COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of June 7-8, 2001
Philadelphia, Pennsylvania

Minutes

TABLE OF CONTENTS

ATTENDANCE

The mid-year meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Philadelphia, Pennsylvania, on Thursday and Friday, June 7-8, 2001. The following members were present:

Judge Anthony J. Scirica, Chair
David M. Bernick
Honorable Michael Boudin
Honorable Frank W. Bullock, Jr.
Charles J. Cooper
Honorable Sidney A. Fitzwater
Dean Mary Kay Kane
Gene W. Lafitte
Patrick F. McCartan
Honorable J. Garvan Murtha
Honorable A. Wallace Tashima
Honorable Thomas W. Thrash, Jr.

The Department of Justice was represented at the meeting by Roger Pauley, Director (Legislation) of the Office of Legislation and Policy in the Criminal Division. Also in attendance was Chief Justice E. Norman Veasey, a former member of the committee.

Chief Justice Charles Talley Wells and Deputy Attorney General Larry D. Thompson were unable to attend the meeting.

Providing support to the committee were: Professor Daniel R. Coquillette, reporter to the committee; Peter G. McCabe, secretary to the committee; John K. Rabiej, chief of the Rules Committee Support Office of the Administrative Office of the U.S. Courts; Nancy Miller, special counsel in the Office of Judges Programs of the Administrative Office; and Christopher F. Jennings, assistant to Judge Scirica.

Representing the advisory committees were:

Advisory Committee on Appellate Rules —
Judge Will L. Garwood, 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 —
Honorable David F. Levi, Chair
Honorable Lee H. Rosenthal, Member
Professor Edward H. Cooper, Reporter
Professor Richard L. Marcus, Special Consultant
Advisory Committee on Criminal Rules —
Honorable W. Eugene Davis, Chair
Professor David A. Schlueter, Reporter
Advisory Committee on Evidence Rules —
Honorable Milton I. Shadur, Chair
Professor Daniel J. Capra, Reporter

Also taking part in the meeting were: Joseph F. Spaniol, Jr., consultant to the committee; Professor Mary P. Squiers, Director of the Local Rules Project; and Joe Cecil of the Research Division of the Federal Judicial Center.

INTRODUCTORY REMARKS

Judge Scirica introduced Dean Michael A. Fitts and Professor Stephen B. Burbank of the University of Pennsylvania Law School and thanked them for making the school's facilities available to the committee for the meeting. Dean Fitts and Professor Burbank welcomed the members and conveyed best wishes from Professor Geoffrey Hazard, a former member of the committee, who was unable to attend the meeting.

Judge Scirica welcomed Dean Mary Kay Kane to the committee and pointed out that she is the dean of the Hastings College of the Law, University of California, president of the American Association of Law Schools, and reporter for the American Law Institute's complex litigation project.

Judge Scirica thanked Chief Justice Veasey for seven years of distinguished service as a member of the Standing Committee, citing, among other things, his leading role in attorney conduct and mass torts issues. He also thanked Judges Garwood and Davis, whose terms as advisory chairs are due to end on October 1, 2001. He praised them especially for their enormous contributions in achieving a complete restyling of the appellate and criminal rules.

Judge Scirica said that there was little to report on the action of the Judicial Conference at its March 2001 meeting. He added, however, that several proposed amendments to the rules will be presented to the Conference at its September 2001 meeting, some of which might prove to be controversial.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee voted without objection to approve the minutes of the last meeting, held on January 7-8, 2001.

REPORT OF THE ADMINISTRATIVE OFFICE

Mr. Rabiej reported that the Judicial Conference at its September 2000 meeting had passed a resolution encouraging courts to post their local rules on the Internet. At that time, 54 district courts already had posted local rules on their respective web sites. The courts, he said, have been complying with the resolution, and now 83 out of the 92 district courts have placed their rules on the Internet. He added that Senator Lieberman had introduced legislation that would require all courts to establish web sites and post on them their local rules and orders.

Mr. Rabiej reported that Senator Thurmond had introduced legislation that would allow a district judge to conduct an arraignment by video conferencing, even without the consent of the defendant, and to conduct a sentencing hearing by video conferencing under certain circumstances.

REPORT OF THE FEDERAL JUDICIAL CENTER

Mr. Cecil noted that the agenda book for the meeting contains a status report on the various educational and research projects of the Federal Judicial Center. He pointed out that the Research Division of the Center is updating an earlier study of summary judgments and should have some additional insights to present at the next committee meeting on the impact of summary judgments on civil litigation in the district courts.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Garwood presented the report of the advisory committee, as set forth in his memorandum and attachments of May 11, 2001. (Agenda Item 8)

Amendments for Final Approval

Judge Garwood reported that the advisory committee had been working since April 1998 on a variety of amendments to the appellate rules. The proposed amendments had been brought to the Standing Committee's initial attention at its January 2000 and June 2000 meetings. They deal with five general subjects: (1) entry of judgment and time for filing an appeal; (2) electronic service; (3) calculating time limits; (4) corporate disclosure statements; and (5) various "housekeeping" changes in the rules. Judge Garwood pointed out that public comments had been received on the proposed amendments, but no commentator had asked to testify on them in person.

FED. R. APP. P. 1(b)

Professor Schiltz said that the advisory committee recommends abrogating Rule 1(b), which declares that the Federal Rules of Appellate Procedure "do not extend or limit the jurisdiction of the courts of appeals." He noted that the provision is obsolete because Congress enacted legislation in 1990 and 1992 authorizing the Supreme Court through the rules process to affect the jurisdiction of the courts of appeals by: (1) defining when a district court ruling is final for purposes of 28 U.S.C. § 1291; and (2) providing for appeals of interlocutory decisions not already authorized by 28 U.S.C. § 1292.

One of the members expressed concern that extending or limiting the jurisdiction of the courts of appeals through the rules process may not be constitutional. Defining the jurisdiction of the courts, he said, is "ordaining and establishing" courts within the meaning of Article III of the Constitution — a power reserved exclusively to Congress.

Judge Garwood responded that the advisory committee is not taking a position on the constitutional issue. Rather, it is merely seeking to abrogate a rule that is no longer correct in light of the legislation described above.

Mr. Cooper moved to add language to the committee note specifying that the committee takes no position with regard to the constitutional issue. The motion died for lack of a second.

The committee with one objection approved the proposed abrogation of Rule 1(b).

FED. R. APP. P. 4(a)(1)(C)

Professor Schiltz explained that the proposed addition to Rule 4, governing the time for filing a notice of appeal, would resolve a split among the courts of appeals as to whether an appeal from an order denying an application for a writ of error *coram nobis* is governed by the time limitations applicable to civil cases (Rule 4(a)) or by those applicable to criminal cases (Rule 4(b)). He said that the proposed amendment adopts the civil case time limitations. He added that no changes had been made in the text or note following publication.

The committee without objection approved the proposed amendment.

FED. R. APP. P. 4(a)(5)(A)(ii)

Professor Schiltz said that the proposed amendment to the rule, governing motions for extension of time, would allow a district court to extend the time to file a notice of appeal if the moving party shows either "excusable neglect" or "good cause" — regardless of whether the extension motion is filed within the original 30-day time for appeal or the next 30 days. He added that some courts have held — based on obsolete language in a committee note — that the "good cause" standard applies to motions brought within the 30-day period, and the "excusable neglect" applies after that time.

Professor Schiltz explained that the proposed amendment brings the civil appellate provision into harmony with the criminal appellate provision. He also said that the only change, other than style, made after publication was to add language to the note explaining "good cause" and "excusable neglect."

The committee without objection approved the proposed amendment.

FED. R. APP. P. 4(a)(7)

Professor Schiltz said that the proposed changes would address problems caused by the interaction of: (1) Rule 4(a)(7)'s definition of when a judgment is entered for purposes of appeal; and (2) FED. R. CIV. P. 58's requirement that a judgment be set forth on a separate document. The core problem, he said, is that many district court judgments — despite the requirement of Rule 58 — are not in fact set forth on separate documents. Under the case law of every circuit but one, the time to file an appeal never begins to run if the trial court fails to comply with the separate document requirement.

In addition, he said, the filing of a post-judgment motion tolls the time for appeal until an order denying the motion is entered. In many circuits, most orders denying post-judgment motions are themselves appealable, and thus are defined under the civil rules as "judgments" that must be entered on separate documents before the time to appeal begins to run. As a result of all this, there are many cases in which the parties assume that the time to appeal has expired, when in fact it remains open. Professor Schiltz pointed out that there are more than 500 court of appeals decisions addressing the subject.

Professor Schiltz reported that the Advisory Committee on Appellate Rules and the Advisory Committee on Civil Rules had worked together on proposing solutions to the problems caused by the interaction of the two sets of rules. He said that the proposed companion amendments to FED. R. CIV. P. 58 would maintain the separate document requirement generally, but specify that when a separate document is required a judgment is entered for purposes of the civil rules when it is entered in the civil docket and when the earlier of these events occurs: (1) the judgment is set forth on a separate document; or (2) 150 days have run from entry in the civil docket. The proposed amendments to the civil rule would also specify that a separate document is not required for an order disposing of specified post-trial motions.

Professor Schiltz explained that the proposed amendments to FED. R. APP. P. 4(a)(7) tie directly into FED. R. CIV. P. 58. There will be no separate document requirement in the appellate rules. Rather, a judgment will be considered entered for purposes of FED. R. APP. P. 4(a) if it is entered in accordance with FED. R. CIV. P. 58.

