COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of June 1-2, 2009
Washington, D.C.
Minutes

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ATTENDANCE

The Judicial Conference Committee on Rules of Practice and Procedure met in Washington, D.C., on Monday and Tuesday, June 1 and 2, 2009. The following members were present:

Judge Lee H. Rosenthal, Chair
David J. Beck, Esquire
Douglas R. Cox, Esquire
Judge Harris L Hartz
Judge Marilyn L. Huff
John G. Kester, Esquire
William J. Maledon, Esquire
Judge Reena Raggi
Judge James A. Teilborg
Judge Diane P. Wood

Deputy Attorney General David Ogden attended part of the meeting for the Department of Justice. The Department was also represented throughout the meeting by Karyn Temple Claggett, Elizabeth Shapiro, and Ted Hirt.

Also participating were the committee's consultants: Joseph F. Spaniol, Jr.; Professor Geoffrey C. Hazard, Jr.; and Professor R. Joseph Kimble. Professor Nancy J. King, associate reporter to the Advisory Committee on Criminal Rules, participated in part of the meeting by telephone.

Judge Anthony J. Scirica, former chair of the committee and current chair of the Judicial Conference's Executive Committee, participated in portions of the meeting.

Providing support to the committee were:

Professor Daniel R. Coquillette	The committee's reporter
Peter G. McCabe	The committee's secretary
John K. Rabiej	Chief, Rules Committee Support Office
James N. Ishida	Senior attorney, Administrative Office
Jeffrey N. Barr	Senior attorney, Administrative Office
Henry Wigglesworth	Senior attorney, Administrative Office
Joe Cecil	Research Division, Federal Judicial Center
Andrea Kuperman	Judge Rosenthal's rules law clerk

Representing the advisory committees were:

Advisory Committee on Appellate Rules —
Judge Carl E. Stewart, Chair
Professor Catherine T. Struve, Reporter
Advisory Committee on Bankruptcy Rules —
Judge Laura Taylor Swain, Chair
Professor S. Elizabeth Gibson, Reporter
Advisory Committee on Civil Rules —
Judge Mark R. Kravitz, Chair
Professor Edward H. Cooper, Reporter
Advisory Committee on Criminal Rules —
Judge Richard C. Tallman, Chair
Professor Sara Sun Beale, Reporter
Advisory Committee on Evidence Rules —
Judge Robert L. Hinkle, Chair
Professor Daniel J. Capra, Reporter

INTRODUCTORY REMARKS

Changes in Committee Membership

Judge Rosenthal noted that several membership changes had taken place since the last meeting. She pointed out that Professor Daniel Meltzer had resigned from the committee to accept an important position in the White House. She emphasized that he had been a superb member and would be sorely missed at committee meetings. She noted, though, that Professor Meltzer had stayed in touch with the committee and would attend its group dinner.

She reported that this was the last official meeting for Judge Hartz and Mr. Beck, whose terms will expire on October 1, 2009. She pointed out that both would be honored at the January 2010 meeting.

In addition, she noted that this was Judge Stewart's last meeting as chair of the Advisory Committee on Appellate Rules. She pointed out that Judge Stewart was truly irreplaceable as a judge, friend, and colleague. She noted that he had been a remarkable chair, and the Chief Justice had extended his term for a year. The new chair, Judge Jeffrey S. Sutton, will represent the advisory committee at the next Standing Committee meeting.

Judge Rosenthal reported, sadly, the recent death of Mark I. Levy, a distinguished attorney member of the Advisory Committee on Appellate Rules. A resolution honoring him had been prepared and would be sent to his widow by Judge Stewart. Judge Rosenthal extended the committee's sympathies and gratitude to his family for his many contributions.

Recent Actions Affecting the Rules

Judge Rosenthal reported that little action at the March 2009 session of the Judicial Conference had directly affected the rules committees, although several items on the Conference's consent calendar indirectly affected the rules. She noted, for example, that the Court Administration and Case Management Committee had recommended that courts provide notice on their dockets of the existence of sealed cases. Also, she said, the Court Administration and Case Management Committee had proposed guidelines for filing and posting transcripts that are designed to safeguard privacy interests, including matters arising during jury voir dire proceedings. She noted that the Standing Committee's privacy subcommittee, chaired by Judge Raggi, would meet to discuss a wide range of privacy and security matters immediately following the committee meeting.

Judge Rosenthal reported that the Supreme Court had approved all the rules recommended by the committee and had sent them to Congress on an expedited basis. She noted that the committee had successfully pursued legislative changes to 28 statutes that specify time limits and would be affected by the time-computation rules. The legislation had just passed both houses of Congress and been enacted into law. The statutory changes will take effect on December 1, 2009, the same time that the new time-computation rules take effect. She added that coordinated efforts were also underway to have all the courts update their local rules by December 1 to harmonize them with the new national time-computation rules.

Judge Rosenthal thanked Judge Thomas W. Thrash, Jr., former committee member, for his assistance in promoting the recent legislation, and Congressman Hank Johnson, who introduced it and was very helpful in shepherding it through Congress. On behalf of the committee, Professor Coquillette expressed special thanks to Judge Rosenthal for leading the concerted and challenging efforts to get the legislation enacted.

On behalf of the Executive Committee, Judge Scirica extended his appreciation to the committee for its excellent work. He noted that the Chief Justice continues to praise Judge Rosenthal for her work, including her impressive legislative accomplishments.

Legislative Report

Judge Rosenthal reported that Judge Kravitz would testify again in Congress on behalf of the Judicial Conference in opposition to the proposed Sunshine in Litigation Act. The legislation, she explained, would impose daunting requirements before a judge could issue a protective order under FED. R. CIV. P. 26(c). The judge would have to first find that the proposed protective order would not affect public health or safety – or if it would, that the protection is needed despite the impact on public health and safety. All of this would occur even before discovery begins.

Judge Kravitz noted that the American Bar Association opposed the legislation, and other bar associations were likely to follow. In addition, he said, the hope is that the Department of Justice would formally oppose the legislation. He pointed out that the bill was well-intentioned in trying to protect public health and safety, but the mechanism it uses to do so was not at all practical. He noted that he was the only witness to be invited by the sponsors to testify against the bill.

Judge Rosenthal explained that the Judicial Conference opposes the legislation because it would amend the federal rules outside the Rules Enabling Act process. She noted that empirical evidence demonstrates clearly that judges are doing a good job in dealing with protective orders and in balancing private and public interests. The Sunshine in Litigation Act, though, would impose significant burdens on judges,

requiring them to make findings when they have little information on which to base those findings.

Judge Kravitz added that if there is a problem in some cases with protective orders, it arises largely at the state level, not in the federal courts. He noted that there is also little understanding by the legislation's sponsors of how the civil litigation process actually works. The thought, he said, that a federal judge would be able to read through all the documents that could be discovered in order to find a smoking gun is truly misguided.

Mr. Rabiej reported that the Judiciary's implementation of the new privacy rules had been questioned by a special-interest group seeking to make all government information available to the public on the Internet without restrictions and without cost. He noted that the group had discovered that some documents filed by parties and posted on the courts' electronic PACER system contained unredacted social security numbers. He added that the privacy subcommittee would consider the matter and address a number of other privacy issues at its upcoming meeting immediately following the Standing Committee meeting.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee without objection by voice vote approved the minutes of the last meeting, held on January 12-13, 2009.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Stewart and Professor Struve presented the report of the advisory committee, as set forth in Judge Stewart's memorandum and attachments of May 8, 2009 (Agenda Item 6).

Amendments for Final Approval

FED. R. APP. P. 1

Judge Stewart reported that the proposed amendment to Rule 1 (scope of the rules, definition, and title) was straightforward. It would define "state" for purposes of the appellate rules to include the District of Columbia and any U.S. commonwealth or territory.

Professor Struve added that, after the public comment period had ended, the advisory committee received a letter from an attorney in New Mexico asking it to expand

the rule's definition of a "state" to include Native American tribes. She noted that the committee had discussed the request at length at its April 2009 meeting and had decided that the matter merited more time to develop because it implicates a number of different rules and issues. Accordingly, the matter had been added to the advisory committee's study agenda. At the same time, though, the committee urged immediate approval of the proposed amendment to Rule 1.

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

FED. R. APP. P. 29

Judge Stewart reported that the proposed amendments to Rule 29(a) and (c) (amicus curiae brief) would add a new disclosure requirement on authorship and funding support received by an amicus in preparing its brief. The amendments had been modeled after the Supreme Court's recently revised Rule 37.6, although the advisory committee had to make a few adjustments because of differences in practice between the Supreme Court and the courts of appeals. Professor Struve added that the proposed amendment to Rule 29(a) would simply conform the rule to the proposed new definition of a "state" in Rule 1(b).

She noted that the advisory committee had received seven sets of public comments on the proposed amendments and had also considered the comments that had been submitted when the proposed revision to Supreme Court Rule 37.6 was published for comment. The comments, she said, had been very helpful, and the advisory committee had made two changes in the rule following publication. First, it reordered the subdivisions to place the authorship and disclosure provision in a new paragraph 29(c)(5).

Second, it revised subparagraph 29(c)(5)(C) to remove a possible ambiguity in the published language. The revised language would require an amicus to include in its brief a statement that "indicates whether . . . a person – other than the amicus curiae, its members, or its counsel – contributed money that was intended to fund preparing or submitting the brief and, if so, identifies each such person." The revised language makes it clear that, if no such person has provided financial support for the brief, the amicus must state that fact expressly, rather than simply say nothing about funding. Professor Struve also pointed out that some public comments had suggested imposing a complete ban on funding amicus briefs, rather than merely requiring disclosure. But, she said, other commentators suggested that a ban would raise constitutional issues.

Professor Struve added that a suggestion had been received to delete the words "intended to fund." But, she explained, the advisory committee did not adopt it because the proposed alternative language — "contributed money toward the cost of the brief" — was too broad. Similar breadth in the version of Supreme Court Rule 37.6 published for

comment had attracted vigorous opposition. It was later revised by the Court to use "intended to fund." She explained that without the "intended to fund" language, the disclosure requirement could require disclosure of membership dues and other indirect financial support. Therefore, both the Supreme Court rule and the proposed appellate rule use the words "intended to fund" to make clear that the rule does not cover mere membership dues in an organization. Rather, the funding disclosure applies only when a party or counsel has contributed money with the intention of funding preparation or submission of the brief.

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

FED. R. APP. P. 40

Judge Stewart reported that the proposed amendments to Rule 40 (petition for a panel rehearing) had been presented to the Standing Committee before. They would clarify the time limit for filing a petition for rehearing in a case where an officer or employee of the United States is sued in his or her individual capacity for an act or omission occurring in connection with official duties. Originally, he explained, the Department of Justice had also sought a companion change in Rule 4 (appeal) to clarify the time limit for filing an appeal in a case where an officer or employee is sued individually for acts occurring in connection with official duties.

