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

Minutes

TABLE OF CONTENTS

ATTENDANCE

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

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

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

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

Representing the advisory committees were:

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

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

INTRODUCTORY REMARKS

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

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

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

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

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

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

APPROVAL OF THE MINUTES OF THE LAST MEETING

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

REPORT OF THE ADMINISTRATIVE OFFICE

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

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

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

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

REPORT OF THE FEDERAL JUDICIAL CENTER

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

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

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

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

Amendments for Judicial Conference Approval

FORMS 1, 2, 3, AND 5

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

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

Informational Items

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

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

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

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

Amendments for Judicial Conference Approval

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

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

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

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

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

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

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

FED. R. BANKR. P. 2016

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

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

FORMS 5 and 17

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

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

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

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

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

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

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

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

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

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

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

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

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

Amendments for Publication

FED. R. BANKR. P. 9014

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

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

Informational Items

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

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

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

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

Amendments for Judicial Conference Approval

FED. R. CIV. P. 23

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

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

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

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

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

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

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

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

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

1. Timing of the court's certification decision

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

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

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

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

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

2. Notice of proposed settlement

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

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

3. Standards for approving a settlement

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

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

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

4. Appointing class counsel

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

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

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

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

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

5. Attorney fees

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The participants engaged in an extended debate on these points.

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

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

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

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

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

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

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

The committee continued to discuss the specific language of proposed Rule 23(e)(3). Objections were raised that the original proposal would permit a court unilaterally to alter the terms of the bargained for settlement by imposing a second opt out. Based on these suggestions, Judge Levi recommended the following substitute language, which would only confer authority on the part of the court to disapprove a settlement that does not, by its terms, provide a second opt-out opportunity:

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

This change leaves the matter unambiguously within party control: the court cannot, by directing a second opt-out opportunity in the notice of settlement, force the parties to accept a settlement they would not have agreed to if it included a second opt out.

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

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

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

FED. R. CIV. P. 51

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

Judge Levi explained that the amended rule would require the court to inform the lawyers of its proposed instructions and give them an opportunity to object on the record

and out of the jury's hearing before the instructions are delivered. Failure of a party to object in a timely manner would constitute a waiver.

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

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

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

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

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

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

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

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

Professor Cooper reported that the advisory committee had deleted from proposed Rule 53 the language of paragraph (a)(3), as published. It would have barred a master, during the period of the master's appointment, from appearing before the judge making the appointment. He pointed out that a flat disqualification would unduly restrict the court's ability to appoint masters. He said that the advisory committee had decided that the problem of potential conflicts of interest was sufficiently complicated that the proposed blanket prohibition should be removed from the rule. But language had been added to the committee note warning courts to take special care to ensure that there are no actual or apparent conflicts of interest involving a master.

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

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

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

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

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

Professor Cooper explained that the advisory committee had made major changes following publication in paragraphs (g)(3) and (4), governing the court's review of a master's report. He said that two alternate versions had been published for comment. The first had provided for de novo review by the court of a master's findings of fact unless the order of appointment specifies that either (1) the findings will be reviewed for clear error, or (2) the parties stipulate with the court's consent that the master's findings will be final. The second published version, he said, had distinguished between "substantive" and "non-substantive" facts made or recommended by a master. He reported that the public had criticized the second version because of the inherent difficulty of distinguishing between substantive and other facts.

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

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

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

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

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

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

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

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

Resolution on Legislation to Address Repetitive and Overlapping Class Actions

Judge Levi reported that in June 2001 the advisory committee had recommended to the Standing Committee three additional proposed changes to FED. R. CIV. P. 23 to address problems posed by repetitive and overlapping class actions in the federal and state courts. The provisions would:

(1) allow a court that has denied certification of a class action to preclude later courts from adjudicating the certification issue;
(2) allow a court to prevent settlement shopping by precluding attempts to persuade another court to approve a class-action settlement that has been rejected; and
(3) provide a court with broad discretion to bar class members from pursuing overlapping class-action litigation in other courts.

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

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

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

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

The committee without objection approved the memorandum by voice vote.

FORMS 19, 31, AND 32

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

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

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

Amendments for Publication

FED. R. CRIM. P. 41

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

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

1. to publish proposed amendments setting forth procedures for tracking-device warrants; and
2. to add a provision authorizing a magistrate judge to delay any notice required by Rule 41; but
3. not to proceed with amendments addressing covert, or "sneak and peek," warrants.

