor at the time in question? Conversely, can the plaintiff introduce evidence of his own peaceful character and/or the defendant's violent temperament to prove how the parties acted?

Most courts have held that character evidence is not admissible to prove conduct in a civil case. Those courts rely on the language of the rule, which permits circumstantial use of character evidence only with respect to the "accused" and the "victim." Those courts reason that the term "accused" is a term of art applied to criminal cases only. Moreover, the Advisory Committee Note to Rule 404(a) says that the rule rejects the circumstantial use of character evidence in a civil case. But two circuits, the Fifth and the Tenth, hold that character evidence can be offered circumstantially where the defendant in a civil case is accused of conduct that is tantamount to a crime.

The Committee considered which view among the circuits is better policy. It concluded unanimously that as a policy matter, character evidence should not be admitted to prove conduct in a civil case. The circumstantial use of character evidence is fraught with peril in *any* case, because it could lead to a trial of personality and could cause the jury to decide the case on improper grounds. But the risks of character evidence historically have been considered worth the costs where a criminal defendant seeks to show his good character or the pertinent bad character of the victim. This so-called "rule of mercy" is thought necessary to provide a counterweight to the resources of the

government, and is a recognition of the possibility that the accused, whose liberty is at stake, may have little to defend with other than his good name. None of these considerations is operative in civil litigation. In civil cases, the substantial problems raised by character evidence were considered by the Committee to outweigh the dubious benefit that character evidence might provide.

The question, then, for the Committee was whether it is necessary to propose an amendment to Rule 404(a) explicitly to prohibit the circumstantial use of character evidence in a civil case. The Committee tentatively agreed to work on a proposed amendment to Rule 404(a) to achieve the desired policy. Members noted that the circuits are split on the question, and this causes both disruption and disuniform results, especially in civil rights cases. Such cases arise relatively frequently in the federal courts, so an amendment to the rule would have a helpful impact on a fairly large number of cases.

Committee members noted that if Rule 404(a) is to be amended, the amendment should include a reference in the text that evidence of a victim's character, otherwise admissible under the rule, nonetheless could be excluded under Rule 412 in cases involving sexual assault. Although the need for such clarification does not justify an amendment on its own, the Committee determined that clarifying language would be useful as part of a larger amendment.

The Reporter was instructed to prepare a proposed amendment and supporting memorandum for the Committee to consider as part of the Committee's long-range planning.

3. Rule 408

The Reporter's memorandum on Rule 408 noted that the courts are divided on three important questions concerning the scope of the rule:

1) Some courts hold that evidence of compromise is admissible against the settling party in subsequent criminal litigation, relying on a policy argument that the interest in admitting relevant evidence in a criminal case outweighs the interest in encouraging settlement. Other courts hold that compromise evidence is excluded in subsequent criminal litigation, noting that there is nothing in the language of Rule 408 that would permit the use of evidence of civil compromise to prove criminal liability.

2) Some courts hold that statements in compromise can be admitted to impeach by way of contradiction or prior inconsistent statement. Other courts disagree, noting that the only use for impeachment specified in the Rule is impeachment for bias, and noting further that if statements in compromise could be admitted for contradiction or prior inconsistent statement, this would chill settlement negotiations, in violation of the policy behind the rule.

3) Some courts hold that offers in compromise can be admitted in favor of the party who made the offer; these courts reason that the policy of the rule, to encourage settlements, is not at stake where the party who makes the statement or offer is the one who wants to admit it at trial. Other courts hold that settlement statements and offers are never admissible to prove the validity or the amount of the claim, regardless of who offers the evidence. These courts reason that the text of the rule does not provide an exception based on identity of the proffering party, and that admitting compromise evidence would raise the risk that lawyers would have to testify about the settlement negotiations, thus risking disqualification.

The Committee began its discussion on whether Rule 408 should be amended to clarify whether that compromise evidence is admissible in criminal cases. The Justice Department representative noted that the Department had not yet come to a conclusion on whether, as a matter of policy, such evidence should be admissible in criminal cases. On the one hand, if compromise evidence is excluded from criminal cases, it will eliminate a disincentive that a party otherwise would have to settle with the government in related civil matters; and it will make it more likely that victims of wrongdoing will receive compensation from wrongdoers in a timely fashion. On the other hand, if compromise evidence is admitted in criminal cases, it might make it more likely that a meritorious criminal prosecution will be successful. The Justice Department representative asked that ultimate consideration of a proposed amendment to Rule 408 be deferred until the Department can formulate a position on the matter. The Reporter responded that any consideration of an amendment to Rule 408 was tentative at this stage—the only question for the Committee at this point was whether the rule should be considered a candidate for an amendment as part of long-range planning.

Other Committee members stated that policy arguments weigh strongly in favor of excluding evidence of a civil compromise in a later criminal case. If such evidence is admissible in a criminal case, it significantly diminishes the incentive to settle civil litigation. Moreover, excluding compromise evidence in criminal cases would not result in the loss of evidence in such cases—without a rule protecting compromise evidence, there is likely to be no settlement that could ever be admitted in a criminal case. In other words, the only evidence "lost" is that generated by the rule protecting compromise evidence.

Committee members argued that it is necessary to amend Rule 408 to provide specifically that evidence of a civil compromise is inadmissible in subsequent criminal litigation. Under the caselaw interpreting the current rule, such evidence is admissible in some circuits and not in others. This is a poor state of affairs, because there may be no way, at the time of a civil settlement, to predict where a criminal litigation might be brought; moreover it is unfair to have such powerful evidence admissible against some defendants and not others. Finally, the possibility that a civil settlement will be admissible in a criminal case presents a trap for the unwary. Rule 408, by its terms, does not specify that civil settlements are admissible in criminal litigation, so a lawyer and client may enter into civil settlement negotiations under the mistaken impression that such negotiations and settlement never could be used against the client.

The Committee then discussed whether the rule should permit impeachment by way of prior inconsistent statement and contradiction. Committee members agreed that the rule should not permit such broad impeachment, because to do so would unduly prohibit settlement. Parties justifiably would be concerned that something said in settlement negotiations later could be found inconsistent with some statement or position taken at trial; it is virtually impossible to be absolutely consistent throughout the settlement process and trial. The Committee resolved that if Rule 408 is to be amended, it should include a provision specifically stating that compromise evidence cannot be offered to impeach by way of prior inconsistent statement or contradiction. The Reporter noted that such a provision exists in several states.

The Committee then turned to whether compromise evidence should be admissible in favor of the party who made the statement or offer of settlement. The Committee determined that such evidence should not be admissible. If a party were to reveal its own statement or offer, this would itself reveal the fact that the adversary entered into settlement negotiations; such evidence is entitled to protection on its own. Thus, it would not be fair to hold that the protections of Rule 408 can be waived unilaterally, because the rule, by definition, protects both parties from having the fact of negotiation disclosed to the jury. Moreover, a party that admits its own offer or statement in compromise would open the door to evidence of counter-offers, responses to offers and counter-offers, and the like—all with the possibility that lawyers will have to be disqualified because of the need to testify about the tenor and import of the settlement negotiations. The Committee concluded that allowing a party to admit its own settlement statements and offers would open up a "can of worms" and could not be justified by any corresponding benefit. The Committee resolved that any amendment to Rule 408 that might be proposed as part of long-range planning should include a provision specifically stating that compromise evidence is excluded even if proffered by the party that made the statement or offer in compromise. Such a provision is necessary, because the circuits are divided on the point, and differing results on the question are not justifiable.

The Committee next considered whether Rule 408 is a rule of privilege; if it is a privilege, any amendment would have to be enacted directly by Congress. If an amendment to Rule 408 went through the ordinary rulemaking process, the question of whether it is a privilege would be resolved definitively only if a court were to render an opinion on the subject. The Committee resolved, however, that the weight of the argument strongly favors the conclusion that Rule 408 is not a privilege. The arguments against a privilege include: a) Rule 408 was placed in Article 4 of the Federal Rules, not in the body of privileges originally proposed as Article 5; b) at least some courts have held that the protections of Rule 408 are not waivable, in contrast to privileges which are waivable; c) privileges ordinarily protect some important confidential relationship—Rule 408 does not; and d) other policy-based rules of exclusion have been amended through the rulemaking process, specifically Rule 407 and the restylized Criminal Rule 11(e)(6), which was substantively identical to Evidence Rule 410. Thus, the Committee preliminarily determined that if an amendment to Rule 408 were to be proposed, it could proceed through the ordinary rulemaking process.

Finally, the Committee reviewed the caselaw holding that Rule 408 protects against admission of statements made by the government during plea negotiations in a *criminal* case. Rule 410

applies to plea negotiations, but it does not by its terms protect statements and offers made by the government: It provides that statements and offers in plea negotiations are not admissible "against the defendant." The inapplicability of Rule 410 to government statements and offers in plea negotiations has led some courts to hold that such evidence is excluded under Rule 408. The Committee noted, however, that Rule 408, by its terms, does not apply to negotiations in criminal cases—Rule 408 refers to efforts to compromise a "claim," as distinct from criminal charges.

As a policy matter, the Committee determined that government statements and offers in plea negotiations should be excluded from a criminal trial, in the same way that a defendant's statements are excluded. A mutual rule of exclusion would encourage a free flow of discussion that is necessary to efficient guilty plea negotiations; there is no good reason to protect only the statements of a defendant in a guilty plea negotiation. The Committee also determined, however, that if an amendment is required to protect government statements and offers in guilty plea negotiations, that amendment should be placed in Rule 410, not Rule 408, which, by its terms, covers statements and offers of compromise made in the course of attempting to settle a *civil* claim. Rule 410, which governs efforts to settle criminal charges, is the appropriate place for any amendment that would exclude statements and offers in guilty plea negotiations.

At the end of its discussion, the Committee directed the Reporter to prepare the following for the Committee's consideration at the next meeting: 1) a draft of an amendment to Rule 408 that would provide that compromise evidence is inadmissible in a criminal case; 2) a draft of an amendment that would provide, in contrast, that such evidence is admissible in a criminal case; 3) provisions in both model drafts of Rule 408 that would provide that compromise evidence may not be used for impeachment by prior inconsistent statement or contradiction; 4) provisions in both model drafts that would provide that compromise evidence is not admissible, even if proffered by the party who made the statement or offer in compromise; and 5) a draft of an amendment to Rule 410 that would exclude statements and offers made by the government during guilty plea negotiations.

4. Rule 412

The Reporter's memorandum on Rule 412 raised two possible problems for the Committee's consideration. One possible problem is that the Rule has three stylistic anomalies: 1) The rule seems to provide that evidence rules other than Rule 412 can operate to exclude evidence offered by a criminal defendant, even though the Constitution would require it to be admitted; 2) when referring to the victim, the rule uses the qualifying term "alleged" in every place but one—this seems merely to have been an oversight; and 3) the notice requirement is drafted in terms that might raise a question whether notice can be submitted and served electronically in those courts permitting electronic case filing.

The Committee reviewed these stylistic problems and concluded unanimously that they do not, together or cumulatively, require an amendment to the rule. No part of the problematic language has actually created a problem in the cases. The Committee resolved that the benefit of any purely stylistic change is never sufficient in itself to justify the cost of amending an evidence rule. Committee members agreed that stylistic changes to an evidence rule would not be proposed unless a particular rule needed to be amended on other, substantive grounds.

The second possible problem addressed in the Reporter's memorandum on Rule 412 is that there has been some confusion in the courts about whether evidence of a victim's prior false claims of rape are covered by the rule. If such claims are covered, then they would rarely be admissible under Rule 412—in a criminal case, they would be admissible only if constitutionally required, and caselaw indicates that the constitution would mandate admissibility only if the false claim were probative of the victim's bias or motive. In contrast, if false claims are not covered by Rule 412, they could be admissible to prove the victim's character for untruthfulness under Rule 608(b).

After discussion, the Committee determined not to proceed further with any amendment to Rule 412. The admissibility of false claims under Rule 412 has created some confusion in the courts, but there is not a substantial body of caselaw on the subject, and the courts still seem to be working out the problem. The problem does not seem substantial enough to justify the costs of amendment–especially an amendment to a rule grounded in sensitive and complicated policy concerns. Moreover, there are many difficult questions about proof of false claims—such as when is a claim considered "false" and when is a false claim probative of bias—that are probably better left to caselaw development than to rulemaking. Finally, members noted that Congress directly enacted the amendment to Rule 412 in 1994, and apparently deliberately chose not to address the question of false claims; this counsels against rulemaking on the subject.

5. Rule 803(4)

At its last meeting, the Committee directed Professor Ken Broun, a consultant to the Committee, to prepare a report on whether Rule 803(4) should be amended. The rule currently sets forth a hearsay exception for statements made for purposes of medical treatment or diagnosis. The rule specifically provides that statements made to doctors for purposes of litigation are within the exception—because the doctor in preparing testimony would be diagnosing the patient's condition.

Professor Broun reported that the original rationale for including, within the exception, statements made for purposes of litigation was that the doctor would ordinarily use such statements as part of a basis for forming an expert opinion, and the statements therefore would be heard by the jury anyway. Professor Broun noted, however, that this rationale has been undermined by the 2000 amendment to Rule 703, under which hearsay used as the basis for expert opinion cannot be disclosed to the jury unless its probative value substantially outweighs its prejudicial effect. Professor Broun also noted that a few courts had held, in criminal cases, that a statement to a doctor solely in

anticipation of litigation was not reliable enough to satisfy the accused's right to confrontation. Professor Broun presented four alternative models that might be used to amend Rule 803(4) to prevent the admission of statements made for purposes of litigation under that rule.

After an extensive discussion, the Committee decided not to pursue an amendment to Rule 803(4). The following points were made by various Committee members during the course of discussion:

1. It will be difficult in many cases to determine the motivation of the patient who speaks to a doctor, especially after an accident or injury. Is the patient seeking treatment, or an expert witness, or both? The current rule avoids this difficult line-drawing.

2. If the rule were amended to exclude only those statements made *solely* for litigation purposes, it would have very little effect. Competent counsel would make sure that consultations with doctors for litigation purposes would have some treatment motivation. Moreover, statements of the patient's current physical condition (e.g., "my neck hurts") will still be admissible under Rule 803(3) even if made to a doctor for purposes of litigation. Thus, the exception as amended would exclude only those statements where counsel has done nothing to work around the rule. The costs of an amendment do not justify a rule that will apply so infrequently.

3. There will still be some situations in which a doctor, testifying as an expert, will be able to disclose hearsay when used as the basis for an expert opinion. Rule 703 does not prohibit such disclosure; it simply makes it more difficult. Thus, the original rationale for admitting statements under Rule 803(4)—that the jury would hear the statements anyway and would not differentiate between statements offered for truth and statements offered as the basis for an expert opinion—has been undermined somewhat, but it is still applicable.

4. A rule change that would exclude statements made by an injured plaintiff to medical experts would encounter substantial opposition from the plaintiffs' bar.

5. To the extent the amendment would be intended to deal with statements made by victims of child abuse for purposes of litigation, this is an enormously complicated question that is better left to caselaw development.

6. Other Rules for Future Consideration

As part of long-range planning, the Reporter prepared a short memorandum on other rules that might be raising problems. The Committee reviewed the rules highlighted by the Reporter, to determine whether to direct the Reporter to prepare a full memorandum on any of those rules.

After discussion, the Committee requested the Reporter to prepare a memorandum on the problems raised by the following two rules:

1. **Rule 806**: The rule provides that if a hearsay statement is admitted under a hearsay exception or exemption, the opponent may impeach the hearsay declarant to the same extent as if the declarant were testifying in court. The courts are in dispute, however, about whether a hearsay declarant's character for truthfulness may be impeached with prior bad acts under Rule 806. If the declarant were to testify at trial, he could be asked about pertinent bad acts, but no evidence of those acts could be proffered—Rule 608(b) prohibits extrinsic evidence of bad acts offered to impeach the witness's character for truthfulness. For hearsay declarants, however, the only way to impeach with bad acts is to proffer extrinsic evidence, because the witness is not on the stand to be asked about the acts. Rule 806 does not explicitly say that extrinsic evidence of bad acts is allowed. As a result, some courts prohibit bad acts impeachment of hearsay declarants, and some permit it.

The Committee recognized that impeachment of hearsay declarants often can be critically important, and to preclude extrinsic evidence of bad acts would mean that a hearsay declarant could not be impeached for untruthful character. This could lead to abuse—a party who wished to avoid impeachment of a witness through bad acts might engineer a hearsay statement to substitute for in-court testimony. The Committee agreed to consider whether Rule 806 should be amended specifically to provide that a hearsay declarant may be impeached through extrinsic evidence of bad acts where the acts are otherwise admissible under Rule 403.

2. **Rule 901:** The Reporter noted that some commentators have suggested that the use of digital photography poses special concerns for establishing and challenging authenticity. Digital photographs can be altered fairly easily, and such alteration might be difficult to detect. The Committee discussed, on a preliminary basis, whether it would be useful to amend Rule 901, or to propose a new evidence rule for Article 9, to provide special rules for authenticating digital photography—such as requiring evidence of a digital "fingerprint."

Committee members were skeptical that such a rule would be necessary. The general feeling was that Rule 901 was flexible enough to allow the judge to exercise discretion to assure that digital photographs are authentic and have not been altered. The Reporter noted, however, that it might be worthwhile for the Committee to allow the Reporter to conduct further research on the problem and to provide a background memorandum to the Committee, especially given the Standing Committee's interest in assuring that the rules are updated when necessary to accommodate technological changes. The Committee directed the Reporter to prepare a background memorandum on the use of digital photographs as evidence, to be considered at a future meeting.

The Committee decided not to proceed with any further investigation as to the following Rules:

1. *Rule 804(a)(5)*—The Rule establishes a "deposition preference" for hearsay exceptions premised on unavailability. Occasionally this preference has led to anomalous results—hearsay statements otherwise admissible under Rule 804(b)(3) have been excluded when the declarant has given a deposition on the subject, and the asserted ground of unavailability is absence. The Committee determined that, although the rule has created problems and anomalous results from time to time, those cases are relatively infrequent. The problems are not so serious or prevalent to justify the costs of an amendment.

2. *Rule 804(b)(1)*—The Rule provides that in a civil case, prior testimony may be admitted against a party who had a similar motive to develop the testimony at the time it was given, or whose "predecessor in interest" had such a motive. The courts have divided over whether the term "predecessor in interest" is broad enough to cover parties in prior litigation with no legal relationship to the party against whom the testimony is now offered, but whose development of that testimony was as effective as the current party could have done.

Committee members noted that any dispute among the courts is one of form rather than substance. Even those courts that refuse to interpret the term "predecessor in interest" expansively will find a way to admit testimony from a prior litigation where the party who developed the testimony did as good a job as the party against whom the testimony is admitted could have expected to do; thus, courts that have refused to admit such testimony under Rule 804(b)(1) have admitted it anyway under the residual exception. Consequently, the Committee decided not to proceed further with an amendment to Rule 804(b)(1).

3. *Rule 807*—The Reporter noted that two possible problems have arisen in the application of the residual exception. First, there is some dispute about the breadth of the exception, specifically whether statements that "nearly miss" the other exceptions can qualify as residual hearsay. Second, the notice requirement of the residual exception is written in unbending, bright-line terms, but courts have applied it flexibly, excusing compliance for good cause or finding harmless error.

Committee members observed that the breadth of the residual exception presented a policy question that most courts had already worked through. Almost all courts apply the exception expansively; even assuming that the exception should be applied more narrowly as a matter of policy, there would be little that could be added to the rule that could guarantee that result. Application of the exception requires a case-by-case approach that depends on the circumstances and the discretion of the judge—such a flexible inquiry is difficult to constrain by textual language in an evidence rule.

As to notice, it was clear to the Committee that courts would apply the notice requirement flexibly, regardless of the language of the rule. Therefore, the only question is whether it would be worthwhile to amend the rule to "codify" the flexible approach already taken by the courts. The Committee agreed that changing the language of the text to codify the result already reached by the courts might be useful, but the benefits of such codification are outweighed by the costs of an amendment—including the risk of upsetting settled expectations and the risk that the amendment will be misinterpreted as broader than intended.

4. *Rule 902(1)*—Rule 902(1) provides for self-authentication of domestic public records under seal, including records of the Canal Zone. Because there is no longer a Canal Zone, it has been suggested that the rule be amended to delete the reference. The Committee decided not to proceed with such an amendment, however. Such an amendment would be the kind of stylistic, non-substantive change that the Committee has decided as a matter of policy is insufficient to justify on its own the substantial costs of amending an evidence rule. Moreover, it is possible that a public record from the former Canal Zone might still be used in litigation.

5. *Rule 902(2)*—The rule provides for self-authentication of public documents not under seal if a public officer having a seal certifies that the document was signed by a person in an official capacity and the signature is genuine. The former Justice Department representative on the Committee had suggested that the rule should be amended because many state officials who certify documents no longer use a seal. When that suggestion was made, the Committee decided that if the Department of Justice representative could determine that the rule was creating a problem for government lawyers in authenticating public records, the Committee would consider proposing an amendment to the rule to provide an alternative to the sealing requirement. To this date, no showing of a problem has been made. The current Justice Department representative informed the Committee that he would look into the matter to determine whether Department lawyers were having a problem with the sealing requirement. Any further consideration of an amendment to Rule 902(2) was tabled pending a report from the Department of Justice representative.

6. *Rule 902(6)*—Rule 902(6) provides that printed materials purporting to be newspapers or periodicals are self-authenticating. It has been suggested that this rule should be expanded to permit self-authentication of internet materials that serve the same function as printed newspapers or periodicals, such as the electronic version of the *New York Times* or *Slate Magazine*.

The Committee decided not to proceed with an amendment to Rule 902(6). All that is at stake is self-authentication; internet materials can still be authenticated by making the necessary showing of authenticity under Rule 901. Moreover, Committee members ex-

pressed concern that there might be legitimate questions of authenticity of material taken from the internet, as distinguished from printed newspapers that are obviously likely to be authentic. Internet material is more subject to alteration; this counsels caution before extending the rule of self-authentication that currently applies to printed materials only.