But, he said, the Supreme Court's decision in *Bowles v. Russell,* 551 U.S. 205 (2007), had seriously complicated any attempts to amend Rule 4. In essence, *Bowles* held that appeal time periods established by statute are jurisdictional in nature. Since the 60-day time limit for filing an appeal under Rule 4(a)(1)(B) is also established by statute, 28 § U.S.C. § 2107, there was a question whether the time period should be changed by rulemaking rather than legislation. Therefore, the Department decided to abandon the effort to amend Rule 4.

Rule 40, however, is not covered by statute. So the Department continued to seek the proposed amendments to that rule. Nevertheless, the advisory committee asked the Department to consider whether it preferred to pursue a legislative solution to deal with both situations.

Judge Stewart pointed out that a case currently pending before the Supreme Court raises the question of the application of the Rule 4 deadline in a qui tam action. *United States ex. rel. Eisenstein v. City of New York,* 129 S.Ct. 988 (2009). In view of the pendency of the case, the Department had asked that the Rule 40 proposal be held in abeyance (along with the Rule 4 proposal) to give it time to consider whether a single statutory fix might be a better approach. In addition, the Department was concerned that there could be a trap for the unwary if Rule 40 were to be amended before Rule 4 catches

up. Therefore, even though the advisory committee had voted unanimously to proceed with amending Rule 40, it had decided to defer seeking final approval until the Supreme Court has acted in *Eisenstein.*

The committee without objection by voice vote approved remanding the proposed amendment back to the advisory committee.

FORM 4

Judge Stewart reported that Form 4 (affidavit accompanying a motion for permission to appeal in forma pauperis) would be amended to conform to the new privacy rules that took effect on December 1, 2007, by removing the request for full social security numbers and other personal identifier information. He noted that the Administrative Office had already made interim changes to the version of Form 4 that it posts on the Judiciary's website. Nevertheless, the official form needs to be changed to ratify those interim changes.

A member asked why a court needs all the information now required on Form 4, such as the street address, city, or state of the applicant's legal residence. Some of that information, for example, may be available from other documents, such as the pre-sentence investigation report. Other information, such as the applicant's years of schooling, may be of little use to the court.

Professor Struve explained that the advisory committee at this time was merely attempting to conform the form to the new privacy rules. It had not yet considered matters of substance. In fact, she said, the advisory committee planned to take up these issues later, and it may decide to draft two separate versions of the form to address the requests of judges for both a short version and long version of the form. Judge Stewart added that the advisory committee had a number of questions about the form and had asked its circuit-clerk liaison, Fritz Fulbruge, to survey his clerk colleagues on how the form is used in the courts.

A participant cautioned that the advisory committees should be careful not to let the privacy rules reach too far. At some point, he said, a court needs to have full information about certain matters. Another participant stated that the other parties in a case are entitled to review the petitioner's in forma pauperis application. But the applications are generally not placed in the official case file or posted on the Internet for public viewing.

The committee without objection by voice vote approved the proposed changes in the form for approval by the Judicial Conference.

Informational Items

Judge Stewart reported that the appellate and civil advisory committees had created a joint subcommittee to study a number of issues that intersect or overlap both sets of rules, including "manufactured finality," the impact of tolling motions, and the impact of the Supreme Court's ruling in *Bowles v. Russell.*

Judge Stewart emphasized the advisory committee's shock and sadness at learning of the death of Mark Levy. He noted that Mark had participated actively in the advisory committee's April 2009 Kansas City meeting and had been responsible for a number of important proposals. He said that the advisory committee will present a resolution of remembrance and gratitude to Mrs. Levy. In addition, he had sent her some photographs that he had taken of Mark at recent advisory committee meetings in Charleston and Kansas City. She, in turn, had sent him a very nice note of appreciation.

Judge Stewart thanked the Standing Committee for its support of him personally and the advisory committee during his four years as chair. He also extended his special thanks to Professor Struve for her tireless, thorough, and uniformly excellent work.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Swain and Professor Gibson presented the report of the advisory committee, as set out in further detail in Judge Swain's memorandum and attachments of May 11, 2009 (Agenda Item 7).

Amendments for Final Approval

FED. R. BANKR. P. 1007, 1014, 1015, 1018, 1019, 4004, 5009, 5012, 7001, 9001

Professor Gibson reported that the advisory committee was seeking final approval of all but one of the proposed changes it had published for comment in August 2008. The committee, she said, would republish proposed new Rule 1004.2 for further comment because it had made a significant change in response to the first round of comments.

The amendments and proposed new rules, she explained, fall into several categories. Six of the provisions principally implement new chapter 15 of the Bankruptcy Code, governing cross-border insolvencies: FED. R. BANKR. P. 1014 (dismissal and change of venue), FED. R. BANKR. P. 1015 (consolidation or joint administration of cases), FED. R. BANKR. P. 1018 (contested petitions), FED. R. BANKR. P. 5009(c) (closing cases), new FED. R. BANKR. P. 5012 (agreements concerning coordination of proceedings in chapter 15 cases), and FED. R. BANKR. P. 9001 (general definitions).

Professor Gibson said that amendments to two rules would change the procedure for seeking denial of a discharge on the grounds that the debtor has received a discharge within the prohibited time period to get a second discharge. She explained that all objections to discharge are currently classified as adversary proceedings and must be initiated by complaint. But, as revised, FED. R. BANKR. P. 4004 (grant or denial of discharge) and FED. R. BANKR. P. 7001 (scope of the Part VII adversary proceeding rules) would allow certain objections to discharge to be initiated by motion, rather than complaint. The advisory committee, she added, had received some helpful technical comments on the amendments and had decided as a result to make changes in the placement of the provisions. Originally, the proposal would have set forth the principal change in Rule 7001. But a former member pointed out that since Rule 7001 introduces the Part VII adversary proceeding rules, it should not begin by referring to a contested matter. Therefore, the advisory committee had moved the key provision to Rule 4004(d). The change, she said, would not require republishing.

Three of the rules, she said, deal with the statutory obligation of individual debtors to file a statement that they have completed a personal financial management course. Amended FED. R. BANKR. P. 1007(c) (lists, schedules, statements, and time limits) would extend the deadline for filing the statement from 45 to 60 days after the date set for the meeting of creditors. This would allow the clerk of court, under proposed new FED. R. BANKR. P. 5009(b) (notice of failure to file the statement), to send a notice within 45 days to anyone who has not filed the required statement that they must do so before the 60-day period expires. Rule 4004(c)(4) (grant of discharge) would be amended to direct the court to withhold the discharge until the statement is filed.

Professor Gibson stated that the advisory committee had received one comment from a bankruptcy judge that the noticing obligation would place an undue burden on the clerks of court. But a survey taken of the clerks by the committee's bankruptcy-clerk liaison, James Waldron, had shown that many send out the notice now, and it would not impose a major burden to require it.

Professor Gibson said that FED. R. BANKR. P. 1019 (conversion of a case to chapter 7) would provide a new period to object to exemptions when a case is converted from chapter 11, 12, or 13 to chapter 7. The amendment would give creditors a new period to object – unless the case had previously been in chapter 7 and the objection period had expired, or it has been pending more than a year after plan confirmation. The advisory committee had received one comment on the rule from the National Association of Bankruptcy Trustees supporting the rule but not supporting the one-year provision.

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

FED. R. BANKR. P. 4001

Professor Gibson reported that the advisory committee recommended approval of two changes to Rule 4001 (relief from the automatic stay and other matters) without publication because they are simply conforming amendments. Rule 4001 contains two time-period adjustments that had been overlooked and not included in the package of time-computation rules that will take effect on December 1, 2009.

OFFICIAL FORM 23

The advisory committee would also make a change in Official Form 23 (debtor's certification of completing a financial management course) without publication to conform to the change being made in Rule 1007. It would revise the instructions regarding the time for consumer debtors to file their certificate of having completed a personal financial management course. The proposed change in the form would become effective on December 1, 2010, at the same time that the proposed amendment to Rule 1007 takes effect.

The committee without objection by voice vote approved the proposed amendments to Rule 4001 and Official Form 23 without publication for approval by the Judicial Conference.

Amendments for Publication

FED. R. BANKR. P. 1004.2

Professor Gibson explained that the advisory committee would republish proposed new Rule 1004.2 (petition in a chapter 15 case) because it had made a substantive change in subdivision 1004.2(b) in response to public comments following the August 2008 publication.

An entity filing a chapter 15 petition to recognize a foreign proceeding must state in the petition the country where the debtor has the "center of its main interests." A party may challenge that designation. A commentator argued, persuasively, that the proposed 60-day time period allowed in the August 2008 version of the rule for a party to challenge the designation was simply too long. Therefore, the advisory committee would now set the deadline to file a challenge at 7 days before the hearing on the petition unless the court orders otherwise.

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

FED. R. BANKR. P. 2003, 2019, 3001, 3002.1, 4004

Professor Gibson highlighted some of the other proposed changes to be published, focusing on two that she said were likely to attract a good deal of attention.

Rule 2019 (representation of creditors and equity security holders in Chapter 9 and 11 cases), she explained, is a long-standing rule that requires disclosure of interests by representatives of creditors and equity security holders. She noted that the advisory committee had received suggestions from trade associations that the rule be deleted on the grounds that it is unnecessary and over-inclusive.

On the other hand, the advisory committee had received comments from the National Bankruptcy Conference, the American Bar Association's Business Bankruptcy Committee, and two bankruptcy judges in the Southern District of New York that the rule should not be eliminated. Rather, it should be rewritten and expanded in scope, both as to whom it applies and what information they must disclose. In response, the advisory committee added a broader definition to the rule to require disclosures from all committees and groups that consist of more than one creditor or equity security holder, as well as entities or committees that represent more than one creditor or equity security holder. The court would also have discretion to require an individual party to disclose.

In addition, the amended rule would expand the type of financial disclosure that must be made beyond just having a financial interest in the debtor. As revised, a party in interest would have to disclose all "disclosable economic interests," defined in the rule as all economic rights and interests that establish an economic interest in a party that could be affected by the value, acquisition, or disposition of a claim or interest.

The purpose of the expanded rule, she said, was to provide better information on the motive of all parties who assert interests in a case to help the court ascertain whom they represent and what they are trying to do. In addition, the advisory committee had reorganized the rule to clarify the requirements and specify the consequences of noncompliance.

Professor Gibson explained that the proposed amendments to Rule 3001(c) (proof of claim based on a writing) and new Rule 3002.1 (notice relating to claims secured by a security interest in the debtor's principal residence) would govern home mortgages and other claims in consumer cases. Rule 3001(c) specifies the supporting information that must be attached to a proof of claim. She pointed out that claims today are often filed by financial entities that the debtor has never heard of because they are bought and sold in bulk freely on the market. Amended Rule 3001(c) would tighten up the documentation requirements to allow the debtor to see what claims are legitimate, what fees are being charged, and what defaults are alleged. Proposed subdivision 3001(c)(2)(D) specifies the consequences for a claim holder of not complying with the rule.