Professor Schiltz pointed out that the committee had received some negative comments from the public on the proposal to "cap" the time for filing an appeal. Commentators declared that the separate document requirement protects parties against unknowingly forfeiting their rights by giving them clear, actual notice that the time for appeal has begun to run. They argue that the appeal period should never run until a separate document is entered. Professor Schiltz reported, however, that the two advisory

committees had rejected that argument, believing that the time to appeal should not be allowed to run forever.

As published, the proposed amendments had specified that a judgment is deemed entered 60 days after entry in the civil docket by the clerk. But commentators suggested that 60 days of inactivity in a case is simply too common to provide the parties with adequate notice that the case is over. Accordingly, in light of the public comments, the advisory committees decided after publication to increase the "cap" from 60 days to 150 days. A period of 150 days of inactivity should clearly signal to the parties that the court is done with their case. Professor Schiltz noted, moreover, that if a a judgment is properly entered on a separate document, a party who receives *no notice at all* has only 180 days to file an appeal under the current rule. It would be inconsistent, he said, to argue that a party who does in fact receive notice of the court's judgment, but not through a separate document, should have an unlimited amount of time to appeal.

Professor Cooper reported that a few changes had been made in FED. R. CIV. P. 58 following publication. He noted that the definition of the time of entering judgment in Rule 58(b) had been extended to apply to all the civil rules, not just the list of specific rules set forth in the published version.

He also noted that the advisory committee had decided to carry forward the separate document requirement in Rule 58(a), even though some commentators had suggested abandoning it. The requirement applies explicitly not only to every judgment, but also to every amended judgment. This provision, he said, is important with respect to orders disposing of post-trial motions. Rule 58(a), as amended, states that a separate document is not required to dispose of certain post-trial motions. But if the order disposing of the motion amends the judgment, a separate document is in fact required.

Professor Cooper pointed out that Rule 58(a)(2) specifies the duty of the clerk to prepare, sign, and enter the judgment. The advisory committee decided after publication to add the words: "unless the court otherwise orders." He noted that subdivision (c) restates the current rule on cost or fee awards. But subdivision (d), he said, is new. It allows a party to request the court to set forth a judgment on a separate document to support an immediate appeal. A complementary amendment to FED. R. CIV. P. 54(d) would delete the requirement that a judgment on a motion for attorney fees be set forth in a separate document.

.

Several of the participants stated that the proposed amendments represented a major accomplishment, achieved as a result of extensive, careful research and close cooperation between the appellate and civil advisory committees.

One of the members pointed out that Supreme Court orders normally specify that amendments to the rules govern all proceedings then pending "insofar as just and practicable." He asked whether the proposed amendments to the FED. R. APP. P. 4(a)(7) and FED. R. CIV. P. 58 will have the effect of ending all pending "time bomb" cases 150 days after the proposed amendments are scheduled to take effect on December 1, 2002. Professors Schiltz and Cooper responded that the Court's orders prescribing the amendments to FED. R. APP. P. 4 and FED. R. CIV. P. 58 should specify that they do in fact apply to all pending cases. Judge Scirica noted that there was a consensus in the committee in support of the recommendation, and he suggested that the matter be brought specifically to the attention of the Court.

The committee without objection approved the proposed amendments to Fed. R. App. P. 4(a)(7) and Fed. R. Civ. P. 54(d)(2) and 58.

FED. R. APP. P. 4(b)(5)

Professor Schiltz reported that the proposed amendment would resolve a split among the circuits by specifying that the filing of a motion to correct a sentence under FED. R. CRIM. P. 35 does not toll the time to appeal a judgment of conviction.

Judge Garwood added that the rule's reference to FED. R. CRIM. P. 35(c) must be changed to FED. R. CRIM. P. 35(a) because of the recent restyling of the criminal rules.

The committee without objection approved the proposed amendment.

FED. R. APP. P. 5(c)

Professor Schiltz said that the proposed amendment would correct an erroneous cross-reference in the rule and impose a 20-page limit on petitions for permission to appeal, cross-petitions for permission to appeal, and answers to petitions or cross-petitions for permission to appeal. He noted that there had been no public comments on the proposal.

The committee without objection approved the proposed amendment.

FED. R. APP. P. 15(f)

Professor Schiltz reported that the advisory committee had proposed adding a new subdivision (f) to Rule 15 (review or enforcement of an agency order) to provide that when an agency order is rendered non-reviewable by the filing of a petition for rehearing or a similar petition with the agency, any petition for review or application filed with the court to enforce that non-reviewable order will be held in abeyance and become effective

when the agency disposes of the last review-blocking petition. The proposed amendment is modeled on Rule 4(a)(4)(B)(i) and treats premature petitions for review of agency orders in the same manner as premature notices of appeal of judicial decisions.

Professor Schiltz noted that the proposed amendment is being deferred in light of opposition from the Advisory Committee on Procedures for the District of Columbia Circuit. He said that the committee would confer with the chief judge and clerk of the court of appeals about the objections.

FED. R. APP. P. 21(d)

Professor Schiltz reported that the proposed amendment would correct an erroneous cross-reference in Rule 21(d) (writs of mandamus and prohibition and other extraordinary writs). It would also impose a 30-page limit on petitions for extraordinary relief and answers to those petitions.

The committee without objection approved the proposed amendment.

FED. R. APP. P. 24(a)

Professor Schiltz said that the proposed amendments to Rule 24(a) (proceeding *in forma pauperis*) would eliminate apparent conflicts with the Prison Litigation Reform Act of 1995 regarding payment of filing fees and continuance of district court *in forma pauperis* status to the court of appeals.

The committee without objection approved the proposed amendments.

ELECTRONIC SERVICE
FED. R. APP. P. 25(c), 25(d), 26(c), 36(b) AND 45(c)

Professor Schiltz pointed out that the proposed amendments to the appellate rules authorizing the use of electronic service are identical to the companion amendments to the civil rules, except for an additional paragraph in the committee note making it clear that parties have the flexibility to define the terms of their consent.

The committee without objection approved the proposed amendments.

TIME CALCULATION
FED. R. APP. P. 26(a)(2), 4(a)(4)(A)(vi), 27(a)(3)(A), 27(a)(4), AND 41(b)

Professor Schiltz reported that the proposed amendments are designed to conform computation of deadlines under the Federal Rules of Appellate Procedure with usage

under the civil and criminal rules. Thus, under the proposed amendment to Rule 26(a)(2), intermediate weekends and holidays will be excluded in computing any prescribed period less than 11 days, rather than periods less than 7 days.

The proposed amendment to Rule 4(a)(4)(A)(vi) (appeal in a civil case) would delete a parenthetical that will become superfluous in light of the proposed amendment to Rule 26(a)(2).

Professor Schiltz explained that the proposed amendment to Rule 27(a)(3)(A) would change from 10 days to 8 days the time within which a party must file a response to a motion. As a practical matter, he said, the time limit would remain about the same as under the current rule since the proposed amendment to Rule 26(a)(2) specifies that intermediate weekends and holidays are excluded in computing deadlines of less than 11 days.

Professor Schiltz said that the proposed amendment to Rule 27(a)(4) would change from 7 days to 5 days the time within which a party must file a reply to a response to a motion. Because of the parallel amendment to Rule 26(a)(2), intermediate weekends and holidays will be excluded from computation.

Professor Schiltz said that Rule 41 (mandate) would be amended to specify that the court's mandate must issue in seven *calendar* days.

The committee without objection approved the proposed amendments.

FED. R. APP. P. 26.1

The committee considered the proposed amendments to Rule 26.1 (corporate disclosure statement) later in the meeting together with proposed parallel amendments to the civil, criminal, and bankruptcy rules. (See the section of these minutes entitled "Corporate Disclosure Statements" at pages 38-41.)

COVER COLORS
FED. R. APP. P. 27(d)(1)(B), 32(a)(2), AND 32(c)(2)(A)

Professor Schiltz pointed out that the proposed amendments would specify the color of a cover, if one is used, for a motion (white), a supplemental brief (tan), and a petition for panel rehearing, petition for hearing or rehearing en banc, answer to a petition for panel rehearing, or response to a petition for hearing or rehearing en banc (white). He said that all the public comments save one had been favorable.

The committee without objection approved the proposed amendments.

FED. R. APP. P. 28(j)

Professor Schiltz explained Rule 28(j) (citation of supplemental authorities) authorizes a party to notify the clerk by letter if pertinent and significant authorities come to its attention after its brief has been filed. The current rule, he said, specifies that the letter must describe the supplemental authorities "without argument," but there is no size limit on the letter. The proposed amendment would eliminate the prohibition on "argument" because it is just too difficult to enforce. But it would impose a limit on the size of the letter. As published, the proposed limit had been 250 words, but commentators expressed concern about letters addressing multiple citations. In response, the advisory committee decided to increase the proposed limit of the letter to 350 words, without specifying how citations will be counted.

The committee without objection approved the proposed amendment.

FED. R. APP. P. 31(b)

Professor Schiltz said that the proposed amendment to Rule 31 (serving and filing briefs) would clarify that briefs must be served on all parties, including those not represented by counsel.

The committee without objection approved the proposed amendment.

FED. R. APP. P. 32(a)(7)(C) AND FORM 6

Professor Schiltz explained that the proposed new Form 6 is a suggested certificate of compliance stating that a brief meets the requirements of Rule 32(a) regarding type-volume limitation, typeface, and type style. The proposed amendment to Rule 32(a)(7)(C) specifies that use of Form 6 is sufficient to meet the certification obligation of the rule.