7. *Rule 1006*—This Rule provides for the admissibility of summaries of evidence that is too voluminous to be formally admitted at trial. The Reporter noted that there has been some confusion in distinguishing between summaries admissible under Rule 1006 and summaries of evidence already admitted at trial. These latter summaries are often called pedagogical summaries, and they are designed to make the evidence already admitted more understandable to the factfinder. Pedagogical summaries are not governed by Rule 1006. It has been argued that Rule 1006 should be amended to clarify that it does not apply to summaries of evidence admitted at trial.

The Committee decided not to proceed with an amendment to Rule 1006, on the ground that any confusion among litigants has been handled adequately by the courts, and has not created a problem that has affected the results in the cases. Thus, any problem is one of form rather than substance and does not justify the substantial costs of an amendment to an evidence rule.

Privileges

The Subcommittee on Privileges has been working for more than a year on a draft of privileges. At the request of the Subcommittee, the Committee discussed what the goal of this privilege project should be. It has become increasingly apparent that the Committee would not propose a new set of privileges for enactment. Privilege rules must be enacted by Congress directly. Submitting a new set of privileges to Congress could result in problematic rules, given the likelihood that interest groups would seek to change or establish certain privileges to their benefit.

This does not mean, however, that the privilege project should be terminated. Committee members noted that from time to time, Congress has proposed rules of privilege; the Committee needs to be prepared to comment on such proposals, and the work of the Privileges Subcommittee will be helpful in responding to such Congressional ventures. It was also emphasized that the Committee could perform a valuable service to the bench and bar by giving guidance on what the federal common law of privilege currently provides. This could be accomplished by a publication outside the rulemaking process, such as has been previously done with respect to outdated Advisory Committee Notes and caselaw divergence from the Federal Rules of Evidence.

After discussion, the Committee agreed to continue with the privileges project, and determined that the goal of the project would be to provide, in the form of a draft rule and commentary, a "survey" of the existing federal common law of privilege. This essentially would be a descriptive, non-evaluative presentation of the existing federal law, not a "best principles" attempt to write how the rules of privilege "ought" to look. Rather, the survey would be intended to help courts and lawyers determine what the federal law of privilege actually is. The Committee determined that the survey will be structured as follows:

1. An introduction setting forth the purpose and plan of the project.

2. The project would be divided into sections, one for each privilege as well as a general section for a discussion of principles such as choice of law and invocation and waiver of a privilege.

3. The first section for each rule would be a draft "survey" rule that would set out the existing federal law of the particular privilege. Where there is a significant split of authority in the federal courts, the rule would include alternative clauses or provisions.

4. The second section for each rule would be a commentary on existing federal law. This section would provide case law support for each aspect of the survey rule and an explanation of the alternatives, as well as a description of any aberrational caselaw. This commentary section is intended to be detailed but not encyclopedic. It would include representative cases on key points rather than every case, and important law review articles on the privilege, but not every article.

5. The third section would be a discussion of reasonably anticipated choices that the federal courts, or Congress if it elected to codify privileges, might take into consideration. For example, it would include the possibility of different approaches to the attorney-client privilege in the corporate context and the possibility of a general physician-patient privilege. This section, like the project itself, will be descriptive rather than evaluative.

The Committee instructed the Subcommittee on Privileges to prepare a draft of one of the privileges as an example for the Committee to review at the next meeting. Professor Broun agreed to provide a draft of the survey rule on the psychotherapist-patient privilege, and the necessary commentary, for the Committee's consideration at the Spring 2003 meeting.

Other Business

Outgoing Committee Member, Judge Norton

Judge Smith expressed the Committee's appreciation to Judge Norton for his stellar work as a member of the Committee. Judge Norton was presented with a plaque commemorating his contributions to the Committee.

Liaisons to Other Rules Committees

Judge Smith raised the possibility that members of the Committee could serve as liaisons to the other rules committees, particularly the Civil and Criminal Rules Committees. John Rabiej stated that he would inquire into that possibility and would report back to the Committee.

Digital Evidence Project

Jennifer Marsh, the representative of the Federal Judicial Center, informed Committee members that the ABA Section of Science and Technology Law has formed a task force and launched the "Digital Evidence Project." The goal of the project is to publish an authoritative treatise on all things law-and-computer-related, including the presentation of electronic evidence. She also noted that the Computer Forensics and Electronic Discovery (CFED) group, affiliated with University of California at San Diego, is also working on a project to write a supplement, future chapter, or stand-alone complement to the scientific evidence manual on computer forensics issues. The Federal Judicial Center is encouraging these two groups to work together to prepare a publication on law and technology issues. Ms. Marsh encouraged any member of the Committee who is interested to get involved in this project. The Reporter stated that he would contact the interested parties and monitor developments on behalf of the Committee.

Next Meeting

The next meeting of the Committee is tentatively scheduled for April 25, 2003, in Washington, D.C.

The meeting was adjourned at 2:30 p.m., October 18.

Respectfully submitted,

Daniel J. Capra
Reed Professor of Law
Reporter

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

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CRIMINAL RULES

JERRY E. SMITH
EVIDENCE RULES

December 17, 2002

To: Committee on Rules of Practice and Procedure
From: Daniel R. Coquillette
Re: The Local Rules Project

You have before you, as a separately bound book, the Report of the Local Rules Project by Professor Mary P. Squiers. This is an exceptional labor of love, involving three years of hard effort. Accompanying the Report are descriptions of the history of prior Local Rules Projects, and a careful description of the Project's methodology. We all owe Professor Squiers a debt of gratitude.

I. Recommended Action

Our recommended action at this meeting is to refer the completed Report to the relevant Reporters of the Advisory Committees and to myself for review. Other appropriate individuals may be included at the designation of the Chairman. This review should be completed by our next meeting in June 2003.

II. Issues for Consideration in June 2003

A. Goals

Historically, the Local Rules Project has had three goals: 1) to identify problematic local rules that conflict with uniform federal law, or which simply repeat such law, and should be rescinded; 2) to identify local rules that have been successful, and have been adopted in many districts, and would make appropriate models for other districts; and 3) to identify areas of local rulemaking that would be greatly simplified or improved by uniform rulemaking. In the past, the first goal was achieved voluntarily by sending the relevant sections of the Report to each district court, identifying the problematic rules, and requesting that they review the rules and take appropriate action. The third goal was achieved by sending the Report to the appropriate Advisory Committees, an approach which has resulted in many successful uniform rule changes. The second goal, promoting good models for local rulemaking, has been much discussed, but never directly addressed.

B. Should There be a Model Local Rule Project?

One way to achieve the second goal would be to prepare a comprehensive set of model local rules. This would require a special task force, including representatives of other appropriate Judicial Conference Committees, such as the Committee on Court Administration and Case Management ("CACM"), as well as other judges and practitioners. It would be a big project, but one that has been encouraged by the ABA Section on Litigation and other interested groups. Professor Geoffrey Hazard has pointed out that a set of well drafted model local rules could have a more positive influence than just periodically reviewing all the district court rules to identify errors. The new Report, by identifying local rules that have been widely adopted, has already done much of the needed research for such models.

C. How Should the Report be Transmitted?

Another issue for resolution in June would be whether the entire Report should be sent to each district court, or only that part which identifies the problematic rules in that district. The first Local Rules Project Report was sent to each of the district courts in its entirety for their review. There are obvious advantages to sending all of the material to all of the courts. For example, a court can learn how other jurisdictions have solved similar problems with different rules, thus assisting the courts in their future rulemaking activities. A court also may see that other courts solve specific problems without using rulemaking. Finally, a court can see whether its rules are similar to, or quite different from, those of other courts.

But this approach also has a major disadvantage, the sheer volume of material that a court would have to review. Preparing special reports focusing solely on the issues of an individual district is far more efficient, and such courts could always request the entire Report if they wish.

D. What Requests Should Accompany the Report?

A final issue is whether to request a specific response from each district court. The first Local Rules Project Report was sent to all district courts, together with the related Report on Criminal Rules of Practice. The report was accompanied by an individualized request to each court that they each review their respective rules and rescind problematic rules. But no direct response was requested.

The Local Rules Project Report on Appellate Rules was treated somewhat differently. It was sent to all courts of appeals. The Chair of the Appellate Rules Committee, the Hon. Kenneth Ripple, asked each Court to review the findings of the Local Rules Project and respond in writing. The response was to address each identified problematic rule, and was to indicate whether, in fact, the identified rule was inconsistent. The responses were reviewed by the Local Rules Project and then discussed by the Appellate Rules Committee.

There is one important reason why district courts should be treated differently from courts of appeals. The statutorily mandated review process for the two types of courts is quite different. District court local rules remain in effect "unless modified or abrogated by the judicial council of the relevant circuit," while local appellate rules remain in effect "unless modified or abrogated by the Judicial Conference." 28 U.S.C. §2071(b). Thus, court of appeals local rules are, by Congressional mandate, within the exclusive supervision of the Judicial Conference.

This Committee could send the material to each district court with a request that each court review the material and respond, in writing, to this Committee, through the Local Rules Project. Or district courts could be asked to respond directly to the relevant circuit council.

Our initial recommendation, however, is that the Committee proceed as it did with the district courts the last time, i.e., with no request for a direct response. Of course, the Local Rules Project would monitor the actual rule changes initiated by the district courts in response to the Local Rules Project, and could recommend more direct responses later, if compliance proves disappointing. Last time, the voluntary compliance was actually encouraging, and no additional action was needed.

III. Conclusion

It is particularly important that the Chief Judges and Clerks of the district courts see this Report in the proper light, i.e., as an effort to provide helpful suggestions, not a "top down" meddling. That was the secret of the success of the prior Reports. Opportunities, such as the pending meetings of the district court representatives to the Judicial Conference and of the Federal Judicial Center, could be used to explain the Report and its goals. Once again, we are all in the debt of Professor Squiers for this extraordinary report.

UNITED STATES DISTRICT COURT
Southern District of Alabama
113 St. Joseph Street
Mobile, Alabama 36602

Charles R. Butler, Jr.
Chief Judge

251-690-2175

October 28, 2002

MEMORANDUM TO JUDICIAL CONFERENCE COMMITTEE CHAIRS WHO ATTEND LONG-RANGE PLANNING MEETINGS

SUBJECT: Report of September Meeting

Thanks again to all of you for contributing to a productive planning meeting and for making my term as planning coordinator enjoyable and enlightening. Attached is a report of the September 23, 2002 long-range planning meeting. The report will be available to your committee members in your upcoming meeting materials. I encourage you to give your committee members a detailed report of our discussions and to continue to incorporate long-range planning concerns in your committee discussions.

The next long-range planning meeting will take place on March 22, 2003, with Chief Judge Brock Hornby presiding as coordinator. Please let him or Cathy McCarthy know if you have suggestions for the agenda.

Charles R. Butler, Jr.

Attachment

cc: Committee Staff

Judicial Conference Committee Chairs Long-Range Planning Meeting

September 23, 2002

Report

Administrative Office of the United States Courts
Office of Management, Planning and Assessment

SUMMARY REPORT
SEPTEMBER 2002 LONG-RANGE PLANNING MEETING

The September 23, 2002 long-range planning meeting was held in Washington, D.C. It was facilitated by Chief Judge Charles R. Butler, Jr., a member of the Judicial Conference's Executive Committee. The meeting was attended by the chairs[1] of 13 Judicial Conference committees with significant long-range planning responsibilities. Also in attendance were: Administrative Office Associate Director Clarence A. Lee, Jr.; Deputy Associate Director Cathy A. McCarthy, who provides principal staff support for the integrated long-range planning process; and other Administrative Office staff. A list of participants is included as Appendix A.

Assessing Administrative Resource Needs in the Courts

Chief Judge John G. Heyburn II reported on a suggestion from the Committee on the Budget that Judicial Conference committees work in concert to explore the possibilities of further sharing administrative functions – such as information technology support, human resource management, financial management, and procurement – among court units. The Budget Committee's intent is not to mandate such sharing. It is interested in considering new arrangements that could result in more efficient and effective resource use. The committee suggested this study because in the foreseeable future it may be increasingly difficult for the judiciary's appropriation to continue to increase at the rates seen over the past several years. At the very least, administrators should have the option of sharing resources.

Judge Dennis Jacobs, chair of the Committee on Judicial Resources, noted that his committee has been actively promoting the effective use of resources. The Judicial Resources Committee asked the AO to conduct a study, using an outside consultant and working with several other committees (including Court Administration and Case Management, Information Technology, Budget, and Criminal Law), to evaluate options for how courts can be structured to ensure the highest quality and most professional administrative support needed without impeding local decision-making in the courts.

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[1]Judge Merrick B. Garland, a member of the Committee on the Judicial Branch, attended the long-range planning meeting in place of that committee's chair, Chief Judge Deanell R. Tacha.

The Judicial Resources Committee also asked the AO to undertake a process-improvement initiative to analyze administrative functions in the courts. The results may allow the committee to consider changes to the staffing formula methodology. At present, staffing formulae are derived based on the findings of work measurement studies conducted using a randomly selected sample of courts. One possible method of controlling the growth of staff, Judge Jacobs remarked, is to select courts for study based on their efficiency and adoption of best practices. If the work measurement program is targeted to courts that adopt more efficient practices, the committee should be able to build an efficiency factor into staffing calculations based on real performance in actual courts.

Process improvement reviews are currently underway to examine human resources and information technology (IT) practices in the courts. The goals of the reviews are to document the work conducted by all levels of staff, identify best practices, and define various levels of services with their associated staffing skills and needs. The review of IT was requested by the Committee on Information Technology's Subcommittee on IT Strategic Issues.

Chief Judge John W. Lungstrum, chair of the Committee on Court Administration and Case Management (CACM Committee), stated that the issue of sharing administrative services is not new to the Judicial Conference or its committees. The CACM Committee has long been a proponent of the sharing of services. The committee in 1995 sponsored a study by the National Academy of Public Administration (NAPA) of district and bankruptcy court administrative functions and structures. NAPA found that administrative functions represented about 15 percent of the courts' workforce. Judge Lungstrum mentioned that the NAPA report offered several possible alternative organizational arrangements for service delivery, and that upon the committee's recommendation, the Judicial Conference encouraged courts to consider these or alternative arrangements for increasing the efficiency of service delivery.

Judge Lungstrum also said that one of the more complex linkages in sharing arrangements is between the district and bankruptcy clerks' offices. To avoid implicating 28 U.S.C. § 156(d), which prohibits consolidation of the district and bankruptcy clerks offices "without prior approval of the Judicial Conference and the Congress," the Conference in March 1998 endorsed guidelines to determine the characteristics of restructuring that rise to the level of consolidation. The guidelines make clear there are many ways for courts to share administrative functions short of consolidation, such as joint purchasing of supplies, combining training or automation efforts, or developing a unified contracts and procurement process.

Deputy Associate Director Cathy A. McCarthy presented background information on court size profiles. A substantial number of district and bankruptcy courts have fewer than 40 employees district-wide in their clerks' offices. Probation and pretrial services offices tend to be even smaller, especially if they are separate units. Ms. McCarthy pointed out that smaller organizations may achieve both greater efficiency and better quality of services by sharing the support of administrative experts in procurement or personnel, for example, rather than assigning multiple administrative duties to staff without this expertise. She also provided court unit co-location data, shown in Appendix B, which illustrate the number of facilities in which court units are co-located. She noted, however, that simply being located in the same building need not be a prerequisite for the sharing of services.

Ms. McCarthy then presented an outline of a study of administrative services being undertaken by the AO in support of the Budget and Judicial Resources Committees' requests (see Appendix C). In addition to the notion of sharing services across court units, the study will examine additional options such as regional, program-wide (e.g., support to probation offices or bankruptcy clerks), national delivery or contracting of services. She noted that the study will be concerned not only with efficiency and cost, but also with quality and satisfactory service levels.

Assistant Director Noel J. Augustyn reported that as part of the AO's study, a survey was sent to all court units to determine the current staffing of administrative functions and the degree of sharing that is presently occurring in the courts. The survey results will be made available to the committees at their winter meetings.

The committee chairs supported these study efforts, and several judges observed that the involvement and education of chief judges would be critical to achieving changes in the future. Associate Director Clarence A. Lee, Jr. pointed out the importance of involving court unit executives, who are already expressing some apprehensions that alternative structures could negatively impact the performance of administrative functions. The group strongly supported the idea that the study will focus on the quality of services as well as efficiency.

Determining the Cost of Information Technology Investments

Judge Edwin L. Nelson, chair of the Committee on Information Technology, discussed a request from the Budget Committee that the IT Committee identify all costs associated with information technology investments, including impacts on staffing, space, and other resources. Judge Butler shared with the group a letter from Chief Judge

Lawrence L. Piersol, who chairs the Budget Committee's Economy Subcommittee, in which he discussed the Budget Committee's difficulty in evaluating funding requests for information technology projects and programs without the identification of all related costs.

Judge Nelson stated that the request from the Budget Committee highlights a critical issue that the IT Committee itself regularly discusses. He stated, however, that such a study must address not only the costs of technology investments but also the enormous benefits that technology has brought.

Judge Nelson reported on the long-range planning process for information technology used by the IT Committee, and provided highlights from the 2002 update to the long-range plan. The planning process was mandated by statute when Congress created the Judiciary Information Technology Fund in 1991.

Judge Nelson also noted that an independent study of IT spending and staffing in the judiciary found that the judiciary has been able to put into place a national IT program with investment levels – both in terms of the technology itself and human resources – significantly below federal government benchmarks.

Judge Nelson concluded by noting some of the qualitative improvements made in the quality of justice through IT. He reminded the group of old processes for recording docket entries, retrieving case file information, and performing legal research. He posed the question, "What is the value of judges being able to access Westlaw, Lexis, the docket, and court files from home or a hotel and work as if they were at their desk in chambers?"

Terry Cain of the Office of Information Technology described the cost analysis to be undertaken to identify the full range of IT investment costs in support of the Budget Committee's request. With the assistance of an experienced contractor, the study will apply a proven methodology to identify all costs associated with IT investments, including but not limited to hardware, software, telecommunications, networks, courtroom technology, contracts, wiring and renovations, personnel, training, travel, and facilities. In addition, the study will provide a five-year cost projection based on current practices. The study will also compare the judiciary's costs with benchmarks from other federal agencies and private industry of similar size and complexity.

Judge Jane R. Roth, Chair of the Security and Facilities Committee, welcomed the study and suggested that when considering facility costs, the study consider the age of the building. Old courthouses are difficult and expensive to retrofit with required wiring,

workstations, servers, displays, and other equipment. Air conditioning and proper ventilation are also major cost items. The Security and Facilities Committee would like the study to provide information that might allow comparisons between older and newer facilities. The committee could then incorporate this information into the *U. S. Courts Design Guide* as appropriate, and establish proper specifications for IT equipment at the time a building is planned. Personnel changes brought about by IT may also dictate special space needs. The Security and Facilities Committee would like the *Design Guide* to keep up in this area.

Achieving and Maintaining Fairness in Employment

Judge Dennis Jacobs reported that the Judicial Resources Committee adopted fairness in employment as a long-range planning issue. The committee will be considering and pursuing a number of fairness in employment initiatives, many of which implement and expand on the various policies that the Judicial Conference has adopted over several decades.

The committee is developing best practices regarding the advertising of open positions and the recruitment process generally, in interviewing and hiring, in promotion and retention, and in termination. The committee is also developing educational materials on fairness in employment, as well as materials about a speakers' bureau. These resources would be made available to courts that wish to use them.

Judge Jacobs stated that the committee monitors the judiciary's experience with the Employment Dispute Resolution Plan, which was adopted by the Judicial Conference in 1997. The data available to the committee suggests that the program is being used, and that it is effective in achieving the resolution and abatement of problems.

He also reported that the committee reviews statistics about the representativeness of the judiciary's employees. Although the data are not complete, statistics suggest a workforce that overall reflects the ethnicity of the country.

Judge Jacobs also described an initiative to promote the advantages of clerkships to law students. The committee would like to reach students in schools that currently do not actively encourage clerkships.

Crosscutting Planning Issues Suggested by Chief Judges

On behalf of the committee chairs and the planning group, Judge Butler sent a letter to all chief judges on April 16, 2002, asking for their general ideas on planning issues, as well as suggestions for particular committees. Judge Butler reported that he was pleased with the effort, having received 63 responses from chief judges of appellate, district, and bankruptcy courts. A report containing the chief judges' ideas was distributed to each of the committee chairs (see Appendix D).

Studies already underway are responsive to some of the issues raised by the chief judges. As mentioned earlier, many chief judges, particularly those in small courts, expressed concern about their ability to carry out administrative functions. The study of administrative services will address this area. In addition, as part of the work measurement process, a study of the staffing impact associated with the implementation of major automated systems such as CM/ECF is underway. Several chief judges expressed concerns about the demands of implementing CM/ECF and other systems in their courts.

Many of the issues raised by chief judges were operational in nature. In those instances where Administrative Office staff were able to provide information that might be helpful, chief judges were contacted and provided with additional information.

Judge Lungstrum suggested that the process of soliciting opinions from chief judges should be repeated periodically. Judge Butler recommended that solicitations of chief judges' ideas might be even more effective if they were focused on specific topics of interest to the committees.

Change in Executive Committee Planning Coordinator

Judge Butler announced that since his term on the Executive Committee would be expiring on September 30, Chief Judge Carolyn Dineen King, the new chair of the Executive Committee, appointed Chief Judge D. Brock Hornby from the District of Maine as the new long-range planning coordinator.

Judge Butler observed that the long-range planning process has worked well because ideas percolate up from committees and from judges who work in the courts, rather than exclusively coming down from the Executive Committee. He suggested that planning meeting participants create an e-mail address book and periodically share ideas with one another. The group expressed its appreciation to Judge Butler for his efforts in coordinating the planning process.