Professor Gibson explained that new Rule 3002.1 would work in tandem with the Rule 3001(c) changes and would govern mortgage claims in chapter 13 cases. It is

common for debtors to attempt to cure their mortgage defaults and maintain their payments under the chapter 13 plan in order to keep their home. But problems arise with mortgage securitization, as holders of the mortgages change. The amounts of arrearages claimed on the mortgage, as well as various penalties and fees, are not clear to either the debtors or the trustees. Debtors, for example, often believe that they have cured the default, but after the plan is completed and the case closed they face a new default notice with a variety of new fees added on. Accordingly, the proposed rule would require full disclosure by the mortgage holder of both the amounts needed to cure and any fees and charges assessed over the course of the plan. The proposed rule also provides for a final cure and sanctions for not following the prescribed procedures.

Professor Gibson reported that some bankruptcy courts have been following a similar procedure on a local basis with considerable success. The bankruptcy system, she said, should benefit from the national uniformity that the rule will bring.

One member questioned the wisdom of adding new sanctions provisions to the rules. He suggested that it is unusual to have sanctions set forth in separate rules, rather than in a general sanctions provision, such as those in FED. R. CIV. P. 11 and FED. R. BANKR. P. 9011.

Professor Gibson explained that the two proposed amendments are very different from the other rules because they deal with the specific requirement that a creditor give a debtor information about the amount of the mortgage or other consumer claims. Judge Swain added that there are very few other sanctions provisions in the bankruptcy rules, and they tend to deal with very practical disclosure issues. FED. R. BANKR. P. 2019 (representation of creditors and equity security holders in chapter 9 and 11 cases), for example, authorizes a court to refuse to hear from a party that has failed to disclose. Proposed Rules 3001(c) and 3002.1, she said, attempt to have the creditor focus specifically on fees and charges tacked onto mortgages.

OFFICIAL FORMS 22A, 22B, 22C

Professor Gibson reported that the proposed changes in the means test forms were designed to conform the forms more closely to the language and intent of the 2005 bankruptcy legislation. Judge Swain explained that the revisions would replace the term "household size" in several places on the forms with "number of persons" in order to count dependents in a way that is consistent with Internal Revenue Service nomenclature.

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

Informational Items

Judge Swain reported that the advisory committee was working on two major projects that would have a major impact on the bankruptcy rules and forms.

REVISION OF THE BANKRUPTCY APPELLATE RULES

First, Judge Swain said, the advisory committee was reviewing comprehensively Part VIII of the Federal Rules of Bankruptcy Procedure, governing appeals from a bankruptcy court to a district court or bankruptcy appellate panel. The current rules had been modeled on the Federal Rules of Appellate Procedure (FRAP) as they existed more than 20 years ago. Since that time, though, the FRAP have been amended several times and restyled as a body. The Part VIII bankruptcy rules, she said, are no longer in sync with them.

She pointed out that Eric Brunstad, a former advisory committee member and distinguished appellate attorney, had drafted for the committee a revised set of rules to bring the Part VIII rules up to date. The two principal goals that the advisory committee would try to achieve are:

1. to clarify the rules – because the current rules are obscure and difficult in many respects; and

2. to eliminate the "hourglass" effect, under which page limits imposed on appeals from the bankruptcy court to the district court later undercut a party's further appeal to the court of appeals.

Judge Swain reported that the advisory committee had convened a very successful special subcommittee meeting in March 2009, to which it had invited a variety of interested parties to discuss their experience with the current rules and suggest how the rules might be improved. She said that the meeting had demonstrated that there is a great deal of support for pursuing the project to revise the part VIII rules.

On the other hand, concern had been expressed by several participants that it would not be advisable to pattern the bankruptcy rules strictly after the current Federal Rules of Appellate Procedure because the bankruptcy courts have made enormous progress in taking advantage of technology. Since most bankruptcy courts and courts hearing bankruptcy appeals now operate with electronic case files and electronic filing, several of the current appellate rules are outdated or immaterial. For example, she said, courts using electronic records are no longer concerned with the colors of briefs or with many of the other requirements devised for a purely paper world. She said that the advisory committee would attempt to draft new appellate rules that take electronic record-keeping fully into account. She added that the committee will conduct another special subcommittee meeting in the fall and is grateful for Professor Struve's collaboration in its work on the bankruptcy appellate rules.

BANKRUPTCY FORMS MODERNIZATION

Second, Judge Swain reported that the advisory committee had made a good deal of progress on its major project to update and modernize the bankruptcy forms. She noted that its forms subcommittee had conducted an extensive analysis and deconstruction of all the information contained in the forms currently filed at the commencement of a bankruptcy case. It had also obtained the services of a professional forms consultant who has worked for the Internal Revenue Service and the Social Security Administration in formulating questions for the general public and making forms more user-friendly and effective in eliciting required information.

She added that the advisory committee's forms subcommittee was also working closely with the group designing the "Next Generation" electronic system that will replace CM/ECF with a new system that will take full advantage of recent advances in electronics and add new functionality. She pointed out that several individuals and organizations had asked the judiciary to build a greater capacity into the new system to capture, retrieve, and disseminate individual data elements provided by filers on the standard bankruptcy forms. She noted that the forms modernization subcommittee will meet again on June 26, 2009, at the Administrative Office.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Kravitz and Professor Cooper presented the report of the advisory committee, as set out in Judge Kravitz's memorandum and attachments of May 8, 2009 (Agenda Item 5).

Amendments for Final Approval

FED. R. CIV. P. 8(c)

Judge Kravitz reported that the advisory committee in August 2007 had published a proposal to eliminate discharge in bankruptcy as an affirmative defense that must be asserted under Rule 8(c) (pleading affirmative defenses) to avoid waiver. He noted, though, that the Department of Justice had objected to the change.

Judge Eugene R. Wedoff, a member of the Advisory Committee on Bankruptcy Rules, had acted as the civil advisory committee's liaison with officials in the Department on the matter, but had been unable to reach an agreement with them. The civil advisory committee then asked the Advisory Committee on Bankruptcy Rules formally to consider the proposed amendment. That committee too supported eliminating the bankruptcy-discharge defense from Rule 8. The civil advisory committee met again in April 2009 and invited both Judge Wedoff and the Department to make presentations.

After a lengthy discussion, the advisory committee voted unanimously, except for the Department, to proceed with the proposed change to Rule 8. Judge Kravitz explained that the advisory committee was convinced that inclusion of a bankruptcy discharge as an affirmative defense is simply wrong as a matter of law because the Bankruptcy Code for years has made all debts discharged in bankruptcy legally unenforceable. They cannot be asserted in any judicial proceedings. Nevertheless, the current rule has misled some courts into finding waiver when a party fails to assert bankruptcy as an affirmative defense. The advisory committee, he said, believed that it was important to eliminate a rule that is continuing to lead some judges to err.

Judge Swain added that the Advisory Committee on Bankruptcy Rules was in complete agreement with those views. Professor Gibson added that the only complication in the matter was that even though a debtor may obtain a discharge in bankruptcy, there are certain statutory exceptions to the discharge. A question might arise in future litigation, for example, over whether a particular type of debt excluded from the discharge in the bankruptcy litigation may still be enforced legally. She explained that this issue is what had caused the Department's concerns. Nevertheless, she said, the proposed amendment to Rule 8 was needed because it will eliminate a trap.

Judge Kravitz reported that Judge Wedoff had prepared some language that might be added to the committee note to reinforce Professor Gibson's point. Ms. Shapiro said that the Department of Justice rested on the statements that it had already made on the matter. She added, though, that the proposed additional language for the committee note will go a long way to easing the Department's concerns.

The committee without objection by voice vote approved adding the proposed, bracketed language to the committee note.

The committee, with one objection (the Department of Justice), by voice vote approved the proposed amendment to Rule 8(c) for approval by the Judicial Conference.

FED. R. CIV. P. 26

Judge Kravitz expressed his gratitude to Judge David G. Campbell and Professor Richard L. Marcus for serving superbly as chair and reporter, respectively, of the advisory committee's Rule 26 project. He noted that the project had been very thorough and had produced a set of balanced, well-crafted amendments that will reduce discovery costs and make a practical, positive difference in the lives of practicing lawyers.

Judge Kravitz reported that the proposed amendments to Rule 26 (disclosures and discovery) enjoyed wide support among bench and bar, and among both plaintiff and defendant groups. Among the supporters were the American Bar Association, its Litigation Section, the American College of Trial Lawyers, the Association of the Bar of New Jersey, the Federal Bar Council of the Second Circuit, the Federal Magistrate Judges Association, the American Association for Justice, the Lawyers for Civil Justice, the Federation of Defense and Corporation Counsel, the Defense Research Institute, the American Institute of Certified Public Accountants, and the Department of Justice. The amendments had been opposed only by a group of law professors. Their concerns, he said, had been carefully considered, but not shared, by the advisory committee.

Judge Kravitz explained that the amendments would accomplish two results. First, they will require lawyers to disclose a brief summary of the proposed testimony of non-retained expert witnesses whom they expect to use. This change should eliminate the confusion that now exists regarding the testimony of treating physicians, employees, and other non-retained experts.

Second, the rule will place draft reports of retained experts and communications between lawyers and their retained experts under work-product protection. In doing so, it will reduce costs, focus the discovery process on the merits of an expert's opinion, and channel lawyers into making better use of experts. At the same time, though, the amendments will not eliminate any valuable information that may be elicited during the discovery phase of a case. Judge Kravitz explained that little useful information is available today under the current rule because lawyers use stipulations to limit discovery and a variety of other practices to prevent discoverable information from being created in the first place.

These other practices are unnecessary and wasteful. One common practice is to hire two sets of experts – one to testify and the other to consult with the litigation team. In addition to being inefficient, the practice gives a tactical advantage to parties with financial resources. Another artificial discovery-avoidance tactic involves using experienced experts who make extraordinary efforts not to record any preliminary draft report in order to prevent discovery.

He noted that the advisory committee had made a few changes in the draft following publication of the amendments. It had eliminated the last paragraph of the

committee note, referring to use of information at trial, and added a new sentence in the note. The new sentence emphasizes that the rule does not undercut the gate-keeping role and responsibilities of judges under *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579 (1993). The advisory committee had also changed the wording of Rule 26(b)(4) from "regardless of the form of the draft" to "regardless of the form in which the draft is recorded" to better capture the idea of drafts recorded electronically, while precluding the concept of an "oral" draft report.

The advisory committee, however, had decided not to extend to non-retained experts the protection against disclosure enjoyed by retained expert witnesses. There had been, he said, public comments recommending that the protection be extended at least to employees. The advisory committee, he said, may do so in the future. But for now, it had decided to defer the issue for a number of reasons. Most importantly, the committee believed that it could not proceed with a change because it had not signaled it sufficiently to the public and would have to republish the proposal. In addition, he explained, drafting a provision to extend the protection would be very tricky, as many employees are both fact witnesses and experts. There are also questions regarding former employees. Moreover, if the provision were limited to employees, it may be seen as tilting more towards defendants, rather than plaintiffs, and the advisory committee wants to be scrupulously neutral on the issue.

Several members praised the work of the advisory committee and said that the proposed amendments would eliminate the need for stipulations and artificial devices now used to avoid the rule. They suggested that the amendments will allow discovery of witnesses to proceed more openly and honestly. Members said that the advisory committee had done an excellent job of working through and accommodating the various public comments. Judge Kravitz added that Judge Campbell and Professor Marcus deserved the lion's share of the credit for the work.