The committee without objection approved the proposed amendment.

FED. R. APP. P. 32(d)

Professor Schiltz reported that the proposed amendment to Rule 32(d) specifies that every brief, motion, or other paper filed with the court must be signed by the attorney or unrepresented party who files it. He said that one commentator strongly opposed the amendment, and other commentators expressed concern as to whether each copy of a document must be signed. He explained that the advisory committee added a sentence to the committee note following publication specifying that only the original of every paper must be signed.

The committee without objection approved the proposed amendment.

FED. R. APP. P. 44(b)

Professor Schiltz explained that the current Rule 44 implements 28 U.S.C. § 2403(a) by requiring the clerk of court to notify the Attorney General of the United States whenever a party challenges the constitutionality of a federal statute and the United States is not a party to the case. Proposed new Rule 44(b) would implement a companion statutory provision, 28 U.S.C. § 2403(b), and require the clerk to notify the attorney general of a state whenever a party challenges the constitutionality of a state statute and the state is not a party to the case.

The committee without objection approved the proposed amendment.

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 15, 2001. (Agenda Item 7)

Judge Small noted that the Supreme Court on April 23, 2001, had approved amendments to eight bankruptcy rules and submitted them to Congress. (Rules 1007, 2002, 3016, 3017, 3020, 9006, 9020, and 9022)

He also reported that major bankruptcy reform legislation had passed both houses of the 107th Congress and will likely be enacted into law sometime later in the year. Because the legislation generally will take effect 180 days after enactment, the advisory committee will have a very short period in which to draft appropriate rules and forms to implement the new law. He said that the advisory committee had appointed subcommittees and hired consultants to examine the legislation thoroughly and determine what changes will be needed in the rules and forms.

Amendments for Final Approval

Judge Small reported that the advisory committee in August 2000 had published proposed amendments to seven rules, one proposed new rule, and amendments to one official form. He said that the committee had received many comments on the proposals and had conducted a public hearing on January 26, 2001. The most controversial of the changes, he said, involves the rewriting of Rule 2014, which requires a professional seeking employment in a bankruptcy case to disclose connections with the debtor and others.

FED. R. BANKR. P. 1004

Professor Morris explained that Rule 1004(a), dealing with voluntary petitions filed by partnerships, would be deleted because it addresses a matter of substantive law beyond the scope of the rules. As amended, the rule will apply only to involuntary petitions.

The committee without objection approved the proposed amendment.

FED. R. BANKR. P. 1004.1

Professor Morris reported that proposed new Rule 1004.1 will fill a gap in the rules and allow an infant or incompetent person to file a petition through a representative, next friend, or guardian ad litem. It also will allow the court to appoint a guardian ad litem or issue any other orders necessary to protect an infant or incompetent debtor. Judge Small pointed out that the proposed rule is modeled on FED. R. CIV. P. 17(c).

The committee without objection approved the proposed new rule.

FED. R. BANKR. P. 2004

Professor Morris said that Rule 2004 (examination) would be amended to clarify that an examination may be conducted outside the district in which a case is pending. The amended rule specifies that the subpoena for the examination may be issued and signed by an attorney authorized to practice either in the court where the case is pending or the court where the examination is to be held.

One of the judges questioned whether it is technically correct to state that an attorney, rather than the court, "issues" a subpoena. It was pointed out, though, that the language of the proposed amendment to the bankruptcy rules is consistent with the usage of the civil rules. Specifically, FED. R. CIV. P. 45(a)(2) declares that a subpoena issues from the court, but FED. R. CIV. P. 45(a)(3) provides that an attorney, as an officer of the court, may also issue and sign a subpoena on behalf of the court.

The committee without objection approved the proposed amendment.

FED. R. BANKR. P. 2014

Judge Small explained that Rule 2014 (employment of a professional) has been rewritten to conform more closely to the provisions of the Bankruptcy Code regarding the disclosures that a professional must make when seeking employment in a bankruptcy case. The amended rule will require the professional to disclose, among other things:

(1) any interest in, relationship to, or connection with the debtor; and

(2) any other interest, relationship, or connection that might cause the court or a party in interest reasonably to question whether the professional is "disinterested" within the meaning of section 101 of the Code.

Judge Small said that the committee had received both favorable and unfavorable comments on the proposed revisions. He explained that the opponents claim that the revised rule will give professionals too much discretion to decide what they must disclose. They express a preference for retaining the current rule, which requires disclosure of "all connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee." Proponents of the revision, on the other hand, declare strongly that the current rule simply does not work and that it is impossible as a practical matter for professionals to comply with it fully.

Judge Small reported that the advisory committee had spent a great deal of time in addressing the rule, and he noted that members had engaged in a personal dialog with some of the opponents of the revisions. As a result of these discussions, he said, the advisory committee had refined the language of paragraphs (b)(3) and (b)(4) following publication. He and Professor Morris explained that the revisions will continue to require full disclosure of any connection with the debtor, will specify a reasonableness standard with respect to disclosure of connections with creditors and other parties in interest, and will give clear notice to professionals that their disinterestedness is to be judged by others, *i.e.*, the court and parties in interest. Judge Small said that the post-publication refinements had satisfied most, though not all, opponents of the change.

The committee with two negative votes approved the proposed amendment.

FED. R. BANKR. P. 2015

Professor Morris said that Rule 2015 (duty to keep records, make reports and give notice) would be amended to specify that the duty to file quarterly reports in a chapter 11 case continues only as long as there is an obligation to make quarterly payments to the United States trustee.

The committee without objection approved the proposed amendment.

FED. R. BANKR. P. 4004

Professor Morris stated that the proposed amendment to Rule 4004(c) (grant or denial of discharge) would expand the types of motions that prevent or postpone the entry of a discharge.

The committee without objection approved the proposed amendment.

FED. R. BANKR. P. 9014

Judge Small noted that the advisory committee had considered the proposed amendments to Rule 9014 (contested matters) originally as part of its proposed "litigation package."

He said that some negative comments had been received regarding new subdivision (d). The proposed amendment makes it clear that testimony as to material, disputed facts in contested matters must be taken in the same manner as in an adversary proceeding. He said that some commentators had expressed concern that the amendment might eliminate the widespread practice of allowing some direct testimony to be presented by way of affidavit. Judge Small explained that the proposed amendment does not eliminate the practice. But if a factual dispute arises in a contested matter, the court must resolve it through live testimony, just as it would in an adversary proceeding.

Professor Morris reported that new subdivision (e) would require a court to provide a mechanism for notifying attorneys as to whether the presence of witnesses is necessary at a particular hearing. He emphasized that the rule does not specify any particular procedures. Nor does it specify whether the court should notify attorneys by local rule, order, or otherwise. He emphasized that local procedures for hearings and other court appearances in contested matters vary from district to district. The amended rule will simply require a court to provide some sort of mechanism enabling attorneys to know at a reasonable time before a scheduled hearing on a contested matter whether they need to bring their witnesses.

The committee without objection approved the proposed amendments.

FED. R. BANKR. P. 9027

Professor Morris said that the proposed amendment to Rule 9027 (removal) makes it clear that if a claim or cause of action is initiated after a bankruptcy case has been commenced, the time limits for filing a notice of removal of the claim or cause of action apply whether the case is still pending or has been suspended, dismissed, or closed by the court.

The committee without objection approved the proposed amendment.

FORMS 1 AND 15

Professor Morris pointed out that only relatively minor changes are proposed in the forms. He said that Form 1 (voluntary petition) would be amended to require a debtor to disclose ownership or possession of any property that poses, or is alleged to pose, a

threat of imminent and identifiable harm to public health or safety. He said that there had been very little public comment on the proposed addition.

Professor Morris reported that Form 15 (order confirming a plan) would be amended to conform to a change in Rule 3020 currently pending in Congress that should take effect on December 1, 2001. The amended rule states that if a chapter 11 plan provides for an injunction against conduct not otherwise enjoined under the Code, the order of confirmation must describe in reasonable detail all acts enjoined, be specific in its terms regarding the injunction, and identify the entities subject to the injunction.

Professor Morris recommended that the amendments to the forms be made effective by the Judicial Conference on December 1, 2001, to coincide with the effective date of amendments to the rules.

The committee without objection approved the proposed amendments to the forms and recommended that they become effective on December 1, 2001.

Amendments for Publication

FED. R. BANKR. P. 1007 AND 7007.1

The committee considered the proposed amendment to Rule 1007 and proposed new Rule 7007.1 (corporate ownership statement) later in the meeting together with proposed parallel amendments to the appellate, civil, and criminal rules. (See the section of these minutes entitled "Corporate Disclosure Statements" at pages 38-41.)

FED. R. BANKR. P. 2003 AND 2009

Judge Small said that the proposed amendments to Rule 2003 (meeting of creditors or equity security holders) and Rule 2009 (trustees for estates when joint administration is ordered) reflect the enactment of a new subchapter V of chapter 7 of the Bankruptcy Code governing the liquidation of multilateral clearing organizations.

The committee without objection approved the proposed amendments for publication.

FED. R. BANKR. P. 2016

Professor Morris said that new subdivision (c) would be added to Rule 2016 (compensation for services rendered and reimbursement of expenses) to implement § 110(h)(1) of the Bankruptcy Code. It would require bankruptcy petition preparers to disclose fees they receive from the debtor.

The committee without objection approved the proposed amendment for publication.