Appendix A: Participants in the September 2002 Long-Range Planning Meeting

Committee Representatives	**Administrative Office Staff**
Planning Coordinator, Executive Committee Hon. Charles R. Butler, Jr.	Clarence A. Lee, Jr. Cathy A. McCarthy William M. Lucianovic Brian Lynch
Executive Committee Hon. Charles R. Butler, Jr.	Helen Bornstein
Committee on the Administrative Office Hon. Lourdes G. Baird, Chair	Cathy A. McCarthy
Committee on Information Technology Hon. Edwin L. Nelson, Chair	Terry Cain Michel Ishakian
Committee on the Administration of the Bankruptcy System Hon. Michael J. Melloy, Chair	Francis F. Szczebak Kevin Gallagher
Committee on the Budget Hon. John G. Heyburn II, Chair	George H. Schafer Gregory Cummings Bruce E. Johnson Joanne Russell
Committee on Court Administration and Case Management Hon. John W. Lungstrum, Chair	Noel J. Augustyn Abel J. Mattos Mark S. Miskovsky
Committee on Criminal Law Hon. William W. Wilkins, Jr., Chair	John M. Hughes Kim Whatley

Committee on Defender Services
Hon. Patti B. Saris, Chair — Theodore J. Lidz, Steven G. Asin

Committee on Federal-State Jurisdiction
Hon. Frederick P. Stamp, Jr., Chair — Mark W. Braswell

Committee on the Judicial Branch
Hon. Merrick B. Garland — Steven Tevlowitz

Committee on Judicial Resources
Hon. Dennis Jacobs, Chair — Alton C. Ressler, Charlotte G. Peddicord, H. Allen Brown

Committee on the Administration of the Magistrate Judges System
Hon. Harvey E. Schlesinger, Chair — Thomas Hnatowski, Charles Six

Committee on Rules of Practice and Procedure
Hon. Anthony J. Scirica, Chair — Peter G. McCabe, John K. Rabiej

Committee on Security and Facilities
Hon. Jane R. Roth, Chair — Ross Eisenman, Susan Hayes, Linda Holz

Also in Attendance:
Hon. A. Thomas Small, Chair, Advisory Committee on Bankruptcy Rules

Other Administrative Office Staff in attendance:

Jeffrey A. Hennemuth	Peggy Irving
Steven Schlesinger	Karen Hanchett
Glen Palman	Nancy Miller
Ellyn Vail	Robert Deyling
Beverly J. Bone	Barbara Kimble
Willam M. Moran, Jr.	Helen Trainor
Mary M. Stickney	

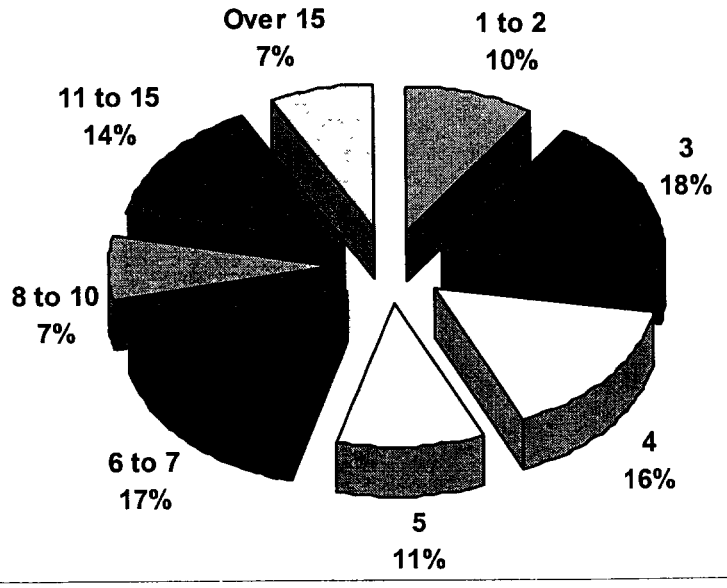
Appendix B: Court Size Profiles and Co-Location Data

Court Size Profiles

District Courts: 41 Courts Have Fewer Than Five District Judges

Authorized District Judgeships FY 2002	Number of Districts	Average District Clerk's Office Staff	Average Probation/ Pretrial Services Staff	Average Total Local Budgets ($millions)
1 to 2	9	23	24	$1
3	17	31	37	$2
4	15	39	51	$3
5	10	47	54	$3
6 to 7	16	61	78	$5
8 to 10	7	78	116	$6
11 to 15	13	109	176	$8
Over 15	7	187	240	$13

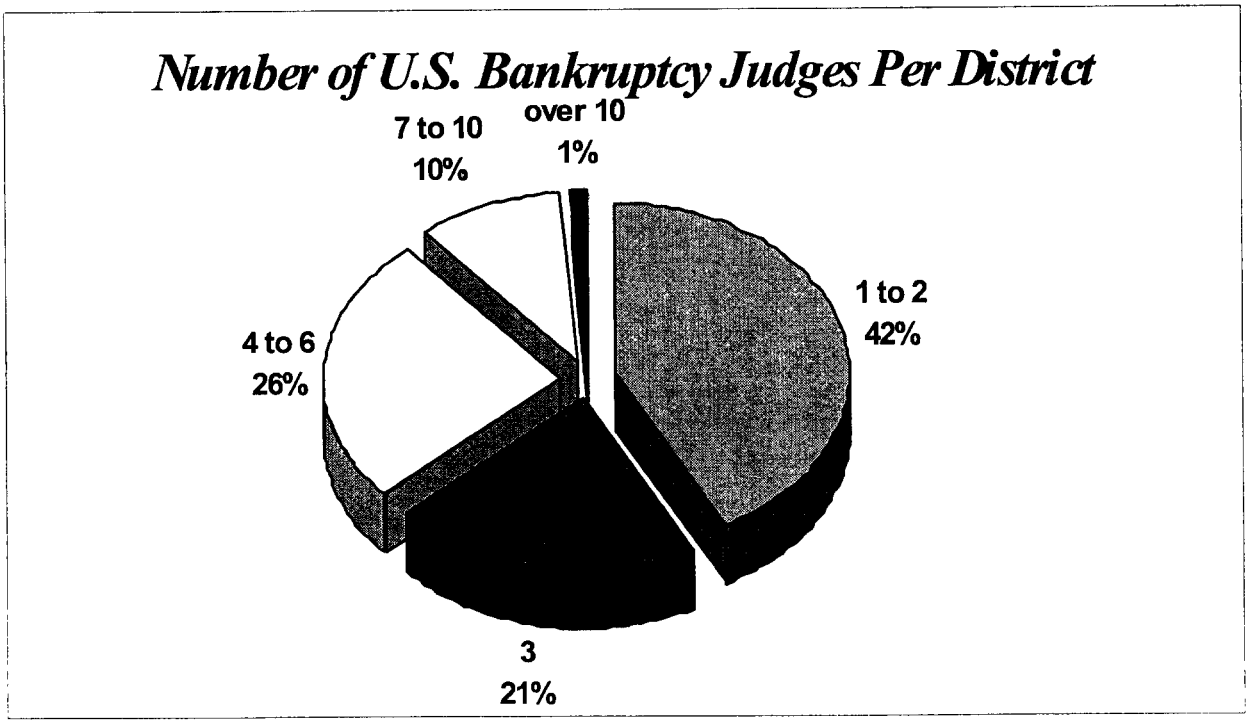
Number of U.S. District Judges per District



Court Size Profiles

Bankruptcy Courts

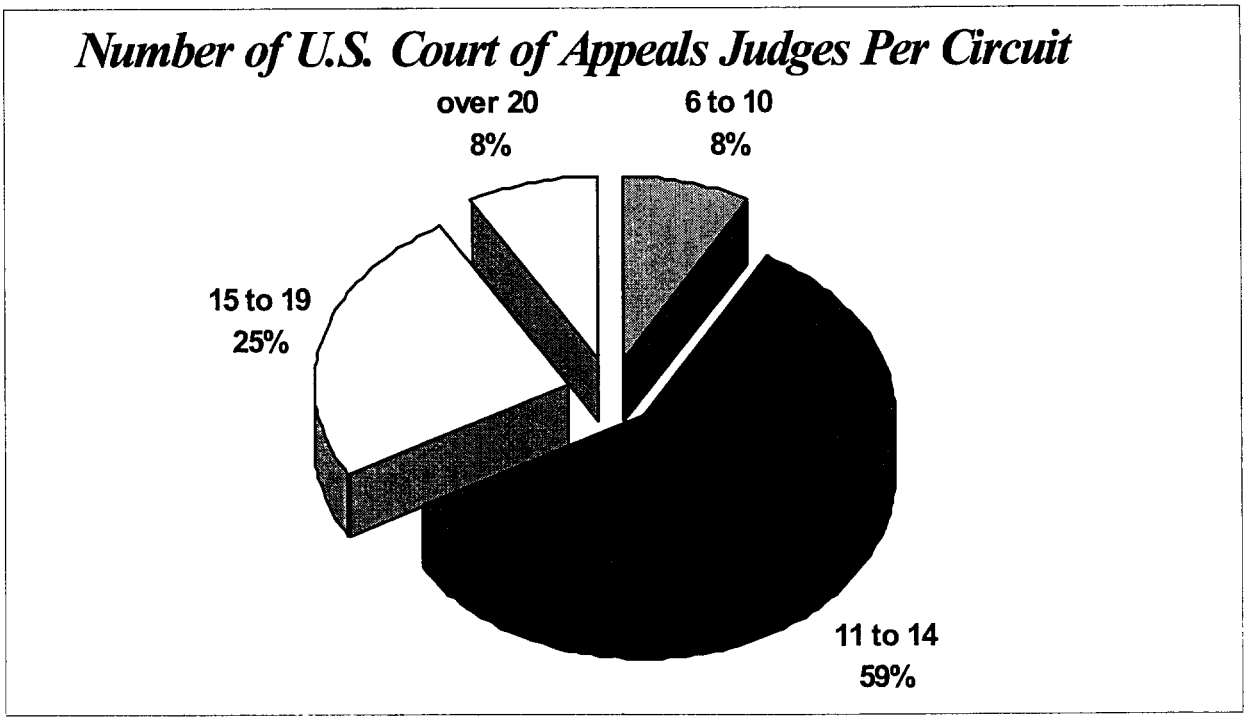
Authorized Bankruptcy Judgeships FY 2002	Number of Districts	Average Bankruptcy Clerk's Office Staff	Average Local Budget ($millions)
1 to 2	38	28	$2
3	19	53	$3
4 to 6	23	83	$5
7 to 10	9	120	$7
over 10	1	380	$22



Court Size Profiles

Appellate Courts

Authorized Circuit Judgeships FY 2002	Number of Circuits	Average Circuit Clerk's Office Staff	Average Local Budget ($millions)
6 to 10	1	28	$2
11 to 14	7	50	$3
15 to 19	3	74	$4
over 20	1	118	$10



More Than Half of Federal Judiciary Facilities House More Than One Court Unit

Table 1

Buildings in the Federal Judiciary

Number of buildings housing court units	762
Number of buildings housing six court units *(appellate court, district court, bankruptcy court, probation, pretrial services, federal defender)*	10
Number of buildings housing any five court units	32
Number of buildings housing any four court units	82
Number of buildings housing any three court units	112
Number of buildings housing any two court units	189
Number of buildings housing only one court unit	337

Table 2

Locations and Co-Locations

	Total nationwide locations	Co-locations with any other court unit
Appellate Court	161	131
District Court	441	382
Bankruptcy Court	260	196
Probation Office	415	324
Pretrial Services Office	134	131
Federal Defender Office	188	98

Table 3

Court Unit Co-Locations

	Appellate Court	District Court	Bankruptcy Court	Probation Office	Pretrial Services Office	Federal Defender Office
Appellate Court		**119**	**71**	**78**	**48**	**35**
District Court	**119**		**166**	**299**	**110**	**87**
Bankruptcy Court	**71**	**166**		**134**	**63**	**110**
Probation Office	**78**	**299**	**134**		**110**	**70**
Pretrial Services Office	**48**	**110**	**63**	**110**		**43**
Federal Defender Office	**35**	**87**	**48**	**70**	**43**	

Appendix C: Study of Administrative Services

PURPOSE OF THE STUDY. Identify, assess, and recommend cost-effective and efficient structural options for the delivery of administrative support services to the courts that will ensure professional, high quality, and responsive services while not impeding local decision-making. Administrative services include business functions such as: budget management, accounting, personnel administration, information technology support services, procurement, property management, and facilities management.

Desired Outcomes

- Key Decision-Making Remains at Local Levels
- Increased Efficiency and Lower Costs
- Equal or Improved Quality of Service
- Enhanced Internal Controls
- Satisfactory Service Levels

Key Questions to be Considered

- How are courts currently organized and staffed to carry out their administrative functions? What is the cost?
- How are other decentralized organizations – including executive branch agencies, private organizations, and state court systems – organized and staffed to provide administrative support services?
- To what extent are court units already sharing various administrative services? What factors appear to be critical to successful sharing?
- What aspects of administrative work must occur on-site and what activities can be performed remotely?
- What potential options exist for performing administrative support work such as: sharing or delivering services locally (e.g., between court units), regionally (e.g., state-wide, circuit-wide), program-wide (e.g., among probation offices), nationally, or through service contracts (e.g., other agency or private company)?
- What service delivery options are most viable? Under what conditions?
- How can quality be measured? What impact will the various options have on the quality of services?
- What is the potential for savings, cost-avoidance, or efficiency?

Study Participants

Both the Budget and Judicial Resources Committees proposed a study in this area, to be undertaken in concert with committees on Court Administration and Case Management, Information Technology, Criminal Law, and the Administration of the Bankruptcy System. The AO will conduct this study with the assistance of one or more contractors. Judges and court personnel will have ample opportunity to provide input and guidance to the study.

Planning Issues Suggested by Chief Judges

September 2002

Administrative Office of the United States Courts
Long Range Planning Office

Planning Issues Suggested by Chief Judges

Table of Contents

Planning Issues Suggested by Chief Judges

September, 2002

Introduction

In April 2002, Chief Judge Charles R. Butler, Jr., the Executive Committee's planning coordinator, sent a letter to all chief judges of United States appellate, district, and bankruptcy courts on behalf of all Judicial Conference committees involved in planning. The letter (see Appendix 1) asked for general ideas on planning issues as well as suggestions for particular committees. Sixty-three chief judges responded (see list, Appendix 2). All of the suggestions have been shared with the chairs of Judicial Conference Committees. An overview of the major themes raised by the chief judges' letters follows.

Overview of Issues

Court Management

- Are the courts' management structures suited to today's decentralized management requirements?
- What management training do chief judges and court unit executives need?
- What level and type of staff support do chief judges need? Do needs differ based on size?
- Should the process for the appointment and term of office for chief bankruptcy judges be more defined?

Judgeships

- How can the judiciary's true judgeship needs be determined? Are the judgeship formulas valid? Are case weights valid?

- Is it appropriate to create magistrate judge positions to limit the number of Article III judgeships?
- What can the judiciary do to obtain needed judgeships?
- What are the implications of the growing number of senior judges for resource and facility planning?

Magistrate Judges

- Is eight years an appropriate term of office for a magistrate judge?
- What is the best way to inform district court judges about the effective use of magistrate judges in the handling of cases and in court governance?

Judicial Independence

- Are executive and legislative branch actions marginalizing the jury system and the district court judiciary? Should the judiciary actively oppose such actions?

Judicial Branch Governance

- Is the Judicial Conference equipped to be responsive to rapidly developing issues?
- Should chief judges be more involved in the policy decision-making process?
- Should the judiciary provide larger courts a more proportionate opportunity to participate in policy-making?
- Should bankruptcy judges have a greater voice in judicial branch governance?

Judicial Relations

- Can the judiciary do more to foster collegiality among judges?

Quality of Justice

- Can quality be defined and measured? Is the judiciary doing enough to describe and articulate the quality of justice that is being delivered?
- Should the judiciary study how to make court rules and procedures less complicated?

- Are courts accessible to the less privileged and to those who do not speak English? Can more be done to assist pro se filers?

Treatment of Large vs. Small Districts

- To what extent is a single solution or approach applicable to large and small courts – can and should the judiciary develop programs and policies that differ based on size categories?

Court Staffing

- What has been the impact of information technology, especially CM/ECF, on staff in terms of the numbers and skills required?
- What are the ramifications – on space, staffing, and procedures – of decreasing trial rates?
- Do the staffing policies for bankruptcy clerks adequately account for the volatility of bankruptcy filings?
- Are there sufficient temporary resources available to courts that are experiencing short-term workload emergencies?
- How can the judiciary foster diversity in the workforce?

Information Technology

- What are the long-range implications of electronic records on personnel, space, security and privacy issues? How will future clerks' offices be designed?
- Are courts effectively utilizing technology? Should the judiciary do more to assess the cost-effectiveness of these investments?
- What role should video technology play in criminal and civil court hearings, trials, and appeals?
- What rules unique to electronic filing will need to be developed nationally as well as locally?
- Should the federal courts explore the possibility of introducing the CM/ECF system to the state courts to reduce the training and technology requirements for the bar?
- Can electronic records become the official case records?

- Are smaller courts equipped to run numerous information technology systems?

Court Operations

- What are the best uses of centralized contractual support services such as the Bankruptcy Noticing Center?
- Can the best practices of courts be better publicized and promoted?
- Is there a declining need for secretarial services and libraries in chambers?

Pay, Benefits, and Training

- Is the erosion of judicial salaries impacting the desirability of a federal judgeship? What is the long-term impact on retention?
- Are judiciary staff salaries and benefits (particularly in chambers) sufficient to recruit and retain talented employees? What other measures can be taken to improve work environments and morale?
- What should the judiciary do to prepare for the large numbers of employees who will be eligible to retire in the next ten years?
- How can we improve the education of judges (especially new judges) about administrative rules and regulations?
- Are bankruptcy judges' education and training programs sufficient?
- Do probation officers receive enough training to carry out their difficult duties?

Facilities and Security

- Should the judiciary's facility planning horizon be extended? Are we building courthouses that are too small?
- Can the process for acquiring new space and buildings be streamlined?
- Are the highest-priority security needs of the courts being met? How can the security needs of courts and judges located in noncourt, nonfederal, or private leased space be effectively addressed? Should security "audits" be undertaken?

- How can the judiciary improve its relationship with executive branch agencies in providing for facilities and security? Would it be cost-effective for the judiciary to assume more of these responsibilities?

- Should the judiciary conduct background checks on all employees?

Detailed Comments of Chief Judges

The following pages present extracts of the chief judges' letters organized by topic, keeping, to the extent possible, the original words of the sender.

Court Management

Management Structures

Carolyn Dineen King, Chief Judge, Fifth Circuit Court of Appeals:

I have one suggestion. The decentralization from the AO to the courts that has been occurring during the past several years results in increasing responsibilities at those courts. The great strength of decentralization is that it gets the decision-making closer to where the impacts of the decision making are to be felt. I have a question whether there has been any systematic look at the management structure of the groups to whom the decision-making and implementation have been delegated. A system that worked before decentralization would likely be strained (without some changes) to deal with a post-decentralization world. Bulking up from a personnel standpoint is only a partial answer. The ever-increasing responsibilities at the circuit level and district court level fall mainly on chief judges and a few senior managers. Some (like me) enjoy that, indeed groove on that. But those responsibilities challenge the resources of even the most enthusiastic manager. A manager who really cares about doing a first-class job in addressing all the responsibilities that come his way must have real concerns about whether that is even possible. Do we have the best structures in place to deal with the post-decentralization world?

Frederic N. Smalkin, Chief Judge, District of Maryland:

Please let me add to Judge King's comments the observation that, while the Circuit Courts of Appeal enjoy the benefits of having a Circuit Executive, we at the District Court level are (except for a few survivors) denied the power to fill such a position for reasons that, as I best understand, have to do with something that happened years ago that offended someone on the Hill.

The result is that leadership at the District Court level is inherently a flawed structure. Either it is a structurally inefficient leadership model, such as one-person band or rule by multiple committees, or it takes a clerk away from the business of running the clerk's office and effectively puts him or her at a level above that of other court unit chiefs.

This is nonsense. Can't we find a way to create a meaningful District Court Executive program?

Howard D. McKibben, Chief Judge, District of Nevada:

I fully support the thoughtful responses you have received on the issues relating to long-range planning. I would simply like to support Chief Judge Smalkin's suggestion that consideration be given to the establishment of a District Court Executive Program in all districts. Thank you for your efforts.

A. Joe Fish, Chief Judge, Northern District of Texas:

Suggested Action: Carefully evaluate the management structure of the circuit and district courts.

> Ensure that the current management structure sufficiently enables court unit executives to handle the many challenges of decentralization. Also, ensure that court unit executives receive adequate training and support to handle the increasing (and always changing) administrative responsibilities placed upon them.

D. Brock Hornby, Chief Judge, District of Maine:

Many of the concerns and cries for help are a result of decentralization. Decentralization has been a valuable initiative undertaken by Director Mecham with many positive effects, but it has inevitably increased the responsibilities and workload at the circuit and district levels, particularly for circuit executives, for clerks' offices and for chief judges. I join the suggestions that we should take a careful look at the implications of this increase in local responsibility and workload (as has already started in the stewardship initiative). But in searching for ways to cope with this increase, we must also keep in mind the core values of judicial independence and equality (among judges, among circuits, and among districts). I share all my colleagues' desires for more help as a chief, and I recognize that large districts and large circuits face problems that small districts and small circuits do not, but there are some risks in building up too many administrative structures or supports (they can come to look like "perks") or in making some districts or circuits or judges look more "powerful" than others. Although there are many creaks and squeaks in the current system, all in all it works pretty well for a governmental institution. We can and should make modest adjustments to keep it running, but let's be very careful of any dramatic change.

Gerardo A. Carlo-Altieri, Chief Bankruptcy Judge, District of Puerto Rico:

My first suggestion is to institutionalize the planning process and have a permanent planning position at all levels of the bankruptcy court system, that would insure the effort is properly carried out, reviewed and adjusted as needed. In a way, planning should be everyone's everyday job, but it should have formal structures so that it remains organic.

Management Training

Judith K. Fitzgerald, Chief Bankruptcy Judge, Western District of Pennsylvania:

I endorse Carolyn King's memo. Perhaps considering additional managerial training for chief judges on business and personnel practices, budgeting, cost controls and handling administrative responsibilities while balancing a full case load (with no extra chambers staff at the Article I judge level) would be helpful.

Geraldine Mund, Chief Bankruptcy Judge, Central District of California:

A court is a business and in the case of large courts it is a "big business." Chief judges need every sort of management training if we are to do our jobs properly. This includes basic leadership skills, organizational understanding, and special training in the areas of personnel and financial management. We need tools for dealing with difficult colleagues or those who are affected by health or psychological problems. It would also be beneficial to understand the relationship of the courts to the Circuit Executive's Office and to the Administrative Office, and to know the powers of both of those institutions as they affect the running of the trial court.