The committee without objection by voice vote approved the proposed amendments to Rule 26 for approval by the Judicial Conference.

FED. R. CIV. P. 56

Judge Kravitz reported that the major project to revise Rule 56 (summary judgment) had been an exercise in rule-making at its very best. The advisory committee, he said, had taken full advantage of empirical research by the Federal Judicial Center (Joe Cecil), the Administrative Office (Jeffrey Barr and James Ishida), and Judge Rosenthal's staff (Andrea Kuperman). It had prepared and circulated several different drafts and had conducted three public hearings and two mini-conferences with lawyers, judges, and professors. The advisory committee, he said, had listened carefully to the views of people with very differing ideas, and it had made several changes in the proposed rule as a result of the public hearings and written comments.

The rules process, in short, had worked exactly as it should. He offered his special thanks to Judge Michael M. Baylson, chairman of the Rule 56 subcommittee, for his dedication and leadership in producing a greatly improved rule governing a central component of the civil litigation process. He also thanked Professor Cooper, the committee's reporter, for his enormous assistance and wise counsel during the project.

Judge Kravitz reported that the advisory committee had announced two overarching goals for the project at the outset. First, it did not want to change the substantive standard for summary judgment in any way. Second, it did not want the rule to tilt in either direction, towards plaintiffs or defendants. Both goals, he said, had been achieved.

The advisory committee also had two other goals in mind. First, it had set out to bring the text of the rule in line with the way that summary judgment is actually practiced in the courts today. Second, it wanted to bring some national uniformity to summary judgment practice. The committee, Judge Kravitz said, had accomplished the first goal. The second goal, he said, had been accomplished in part.

Judge Kravitz reported that the advisory committee had made three changes in the rule from the version that had been published.

First, it had eliminated from the rule the requirement of a point-counterpoint procedure based on the comments of several judges and lawyers who have used the procedure and believe that it imposes unnecessary expense. Several judges who testified at the public hearings, including Judges Holland, Lasnik, Wilken, and Hamilton, had been articulate in opposing the point-counterpoint procedure on the basis of their personal experience. But, he said, many other judges and lawyers, including the chair and several members of the advisory committee, believe that the procedure is quite effective.

Judge Kravitz emphasized, though, that all sides agree that, regardless of the specific procedure used to handle summary judgment motions, it is essential that lawyers provide pinpoint citations to the record to back up their assertions. Therefore, the advisory committee had decided to allow districts to continue with their own procedures for eliciting the facts, but uniformly to require pinpoint citations. He added that, even without the prescribed point-counterpoint procedure, the revised rule embodies a number of other good new features, such as specifically acknowledging partial summary judgment, limiting motions to strike, and addressing non-compliance.

The second significant change made following publication was to re-introduce the word "shall" into the text of the rule. As revised, new Rule 56(a) would specify that: "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."

"Shall," he said is an ambiguous term and should not normally be used in drafting. But the dilemma that the advisory committee faced was that the word "shall" had acquired a substantive meaning in former Rule 56(c).

"Shall" had been used in the rule for decades until replaced with "should" as part of the 2007 general restyling of the civil rules. But in revisiting the matter in depth, Judge Kravitz said, the advisory committee simply could not find an appropriate replacement term for "shall," based on the pertinent case law. Neither "should" nor "must" are completely accurate. Many public comments, moreover, had asserted that selecting one or the other term would be viewed as making a change in substance and tilting the playing field. The advisory committee, he said, had even tried to formulate a revision using the passive voice, but decided that the alternative might inflict even more damage.

After hearing all the arguments, Judge Kravitz said, the advisory committee had returned to the vow that it had made at the outset of the project – not to change the substantive standard for granting summary judgment as developed in each circuit under the historical term "shall." Therefore, it decided to return to "shall" and allow the case law to continue to deal with that term. If, however, the Supreme Court were to change the substantive standard in the future, the advisory committee could later adjust the language of the rule. In essence, he said, the advisory committee does not advocate use of the term "shall" in drafting, but it had faced an unsolvable problem. The ambiguity in Rule 56 was so intractable that it could not be changed without affecting substance.

The third change made following publication was to eliminate the national rule's proposed time schedule for filing motions for summary judgment, responses to those motions, and replies to the responses. With elimination of the point-counterpoint procedure, there was no longer a need to retain all the deadlines. The advisory committee had been unanimous in deciding to specify only the deadline for filing a summary judgment motion and not to prescribe a schedule for further filings and responses. He noted that there is, for example, no other place in the Federal Rules of Civil Procedure where the rules fix briefing schedules, and it would not be appropriate to specify them for just one category of motions. In addition, he said, some lawyers recommended that the rule provide for sur-replies, which would have complicated the rule further.

The advisory committee had also been concerned about the time-computation rules that take effect on December 1, 2009. They will add the time periods to respond and reply to the existing Rule 56, only to have a completely revised rule delete those time periods on December 1, 2010, when the new Rule 56 would take effect. The advisory committee concluded, however, that it needed to produce the best rule possible for the future, even though there might be some confusion for a year.

Finally, Judge Kravitz explained that the advisory committee had considered at length whether to republish the rule, since several changes had been made following the August 2008 publication. But it decided unanimously not to do so because, at the Standing Committee's direction, it had already solicited the public's comments on a number of specific issues. The revised rule, he said, does not add any provision not fully noticed to the public. Rather, the advisory committee merely eliminated some provisions of the published rule.

Several committee members agreed that the rules process had worked at its best to facilitate a healthy public debate on summary judgment practice and to produce a very workable new rule. Several noted that legitimate differences of opinion had been expressed on some of the major issues, and the advisory committee had accommodated the differing views as well as possible. Some pointed out that they personally favored the point-counterpoint procedure, but recognized that it could not be forced on all the courts, particularly those that have tried and rejected it. They noted, though, that individual judges and districts that have adopted the procedure will be free to continue using it.

Support was voiced for the advisory committee's decision to return to use of the word "shall' in Rule 56(a) on the ground that it preserves the substantive standard for granting summary judgment. A few members went further and suggested that "shall" is an appropriate term to use in drafting, despite the style conventions. The committee's style consultant, Professor Kimble, though, disagreed and asserted that "shall" is never appropriate. He suggested that a different formulation might still be developed to maintain the substantive standard.

Judge Rosenthal emphasized that the advisory committee's dilemma had been to resolve a conflict between two competing principles. First, as part of the restyling process, all the advisory committees have consistently eliminated the word "shall." But the higher principle that prevailed was avoiding making any change in the substantive standard for summary judgment. She noted that, in the interests of improving style by changing "shall" to "should" in the 2007 restyling amendments, the committee had actually changed the substantive law in some circuits.

A member suggested adopting a public comment to replace "as to" with "about" in proposed Rule 56(a)(2). The style consultant agreed that the change was better stylistically, but several members urged that the change not be made since it was not essential. One member added that the current language is almost a sacred phrase and should not be tinkered with.

The committee without objection by voice vote agreed not to make the proposed additional change in the language of Rule 56(a)(2).

Another member expressed concern over the language in proposed Rule 56(c)(2) authorizing a party to assert in its response or reply that the other party's material cited to

support or dispute a fact "cannot be presented in a form that would be admissible in evidence." He suggested that the language had been revised from the formulation presented to the public for comment, *i.e.,* that the material "is not admissible in evidence." The revised language, he said, appeared to require the judge to make a ruling on the potential future admissibility of evidence.

Judge Kravitz explained that affidavits and other materials submitted as part of the summary judgment process are not evidence. Professor Cooper added that the published language was too broad because it cannot be known until trial what evidence will be admissible. Some public comments, he said, had suggested alternative language, such as "would not be admissible" or "could not be put in a form that would be admissible." The specific language added after publication was intended to show that something more than an affidavit is needed at trial. There is no need for the objecting party to make a separate motion to strike. In addition, failure to challenge the material during summary-judgment proceedings does not forfeit the party's right to challenge its admissibility at trial.

Other members suggested that the change in language was helpful because it lays out an option for parties to deal with an issue that arises often as part of summary-judgment practice, though not specified in the current rule. When a party objects that a submission cannot be produced in any admissible form, it allows the judge to cut through the issues and remedy any technical problems as part of the summary-judgment motion itself, rather than wasting time on motions to strike. Judge Kravitz pointed out that the revised rule gives the judge flexibility to tell a party that it has not presented the material in an admissible form, to give the party an additional opportunity to correct the defect, and to fashion an appropriate remedy.

One member suggested that the problem with the language may be that it could be construed as requiring the moving party to carry some burden, such as to show that the other party cannot present evidence in an admissible form. The word "cannot" appeared to be the problem. She suggested that it be changed to "could not." It was also suggested that the chair and reporter of the advisory committee consider possible modifications in the language.

Judge Kravitz recommended, alternatively, that an explanatory sentence be added to the committee note. He pointed out that in the situation covered by the provision, there is no doubt that the party has not properly presented the pertinent material, but it is difficult to say that it "cannot" be so presented. He suggested adding language to the note to explain that an assertion that the opponent could not produce material in admissible form functions like an objection at trial. The proponent of the material can then either show that it is admissible or explain the admissible form that is anticipated.

A member stated that the text of the rule was perfectly appropriate. An objector only has to assert that the material cannot be presented. The moving party then has the burden of showing that it can.

Another member suggested that the rule might be rephrased to say something like: "If an objection has been made that the material has not been presented in a form that can be admissible at trial, the court may require (or allow) the proponent of the material to show that it can be presented in an admissible form." Judge Kravitz pointed out, though, that the advisory committee was trying to get away from motions to strike. It would prefer to have parties address the matter in their summary-judgment briefs.

Other members said that the language of the rule, as modified after publication, was correct. One pointed out that proposed Rule 56(c)(2) must be read together with proposed Rule 56(c)(4), which states that an affidavit used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify on the matters stated. The trial judge can easily handle any problems that arise. A member declared that it is a very interesting issue in theory, but will not be a real problem in practice.

A member suggested substituting the word "object" for "assert." "Assert" requires the opponent to know, or allege, that the material cannot be presented in admissible form. "Object" makes it clear that the opponent is only raising the point, placing the burden on the proponent. Judge Kravitz explained that the advisory committee had used the word "assert" because it is a word commonly used to refer to a point mentioned in a brief. He agreed to change it to "object."

The committee with one objection by voice vote approved changing "assert" and "asserting" in proposed Rule 56 to "object" and "objecting."

The committee without objection by voice vote then approved the proposed amendments to Rule 56 for approval by the Judicial Conference.

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

A member suggested adding language to the committee note to alert the reader that the revised rule places the burden on the parties to raise the point that the submitted material cannot be presented in an admissible form.

The committee by a vote of 7 to 3 approved making the suggested addition to the committee note.