FORMS 1, 5, AND 17

Professor Morris said that Form 1 (voluntary petition) would be amended by adding a check box to designate a clearing bank case filed under subchapter V of chapter 7 of the Bankruptcy Code. The proposed changes to Form 5 (involuntary petition) and Form 17 (notice of appeal) are required by an uncodified 1994 amendment to the Bankruptcy Code providing that child support creditors do not have to pay filing fees.

The committee without objection approved the proposed amendments for publication.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Levi and Professor Cooper presented the report of the advisory committee, as set forth in Judge Levi's memorandum and attachments of May 14, 2001. (Agenda Item 6)

Amendments for Final Approval

FED. R. CIV. P. 7.1

The committee considered proposed new Rule 7.1 (corporate disclosure statement) later in the meeting together with proposed parallel amendments to the appellate, bankruptcy, and criminal rules. (See the section of these minutes entitled "Corporate Disclosure Statements" at pages 38-41.)

FED. R. CIV. P. 54 AND 58

The committee approved proposed amendments to Rule 54 (judgment and costs) and Rule 58 (entry of judgment) as part of its consideration of proposed amendments to FED. R. APP. P. 4(a)(7). (See pages 6-8 of these minutes.)

FED. R. CIV. P. 81

Professor Cooper said that the proposed amendment to Rule 81 (applicability of the rules) would eliminate an inconsistency regarding time provisions between Rule 81(a)(2) and the rules governing § 2254 cases and § 2255 proceedings.

The committee without objection approved the proposed amendment.

ADMIRALTY RULE C

Professor Cooper pointed out that the proposed amendments to the admiralty rules had been described in detail at the January 2001 meeting of the committee. He explained that the proposed changes are minor in nature and designed to eliminate unintentional inconsistencies between the rules and the Civil Asset Forfeiture Reform Act of 2000. He noted that the amendments had been published under an expedited schedule and had attracted no public comments.

The committee without objection approved the proposed amendments.

Amendments for Publication

Judge Levi reported that the advisory committee was seeking authority to publish proposed amendments to Rule 23 (class actions), Rule 51 (jury instructions), and Rule 53 (masters).

FED. R. CIV. P. 23

Background

Judge Levi noted that the advisory committee had been studying the operation of Rule 23 for a number of years. In the 1990s, he said, its efforts had focused largely on the merits of the decision to certify a class. Although several proposed amendments to Rule 23 had been published for comment, the only change actually made in the rule was the addition in 1998 of subdivision (f), authorizing interlocutory appeals of decisions granting or denying class certification. That amendment, he said, appears to be working very well. It has facilitated a healthy development of the law without either overburdening the courts of appeals or delaying cases in the district courts.

Judge Levi said that the focus of the advisory committee's current efforts is on judicial oversight of class actions, including oversight of settlements, appointment and payment of attorneys, and overlapping or competing class actions. He reported that the advisory committee's class-action work has been directed by Judge Rosenthal, chair of the committee's class action subcommittee, assisted by Professor Cooper and Professor Marcus, its special consultant.

Judge Levi pointed out that the standing committee in January 2001 had advised the advisory committee to be bold in devising solutions to class action problems and not to be intimidated by the restrictions of the Rules Enabling Act. To that end, he said, some members invited the advisory committee to recommend possible statutory amendments as part of the proposed solutions.

Judge Levi noted that the advisory committee's package of proposed amendments to Rule 23 had been carefully drafted with an eye on the Rules Enabling Act. Nevertheless, he said, some members have questioned whether the committee has authority to proceed under the rules process with three of the amendments in the package. As included in the committee's agenda book, the three deal with competing class actions and may be summarized as follows:

(1) Proposed Rule 23(c)(1)(D) specifies that if a court refuses to certify a class, it may direct that no other court certify a substantially similar class.

(2) Proposed Rule 23(e)(5) specifies that if a court refuses to approve a settlement, other courts are precluded from approving substantially the same settlement.

(3) Proposed Rule 23(g) specifies that a court may enjoin a class member from filing or pursuing a similar class action in any other court.

Judge Levi said that the advisory committee had decided to table further action on these three particular provisions in order to avoid controversy over the Rules Enabling Act that could derail the whole package of proposed class action amendments. He said that the advisory committee will not publish the three provisions, but will distribute them in a less formal way to members of the bench, bar, and academia, and invite comments. Accordingly, the attorney appointment and attorney fee subdivisions, originally designated as proposed Rules 23(h) and (i), will be redesignated as proposed Rules 23(g) and (h). In addition, the committee will host a class-action conference at its October 2001 meeting that will consider, among other things, competing and conflicting class actions.

Judge Scirica reported that the decision to defer publication of the three proposed amendments had been reached following considerable discussion among the committee chairs and reporters. He said that it is very important to solicit input on the three "preclusion" amendments and to discuss them with bar groups, judges, and law schools, and also with the Federal-State Jurisdiction Committee of the Judicial Conference.

Several members of the committee extolled the work of the advisory committee, stating that the proposed preclusion provisions are badly needed, whether by way of statute or rule.

Rule 23(c)

Judge Levi pointed out that proposed Rule 23(c)(1)(A) requires a court to make a decision on whether to certify a class "when practicable." The current rule, on the other hand, requires a decision "as soon as practicable." He said that the proposed change is significant because it would give a judge adequate time to decide whether certification of a

class is appropriate. The amendment, he said, is not designed to have the judge delve into the merits of the case, but to learn more about the nature of the issues.

Professor Cooper added that the proposal had been recommended by the advisory committee in the past, but had been deferred in part because of concern by some that it might cause delay in some cases. The advisory committee, he said, had looked at the proposal afresh, had considered a Federal Judicial Center study of class actions, and had determined that the proposal strikes a good balance between the need for dispatch and the need to gather sufficient information to support a well-informed determination by the court on whether to certify a class.

One member stated that there is no compelling reason to change the current rule. He said that the bench and bar are comfortable with the present language, which emphasizes prompt court action. Any change in the rule, he said, could lead to mischief and unintended consequences. Another member complained that some judges now defer certification decisions in order to encourage settlement. He said that the amendment may broaden that practice and open the way to additional discovery and delay.

Judge Levi responded that most courts read the current "as soon as practicable" language to mean "when practicable." Thus, the amendment may make no difference in these courts. On the other hand, other courts read the current language to mean "as quickly as is humanly possible," and some even have local rules setting overly strict time limits for making certification decisions. The advisory committee, he said, wants to emphasize the need for the court to make an informed decision, even if it takes a little time for the judge to explore the key issues, and even to allow some limited discovery.

Judge Rosenthal pointed out that an unintended consequence of the current rule is that many judges and lawyers believe that there is an absolute barrier against inquiring into the nature of the issues on the merits. The amendment, she said, would remove that impediment. At the same time, she said, the advisory committee is very careful in the note to explain the purposes of the pre-certification activities and to emphasize that the amendment does not allow further delay.

One of the participants suggested that the key issue is whether a court may grant a dispositive motion before it makes a certification decision. He suggested that the rule or note focus on the power of a judge to rule on a dispositive motion before ruling on a class certification motion.

Several participants offered language changes in the proposed amendment and committee note. Judge Scirica noted that there appeared to be a consensus as to the desirability of publishing the proposed rule. But, he said, there were a number of disagreements as to language. Accordingly, he suggested that Professor Cooper work with several of the members to incorporate their suggestions and improve the language of

the rule and note before publication. Ultimately, it was decided to require that the court's certification decision be made "at an early practicable time."

Judge Levi noted that the remaining parts of proposed Rule 23(c) are non-controversial. He pointed out that Rule 23(c)(2)(a)(ii) would require that reasonable notice be provided to class members in (b)(1) and (b)(2) class actions.

The committee without objection approved proposed Rule 23(c) for publication — after tabling subparagraph (c)(1)(D), as noted above. It also authorized the advisory committee to entertain additional changes in the note.

Rule 23(e)

Judge Levi noted that the proposed amendment to Rule 23(e)(1) would for the first time specify standards in the rules for approving a settlement. It would require a settlement to be "fair, reasonable, and adequate."

Professor Cooper stated that the current rule provides that an action may not be dismissed or settled without notice. He explained that the rule, as revised, would distinguish between: (1) voluntary dismissals and settlements occurring before the court certifies a class; and (2) dismissals and settlements that bind a class. In the first case — covered by proposed Rule 23(e)(1)(A) — notice is not required, although the court retains discretion to order notice. But court approval is required because people may have relied on the action being pending. In the second case — covered by proposed Rule 23(e)(1)(B) and (C) — reasonable notice must be provided to all class members, and the court must determine that the dismissal or settlement is "fair, reasonable, and adequate." Professor Cooper added that the term "compromise" has been retained in the rule, as well as "settlement," out of an abundance of caution.

Some participants offered suggested improvements in the language of the rule that Judge Levi agreed to consider.

The committee with one objection approved proposed Rule 23(e)(1) for publication.

Judge Levi stated that proposed Rule 23(e)(2) would authorize the court to direct that settlement proponents file copies of any side agreements made in connection with the settlement.

The committee with one objection approved proposed Rule 23(e)(2) for publication.

Judge Levi said that in many cases a proposed settlement and a class certification are presented to the court at the same time. Class members have the opportunity to opt out with full knowledge of the terms of the settlement.

On the other hand there are many cases where class members are provided a single opportunity to opt out of a class before settlement terms are disclosed. He said that the court should have discretion to give them another chance to opt out when they learn the terms of the settlement. Judge Levi said that most class members will likely not opt out, but fairness dictates that they be allowed to elect exclusion after the settlement terms are announced. He noted that the advisory committee had drafted two alternate versions of the opt-out provision for publication. Judge Rosenthal explained that the first alternate is stronger, containing a presumption in favor of an opt out. The second, she said, is more neutral.