Thomas F. Waldron, Chief Bankruptcy Judge, Southern District of Ohio:

I write to simply add my voice to my colleagues, particularly Chief Judge Mund. It appears that in many Circuits the role of Chief Bankruptcy Judge is changing. The expectations of many other participants in the court system (other Bankruptcy Judges, the AO, the Clerk's office, the District Court, the Circuit Court, the Circuit Executive, the Marshal, Court Security Officers, etc.) concerning the Chief Bankruptcy Judge are increasing **without a concomitant increase in appropriate authority, resources and training** [emphasis original]. To the extent these increased expectations, without a commitment to increased appropriate authority, resources and training, are being embedded by unspoken assumptions, rather than by articulated analysis, the planning process may be building on an unstable foundation. Perhaps I am pushing on an open door; however, judicial officers, particularly those charged with administrative responsibilities, must be regarded as a valuable resource and given additional tools necessary to properly complete the assigned tasks.

James K. Singleton, Chief Judge, District of Alaska:

I would like to comment regarding concerns that the Chief District Judges have regarding the AO's Stewardship Program. In my capacity as the Chair of the Chief District Judges for the Ninth Circuit, I recently attended a meeting on the Chief Bankruptcy Judges of this circuit and they share in these concerns. I also sit on the Judicial Council of the Ninth Circuit and I believe that the circuit judges also share these concerns. Frankly, the proposal that Chief District and Chief Bankruptcy Judges closely monitor the unit executives' time, attendance and travel has caused a great deal of concern among the Judges, in part because they feel that it is demeaning to

the unit executives and partly because most Chief Judges lack the background in management, accounting and business practices to successfully monitor.

Chief Judge Staff Support

Richard G. Kopf, Chief Judge, District of Nebraska:

A Chief Judge of a court with five or more active judges is entitled to one additional staff member to assist with the administrative burden. That is not true for courts such as the District of Nebraska. We have four active district judges, two senior district judges, three magistrate judges, and two bankruptcy judges. We are implementing CM/ECF for both civil and criminal cases. We have the ninth heaviest criminal caseload in the nation. I could go on, but the point is this: The administrative burden on Chief Judges in small and medium size districts is at least as great as that carried by our colleagues in larger districts. Thus, I urge that Chief Judges in small- and medium-sized districts be provided with the same staff resources as Chief Judges in larger courts.

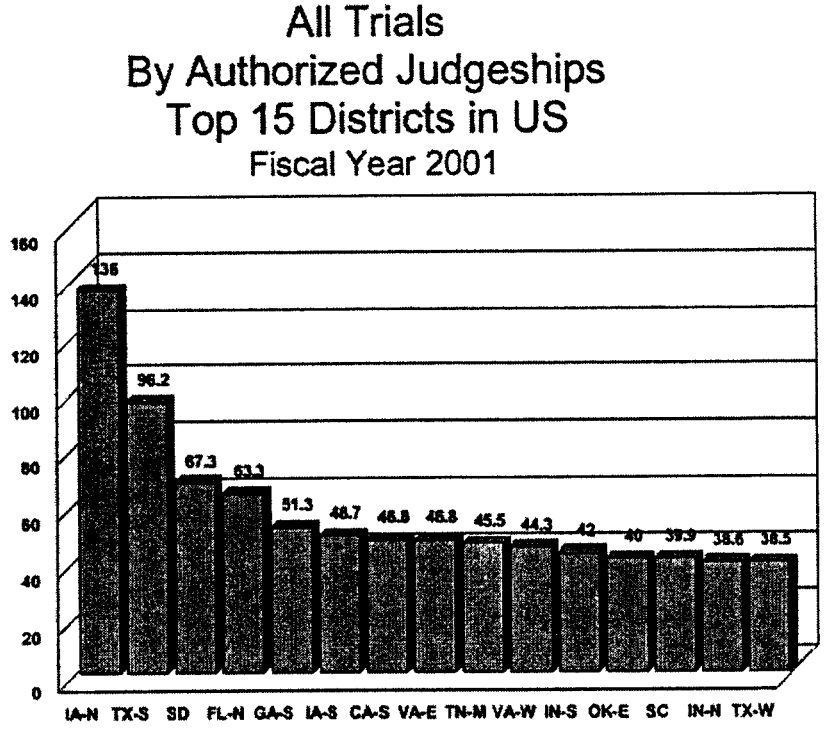
Donald W. Molloy, Chief Judge, District of Montana:

I am also concerned that as Chief Judge of a district that has three active Article III judges, we are short-changed on staff. If we had five active Article III judges, an additional staff person would be authorized, and the Chief Judge would be authorized to take a reduced case load. We have three active Article III judges, one active circuit judge, two senior judges, three magistrate judges, one bankruptcy judge, a recalled bankruptcy judge, and a part time magistrate, with the same administrative issues the bigger districts entertain. We are not given the staff assistance, nor can our chief judge take a reduced case load. This needs to be changed, particularly with the added administrative/safety issues we are all dealing with post-9/11.

Mark W. Bennett, Chief Judge, Northern District of Iowa:

I could not agree more with C.J. Molloy's concern about small districts (less than five district court judges) not getting an additional position for the Chief Judge of the district. Here in the Northern District of Iowa we have two authorized judgeships, we have the sixth heaviest criminal caseload per judge in the nation – first among the non-border courts. We led the nation in trials last year at 51 per judge, led the nation by an eye-popping amount in the "all trials category" at 136 per judge (see graph below) and led the nation with 86 contested sentencings per judge. Our weighted caseload is 555 per judge and I travel extensively to two other court points (the farthest is 330 miles one way – I was there 16 times last year). We are also building a new courthouse in Cedar Rapids. As Chief Judge, I have to review and act on every e-mail and piece of paper that crosses my desk. Unlike the larger districts, we have no Article III judges committee (in fact I am currently the only full time Article III judge in the district) or large administrative structure in the clerks office to delegate to. I respectfully submit that the small busy districts like ours and Chief Judge Molloy's (the District of Montana) need the position far

more than many of the larger districts that have far fewer judicial demands on them. Without this additional help, I am so busy working 90 hours a week, seven days a week, that long-range planning is, unfortunately, a pipe dream. I beg you to consider doing something about this grave inequity.



Sue L. Robinson, Chief Judge, District of Delaware:

As another Chief Judge of a busy but small district, I echo the concerns raised by my colleagues concerning the allocation of resources to districts having less than five district court judges. I will save my examples for another day, but rest assured I have them.

W. Harold Albritton III, Chief Judge, Middle District of Alabama:

I don't want to be left out as a small court (three judges) crying for help. No one understands these problems better than you, since you are the chief of a three-judge court which went for a couple of years with only one active judge (you) and still has only two. Our court has been recommended for an additional judge for ten years now because of our heavy case load, but even with that, no extra help is available except recruiting visiting judges and being creative in overloading our magistrate judges with work that takes them away from their duties with prisoner cases, etc. I wish I had time to think of and suggest some specific things, but I will have to wait until I finish building a new courthouse on top of everything else. Thanks for asking.

Robin J. Cauthron, Chief Judge, Western District of Oklahoma:

How interesting to read all the thoughtful comments from around the country, with all of which I agree, with special emphasis on the need to give chief judges some help in managing our courts.

Jimm Larry Hendren, Chief Judge, Western District of Arkansas:

I join Judges Molloy and Bennett in the belief that Chief Judges of all districts having more than one active district judge should be accorded additional staff assistance and other considerations currently accorded only to chiefs in districts having five or more active judges. I doubt we judges of smaller districts get fewer emails from the AO than do our brethren in the larger courts and, also, most of us in the smaller courts are widely dispersed geographically. We need the extra help.

Robert L. Echols, Chief Judge, Middle District of Tennessee:

I want to join the number of chiefs of smaller courts who have recognized the need for an additional staff member to assist them in the growing demands of a decentralized system which has not adjusted to meet the continuing demands and delegations from the AO and others. With four active judges, three senior judges, and three magistrate judges, I am extremely busy carrying out the duties of a Chief and handling a full case load. Compounding the problem is the fact we are replacing our Chief of Probation and Pretrial Services, building a new courthouse, trying to participate in a few community outreach projects, etc. I am discovering that the courthouse project alone will occupy a tremendous amount of my time both in and out of the office. I have not worked a normal schedule for a while, but I would not complain if I had another staff member (preferably a law clerk) to help with the work load. Effective managers can accomplish so much more if they have qualified people to whom they can delegate responsibilities.

David Alan Ezra, Chief Judge, District of Hawaii:

I fully agree with and adopt the remarks of Chief Judge Echols.

Glen H. Davidson, Chief Judge, Northern District of Mississippi:

I join in the statements relative to additional duties assumed by chiefs in small districts. I have been chief for approximately two years, and spend about 50% of my time on the additional administrative duties. Our Circuit Council saved me by allowing an additional law clerk on a temporary basis. I thought I was busy previously when I was concerned with my caseload. Construction projects seem to take a great deal of time. We have three major projects under way currently.

Thomas E. Baynes, Chief Bankruptcy Judge, Middle District of Florida:

If your committee can come up with some remedies for the chief judges in smaller districts, those of us in the larger districts would greatly appreciate a piece of the benefits from a decentralized Washington. Having a district the size of South Carolina with a population of New Jersey or Georgia only starts the perpetual chaos for a chief judge here. Then there are the seven other judges and one recalled judge sitting in divisions the size of most districts, the 180 employees similarly disbursed seeking solutions to such things as occupying, building, or planning for four courthouses, budgeting and spending a $10 million budget and coming on line with CM\ECF while handling 50,000 bankruptcy cases annually. All this puts a crimp in my CJ style when trying to handle 5,500 of my own cases with a half-time JA, courtroom deputy and law clerk. Of course, it is too early to mention the judge survey team coming next month to see if we need two or three new judges – where we will put them will be an interesting test of this court and GSA. Then there is the third audit in a year and a half in August – then it is budget time again. Why would anyone in their right mind be a chief judge – fortunately for me all my blood oaths as to this job end in December and I will go back to judicial obscurity; nonetheless, I hope someone has a relief plan for the chief judges who remain.

F.A. Little, Jr., Chief Judge, Western District of Louisiana:

As Chief Judge of a district that has, or will have when three vacancies are filled, seven active judges, five senior judges, five magistrates, three bankruptcy judges, and five divisional offices, I can justify the need for more staff support. A third law clerk just does not close the gap. Moreover, a reduction in case load for a Chief who is the sole judge in a division that is 100 miles distant from any other division provides little practical relief.

Roger Vinson, Chief Judge, Northern District of Florida:

I join with all of those who feel we need some help in handling the administration and management of our courts. In the five years that I've been a Chief, it seems that the volume of administrative work has doubled. A good Clerk of Court can help, but he/she has other demanding duties, too. And, as others have pointed out, multiple staffed courthouses make everything more difficult. Just trying to schedule meetings with my fellow judges can be very time consuming. We need a court executive, or some similar position, to assist us. This is particularly important when construction projects are in progress. (I've had two new courthouses constructed in my five years, along with planning for a third, extensive reconstruction of the two vacated courthouses to be backfilled, major renovations in two other courthouses, and the leased temporary spaces required during all of this.) Personnel matters are taking more time, too, now that we have the EDR Plans in effect. For courts with several judicial vacancies (such as yours), I don't see how the Chief can keep up.

Geraldine Mund, Chief Bankruptcy Judge, Central District of California:

In calculating the weighted case load for bankruptcy judges, I suggest that the Administrative Office allow a district to give credit to its chief judge in the workload statistics if the district decides that it is warranted to do so. Further, if a chief judge feels the need for additional staff, there should be a mechanism to request that.

The allocation of law clerks to judges throughout the judiciary seems to be based more on status than on need (I believe that the number of law clerks increases as you move up the judicial pay scale: one for bankruptcy judges and magistrate judges, two for district judges, three for circuit judges, and four for supreme court justices.) Further, a busy district has the same number of law clerks per judge as a district with much less work. Being able to use a judicial assistant spot for a law clerk has been beneficial, but does not necessarily fill the need of some bankruptcy courts. There should be a method whereby a bankruptcy court can certify the need for additional law clerks and obtain them. At the present time, bankruptcy courts must compete with others for limited temporary personnel funds. Further, each year the allocation of funds for temporary personnel must wait until the budget is passed, and this interferes with the hiring and retention process.

Gerardo A. Carlo-Altieri, Chief Bankruptcy Judge, District of Puerto Rico:

I agree with a lot of the recommendations made by the other judges, which I have read with interest. I would support the idea that the number of law clerks, facilities and resources be allocated by the courts in a more appropriate fashion and based on need rather than the status given to one type of federal judge over the other, which in this time and age seems anachronistic.

Thomas I. Vanaskie, Chief Judge, Middle District of Pennsylvania:

In particular, I agree that additional staffing support is essential for Chief Judges. In some of the larger Districts, there is both a Clerk of Court and a District Executive. With increasing decentralization, such a position should be considered for other courts. In addition, each Chief Judge, regardless of District size, should be entitled to an additional support staff person.

James A. Parker, Chief Judge, District of New Mexico:

One of our greatest concerns in the District of New Mexico is how to plan for all aspects of growth of a court family that is rapidly increasing in size while trying to keep abreast of our exploding caseload that drives the growth. In the last ten years, our district's Article III judgeships increased 50% – from four to six. Hence, we are sympathetic to Judge Molloy's concerns about courts with fewer than five judges and to the concerns of the judges of districts with inadequate numbers of judgeships. Despite our district's large percentage increase in judges, our weighted filings per judge – presently 723 and above 800 until we received the sixth position at the end of 2000 – continue to be well above the national average. (Even if our district

receives the three additional judgeships as has been recommended, our weighted filings would still be above the national average). As an impacted border district, we do expect to have at least one and possibly two additional judges authorized fairly soon. While this would give some relief in managing caseloads, it would exacerbate our space and facilities problems because our courthouses are essentially full at this time, and would result in many other problems associated with rapid growth. (During the last ten years, our court-related agencies increased in size at a much greater rate than the rate of increase of judges. The U. S. Probation Office increased over 150% from 35 to 88 employees; U. S. Pretrial Services increased about 150% from 14 to 34; and the Clerk's Office doubled from 36 to 71. Needless to say, this enormous increase in court-related agencies staffs has imposed a heavy management load on the judges, especially those who have served as chief judge).

Chief Bankruptcy Judge Selection

David P. McDonald, Chief Bankruptcy Judge, Eastern District of Missouri:

The entire judicial system would benefit if the selection and period of service of a chief bankruptcy judge were given more certainty, or were based on the Article III system, or were at least more clearly defined.

Judgeships

Mary M. Schroeder, Chief Judge, Ninth Circuit Court of Appeals:

I think it is important, for long-range planning purposes, that the committee look at the formulas used for determining when additional judgeships are needed. As they presently exist, they are not useful for many types of judgeships, especially court of appeals judgeships. What kind of guidance do we want to give Congress, or do we want to give any specific guidance on a national basis, as opposed to a court-by-court plan?

Lawrence L. Piersol, Chief Judge, District of South Dakota:

On another subject, the Federal Judiciary has previously examined the issue of the number of Article III judicial positions that there should be at various points in the future. The topic has been debated in the past without any clear resolution, at least as far as I know. We have been requesting additional positions as need is determined, but that does not mean Congress will accede to the requests. Increased delegation and use of Magistrate Judges has been at least an implicit determination by the Federal Courts to limit the number of Article III judges requested. We should revisit this issue to reach specific conclusions and goals, rather than seeming to drift along responding to demand.

Marilyn L. Huff, Chief Judge, Southern District of California:

The Long-Range Planning Committee (and Judicial Resources) should discuss how the judiciary can better obtain the judgeships that it needs. The last Omnibus Judgeship Act was in 1990. Since that time, the additional new judgeships have not been through the House and Senate Judiciary Committees and not technically through "official" Judicial Conference action. While the two political parties blame each other for delay in filling existing vacancies, Congress has been reluctant to act on the Judicial Conference recommendations for new judgeships. There are courts with a demonstrated need for new judgeships. There are courts that are in jeopardy of losing a temporary judgeship when the next judge takes senior status, or the court loses one of its existing judges. Are the courts doing enough to get the message to the Congress that the lack of action on judgeships is impairing the administration of justice? If the judiciary doesn't speak on this issue, who will? How can we persuade Congress to act? If we don't persuade Congress to create more judgeships, then something should be done institutionally to provide sufficient resources to those courts in need. However, additional magistrate judges, and even visiting judges, are not sufficient to address the needs of those courts with high caseloads. Perhaps the Long-Range Planning Committee has some ideas for action. We will be discussing some of these issues at the meeting of the Judicial Resources Committee in June.

Geraldine Mund, Chief Bankruptcy Judge, Central District of California:

The workload formula for bankruptcy judges is based on a study done in the late 1980s by the Federal Judicial Center. I have been advised that a Judicial Conference committee has decided that the methodology used was flawed and will not be using that methodology to determine workload for district court judges. Perhaps it is time to see whether the workload formula for bankruptcy judges is valid.

> Judgeship Formula – The formula used to recommend new judgeships is heavily tied to past filings. Increase in bankruptcy filings is a result of a combination of economic waves which flow across the country from East to West, housing issues in the West, high levels of consumer debt, and demographic growth. Even if Congress acted immediately upon the judiciary's judgeship requests (and this has never been the case), it takes between 12 and 18 months to fill an open bankruptcy judgeship. These issues should be considered in determining the need for new judgeships in bankruptcy courts.
>
> Temporary Judgeships – The judiciary should take a careful look at Congress' intent to make all new bankruptcy judgeships "temporary." In a small district with younger judges, it is possible this will not create a problem for many years to come. But in the Central District of California, six of our 21 judges have retired during the last 10 years and we expect that pace to continue for some period of time. Thus, we will constantly be losing badly needed judgeships, since they expire after five years if there are any openings. Beyond the obvious problems for planning arid efficient work, this means that on-going cases will constantly be divided up among the existing judges who are not familiar with them, rather than through an orderly transition from a retiring judge to a new judge.

John M. Walker, Jr., Chief Judge, Second Circuit Court of Appeals:

The issue of case weighting and its impact on judicial resources or the process of obtaining additional judicial resources is a primary concern for many of the chief judges of the district and bankruptcy courts in the Second Circuit. Four of the district courts in our Circuit recently received "congested court" letters from CACM Committee Chair Chief Judge John Lungstrum. Although the Second Circuit Judicial Council currently plans to discuss this issue at its June 6th meeting, including any ways in which we can assist our congested districts, improving court administration and case management techniques only goes so far, and they are no substitute for increased judicial resources.

The caseloads of many of our Second Circuit courts comprise a significant number of *pro se* filings, and in some of these courts, it is almost one-third of the entire workload. The current case weighting formula, which is about a decade old, treats four *pro se* filings as the equivalent of one counseled matter. As you are well aware, the issues raised in many of these uncounseled cases, particularly habeas petitions under AEDPA, are difficult and require substantial judicial attention. *Pro se* and prisoner matters currently comprise 43% of my own court's docket and I can attest to their frequent complexity.

Similarly, "consumer bankruptcy courts," especially those in districts like New York's with large immigrant populations, receive minimal credit for *pro se* filings under the current case weighting formula. The majority of these cases cannot be resolved by non-judicial personnel in the Clerks' Offices and thus necessitate judicial intervention. In the EDNY Bankruptcy Court, consumer filings have fluctuated over the past several years between 29,000 and 32,000, and yet, based on these statistics, this court no longer qualifies for a much-needed seventh judgeship. The widely held view in the Second Circuit is that the federal judiciary should revisit the present case weighting formula and, in order to appropriately reflect both the volume and complexity of *pro se* and prisoner litigation pending in the federal courts, accord greater weight to such matters.

Thomas I. Vanaskie, Chief Judge, Middle District of Pennsylvania:

One item that I believe warrants study is the increase in the number of Senior Judges and their length of service beyond assumption of senior status. Senior judges render extremely valuable service to their courts and the nation. At the same time, the growth in number of senior judges can place a strain on facilities and resources. When I was a law clerk in this District more than twenty years ago, there were five active judges, and no senior judges. Today, we are authorized six judgeships, and currently have seven senior judges. I suspect that there are other districts that have a large contingent of senior judges. A study on the longevity of our Senior Judges may prove helpful in planning for resource and facility utilization.

Another item that may warrant study is the loss of judges after a considerable period of service, either due to financial constraints or for other reasons. It would be interesting to learn whether there is a trend in the loss of experienced judges so that any developing problem could be addressed.

Gerardo A. Carlo-Altieri, Chief Bankruptcy Judge, District of Puerto Rico:

The idea of having a form of senior bankruptcy judgeship in addition to recall and full retirement also seems to make sense.

Magistrate Judges

A. Joe Fish, Chief Judge, Northern District of Texas:

Suggested Action: Take steps to change references from "magistrate" to "magistrate judge" in statutes and rules.

> The Conference should take action to see that all of the references to "magistrate" found in Chapter 43 of 28 U.S.C. be replaced with "magistrate judge." The position was recognized in 1990 as a judicial office. Retention of the erroneous "magistrate" in the Code tends to perpetuate an antiquated and restrictive view of magistrate judges. All rules should also conform.

Suggested Action: Encourage courts to effectively use magistrate judges in court governance by documenting "best practices "

> As recognized in the 1995 plan, judicial governance bodies represent the interest of all judges. Although the Conference spoke to this in the 1995 Plan saying that, "district courts should take appropriate steps to involve bankruptcy judges and magistrate judges in local governance" (Recommendation 50c, p. 84), there have been various interpretations of the term "appropriate." Perhaps the Conference could identify some of the participatory practices that have worked well and/or give examples of what works.

Suggested Action: Consider requesting an increase in the magistrate judge term of office.

> The magistrate judge positions are viewed as career positions and in almost all respects, treated in the same fashion as bankruptcy judges regarding pay and benefits. To obtain full benefits on retirement for both types of judges requires fourteen years of service and obtaining age sixty-five. However, the term of a bankruptcy judge is fourteen years while the magistrate judge's term is eight years. The Conference should consider taking steps to eliminate this disparate treatment by asking that Congress increase the term of a magistrate judge to fourteen years. This change might help attract better candidates to the position and would save courts the time and money it takes to reappoint a magistrate judge every eight years.

Suggested Action: Better inform district judges on how to effectively utilize magistrate judges.