Amendment for Publication

SUPPLEMENTAL RULE E(4)(f)

Professor Cooper noted that Rule E(4)(f) (in rem and quasi in rem actions – procedure for release from arrest or attachment) would be amended to delete the last sentence because it has been superseded by statutory and rule developments. The statutes cited in the rule, 46 U.S.C. §§ 603 and 604, were repealed in 1983. Deletion of the reference to them seems entirely appropriate, and publishing the amendment for public comments might also flush out any arguments that other statutes should be invoked.

Deletion of the reference to forfeiture actions, though, is more complicated. Rule G, which took effect in 2006, governs forfeiture actions in rem arising from a federal statute. It also specifies that Supplemental Rule E continues to apply to the extent that Rule G does not. The problem, he said, is how best to integrate Rule G with Rule E(4)(f). The proposed amendment would strike the last sentence of Rule E(4)(f) and let courts figure it out on a case-by-case basis. The Department of Justice, he said, had suggested adding a sentence stating that Rule G governs hearings in a forfeiture action.

Professor Cooper added that the advisory committee recommended publishing the rule for comment. But since the proposed changes are relatively minor, the publication should be deferred until other amendments to the civil rules are proposed and the proposed amendment to Supplemental Rule E(4)(f) can be included in the same publication.

The committee without objection by voice vote approved the proposed amendment for publication at an appropriate future time.

Informational Items

Judge Kravitz reported that the advisory committee would convene a major conference on the state of civil litigation to be held at Duke Law School in May 2010. He noted that Judge John G. Koeltl would chair the conference, and the Federal Judicial Center was helping him compile empirical data for the program. He pointed out that Judge Koeltl was working with the Litigation Section of the American Bar Association on a survey of its members. In addition, Judge Koeltl had persuaded RAND and others to produce papers and other information for the conference. He had put together a comprehensive agenda and was now securing moderators and panel members. The Chief Justice will deliver a taped message. The program may be broadcast by Duke, and the Duke Law Review is expected to publish the proceedings.

Judge Kravitz reported that a special subcommittee chaired by Judge Campbell and assisted by Professor Marcus was considering a range of potential changes to Rule 45 (subpoenas). The subcommittee was in the process of seeking input and planning for mini-conferences with the bench and bar.

Judge Kravitz reported that a joint subcommittee comprised of members of the civil and appellate advisory committees had been appointed and will begin studying several issues that intersect both sets of rules. In addition, the civil advisory committee was examining issues arising when judges are sued in their individual capacities, including service in those cases. One suggestion is to require that service be made on the clerk of the court where the judge sits.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Tallman and Professor Beale presented the report of the advisory committee, as set forth in Judge Tallman's memorandum and attachments of May 11, 2009 (Agenda Item 9).

Amendments for Final Approval

VICTIMS' RIGHTS AMENDMENTS

FED. R. CRIM. P. 12.3

Judge Tallman reported that the proposed amendment to Rule 12.3 (notice of public-authority defense) would conform the rule with a similar amendment made recently in Rule 12.1 (notice of alibi defense). He noted that the change was appropriate, even though the public-authority defense arises rarely.

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

A member pointed out that proposed Rule 12.3 and Rule 12.1 both permit the district court in certain circumstances to order the government to turn over to the defendant the names and telephone numbers of victims, which would otherwise be protected. She recommended that both rules require the Government to inform the protected persons that their names and numbers are being disclosed. Judge Tallman replied that proposed Rule 12.3(a)(D)(ii) explicitly authorizes a court to fashion a reasonable procedure to protect the victims' interests.

FED. R. CRIM. P. 21

Judge Tallman reported that the proposed amendment to Rule 21(b) (transfer for trial) would allow a court to consider the convenience of any victim in making a decision to transfer a case for trial.

A member questioned the need for the rule since it is not required by the Crime Victims' Rights Act. Judge Tallman pointed out that the advisory committee has been

concerned over criticism that it has not been expansive enough in making changes to the rules to implement the Act. Professor Beale added that this was one of the few rules where the advisory committee had made changes that go beyond what is mandated by the Act. She explained that the advisory committee wants to incorporate victims' rights as fully as possible without doing damage to the carefully balanced criminal justice system. Victims' rights groups, she said, have expressed a particularly strong interest in victims being able to attend court proceedings, and the proposed amendment to Rule 21 would further that interest. She pointed out, though, that the committee had made several other, more significant changes in the rules for victims at earlier meetings.

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

FED. R. CRIM. P. 5

Judge Tallman reported that the advisory committee had withdrawn its proposed change to Rule 5 (initial appearance) because it felt the current language adequately referenced the statutes providing consideration of the safety of victims and the community. The proposal would have required a court, in making the decision to detain or release a defendant at an initial appearance, to consider the right of any victim to be reasonably protected from the defendant.

Professor Beale explained that the advisory committee had been concerned that by singling out one situation, it had put its finger on the scales and changed the substantive law. The proposed amendment, moreover, was redundant and unnecessary. The Bail Reform Act, she said, is a carefully balanced and nuanced law, and just singling out one factor in support of victims could cause more damage than good. But in light of the politics of the situation, the decision to withdraw the amendment had not been an easy one for the committee.

A member agreed that many of the victims' rules amendments were not necessary, but clear political implications counsel in favor of including them. The Crime Victims' Rights Act, he said, emphasizes particularly the safety of victims. Therefore, this may be one area where a rule amendment may be advisable. Victims are particularly vulnerable to being harmed by defendants who have been released. He said, moreover, that he had not been persuaded by the argument that the proposed amendment would change the substantive law.

Judge Tallman pointed out that the Federal Magistrate Judges Association, whose members apply the rule every day, oppose changing the rule because they view the Bail Reform Act and the Crime Victims' Rights Act as sufficient, and changing the rule would upset the careful balance of the statutes. Judge Rosenthal added that the rule already

speaks of detention or release "as provided by statute," which covers both the Bail Reform Act and the Crime Victims' Rights Act.

Members questioned whether the Standing Committee is authorized to initiate its own rules proposals or to forward to the Judicial Conference a proposed amendment that has been withdrawn or rejected by an advisory committee. Professor Coquillette suggested that the Rules Enabling Act appears to contemplate the Standing Committee confining itself to reviewing the recommendations of the advisory committees.

A member recommended sending the matter back to the advisory committee for further consideration. But Judge Tallman pointed out that the advisory committee had already published the rule for comment, had then discussed it thoroughly, and had voted unanimously not to proceed with the amendment. He said that he was not sure that returning the matter to the committee would change the result.

A participant suggested, though, that other statutory changes may be made in the future. Sending the rule back to the advisory committee, rather than rejecting it, would keep the matter alive and be advisable as a matter of policy. A member added that the advisory committee might be asked to include the matter as part of its ongoing study of how the courts are implementing the Crime Victims' Rights Act. Professor Beale added that there is a careful balance between that statute and the Bail Reform Act, and the advisory committee will continue to monitor the situation closely to make sure that any problems are addressed.

The committee unanimously by voice vote returned the proposed amendment to the advisory committee with instructions to further study proposed amendments to Rule 5 as part of its ongoing study of the courts' implementation of the Crime Victims' Rights Act.

OTHER AMENDMENTS

FED. R. CRIM. P. 15

Judge Tallman reported that the advisory committee had briefed the Standing Committee before on the proposed amendments to Rule 15 (depositions). Recommended by the Department of Justice, they would allow the government – under certain limited conditions – to take a deposition in a criminal case outside the United States and outside the physical presence of the defendant, with the defendant participating by electronic means. Before allowing the deposition to proceed, the trial court would have to make case-specific findings on the following six factors:

1. the witness's testimony could provide substantial proof of a material fact in a felony prosecution;

2. there is a substantial likelihood that the witness's attendance at trial cannot be obtained;
3. the witness's presence for a deposition in the United States cannot be obtained;
4. the defendant cannot be present because: (i) the country where the witness is located will not permit the defendant to attend the deposition; (ii) for an in-custody defendant, secure transportation and continuing custody cannot be assured at the witness's location; or (iii) for an out-of-custody defendant, no reasonable conditions will assure an appearance at the deposition or at trial or sentencing;
5. the defendant can meaningfully participate in the deposition through reasonable means; and
6. for the deposition of a government witness, the attorney for the government has established that the prosecution advances an important public interest.

Judge Tallman explained that the Fourth Circuit had already approved procedures similar to those set forth in the proposed amendment and had held that the Confrontation Clause did not prohibit the introduction of deposition testimony taken under those procedures. *United States v. Ali,* 528 F.3d 210 (4th Cir. 2008), *cert. denied,* 129 S. Ct. 1312 (2009).

Judge Tallman pointed out that an analogous proposal for a change to Rule 26 (taking testimony) had been forwarded to the Supreme Court in 2002, but the Court rejected it on Confrontation-Clause grounds in an opinion by Justice Scalia. The advisory committee, he said, recognized fully that there may also be confrontation issues with the new proposal. But it also recognized that the practical need for the amendment is substantial, and it had been carefully crafted to address the Confrontation-Clause factors considered by the Supreme Court in 2002. He added that, unlike the proposed amendments to Rule 26, the proposed amendment to Rule 15 deals only with the taking of depositions and not the later admissibility of their contents at trial, which is where the Confrontation Clause issue arises.

Judge Tallman noted that there had been opposition to the proposed rule, as expected, from the defense bar. As a result, the advisory committee had limited the rule's reach to make sure that a deposition is restricted to evidence necessary to the government's case. But the committee did not adopt three other suggestions made by the defense bar during the comment period: (1) to limit the rule to government witnesses; (2) to require the government to show that the deposition would produce evidence "necessary" to its case; and (3) to require the government to show that it had made diligent efforts to secure the witness's testimony in the United States.

Deputy Attorney General Ogden thanked the committee for its attention to the matter and emphasized that the proposed rule is of substantial importance to the Department of Justice. It would be needed only in a few cases, but the depositions would

be very important in those cases. The detailed procedures will require the Department to go to a great deal of trouble and expense to obtain the testimony. Arranging for a foreign deposition is costly and difficult, so it will not be pursued lightly, and the rule will be used only in cases that are vitally important to the United States.

Mr. Ogden said that the Department fully recognizes the importance of the issues under the Confrontation Clause. But, he said, the careful conditions that the rule specifies go a long way to shield the proposal from constitutional infirmity. The rule, he assured the committee, will not be taken lightly. Using the rule will be expensive because the government will likely also have to pay for defense counsel. And it will have to get the cooperation of the State Department and the approval of the foreign country involved. Moreover, the trial court has to approve taking the deposition, and it can do so only after having made all the requisite findings specified in the rule.

A member pointed out that subparagraph 15(c)(3)(F) is the only part of the rule that refers to the government. The rest of the rule would also apply to defendants. Professor Beale explained that the federal defenders had wanted to limit the rule to government witnesses, but the advisory committee did not agree. In fact, the committee had been surprised that the suggestion had come from the defenders. The defenders, she said, had suggested that they would very rarely use the device. As a matter of policy, though, the advisory committee believed that the rule should not be just a one-way street.

A participant suggested that the proposed amendments will have an impact on the admissibility of declarations against penal interest under FED. R. EVID. 804(b)(3). To admit evidence under Rule 804, he said, a party must show that the declarant was not only absent from trial, but cannot be deposed. Under proposed Rule 15, and its expanded possibilities to conduct depositions, declarations against penal interest will be admissible less often.