1. Tracking devices

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

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

2. Delay in giving notice

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

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

HABEAS CORPUS RULES

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

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

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

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

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

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

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

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

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

Legislative Action

FED. R. CRIM. P. 16

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

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

FED. R. CRIM. P. 46

As noted above in the report of the Administrative Office, Mr. Rabiej announced that members of the House Judiciary Committee had requested the judiciary's views on

pending legislation (H.R. 2929) that would amend FED. R. CRIM. P. 46(e) and specify that a court may forfeit a bond only for the defendant's failure to appear before the court as ordered, and not for violation of any other condition of the bond.

The issue was not addressed at the committee meeting, but the members considered the matter by mail following the meeting. They noted that the Advisory Committee on Criminal Rules had specifically rejected amending Rule 46(e) in 1998, and it had just reaffirmed that position at its April 2002 meeting. It was further noted that the advisory committee had conducted a survey of magistrate judges on the proposed change. The results revealed that bonds are forfeited in most districts only if the defendant fails to appear at a scheduled court proceeding. In some districts, however, courts incorporate other conditions of release into the bond, and they forfeit bonds for violations of those conditions. The survey showed that judges in the latter districts believe strongly that the threat of forfeiture significantly increases the probability that defendants will comply with all conditions of release. Accordingly, the advisory committee concluded that the current Rule 46(e) provides judges with valuable flexibility to impose added safeguards ensuring a defendant's compliance with conditions of release.

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

Informational Items

FED. R. CRIM. P. 35

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

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

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

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

Amendment for Judicial Conference Approval

FED. R. EVID. 608

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

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

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

Amendment for Publication

FED. R. EVID. 804

Professor Capra reported that the Standing Committee in June 2001 had approved for publication a proposed amendment to Rule 804(b)(3) (statement against interest exception to the hearsay rule) that would have required the proponent of any declaration against penal interest — whether proffered in civil cases or criminal cases, or to inculcate or exculpate the accused — to establish corroborating circumstances clearly indicating

the trustworthiness of the hearsay statement. But, he said, after reviewing the public comments, particularly the comments submitted by the Department of Justice, the advisory committee withdrew the proposal because it would create problems for the prosecution in admitting declarations against penal interest in criminal cases. The government, he said, might be required to satisfy an evidence standard different from, or more stringent than, that required by the Confrontation Clause of the Constitution.

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

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

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

Informational Items

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

Judge Shadur emphasized that privileges are a very sensitive and controversial topic. Therefore, the project is proceeding slowly, and it may never result in proposed rule amendments. Nevertheless, he said that the committee's work may eventually be

incorporated into a Federal Judicial Center publication, rather than an official committee document, similar to two previous publications on the divergence of committee notes and case law from the text of the rules.

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

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

LOCAL RULES PROJECT

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

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

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

REPORT OF THE TECHNOLOGY SUBCOMMITTEE

Professor Capra reported that the Technology Subcommittee is working on two topics. First, he said, it is continuing to monitor the local court rules implementing the judiciary's national Case Management/Electronic Case Files project. He noted that the Judicial Conference had approved model local rules for civil cases. He added that the subcommittee had recently reviewed a separate set of model local rules for criminal cases, prepared by a subcommittee of the Court Administration and Case Management Committee and adapted from the model rules for civil cases. The Technology Subcommittee and the Advisory Committee on Criminal Rules, he said, had recommended to the case management committee that forms and other documents in criminal cases that bear the defendant's signature should either be scanned into the court's electronic case file system or be retained in paper form.

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

ATTORNEY CONDUCT RULES

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

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

Professor Coquillette noted that the committee has been involved in the matter because there are about 600 local federal court rules regulating attorney conduct. He pointed out that the committee favors a rule of "dynamic conformity," *i.e.,* tying attorney conduct in the federal courts to the current conduct rules of each respective state. But it

has also expressed interest in incorporating into any future national rule limited provisions narrowly addressing particular problems cited by the Department, as long as there is agreement among the Department, the ABA, and the Conference of Chief Justices.

LONG-RANGE PLANNING

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

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

NEXT COMMITTEE MEETING

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

Respectfully submitted,

Peter G. McCabe,
Secretary