At magistrate judges conferences (FJC) and through the Magistrate Judges Division at the AO, significant attention is given to the issue of efficient utilization of magistrate judges. However, this information is not necessarily reaching the district judges.

Judicial Independence

Graham C. Mullen, Chief Judge, Western District of North Carolina:

Our branch of government is by design, totally reactive. We have no control over our work load or our finances, but must depend on Congress, both to create our jurisdiction and provide the resources to do our work. The jurisdictional legislation creates the possibilities and private counsel and to the largest extent, the U.S. Attorney determines our actual work load. The criminal cases offer the greatest challenge to our independence with rigidly structured plea agreements some of which even preclude any argument about sentences. Our choice is to wreck our court by rejecting pleas and be overwhelmed with trials or move the cases. Departures are treated as judicial bad boy tantrums defying the "guidelines" (or perhaps the circuit). So far, Congress has not tampered with the rules of decision to control civil outcomes but it's probably because they haven't thought of it, yet. It seems to me that both the legislative and executive branches are hostile to judicial independence and seek to convert us into mere fora to enforce the politically correct rule de jour. As a result, I am not optimistic about our ability to remain independent.

Thus for planning purposes, I believe that the overwhelming issue we face is the continuing pressure if not downright assault on our independence. That assault can be turned aside only if the general public supports us and that means we must find a way to be politically proactive on behalf of the judiciary, not a partisan political party. I have no concrete suggestion as to how to accomplish that and I am fully aware that any such efforts are fraught with risk, especially the risk that any such effort will produce more loss of independence. Certainly, at a bare minimum we must continue to press our case before Congress.

William G. Young, Chief Judge, District of Massachusetts:

My comments are of such a broad institutional nature that they will be difficult to work into your committee's format. Moreover, in a letter of this nature my conclusions necessarily seem more stark and absolute than I desire, as they are bereft of meaningful reasoned argumentation and nuance. Nevertheless, they are deeply felt and will, I hope, provide a starting point for discussion. While these are all matters of round table debate in our court, and some of my colleagues concur in certain of these ideas, I write for myself alone. Throughout, the focus here is on the district court judiciary.

-- **The district court judiciary is losing (has lost) focus on its primary missions.** Ours is a dual mission.

First, we preside over the largest, moot daring, and most successful experiment in direct democracy ever attempted in the history of the world -- the American Jury system. The continued vitality of that system depends in no small measure on the skillful management and warm inspirational support of United States district court judges.

Second, alone among the democracies of the world we commit first instance constitutional interpretation to United States district judges. In contrast, most countries reserve constitutional adjudication for a special appellate court. The result is plain -- the United States Constitution is the most vibrantly living written governmental framework and guarantee of individual liberties ever seen -- precisely because reasoned, case specific, written interpretation of the fundamental law is as close as the nearest federal district court.

That's what we do. A bit of the very sovereignty of the nation is committed to our charge, and with this as our trust we make the jury system flourish so that dimension of direct democracy works well in tandem with our federal system of representative democracy. At the same time, we provide reasoned explanations of the rule of law (ultimately constitutional law) to our citizens.

Do our institutional actions reflect the burden and glory of these monumental challenges? You know they do not. Our processes are too costly and too slow, yet we were not even included in the last major discussion of these issues and had to scramble to catch up and prevent unwise micromanagement. Today, our processes are slower still and even more costly, yet we can hardly be considered proactive on these issues. Instead, one of our most distinguished circuit chief judges tells her district court colleagues that we ought no longer consider ourselves trial judges at all and articles in Judicature echo the point. We express concern that our jury system is withering, study the matter, find out that much of the decline is statutorily driven so -- ho hum -- nothing we can do about it. In fact, the demise of our jury system is the single most significant development in American law since the populist era -- and we district judges are uniformly silent. It is today unfashionable, somewhat *de classe*, certainly old fashioned and out of step to extol the systemic virtues of the American jury and carefully reasoned written adjudication.

Don't get me wrong. Whenever I start off like this, some of my most thoughtful colleagues hear me ranting against case management. Not so. Not so at all. One of the difficulties inherent in raising these issues is that the debate seems to fall into extreme positions. Those who argue that the district court judiciary ought evolve frequently disparage the trial process itself while, on the other side, Judy Resnik, the most brilliant observer of our institutional drift, seems committed to attacking us as conservative and anti-feminist. Small wonder that the hard working majority of judges are silent.

My point is more modest. Of course we must be skilled managers. Of course we must embrace all forms of voluntary ADR. But to what end? To the end that we devote the bulk of **our** time to those core elements of the work of the Article III trial judiciary -- trying cases and writing

opinions. We ought remember, as the RAND study and all its progeny confirm, the best case management tool ever devised is an early, firm trial date.

In this regard, the District of Massachusetts is worth study. Through a combination of extraordinary collegiality, adequate judicial resources, and innovation, we are continuing to enshrine the core values while at the same time supporting the nation's leading in-house ADR program and achieving fair settlements wherever possible. We are neither unique nor "better." I suspect many district courts operate as we do; it's just that we never talk about it. Here's what I mean. In Massachusetts, we are generous and accepting of each other and of our various emphases in adjudication. If a judge seeks to be on trial every day, that judge can do it -- every day. If another judge is engaged in extensive writing, there is judicial support ready on other cases. The well tried case or the ground breaking opinion is rewarded with personal notes, calls, and e-mails from colleagues. In addition to discussions of the events of the day and inadequate judicial pay, our informal judicial luncheons are filled with shop talk -- vital matters of sentencing, evidence, procedure, and substantive law. In short, judicial practice here in the District of Massachusetts exemplifies and inculcates a high degree of professionalism with all the results one might expect -- genuine job satisfaction, intensive courtroom usage, distinguished and oft-cited judicial decisions, judicial rules, policies, and procedures that are frequently followed as exemplars, and a district court jurisprudence that is both thorough and case specific as well as being grounded in legal developments across the judicial spectrum.

The truth of the matter is that good management and traditional adjudication go hand in hand. We ought confirm that basic truth, study how it is done, trumpet it, budget for it -- and fight for it. The district court judiciary ought be the nation's most vigorous advocates of our adversary system and the American jury. We fail at our own peril. Here's why:

-- The Congress is increasingly marginalizing the district court judiciary -- and we are complicit in our own sidelining. When was the last time the district court judiciary protested a diminution in our jurisdiction? Can anyone remember? We didn't do it before the adoption of the Sentencing Guidelines and we've never done it since. We are today, largely due to Ralph Mecham's brilliant administration, the best housed (huge court building and renovation program), finest supported (92 support personnel to I judge), most fiscally independent (budget decentralization) judiciary in history. And what is our policy? Other than general platitudes, at the district court level we're all too often unclear what we do, we frequently engage in disparaging it and minimizing its importance, and by the way, dear Congress, we'd like to do less. Our official position is that we'd like to give away diversity jurisdiction. We made no protest over the creation of the redundant and fiscally wasteful Bankruptcy Appellate Panel program, and the present bankruptcy legislation strips away the last vestiges of our review of bankruptcy court decisions. The President's panel on the Social Security System proposes replacing the district judge review of social security decisions with an expanded Article I hearing officer (ALJ) program within the executive. AEDPA and IIRIRA strip away rights that were traditionally vindicated in the district courts and crowd them onto the already overburdened dockets of the courts of appeal, confident that, as a practical matter, the exercise of these rights will be markedly diminished. And us? We are utterly supine in the face of our ever shrinking jurisdiction. After all, these are matters of "policy." Indeed, when the Congress asks us how we feel about the diminution of the role of the jury, the Conference response pallidly explains we are

aware of the modern techniques of juror utilization and promise vigorous support of the jury system. Of course, we don't really mean the last. That would require that we take a position on patients rights legislation, on amendments to the Federal Arbitration Act to return it to its original purposes, and on the host of proposed legislation that preempts state consumer protection but affords no federal remedy which can be vindicated in the courts.

While we effectively, even superbly, lobby for our budget, we otherwise are utterly passive in the fact of forces that marginalize the strength of our democratic adversary system and the jury's role in it. We are, of course, risk averse, and so we ought be in the face of partisan politics. Yet we will have only ourselves to blame when Congress comes to the realization that it is spending more and more upon an ever-shrinking jurisdiction, one that is increasingly divorced from the touchstone of common sense supplied by the nation's juries. In sum, if we don't use our courtrooms we will lose them, and much more besides.

-- The business community -- throughout American history the most vigorous advocate of a strong federal judiciary -- has lost interest in us. We are too slow, too costly, too unpredictable, say global (and local) business leaders. Sadly, the indictment has much merit. How vigorously are we addressing these legitimate concerns?

More ominously, for the first time in our history business has a good chance of opting out of the legal system altogether. Today's expansive reading of the Federal Arbitration Act allows the unilateral imposition of arbitration clauses to trump all sorts of civil rights and consumer protection legislation. Coupled with today's expansive preemption jurisprudence, business can (and does) make a rational calculus that leads it to lobby for an ever- diminishing role for the federal district courts. This is never overt, of course. It coalesces around specific issues with specific "reforms" advanced - the Private securities Litigation Reform Act is a prime example. Yet bit-by-bit, issue-by-issue, the doors of our district courts are closing to ordinary citizens. Business once was the strongest supporter of the federal court system. Today, save in the area of intellectual property, it sees itself as having little stake in our continued vitality and chooses instead to fight its battles directly with the regulatory state.

-- The Europeanization of American law. This is a lousy title -- I'm trying to think of a better one. It does, however, encompass what I am trying to say -- that all these many points together have an increasing tendency to blur the distinctions between the American adversary system and the European civil justice system. In the latter, trial judges are professional civil servants, roughly equivalent to upper level bureaucrats. Constitutional adjudication is performed by a specialized, centralized multi-judge court. Trial judges are often specialized by task since, in such a system, the advantages of judicial bureaucratization seem overwhelming. In our own system, OSHA hearing officers are a good example. Can't happen here? Don't bet on it. The evidence is all around us. It is the Article I, not the Article III, trial judiciary that is today expanding, vital, and taking on ever more judicial responsibilities. The Federal Long Range Study Committee Report, in contrast, largely written by and protective of the functions of the heavily burdened courts of appeal, opts for a steady-state federal judiciary -- saving itself for the really big federal case. But what of the district court judiciary? Once civil juries are gone, I suppose we can continue to try the few criminal cases the executive cannot force to plead. I am not sanguine of the public funding support for such an enterprise. Surely the fate of the state

criminal courts does not hold out much solace for us. Beyond that, let's face it -- there's then little jurisprudential difference between us and the immigration law "judge" whose decisions now go straight to the court of appeals. And, sooner or later, Congress and the public will catch on as well. Since, absent a jury, hearing officers are truly judges, aren't district judges then nothing but hearing officers?

-- **Conclusion.** I am the 31st United States District Judge to sit on a bench whose first occupant was appointed by President George Washington. If you count my prior state judicial service, I have been privileged now to serve for nearly a quarter of a century -- and I earnestly pray that I have a number of good years left in me. While I hope it is too soon to start thinking about my successor, this much is certain -- she will be younger, stronger, and much smarter than am I. Will she have the same opportunity to participate judicially in the life of our nation that has been my happy and sustaining privilege and duty? I hope so. If you take as your Committee's charge insuring that she does, then this letter is well worth it even though substantively you may disagree utterly with what I have written.

Consuelo B. Marshall, Chief Judge, Central District of California:

The following [is a suggestion] for the Judicial Conference Long-Range Planning Committee to consider for implementation among the district courts:

- The judiciary should seek to obtain and exploit a greater consultative role for the judges in the process by which Congress considers new legislation that expands the scope of federal jurisdiction.

I believe [this idea is] worth further study which might reveal [its] benefits or disadvantages.

Judicial Branch Governance

Roger Vinson, Chief Judge, Northern District of Florida:

The Judicial Conference is a very cumbersome entity, and as the scope of its responsibilities grows continually larger, we judges need to consider whether there are alternative organization structures that can better handle the complex and (sometimes) rapidly-developing issues that have to be addressed. I know that the Executive Committee is tasked with dealing with the matters that pop up between regular Conference meetings, but maybe there's a better way to organize ourselves. How we utilize the Administrative Office and its staff is an important consideration, especially as our relationship with Congress and the White House requires regular and ongoing coordination. I've often wondered why the annual Chief Judges' meeting did not involve more exchange from/to the Conference, for example, in the decision making process.

Geraldine Mund, Chief Bankruptcy Judge, Central District of California:

The bankruptcy courts constitute a large percent of the work of the judiciary and receive many of its resources. It seems both appropriate and wise that there be a bankruptcy observer on the Judicial Conference and on each judicial council to give input in the decision-making process and the affect of various decisions on the entire bankruptcy system.

D. Brock Hornby, Chief Judge, District of Maine:

This process itself is worthy of note in a planning and governance context. To quote McLuhan, "The medium is the message." (I know, he actually said "massage.") I don't think I've been privy to anything like this e-mail exchange except in the context of debating a Restatement draft with a Reporter and Advisors for the American Law Institute. We should carefully explore where else we can use such a vehicle. The Judicial Conference never has the benefit of such a wide-ranging and informed debate, and I venture to say, seldom do the Committees. There is tremendous intellectual horsepower and experience out there among the chief judges and obviously among all judges. How can we properly take better advantage of the electronic medium to get their input where it counts? I congratulate you for doing so here; I'll bet that if you had solicited input by mail, you would not have received half the response; and certainly a mail response would not have prompted the cross-fertilization of ideas that has occurred here.

Consuelo B. Marshall, Chief Judge, Central District of California:

The following [is a suggestion] for the Judicial Conference Long-Range Planning Committee to consider for implementation among the district courts:

- Prior to final implementation of policies, allow a comment period to help Judicial Conference committees understand all related issues.

I believe [this idea is] worth further study which might reveal [its] benefits or disadvantages.

Robert A. Mark, Chief Bankruptcy Judge, Southern District of Florida, forwarding comments from his Clerk of Court, Karen Eddy:

> Policies are not always agreed to by the different program branches. Better coordination and agreement of policy decisions needs to be implemented before a policy is issued to the courts. The impact of implementation of a new policy on the courts should be assessed before the policy is issued.

William J. Zloch, Chief Judge, Southern District of Florida:

The other [issue] considers the Judiciary's organizational responsiveness, in that it seems to me that we should explore and implement methods to become more flexible or less bureaucratic as an organization. In these times of light-speed change, the way that we approach problems should be oriented toward the future and fast action. I would suggest that as an institution, we need to focus more attention toward being proactive and toward acting at meaningful times, and the organization's management and collateral advisory structures should evolve to facilitate that approach.

David P. McDonald, Chief Bankruptcy Judge, Eastern District of Missouri:

Can the period between Rules Committee action and effective date of amendments be shortened?

Treatment of Large vs. Small Districts

Geraldine Mund, Chief Bankruptcy Judge, Central District of California:

The judiciary runs much like the Senate, in that each district seems to have an equal voice no matter the size of its constituency. There is no counterbalancing House, based on the relative size of the district. Plans should be made and systems built so that they will work for all districts. A cost-cutting measure or rush to production sometimes leads to the roll-out of products which will not function for the largest districts without significant delay and use of local resources. In the case of automation, it is usually the largest districts which need the automation the most, but find that after years of waiting, the system will not function for their caseload. Other resources – such as courthouse construction – also are allotted to smaller projects and districts on the theory that either a single large district can be satisfied or, for the same amount of money, several small districts can be accommodated.

Similarly, it seems that large districts do not receive a proportionate share of committee assignments and other opportunities to participate on a national level. While I am not suggesting any sort of strict proportional representation, treating each district the same, no matter its size, is a policy which should be reviewed to see if this best serves the judiciary as a whole.

William J. Zloch, Chief Judge, Southern District of Florida:

There are two issues that seem to me to be ripe for attention for strategic planning and development purposes. One contemplates whether it would be desirable to categorize or classify courts (e.g. by geographic size, number of judges, workload, etc.) administratively, in recognition that one solution or approach might not adequately address concerns in all districts. It is fair to say that all courts have problem issues to address. The issues in my District,

however, are often very different from the issues in the District of North Dakota or even the Southern District of Alabama: it is not always equitable to lump all districts together for purposes of solving complex problems.

Judicial Relations

Tamara O. Mitchell, Chief Bankruptcy Judge, Northern District of Alabama:

At most judges' conferences, FJC programs, etc. two issues frequently are discussed in the hall or in small discussions groups: attorneys and relationships between judges. Improvement of the latter, relationships between judges, is something that you might want to consider for planning purposes. This subject has several levels, first is **the relationship between judges on the same court**; how they deal with each other, procedural differences in handling the same cases, etc; second **the relationship between the district judges and both the magistrate judges and the bankruptcy judges**; third, **the relationship between the district judges and the appellate judges**, and fourth **the relationship between the bankruptcy judges and the appellate judges** since they appoint bankruptcy judges. [Emphasis original]

I think that in the busy lives of judges there is little or no time or opportunity for judges to "meet and greet," socialize and get to know each other and I assume in the bigger courts this is especially true. I think that there may be a feeling among some judges that there is no benefit from or need for a closer relationship between judges on the same court or from different levels within the same court.

James F. Schneider, Chief Bankruptcy Judge, District of Maryland:

The following suggested planning issue is hereby submitted on behalf of the Judges of the U.S. Bankruptcy Court for the District of Maryland:

> Investigating ways to encourage collegiality among courts and judges at all levels in the Federal system.

Quality of Justice

Lawrence L. Piersol, Chief Judge, District of South Dakota:

The Judicial Branch must continue to try to ascertain the quality of justice that is being delivered. The task is difficult, given the problems of defining what justice is, and then trying to determine what the quality of justice is from the federal courts. The courts generally attempt to approach

the quality of justice question from a procedural approach as the wealth of statistical information available to the courts invites a procedural analysis. A more complete analysis of the quality of justice in federal courts also requires an analysis of whether the outcomes in the federal courts are substantially just. That distinction is made by John Rawls, Emeritus Professor of Philosophy, Harvard University, in his "Reply to Habermas" which originally appeared in the "Journal of Philosophy 1992" (March 1995). Professor Rawls' more complete statement is set forth in the revised edition of his book "A Theory of Justice," Revised Edition, Harvard University Press. For one example, the time of disposition of cases at the trial and appellate court levels is watched closely, a procedural analysis. However, the more prompt disposition could also mask a possibility that the case was not ready for trial or that argument was not heard when maybe it should have been heard in that case, either of which could result in the disposition not being just. Statistics are valuable, but we must establish other means to assist in determining the quality of justice received in federal courts. The overall result will not have the seeming certainty of statistics alone, although a portion of the support for the answers would have statistical basis. Continuing efforts at establishing criteria for and determining the quality of justice will not only benefit the Judicial Branch directly, but the information may well be of interest to and assistance to the Legislative and Executive Branches.

Roger Vinson, Chief Judge, Northern District of Florida:

Fewer jurors needed equates into reduced venues and decreased citizen participation, with even less public understanding of the judicial process and its importance. If the cost of trial is a factor in the trend, what can we do to reduce the cost to litigants?

Elizabeth A. Kovachevich, Chief Judge, Middle District of Florida:

I have selected one e-mail with which I totally concur, and I applaud his direct and incisive insights; Chief Judge Roger Vinson, ND/FL nailed it ! ! My personal post script to his item [on] Trials relates to his comment regarding "... decreased citizen participation, with even less public understanding of the judicial process and its importance. " The 2000 Florida election epic provided a 101 civics lesson on the part the courts play in our democracy. The public hungrily consumed daily media servings, and, we had their interest in the effect the courts directly had in their decisions. NO ONE IS GOING TO MARKET THE SERVICE THAT THE COURTS PROVIDE UNLESS WE JUDGES DO IT ! ! WE MUST BE OPEN TO THE WAYS TO DO IT ! ! [Emphasis original]

Gerardo A. Carlo-Altieri, Chief Bankruptcy Judge, District of Puerto Rico:

In regard to external court matters, I think we have to look at how to make the courts and the system less complicated, and work to make the system fair for the less privileged in terms of costs of litigation, which we all know favor the parties with the most resources and creates an unbalanced system. The courts have to be available to all, not just the more privileged of us, and there should be a way to insure that everyone is properly represented irrespective of whether or

not they are able to afford the litigation costs, specially so in the bankruptcy field wherein the litigants can lose their home and all their resources if not properly represented. (*Pro bono* programs are not the answer and *pro se* litigation is generally a disaster in the bankruptcy field.)

Donald E. Cordova, Chief Bankruptcy Judge, District of Colorado:

The second topic comes under the heading of *pro se* litigants. It is my opinion that the number of *pro se* litigants and debtors filing petitions in bankruptcy is increasing. We need to concern ourselves with whether these people will continue to have access to the bankruptcy courts after we convert our system to CM/ECF. Most bankruptcy courts are in the process of converting our entire system from a paper system to an electronic one, which will require access to and the use of a computer in order to file and receive electronic transmissions. Since the system will be fully automated, these people will need assistance with the computers and filling out the forms. We need to address how we will make the system accessible to them. At present, they have access for the price of a stamp and the forms.

Also, due to the changing demographics of the population of the United States, courts may be required to hire employees who not only are familiar with the use of computers and bankruptcy forms, but who speak languages other than English. There should be some emphasis placed on hiring employees who are bilingual especially in those areas of the country where we have a high concentration of non-English speakers. I don' t have any answers to these problems, which I believe to be exacerbated by the advent of conversion to CM/ECF. We are already faced with many of these problems and we need to deal with them and attempt to solve them with the limited resources we have at our disposal. One thought is to develop and produce videos in languages other than English that can be used by the clerks to assist *pro se* filers.

Court Staffing

Richard G. Kopf, Chief Judge, District of Nebraska:

CM/ECF is a wonderful, indeed magical, innovation. Making CM/ECF available is, in my view, the most important step that the federal judiciary can take to meet the needs of the bench, the bar and litigants in the early part of the 21st century.

However, CM/ECF is incredibly labor intensive. Any competent survey of courts which are involved with this program will demonstrate the enormous burden CM/ECF places upon the staff of the Clerk's office. This is true not only during implementation, but also thereafter when making the system work to its full potential. I am certain that before the bench, the bar and the public can realize the full benefits of CM/ECF that additional staffing resources must be provided to Clerks of Court which take on the task of making CM/ECF available.