A member expressed strong opposition to the proposed amendments, asserting that they were directly contrary to the Confrontation Clause. He said that the committee should not recommend rules that are constitutionally debatable. That alone, he said, should be grounds for not proceeding further.

In addition, he said, there was no empirical support for the rule. Normally, he said, the advisory committee asks for data and background information. In this case, the procedures differ widely from country to country. The advisory committee needs to have a clearer understanding of the different procedures and requirements imposed around the world. It also needs to know more specifically how big a problem the government actually faces without the rule. In addition, he said, many additional procedural safeguards required by the developing case law had not been included in the proposed amendments, including some of the requirements set forth in the *Ali* case. The key question, he said, is not how rarely the proposed authority will be exercised, but whether it is fundamentally sound.

He noted that subparagraph 15(c)(3)(F) specifies that the procedure may only be invoked if there is "an important public interest." But, he noted, the government claims an important public interest in every prosecution. The provision, consequently, is not meaningful. Subparagraph 15(c)(3)(E) requires that the defendant be able to participate in the deposition by "reasonable means," but that standard is too vague. In addition, it is unclear how the government will show that the witness cannot be obtained. He concluded that if this rule were so important to the country, it should be enacted by legislation, rather than by rule.

A member pointed out that the Confrontation Clause can still be used to prevent any testimony elicited at the foreign deposition from being used in court. Mr. Ogden agreed that admissibility questions must still be addressed in each case, but said that courts are competent to make the case-by-case decisions that the rule requires.

A member suggested that the rule would be very helpful because it would provide national uniformity on a matter that individual courts currently have to struggle with. She said that trial courts need guidance and a framework for dealing with foreign depositions. Another participant said, however, that it may be premature for the committee to bless the specific proposed procedure and suggested that the Department might consider adopting an internal guide rather than seeking a rule.

Professor Beale said, though, that the proposed rule would create a desirable template to guide the Department and the courts on taking depositions. She pointed out that the rule is procedural in nature. She emphasized that the evidence produced at the deposition still must face other obstacles under the Confrontation Clause and the Federal Rules of Evidence when the government tries to admit the testimony.

Another member expressed concern about proceeding by rule at this point and questioned whether the advisory committee had pinned down all the procedures correctly. Perhaps some additional flexibility may be needed. Moreover, she suggested, the advisory committee may be underestimating how often the defense might want to invoke the rule. The principal justification for the rule is that the courts need some procedural guidance on taking foreign depositions. But in light of the lack of definitive information at this point, it might be better to defer on a rule and consider providing other kinds of guidance to the courts, such as memoranda, white papers, or studies.

A participant asked whether the Department of Justice had considered proceeding with an internal Department memorandum based on the existing case law, rather than seeking a controversial rule. Mr. Ogden responded that the Department had conducted an extensive review of the matter and had taken an official position that seeking a federal rule is the best way to proceed.

A member added that the government faces many thorny problems in meeting the requirements and restrictions of other countries' laws. The federal courts, therefore, may

need more advice on how to deal with these problems as a practical matter. Mr. Ogden responded that the Department would not even proceed if there were legal impediments in a particular country. He pointed out that the rule is based on the actual cases that had arisen to date and reflects the current case law.

A member responded, though, that it would be very difficult to obtain additional relevant information without actually having a rule in place. A procedural rule is needed, he said, and the Confrontation Clause and rules of evidence are in place to protect against constitutional violations. The Department of Justice, he said, still has obstacles to face, even if it follows the procedures specified in the rule. He recommended proceeding with the rule and monitoring how it works in practice.

Mr. Ogden noted that the Department had some concern about proposed subparagraph 15(c)(3)(F), which requires the government to establish that the prosecution advances "an important public interest." He pointed out that the requirement would lead to a determination by the court as to what is important, and what is not. The Department, he said, was prepared instead to have the certification made internally by a high-level Department official, at least as high as the Assistant Attorney General level.

Judge Tallman explained that the reason for including the provision was to respond to criticisms by the defense community that it would be too easy for a prosecutor to use the foreign deposition procedure without some greater level of accountability. The defense bar had argued for a certification by the Attorney General. He suggested that the committee might strike subparagraph (F) entirely upon assurance that the Department will impose an internal requirement of high-level approval.

A participant suggested that it is misleading to say that only a few cases will be brought under the rule because there are in fact many cases in this area. The key issue, he said, is preserving the defendant's right to face-to-face confrontation. The situations presented by the rule are similar in ways to those involved in confrontation of child witnesses. He suggested that the advisory committee was, in effect, trying to apply *Maryland v. Craig,* 497 U.S. 836 (1990), and the various statutes that implement it.

Judge Rosenthal concluded that members had expressed discomfort on two levels:

1. Whether the case had been made that the rule is needed.

2. Whether the committee knows enough about how the rule might be applied, even though it would be difficult to obtain that information in advance without having a rule in place.

She added that the advisory committee also needed to decide whether subparagraph 15(c)(3)(F) was needed, and whether the committee was confident enough to let the rule go forward in final form to the Judicial Conference and the Supreme Court.

She noted that the advisory committee had drafted the rule very carefully to respond to all the expressed concerns. She pointed out that Justice Scalia's 2002 opinion was specific in setting forth the minimal requirements for a rule, and the rule that the advisory committee had drafted appeared to respond well to the concerns he had articulated. One member suggested that although the draft rule contained all the minimal requirements, it might also specifically state that a judge may impose other requirements.

A participant noted that FED. R. EVID. 804(b)(1) (hearsay exceptions – declarant unavailable) deals with admissibility and has its own standard that requires a party to be afforded a trial-like "opportunity" to examine the witness before the witness's testimony may be admitted. He suggested that the criminal provision be dovetailed with the evidence rule or use the language of the evidence rule. Admissibility of the deposition evidence at trial is governed by the standards of FED. R. EVID. 804(b)(1), so a different standard is not needed in proposed FED. R. CRIM. P. 15(c). In fact, if the evidence is admissible under FED. R. EVID. 804(b)(1), it will probably also satisfy the Confrontation Clause under the pertinent case law. But for the evidence to meet the Rule 804(b)(1) standard, the defendant needs a "trial-like" opportunity to confront the witness.

A member moved to adopt the proposed amendments to Rule 15 with two changes:

1. delete proposed subparagraph 15(c)(3)(F) – on the representation of the Department of Justice that before invoking the revised Rule 15, it will require internal approval by an Assistant Attorney General; and

2. amend subparagraph 15(c)(3)(E) to conform it to the provisions of FED. R. EVID. 804(b)(1).

Professor Beale reported, though, that the advisory committee had been persuaded not to import the standard of FED. R. EVID. 804(b)(1) into the revised criminal rule. She explained that the district court evaluates motive and opportunity under Rule 804(b)(1) after the deposition has been taken, while ruling on admissibility of the evidence at trial. The standard in proposed FED. R. CRIM. P. 15(c), however, is different. It articulates the requirements that must be met for approving taking the deposition in the first place.

The member restated his motion to approve the proposed amendments with just one change – elimination of subparagraph 15(c)(3)(F).

The committee by a vote of 9-1 approved the motion and voted to forward the proposed amendments to Rule 15 for approval by the Judicial Conference.

FED. R. CRIM. P. 32.1

Judge Tallman reported that the proposed amendments to Rule 32.1(a)(6) (revocation or modification of probation or supervised release) had been requested by the

Federal Magistrate Judges Association. They would resolve ambiguities and clarify in two ways the burden of proof for obtaining release in revocation and modification proceedings.

First the amended rule would specify the precise statutory provision that governs the revocation proceeding – 18 U.S.C. § 3143(a)(1), rather than all of 18 U.S.C. § 3143(a), which contains other provisions that do not apply and have caused some confusion. Second, the current rule places the burden of proof on the person seeking release, but it does not specify the standard. The revised rule specifies that the person facing revocation or modification must establish by "clear and convincing evidence" that he or she will not flee or pose a danger to any other person or the community.

He noted that an additional change to the rule, to allow video conferencing of these proceedings, was pending separately before the advisory committee for approval to publish as part of the package of technology-related amendments.

A member pointed out that the proposed committee note stated that the amendment reflected established case law. But only a single Ninth Circuit case and a district court case had been cited. She questioned whether the case law was in fact uniform across the country and expressed some concern that the committee may be making a substantive change in the law in some circuits. Professor Beale responded that the case law is, in fact, clear, as is the statute itself. She added that the defense bar did not object to the rule specifying the standard of "clear and convincing evidence."

Professor Coquillette recommended that the case references and the last sentence of the note be eliminated. He pointed out that case law is subject to change. Judge Tallman agreed with the suggestion.

The committee unanimously by voice vote approved the proposed amendments to the rule for approval by the Judicial Conference.

Amendments for Publication

FED. R. CRIM. P. 12 and 34

Judge Tallman reported that the proposed amendments to Rule 12 (pleadings and pretrial motions) would conform the rule to the Supreme Court's decision in *United States v. Cotton,* 535 U.S. 625 (2002). They would also save judicial resources by encouraging defendants to raise all objections to an indictment before trial. Rule 12(b)(3)(B), he said, sets forth the general rule that a defendant must raise before trial any claim alleging a defect in the indictment or information. But it also specifies that the particular objection that the indictment fails to state an offense may be raised at any time. This exception was justified originally on the ground that the latter claim is jurisdictional in nature and therefore may be raised at any point.

In *Cotton*, however, the Supreme Court abandoned that justification by holding that a defective indictment does not deprive a court of jurisdiction. A claim that the indictment fails to allege an essential element of an offense does not raise jurisdictional issues. The claim can be forfeited if not timely raised. Judge Tallman explained that the Department of Justice had asked the advisory committee to amend Rule 12 to require explicitly that a claim that an indictment fails to state an offense be raised before trial.

The proposed amendment would do so. But it also contains a fail-safe provision in proposed Rule 12(e)(2), which states that a court may grant relief from the waiver either: (1) for good cause; or (2) if the indictment's omission of an element of the offense has prejudiced a substantial right of the defendant. The proposed amendment to Rule 34 (arresting judgment) would conform that rule to the proposed amendment to Rule 12(b).

Judge Tallman explained that the advisory committee had wrestled with whether to require a defendant to show both good cause and prejudice to obtain relief from the waiver, but it had concluded that only one or the other should be required. Professor Beale added that the advisory committee wanted to provide judges with greater leeway in dealing with this specific type of error and noted that it is a different standard from that required for relief from other errors.

Several members suggested that "forfeiture" would be a better choice of words than "waiver" because the context makes clear that Rule 12 deals with forfeiture. Moreover, the Supreme Court used the term "forfeiture" in *Cotton.* Judge Tallman replied that "waiver" has always been used in the text of Rule 12, even though "forfeiture" might be a better term if the advisory committee were writing the rule on a clean slate. He suggested that the proposed rule could be published using the term "forfeiture," and the advisory committee could solicit public comments regarding the appropriate choice. It was also suggested that both terms could be used in the publication and placed in brackets to solicit comments from bench and bar.