One of the members strongly opposed the proposed amendment, saying that although it appears on its face to be fair to class members, it is normally lawyers, not class members, who make the decisions. The amendment, he said, would allow attorneys to sabotage a class action by threatening to pull out large numbers of clients. It would also make the negotiation process considerably more difficult.

Judge Levi responded that there were points to be made on both sides of the argument, but the arguments in favor of allowing an opt-out are stronger on balance. He added that the advisory committee had considered the alternative of strengthening the procedural support for objections, but had come to the conclusion that it was not workable. He emphasized, moreover, that support had been voiced for the opt-out proposal by attorneys from all segments of the bar. Thus, he said, the advisory committee had concluded that giving bound class members a chance to opt out — at the discretion of the court — is simply the right thing to do.

Some participants made suggestions for improvements in the language of the rule that Judge Levi said he would try to incorporate.

The committee without objection approved proposed Rule 23(e)(3) for publication.

Judge Levi said that proposed Rule 23(e)(4) is self-explanatory. It confirms the right of class members to object to a proposed settlement or dismissal.

The committee without objection approved proposed Rule 23(e)(4) for publication.

Rule 23(h)

Professor Marcus noted that proposed subdivisions (h) and (i), dealing with appointment of counsel and attorney fees, will be relettered to account for the decision to table proposed subdivision (g) on overlapping classes.

Professor Marcus stated that proposed paragraph (h)(1) sets forth both the requirement that the court appoint class counsel and the obligation of class counsel to fairly and adequately represent the interests of the class. He noted that the introductory phrase to subparagraph (1)(A), *i.e.*, "unless a statute provides otherwise," is designed to exclude securities litigation. This recognizes explicitly that the rule will not supersede the Private Securities Litigation Act of 1995, which contains specific directives about selecting a lead plaintiff and retaining counsel.

Professor Marcus noted that paragraph (h)(2) sets forth procedures for appointing class counsel. In subparagraph (2)(A), he said, the advisory committee contemplates possible competition for appointment as class counsel. It specifies that the court may allow a reasonable time for attorneys seeking appointment to apply. He added that a Federal Judicial Center study of class actions in the district courts shows that it may take several months before certification and appointment of class counsel in many cases.

He explained that subparagraph (2)(B) elaborates on what the court must look for in class counsel, including experience, work undertaken on the case to date, and resources that counsel will devote to representing the class. The court may consider any other factors and require counsel to provide additional information and propose terms for attorney fees and costs. Subparagraph (2)(C) suggests that the court order appointing class counsel may include provisions for attorney fees and costs.

Concern was expressed regarding use of the word "appoint" in Rule 23(h)(1)(A) because counsel is not "appointed" in securities litigation. The court merely approves the parties' designation of counsel. Professor Marcus responded that the narrow purpose of the lead-in language is only to document that the rule does not supersede the securities legislation. Judge Rosenthal suggested that the advisory committee could draft appropriate language to address the concern.

Several language improvements were suggested in the rule and committee note. Judge Levi agreed to work on incorporating the suggestions.

The committee without objection approved proposed Rule 23(h) for publication.

Professor Marcus explained that proposed Rule 23(i), dealing with attorney fees, is new. Under paragraph (i)(1), notice of a motion for award of attorney fees must be served on all parties, and notice of motions by class counsel must also be given to all class

members in a reasonable manner. Under paragraph (i)(2), class members or parties from whom payment is sought may object to the motion. Under paragraph (i)(3), the court must give a careful explanation of its decision by holding a hearing and making findings of fact and conclusions of law. Under paragraph (i)(4), the court is authorized to refer fee award issues to a special master or magistrate judge, as provided in FED. R. CIV. P. 54(d)(2)(D).

Several members suggested that the language of paragraph (i)(3) should not specify that the court must hold a hearing. Judge Rosenthal responded that the rule is intended to simply provide an opportunity for a hearing, not a right to a hearing. She suggested, and the members agreed, that the paragraph should be rephrased to specify that "the court may hold a hearing, and must find the facts and state its conclusions."

The committee without objection approved proposed Rule 23(i) for publication.

Judge Thrash moved to delete lines 69 to 145 of the committee note.

He pointed out that the proposed rule itself specifies no criteria for setting attorney fees. Nevertheless, extensive discussion is set forth in the committee note explaining the criteria that courts follow in setting fees. He said that this amounted to placing substantive law in the committee note and questioned the appropriateness of the practice.

Judge Rosenthal responded that the advisory committee had debated the matter at considerable length and had decided in the end not to include a "laundry list" of attorney fee factors in the rule itself. She explained that the committee's goal has been to blend flexibility with standards. To that end, it concluded that it would not be possible to specify all the potentially relevant factors in the rule. Rather, it chose to set forth some examples in the committee note to guide bench and bar and make it clear that the list is not exhaustive or complete. Thus, case law will not be restrained from developing additional factors.

Judge Thrash said that the committee note contains an excellent summary of the current law, but it will be out of date in a few years. He objected on principle to placing substantive law in committee notes. He said that if standards are desired, they belong in the rule, not the note.

He also pointed to the proposed committee note to FED. R. EVID. 804(b)(3), which contains a detailed discussion of the law on corroborating circumstances in support of declarations against penal interest. He recommended elimination of the extensive case law discussion from that note.

Two of the advisory committee chairs responded that committee notes in general serve an important educational purpose for bench and bar. They recognized that the case

law is expected to develop and change. Nevertheless, an explanation of the current law and a careful citing of key cases and factors can provide clear guidance and serve as a useful resource for counsel.

The motion died for lack of a second.

FED. R. CIV. P. 51

Judge Levi noted that the current Rule 51 allows a party to file proposed jury instructions at the close of evidence or at "such earlier time during the trial" that the court directs. Many judges, however, request or allow proposed instructions before trial. The rule, he said, does not reflect current practice, and it fails to distinguish clearly among requests, instructions, and objections.

Judge Levi explained that the common model today is for a court to ask the parties to submit proposed instructions before trial. At some point, usually well before argument, the court prepares its own instructions, often including portions of the parties' proposed instructions. At that point, the parties are given a chance to object and be heard on the court's instructions.

He said that the amended rule follows this approach. Subdivision (a) deals with requests of the parties. Paragraph (a)(1) gives the court authority to direct that requests be submitted before trial. Paragraph (a)(2) allows a party to file requests for additional instructions at the close of the evidence in appropriate circumstances, recognizing that evidence emerging during the trial may turn out to be different from that anticipated by the parties before trial.

In subdivision (b), the court must inform the parties of its proposed instructions and its actions on their requests. The court must give the parties a chance to object on the record before instructions and arguments are delivered to the jury.

Subdivision (c) deals with objections. It specifies that a party may object to an instruction by stating the matter objected to and the grounds of the objection. A party must also object to the court's failure to give an instruction. Judge Levi noted that subdivision (d) requires both a timely request and a timely objection, although a request alone suffices if the court made a definitive ruling on the record rejecting the request. It also incorporates the plain error rule.

Several participants suggested some modifications in the language of the rule, and Judge Levi agreed to incorporate them in a revised draft for publication.

The committee without objection approved the amended rule for publication.

FED. R. CIV. P. 53

Professor Cooper explained that Rule 53 would be revised to reflect the actual use of masters in the district courts. The current rule, he said, focuses on special masters who perform trial functions. But a study conducted for the advisory committee by the Federal Judicial Center has confirmed the general experience that masters are also used extensively to perform pre-trial and post-trial functions.

He emphasized that the revised rule is not designed either to encourage or discourage the use of special masters. Rather, it reflects current reality and addresses the key issues that district courts need to consider in using masters.

Professor Cooper pointed out that subdivision (a) of the revised rule, dealing with appointment of a master, is a central part of the revisions. Under paragraph (a)(1), a court may appoint a master to perform duties consented to by the parties. He said that the rule provides broad discretion for the court to agree to the parties' wishes on the use of a master, as long as their consent is genuine.

If the parties do not consent, the court may appoint a master to hold trial proceedings and make recommended findings of fact, but only if warranted by an "exceptional condition" or if there is a need to perform an accounting or resolve a difficult computation of damages. In this respect, he said, the revised rule retains the current limits on the use of masters in exercising trial functions, as directed by case law such as *La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957). The rule also eliminates the use of trial masters in a case tried before a jury, unless the parties consent.

Finally, Professor Cooper noted that subparagraph (a)(1)(C) would allow a court to appoint a master to perform pretrial and post-trial duties. The duties, however, would be limited to those that cannot be performed by an available district judge or magistrate judge of the district. He added that an earlier draft of the revised rule had contained a lengthy list of duties that might be assigned, but the advisory committee decided against detail in the rule in favor of just setting forth examples in the committee note.

Professor Cooper pointed out that it is essential that there be no actual or apparent conflicts of interest involving a master. To that end, paragraph (a)(2) would extend to masters the standard of disqualification for a judge found in 28 U.S.C. § 455. But it would allow the parties to consent to appointment of a particular person as master after disclosure of a potential ground for disqualification.

He added that paragraph (a)(3) would prohibit a master, during the period of appointment, from appearing as an attorney before the judge who made the appointment. Under paragraph (a)(4), the court must consider the fairness of imposing the expenses of a master on the parties and protect against unreasonable expense and delay.