Larry E. Kelly, Chief Bankruptcy Judge, Western District of Texas:

I have read the comments of Judges responding to date and see many areas which require some thoughtful consideration. I don't know at what level this item fits – but it is becoming apparent that with the implementation of electronic case filing and case management – at some point in the not too distant future major changes may be coming to Clerk's offices – physical space requirements will be lessened as actual file folders are discontinued . . . and staffing requirements may go down as pleadings come in electronically and get docketed automatically. The issue I see coming is the possibility that some may see less of a "need" for local clerk's offices in various divisions. This issue can be seen by an analogy to Westlaw – few users have a clue where the servers are – all they care about is that they can access it and it works . . . filing will be much like that in the future. So if one can file, receive and review pleadings from their home or office . . . they have little need of any actual interface with Clerk's offices . . . and with budget issues always being of major concern . . . I can see pressure in the future to "retire" local divisional offices . . . perhaps consolidate District offices within a State, a Circuit or even nationally. To the extent any of us think local offices have a role – this topic may be deserving of some time as a "long-range" planning issue.

Stacey W. Cotton, Chief Bankruptcy Judge, Northern District of Georgia:

The judges of this court echo the expressed concerns regarding the need for additional judicial and administrative resources. As expressed by Judge Parker, the court's exploding caseload mandates growth in all aspects of the court. The judges recently requested consideration for two additional judgeships, and the clerk recently received an emergency staffing supplemental from the Administrative Office.

As one of the original five bankruptcy courts that piloted CM/ECF, we find our experience with CM/ECF more in line with that of Judge Kopf's than Judge Kelly's. CM/ECF resulted in many increases throughout the court. Not only did we experience an increase in the Systems Staff, but also additional and more sophisticated computer hardware and software. Although 50 percent of the court's pleadings come in electronically and get docketed automatically, the judges and staff perform more, not less, quantity of work. Furthermore, that work requires reading documents on a computer screen, and new quality control functions in addition to the familiar data entry in a period of substantially increasing caseloads. Training and adjustments did not end with implementation of CM/ECF, but they continue for all of us every day.

Irvin N. Hoyt, Chief Bankruptcy Judge, District of South Dakota:

I concur with Judge Cotton's comments.

James B. Haines, Jr., Chief Bankruptcy Judge, District of Maine:

Please know that we, as a court in transition to CM/ECF (we've completed the case management segment and are moving toward electronic filing), are facing the same issues as those outlined by Judge Cotton. We are concerned that staffing formulae, which notoriously operate "behind the curve" may not account for the workload changes that CM/ECF effects. Moreover, in addition to training staff in new tasks and adjustment to continually changing work environments, resources should be devoted to ensuring that workplace health and safety designs and policies (e.g., ergonomics) evolve apace with technological change.

David T. Stosberg, Chief Bankruptcy Judge, Western District of Kentucky:

I concur with Judge Haines and we are experiencing similar staffing shortages as we tackle the plethora of CM/ECF tasks, especially the constant training!

Sarah Sharer Curley, Chief Bankruptcy Judge, District of Arizona:

It is unclear to the bankruptcy judges whether the new CM/ECF system will decrease the workload of our dedicated staff. We should consider the long-term increase in the work force or staff to meet our needs concerning the labor intensive scanning of documents and other case administrative functions. At least 40 percent of the Arizona bankruptcy court filings are done by individuals acting *pro se*. This percentage of *pro se* filers may increase over time, and it is difficult to provide said individuals access to the courts without providing such labor intensive work.

The CM/ECF process, even if utilized by attorneys, still requires an extensive time commitment by our staff. The AO is unsure whether this additional workload will decrease or remain at its current high level. Each of our case administrators is currently responsible for 1,100 cases. Our filings in Arizona continue to increase, and within the foreseeable future, the administrators may be handling as many as 1,300 cases per individual. This places a tremendous amount of stress on our staff. With the current proposed bankruptcy legislation, which will only increase the administrative tasks of our staff, we believe that the workload will increase exponentially. We recommend that additional staff be considered a priority and that every effort be made to add such staff to our courts as soon as possible. If the staffing formula utilized by the AO does not consider these increased duties and responsibilities of the courts, the formula should be immediately reviewed and adjusted to meet our changing staffing requirements.

Dean Whipple, Chief Judge and Arthur B. Federman, Chief Bankruptcy Judge, Western District of Missouri:

The impact [of CM/ECF] on staffing has been interesting. The need for technical support has only become apparent since the CM/ECF servers have been located in the individual courts. In 1997 the civil server was located at the AO so the technical support took the form of desk top

assistance only; installing and maintaining Netscape and Adobe products. With the arrival of the CM/ECF servers, the need for local data base administration has come home to roost but only one additional staff person has been added in the role of programmer to make local adjustments to the system.

Those staff whose roles historically have been that of docket clerk and intake clerk have seen the need to receive more training in customer service skills as they no longer only work with paper documents, but now are involved in the training and daily support of CM/ECF users outside of the court. The planning assumption that using an automated case filing system would make court employees more distant from attorneys and trustees was exactly wrong. There is now a much stronger relationship; in some cases a one to one personal relationship has developed as users come on the system.

The numbers of staff needed to provide this level of customer service in operational areas is larger than in the paper world, not smaller. The need for local support will never diminish as it is the personal contact with local court staff that makes users comfortable with CM/ECF.

The need for administrative support, other than technical, also increases as different skill sets need to be taught to tenured employees who may not have had personal contact with court customers in the paper world. This adds a burden to existing training programs and illustrates the need for training programs to be developed where they might not currently exist.

In conclusion, the roles of staff members within a court unit will change with CM/ECF but the need for them will only become greater, not smaller.

Barbara B. Crabb, Chief Judge, Western District of Wisconsin:

The first [issue] is one I've been championing for many years without great success. This lack of success has not deterred me; I continue to think it is important. It is greater recognition among judges and the Administrative Office of the critical importance of clerks' offices in case management and judicial administration. In my view, the Civil Justice Reform Act study fell down in this area by concentrating wholly on judges and judges' chambers and failing to acknowledge that without excellent clerks' offices and greater utilization of their services by judges, caseload statistics could not improve significantly.

The second suggestion is for the Administrative Office to do a better job of publicizing and promoting "Best Practices" in various areas. It would be politically difficult to mandate procedures but there seems no good reason not to advertise procedures that courts are using to improve their case load management, their trial techniques, plea procedures, employee training or anything else.

Robert A. Mark, Chief Bankruptcy Judge, Southern District of Florida, forwarding comments from his Clerk of Court, Karen Eddy:

> The impact of segregation of duties (internal controls) must be evaluated in the work measurement review. The internal control requirements place additional burdens and responsibilities on clerk's staff.

James F. Schneider, Chief Bankruptcy Judge, District of Maryland :

The following suggested planning issue is hereby submitted on behalf of the Judges of the U.S. Bankruptcy Court for the District of Maryland:

> The great wave of future *pro se* filings in bankruptcy and the designation of staff attorneys to handle them.

William C. Lee, Chief Judge, Northern District of Indiana:

I would like to add one variation on the staffing issue that has been raised by the Chief Judges of Districts with less than five active judges. I believe that any district that operates more than one staffed division should receive consideration for additional staffing simply because such districts lose the economies of scale and flexibility of staffing that are available to courts where the entire operation is at one site.

Consuelo B. Marshall, Chief Judge, Central District of California:

The following are suggestions for the Judicial Conference Long-Range Planning Committee to consider for implementation among the district courts. If any of the ideas expressed below would be applicable to the magistrate judges, then those items should be given for the benefit of the magistrate judges as well:

- The job of the district court judge has changed over the years. A judge's work encompasses a significant amount of research, analysis, and opinion writing regarding complex legal issues and fact patterns. This change in the nature of judicial work, coupled with expanding caseloads and increased litigation, calls for a change in the way the court operates and provides service. The following [suggestion] would help to preserve the quality of the judiciary's administration of justice:
    - 3 law clerks for each district judge (in addition to the secretary); 2 law clerks for each magistrate judge (in addition to the secretary).
- A one-month, paid overlap between incoming and outgoing law clerks for continuity/training purposes.

- Although it is impossible to speed up the political process of filling vacancies, it would be helpful if the courts were able to use all authorized staff positions for vacant judgeships while waiting for those positions to be filled without relying on funding from the circuits.

- Court-employed mediation staff for district courts similar to the system currently in use by the federal circuit courts of appeals. (It is my understanding that in 1981 the Sixth Circuit began a program entitled the Pre-Argument Conference Program. Since 1996, the Sixth Circuit program has been known as the Office of the Circuit Mediators and the attorneys employed by the office are known as circuit mediators. Today, all but one of the circuits have staff mediation programs. All but two circuits use court-employed staff mediators exclusively. (The FJC has published a sourcebook [Robert J. Niemic, 1997] describing each circuit's program and a study of this model [James B. Eaglin, 1990] which concluded that such programs have been very cost effective compared to the cost of an additional judgeship and accompanying staff.)

- Permanent centralized funding for the CJA Supervising Attorney position in courts that meet established criteria.

I believe these ideas are worth further study which might reveal their benefits or disadvantages.

Roger Vinson, Chief Judge, Northern District of Florida:

In a related matter, we judges need to consider the long term trend of decreasing trial rates in both civil and criminal cases. It may have wide ramifications. We may not like what they may be. For example, fewer courtrooms may be needed and staffing may need to be altered.

Gerardo A. Carlo-Altieri, Chief Bankruptcy Judge, District of Puerto Rico:

I am also astonished by the lack of minorities occupying judicial and administrative positions at all levels. As a recent appointee as the NCBJ coordinator with the National Hispanic Bar Association, I hope to create some conscience of this reality which I don't think many of us are really thinking about.

Information Technology

Roger Vinson, Chief Judge, Northern District of Florida:

It's difficult to predict what is going to happen in this area, but we need to do our planning on the certain assumption that we are definitely going to see major changes in the future – probably a lot sooner than we think. The design of the Clerk's offices, for example, is going to be affected

by electronic case filing. Videoconferencing may soon change the way we conduct trials and hearings. Evidence is rapidly shifting from physical into electronic forms. As the equipment and operating systems change in future years, how will we access the archived information? Security and emergency back-up are critical, too.

A. Joe Fish, Chief Judge, Northern District of Texas:

Suggested Action: Use information technology (IT) to enhance oversight and internal controls.

> IT could be used more effectively to better protect judiciary resources. Yet, local courts have had to develop many of their own systems, or just do without. Examples of areas where national systems could be developed to improve oversight are: 1) human resources (a comprehensive human resource information system); 2) procurement (an inventory control system); and 3) financial (a travel program).

Suggested Action: Clarify the judiciary's policy on monitoring the use of technology.

> What is the Conference's policy on monitoring the use of telephones, computers, and other equipment? Is the unit executive expected to be responsible for this? What is the chief judge's role? Who is subject to being monitored? What is the enforcement mechanism?

Steven A. Felsenthal, Chief Bankruptcy Judge, Northern District of Texas:

My comments for long-range planning consideration are a bit more esoteric, but I believe warrant debate. As we "progress" with CM/ECF and the reduction of paper judgments and orders with judges signatures and seals, etc., will there be some kind of reduction in the perceived legitimacy and efficacy of our decisions and, if so, should the judiciary devise functional equivalents to the old certified, signed paper judgments actually placed into the hands of a person who must act in compliance with the judgment?

Susan Pierson Sonderby, Chief Bankruptcy Judge, Northern District of Illinois:

I suggest that procedures be adopted which authorize the electronic record as the official record of the case. The committee should work with National Archives and Records Administration to develop a standard for archival of electronic records. Privacy and public access concerns for bankruptcy case filings should be addressed.

Thomas I. Vanaskie, Chief Judge, Middle District of Pennsylvania:

A study should be conducted on utilization of technology in courtrooms for purposes of assessing the impact of technology utilization on trial efficiency and reliability of results.

Considerable resources have been devoted to equipping courts with the latest in technology. We should assure the public and ourselves that the investment is worthwhile.

John M. Walker, Jr., Chief Judge, Second Circuit Court of Appeals:

At the March 2002 meeting of the Chief Circuit Judges and Circuit Executives, we discussed the issue of the new CM/ECF project and tried to assess the impact this new technology will have on court administration resources. The AO has taken the position that, at present, it is not considering adjusting court personnel funding formulas for circuit, district or bankruptcy courts and that courts must use current resources to fulfill any new personnel or other administrative demands created by their move to CM/ECF. From reading the E-mails of some of my chief judge colleagues, there appears to be a difference of opinion as to the impact CM/ECF will have on the federal courts. My suggestion is that the Judicial Conference consider the long-range implications CM/ECF and other new information technology present to our courts, in terms of personnel, space, security and privacy issues. I question whether the courts will be able to meet the challenges of new automation technologies using pre-technology derived formulas.

Joseph M. Scott, Jr., Chief Bankruptcy Judge, Eastern District of Kentucky:

Our other comment deals with video conferencing. Again, the physical layout of our court is the source of our comments. Ashland and Pikeville are 150 and 175 miles respectively from Lexington; Corbin and Covington are about 80 miles, and Frankfort 25 miles. Our judges spend a disproportionate amount of their time traveling to our outlying divisions, and it is our belief that having the ability to conduct video conferencing would result in substantial savings of time and energy, both for the court and for the attorneys practicing in Bankruptcy Court. Our court has had a particularly substantial occurrence of large Chapter 11 cases, most of which require emergency hearings and much larger blocks of docket time. For those cases in our outlying divisions, the video conferencing facilities would help to provide the access to the court that those litigants often need to be able to successfully reorganize. Presently, we have no video conferencing capability in our court, and it is our understanding that no such facilities are available in our District Court facilities either. While we have understood that video conferencing is considered to be an integral part of a well-functioning court, we have also understood that its funding is left up to the local courts. Our court simply lacks the resources to fund this type of expenditure from the funds which we have available. Our request is that the Judicial Conference seek to have video conferencing facilities made available to all courts in all divisional offices where they hold court.

We also have concerns about the numerous mandated changes being implemented in our court. Beginning November, 2001, and running through October, 2002, our court will have implemented the following:

1. Lotus Notes
2. FAS4T
3. CM/ECF

In terms of size of staff, ours is a relatively small court. Each of these changes by itself is a substantial load for our staff to deal with, particularly in the systems area. The net effect of all three going on at the same time has been excruciating. A court of our size should not be required to undertake so many fundamental and substantial changes at essentially the same time. The levels of temporary support afforded through the AO simply don't supply the level of assistance required.

Donald W. Molloy, Chief Judge, District of Montana:

I think we should consider the role video technology is to play in criminal and civil court hearings, trials and appeals.

Sarah Sharer Curley, Chief Bankruptcy Judge, District of Arizona:

We should consider the use of videoconferencing and telecommuting as a means to conserve the resources of the judiciary, yet provide convenience to the court, to litigants, and to witnesses. For instance, in the West, any district may cover great distances where it becomes difficult for the litigants or the witnesses to have access to a court facility. Videoconferencing permits the individuals to appear at a convenient location near them and permits the courts to function in many locations without building facilities in the particular locale. Telecommuting also serves as a convenience and cost saver to court staff or personnel that may complete certain functions at home on their computers.

Consuelo B. Marshall, Chief Judge, Central District of California:

The following [is a suggestion] for the Judicial Conference Long-Range Planning Committee to consider for implementation among the district courts:

- Consideration should be given to a voluntary law clerks' work-product database, arranged by subject in each court, to facilitate law clerks' access to pre-existing research. Even though there are judges who would not agree to participate in such a database, many judges would like a better way to learn about each other's published and unpublished opinions.

I believe [this idea is] worth further study which might reveal [its] benefits or disadvantages.

John W. Lungstrum, Chief Judge, District of Kansas:

[The following is from a report of a District of Kansas long-range planning committee convened by Chief Judge Lungstrum in response to Chief Judge Butler's request for planning issues and other ideas:]

Improving service to the public and bar. The Federal Rules of Civil Procedure contemplate efficient court administration "to secure the just, speedy, and inexpensive determination of every action." Technological advances, including the introduction of electronic case management and electronic filing (CM/ECF), will enhance the processing of pleadings in many cases. Large and mid-size law firms in Kansas will have sufficient resources to adopt such methods upon the introduction of CM/ECF in March 2003. However, full access to the federal courts must be maintained for small firms, sole practitioners, and *pro se* litigants.

Methods for enhancing access to the courts for all include:

- accept payment by credit card for services
- improved materials, available in Spanish and English, for potential jurors and *pro se* litigants
- recruit bilingual employees
- provide web pages with procedural rules and links to lead cases which identify established standards in such areas as the appointment of counsel
- provide orientation videos explaining such topics as the burden-shifting analysis in employment discrimination cases
- establish an ombudsperson position to provide procedural assistance
- develop a kiosk system for electronic filing and access to files with stations in the clerk's office and selected sites, such as public libraries
- conduct an ongoing review of available literature for specific means to improve access to the courts
- adapt materials, including website, to provide access to the visually handicapped

Use of Technology: Emerging information technology will continue to impact the daily business operations of the judiciary and probation, and the efficient use of IT is critical to the administration of justice. Ongoing study by the judiciary is required to evaluate the best use of technology in many contexts, such as the use of virtual reality in the courtroom, the expansion of electronic filing to prisoners, or electronic access to criminal files. The [District of Kansas long-range planning] committee proposes the following options from currently available technology to foster the efficient use of IT staff and the effective integration of technology:

- use "thin client" boxes with an application server farm instead of a PC at each work station: simpler to maintain because only the server is upgraded
- use multiple user work stations with thumb print or face recognition capability: eliminates passwords and related support calls

- use a Local Area Network (LAN) with "load-balanced" application servers in each office: demands are spread equitably among the servers, increasing efficiency
- use IT staff to manage telephone switches: saves expense of contract providers and allows an integrated inbox for users with voice mail, e-mail, and fax accessible through Lotus Notes
- use streaming media services to allow users to view FJTN at their work stations
- use Lotus Notes to create standard forms: this allows forms to be completed, signed, and transmitted electronically, e.g., use of encrypted email to transmit pre-sentence investigation reports (PSIs) to judges, U.S. attorneys, and federal public defenders
- use video technology, possibly with closed captioning, for translation services: allows participation of a translator from a remote location
- use video technology for testimony or depositions of federal employees who are expert witnesses, such as chemists and psychiatrists: reduces delays caused by scheduling conflicts
- use video technology for pretrial hearings: reduces expense and risk in transport of detainees
- use laptops, palm pilots, etc. for fieldwork to allow probation officers immediate, paperless access to files and other information
- use voice recognition dictation software
- use dedicated computers to monitor offenders convicted of cyber-crimes
- use global positioning systems (G.P.S.) to monitor offenders

Barbara B. Crabb, Chief Judge, Western District of Wisconsin:

Finally, I'd like to see the Administrative Office undertake some efforts to test their "consumer responsiveness" and decision-making. For example, the recent nation-wide Lotus Notes implementation consumed millions of dollars and hundreds of thousands of hours of staff time. Could it have been done better with fewer resources? How was the contracted training? How do the courts like the program? What features would courts like?

Robert A. Mark, Chief Bankruptcy Judge, Southern District of Florida, forwarding comments from his Clerk of Court, Karen Eddy:

- Keeping pace with technology and specifically the speed of data lines. Our DCN is way behind today's needs.
- AO needs the programming resources to keep development and upgrades to CM/ECF timely.
- Promote the use of electronic tools (email, CM/ECF, web-based calendaring) by judges and their staff.
- We need a web-based judiciary wide Human Resources database that houses personnel, payroll, training and leave information.
- We need model templates for court documentation and manuals.

- FAST does not yet accommodate receipt of funds by the public (no cashiering module). This is a major shortfall of a product that has been in development for over 10 years. This application in general needs to be streamlined and made more user-friendly.
- J-Net updates are not relayed to courts timely and information is posted in so many areas that the clerks' offices can't keep pace with all the postings and information updates.

Douglas H. Ginsburg, Chief Judge, D.C. Circuit Court of Appeals:

Although the appellate version of CM/ECF has not yet come into operation, we agree with the other commenters that the effect CM/ECF will have on staffing and other resources must be considered seriously. In addition, rules unique to electronic filing will need to be developed nationally as well as locally. Finally, as courts become more and more dependent on networked automation systems and the Internet to conduct their ordinary business, more resources will have to be expended to ensure that redundancy protections are built to allow the continuation of operations when servers or systems go down. Redundancy must also be considered as courts develop continuity of operations plans to assure access to court systems during disasters at courthouses.

State Courts

Arthur N. Votolato, Chief Bankruptcy Judge, District of Rhode Island:

In response to your April 16, 2002, memorandum seeking issues or ideas for discussion by the Judicial Conference to further the effectiveness of the judiciary, I have conferred with our clerk of court, Susan Thurston, and my career law clerk, Jonathan Calianos and submit the following substantive comments for your consideration.

We recommend adding the strategic issue of "Explore possibility of introducing CM/ECF system to the state courts so that we will have one unified electronic filing system throughout the country for the organized bar to master and use."

This issue was recently discussed in The Short Circuit, the First Circuit's local newspaper, as an initiative that the Massachusetts District Court is exploring with its state bar. This strikes us as an excellent concept that should be considered on a national level. The training and technical requirements (including equipment requirements) for the bar throughout the country would be greatly eased if both the federal and state courts were using similar electronic filing systems.

Volatility of Bankruptcy Filings and Its Impact on Resources

Joseph M. Scott, Jr., Chief Bankruptcy Judge, Eastern District of Kentucky:

Finally, as a small court, we are greatly impacted by the uncertainty of staffing levels due to the linking of the bankruptcy staffing formula so closely to case filings. Based on the historic fluctuations in case filings, we feel it prudent to operate below full staffing in order to avoid the consequences of undergoing another RIF, as we so painfully experienced in the past. It is difficult to recruit employees knowing we cannot give even moderate assurances about the stability of our staffing levels. Once on board, a great deal of time and money is invested in employees (especially training) who may need to be let go if there is a sufficient drop in case filings. Beyond the obvious costs to the Judiciary, a negative image of the Judiciary as an employer emerges.