Some members questioned whether the proposed amendments were completely consistent with *United States v. Cotton* and suggested that there are alternative possible readings of the holding. Judge Rosenthal noted that revising the remedy provision of the rule, Rule 12(e)(2), would pose many drafting difficulties. Professor Beale explained that the advisory committee had struggled with drafting that portion of the rule and suggested that it might be advisable, in light of the comments of the members, for the advisory committee to explore the issues further and consider additional adjustments in the rule. A member suggested that the advisory committee also take a fresh look at all the criminal rules that use the term "waiver," rather than "forfeiture."

Due to the many issues surrounding the provision, Judge Rosenthal suggested that the best course of action might be for the matter to be returned to the advisory committee for further study.

The committee without objection by voice vote approved returning the proposed amendments to Rules 12 and 34 to the advisory committee for further study.

TECHNOLOGY RULES

Judge Tallman reported that the proposed amendments started with a commission given to Judge Anthony J. Battaglia and his subcommittee to review all the Federal Rules of Criminal Procedure with a view towards improving them to take account of technology changes. He added that technology has now reached the stage of high reliability and accessibility that the rules should take specific account of it and make it easier for prosecutors, law enforcement officers, judges, and others to use the system. The proposed changes deal largely with the issuance of arrest and search and seizure warrants, and with the use of video conferencing to avoid having to bring people into court.

FED. R. CRIM. P. 1

Judge Tallman reported that the proposed amendment to Rule 1 (scope of the rules and definitions) would broaden the definition of "telephone," "telephonic," or "telephonically" to include any form of live electronic voice communication. The definition is intended to be sufficiently broad in order to cover both recent changes and future changes in technology. The committee note, moreover, also speaks of services for the hearing impaired.

Judge Tallman emphasized that use of the technological options is discretionary. Judges, prosecutors, and officers may continue to handle proceedings in the traditional way. But he pointed out that there are many areas in the country where the distance between a judicial officer and a law enforcement officer is great. The proposed rules authorize the use of technology to close the distance gap and improve enforcement of the law.

Professor Beale pointed out that live communication will continue to be required for taking an oath. Under proposed new Rule 4.1, "[t]he judge must place under oath — and may examine — the applicant and any person on whose testimony the application is based." The proposed rules preserve live communication in person by video or telephone.

FED. R. CRIM. P. 3

Judge Tallman reported that Rule 3 (complaint) would be amended to require that a complaint be made under oath before a magistrate judge "except as provided in Rule 4.1."

FED. R. CRIM. P. 4

Judge Tallman explained that Rule 4 (arrest warrant or summons on a complaint) sets forth the procedure for obtaining a warrant on a complaint. The amended rule adopts the concept of a "duplicate original" that has been in Rule 41 for years, dealing with issuance of search warrants by telephone. The term will now be used for other kinds of process besides search warrants. Under proposed Rule 4(d), all warrant applications may be presented to a magistrate judge by telephone or other reliable electronic means.

FED. R. CRIM. P. 4.1

Judge Tallman explained that new Rule 4.1 (complaint, warrant, or summons by telephone or other reliable electronic means) was the heart of the technology amendments. It would place in one rule the procedure for obtaining electronic process of all kinds. The new rule extends the Rule 41(e)(3) procedures governing the issuance of a warrant on information transmitted by reliable electronic means to the issuance of a complaint and summons. Testimony taken by electronic means must be recorded in writing, but a written summary or order suffices if the testimony is limited to attesting to the contents of a written affidavit submitted by reliable electronic means. The applicant must prepare a "duplicate original" of a complaint, warrant, or summons and must read or otherwise transmit its contents verbatim to the judge. When approved by the judge, the duplicate original may serve as the original. The officer, who may be many miles away, may use the duplicate original as an original.

The judge always has discretion to require that the oath be taken in person. In addition, the judge may modify the complaint, warrant, or summons, and transmit the modified version to the applicant electronically, or direct the applicant to modify the proposed duplicate original. The judge, for example, might require more facts or alter the warrant to specify clearly what the agent is authorized to search and seize. The officer at the other end makes the changes and sends them to the judge.

Rule 4.1 also contains a provision in subsection (c), using language now found in Rule 41, specifying that "absent a finding of bad faith, evidence is not subject to suppression." This is derived from the decision of the Supreme Court in *United States v. Leon*, 468 U.S. 897 (1984).

Professor Beale pointed out that the new Rule 4.1 has a number of innovations not found in the current Rule 41. The oath, for example, would be broken out from the rest of the conversation between the law enforcement officer and the magistrate judge. She noted that many judges interpret the current rule to require the judge to write down everything said during the conversation. The new rule allows the judge to prepare only a summary or a brief order (rather than a verbatim record of the conversation) if the conversation was limited to an oath affirming a written affidavit. The rest of the conversation may be recorded. Judge Tallman added that the rule should produce a better record of all the proceedings from start to finish. It may also encourage greater use of the warrant process by law enforcement officers, which is good as a matter of public policy.

A member questioned the numbering of the new rule as FED. R. CRIM. P. 4.1, asking why it should not be placed later in the body of rules. Judge Tallman responded that the advisory committee had considered the matter and had decided to set forth the procedures immediately following the first place in the rules where they could be invoked – after Rule 4, governing issuance of arrest warrants. He suggested that the rule could easily be moved to a later position in the rules. A member suggested soliciting comments from the public on the appropriate numbering of the rule.

FED. R. CRIM. P. 9

Judge Tallman reported that amended Rule 9 (arrest warrant or summons on an indictment) would allow an arrest warrant on an indictment or information to be issued electronically.

FED. R. CRIM. P. 40

Rule 40 (arrest for failing to appear in another district or for violating conditions of release set in another district) would be amended to permit the use of video conferencing to conduct a Rule 40 appearance, with the defendant's consent. The procedure would be discretionary with the court.

FED. R. CRIM. P. 41

Rule 41 (search and seizure) would be substantially reduced in size because its provisions for issuing a telephonic warrant would be moved to the new Rule 4.1. In addition, the revised rule provides that electronic means may be used for the return of a search warrant or tracking warrant.

FED. R. CRIM. P. 43

Rule 43 (defendant's presence) would be amended to include a cross-reference to Rule 32.1. In addition, the court may permit misdemeanor proceedings to be handled by video conferencing.

A member noted that Rule 43 specifies that the entire proceedings in misdemeanor cases could be conducted without the defendant's presence. It would be possible, for example, for the arraignment, plea, and sentencing all to be conducted without the judge verifying in person that the defendant is the correct person before the court. But, she noted, that is already the case under the current Rule 43.

Judge Tallman explained that waiver of the defendant's presence should normally be used only for traffic cases and other low-penalty offenses, even though the language of the rule is broad enough to cover more serious offenses. He said that the system has to rely on the sound judgment of magistrate judges to determine which cases to apply the

rule in. He observed, for example, that the advisory committee had heard of several cases where prison inmates want to get rid of cases outstanding against them to avoid negative effect on their prison condition and opportunities. Professor Beale added that the proposed rule is an improvement over the current rule because it adds the alternative of conducting the proceedings by video conferencing to the current option of proceeding without the presence of the defendant at all.

FED. R. CRIM. P. 49

Rule 49 (serving and filing papers) would be amended to conform the criminal rules with the civil rules regarding electronic filing of documents. It is derived from FED. R. CIV. P. 5(d)(3), and makes clear that a paper filed electronically in compliance with a court's local rule is a written paper.

A participant stated that in the recent restyling of the evidence rules, the term "telephone" had been changed to "phone" in order to capture cell phones. It was recommended that the terminology in the criminal rules and the evidence rules be consistent. During a break in the proceedings, representatives of the criminal and evidence advisory committees and the Style Subcommittee conferred and agreed to change the references in the proposed restyled evidence rules back from "phone" to "telephone."

Professor Beale added that the package of technology amendments also included an amendment to Rule 6(e) (recording and disclosing grand jury proceedings), previously approved by the Standing Committee for publication. It would authorize the taking of a grand jury return by video conferencing.

FED. R. CRIM. P. 32.1

Judge Tallman pointed out that the amendments to Rule 32.1 (revocation or modification of probation or supervised release) were somewhat different from the other technology amendments. They deal with defendants who are subject to revocation or modification of probation or supervised release. At the defendant's request, the court would be able to allow the defendant to participate in the proceedings through video conferencing. The advisory committee, he said, had reviewed the case law and had seen no suggestion that the defendant's waiver would be inconsistent with the Sentencing Reform Act.

A participant suggested that the revised rule appeared to carry the negative implication that a judge may not modify conditions by telephone. In revocation cases where a defendant is far away, a judge may simply telephone the defendant and the probation officer to resolve a matter without the need for a hearing. The rule, he said, should not imply that the judge cannot continue to resolve matters in this manner. As written, though, it appears to apply to all modifications of probation or supervised release.

It should, instead, provide that in appropriate cases a judge may simply use the telephone to resolve problems.

Professor Beale stated that the situation posed is different from that contemplated in the proposed amendments to Rule 32.1. In the former, the defendant is waiving a hearing altogether. The judge then chooses to speak personally with the defendant and the probation officer by telephone and be assured that the defendant's waiver is voluntary and knowing. The proposed amendments to Rule 32.1, by contrast, address holding a hearing – which the defendant has not waived – by video conferencing at the defendant's request.

Another participant suggested that there may be a potential conflict between Rule 32.1(c)(2)(A), specifying that a hearing is not required if the person waives it, and the proposed new Rule 32.1(f) because the latter applies to the entire rule and could be construed as replacing Rule 32.1(c)(2)(A). Another participant recommended adding a heading to Rule 32.1(f).

Professor Beale reported that Rule 32.1 was the only rule in the technology package that had produced any controversy during the advisory committee's deliberations. Some members, she said, had expressed concerns over a judge being able to revoke release by video conference. A member added that the appropriate procedure depends in large measure on what the judge is going to do. Sometimes the modifications will be very minor in nature, but other times they may be more serious. She pointed out that before video conferencing became widely available, judges simply used the telephone to handle many different circumstances. Video conferencing is easier to use than in the past, but it is still a big step to take and is more difficult and inconvenient than using the telephone.

A participant suggested adding a sentence to the committee note to address the issue. Another suggested that the note state that whenever a defendant is entitled to waive a hearing completely, the proceeding may be conducted by telephone. Others agreed that additional language would be helpful.

A participant pointed out that use of the word "proceedings" in Rule 32.1(f) may create some ambiguity. In reality, the rule should refer to a "hearing" conducted by video conference. That term, she said, is used several other places in the rule.

A participant questioned the need for the rule because a defendant may waive the hearing altogether. Professor Beale explained that the rule sets forth alternatives. The advisory committee had decided to exempt Rule 32.1 proceedings from the requirements of Rule 43 because there had been some uncertainty among the members as to whether Rule 43 applied to revocation and modification proceedings.

The committee without objection by voice vote approved Rule 32.1 for publication with additional language to be included in the committee note

emphasizing that use of a telephone is still a permissible alternative to video conferencing in appropriate circumstances.