Professor Cooper emphasized the key role played by the order appointing a master under the revised rule. He said that the order must specify the master's duties and compensation and address certain procedural matters. He pointed out that the Federal Judicial Center's study of masters in the district courts had revealed that *ex parte* communications between a master and either the court or the parties are the focus of continuing concern, but may be very beneficial in certain circumstances. Accordingly, the rule requires the order appointing the master to specify the circumstances in which the master may communicate *ex parte* with the court or a party.

One member questioned the advisability of authorizing *ex parte* contact between a master and a party. He said that *ex parte* communications can bring the institution of master into great disrepute and are inherently inconsistent with the concept of an impartial decider. He said that the rule will result in parties questioning the neutrality of the master.

Professor Cooper responded that the rule simply allows the district judge to determine the matter. He pointed out that the Federal Judicial Center study on the use of masters in the district courts had pointed out that this issue is the single most difficult problem cited by interviewees. He noted that *ex parte* contacts normally will not be allowed, but that confidential contacts with the parties may be essential for a settlement master. He said that lines 266-281 of the committee note provide guidance to the courts on the matter.

Professor Cooper stated that subdivision (g) addresses a master's order, report, or recommendations. He pointed out that a party may file objections to a master's findings or recommendations within 20 days, unless the court sets a different time. Professor Cooper noted that the presumptive standard of review for a master's findings of fact will be "clearly erroneous," carried over from the current Rule 53(e)(2). But the court's order of appointment may specify *de novo* review by the court, or the parties may stipulate with the court's consent that the master's findings will be final.

After discussion, it was decided to publish alternate versions of subdivision (g). The first version establishes *de novo* review of all fact issues unless the order of appointment provides for clear error review or the parties stipulate with the court's consent that the master's findings will be final. The second version uses the approach of the first version for "substantive fact issues," but establishes clear error review for "non-substantive fact issues" unless the order of appointment provides for *de novo* review, the court receives evidence, or the parties stipulate with the court's consent that the master's findings will be final.

Professor Cooper pointed out that subdivision (h) deals with compensation of a master. Among other things, it requires the court to take into account the means of the parties. In subdivision (i), a magistrate judge may be appointed as a master only for duties

that cannot be performed in the capacity of a magistrate judge and only in exceptional circumstances.

Several suggestions were made for language improvements, which Professor Cooper and Judge Levi agreed to incorporate in the rule before publication.

One member expressed reservations concerning the proposed revisions in general. He said that masters are not a beneficial institution, and individual masters have engaged in egregious violations of the judicial process. He feared that the revised rule would encourage the use of masters or increase their authority. He voiced particular concern over subdivision (g), which he said gives a master the powers of an Article III judge to make findings of fact. He questioned the constitutional propriety of allowing masters to perform judicial functions.

Judge Levi responded that the advisory committee was very much aware of this issue, and the rule does not attempt to change the current law or expand its exceptional circumstance limitations. Masters, he said, make findings of fact under the current rule, and review of the findings by a district judge is limited to the clear error test. He emphasized that the revised rule will place firm control in the Article III judge's hands. The judge may require *de novo* review in the order appointing the master and may also review any finding on a *de novo* basis, even if the order specifies a less rigid standard. Professor Cooper emphasized that the revised rule gives the judge more power than the current rule in reviewing a master's report. He pointed out that under the revised rule, the master's report is a nullity unless the court acts to adopt it.

The committee without objection approved the revised rule for publication.

Professor Cooper pointed out that conforming amendments are needed in Rule 54(d)(2)(D) (attorneys' fees) and Rule 71A(h) (condemnation of property) to reflect the proposed revisions in Rule 53. The proposed amendments would delete references to specific subdivisions of the current rule.

The committee without objection approved the amendments for publication.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Davis and Professor Schleuter presented the report of the advisory committee, as set forth in Judge Davis's memorandum and attachments of May 10, 2001. (Agenda Item 5)

Style Package

Judge Davis explained that the project to restyle the body of criminal rules, begun in January 1998, had entailed an enormous amount of effort and thought on the part of the advisory committee, its consultants, and the Administrative Office staff. He expressed special appreciation for the contributions of Judge James A. Parker, former chairman of the style committee; John K. Rabiej, chief of the Rules Committee Support Office; Professor Schlueter, the committee's reporter; and the committee's consultants — Bryan A. Garner, Professor Stephen A. Salzburg, Professor R. Joseph Kimble, and Joseph F. Spaniol, Jr.

Judge Davis distributed to the members a chronology of the project. He noted that he had divided the advisory committee into two subcommittees, assigning blocks of rules to each. In addition, each member was given a number of rules for which he or she was primarily responsible. He explained that all the proposed revisions had been reviewed on several occasions by the individual members, the consultants, a subcommittee, and the full committee. The committee's schedule, he said, had been demanding and intense, with 10 subcommittee meetings and 6 full committee meetings taking place between December 1998 and April 2001.

Judge Davis reported that the proposed revisions had been published in two separate packages — one limited to stylistic changes and the other comprising those rules containing substantive changes. He said that the committee had made a number of non-controversial changes in the style package after publication, most of them suggested by the style consultants. He also pointed out that two changes had been added to the style package to take account of recent legislation — in Rule 4 (arrest warrant or summons on a complaint) to reflect the Military Extraterritorial Jurisdiction Act and in Rule 6 (grand jury) to reflect 18 U.S.C. § 3322.

The committee without objection voted to approve the "style" package of proposed amendments.

Substantive Package

Judge Davis reported that the advisory committee had decided after the public comment period to withdraw or defer three matters in the substantive package.

First, revised Rule 32(h)(3), as published, would have required a sentencing judge to resolve all objections to "material" matters in a presentence report, even matters not affecting the actual sentence. Judge Davis explained that presentence reports are used by the Bureau of Prisons to make operational decisions, such as whether a defendant is eligible for drug treatment. He noted that the proposal had attracted negative comments from a number of judges. Thus, he said, after further consideration of the proposal and

consultation with the Bureau of Prisons, the advisory committee had decided to withdraw the amendment.

Second, the advisory committee had published an amendment to Rule 41 prescribing procedures for issuing "covert" warrants, *i.e.*, warrants permitting law enforcement agents to enter premises, not to seize property, but covertly to observe and record information. Judge Davis noted that these warrants, though not mentioned in Rule 41, are authorized by case law and are currently issued by magistrate judges. He said that the advisory committee had decided that the rule itself should give magistrate judges clear, authoritative advice. He said that the advisory committee had received a good deal of opposition to the proposal and had decided to defer the amendment for further study.

Third, the advisory committee had published several amendments to the Rules Governing § 2254 Cases and § 2255 Proceedings. Judge Davis noted that several public comments suggested that more extensive changes were needed in these rules. Therefore, the committee decided to defer the proposed amendments and conduct a broader study of the rules. To that end, it has hired a special consultant to assist with the study.

Judge Davis proceeded to describe the proposed amendments contained in the substantive package.

FED. R. CRIM. P. 5, 10, AND 43 — VIDEO CONFERENCING

Judge Davis noted that the proposed amendments to Rule 5 (initial appearance), Rule 10 (arraignment), and Rule 43 (presence of the defendant) are closely related. They will allow a judge to conduct an initial appearance or arraignment by video conferencing. He reported that originally the advisory committee had decided to propose that video conferencing be allowed only with the consent of the defendant. But after considerable discussion, it voted to seek public comments also on an alternate proposal allowing video conferencing without consent.

Judge Davis said that a number of judges had expressed very strong support for the proposal — especially judges who have conducted criminal proceedings along the Mexican border and judges from districts with large geographical expanses. He added that many of the judges would support a rule authorizing video conferencing without consent.

Judge Davis pointed out that the committee had also received a good deal of opposition to the amended rule, particularly to the alternate proposal dispensing with consent. He focused on a letter just received from the chair of the Defender Services Committee of the Judicial Conference. He said that the advisory committee had assumed that the defender committee would object to the non-consent provision. But the letter

expressed broader opposition to the very concept of video conferencing of initial criminal proceedings as a matter of policy, regardless of whether the defendant consents. It also emphasized that video conferencing, if permitted, would shift significant costs from the Department of Justice to the judiciary's defender services budget.

He added that the National Association of Criminal Defense Lawyers and the public defenders' organizations had also voiced opposition to the proposed rule. They argue, he said, that it is essential for an initial appearance to be conducted before a judge in a courtroom. The proceedings are seen as a critical opportunity for a lawyer to meet personally with his or her client.

Judge Davis pointed out that he and Judge Scirica had met with members of the Judicial Conference in March 2001 to give them a preliminary briefing on the two alternative proposals. He said that several of the members had expressed concern about the amendments and had reacted negatively to the non-consent alternative.

Judge Davis reported that the advisory committee — in light of the public comments and the initial reactions of the members of the Judicial Conference — had decided to seek approval of an amendment authorizing video conferencing of initial appearances and arraignments only with the consent of the defendant. He suggested that giving defense counsel an absolute right to opt out of video conferencing should meet the principal objections and provide sufficient protection for the defendant.

He added that the negative public comments to the rule had been directed generally to the initial appearance, not the arraignment. He noted that a separate amendment to Rule 10, allowing a defendant to waive appearance at the arraignment entirely, had attracted no significant objection. He suggested that if a defendant can waive the proceeding itself, he or she should be able to consent to having it conducted by video conferencing.