James A. Pusateri, Chief Bankruptcy Judge, District of Kansas:

Through experience, I am aware that the Bankruptcy Courts experience volatility in case filings which causes difficulty because of the lack of flexibility in deploying additional resources for personnel to handle the paper load during periods of increased filing. I am certain the District Courts must face similar problems with sudden influxes of filings, particularly in the criminal filing area. I suggest that consideration be given to establishing a reserve at the Administrative Office for the express purpose of funding crisis support positions. Triggering criteria would be necessary to release these funds. For example, if a court experienced two straight quarters of double digit increases, then it would qualify to make application for funding. Funding would be released only for temporary staff positions. These positions could roll over into permanent positions (by formula) when a court received its full fiscal year funding. (Assuming the spike was not a two quarter aberration.)

Arthur N. Votolato, Chief Bankruptcy Judge, District of Rhode Island:

In response to your April 16, 2002, memorandum seeking issues or ideas for discussion by the Judicial Conference to further the effectiveness of the judiciary, I have conferred with our clerk of court, Susan Thurston, and my career law clerk, Jonathan Calianos, and submit the following substantive comments for your consideration.

We recommend adding the strategic issue of "Flexibility in the deployment of resources in light of the volatility of bankruptcy case filings."

The most recent work measurement formula did not resolve this problem in any meaningful way – in fact it has made the situation worse with respect to the demonstrated cyclical nature of bankruptcy filings. Courts are being required to RIF well-trained staff to meet an annual budget and then, possibly one or two years later, see filings climb again and must hire new staff and begin the training process all over again. This predictable cycle is extremely time-consuming and expensive for small courts, not to mention the demoralizing effect on the remaining court

staff. Long term, it does not seem practical or efficient to be constantly hiring and dismissing staff based on short-term trends in bankruptcy filings.

Geraldine Mund, Chief Bankruptcy Judge, Central District of California:

Unlike the district courts whose workload can generally be anticipated, the workload in bankruptcy courts may change drastically in a short period of time. The workload formula for bankruptcy court staff does not react to this and is based on past filings rather than anticipated filings at the time that the work is actually going to be done. Further, as noted by several other people, new automation in the courts often does not save time and may actually eat up time and resources. Because of hiring freezes, there may be a void in areas needed to implement automation and other changes.

Lee M. Jackwig, Chief Bankruptcy Judge, Southern District of Iowa:

I write only to raise one issue that I did not see (or perhaps missed) in the email messages that crossed my virtual desk. That issue is the impact of any major change in the bankruptcy laws on the federal judiciary's ability to generate revenue from filing fees. It is no secret that the bankruptcy courts generate more dollars for the good of the order than the district or appellate courts. That is true despite the fact that the number of annual filings has fluctuated over time. Some, however, predict a dramatic and lasting decline in individual liquidation cases should Congress enact the pending legislation. I am not predicting that will be the case but that result would not surprise me.

Court Operations

Donald E. Cordova, Chief Bankruptcy Judge, District of Colorado:

The first topic comes under the heading of managing the court's resources effectively and maintaining the quality of services. The AO has strongly encouraged utilization of off-site contractors to perform services historically performed by the clerks presumably for the purpose of saving money. An example of this is requiring courts to use the BNC to mail notices and orders that were previously mailed by the clerk or the parties at the clerk's direction. We have found this service to be unsatisfactory because of the delay in serving the notices and orders on interested parties following entry in the docket. What routinely took one or two days to receive now takes 7 to 10 days. We have received hundreds of complaints from lawyers and parties about the delay and the poor service. A delay of 7 to 10 days may have an adverse impact on a party's appeal rights and ability to file timely motions directed to the notices and orders. In order to preserve the litigant's rights, we have had to resort to hand mailing all time sensitive documents using non-automated equipment and cumbersome back up procedures. The end result is that it is taking us longer to do the mailing we previously did using the automated equipment which has been taken away from us. While we support the concept of using BNC for electronic

transmission of court generated notices and orders, we should be allowed to use our automated mailing system during the transition from paper documents to electronic transmissions until the CM/ECF system is fully implemented. We are not the only court to experience this problem and those who follow us undoubtedly will have the same experience. The point here is that the AO should allow some flexibility when it mandates a procedure that affects the clerks and the courts. We are mindful of our responsibility to conserve the court's resources, but we should not do so at the expense of the rights of litigants and the credibility of our courts.

Susan Pierson Sonderby, Chief Bankruptcy Judge, Northern District of Illinois:

Additional uses and cost savings of the Bankruptcy Noticing Center should be explored. One national system for electronic noticing contracts should be developed instead of having each court, and thus, each vendor submit their requests individually.

Donald W. Molloy, Chief Judge, District of Montana:

I am also concerned that AO and Judicial Conference policy may overlook the geographical issues in the west, i.e. vast areas, low population, few judges and multiple court sites mandated by statute. In Montana we are "required" to hold court in several locations where we have no courthouse: "Court shall be held at Billings [courthouse], Butte [courthouse] Glasgow [no courthouse], Great Falls [courthouse], Havre [no courthouse], Helena [courthouse], Kalispell [no courthouse], Lewistown [no courthouse], Livingston [no courthouse], Miles City [no courthouse], and Missoula [courthouse]." 28 USC § 106. By virtue of budget constraint we do not comply with the law. There are likely a number of other states that face similar problems.

Paul R. Matia, Chief Judge, Northern District of Ohio:

With population shifting as quickly as it is within districts, it would be very helpful to have flexibility in designating the counties that fall within a district court's divisions. It should not be necessary to have congressional legislation just to realign the divisions. This flexibility would allow us to make better use of our existing judicial personnel.

Robin J. Cauthron, Chief Judge, Western District of Oklahoma:

I would add two issues to the discussion – the declining need for both secretarial services and libraries in chambers.

Frederick J. Scullin, Jr., Chief Judge, Northern District of New York:

Our district recently responded to a letter from Judge Lungstrum, Chair of the Court Administration and Case Management Committee concerning congested Courts. Our district is presently ranked 5th in the United States with cases pending per-judgeship. Due to judgeship

vacancies which have represented the loss of over 16 years worth of Judicial manpower between 1990 and 2000 we felt that the use and funding of Temporary Emergency Law Clerks should be reviewed. This resource should be expanded to Courts such as ours that have been designated as "congested" courts. The availability of funding for Temporary Emergency Law Clerks should be part of the long range planning process to assist those courts where the caseload has risen beyond the resources available to the Court. We are all aware that the process of obtaining additional judicial resources is at best only hopeful, given the fact that we have not had a major judgeship bill in over ten years. The Judicial Council for the 2nd Circuit has been extremely generous in providing what limited funding they can to our district to hire TEF clerks. At the present time we have two TEF clerks and will be asking for at least two more next year. Based on the TEF formula, the 2nd Circuit received **$457,850.00** in TEF funds in FY-2002. The Circuit has limited the funding that can be applied to a TEF clerk to a JSP-11 step 1, or **$45,825.00**. This limit on TEF funding has helped the Circuit stretch these limited funds throughout the Circuit. Based on the funding received by the 2nd Circuit, and the cap applied to TEF clerks, there is only enough funding to provide the courts in the entire 2nd Circuit with **10** additional clerks. This fund is also used for emergency hires, such as when a judges administrative assistant becomes ill, or a law clerk becomes ill. In the Second Circuit, the four districts in New York are ranked as follows (EDNY 4th, NDNY 5th, WDNY 6th, SDNY 10th). Courts that have been designated as "congested" should receive special funding for TEF clerks to help assist the court with the overwhelming volume of motions that it must deal with. [Emphasis original]

John M. Walker, Jr., Chief Judge, Second Circuit Court of Appeals:

I know that Chief Judge Fred Scullin of the Northern District of New York, who sits with me on the Judicial Conference, already has responded to your request in a separate letter. I concur with the views expressed in that letter which are widely held by many judges in the Second Circuit.

As Judge Scullin aptly noted, the current Temporary Emergency Fund formula is woefully inadequate for our Circuit. In the past four years, our Circuit has attempted to maximize the number of TEF law clerks spread among the twelve district and bankruptcy courts by limiting their salaries to JSP 11, step 1. Even so, we are only able to afford about ten TEF law clerks in any one fiscal year. Although the funding amount has remained static over the past several years, the *pro se* and prisoner caseload in these courts has increased. The TEF formula should more fully account for this portion of the workload particularly with respect to the district and bankruptcy courts that handle large volumes of *pro se* cases and prisoner petitions.

In bankruptcy courts with large numbers of consumer filings, the debtor or even a creditor frequently appears *pro se* before the court, requiring the judge to become substantially involved in the review of documents in order to protect the rights of the appropriate party. Either the bankruptcy judge workload formula should be revised to address this additional judicial workload or the case weighting formula should be adjusted to provide greater personnel resources to the clerks' offices, enabling them to hire attorneys as *pro se* law clerks as we do in the circuit and district courts.

Currently, bankruptcy courts are not provided independently with funds to secure the services of foreign language interpreters. Instead, the bankruptcy court must use the funds of the district

court for interpreters. These funds generally are not provided for basic calendar calls, forcing the bankruptcy court to rely either on in-house staff or family members of the litigants themselves. Court records for one of our districts reflected that in 2001 that court employed the services of interpreters for about fifty different languages or dialects. Given the nation's increasing immigrant population, a bankruptcy court's inability to retain the services of professional language interpreters due to the absence of funding threatens to compromise fair access to the federal courts for many litigants.

Consuelo B. Marshall, Chief Judge, Central District of California:

The following are suggestions for the Judicial Conference Long-Range Planning Committee to consider for implementation among the district courts. If any of the ideas expressed below would be applicable to the magistrate judges, then those items should be given for the benefit of the magistrate judges as well:

- The job of the district court judge has changed over the years. A judge's work encompasses a significant amount of research, analysis, and opinion writing regarding complex legal issues and fact patterns. This change in the nature of judicial work, coupled with expanding caseloads and increased litigation, calls for a change in the way the court operates and provides service. The following [suggestion] would help to preserve the quality of the judiciary's administration of justice:
    - scheduled district court recess(es) during which time the court is closed or open for emergency matters only to allow time for research, analysis, and opinion writing. Provisions could be made for emergency matters via duty judges during recess.

- Increased incentives for senior judges to actively participate in the work of the courts and lend their resourceful and vitally necessary talents, and more recognition for their assistance to the courts.

I believe these ideas are worth further study which might reveal their benefits or disadvantages.

Pay, Benefits, and Training

Frank J. Polozola, Chief Judge, Middle District of Louisiana:

In addition to the matters suggested by other Chief Judges, particularly those from small courts, my court recommends the following additional items be considered by the appropriate committees:

- An amendment to the Rule of 80 to allow a judge with 20 years of service to take senior status at age 60.
- Support legislation to allow for the full payment of life insurance premiums for judges.

Roger Vinson, Chief Judge, Northern District of Florida:

There was a time when I always recommended a federal judgeship to someone considering it, without any hesitation or qualification. Now, however, I hedge a lot – especially for those who are not independently wealthy. The compensation is simply not comparable to the private sector, and the prospects are that it will get worse instead of better. We are doomed to be at the mercy of Congress, and that is about as bad a position as you can possibly be in. State judges seem to have fared better than we over the past decade. The political atmosphere in Washington makes any nomination into a potential torture test, with the nominee often left dangling in the wind. Retirement before 65 is out of the question, unlike the attractive options available to Bankruptcy and Magistrate Judges. Of course, all of us know this now and have learned to live with it. For those who are thinking about joining us, however, it's not very enticing, and the quality of the federal judiciary is going to be affected. Our long-range planning faces a huge challenge in trying to restore the desirability of a federal judgeship.

Deanell R. Tacha, Chief Judge, Tenth Circuit Court of Appeals:

The Committee on the Judicial Branch also urges that we continue to do long range planning around benefits proposals for the judiciary.

Arthur N. Votolato, Chief Bankruptcy Judge, District of Rhode Island:

In response to your April 16, 2002, memorandum seeking issues or ideas for discussion by the Judicial Conference to further the effectiveness of the judiciary, I have conferred with our clerk of court, Susan Thurston, and my career law clerk, Jonathan Calianos, and submit the following substantive comments for your consideration.

Your attention is called to the May 10, 2000 memorandum from Director Mecham regarding "Funding Policy and Guidelines for Administrative, Operational and Management Training

Provided Judges and Chambers Staff," which announced a new funding mechanism for management training and training-related travel expenses for judicial officers and chambers staff. Given the need to stay current with new technology, I support the provision of additional resources for at least career law clerks and chambers staff for travel and training.

John W. Lungstrum, Chief Judge, District of Kansas:

[The following is from a report of a District of Kansas long-range planning committee convened by Chief Judge Lungstrum in response to Chief Judge Butler's request for planning issues and other ideas:]

> *Employee development and retention:* As noted, a number of current employees will reach retirement age during the next 10 years. Technological change will impact the nature of work performed by current employees, and ongoing training will require the investment of both financial and human resources. Research suggests that younger, future employees may be less interested in long-term "career" employment. However, the recruitment and retention of qualified employees is critical to the maintenance of effective customer service, and a work culture which emphasizes team building and innovation must be encouraged. Private sector competition for information technology (IT) employees poses a particular challenge to employee retention. To advance the goals of recruiting and retaining qualified employees, the [District of Kansas long-range planning] committee suggests the following means:
>
> - establish competitive pay scales
> - require a time commitment for new hires
> - allow flex-time where feasible
> - allow telecommuting where feasible
> - increase systems and training budgets
> - provide upgrades to hardware and software and ongoing training to foster efficiency
> - improve benefit packages, including medical, dental, and vision coverage, and retirement
> - provide on-site services, such as day care facilities, banking, exercise areas, nurse practitioners, dry cleaners, shopping services
> - hire temporary personnel or contract labor to assist with the implementation of new technologies
> - survey staff concerning safety, compensation, benefits, morale, etc.
>
> *Probation officers:* These employees are especially costly to train, as they must master both traditional skills associated with the supervision of offenders, as well as evolving topics such as the federal Sentencing Guidelines. Meanwhile, budgetary limitations have reduced the training provided at the national level, requiring new officers to rely on local sources for training. This occurs against a backdrop of demographic change which calls for ever-increasing training. Probation officers daily face the consequences of a growing prison population; lengthy, mandatory sentences giving rise to an offender population with significant reintegration issues; the prevalence of substance abuse among offenders;

language barriers; and a rise in mentally ill offenders as national funding for services for the mentally ill shrinks. As a whole, offenders have more criminal history and a greater propensity for violence. Technology has given rise to new crimes, particularly cyber-crimes, which require new monitoring strategies and considerable technical expertise. These circumstances underscore the need for a national training effort, more specialized training, and the recruitment of probation officers with more diverse skills and backgrounds. To foster the training and retention of these employees, the [District of Kansas long-range planning] committee recommends that we:

- establish a national training academy to provide intensive training for new hires and supervisory employees. Provide expanded training on federal sentencing guidelines for new officers.
- provide sufficient staffing to allow a new officer to team with an experienced officer for the first year
- develop interactive tools for ongoing national training at remote locations
- recruit applicants with backgrounds such as IT, accounting, foreign language skills
- foster continuing education in relevant disciplines by offering student loan reimbursement, tuition assistance, flexible schedules
- provide increased training concerning substance abuse and mental health treatment. Include judicial officers and court staff to assure familiarity with resources, funding, and the nature of treatment available.
- consider raising the mandatory retirement age for probation officers (currently 57)
- outsource services by using probation officer retirees for such tasks as PSI preparation
- develop a national automated package for use by substance abuse/mental health providers including invoices, logs, instructions, and other related documents to allow automated billing. This would reduce delays caused by frequent turnover in vendor billing personnel.
- offer additional training to Drug Aftercare Treatment Specialists (DATs), including detailed instruction on audit and procurement procedures and on the division of duties.
- facilitate a national forum for an organized exchange of information and ideas concerning drug aftercare.[1]

IT Employees: Due to their highly specialized skills and the relatively few positions involved, retention of these employees is critical. It appears likely reliance on technology will increase, and additional IT staff will be needed as a result. To recruit and retain IT employees, the [District of Kansas long-range planning] committee suggests that we:

- provide a competitive salary scale

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[1]For example, a recent study (prepared in San Antonio) on the use of noninstrumented testing devices (NIDT) to immediately detect drug usage is of interest in this district and, no doubt, in many others. However, Kansas probation staff learned of this study only incidentally, during an unrelated contact with San Antonio personnel.

- streamline operations through the use of standardized equipment
- fund ongoing training for IT personnel

Donald W. Molloy, Chief Judge, District of Montana:

My final concern is the limitation placed on the salaries that a judge can pay his or her administrative assistant. These dedicated, loyal, and hard-working staff persons often are the institutional core of chambers along with the judge. Many times they do more work than persons in the clerk's office, yet their salary is capped below the pay opportunities for courtroom clerks. The Judicial Conference should either develop a pay scale for chambers career staff, or allow administrative assistants to participate in the JSP schedule with no cap on what they can earn.

Robert A. Mark, Chief Bankruptcy Judge, Southern District of Florida, forwarding comments from his Clerk of Court, Karen Eddy:

- FERS employees should be able to credit sick leave balances toward their retirement as CSRS employees do. This would encourage new employees to save their sick leave rather than use it up because they can't credit it toward their retirement years.

- We need to offer dental insurance to employees.

Jimm Larry Hendren, Chief Judge, Western District of Arkansas:

I join in the notion that we should be allowed to pay our staffs more – not only while we are acting as chief judge (though obviously then) – but also as a general proposition over the long haul.

Robert L. Echols, Chief Judge, Middle District of Tennessee:

I also believe the Administrative Assistant to a Chief Judge should be paid at a higher salary for the additional duties and long hours required.

David Alan Ezra, Chief Judge, District of Hawaii:

I fully agree with and adopt the remarks of Chief Judge Echols.

F. A. Little, Jr., Chief Judge, Western District of Louisiana:

A couple of years ago, I tried to get Judicial Conference approval for an increased wage for the secretary of a Chief District Court Judge, much like that accorded the secretary for the Circuit

Chief. That request was denied. The secretary to the Chief occupies a unique position, one for which the current compensation is inadequate.

Geraldine Mund, Chief Bankruptcy Judge, Central District of California:

To the extent that the Long Range Plan interfaces with the FJC and chambers training, it should consider several issues. There has been an increased use of career law clerks, but little or no training money and programs are available to them. While FJTN programs provide some specific information, they simply can't replace what is gained by live interaction between teacher and student and between the law clerks with each other.

The AO money for training of chambers staff is a welcome addition to our resources, but its uses are too limited. It would be very beneficial if it could be used for legal education, not just administrative classes.

A. Joe Fish, Chief Judge, Northern District of Texas:

Suggested Action: Better inform judges, particularly as part of new judge orientation, on appropriations laws, codes of conduct, and personnel regulations.

> It does not appear that new judges are adequately informed about regulations that apply to their staffs (time and attendance, travel, etc.) or regulations that govern the court relative to purchasing. It would be helpful for new judges to receive information or training on such matters after they have been on the bench between six months and one year.

Suggested Action: Identify ways to remain competitive as an employer and improve productivity by increasing employee morale.

> Certainly pay is an important factor in attracting and retaining good staff. However, there are other ways to motivate and retain staff that do not involve raising salaries. Unfortunately, courts are generally prohibited from purchasing refreshments and *de minimis* tokens for employees. This is especially demoralizing when court staff see employees in other federal agencies and the private sector get such perks. Also, investitures (within a district) provide an opportunity for employees to feel part of the organization and give them a sense of pride in the judiciary. Yet, such events are not deemed appropriate for travel, even for court unit executives or senior managers. Is it not possible to give chief judges and court unit executives more discretion in such matters for the good of the organization?

Susan Pierson Sonderby, Chief Bankruptcy Judge, Northern District of Illinois:

The second most important issue is Bankruptcy Judges' education. Circuits are appointing Bankruptcy Judges who have no bankruptcy education or experience. There are no monies to fund even a basic bankruptcy course. Bankruptcy Judges' orientation merely scratches the

surface. Also, existing Bankruptcy Judges should have bankruptcy seminars more frequently than every 18 months. They should be at least once a year.

Douglas H. Ginsburg, Chief Judge, D.C. Circuit Court of Appeals:

We agree with other commenters that paying and retaining qualified and experienced staff has become increasingly difficult with the current salary caps. Courts must be able to maintain competitive salaries and benefits that allow the recruitment of qualified staff. Fewer and fewer court positions can be filled by employees who lack significant educational accomplishments or sophisticated technical skills. In addition, like the rest of the federal workforce, the judiciary appears to have a large number of senior personnel who are eligible for retirement or will become eligible within the next ten years. The loss of experience and institutional memories will be considerable. Strategies need to be developed to cope with the losses.

Consuelo B. Marshall, Chief Judge, Central District of California:

The following are suggestions for the Judicial Conference Long-Range Planning Committee to consider for implementation among the district courts. If any of the ideas expressed below would be applicable to the magistrate judges, then those items should be given for the benefit of the magistrate judges as well:

- Spousal survival benefits of 75% of the judge's pay for the remainder of spouse's life and for non-spouse survivors. It is my understanding that dependent and disabled children survivors are covered under the current Judicial Survival Annuity system but that the benefit is very small compared to the required investment. Perhaps it would be beneficial to have a larger benefit for both spouse and non-spouse survivors that would not terminate for non-spouses at the age of maturity.

- Allow more flexibility in salaries for chambers staff, especially a) salary matching; and b) credit for prior law clerk (and death penalty law clerk) experience. With respect to elbow law clerks for magistrate judges, greater pay equity with that of pro se law clerks would erase the disincentive for experienced pro se law clerks to take positions as elbow law clerks to the magistrate judges. In the alternative, allowing two years of pro se/career law clerk service to qualify for a higher pay grade level as an elbow law clerk would also help to ameliorate the disincentive.

- Provide parking (or parking allowance) for all judiciary employees, regardless of size of court.

I believe these ideas are worth further study which might reveal their benefits or disadvantages.