The committee then without objection by voice vote approved all the other proposed technology-related amendments for publication, including the amendments to Rule 6 approved for publication by the committee in June 2008.

Judge Tallman pointed out that proposed amendments to Rule 47 (motions and supporting affidavits) had been withdrawn by the advisory committee.

Judge Rosenthal extended special thanks to Judge Battaglia for spearheading the technology project and producing a superb package of amendments.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Hinkle and Professor Capra presented the report of the advisory committee, as set forth in Judge Hinkle's memorandum and attachments of May 6, 2009 (Agenda Item 8).

Amendments for Final Approval

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

Judge Hinkle reported that the proposed amendment to Rule 804(b)(3) (statement against interest) would change the hearsay exception regarding the statement against penal interest of an unavailable witness. The existing rule, he said, requires a defendant in a criminal case to show "corroborating circumstances" in order to have the statement admitted. But the government introducing a statement does not have the same requirement. The amended rule, he said, would apply the corroborating circumstances requirement to the government as well. The Department of Justice, he said, did not object to the amendment, and there had been no written comments objecting to its substance. One comment from a defense lawyer had recommended that corroborating circumstances be deleted as a requirement for a defendant, but the committee did not consider that course appropriate as a substantive matter. The public hearings had been cancelled because no witnesses had asked to testify on the rule.

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

Amendments for Publication

RESTYLED FED. R. EVID. 101-1103

Judge Hinkle reported that the written agenda materials provided background information about the restyling project. The effort to restyle the federal rules started back in the early 1990s under the leadership of committee chair Judge Robert Keeton and committee member Professor Charles Alan Wright. It has been a long and successful process over several years, though not without controversy. Some had thought that it would not be worth the effort to change the rules, even if the end product were improved. But, in fact, the four restyling projects have been very successful, and the rules are clearly much better than before.

He pointed out that accuracy and clarity are the most important values in the restyling effort. It is important, he said, for a judge or a lawyer to be able to look at an evidence rule and know immediately what it means. Consistency is also important, but it does not rise to the same level as the other two values.

The process used to restyle the Federal Rules of Evidence, he said, had started with Professor Kimble rewriting each of the rules in the first instance. Then Professor Capra made his changes. The drafts were then sent to the advisory committee and the style subcommittee of the Standing Committee for comment. The rules were reviewed carefully several times and at several levels. In addition, some members of the Standing Committee had already made specific comments on the proposed rules.

But, he said, that will not be the end of the process. The advisory committee was only asking for authority to publish the rules for comment. It should receive a number of public comments, each of which will be reviewed in 2010. He thanked Judge Hartz for spotting inconsistencies, and he thanked Jeffrey Barr and Stacey Williamson of the Administrative Office for great staff support in getting the package completed.

Judge Hinkle reported that the advisory committee was presenting Rules 801-1103 to the Standing Committee for the first time. All the other rules in the restyling package had been presented to the committee at earlier meetings. The advisory committee was now seeking authority to publish the entire set of evidence rules for comment. It would also like authority to make further corrections before publication.

Judge Hinkle noted that several changes had been made in the restyled hearsay rules from "offered to prove" to "admitted to prove," and the advisory committee will highlight the terminology in the publication. Professor Capra explained that the change had started with the restyling of Rule 803(22). There, it would be a substantive change from the current rule to use "offered to prove" because the judge plays a fact-finding role and so admissibility is not controlled by the purpose of the proffering party. Once the advisory committee had made the change from "to prove" to "admitted to prove", he said,

it decided to change all the instances of "offered to prove" to "admitted to prove" because the judge has some role as to each piece of evidence offered. What is determinative is not what the lawyer states the evidence is offered for, but what the judge admits it to prove. He said that the advisory committee wanted to hear from the public on the use of the terminology so that it can make a reasoned choice on it.

A member questioned the use of unnumbered bullet points, rather than numbers, noting that bullet points cannot be cited. He added, though, that it is not a big problem because a whole rule may be cited. Professor Kimble explained that the style guidelines call for using bullet points where there is no preferred rank order in a list. In Rule 407 (subsequent remedial measures), for example, there is no way to cite each of the measures listed. In addition, he pointed out that when a list is created with numbered divisions, a dangling paragraph may follow. That dangling paragraph cannot be effectively cited. Where a list is created within a rule, with text before the list and more text after the list, bullets work better than numbers. The member pointed out, though, that not every series in the restyled rules appeared to have been broken out and expressed a strong preference for breaking out and numbering all series and lists.

The member also questioned the use of dashes, rather than commas. In some cases, he pointed out, dashes are used to set off an aside, which is an appropriate usage. But often what appears within the dashes follows from what is said before the dash, which is inappropriate usage. Professor Kimble responded that dashes may properly be used for both purposes. They are often more successful than commas, especially if there are other commas in a sentence. One member emphasized that dashes make the text easier to read, and that is the key objective of the restyling effort.

The committee without objection by voice vote approved the proposed amendments for publication, subject to the advisory committee making additional, minor style changes.

Professor Capra thanked Professor Kimble for truly excellent work. He also said that the style subcommittee had accomplished amazing work with a very fast turn around time. In short, he said, the process had been fantastic. Judge Hinkle added that very special thanks are due to Professor Capra for his major, indispensable role in the restyling project.

GUIDELINES ON STANDING ORDERS

Judge Rosenthal reported that the primary changes made in the text of the proposed guidelines since the last meeting had been to strike just the right balance between concerns that the draft guidelines had placed insufficient limits on individual-judge orders and countervailing concerns that individual-judge orders are entirely

appropriate and useful. She thanked Judge Raggi for her help in improving the product to address those competing concerns.

Judge Rosenthal pointed out that the revised guidelines distinguish between substantive rules of practice, on the one hand, and rules of courtroom conduct, on the other. The former should clearly be set forth in local rules of court. But rules of courtroom conduct are appropriate for orders by individual judges. The revised second paragraph of Guideline 4, she said, now makes that distinction clear. In addition, at the request of the Department of Justice a new bullet point had been added to the internal administrative matters listed in Guideline 1 to suggest that standing orders are appropriate to deal with courthouse or courtroom access for individuals with disabilities. In addition, Guidelines 7 and 8 had been supplemented.

Judge Rosenthal reported that a reference had been added to Bankruptcy Rule 9029. She noted that the Advisory Committee on Bankruptcy Rules had suggested that the guidelines address some special needs of the bankruptcy courts. The bankruptcy courts, for example, sometimes need greater flexibility to use standing orders to effect urgently needed changes during the time that it takes for local rules to be put into effect. The recent implementation of the massive 2005 bankruptcy reform legislation demonstrated the value of operating under standing orders.

The committee, she said, planned to send the guidelines to the Judicial Conference with a request that they be distributed to the courts for consideration as non-binding guidance. But Mr. Rabiej suggested that it might be more effective to have the Judicial Conference actually adopt the guidelines. Some members agreed and said that it would be easier to get courts to adopt them if they are approved by the Conference itself. Judge Rosenthal added that the Conference might also be informed that the committee is considering bankruptcy guidelines and may return with additional recommendations.

The committee without objection by voice vote approved submitting the proposed guidelines for approval by the Judicial Conference.

SEALED CASES

Judge Hartz reported that the sealing subcommittee would meet again immediately following the Standing Committee meeting. He pointed out that the subcommittee included a representative from each advisory committee, a Department of Justice representative, and a clerk of court. He noted that the subcommittee was only addressing cases that are entirely sealed, not sealed documents within a case.

He reported that Tim Reagan of the Federal Judicial Center had completed a good deal of work on sealed cases, having examined all the cases filed in 2006 at both the district and appellate levels. He had found no bankruptcy cases in which an entire case

had been sealed by a court. He added that roughly 10,000 magistrate-judge and miscellaneous cases had been found, and a few will be sampled from each court. Most of these matters involve initial proceedings pending formal initiation of a criminal prosecution.

Judge Hartz pointed out that no indications of abuse had been found. In fact, he said, he had only seen one case that he thought might have been sealed improperly. The decisions of courts to seal cases, he said, appear to be reasonable. Nevertheless, there may be some other issues that should be addressed, such as how long cases should remain sealed. Apparently, there is a problem in that some courts appear to overlook the task of unsealing cases.

He noted that the subcommittee would consider whether there should be standards on when cases should be sealed. The subcommittee would also consider whether there should be procedural requirements for sealing, who should order the sealing, whether there should be notice of sealing, whether a record should be made of the reasons for sealing, and whether there should be time limits on the length of sealing. He pointed out that the subcommittee would also look at whether certain administrative measures should be pursued, such as adding special prompts to the courts' electronic case management and filing systems. Finally, the subcommittee would consider whether there is a need for additional empirical research or public hearings.

Judge Hartz pointed out that the subcommittee had contemplated at the start of the project that it would discover that most sealed cases might be national security cases. But, in fact, very few involve national security. The biggest group of sealed cases, he said, are criminal cases that involve danger to witnesses and victims. There are also a number of qui tam civil cases.

He thanked Professor Richard Marcus for participating in all the meetings and working exceptionally hard on the project. Judge Rosenthal added that Professor Marcus is a recognized national authority on sealing.

LONG-RANGE PLANNING

Judge Rosenthal pointed out that the rules committees have been deeply involved in long-range planning for several years. Some examples of current activities include the ongoing work of the privacy subcommittee, the convening of the upcoming conference at Duke Law School on the state of civil litigation, and the major projects of the Advisory Committee on Bankruptcy Rules to reformulate the appellate bankruptcy rules and modernize the bankruptcy forms. She invited all the participants to send the Administrative Office staff any additional ideas for long-range planning that the committees should consider.

REPORT OF THE PRIVACY SUBCOMMITTEE

Judge Raggi reported that she had been asked to chair the special subcommittee to examine implementation of the new privacy rules. The subcommittee, she said, would hold its first meeting immediately following the Standing Committee meeting. She pointed out that the subcommittee included several colleagues from the Court Administration and Case Management Committee, which had established the original Judicial Conference privacy policies later incorporated into the 2007 amendments to the w1federal rules. She added that Professor Capra will be the reporter for the subcommittee, and Judge Hinkle will participate. She said that the subcommittee would address the following areas:

1. Are amendments needed to the national privacy rules?

2. Are there problems in criminal cases and sealed cases that need to be addressed further? Should, for example, the Judicial Conference policy that certain documents not be included in the public case file be stated expressly in the national rules? If so, should the list of documents be expanded or contracted?

3. Should the policy of placing the burden on the parties to redact sensitive information be reviewed with an eye towards simplification? Are there viable alternatives that will assure protection of private information without imposing undue burden on the courts? Is more public education needed to inform the parties of their obligations to redact private information from transcripts?

4. Are additional efforts needed to implement the existing rules, especially in response to Congressional concerns that personal information still appears in some court case files?

NEXT MEETING

The committee agreed to hold the next meeting in January 2010, with the exact date to be set after the members have had a chance to consult their calendars. By e-mail, the committee later decided to hold the meeting on Thursday and Friday, January 7-8, 2010, in Phoenix, Arizona.

Respectfully submitted,

Peter G. McCabe
Secretary