Judge Davis said that many district courts already use video conferencing to conduct initial appearances or arraignments with the defendant's consent. One of the members added that he had been doing so for several years, largely to accommodate lawyers and defendants. He said that the lawyers request video conferencing, and it makes a great deal of sense to all participants for geographic reasons. He noted that the video proceedings are conducted with the judge in his own courtroom, the defendant in another courtroom, and lawyers in both courtrooms. Another member added that many state court systems successfully use video conferencing for a number of criminal proceedings.

Mr. Pauley pointed out that the vote in the advisory committee to require consent for video proceedings had been a close one. The Department of Justice, he said, favors a

rule giving a court discretion to order video conferencing without the defendant's consent. He pointed out that video proceedings are held already in many courts on consent. Therefore, the proposed amendment would not accomplish anything of substance. He said that the Department is concerned about locking a consent requirement into the rule that will freeze the law for an indeterminate period.

Mr. Pauley added that several potential options exist between the published consent and non-consent alternatives. He suggested a rule allowing a court to order video conferencing without consent for "good cause" or under "exceptional circumstances." He said that the committee could also consider approving the consent proposal, but with the clear understanding that the advisory committee will return shortly with an amendment allowing video conferencing in certain circumstances without consent. Another option, he said, would be to recommit the whole rule to the advisory committee for further consideration.

Judge Scirica said that the proposed consent rule may be just the first step towards greater use of video conferencing. He said that the consent requirement should mitigate the legitimate concerns expressed by the members of the Judicial Conference and the defense bar. Nevertheless, he said, the advisory committee should think about additional alternatives and consider the advisability of a further amendment addressing the concerns of the Department of Justice.

The committee without objection approved the proposed three amended rules.

FED. R. CRIM. P. 5.1

Judge Davis explained that Rule 5.1 (preliminary examination), as amended, would permit a magistrate judge to grant a continuance of a preliminary examination. He noted that the Judicial Conference had approved the amendment at its Spring 1998 meeting. Mr. Rabiej added that Congress needs to be informed that the amendment, though non-controversial, will supersede a statute, 18 U.S.C. § 3060(c).

The committee without objection approved the proposed amended rule.

FED. R. CRIM. P. 12.2

Professor Schlueter said that several substantive changes are included in amended Rule 12.2, addressing notice requirements for presenting an insanity defense or evidence of a mental condition. He noted that the rule had attracted only two comments from the public, and the advisory committee had made some minor language changes following publication.

The committee without objection approved the proposed amended rule.

FED. R. CRIM. P. 12.4

The committee considered proposed new Rule 12.4 (disclosure statement) later in the meeting together with proposed parallel amendments to the civil, bankruptcy, and appellate rules. (See the section of these minutes entitled "Corporate Disclosure Statements" at pages 38-41.)

FED. R. CRIM. P. 26

Professor Schlueter said that amended Rule 26 (taking of testimony) would permit a court to use remote transmission for live testimony. It generally tracks a counterpart provision in the civil rules, FED. R. CIV. P. 43.

He noted that the advisory committee had made some improvements in the rule as a result of the public comments. First, the rule was amended to refer specifically to "two-way" video presentations. Second, a requesting party must establish "exceptional circumstances" for remote transmission, rather than "unusual circumstances." The revised language reflects the FED. R. CRIM. P. 15 standard for taking depositions, as well as the standard courts have applied under the Confrontation Clause of the Constitution. Third, the committee expanded the note to address the Confrontation Clause and provide courts with guidance as to the steps they may take to ensure the accuracy and quality of remote transmissions.

The committee without objection approved the proposed amended rule.

FED. R. CRIM. P. 30

Judge Davis reported that amended Rule 30 (jury instructions) permits a judge to request the parties to submit requested jury instructions before trial. The current rule allows a party to file a request for instructions only after the trial has started.

Judge Davis said that some commentators had raised concerns about permitting a court in a criminal case to require the defense to disclose its theory of the case before trial. Nevertheless, he said, the proposal simply conforms with actual, current practice in the district courts. He pointed out that the advisory committee had added a comment in the note explaining that the amendment does not preclude a party from seeking to supplement during the trial, particularly when the evidence turns out to be different from that contemplated in its requested instructions. The committee also added a sentence to Rule 30(d) specifying that failure of a party to object precludes appellate review, except as permitted under FED. R. CRIM. P. 52(b) (stating that plain errors or defects affecting substantial rights may be noticed although not brought to the court's attention).

Judge Davis noted that the proposed criminal rule differs in several respects from a proposed amendment to its civil rule counterpart, FED. R. CIV. P. 51. Professor Coquillette explained that the proposed revision of FED. R. CRIM. P. 30 had been published, subject to public comments, and is now ready for final approval by the Judicial Conference. On the other hand, the proposed revision of FED. R. CIV. P. 51 had not yet been published. He said that the rules committee reporters work together as a group to keep the rules in tandem, but they have concluded that it is not advisable to defer final approval of the criminal rule — which has been under consideration for several years — until the civil rule is published and subject to public comment. He added that there may be legitimate reasons for some differences between the civil and criminal rules. The criminal rule, moreover, could be amended in the future if additional insights are gained during the public comment period for the civil rule.

The members proceeded to comment on and compare the language of the proposed civil and criminal rules. Several offered suggestions for improving the language of the proposed revision of FED. R. CIV. P. 51. Judge Davis and Judge Levi agreed to confer to harmonize the two proposals as much as possible.

The committee without objection approved the proposed amended rule.

FED. R. CRIM. P. 35

Judge Davis reported that the primary substantive change to Rule 35 (correcting or reducing a sentence) is to broaden the exceptions to the one-year deadline that the government has to seek reduction in a sentence to reward the defendant's substantial assistance. He explained that the amended rule will allow exceptions where the substantial assistance involves:

(1) information not known to the defendant until a year or more after sentencing;

(2) information provided to the government within a year of sentencing, but that did not become useful to the government until a year or more after sentencing; and

(3) information the usefulness of which the defendant could not reasonably have anticipated until more than a year after sentencing, and that was promptly provided to the government after its usefulness was reasonably apparent to the defendant.

Judge Davis added that the rule, as published, did not specify what event constitutes "sentencing" for purposes of triggering the one-year period for bringing a motion. Accordingly, the advisory committee, at its April 2001 meeting, added a

provision to Rule 35(a) defining "sentencing" as the entry of judgment, rather than the oral announcement of sentence from the bench.

Judge Davis said, however, that several members wrote to him after the meeting suggesting that the additional provision was sufficiently substantive to require further publication of the rule. Thus, the committee decided to seek final approval of the rule without the definitional provision and separately seek authority to publish the proposed definition. Mr. Pauley noted that the Department of Justice was opposed to the recommended definition, preferring to define sentencing for purposes of computation as the oral announcement of the court.

The committee voted without objection: (1) to approve the proposed amended rule without the proposed definition of "sentencing" in Rule 35(a); and (2) to authorize for publication the proposed amendment to Rule 35(a).

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Shadur and Professor Capra presented the report of the advisory committee, as set forth in his memorandum and attachments of May 1, 2001. (Agenda Item 9)

Amendments for Publication

FED. R. EVID. 608(b)

Professor Capra reported that the proposed amendment to Rule 608 (evidence of character and conduct of witness) deals with extrinsic evidence. He said that the intent of the drafters of the rule was to preclude the use of extrinsic evidence when an attorney asks a witness about specific instances of past conduct to attack or support the witness's character for veracity.

Professor Capra explained that the problem with the current rule is that it uses the broad term "credibility." Thus, many courts apply the ban on extrinsic evidence more widely than was intended and have prohibited the use of evidence for non-character forms of impeachment, such as bias, contradiction, or prior inconsistent statements. The proposed amendment substitutes the term "character for truthfulness" for "credibility." As a result, it brings the text of the rule into line with the original intent of the drafters.

One of the members hailed the change and suggested that the existing rule may be the most misunderstood provision in the Federal Rules of Evidence.

The committee without objection approved the proposed amendment for publication.

FED. R. EVID. 804(b)(3)

Professor Capra explained that Rule 804(b)(3) is designed to assure that a declaration against penal interest is reliable by requiring that it be supported by corroborating circumstances. He pointed out that the current text of the rule imposes the corroborating circumstances requirement on declarations offered by a criminal defendant, but not on those offered by the government. Nevertheless, he said, most courts applying the rule have extended its corroboration requirement to prosecution-proffered declarations as a matter of fundamental fairness.

Professor Capra said that the proposed amendment would adopt the case law and provide uniform treatment of all declarations against interest, whether offered by the defendant or the government. It would also apply equally in criminal cases and civil cases. Professor Capra added that the amendment does not reach beyond the current case law, including the Supreme Court's decision in *Williamson v. United States,* 512 U.S. 594 (1994).

Mr. Pauley said that the Department of Justice is strongly opposed to the amendment and recommended that it be rejected outright or returned to the advisory committee. He reported that the Department also opposes the rule's application in civil cases, but it is most concerned about its impact on criminal cases.

Judge Shadur responded that the advisory committee had considered all the issues thoroughly and had explicitly rejected the Department's arguments. He emphasized that — despite the literal language of the current rule — many courts interpret Rule 804(b)(3) broadly, applying it as a matter of fundamental fairness equally to the defendant and the government.

Some members pointed out that the matter had been discussed largely in the abstract and suggested that the advisory committee take advantage of the public comment period to document specific factual examples, obtain the views of prosecutors and defense counsel, and examine the operation of the rule in those state court systems that have a two-way corroboration requirement.

The committee with one objection approved the proposed amendment for publication.