Facilities and Security

Joseph M. Scott, Jr., Chief Bankruptcy Judge, Eastern District of Kentucky:

Part of our comments have to do with the particulars of our district. We have six divisions of our court (Lexington, Covington, Ashland, Frankfort, Corbin and Pikeville) and our judges travel from Lexington to the outlying divisions monthly. Presently, three of those divisions (Lexington, Corbin and Pikeville) are housed in non-federal buildings. We have unsatisfactory levels of security in these facilities, due to the lack of constant presence of US Marshal personnel and/or security equipment. The situation in Corbin and Pikeville is substantially worse. We have been able to have the temporary presence of a CSO in Corbin and Pikeville, on loan from the District Court facilities, but only for dates when the Bankruptcy Judge is holding court. No CSO security has been available for the creditor's meetings or trustee hearings. There is NO type of security equipment in either location. Our headquarters office and only manned clerk's office is in Lexington. We have requested additional security items from the US Marshal in an effort to provide a higher level of security for Lexington, but those requests have been declined. Our request in this regard is that the security for our court in these non-federal buildings be upgraded to the same levels afforded in federal buildings, or that our court be returned to federal buildings.

John W. Lungstrum, Chief Judge, District of Kansas:

[The following is from a report of a District of Kansas long-range planning committee convened by Chief Judge Lungstrum in response to Chief Judge Butler's request for planning issues and other ideas:]

> *Security:* The events of September 11 and incidents of anthrax exposure underscore the need for ongoing evaluation of the security of federal buildings, federal employees, and the public. Risk, whether from a dissatisfied litigant or from a terrorist act, must be weighed against the goal of public access. The [District of Kansas long-range planning] committee recommends consideration of the following safety measures:
>
> - install bullet-proof glass at all clerk's offices
> - locate day-care centers outside federal buildings
> - evaluate a phase-out of 24-hour filing boxes as electronic case filing is implemented
> - consider remote data processing and/or mail handling
> - allow telecommuting on a full- or part-time basis
> - develop disaster plans and train staff on response
> - consider a decentralized model with agencies in different buildings rather than a traditional courthouse housing numerous governmental entities

Frank J. Polozola, Chief Judge, Middle District of Louisiana:

In addition to the matters suggested by other Chief Judges, particularly those from small courts, my court recommends the following additional items be considered by the appropriate committees:

- Providing Federal Protective Officers to patrol the outside of the courthouse instead of contract guards who are neither trained nor have the proper equipment, staff or experience.

- Providing sufficient funds and technical assistance to maintain proper security at the courthouse.

Haldane Robert Mayer, Chief Judge, Federal Circuit Court of Appeals:

In response to your April 16 memo to all Chief Judges, we have reviewed the list of strategic issues both for your long-range planning committee and each of the other standing committees of the Judicial Conference. We think the lists are comprehensive and cannot suggest any additions. The only suggestion that we make is that physical security in response to terrorism threats should go to the top of the list for every committee and be considered on a time-urgent basis and separately from all other issues.

A. Joe Fish, Chief Judge, Northern District of Texas:

Suggested Action: Establish comprehensive security audits in all court facilities.

> Local courts are subject to financial audits, but not security audits. We lack the expertise locally to know if the Marshals Service and Federal Protective Service are doing adequate jobs. Court facilities, particularly the larger ones, should be audited at least every two years by an outside private firm or federal agency.

Suggested Action: Find ways to work with the Marshals Service and state legislative bodies to keep information about a judge's residence off the Internet.

> In some states (such as Texas) the local tax appraisal district posts the names and addresses of all residents in the district on the Internet. This includes judges. Although we understand it is not possible to keep all information about a judge off the Internet, we should at least be able to work with state and local governments to keep them from posting such information.

Suggested Action: Require comprehensive background checks on all employees in judicial administration agencies and local courts.

> No one should be hired into a position in the federal judiciary without first being subjected to at least a minimal background check with periodic (five-year) updates.

Senior-level managers should be subjected to more rigorous clearances. Background checks should be required by Conference policy and not be left to the discretion of a local court since wrongful activity by an employee in one district negatively impacts all the districts.

Susan Pierson Sonderby, Chief Bankruptcy Judge, Northern District of Illinois:

The most important and urgent planning issue that the conference committees should consider is the safety and security of court employees and the public who use court and court-related facilities. This should include procuring funds to make our federal courthouses as physically safe as possible and getting professional assistance for our building evacuation plans.

Douglas H. Ginsburg, Chief Judge, D.C. Circuit Court of Appeals:

Long-term solutions need to be developed for the mail handling problems that arose in the wake of the anthrax incidents of last fall. While this particular incident may have affected only the courts in the District of Columbia, New York, and New Jersey, this serious security issue should be considered nationwide.

John M. Walker, Jr., Chief Judge, Second Circuit Court of Appeals:

I think the judiciary needs to examine the security measures provided for existing court facilities, especially those courts occupying leased space. Courts today have millions of dollars worth of computer hardware and office equipment, but many of these courts, especially those in leased space, have little or no after-hours security to protect these investments from theft. Nearly one-third of the judges on the Second Circuit Court of Appeals maintain chambers in private leased space because local district courthouses lack sufficient space to accommodate them. One colleague has no federal courthouse located in the vicinity of his resident chambers. This situation presents unique security concerns. Security measures vary widely from building to building. The federal judiciary needs to develop a comprehensive view of the overall security needs of the courts, especially for courts and judges located in private leased space.

With regard to space issues, I believe that our present means of planning for and seeking space to meet the needs of ever-growing courts appears, at times, to be woefully inadequate. The EDNY has had a space emergency for ten years and it will continue for several more years until the new Brooklyn courthouse is completed and the existing Cellar building is renovated. GSA has neglected 40 Foley Square, home to the Second Circuit Court of Appeals and judges of the SDNY, for decades. A recent comprehensive review of that building's infrastructure and architectural needs revealed that, although the physical structure is sound, the electrical, plumbing and HVAC/heating systems have outlived their useful lives by many years, and unless drastic and immediate action is taken, we can expect this land marked courthouse to deteriorate rapidly over the next decade. While we are working with the AO and GSA to rectify this situation, it appears at times to be a Sisyphian task. There needs to be a comprehensive review of

our relationship with GSA particularly with regard to Repair and Alteration funding for large renovation projects as older courthouses deteriorate.

Consuelo B. Marshall, Chief Judge, Central District of California:

The following are suggestions for the Judicial Conference Long-Range Planning Committee to consider for implementation among the district courts:

- Introduce legislation that would allow the judiciary to request money for construction projects without proceeding through GSA.
- Negotiations with GSA for the U.S. Marshal to have all courthouse security authority (inside and out) regardless of the size of the courthouse.
- Provide one new security position per district that reports to the Chief Judge or Clerk of Court to liaison with the U.S. Marshal regarding security issues.

I believe these ideas are worth further study which might reveal their benefits or disadvantages.

F. A. Little, Jr., Chief Judge, Western District of Louisiana:

Decaying courthouses are propped up, repaired, repainted, and repapered. They are, however, not worthy of retention. Those of us in small town courthouses have very little chance of building replacement. Our tools are worn. The need for modern security devices are not being supplied and will not be supplied to those buildings erected in the first administration of FDR.

Arthur N. Votolato, Chief Bankruptcy Judge, District of Rhode Island:

In response to your April 16, 2002, memorandum seeking issues, or ideas for discussion by the Judicial Conference to further the effectiveness of the judiciary, I have conferred with our clerk of court, Susan Thurston, and my career law clerk, Jonathan Calianos, and submit the following substantive comments for your consideration.

We recommend adding the strategic-issue of "increasing the number of certified contracting officers in the judiciary so that reliance on GSA can be eliminated thereby saving substantial monies for courts engaged in non- construction/tenant alteration work."

The current practice of having to use GSA for all construction/tenant alteration projects at the local court level results in extremely unreasonable and unjustifiable additional cost for such projects. Particularly for courts in leased space, where most times tenants are required to pay a building owners/management fee for any tenant alteration work, the court ultimately ends up paying between 30-50% above market for all necessary work, due to the exorbitant fees charged by GSA (10-15%) and Building Management (15-20%), with little to no service being provided in exchange for these fees. The judiciary can and should train court staff as certifying contract

officers, have amended any restrictive regulations, and eliminate the requirement of using GSA and RWA's for such minor T/A projects (under $100,000).

Robert A. Mark, Chief Bankruptcy Judge, Southern District of Florida, forwarding some comments from his Clerk of Court, Karen Eddy:

The need to streamline the process for acquiring new space and buildings. Our growth is rapid and the assessment process is cumbersome and it takes years to construct and occupy new buildings. Planning is a nightmare. For an example and suggestion, for this office to acquire one parking space we must get approval of the bankruptcy chief, district court chief, Circuit Council, AO and then GSA. This is a request for a 10' x 15' space. Courts should be allocated a decentralized space budget developed by formula and policy and as long as we stay within that allocation we should not have to go through this long approval process.

Robert L. Echols, Chief Judge, Middle District of Tennessee:

[T]he long-range planning of the Judiciary should include the length of time it takes GSA to take a new courthouse building from beginning to end. I have heard of some horror stories from judges who have gone through the process. Some new courthouses will be almost full by the time they are finally occupied. My relatively brief experience is very disappointing so far. I am afraid the bureaucratic policies, delay, and expense are costing the taxpayers a great deal of money and not serving the best interests of the Judiciary.

David Alan Ezra, Chief Judge, District of Hawaii:

I fully agree with and adopt the remarks of Chief Judge Echols.

Roger Vinson, Chief Judge, Northern District of Florida:

I suggest that the courthouse planning horizon needs to be expanded – probably to ten years, and that we need to do a better job of identifying where the courts' nationwide priority needs are. It's always seemed odd that we often put the cart before the horse, because we design to meet the money appropriated instead of the other way around. Isn't there a better way?

Geraldine Mund, Chief Bankruptcy Judge, Central District of California:

As noted by other chief judges, we are often limited to building or renting facilities which are simply too small for our anticipated future needs. This is poor planning and extremely expensive. Prior to moving into our current quarters, for five years our Los Angeles division lived through the horror of having our judges spread over three buildings (two of which were over a mile away from each other) and our clerk's staff in five buildings triangulated on that one mile diameter. Unfortunately this type of situation is not unique within the judiciary.

Sarah Sharer Curley, Chief Bankruptcy Judge, District of Arizona:

The judiciary currently pays rent to the GSA to support management and operation by the GSA of federal leases and properties. GSA also utilizes Federal Protective Services as security for their properties or leaseholds in conjunction with the Untied States Marshal's Service. We should study whether the costs of the judiciary could be reduced if we decided to operate or manage our buildings. We may be able to reduce overhead, reducing the number of employees necessary to operate the buildings and perhaps realizing cost savings by having the Marshals Service, in conjunction with the court security officers, provide the security for the courthouses without the additional layer of expense of the Federal Protective Services.

Workload Statistics

Deanell R. Tacha, Chief Judge, Tenth Circuit Court of Appeals:

On a related matter, I wonder whether there is any uniform way to report caseload that adequately takes into account screening procedures, oral argument, internal court reporting, etc. It has always appeared to me that the statistics used to determine caseloads, judges needed, etc. were very uneven because of the widely varying practices and reporting mechanisms in different courts.

Roger Vinson, Chief Judge, Northern District of Florida:

I have always felt that the AO's caseload statistics overlook the most important area of our work: hours in the courtroom, particularly trial hours. If you have time, it's not that difficult to handle a high volume of complex cases. If you're in the courtroom, however, it's much harder to do, especially if you're averaging 80 to 100 hours a month for several months in a row. Locally, I think most of us do watch these numbers to ensure that a colleague gets relief when needed, but our national workload analysis probably needs to take this into account, too.
Frederick J. Scullin, Jr., Chief Judge, Northern District of New York:

The other issue that we raised was that of case weighting and how that impacts on judicial resources or the process of obtaining new judicial resources. I sent a letter to Judge Marilyn Huff, Chair of the Subcommittee on Judicial Statistics raising this issue a few weeks ago.
In brief, we raised the concern of the weight that was attributed to Prisoner Cases. Our district, along with 29 other courts, have a filings that represent 30% or more of our total caseload. The original case weighting survey was completed conducted between 1987 and 1993 by the Federal Judicial Center. As an example, a State Prisoner 1983 action is weighted at about 1/4 of a full case. These cases in our view take up considerably more time than what was reflected in the old case weighting system. In vew of the fact that the judiciary committees in both the House and Senate are focusing only on weighted filings when reviewing the recommendations of the Judicial Conference, the underscoring for prisoner cases alone in our district is having a severe

adverse effect on our judicial resources. It is clear that we need to develop a better methodology for weighting the workload of our judicial officers.

A. Joe Fish, Chief Judge, Northern District of Texas:

Suggested Action: Continue to monitor the increased workload associated with violation proceedings and its effect on budgetary needs.

> Cases being released to our district are presenting more serious supervision issues and are resulting in an increase in violation proceedings. This will undoubtedly impact our future budgetary needs.

Sarah Sharer Curley, Chief Bankruptcy Judge, District of Arizona:

No recent study has been done concerning the cases which are currently handled by bankruptcy judges and the amount of time that must be allotted to resolve them. The weighted caseload formula needs to be reviewed and updated.

Appendix 1: Memorandum to Chief Judges from Judge Charles R. Butler, Jr.

UNITED STATES DISTRICT COURT
Southern District of Alabama
113 St. Joseph Street
Mobile, Alabama 36602

Charles R. Butler, Jr.
Chief Judge

April 16, 2002

MEMORANDUM TO ALL CHIEF JUDGES, UNITED STATES COURTS

SUBJECT: Planning Issues

RESPONSE REQUESTED BY: May 31, 2002

I am writing to you in my capacity as the long-range planning coordinator for the Executive Committee of the Judicial Conference. The purpose of this memorandum, as Chief Judge John Lungstrum and I pointed out at the district chief judges conference last week, is to seek your input on planning issues and to ask for suggestions about additional matters or ideas you think the Conference committees ought to consider.

Following the publication of the *Long Range Plan for the Federal Courts* in 1995, each Judicial Conference committee has engaged in planning activities within its area of jurisdiction. In addition, since April of 1999, chairs of Judicial Conference committees have met semi-annually to discuss crosscutting strategic issues of importance for planning and budgeting. These planning meetings provide an opportunity for the committee chairs to explore ways to maximize the effectiveness of the programs within their committees' jurisdiction and to plan for the future consistent with the judiciary's core values and goals. A list of crosscutting and specific strategic issues identified by the committees is attached for your reference.

The committee chairs are interested in your views on what developments or issues will be of importance in your court or for the judiciary generally over the next several years or beyond. Also, where do you see a need for change or an opportunity to do things better? We are interested in any creative ideas you have for improving the efficiency and effectiveness of the judiciary's programs and ensuring the quality of justice. Your suggestions may be broad or specific in nature. They can pertain to any aspect of the judiciary's business, including staffing, budget, technology, facilities, rules, defender services, probation and pretrial services, case management, statistics, demographic or economic changes, etc. We are seeking your views as chief judge, but we also encourage you to consult with your judicial colleagues, court managers, and others.

Please send us your suggestions or ideas to aid the planning process. Your ideas will be shared with the appropriate committees and may be discussed at future long-range planning meetings. Due to mail delays, it would be best to send your letter by fax or e-mail to Cathy McCarthy, Deputy Associate Director, at the Administrative Office, fax (202) 502-1155, phone (202) 502-1300, and she will forward them to me.

Charles R. Butler, Jr.

Attachment (not included)

Appendix 2: List of Respondents

Courts of Appeals

Second Circuit	John M. Walker, Jr.
Fifth Circuit	Carolyn Dineen King
Ninth Circuit	Mary M. Schroeder
Tenth Circuit	Deanell R. Tacha
D.C. Circuit	Douglas H. Ginsburg
Federal Circuit	Haldane Robert Mayer

District Courts

AK	James K. Singleton
AL-M	W. Harold Albritton III
AR-W	Jimm Larry Hendren
CA-C	Consuelo B. Marshall
CA-S	Marilyn L. Huff
DE	Sue L. Robinson
FL-M	Elizabeth A. Kovachevich
FL-N	Roger Vinson
FL-S	William J. Zloch
HI	David Alan Ezra
IA-N	Mark W. Bennett
IN-N	William C. Lee
KS	John W. Lungstrum
LA-M	Frank J. Polozola
LA-W	F. A. Little, Jr.
MA	William G. Young
MD	Frederic N. Smalkin
ME	D. Brock Hornby
MO-W	Dean Whipple
MS-N	Glen H. Davidson
MT	Donald W. Molloy
NC-W	Graham C. Mullen
NE	Richard G. Kopf
NM	James A. Parker
NV	Howard D. McKibben
NY-N	Frederick J. Scullin, Jr.
OH-N	Paul R. Matia
OK-W	Robin J. Cauthron
PA-M	Thomas I. Vanaskie
SD	Lawrence L. Piersol
TN-M	Robert L. Echols
TX-N	A. Joe Fish
WI-W	Barbara B. Crabb

Bankruptcy Courts

AL-N	Tamara O. Mitchell
AZ	Sarah Sharer Curley
CA-C	Geraldine Mund
CO	Donald E. Cordova
FL-M	Thomas E. Baynes
FL-S	Robert A. Mark
GA-N	Stacey W. Cotton
HI	Robert J. Faris
IA-S	Lee M. Jackwig
IL-N	Susan Pierson Sonderby
KS	James A. Pusateri
KY-E	Joseph M. Scott, Jr.
KY-W	David T. Stosberg
MD	James F. Schneider
ME	James B. Haines, Jr.
MO-E	David P. McDonald
MO-W	Arthur B. Federman
OH-S	Thomas F. Waldron
PA-W	Judith K. Fitzgerald
PR	Gerardo A. Carlo-Altieri
RI	Arthur N. Votolato
SD	Irvin N. Hoyt
TX-N	Steven A. Felsenthal
TX-W	Larry E. Kelly

Appendix 3: List of Respondents by Circuit

First Circuit:

William G. Young, Chief Judge, District of Massachusetts
D. Brock Hornby, Chief Judge, District of Maine
James B. Haines, Jr., Chief Bankruptcy Judge, District of Maine
Gerardo A. Carlo-Altieri, Chief Bankruptcy Judge, District of Puerto Rico
Arthur N. Votolato, Chief Bankruptcy Judge, District of Rhode Island

Second Circuit:

John M. Walker, Jr., Chief Judge, Second Circuit Court of Appeals
Frederick J. Scullin, Jr., Chief Judge, Northern District of New York

Third Circuit:

Sue L. Robinson, Chief Judge, District of Delaware
Thomas I. Vanaskie, Chief Judge, Middle District of Pennsylvania
Judith K. Fitzgerald, Chief Bankruptcy Judge, Western District of Pennsylvania

Fourth Circuit:

Frederic N. Smalkin, Chief Judge, District of Maryland
Graham C. Mullen, Chief Judge, Western District of North Carolina
James F. Schneider, Chief Bankruptcy Judge, District of Maryland

Fifth Circuit:

Carolyn Dineen King, Chief Judge, Fifth Circuit Court of Appeals
Frank J. Polozola, Chief Judge, Middle District of Louisiana
F.A. Little, Jr., Chief Judge, Western District of Louisiana
Glen H. Davidson, Chief Judge, Northern District of Mississippi
A. Joe Fish, Chief Judge, Northern District of Texas
Steven A. Felsenthal, Chief Bankruptcy Judge, Northern District of Texas
Larry E. Kelly, Chief Bankruptcy Judge, Western District of Texas

Sixth Circuit:

Paul R. Matia, Chief Judge, Northern District of Ohio
Robert L. Echols, Chief Judge, Middle District of Tennessee
Thomas F. Waldron, Chief Bankruptcy Judge, Southern District of Ohio
Joseph M. Scott, Jr., Chief Bankruptcy Judge, Eastern District of Kentucky
David T. Stosberg, Chief Bankruptcy Judge, Western District of Kentucky

Seventh Circuit:

William C. Lee, Chief Judge, Northern District of Indiana
Barbara B. Crabb, Chief Judge, Western District of Wisconsin
Susan Pierson Sonderby, Chief Bankruptcy Judge, Northern District of Illinois

Eighth Circuit:

Jimm Larry Hendren, Chief Judge, Western District of Arkansas
Mark W. Bennett, Chief Judge, Northern District of Iowa
Dean Whipple, Chief Judge, Western District of Missouri
Richard G. Kopf, Chief Judge, District of Nebraska
Lawrence L. Piersol, Chief Judge, District of South Dakota
Lee M. Jackwig, Chief Bankruptcy Judge, Southern District of Iowa
David P. McDonald, Chief Bankruptcy Judge, Eastern District of Missouri
Arthur B. Federman, Chief Bankruptcy Judge, Western District of Missouri
Irvin N. Hoyt, Chief Bankruptcy Judge, District of South Dakota

Ninth Circuit:

Mary M. Schroeder, Chief Judge, Ninth Circuit Court of Appeals
James K. Singleton, Chief Judge, District of Alaska
Consuelo B. Marshall, Chief Judge, Central District of California
Marilyn L. Huff, Chief Judge, Southern District of California
David Alan Ezra, Chief Judge, District of Hawaii
Donald W. Molloy, Chief Judge, District of Montana
Howard D. McKibben, Chief Judge, District of Nevada
Sarah Sharer Curley, Chief Bankruptcy Judge, District of Arizona
Geraldine Mund, Chief Bankruptcy Judge, Central District of California
Robert J. Faris, Chief Bankruptcy Judge, District of Hawaii

Tenth Circuit:

Deanell R. Tacha, Chief Judge, Tenth Circuit Court of Appeals
John W. Lungstrum, Chief Judge, District of Kansas
James A. Parker, Chief Judge, District of New Mexico
Robin J. Cauthron, Chief Judge, Western District of Oklahoma
Donald E. Cordova, Chief Bankruptcy Judge, District of Colorado
James A. Pusateri, Chief Bankruptcy Judge, District of Kansas

Eleventh Circuit:

W. Harold Albritton III, Chief Judge, Middle District of Alabama
Elizabeth A. Kovachevich, Chief Judge, Middle District of Florida
Roger Vinson, Chief Judge, Northern District of Florida
William J. Zloch, Chief Judge, Southern District of Florida
Tamara O. Mitchell, Chief Bankruptcy Judge, Northern District of Alabama
Thomas E. Baynes, Chief Bankruptcy Judge, Middle District of Florida
Robert A. Mark, Chief Bankruptcy Judge, Southern District of Florida
Stacey W. Cotton, Chief Bankruptcy Judge, Northern District of Georgia

DC Circuit:

Douglas H. Ginsburg, Chief Judge, D.C. Circuit Court of Appeals

Federal Circuit:

Haldane Robert Mayer, Chief Judge, Federal Circuit Court of Appeals

Name Index