Informational Items

Judge Shadur reported that the advisory committee had considered a proposal to amend Rule 1101 (applicability of the rules). He noted that subdivision (d), listing the proceedings to which the evidence rules are not applicable, is not complete. But, he said, it would be difficult, if not impossible, to set forth specifically all the proceedings to which the rules are not, or should not be, applicable. It would be inadvisable to provide a list of excluded proceedings that is not comprehensive. In addition, he pointed out, the courts are having no problem in applying Rule 1101(d).

Judge Shadur noted that the advisory committee is continuing to work on a long-term project to prepare provisions that would state, in rule form, the federal common law of privileges. But, he emphasized, the project may never result in proposed amendments. He also reiterated the advisory committee's policy not to make changes in the evidence rule unless it is obvious that there is an important need for them.

CORPORATE DISCLOSURE STATEMENTS

[FED. R. APP. P. 26.1; FED. R. BANKR. P. 1007(a)(1) and 7007.1; FED. R. CIV. P. 7.1; FED. R. CRIM. P. 12.4]

Judge Scirica commented that the advisory committees had not initiated the proposed amendments. Rather, he said, they are in large part a response to recommendations from members of Congress that the Judicial Conference take additional steps to ensure that judges recuse themselves from cases in which they hold stock in a corporate party.

Judge Scirica said that the proposed amendments have resulted from well-coordinated efforts by the standing committee, the advisory committees, and the reporters. He noted that the proposed amendments to the appellate, civil, and criminal rules had been published in August 2000 and are ready for final approval by the Judicial Conference. On the other hand, the standing committee gave the Advisory Committee on Bankruptcy Rules additional time to consider how corporate disclosure requirements could be implemented in bankruptcy cases and proceedings. Accordingly, the proposed amendments to the bankruptcy rules are only ready for public comment.

As to the merits of the proposals, Judge Scirica reported that the Codes of Conduct Committee of the Judicial Conference recommends that the relatively minimal disclosure requirement of the current FED. R. APP. P. 26.1 be extended to the civil, criminal, and bankruptcy rules. Rule 26.1 requires a non-governmental corporate party to file a statement with the court identifying only its parent corporations and any publicly held company owning 10% of more of its stock.

Judge Scirica reported that the proposed amendments, as published, would have both: (1) extended FED. R. APP. P. 26.1 to the other sets of rules; and (2) given the Judicial Conference authority to prescribe additional disclosure requirements from time to time. But, he said, significant objections were raised during the comment period to the second part of the proposal. The objectors cited two potential problems: (1) it is difficult for the bar to know the requirements unless they are set forth in the rule itself; and (2) it would be illegal, or at least unwise, to permit the Judicial Conference to supplement a federal rule without proceeding through the full Rules Enabling Act process. He said that the advisory committees had decided to withdraw the Judicial Conference authority to supplement Rule 7.1 in light of the public comments.

Judge Scirica also pointed out that, although FED. R. APP. P. 26.1 imposes only minimum disclosure requirements, the committee note to the rule encourages the courts of appeals by local rule to require additional disclosures. He noted that research conducted for the committee by the Federal Judicial Center shows that virtually every court of appeals, and several district courts, have in fact expanded upon the national rule and require parties to disclose a wide variety of additional financial interests and connections. Thus, he said, it would be very difficult at this juncture to restrict local rulemaking in this area, even though a uniform set of national disclosure requirements should be an ultimate goal.

In addition, he said, the Codes of Conduct Committee, rather than the rules committee, is the body with the pertinent subject matter expertise. It should take the lead for the Judicial Conference in deciding what disclosures are needed. To that end, he added, it would be advisable to have a formal understanding between the two committees that any additional disclosure requirements recommended by the Codes of Conduct Committee will be considered by the rules committee through the Rules Enabling Act process.

Professor Coquillette emphasized that the committee reporters had worked together closely to coordinate the proposed amendments. He reported that the proposed amendments now before the committee for final approval are substantially identical, although there are a few minor differences in language among them.

Professor Schlueter pointed out that three post-publication changes had been made in the criminal version of the amendments: (1) requiring parties to file their disclosure statements at the defendant's first appearance; (2) requiring the government to file a statement identifying a corporate victim, but only to the extent that the information "can be obtained through due diligence"; and (3) deleting some material from the committee note.

Professor Morris explained that the bankruptcy version had several differences in language from the other versions in order to take account of statutory definitions set forth in section 101 of the Bankruptcy Code. Among other things, he noted, the Code defines "corporation" more broadly than in the normal context. Likewise, while the other versions refer to a "non-governmental corporate party," the bankruptcy version speaks of a corporation "other than the debtor or a governmental unit." In addition, FED. R. BANKR. P. 1007 would be amended to require the debtor to file a statement at the beginning of a case, rather than with every adversary proceeding. He noted, also, that the advisory committee had decided not to apply the rule to contested matters, in part because there is no requirement for a response in those proceedings.

Professor Cooper reported that the only difference between the proposed civil rule and the other versions is the inclusion of subdivision (c) in proposed FED. R. CIV. P. 7.1 , specifying that the clerk of court must deliver a copy of the disclosure statement to each judge acting in the action or proceeding.

Judge Tashima said that subdivision (c) does not belong in a national rule because it deals with a purely internal operating matter pertinent only to court personnel. Several members agreed.

Accordingly, Judge Tashima moved to eliminate proposed FED. R. CIV. P. 7.1(c). The committee without objection approved his motion.

One member suggested that the rule or committee note should make it clear that the corporate disclosure statement requirement does not apply to every member of a class. Professor Cooper responded that the same issue exists with the current FED. R. APP. P. 26.1. He added that it is not the intention of the advisory committees to require class members to file statements.

Another member pointed out that the rule did not specify procedures for removal situations. It was generally agreed, however, that the subject could be addressed by local rule.

The committee without objection approved the proposed amendments to FED. R. APP. P. 26.1 and proposed new FED. R. CIV. P. 7.1, as modified, and FED. R. CRIM. P. 12.4.

It also without objection authorized publication of the proposed amendment to FED. R. BANKR. P. 1007(a)(1) and proposed new FED. R. BANKR. P. 7007.1.

REPORT OF THE TECHNOLOGY SUBCOMMITTEE

Privacy and Public Access to Court Files

Mr. Lafitte presented the report of the Technology Subcommittee, noting that the primary focus of the subcommittee's attention for the past two years has been the judiciary's Electronic Case File (ECF) systems, now being deployed in the courts.

He reported that implementation of ECF has given rise to a number of important policy questions cutting across jurisdictional lines of Judicial Conference committees. He said that the Court Administration and Case Management Committee has formed two subcommittees to address the issues – one to deal with privacy and public access to court records, and the other to draft model local rules for electronic case filing. He noted that he has served as a representative of the rules committee on the two subcommittees. Both subcommittees, he said, have filed draft reports and are seeking input on the products from the rules committee and other committees of the Conference.

Privacy and Public Access

Mr. Lafitte reported that there is a natural tension between two very important, competing public policies — open access to court records and protection of legitimate privacy interests. He said that the privacy and public access subcommittee had conducted considerable research on these issues, listened to experts from different disciplines, and received initial input from the rules committees. It then published a document soliciting public comments and conducted a public hearing in Washington in March 2001.

The subcommittee, he said, has now prepared a draft report and set of recommendations for approval by the Court Administration and Case Management Committee. That committee, however, has not made the draft report public, and it distributed the draft to the rules committees for comment on a confidential basis.

The members reviewed the report and made suggestions to bring to the subcommittee's attention. There was a consensus that no amendments were needed in the federal rules at this time to address the issues of privacy and public access.

Model Electronic Filing Rules

Mr. Lafitte reported that Professor Capra and Ms. Miller had collected and analyzed the local rules of the ECF pilot courts and that the subcommittee had developed a set of model local court rules. Professor Capra pointed out that no original rule drafting had been involved. Rather, he said, the subcommittee worked from the existing rules of the pilot courts and made a few modifications and language improvements.

Judge Small expressed concern over use of the term "model rules." He pointed out, for example, that they had not been subject to any of the requirements of the rules process. Moreover, he said, the Advisory Committee on Bankruptcy Rules will soon draft

model local rules to implement the pending bankruptcy reform legislation. The model rules need to be in place within 180 days of enactment of the legislation. He emphasized that it is important to avoid any confusion between the two sets of model rules.

Professor Capra pointed out that a different title would be advisable. He noted, by way of example, that the term model "procedures" had been used in the past. Judge Scirica agreed with the suggestion and said that Judge Small was free to send any additional comments to the Electronic Filing Rules Subcommittee.

Professor Capra promised to convey orally the committee's suggestions to the chair of the subcommittee. **Judge Scirica noted that it was the consensus of the committee that the proposed model electronic filing rules or procedures will be helpful to the courts and should be distributed to them.**

ATTORNEY CONDUCT

Judge Scirica and Professor Coquillette reported that the committee has deferred further action on proposed attorney conduct rules for a number of reasons. Among other things, they said, a new administration and Congress have just been elected. In addition, negotiations have not yet resumed among the American Bar Association, the Department of Justice, and the Conference of Chief Justices on developing a standard for government attorneys in dealing with represented parties.

LOCAL RULES PROJECT

Professor Squiers stated that she was continuing to work on the comprehensive local court rules report for the committee. She said that the report will follow the same format as her last report, and the bulk of it should be available at the January 2002 committee meeting.

NEXT COMMITTEE MEETING

The next meeting of the committee is scheduled for January 10-11, 2002, in Tucson, Arizona.

Respectfully submitted,

Peter G. McCabe
Secretary